Williams v Commonwealth (School Chaplains Case)
[2012] HCA 23

The National School Chaplaincy Program (the NSCP) was created by the Commonwealth in 2006 as a voluntary program under which schools may seek financial support from the Commonwealth to establish or enhance chaplaincy services for school communities. Schools may choose the chaplain that best meets their needs, with the position supported by a funding agreement between the Commonwealth and the chaplaincy service provider engaged by the school.

Ronald Williams is the father of four children enrolled at the Darling Heights State School in Queensland. For several years before the establishment of the NSCP that school received the services of chaplains through the support of the Queensland government. These chaplains had been ‘endorsed’ by Scripture Union Queensland (SUQ). In 2007, the principal sought funds under the NSCP in order to extend the number of days their chaplain was available to provide services to students at the school. Under the Darling Heights Funding Agreement, the Commonwealth undertook to fund the provision of chaplaincy services at the school by SUQ.

Williams challenged the validity of the NSCP in the High Court as being beyond Commonwealth power. He brought the case because he wanted his children to have a secular education in a public state school, which he believed was compromised by the presence of religious chaplains. In the High Court, he sought to assert the separation of church and state by arguing that the NSCP breached the guarantee in s 116 of the Constitution that “no religious test shall be required as a qualification for any office or public trust under the Commonwealth”. However, this argument was swiftly and unanimously dismissed by the Court on the basis that the chaplain working at Darling Heights State School held no “office ... under the Commonwealth”. Instead, she was engaged by SUQ to provide services under the control and direction of the school’s principal. As Gummow and Bell JJ explained: “That the Commonwealth is a source of funding to SUQ is insufficient to render a chaplain engaged by SUQ the holder of an office under the Commonwealth”.

Williams also challenged the validity of the Commonwealth’s appropriation of the funds and its expenditure of them pursuant to the Funding Agreement. The Court decided it was unnecessary to consider the appropriations point. Not only was it questionable whether Williams possessed sufficient standing to raise this objection, but even if he did succeed in showing that the money for the NSCP had not been lawfully appropriated this would not impeach the Funding Agreement. It had been recognised in New South Wales v Bardolph (1934) 52 CLR 455 that the executive may contract for the expenditure of money conditionally upon appropriation by Parliament.

Lastly, Williams argued that the Commonwealth lacked the power to enter into the Funding Agreement and make the payments under it to SUQ. This required the Court to address the scope of the executive power of the Commonwealth in s 61 of the Constitution. No statute established the NSCP or authorised the payments made by the Commonwealth under the funding agreements. Nor was funding provided by the Commonwealth under s 96 of the Commonwealth Constitution as a grant of “financial assistance to any State on such terms and conditions as the parliament thinks fit”. Instead, the Commonwealth relied on its executive power to spend the funds required to support the NSCP. As French CJ acknowledged in referring to the Court’s decision in Pape v Federal Commissioner of Taxation (2009) 238 CLR 1: “[T]he extent to which the executive power authorises the Commonwealth to make contracts and spend public money pursuant to them is raised in these
proceedings because, as this Court has recently held contrary to a long-standing assumption, parliamentary appropriation is not a source of spending power”.

The Commonwealth offered two main submissions in support of its power to contract and spend the money in question. The broader of its submissions was that the executive power of the Commonwealth is, in all its aspects, “limited to the subject-matters of the express grants of legislative power in ss 51, 52 and 122 of the Constitution (together with matters that, because of their distinctly national character or their magnitude and urgency, are peculiarly adapted to the government of the country and otherwise could not be carried on for the public benefit)”.

This second submission proceeded on the basis that, although these grants of legislative power assisted to delineate the scope of executive power, it was not necessary that they had actually been used by the Commonwealth to enact a law in support of the scheme. It was thus argued that the executive’s ability to spend money on chaplains in schools was sustained by the mere existence of legislative capacity in this area.

A majority of the High Court, with Heydon J dissenting, struck down the Funding Agreement and payments made to SUQ under that Agreement on the basis that they were beyond the executive power of the Commonwealth. French CJ, Gummow, Crennan and Bell JJ did so by rejecting both of the Commonwealth’s submissions. They held that the Commonwealth’s executive power is not coextensive with the potential scope of its legislative power, and that the scheme might only be supported by legislation actually enacted by Parliament. Hayne and Kiefel JJ rejected the Commonwealth’s broad submission and found it unnecessary to determine the correctness of the narrow one since they were of the view that the NSCP could not have been the subject of a valid law under s 51 in any event. Heydon J found it unnecessary to decide on the broad submission but accepted the Commonwealth’s narrow submission. He found the NSCP within executive power because it could be supported as being with respect to the “provision of ... benefits to students” under the federal legislative power in s 51(xxiiiA) of the Constitution.

**Gummow and Bell JJ:** The executive power of the Commonwealth with respect to spending

As the plaintiff framed his written submissions he accepted the proposition which at that stage had been advanced by the Commonwealth parties that the executive power of the Commonwealth extends at least to engagement in activities or enterprises which could be authorised by or under a law made by the Parliament, even if there be no such statute. That broad proposition as to the scope of s 61 of the Constitution, which had the support of Sir Robert Garran, appears to have had a source in the Opinion given on 12 November 1902 by Alfred Deakin as Attorney-General [Reprinted in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia*, (1981), vol 1, at 131], that:

“It is impossible to resist the conclusion that the Commonwealth has executive power, independently of Commonwealth legislation, with respect to every matter to which its legislative power extends.”

The width of that proposition requires consideration before it could be accepted by this Court. Its correctness was challenged, particularly by Queensland in oral submissions, and by Tasmania in written submissions filed, by leave, after the hearing.

Upon the assumption that the proposition is correct the defendants rely upon the powers of the Parliament with respect to “trading ... corporations” (s 51(xx)) and “the provision of ... benefits to students” (s 51(xxiiiA)). The argument by the defendants appears to involve the proposition that a law authorising entry into and performance of the Funding Agreement would be supported by those heads of power, even if not also by s 51(xxxix) in its operation with respect to matters incidental to the execution of the executive power of the Commonwealth. In response, the plaintiff, New South Wales, Victoria, South Australia, Western Australia and Tasmania deny that SUQ is a trading corporation in
the constitutional sense; and the plaintiff, Victoria and Western Australia also deny that the Funding Agreement provides “benefits to students”, rather than merely to SUQ, which is obliged by the Funding Agreement to provide the “chaplaincy services” at the Darling Heights State Primary School.

However, in the course of argument the plaintiff resiled from, and asserted the contrary to, the general proposition that because s 61 empowers the executive branch of government to engage in activities authorised by or under a law made by the Parliament, the executive power extends to engagement in activities or enterprises which could be authorised by or under a law made by the Parliament, even though they have not yet been and may never be so authorised. Support for that view of s 61 which the plaintiff now disavows was based primarily upon a reading of Victoria v The Commonwealth and Hayden (“the AAP Case”) [(1975) 134 CLR 338]. But that decision does not provide a sufficient basis for such a broad proposition.

The AAP Case

The AAP Case was argued on demurrer by Victoria to the defence of those who were the Commonwealth parties in that case and was decided on what, since Pape [v Federal Commissioner of Taxation (2009) 238 CLR 1], can be seen to have been the false assumption that the spending power of the Executive Government of the Commonwealth was to be found in Ch IV of the Constitution, in particular in ss 81 and 83. Hence the attention given in the submissions in the AAP Case and in the reasons of the Court to the phrase in s 81 “the purposes of the Commonwealth”.

Barwick CJ [134 CLR at 363] reasoned that this phrase was “a reasonable synonym” for the expression in s 51(xxxi) “for any purpose in respect of which the Parliament has power to make laws”; and concluded [[134 CLR at 362-63]:

“With exceptions that are not relevant to this matter and which need not be stated, the executive may only do that which has been or could be the subject of valid legislation. Consequently, to describe a Commonwealth purpose as a purpose for or in relation to which the Parliament may make a valid law, is both sufficient and accurate.”

Gibbs J [[134 CLR at 378-79], after stating that “the whole question is whether the purposes of the Australian Assistance Plan are ‘purposes of the Commonwealth’”, said:

“According to s 61 of the Constitution, the executive power of the Commonwealth ‘extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth’. Those words limit the power of the Executive and, in my opinion, make it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth. A view consonant with that which I have expressed has previously received acceptance in this Court: see The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd [(1922) 31 CLR 421 at 431-32, 437-41]; The Commonwealth v The Australian Commonwealth Shipping Board [(1926) 39 CLR 1, 10]. The Constitution effects a distribution between the Commonwealth and the States of all power, not merely of legislative power. We are in no way concerned in the present case to consider the scope of the prerogative or the circumstances in which the Executive may act without statutory sanction. Once it is concluded that the Plan is one in respect of which legislation could not validly be passed, it follows that public moneys of the Commonwealth may not lawfully be expended for the purposes of the Plan.”

The last sentence in this passage is expressed in negative terms. Gibbs J did not say that public moneys could lawfully be expended on any purpose for which legislation might be passed. It was sufficient for his Honour’s decision that the Australian Assistance Plan could not have been supported by legislation.

Mason J [134 CLR at 396] concluded that the phrase “for the purposes of the Commonwealth” had the meaning “for such purposes as Parliament may determine”. His Honour, prescient of what was to be decided in Pape, went on to say that an appropriation “does not supply legal authority for the Commonwealth’s engagement in the activities in connexion with which the moneys are to be spent”; and added that, no legislation having been enacted with respect to the Australian Assistance Plan, it was necessary to look to the executive power [134 CLR at 396]. His Honour then responded to the opposing submissions by the Commonwealth parties (that the devotion of an appropriation to its purpose may be secured by legislation or executive action) and by Victoria (that s 61 of the
Constitution does not confer executive power beyond the execution of laws made by the Parliament). Mason J did so in these qualified terms [134 CLR at 396-97]:

“Although the ambit of the power is not otherwise defined by Ch II it is evident that in scope it is not unlimited and that its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government. The provisions of s 61 taken in conjunction with the federal character of the Constitution and the distribution of powers between the Commonwealth and the States make any other conclusion unacceptable.”

However, in referring to the distribution of responsibilities between the Commonwealth and the States, Mason J was speaking in general terms and, like Gibbs J, his Honour was not adopting any broad proposition that moneys may be spent by the Executive Government upon what answers the description of any head of legislative power found in s 51 of the Constitution. That this is so is apparent from the earlier rejection by Mason J, along with Barwick CJ, of the application to s 51(ii) of the Constitution of the United States doctrine, exemplified in United States v Butler [[1936] USSC 11], that because the power of Congress to tax is “unlimited” the power to spend is also “unlimited”.

On the other hand, Murphy J appears to have accepted the application in Australia of Butler, and Jacobs J [134 CLR at 413] said that “the purposes of the Commonwealth” spoken of in s 81 “certainly include all the purposes comprehended within the subject matters of s 51 in respect of which the Commonwealth may legislate, including the subject matter comprised in s 51(xxxix)”.

As the argument on the Special Case proceeded it became apparent that the AAP Case does not support any proposition that the spending power of the executive branch of government is co-extensive with those activities which could be the subject of legislation supported by any head of power in s 51 of the Constitution.

First, any such proposition is too broad. Reference has been made to s 51(ii), the taxation power; it is well settled that there can be no taxation except under the authority of statute. Many other of the heads of power in s 51 are quite inapt for exercise by the Executive. Marriage and divorce, and bankruptcy and insolvency by executive decree, are among the more obvious examples. These heads and other heads of legislative power in Ch II [sic] are complemented by the power given to the Parliament by Ch III to make laws conferring upon courts federal jurisdiction in matters arising under federal laws. Further, while heads of power in s 51 carry with them the power to create offences, the Executive cannot create a new offence, and cannot dispense with the operation of any law.

Secondly, such a proposition would undermine the basal assumption of legislative predominance inherited from the United Kingdom and so would distort the relationship between Ch I and Ch II of the Constitution. No doubt the requirement of s 64 of the Constitution that Ministers of State be senators or members of the House of Representatives has the consequence that the Minister whose department administers an executive spending scheme, such as the NSCP, is responsible to account for its administration to the Parliament. This is so whether the responsibility is to the chamber of which the Minister is a member or to the other chamber, in which the Minister is “represented” by another Minister. But there remain considerations of representative as well as of responsible government in cases where an executive spending scheme has no legislative engagement for its creation or operation beyond the appropriation process. And that appropriation process requires that the proposed law not originate in the Senate, and that the proposed law appropriating revenue or moneys “for the ordinary annual services of the Government” not be amended by the Senate. The questions on the Special Case are not to be answered through debate as to what legislation could have been passed by the Parliament in reliance upon pars (xx) or (xxiiiA) of s 51 of the Constitution.

The determinative question

The Commonwealth parties make the general submission that the executive power extends to entry into contracts and the spending of money without any legislative authority beyond an appropriation. The determinative question on this Special Case thus becomes whether the executive power is of sufficient scope to support the entry into and making of payments by the Commonwealth to SUQ
under the Funding Agreement. For the reasons which follow this question should be answered in the negative.

In his reply, the plaintiff submitted that the relevant aspect of the executive power was that concerned with the ordinary course of administering a recognised part of the Government of the Commonwealth or with the incidents of the ordinary and well-recognised functions of that Government. These functions would vary from time to time, but would include the operation of the Parliament, and the servicing of the departments of State of the Commonwealth, the administration of which is referred to in s 64 of the Constitution, including the funding of activities in which the departments engage or consider engagement. The plaintiff accepted that this aspect of the executive power encompassed expenditure without legislative backing beyond an appropriation and the Commonwealth parties appeared to accept that concession.

However, the plaintiff contended that expenditure upon the NSCP does not fall within any ordinary and well-recognised functions of the Government of the Commonwealth. The Commonwealth parties submitted that the expenditure at least now had that quality because expenditures under the NSCP had commenced in the 2007 school year and had continued thereafter. That submission assumes the determination of the issue on which the Special Case turns and should not be accepted.

The plaintiff agrees that the ordinary and well-recognised functions of the Government of the Commonwealth include the Commonwealth entering into agreements with the States, particularly with reference to the referral by State Parliaments of matters pursuant to s 51(xxxvii), and to the engagement of s 96 of the Constitution. No doubt a range of agreements and understandings between the Commonwealth and State Executive Governments, recently exemplified in *ICM Agriculture* [(2009) 240 CLR 140], would be supported upon the plaintiff's thesis.

The plaintiff did not support the outcome in *Pape* as having rested upon an ordinary and well-recognised activity of the Government of the Commonwealth. Rather, *Pape* was said by the plaintiff to have been decided in a “different universe of discourse” to that of the NSCP because the expenditure with which *Pape* was concerned was effected with legislative support. Several points should be made in response.

First, while the engagement of the legislative branch of government marked off *Pape* from cases where there is, by reason of the absence of such engagement, a deficit in the system of representative government, there remains in common with any assessment of the NSCP the considerations of federalism, stimulated by the by-passing by the Executive of s 96. Secondly, the outcome in *Pape* indicates that although the plaintiff’s submission is satisfactory as a partial description of the executive power to spend, it does not mark any outer limit of universal application. Thirdly, fuller attention to *Pape* nevertheless yields support to the conclusion sought by the plaintiff: that the executive power does not go so far as to support the entry by the Commonwealth into the Funding Agreement, and the making of payments by the Commonwealth to SUQ.

In *Pape*, approval was given to the statement by Mason CJ, Deane and Gaudron JJ in *Davis v The Commonwealth* [(1988) 166 CLR 79 at 93-94] that:

“the existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence”.

In *Davis*, Brennan J invited consideration of “the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question” [166 CLR at 111]. This consideration reflects concern with the federal structure and the position of the States.

Further, as noted above, the NSCP contracts, such as the Funding Agreement, present an example where within the Commonwealth itself there is a limited engagement of the institutions of representative government. The Parliament is engaged only in the appropriation of revenue, where the role of the Senate is limited. It is not engaged in the formulation, amendment or termination of any programme for the spending of those moneys.

The present case, unlike *Pape*, does not involve a natural disaster or national economic or other emergency in which only the Commonwealth has the means to provide a prompt response. In *Pape*, the short-term, extensive and urgent nature of the payments to be made to taxpayers necessitated the
use of the federal taxation administration system to implement the proposal, rather than the adoption of a mechanism supported by s 96. However, the States have the legal and practical capacity to provide for a scheme such as the NSCP. The conduct of the public school system in Queensland, where the Darling Heights State Primary School is situated, is the responsibility of that State. Indeed, Queensland maintains its own programme for school chaplains.

Section 96 of the Constitution gives to the Parliament a means for the provision, upon conditions, of financial assistance by grant to Queensland and to any other State. This is subject to the qualification stated in *ICM Agriculture* that the legislative power conferred by s 96 and s 51(xxxvi) does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms.

With respect to the significance of s 96 in the federal structure, the following passage from the reasons of Barwick CJ in the *AAP Case* is in point [134 CLR at 357-58]:

“Section 96 ... has enabled the Commonwealth to intrude in point of policy and perhaps of administration into areas outside Commonwealth legislative competence. No doubt, in a real sense, the basis on which grants to the claimant States have been quantified by the Grants Commission has further expanded the effect of the use of s 96. But a grant under s 96 with its attached conditions cannot be forced upon a State: the State must accept it with its conditions. Thus, although in point of economic fact, a State on occasions may have little option, these intrusions by the Commonwealth into areas of State power which action under s 96 enables, wear consensual aspect. Commonwealth expenditure of the Consolidated Revenue Fund to service a purpose which it is not constitutionally lawful for the Commonwealth to pursue, is quite a different matter. If allowed, it not only alters what may be called the financial federalism of the Constitution but it permits the Commonwealth effectively to interfere, without the consent of the State, in matters covered by the residue of governmental power assigned by the Constitution to the State.”

What then was said by the defendants for the conclusion contrary to that which would follow from the above?

The Commonwealth parties’ ultimate submission

With the support of SUQ, and the qualified support of South Australia, the Commonwealth parties presented their ultimate submission. This was that because the capacities to contract and to spend moneys lawfully available for expenditure do not “involve interference with what would otherwise be the legal rights and duties of others” which exist under the ordinary law, the Executive Government in this respect possesses these capacities in common with other legal persons. The capacity to contract and to spend then was said to take its legal effect from the general law.

A basic difficulty with that proposition is disclosed by the observation by Dixon CJ, Williams, Webb, Fullagar and Kitto JJ in *Australian Woollen Mills Pty Ltd v The Commonwealth* [(1954) 92 CLR 424 at 461] that:

“the position is not that of a person proposing to expend moneys of his own. It is public moneys that are involved.”

The law of contract has been fashioned primarily to deal with the interests of private parties, not those of the Executive Government. Where public moneys are involved, questions of contractual capacity are to be regarded “through different spectacles” [cf *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51].

One example of what may be seen through those spectacles is the debate (which does not fall for consideration here) as to the extent to which by contract the Commonwealth may fetter future executive action in a matter of public interest...

Consideration of the issues which the Commonwealth parties’ submission presents (contrary to what is put in support by South Australia) is not assisted by reference to the position of the Sovereign in the United Kingdom of Great Britain and Ireland at the time of the framing of the Constitution. It was, as explained in *Sue v Hill* [(1999) 199 CLR 462 at 497-498], then well understood that the term “the Crown” was used in a number of metaphorical senses. Five of these were considered in *Sue v Hill*. The first concerned the use of “the Crown” in English law as a device to dispense with the recognition of the State as a juristic person. In his doctoral thesis, which was presented some years
after Federation and only published in 1987, Dr H V Evatt referred to the failure in English constitutional theory “to separate the personal rights of the monarch from the legal authority of the State” [Evatt, The Royal Prerogative, (1987) at 7].

To this may be added the point made by the plaintiff that the Commonwealth parties’ ultimate submission appears to proceed from the assumption that the executive branch has a legal personality distinct from the legislative branch, with the result that the Executive is endowed with the capacities of an individual. The legal personality, however, is that of the Commonwealth of Australia, which is the body politic established under the Commonwealth of Australia Constitution Act 1900 (Imp), and identified in covering cl 6.

The assimilation of the executive branch to a natural person and other entities with legal personality was said by the Commonwealth parties to be supported by statements by Brennan CJ and by Gummow and Kirby JJ in The Commonwealth v Mewett [(1997) 191 CLR 471 at 491, 550-551]. These were to the effect that s 75(iii) of the Constitution denies any operation of doctrines of executive immunity which might be pleaded to any action for damages in respect of a common law cause of action. The absence from the Constitution of doctrines of executive immunity assists those private parties who have dealings with the executive branch of government. Different considerations arise where the question is one of executive capacity to enter into such dealings. In that situation there arise the considerations referred to at the outset of these reasons, respecting both the federal structure and the relationship between Ch I and Ch II of the Constitution.

In oral submissions the Commonwealth Solicitor-General resisted the suggestion that the references made in earlier submissions to the character and status of the Commonwealth as a national government, in support of his submission as to the assimilation of the capacities of the Commonwealth to contract and to spend to those of other legal persons, may conflate the capacities to contract and to spend with the distinct and special financial privileges associated with the prerogative; the latter have been referred to earlier in these reasons.

Rather, the Commonwealth parties’ assimilation submission was said to draw support as constitutionally coherent from (i) the relationship between s 61 and the appropriation provisions in s 81 and s 83, and (ii) the extent of the power to tax. The first consideration understates the significance of the holding in Pape respecting the relationship between the provision of an appropriation and the spending power. The second shows the tenacity of his successors to the views of Sir Robert Garran, noted earlier in these reasons. Further, for the reasons already given, considerations of constitutional coherence point away from the existence of an unqualified executive power to contract and to spend.

The Commonwealth Solicitor-General also distinguished on the one hand attempts by the Executive to conscript or command individuals and entities such as trading corporations, and on the other hand the conferral of rights or benefits upon parties with the attachment of conditions to be observed by the recipient, such as those imposed upon SUQ by the Funding Agreement. The latter was within the executive power but the former was not. But the distinction rests upon what appears to be a false assumption as to the non-coercive nature of the attachment of conditions. Financial dealings with the Commonwealth have long had attached to them the sanctions of the federal criminal law. For example, the provisions added respectively as s 29A(1) and s 29B to the Crimes Act 1914 (Cth) by s 16 of the Crimes Act 1926 (Cth) created offences of obtaining from the Commonwealth, with intent to defraud, “any chattel, money, valuable security or benefit” by any false pretence, and also of imposing or endeavouring to impose upon the Commonwealth any untrue representation with a view to obtain money or any other benefit or advantage.

These submissions by the Commonwealth parties as to the scope of the executive power to contract and to spend should not be accepted.

French CJ undertook an extensive survey of the historical record surrounding the drafting and subsequent judicial and academic consideration of s 61 of the Constitution. He concluded:

**French CJ:** There is no clear evidence of a common understanding, held by the framers of the Constitution, that the executive power would support acts of the Executive Government of the Commonwealth done without statutory authority provided they dealt with matters within the
enumerated legislative powers of the Commonwealth Parliament. A Commonwealth Executive with a
general power to deal with matters of Commonwealth legislative competence is in tension with the
federal conception which informed the function of the Senate as a necessary organ of Commonwealth
legislative power. It would undermine parliamentary control of the executive branch and weaken the
role of the Senate. The plaintiff submitted that the requirement of parliamentary appropriation is at
best a weak control, particularly given the power of the Executive to advise the Governor-General to
specify the purpose of appropriations. The inability of the Senate under s 53 to initiate laws
appropriating revenue and its inability to amend proposed laws appropriating revenue for “the
ordinary annual services of the Government” also point up the relative weakness of the Senate against
an Executive Government which has the confidence of the House of Representatives. As the Solicitor-
General of Queensland put it in oral argument, the Senate has limited powers to deal with an
Appropriation Bill, whereas it has much greater powers with respect to general legislation which might
authorise the Executive to spend money in specific ways.

The function of the Senate as a chamber designed to protect the interests of the States may now be
vestigial. That can be attributed in part to the predicted evolution whereby responsible government has
resulted in a powerful Executive which, using the mechanisms of party discipline, is in a position to
exert strong influence over the government party or parties in both Houses. The Executive has become
what has been described as “the parliamentary wing of a political party” which “though it does not
always control the Senate ... nevertheless dominates the Parliament and directs most exercises of the
legislative power.” [Mantziaris, “The Executive – A Common Law Understanding of Legal Form and
Responsibility”, in French, Lindell and Saunders (eds), Reflections on the Australian Constitution
(2003) 125 at 130]. However firmly established that system may be, it has not resulted in any
constitutional inflation of the scope of executive power, which must still be understood by reference to
the “truly federal government” of which Inglis Clark wrote in 1901 [Inglis Clark, Studies in Australian
Constitutional Law (1901) at 12-13] and which, along with responsible government, is central to the
Constitution.

Note how French CJ emphasised the federal aspect of the Constitution as a factor in his
reasoning as to the limited scope of the executive power.

In dissent, Heydon J referred to as a ‘Common Assumption’ the notion that federal
executive power includes a power to enter contracts without statutory authority as long as the
Commonwealth possesses the legislative power to furnish that authority. He responded to the
defederalist arguments made by the majority against a view of executive power as coextensive
with the scope of Commonwealth legislative power as follows:

Heydon J: In various respects critics of the Common Assumption contended that it ignored federal
considerations. Federal considerations have certainly been seen as relevant to the extent of the
executive power. Different Justices grappled with the impact of federal considerations in different
ways in Pape v Federal Commissioner of Taxation, to go no further back. But the vice of
Commonwealth executive power is reduced when the executive power relied on is marked by the
limits of the Common Assumption. For the Common Assumption takes federal considerations into
account in holding that Commonwealth executive power follows the contours of Commonwealth
legislative power. Commonwealth legislative power, coupled with s 109, gives the Commonwealth a
preferred position over the States in certain respects. But otherwise State executive power is not
fettered by Commonwealth executive power.

Critics of the Common Assumption appealed to federal considerations by submitting that on the
Common Assumption the Executive could bypass the Senate, damage representative and responsible
government, and upset the correct balance between the House of Representatives and the Senate. They
submitted that if all the Commonwealth Executive needed to act was an Appropriation Act and an
unexercised capacity on the part of the legislature to legislate, the Senate's role in government would
diminish. That is because Commonwealth legislation, other than appropriation and taxation legislation,
requires Senate assent, can be initiated in the Senate and can be amended in the Senate, whereas
appropriation and taxation Bills, though they need Senate assent, cannot originate or be amended in the Senate. Bills of that kind can only be returned to the House of Representatives with a request for amendment (s 53 of the Constitution). They submitted that if the Common Assumption were correct, the Executive would be able to avoid legislative scrutiny, and in particular the risk of amendments by the Senate to draft legislation. Those arguments may be answered thus. In practice, and by right, the Senate takes a very active role in controlling and monitoring executive expenditure. It is true that the description given to money appropriated in Appropriation Acts and their accompanying documents is often very brief and general. But Senators are able to seek information and criticise proposals to expend money. Senators can do this through the Senate Estimates Committee, through correspondence with responsible Ministers, through debate on Appropriation Bills, and through the questioning of Ministers who are Senators, or their representatives, in the Senate. Nothing in the Constitution prevents the Senate from returning Bills to which s 53 relates which it dislikes to the House of Representatives for amendment, and, in the last resort, from rejecting them. The Senate is not in the same position as some almost impotent post-Asquithian House of Lords. It cannot be said that the effect of the Common Assumption is to remove the Senate (or the House of Representatives) from the process of sanctioning executive expenditure. And nothing in the Constitution prevents the Senate initiating legislation to control the use by the Executive of its power to spend what has been appropriated. Finally, the Senate, like the House of Representatives, is a platform from which critics of how the executive power has been wielded can build up that corrosive dissatisfaction which eventually leads to a change of government after an election.

Hayne and Kiefel JJ joined the majority in holding the NSCP invalid for want of power. They did so without deciding the correctness of the Commonwealth’s narrow submission as they held in any event that it could not be made out on the facts.

**Kiefel J:** The narrow basis assumes that it is sufficient if the executive action of expenditure falls within the subject matter of Commonwealth legislative power in ss 51, 52 or 122 of the Constitution. The Commonwealth defendants do not acknowledge the need for legislative authority. On this approach, the questions concerning the validity of the Funding Agreement are to be answered by reference to legislative powers which might have been employed but were not, which is to say by hypothetical legislation.

The plaintiff, together with Queensland and Tasmania, takes issue with the correctness of such an approach and points to the absence of any authority which holds that the Executive has power to engage in activities which the Parliament could authorise, but has not. Queensland submits that the Commonwealth must point to a Commonwealth law, a provision of the Constitution, or something which inheres in the Commonwealth Executive, which would permit it to enter into the Funding Agreement.

It is not necessary in this case to resolve whether and in what circumstances legislative authority, or authority arising from the Constitution, is required. That is because the Commonwealth defendants identify two heads of power as appropriate to support the Funding Agreement – s 51(xxiiiA), by which “benefits” may be provided to students, and s 51(xx) respecting trading corporations – and reliance upon these heads of power is misplaced.

The inclusion of s 51(xxiiiA) in the Constitution, following a referendum, was a response to this Court’s decision in the *Pharmaceutical Benefits Case* [(1945) 71 CLR 237]. In the Second Reading Speech to the Constitution Alteration (Social Services) Bill 1946, the amendment was said by the Attorney-General of the Commonwealth to be necessary to “authorize the continuance of acts providing benefits in the nature of social services, and to authorize the Parliament in the future to confer benefits of a similar character.” The Bill was said not to seek an extension of the “appropriation power”, but was “limited to benefits of a social service character and, in the main, to benefits of a type provided for by legislation already on the statute-book.” [Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 648]. The provision of benefits to students at that time primarily took the form of financial assistance, such as the payment of a student’s tuition and
other University fees and the provision of allowances. A purpose of the introduction of s 51(xxiiiA) was to confirm the Commonwealth’s power to continue providing assistance of that kind.

The word “benefits” is not limited to money; it may extend to services. So much is clear from the meaning given to the term by McTiernan J in British Medical Association v The Commonwealth (“the BMA Case”) [(1949) 79 CLR 201 at 279], which was approved by the Court in Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth [(1987) 162 CLR 271 at 280]. His Honour stated:

“The material aid given pursuant to a scheme to provide for human wants is commonly described by the word ‘benefit.’ When this word is applied to that subject matter it signifies a pecuniary aid, service, attendance or commodity made available for human beings under legislation designed to promote social welfare or security: the word is also applied to such aids made available through a benefit society to members or their dependants. The word ‘benefits’ in par (xxiiiA) has a corresponding or similar meaning.”

It may be inferred from this description and the structure of s 51(xxiiiA) that the power to make provision for benefits to students is not a power to provide anything which may be of benefit to them. “Benefits” has a more tangible meaning than that. In the present context, it refers to social services provided to students. Social services provided to students might take the form of financial assistance, for example payment of fees and living and other allowances, or material assistance, such as the provision of books, computers and other necessary educational equipment, or the provision of services, such as additional tutoring. The term “benefits” in the context of s 51(xxiiiA) does not extend to every service which may be supportive of students at a personal level in the course of their education.

“Benefits to students” provided pursuant to s 51(xxiiiA) must be provided by the Commonwealth to students. Benefits may be provided to students through a third party. The passage from the BMA Case quoted above recognises this. However, care must be taken not to give s 51(xxiiiA) a wider operation than was intended. The power given is to provide benefits to students, not funding to schools. The power to provide benefits to students is not one to assist schools to provide services associated with education which may be of some benefit to students. Moreover, benefits provided to students in reliance on s 51(xxiiiA) must be provided to students as a class. It is clear from the Funding Agreement itself that the chaplaincy services are to be provided not only to students, but to the school’s staff and members of the wider school community. This suggests that there is a wider purpose to the Funding Agreement.

The Funding Agreement does not provide benefits to students and is not a contract for the provision of such benefits. It is a contract to provide funds for the provision of chaplaincy services in a school, as part of the education-related program of the school. A hypothetical statute authorising the Funding Agreement could not be supported by s 51(xxiiiA).

The Commonwealth defendants’ contention that the Funding Agreement might be authorised by s 51(xx), the corporations power, may be dealt with shortly. The question is not whether SUQ is a trading or financial corporation, as much of the argument assumed. The Guidelines did not require a party to a funding agreement entered into pursuant to the NSCP to be a trading or financial corporation. Any statute authorising the Funding Agreement could not be said to be concerned with the regulation of the activities, functions, relationships and business of a corporation, the rights and privileges belonging to a corporation, the imposition of obligations upon it, or the regulation of the conduct of those through whom it acts. More generally, any legislation supporting the Funding Agreement would not single out constitutional corporations as the object of its statutory command.

Less than a week after the Court handed down its decision, the Gillard government introduced into Parliament a Bill designed to ensure the continuation of the NSCP. The Bill also dealt with hundreds of other Commonwealth programs that were not provided for by a grant of financial assistance to a State or States under s 96 of the Constitution or otherwise supported by legislation beyond the making of the relevant appropriation of funds from Consolidated Revenue. The Financial Framework Legislation Amendment Bill (No 3) 2012 was passed by
both houses of Parliament within two days of being introduced. The key provision added by the new legislation states:

**Financial Management and Accountability Act 1997 (Cth)**

32B Supplementary powers to make commitments to spend public money etc.

(1) If:

(a) apart from this subsection, the Commonwealth does not have power to make, vary or administer:

(i) an arrangement under which public money is, or may become, payable by the Commonwealth; or

(ii) a grant of financial assistance to a State or Territory; or

(iii) a grant of financial assistance to a person other than a State or Territory;

and

(b) the arrangement or grant, as the case may be:

(i) is specified in the regulations; or

(ii) is included in a class of arrangements or grants, as the case may be, specified in the regulations; or

(iii) is for the purposes of a program specified in the regulations;

the Commonwealth has power to make, vary or administer the arrangement or grant, as the case may be, subject to compliance with this Act, the regulations, Finance Minister’s Orders, Special Instructions and any other law.

(2) A power conferred on the Commonwealth by subsection (1) may be exercised on behalf of the Commonwealth by a Minister or a Chief Executive.

(3) In this section:

*administer*:

(a) in relation to an arrangement—includes give effect to; or

(b) in relation to a grant—includes make, vary or administer an arrangement that relates to the grant.

*arrangement* includes contract, agreement or deed.

*make*, in relation to an arrangement, includes enter into.

*vary*, in relation to an arrangement or grant, means:

(a) vary in accordance with the terms or conditions of the arrangement or grant; or

(b) vary with the consent of the non-Commonwealth party or parties to the arrangement or grant.

This broad legislative authority to enter into arrangements such as contracts and to spend money pursuant to them echoes an idea put by Sir Owen Dixon to the 1929 Royal Commission on the Constitution of the Commonwealth. He suggested that the Commonwealth Parliament might enact a *General Contracts Act* to provide standing legislative authority for Commonwealth spending under contract. French CJ referred to this in his opinion in the *School Chaplains Case*, but said it was “not necessary for present purposes to express a concluded view on that suggestion”.

The amending Act also inserted a new Schedule 1AA into the *Financial Management and Accountability Regulations 1997 (Cth)*. The purpose of the Schedule is to provide the specification in the regulations to the Act to which s 32B(1)(b) refers. Part 3 of the Schedule is titled “Grants of financial assistance to persons other than a State or Territory” and Part 4 is simply headed “Programs”. Together these Parts apply to hundreds of Commonwealth spending programs which have previously had no legislative basis beyond the mere appropriation of the necessary funds. Amongst these is included the NSCP, though it is unclear whether that program is able to be supported by any Commonwealth legislation in
light of the opinion expressed by Hayne and Kiefel JJ on that question in the *School Chaplains Case*.

Although the Opposition gave its support to the Bill, it expressed reservations about the Bill’s validity and effectiveness. Shadow Attorney-General George Brandis SC said that he was far from satisfied with s 32B’s “umbrella form of statutory validation” [Australia, Senate, *Parliamentary Debates* (Hansard), 27 June 2012, 32]. He also queried the extent to which s 32B was itself supported by a head of power in s 51 insofar as it purported to validate programs and payments lacking any connection to Commonwealth power.