Williams v Commonwealth of Australia [2012] HCA 23 (20 June 2012)

Last Updated: 20 June 2012

HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

RONALD WILLIAMS PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ORS DEFENDANTS

Williams v Commonwealth of Australia [2012] HCA 23
20 June 2012
S307/2010

ORDER

The questions stated in the Amended Special Case dated 26 July 2011 be answered as follows:

Question 1

Does the plaintiff have standing to challenge:

(a) the validity of the Darling Heights Funding Agreement?

(b) the drawing of money from the Consolidated Revenue Fund for the purpose of making payments pursuant to the Darling Heights Funding Agreement during the following financial years:
(i) 2007-2008;
(ii) 2008-2009;
(iii) 2009-2010;
(iv) 2010-2011;
(v) 2011-2012?

(c) the making of payments by the Commonwealth to Scripture Union Queensland pursuant to the Darling Heights Funding Agreement during the following financial years:
(i) 2007-2008;
(ii) 2008-2009;
(iii) 2009-2010;
(iv) 2010-2011;
(v) 2011-2012?

Answer

(a) Yes.

(b) Unnecessary to answer.

(c) Yes.

Question 2

If the answer to Question 1(a) is Yes, is the Darling Heights Funding Agreement invalid, in whole or in part, by reason that the Darling Heights Funding Agreement is:

(a) beyond the executive power of the Commonwealth under s 61 of the Constitution?

(b) prohibited by s 116 of the Constitution?

Answer

(a) Yes.

(b) No.

Question 3

To the extent that the answer to Question 1(b) is Yes, was or is the drawing of money from the Consolidated Revenue Fund for the purpose of making payments under the Darling Heights Funding Agreement authorised by:

(a) the 2007-2008 Appropriation Act?

(b) the 2008-2009 Appropriation Act?

(c) the 2009-2010 Appropriation Act?

(d) the 2010-2011 Appropriation Act?

(e) the 2011-2012 Appropriation Act?

Answer

Unnecessary to answer.

Question 4

To the extent that the answer to Question 1(c) is Yes, was or is the making of the relevant payments by the Commonwealth to Scripture Union Queensland pursuant to the Darling Heights Funding Agreement unlawful by reason that the making of the payments was or is:

(a) beyond the executive power of the Commonwealth under s 61 of the Constitution?

(b) prohibited by s 116 of the Constitution?

Answer

(a) The making of the payments was not supported by the executive power of the Commonwealth under s 61 of the Constitution.

(b) No.

Question 5

If the answer to any part of Question 2 is Yes, the answer to any part of Question 3 is No, or the answer to any part of Question 4 is Yes, what, if any, of the relief sought in the statement of claim should the plaintiff be granted?

Answer

The Justice disposing of the action should grant the plaintiff such declaratory relief and make such costs orders as appear appropriate in the light of the answers to Questions 1-4 and 6.

Question 6

Who should pay the costs of this special case?

Answer

The first, second and third defendants.

Representation

B W Walker SC with G E S Ng for the plaintiff (instructed by Horowitz & Bilinsky)

S J Gageler SC, Solicitor-General of the Commonwealth with G R Kennett SC and S J Free for the first, second and third defendants (instructed by Australian Government Solicitor)

R Merkel QC with G A Hill and J A Thomson for the fourth defendant (instructed by Norton Rose Australia)

Interveners

M G Sexton SC, Solicitor-General for the State of New South Wales with N L Sharp intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

W Sofronoff QC, Solicitor-General of the State of Queensland with G P Sammon and G J D del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

G L Sealy SC, Solicitor-General of the State of Tasmania with S D Gates intervening on behalf of the Attorney-General of the State of Tasmania (instructed by Solicitor-General of the State of Tasmania)

M G Hinton QC, Solicitor-General for the State of South Australia with M J Wait intervening on behalf of the Attorney-General for the State of South Australia (instructed

by Crown Solicitor (SA))

S G E McLeish SC, Solicitor-General for the State of Victoria with R J Orr and N M Wood intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R M Mitchell SC, Acting Solicitor-General for the State of Western Australia with F B Seaward intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

P D Quinlan SC with K E Foley appearing as amicus curiae on behalf of the Churches' Commission on Education Incorporated (instructed by Mallesons Stephen Jaques)

CATCHWORDS

Williams v Commonwealth of Australia

Constitutional law − Executive power of Commonwealth − Commonwealth entered funding agreement with private service provider for provision of chaplaincy services at State school ("Funding Agreement") − Funding Agreement made pursuant to National School Chaplaincy Program − Whether executive power of Commonwealth extends to matters in respect of which Parliament may legislate − Whether s 61 of Constitution or s 44(1) of *Financial Management and Accountability Act* 1997 (Cth) ("FMA Act") source of power to enter Funding Agreement − Whether s 61 of Constitution or s 44(1) of FMA Act source of power to pay service provider.

Constitutional law − Powers of Commonwealth Parliament − Whether law providing for payments in circumstances identical to Funding Agreement would be law with respect to s 51(xx) of Constitution − Whether law providing for payments in circumstances identical to Funding Agreement would be law with respect to s 51(xxiiiA) of Constitution.

Constitutional law − Freedom of religion − Prohibition on religious tests as qualification for any office under Commonwealth − Under Funding Agreement, "school chaplain" to

provide services − Whether "school chaplain" holds office under Commonwealth − Whether Funding Agreement or payments to service provider prohibited by s 116 of Constitution.

Constitutional law − Appropriations of moneys from Consolidated Revenue Fund − Commonwealth paid appropriated moneys to service provider pursuant to Funding Agreement − Whether Appropriation Acts authorised appropriations of moneys for purpose of payments under Funding Agreement.

Constitutional law − Standing − Plaintiff's children attended State school party to Funding Agreement − Whether plaintiff has standing to challenge validity of Funding Agreement − Whether plaintiff has standing to challenge validity of appropriations to pay moneys pursuant to Funding Agreement − Whether plaintiff has standing to challenge validity of payments to service provider.

Words and phrases – "appropriation", "benefits to students", "capacity to contract", "execution and maintenance of this Constitution", "executive power of the Commonwealth", "office under the Commonwealth", "ordinary and well-recognised functions", "religious test".

Constitution, ss 51(xx), 51(xxiiiA), 61, 64, 81, 96 and 116.
Financial Management and Accountability Act 1997 (Cth), s 44(1).

FRENCH CJ.

Introduction

1. In 1901, one of the principal architects of the Commonwealth Constitution, Andrew Inglis Clark, said of what he called "a truly federal government"[1]:

> "Its essential and distinctive feature is the preservation of the separate existence and corporate life of each of the component States of the commonwealth, concurrently with the enforcement of all federal laws uniformly in every State as effectually and as unrestrictedly as if the federal government alone possessed legislative and executive power within the territory of each State."

In this case, that essential and distinctive feature requires consideration of the observation of Alfred Deakin, another of the architects of the Commonwealth Constitution and the first Attorney-General of the Commonwealth, that[2]:

> "As a general rule, wherever the executive power of the Commonwealth extends, that of the States is correspondingly reduced."

In particular, this case requires consideration of the executive power of the Commonwealth, absent power conferred by or derived from an Act of the Parliament, to enter into contracts and expend public money.

2. The plaintiff, Ronald Williams, calls into question the validity of a contract made by the Commonwealth with a private service provider, and expenditure under that contract, for the delivery of "chaplaincy services" into schools operated by the Queensland State Government. His claim concerns the provision of such services in the Darling Heights State School in Queensland, at which his children are students. Although the expenditure is said by the Commonwealth to have met the necessary condition of a parliamentary appropriation for each year in which it has been made, no Act of Parliament has conferred power on the Commonwealth to contract and expend public money in this way. The Commonwealth relies upon the executive power under s 61 of the Constitution. That section provides:

> "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

The extent to which the executive power authorises the Commonwealth to make contracts and spend public money pursuant to them is raised in these proceedings partly because, as this Court has recently held**[3]** contrary to a long-standing assumption, parliamentary appropriation is not a source of spending power**[4]**.

3. Initially there was another common assumption underpinning the written submissions in this case that, subject to the requirements of the Constitution relating to appropriations, the Commonwealth Executive can expend public moneys on any subject matter falling within a head of Commonwealth legislative power. The unanimity of that assumption did not survive oral argument and further written submissions were filed by leave after oral argument had concluded.
4. For the reasons that follow, s 61 does not empower the Commonwealth, in the absence of statutory authority, to contract for or undertake the challenged expenditure on chaplaincy services in the Darling Heights State School. That conclusion depends upon the text, context and purpose of s 61 informed by its drafting history and the federal character of the Constitution. It does not involve any judgment about the merits of public funding of chaplaincy services in schools. It does not involve any conclusion about the availability of constitutional mechanisms, including conditional grants to the States under s 96 of the Constitution and inter-governmental agreements supported by legislation**[5]**, which might enable such services to be provided in accordance with the Constitution of the Commonwealth and the Constitutions of the States. Nor does it involve any question about the power of the Commonwealth to enter into contracts and expend moneys:

. in the administration of departments of State pursuant to s 64 of the Constitution;

. in the execution and maintenance of the laws of the Commonwealth;

. in the exercise of power conferred by or derived from an Act of the Parliament;

. in the exercise of powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth;

. in the exercise of inherent authority derived from the character and status of the Commonwealth as the national government.

What is rejected in these reasons is the unqualified proposition that, subject to parliamentary appropriation, the executive power of the Commonwealth extends generally to enable it to enter into contracts and undertake expenditure of public moneys relating to any subject matter falling within a head of Commonwealth legislative power.

Procedural history

5. The plaintiff is the father of four children enrolled in the Darling Heights State School. On 21 December 2010 he commenced proceedings in the original jurisdiction of this Court challenging the authority of the Commonwealth to draw money from the Consolidated Revenue Fund ("CRF") and to make payments to Scripture Union Queensland ("SUQ") to provide chaplaincy services at the Darling Heights State School. The payments were made pursuant to the Darling Heights Funding Agreement ("DHF Agreement") between the Commonwealth and SUQ and were made for the purposes of the National School Chaplaincy Program ("NSCP"), established by the Commonwealth.
6. SUQ was incorporated under the *Corporations Act* 2001 (Cth) as a public company limited by guarantee and is registered in Queensland. It is designated in its Constitution as "the Mission". Its objects are "to make God's Good News known to children, young people and their families" and "to encourage people of all ages to meet God daily through the Bible and prayer". In furtherance of these objects, SUQ shall "undertake ... a variety of specialist ministries", "shall preach the need of true conversion and of holiness in heart and life" and "shall aid the Christian Church in its ministries."
7. In an amended writ of summons filed in the Court on 12 July 2011, the plaintiff sought declarations to the effect that Appropriation Acts enacted for the years 2007-2008 to 2011-2012 inclusive did not validly authorise the drawing of funds, pursuant to the DHF Agreement or any like agreement, and did not authorise the payment of funds to SUQ. Declarations were also sought relating to the issue of drawing rights purporting to authorise the payment of public moneys to SUQ under the DHF Agreement or other similar agreements. The plaintiff claimed injunctive relief to restrain officers of the Commonwealth from making such payments for chaplaincy services at the school.
8. On 26 July 2011, Gummow J referred an amended special case for the opinion of the Full

Court.

9. A number of questions were posed for determination by the amended special case. Question 1 was whether the plaintiff had standing to challenge the DHF Agreement and, for each of the financial years from 2007-2008 to 2011-2012 inclusive, the drawing of money from the CRF and the payments by the Commonwealth to SUQ. For the reasons given by Gummow and Bell JJ**[6]**, I agree that the plaintiff had the requisite standing to support his challenge to the DHF Agreement and the payments made under it. I agree that it is unnecessary to answer the question relating to the drawing of money from the CRF for the purpose of making payments under the agreement. On the basis that the plaintiff had the requisite standing, the remaining questions were:

    2. 2. is the DHF Agreement invalid, in whole or in part, by reason that the DHF Agreement is:

    (a) beyond the executive power of the Commonwealth under s 61 of the Constitution?

    (b) prohibited by s 116 of the Constitution?

3. 3. is the drawing of money from the CRF for the purpose of making payments under the DHF Agreement authorised by:

    (a) the 2007-2008 Appropriation Act?

    (b) the 2008-2009 Appropriation Act?

    (c) the 2009-2010 Appropriation Act?

    (d) the 2010-2011 Appropriation Act?

    (e) the 2011-2012 Appropriation Act?

4. 4. was or is the making of the relevant payments by the Commonwealth to SUQ pursuant to the DHF Agreement unlawful by reason that the making of the payments was or is:

    (a) beyond the executive power of the Commonwealth under s 61 of the Constitution?

    (b) prohibited by s 116 of the Constitution?

I agree, again for the reasons given by Gummow and Bell JJ, that neither the DHF Agreement nor the payments made under it were prohibited by s 116 of the Constitution**[7]**. The only limb of that provision relevant to this case was that which prohibits the Commonwealth from requiring any religious test "as a qualification for any office ... under the Commonwealth." The persons providing chaplaincy services under the DHF Agreement did not hold offices under the Commonwealth. Questions 5 and 6 related to the relief sought, dependent upon the answers to questions 2, 3 and 4, and who should pay the costs of the special case.

Factual background

10. On 29 October 2006, Prime Minister Howard announced the introduction of the NSCP for the provision of chaplaincy services in schools. The initial level of funding announced was $90 million over a three year period. That level of funding was increased in 2007 to $165 million over three years. Prime Minister Rudd announced an extension of the NSCP in November 2009. That extension involved additional funding of $42 million over the 2010 and 2011 school years.
11. Following Prime Minister Howard's announcement the Department of Education, Science and Training ("DEST") issued NSCP Guidelines. The guidelines were administrative in nature. They did not have statutory force. Revised guidelines were issued on 19 January 2007. Responsibility for the administration of the NSCP was brought under the Department of Education, Employment and Workplace Relations ("DEEWR") on 3 December 2007**[8]**. Further revised guidelines were issued on 1 July 2008 and 16 February 2010. From July 2008 DEEWR made funds available under the NSCP for the provision of secular pastoral care workers in accordance with a Secular Service Providers Policy ("SSP Policy"). Where a school seeking funding under the NSCP had been unable to locate a suitable chaplain, it was given a copy of the SSP Policy.
12. At the time of the Prime Minister's announcement in 2006, the Queensland Government had in place a procedural policy, published in 1998, for the supply of chaplaincy services in Queensland State schools. The policy set out requirements to be met by Queensland State schools in providing such services. Revised versions were published in July 2007 and April 2011 ("the Queensland Procedure"). Compliance with the Queensland Procedure was a condition of State Government funding. The Queensland Procedure was applicable even if the funding for a particular school's chaplaincy service did not come from the Queensland Government. Pursuant to the Queensland Procedure, SUQ entered into an agreement with the State of Queensland which required chaplains provided by SUQ to State schools to comply with a code of conduct and also with the Queensland Procedure as in force from time to time.
13. On 9 November 2007, the Commonwealth entered into the DHF Agreement with SUQ for the provision of funding under the NSCP in respect of the Darling Heights State School. That agreement was varied in October 2008 and again in May 2010. It followed a standard form used for funding under the NSCP.
14. SUQ provided chaplaincy services at the Darling Heights State School and received payments under the DHF Agreement. Three payments of $22,000 each were made on or about 14 November 2007, 15 December 2008 and 2 December 2009. A further payment of $27,063.01 was made on or about 11 October 2010. It covered the provision of NSCP chaplaincy services at the school for the period until 31 December 2011. No further payments were due to be made by the Commonwealth pursuant to the DHF Agreement.

The Darling Heights Funding Agreement

15. On 4 April 2007 the Darling Heights State School lodged an application for funding under the NSCP for chaplaincy services. The application was made in the name of the Deputy Principal of the school. It was endorsed by the Principal and the President of the Darling Heights State School Parents' and Citizens' Association. It was also endorsed by SUQ as the proposed chaplaincy service provider.
16. The application was successful and led to the DHF Agreement. The stated purpose of that agreement was "the provision of funding under the National School Chaplaincy Programme on behalf of Darling Heights State School."
17. SUQ was required under the DHF Agreement to provide chaplaincy services in accordance with the application for funding under the NSCP. The chaplain employed under the project was required to deliver services to the school and its community. A key element of that service was the provision of "general religious and personal advice to those seeking it, [and] comfort and support to students and staff, such as during times of grief". The chaplain was not to seek to "impose any religious beliefs or persuade an individual toward a particular set of religious beliefs". SUQ was required to ensure that the chaplain signed the NSCP Code of Conduct which formed part of the DHF Agreement.
18. The DHF Agreement provided for payments to be made in accordance with a payment schedule set out in Sched 1 to the agreement. The payments made to SUQ pursuant to the DHF Agreement have been set out earlier in these reasons.
19. The funding arrangements having been outlined, it is necessary now to refer to the legal bases for those payments, relied upon by the Commonwealth and challenged by the plaintiff.

Bases for validity – the Commonwealth contentions

20. The Commonwealth submitted that the power of the Executive Government to enter into the DHF Agreement and to make payments to SUQ pursuant to the agreement and the NSCP derived from s 61 of the Constitution.
21. It should be emphasised at the outset that the executive power of the Commonwealth is to be understood as a reference to that power exercised by the Commonwealth as a polity through the executive branch of its government. It is, as the plaintiff submitted, an error to treat the Commonwealth Executive as a separate juristic person. The character of the Executive Government as a branch of the national polity is relevant to the relationship between the power of that branch and the powers and functions of the legislative branch and, particularly, the Senate.
22. The Commonwealth submissions fall to be considered in relation to aspects of executive power identified in the decisions of this Court. Those decisions have been made in the context of particular controversies about specific applications of the power. They have not required a global account of its scope. Nevertheless, it can be said that the executive power referred to in s 61 extends to:

. powers necessary or incidental to the execution and maintenance of a law of the Commonwealth**[9]**;

. powers conferred by statute**[10]**;

. powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth[11];

. powers defined by the capacities of the Commonwealth common to legal persons[12];

. inherent authority derived from the character and status of the Commonwealth as the national government[13].

23. It is necessary to draw a distinction between that aspect of the executive power which derives its content from the prerogatives of the Crown and that aspect defined by reference to the capacities which the Commonwealth has in common with juristic persons.
24. The mechanism for the incorporation of the prerogative into the executive power is found in the opening words of s 61 which vests the executive power of the Commonwealth in "the Queen". This has been described as a "shorthand prescription, or formula, for incorporating the prerogative – which is implicit in the legal concept of 'the Queen' – in the Crown in right of the Commonwealth."[14] As Dixon J said in *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd*[15]:

> "This consequence flows from the fact that the executive power of the Commonwealth is vested in the Crown, which, of course, is as much the central element in the Constitution of the Commonwealth as in a unitary constitution."

25. The taxonomical question whether the prerogatives incorporated in the executive power of the Commonwealth include the common law capacities of a juristic person has been given different answers. Blackstone said that "if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer"[16] and therefore that "the prerogative is that law in case of the king, which is law in no case of the subject."[17] Dicey thought the prerogatives extended to "[e]very act which the executive government can lawfully do without the authority of the Act of Parliament"[18]. Professor George Winterton considered the dispute sterile and concluded that[19]:

> "there is neither a rational basis nor any utility in distinguishing the 'prerogative' in Blackstone's sense from the other common law powers of the Crown".

In the United Kingdom that view has been said to be reflected in "the prevalence of judicial references to Dicey's definition of the prerogative and the relative marginalization of Blackstone's" indicating "a preference for the modern over the archaic, as Dicey's definition is read as functional and modern in emphasizing residuality and parliamentary supremacy."[20] There is, nevertheless, a point to Blackstone's distinction in this case. It avoids the temptation to stretch the prerogative beyond its proper historical bounds[21]. Moreover, as appears below, one of the Commonwealth submissions suggested that the exercise of the executive "capacities" was not subject to the same constraints as the exercise of the prerogative. It is necessary now to turn to the Commonwealth submissions.

26. In its written submissions, filed before the hearing, the Commonwealth made what was presented as a limiting assumption for the purpose of its argument. The assumption was that the breadth of the executive power of the Commonwealth, in all of its aspects, is confined to the subject matters of express grants of power to the Commonwealth Parliament 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. The "aspects" of executive power so limited were said to be the prerogative in the "narrower sense"**[22]**, the powers that arise from the position of the Commonwealth as a national government, and the capacities which the Commonwealth has in common with other legal persons. The limiting negative assumption was linked to a broad positive proposition that the executive power in all of its aspects extends to the subject matter of grants of legislative power to the Commonwealth Parliament. In oral argument at the hearing the Commonwealth nevertheless disavowed the proposition that the "executive power authorises the Executive to do anything which the Executive could be authorised by statute to do, pursuant to one of the powers in section 51". In later written submissions, filed after the hearing, in response to submissions by Tasmania and South Australia, the Commonwealth appeared to revive its broad proposition and contended that the executive power supports executive action dealing at least with matters within the enumerated heads of Commonwealth legislative power.
27. The broad proposition in each of its manifestations should not be accepted. The exercise of legislative power must yield a law able to be characterised as a law with respect to a subject matter within the constitutional grant of legislative authority to the Parliament. The subject matters of legislative power are specified for that purpose, not to give content to the executive power. Executive action, except in the exercise of delegated legislative authority, is qualitatively different from legislative action. As Isaacs J said in *R v Kidman***[23]**:

> "The Executive cannot change or add to the law; it can only execute it".

To say positively and without qualification that the executive power in its various aspects extends, absent statutory support, to the "subject matters" of the legislative powers of the Commonwealth is to make a statement the content of which is not easy to divine. Neither the drafting history of s 61 of the Constitution nor its judicial exegesis since Federation overcomes that difficulty.

28. In reliance upon its broad premise, the Commonwealth submitted that the making of the DHF Agreement and the payments to SUQ were within the executive power in that:
    1. 1. The DHF Agreement provided for, and its performance involved, the provision of benefits to students, a subject matter covered by s 51(xxiiiA) of the Constitution.
    2. 2. The DHF Agreement was entered into with, and provided for assistance to, a trading corporation formed within the limits of the Commonwealth, a subject matter covered by s 51(xx) of the Constitution.
29. The Commonwealth referred to a number of authorities in support of its broad proposition. The first of those was *Victoria v The Commonwealth and Hayden* ("the *AAP case*")**[24]**. The focus in that case, which concerned the validity of Commonwealth payments to regional councils to provide welfare services, was upon the term "purposes of the Commonwealth" in s 81 of the Constitution. Gibbs J said**[25]**:

> "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."

Observations about the executive power made in the judgments in the *AAP case* were generally cast in a form reflecting the negative limiting assumption which stood at the threshold of the Commonwealth's initial written submissions in this case. Barwick CJ said that the Executive "may only do that which has been or could be the subject of valid legislation."**[26]** Gibbs J said that the Executive "cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth"**[27]**. The content of executive power as Mason J explained it "does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution"**[28]**. His Honour did not define those responsibilities in terms of the subject matters of Commonwealth legislative competence. Rather, he described them as**[29]**:

> "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."

This was no simplistic mapping of the executive power on to the fields of legislative competency. His Honour described his view of the executive power as confirmed by the decisions of this Court in *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* ("the *Wool Tops case*")**[30]** and *The Commonwealth v Australian Commonwealth Shipping Board***[31]**. In relation to the *Wool Tops case* his Honour referred in his footnote**[32]** to the joint judgment of Knox CJ and Gavan Duffy J, in which the impugned agreements were held invalid for want of constitutional or statutory authority**[33]**. His footnoted reference**[34]** to *Commonwealth Shipping Board* was to a passage in the joint judgment of Knox CJ, Gavan Duffy, Rich and Starke JJ in which their Honours held that an activity unwarranted in express terms by the Constitution could not be vested in the Executive**[35]**.

30. In *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd***[36]**, Mason J held that Commonwealth executive power extended to the making of inter-governmental agreements between the Commonwealth and the States "on matters of joint interest, including matters which require for their implementation joint legislative action", so long as the means used and the ends sought were consistent with the Constitution**[37]**. His Honour said that the executive power of the Commonwealth was not "limited to heads of power which correspond with enumerated heads of Commonwealth legislative power under the Constitution."**[38]** Referring back to what he had said in the *AAP case*, he added**[39]**:

> "Of necessity the scope of the power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constituent elements in the federation."

These remarks are consistent with a concept of executive power in which the character and status of the Commonwealth as a national government is an aspect of the power and a feature informing all of its aspects, including the prerogatives appropriate to the Commonwealth, the common law capacities, powers conferred by statutes, and the

powers necessary to give effect to statutes. His Honour's conception of executive power was consistent with that most recently discussed by this Court in *Pape v Federal Commissioner of Taxation*[40]. It does not afford support for the broad proposition that the Executive Government of the Commonwealth can do anything about which the Parliament of the Commonwealth could make a law.

31. In *Davis v The Commonwealth*[41] the Court was again concerned with the way in which the "character and status of the Commonwealth as the government of the nation" underpinned executive action and associated incidental legislation to celebrate the bicentenary of first European settlement in Australia. It was in the context of that question that Mason CJ, Deane and Gaudron JJ held the executive power to extend most clearly "in areas beyond the express grants of legislative power ... where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence."[42] It is necessary, in considering *Davis*, to have regard not only to the questions which fell for decision in that case, but also to the observation of Brennan J that[43]:

> "Section 61 refers not only to the execution and maintenance of the laws of the Commonwealth (*a function characteristically to be performed by execution of statutory powers*); it refers also to 'the execution and maintenance of this Constitution' (a function to be performed by execution of powers which are not necessarily statutory)." (emphasis added)

What his Honour said was not a prescription for a general non-statutory executive power to enter contracts and spend public money on any matter that could be referred to a head of Commonwealth legislative power or could be authorised by a law of the Commonwealth. What *Davis* was about is encapsulated in the observation by Wilson and Dawson JJ[44]:

> "In this case it is enough to say that, viewing its powers as a whole, the Commonwealth must necessarily have the executive capacity under s 61 to recognize and celebrate its own origins in history. The constitutional distribution of powers is unaffected by its exercise."

32. *R v Hughes*[45], also cited in the Commonwealth's submissions, concerned the validity of a State law conferring on the Commonwealth Director of Public Prosecutions the power to institute and carry on prosecutions for indictable offences against the law of the State. In the joint judgment, consideration was given to whether the provisions of the relevant Commonwealth Act authorising regulations conferring such functions on a Commonwealth officer could be supported as laws with respect to matters incidental to the executive power pursuant to s 51(xxxix)[46]. The underlying inter-governmental agreement was referred to in the joint judgment as a possible illustration of the propositions stated by Mason J in *Duncan* and referred to earlier in these reasons.
33. The Commonwealth also relied upon observations in the judgments of McHugh and Gummow JJ in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[47]. As McHugh J correctly pointed out, much Commonwealth executive activity does not depend on statutory authorisation. He said[48]:

> "In the ordinary course of administering the government of the

> Commonwealth, authority is frequently given to Commonwealth servants and agents to carry out activities in the exercise of the general powers conferred by the Constitution."

Gummow J also said**[49]**:

> "The executive power of the Commonwealth enables the undertaking of 'all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution'." (footnote omitted)

34. There are undoubtedly significant fields of executive action which do not require express statutory authority. As was accepted by the Attorney-General of Tasmania in further written submissions, filed after the oral hearing, the executive power of the Commonwealth extends to the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect. That field of action does not require express statutory authority, nor is it necessary to find an implied power deriving from the statute. The necessary power can be found in the words "execution and maintenance ... of the laws of the Commonwealth" appearing in s 61 of the Constitution. The field of non-statutory executive action also extends to the administration of departments of State under s 64 of the Constitution and those activities which may properly be characterised as deriving from the character and status of the Commonwealth as a national government. To accept those propositions is not to accept the broad proposition for which the Commonwealth contended, nor does such a proposition have the authority of a decision of this Court**[50]**.
35. The Commonwealth sought to support the challenged expenditure on two other bases. The first was that the Commonwealth possesses capacities, in common with other legal persons, including the capacity to obtain information, to spend money lawfully available to be spent or to enter into contracts. As initially formulated by the Commonwealth, these capacities were not limited in their exercise by reference to the subject matters of the legislative powers of the Commonwealth. The second basis, put in oral argument, was that:

> "a relevantly unlimited power to pay and to contract to pay money is to be found in the character and status of the Commonwealth as a national government just as it would be inherent in the character and status of the Commonwealth were it a natural person."

The Commonwealth accepted that, unlike a natural person, its power to pay and to contract to pay money was constrained by the need for an appropriation and by the requirements of political accountability.

36. In oral argument, the Commonwealth submitted that its capacity to contract, and to pay money pursuant to contract, extends at least to payments made on terms and conditions that could be authorised or required by an exercise of the legislative power of the Commonwealth under s 51. The metes and bounds of aspects of executive power, however, are not to be measured by undiscriminating reference to the subject matters of legislative power. Those subject matters are diverse in character. Some relate to activities, others to classes of persons or legal entities, some to intangible property rights and some to status. Some are purposive**[51]**. The submission invites the Court to determine whether there is an hypothetical law which could validly support

an impugned executive contract and expenditure under such a contract. There might be a variety of laws which could validly authorise or require contractual or spending activity by the Commonwealth. The location of the contractual capacity of the Commonwealth in a universe of hypothetical laws which would, if enacted, support its exercise, is not a means by which to judge its scope.

37. The Commonwealth submitted that the exercise by its Executive Government of its capacities does not involve interference with what would otherwise be the legal rights and duties of others, nor does the Executive Government thereby displace the ordinary operation of the laws of the State or Territory in which the relevant acts take place. This is correct as far as it goes but does not provide an answer to the question of validity. There are consequences for the Federation which flow from attributing to the Commonwealth a wide executive power to expend moneys, whether or not referable to a head of Commonwealth legislative power, and subject only to the requirement of a parliamentary appropriation. Those consequences are not to be minimised by the absence of any legal effect upon the laws of the States. Expenditure by the Executive Government of the Commonwealth, administered and controlled by the Commonwealth, in fields within the competence of the executive governments of the States has, and always has had, the potential, in a practical way of which the Court can take notice, to diminish the authority of the States in their fields of operation. That is not a criterion of invalidity. It is, however, a reason not to accept the broad contention that such activities can be undertaken at the discretion of the Executive, subject only to the requirement of appropriation.
38. That aspect of executive power, which has been described as the "mere capacities of a kind which may be possessed by persons other than the Crown"**[52]**, is not open-ended. The Commonwealth is not just another legal person like a private corporation or a natural person with contractual capacity. The governmental contract "is now a powerful tool of public administration."**[53]** As Professor Winterton said of the capacities exercised by the Executive Government**[54]**:

> "Important governmental powers, such as the power to make contracts, may be attributed to this source, but the general principle must not be pressed too far. It can be applied only when the executive and private actions are identical, but this will rarely be so, because governmental action is inherently different from private action. Governmental action inevitably has a far greater impact on individual liberties, and this affects its character."

Relevantly for present purposes, there is also the impact of Commonwealth executive power on the executive power of the States.

39. The Commonwealth submitted that the necessary condition, imposed by s 83 of the Constitution, for the exercise of the Commonwealth power to spend, namely that it be under appropriation made by law, had been met by the enactment of Appropriation Acts in each of the relevant years. It was not in dispute that, although a necessary condition of the exercise of executive spending power, an appropriation under s 83 is not a source of that power**[55]**. For the reasons given by Gummow and Bell JJ**[56]** it is not necessary in this case to deal with the sufficiency of the parliamentary appropriations relied upon by the Commonwealth. No Act of Parliament existed which conferred power on the Executive Government of the Commonwealth to make the impugned payments to SUQ**[57]**. The lawfulness of the payments therefore depended critically upon whether s 61 of the Constitution supplied that authority. That question invites consideration of the construction of s 61 by reference to its drafting history and the concept of executive government which informed it.

Executive power – prehistory and drafting history

40. There were elements of the drafting history of s 61 of the Constitution which reflected some of the Commonwealth's arguments about its scope. It is helpful to consider that history.
41. In November 1890, a few months before the first National Australasian Convention, Sir Samuel Griffith, then Premier of Queensland for the second time, proposed, by way of motion in the Legislative Assembly, a federal constitution for the Colony of Queensland involving the creation of three provinces. The motion was a political response to a long-running separatist movement**[58]**. Relevantly, he proposed executive governments of the provinces and a central "United Provinces" Executive Government. Their functions, he said, "should correspond with the functions assigned to their respective Legislatures."**[59]** Queensland did not become a federation but Griffith's delineation of executive powers was to have some resonance in the drafting process which led to s 61 of the Constitution of the Commonwealth.
42. On 18 March 1891, the National Australasian Convention resolved in Committee of the Whole to approve of the formation of the framing of a Federal Constitution which would establish, among other things**[60]**:

> "An Executive, consisting of a Governor-General, and such persons as may from time to time be appointed as his advisers."

A Constitutional Committee was created to draft a Bill. Sir Samuel Griffith, Edmund Barton, Alfred Deakin and Andrew Inglis Clark were among its members. A list of issues for decision by the Committee at its first meeting, probably prepared by Griffith**[61]**, included an Executive with "[p]owers correlative to those of Legislature."**[62]** A framework document subsequently produced by the Committee proposed an Executive Government but made no reference to its powers**[63]**.

43. Inglis Clark prepared a draft Constitution which, in effect, became a working document in the drafting process that ensued in the 1891 Convention and the 1897-1898 Conventions. The initial draft was based upon the Constitution of the United States in so far as it assigned enumerated legislative powers to the Federal Parliament**[64]**. In relation to the "location, nature and exercise of the Executive power"**[65]** it followed the Constitution of Canada embodied in the *British North America Act* 1867 (Imp) ("the British North America Act")**[66]**. Section 9 of that Act provided:

> "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."

Nevertheless, Inglis Clark, perhaps having in mind the power of the central government under the Canadian Constitution, warned the delegates, in the memorandum that accompanied his draft, against**[67]**:

> "an Executive having an immense number of provincial offices at its disposal, and the reduction of the present local Governments to the position of large Municipal Councils with a Governor and a Ministry attached to each of them."

A relevant contrast between the British North America Act and the Commonwealth Constitution was made by the Privy Council in *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd*[68]. What was in the minds of those who agreed on the resolutions which gave rise to the British North America Act "was a general Government charged with matters of common interest, and new and merely local Governments for the Provinces", which were to have "fresh and much restricted Constitutions"[69]. The Constitution adopted by the Australian colonies was "federal in the strict sense of the term"[70], in which "States, while agreeing on a measure of delegation, yet in the main continue[d] to preserve their original Constitutions."[71]

44. Clause 5 of Inglis Clark's draft Constitution provided that the executive power and authority of the "Federal Dominion of Australasia" would continue and be vested, subject to the provisions of the Bill, in the Queen[72]. Clause 6 provided for the Queen to appoint a Governor-General to exercise such "executive powers, authorities, and functions" as the Queen might deem "necessary or expedient to assign to him."[73] Charles Kingston's draft Constitution was to broadly similar effect[74].
45. The Constitution produced by the Constitutional Committee of the 1891 Convention, and submitted to the Convention, followed the Inglis Clark and Kingston model in relation to executive power. Clause 5 of the Inglis Clark draft became cl 1 of Ch II of the proposed Constitution, entitled "THE EXECUTIVE GOVERNMENT". It provided[75]:

> "The Executive power and authority of the Commonwealth is vested in the Queen, and shall be exercised by the Governor-General as the Queen's Representative."

That clause was one of two precursors of s 61.

46. The second precursor of s 61, a new provision with respect to executive power which had not appeared in either of the Inglis Clark or Kingston drafts, was cl 8 of the proposed Ch II[76]:

> "The Executive power and authority of the Commonwealth shall extend to all matters with respect to which the Legislative powers of the Parliament may be exercised, excepting only matters, being within the Legislative powers of a State, with respect to which the Parliament of that State for the time being exercises such powers."

In speaking to the draft Bill, Sir Samuel Griffith said[77]:

> "It is proposed that [the Commonwealth's] executive authority shall be co-extensive with its legislative power. That follows as a matter of course."

The 1891 draft Constitution contained a paramountcy provision, cl 3 of Ch V, in terms identical to those which became s 109 of the Constitution[78]. That circumstance, and the non-exclusive character of most Commonwealth legislative powers, was at least consistent with the proposition that cl 8 was directed to cases in which the Commonwealth had exercised its concurrent legislative power on a particular subject matter. The proposition is, to some degree, speculative because no explanation emerged at

the time of what was meant by an executive power extending to matters with respect to which the legislative powers of the Parliament could be exercised.

47. In the course of consideration by the Convention in Committee in April 1891, cl 8 was amended, on Sir Samuel Griffith's motion, to read**[79]**:

> "The Executive power and authority of the Commonwealth shall extend to the execution of the provisions of this Constitution, and the Laws of the Commonwealth."

In moving the amendment, Griffith said that it did not alter the intention of cl 8 and added**[80]**:

> "As the clause stands, it contains a negative limitation upon the powers of the executive; but the amendment will give a positive statement as to what they are to be."

With what has been described as "an optimism that history has shown to be misplaced"**[81]** he said**[82]**:

> "That amendment covers all that is meant by the clause, and is quite free from ambiguity."

The stated equivalence of the original and amended forms of cl 8 raised more questions than it answered. As amended, the clause did not, in terms or by any stretch of textual analysis, describe an executive power to do any act dealing with a subject matter falling within a head of Commonwealth legislative power.

48. The 1891 draft Constitution failed to secure support from the colonial legislatures**[83]**. Nevertheless, it became an important working document for the Drafting Committee of the Constitutional Committee of the National Australasian Convention which met in Adelaide in 1897. In debate at the Adelaide session, Edmund Barton, responding to a proposal to insert the words "in council" after "Governor-General" in s 61, described the executive power of the Crown as "primarily divided into two classes"**[84]**:

> "those exercised by the prerogative ... and those which are ordinary Executive Acts, where it is prescribed that the Executive shall act in Council."

The latter class he described as "the offsprings of Statutes."**[85]** Quick and Garran summarised his observation as a statement that**[86]**:

> "Executive acts were either (1) exercised by prerogative, or (2) statutory."

The draft Constitution, recommended to the 1897 Convention by the Constitutional Committee, made no substantial changes to the provisions of Ch II dealing with the location and nature of executive power. Sir Samuel Griffith, having become Chief Justice of Queensland, was not a delegate to the 1897-1898 Conventions. Nor was Inglis Clark present. His journey in 1897 to the United States, and his appointment in 1898 to the Supreme Court of Tasmania, precluded his attendance at those Conventions**[87]**. Nevertheless, Griffith and Inglis Clark offered written critiques of the draft Constitution under consideration in 1897. They did not propose any alterations relating to the location and scope of the executive power**[88]**. Nor did the Colonial Office beyond the suggestion, which was accepted, that the words "is exercisable" be substituted for the words "shall be exercised" in cl 60**[89]**, the provision which evolved into s 61. That change was adopted at the Sydney Convention of 1897**[90]**, along with other changes to Ch II which are not material for present purposes.

49. After consideration by colonial legislatures, pursuant to enabling Acts establishing the 1897 Convention**[91]**, the draft Constitution was revised by the Drafting Committee. As finally presented to the Melbourne Convention in 1898 the provisions which were to become s 61 of the Constitution were embodied in two clauses found in Ch II**[92]**:

> "60. The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative.
>
> 67. The executive power of the Commonwealth shall extend to the execution of this Constitution, and of the laws of the Commonwealth."

Clauses 60 and 67, although not debated in Committee at the Melbourne Convention of 1898, were condensed into one clause by the Drafting Committee, namely cl 61, which became s 61 of the Constitution**[93]**.

50. The two versions of cl 8 in the 1891 draft and Griffith's comment upon moving the amendment to the clause were relied upon in the "Vondel Opinion" signed by Alfred Deakin, as Attorney-General, in 1902. In that Opinion, Deakin gave a meaning to s 61 which, at least so far as the documentary record discloses, had not been exposed during the National Australasian Convention debates. He regarded executive power as existing "antecedently to, and independently of, legislation". Its scope was "at least equal to that of the legislative power – exercised or unexercised."**[94]** Later in his Opinion he concluded**[95]**:

> "the Commonwealth has executive power, independently of Commonwealth legislation, with respect to every matter to which its legislative power extends."

Deakin's Opinion reflected that of the Secretary to the Attorney-General's Department, Robert Garran, who may have contributed to its drafting**[96]**. Garran, however, was later to resile from that opinion in testimony to the Royal Commission on the Constitution of the Commonwealth. He told the Royal Commission**[97]**:

> "I used to have the view that some common law authority might be found for

> the executive; but, in view of those words in section 61, I think you must seek support for it either in the Constitution itself or in an act of Parliament."

Deakin's Opinion contrasted sharply with that of Inglis Clark, expressed in 1901, that**[98]**:

> "It is evident that the legislative power of the Commonwealth must be exercised by the Parliament of the Commonwealth before the executive or the judicial power of the Commonwealth can be exercised by the Crown or the Federal Judiciary respectively, because the executive and the judicial powers cannot operate until a law is in existence for enforcement or exposition."

It is not to be thought that Inglis Clark thereby took a narrow view of executive power. The power declared by s 61 of the Constitution to be vested in the Queen included "the discretionary authority of the Crown within the Commonwealth" and extended "to the maintenance and execution of the Constitution and of the laws of the Commonwealth."**[99]** So far as the section referred to the Queen it was to be read as a declaration of an existing fact and not as an original grant of executive authority to her within the Commonwealth**[100]**.

51. The extension of the executive power in the closing words of s 61 was not the subject of any exegesis by Quick and Garran, beyond their observation that the execution and maintenance of the Constitution and of laws passed pursuant to it would be "foremost" among the powers and functions conferred upon the Governor-General**[101]**.
52. The similarity between the words of extension in s 61 and the language of s 101 of the Constitution, which provides for the establishment and functions of the Inter-State Commission, is striking**[102]**. In *New South Wales v The Commonwealth* ("the *Inter-State Commission case*") **[103]**, which was concerned with s 101, Isaacs J, with whom Powers J agreed**[104]**, described s 61 as according with Blackstone's observation that**[105]**:

> "though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate."

Barton J, dissenting in the result, equated the words "execute and maintain" with "enforce and uphold the laws of which they are the guardians."**[106]**

53. Professor W Harrison Moore, writing in 1910, noted that the colonial constitutions were "almost silent on the subject of the powers as of the organization of the Executive."**[107]** He identified as one function of the Executive the representation of the Commonwealth whenever necessary, "whether as a political organism, or as a juristic person making contracts and appearing as a party in Courts of justice."**[108]** That function required no express power. It flowed from the establishment of the Commonwealth as a new political community. The other functions were those conferred by the terms of s 61**[109]**. In relation to s 61, the Commonwealth Executive had more to do with the subject matters of Commonwealth legislative power than just giving effect to Commonwealth legislation**[110]**:

> "In relation to all such matters, the Commonwealth Executive does ... represent the Commonwealth and all the States to the outside world, whether there has been any Commonwealth legislation or not".

Further, where a power or duty committed to "the Commonwealth" under the Constitution was of a kind exercisable at common law by the Executive, the Commonwealth Executive was empowered to take such action as the common law allowed**[111]**.

54. Professor A Berriedale Keith, in the first edition, published in 1912, of *Responsible Government in the Dominions*, described the executive power of the Commonwealth as "very large", adding**[112]**:

> "It includes in addition to the power conferred by Commonwealth Acts the power sole and exclusive over the transferred departments."

In a subsequent edition, he also proposed that "[t]he executive power in the Commonwealth is little affected by considerations of the federal character of the Commonwealth."**[113]**

55. The Commonwealth submitted that it had been part of the accepted understanding of the Constitution, since the time of the National Australasian Convention debates, that the executive power of the Commonwealth supports executive acts dealing at least with matters within the enumerated heads of Commonwealth legislative power. There is no doubt that at the time of the Convention debates, the statement that the distribution of executive powers in a federation would follow the distribution of legislative powers was not novel. However, its meaning appears to have been no clearer then than it is now.
56. There is little evidence to support the view that the delegates to the National Australasian Conventions of 1891 and 1897-1898, or even the leading lawyers at those Conventions, shared a clear common view of the working of executive power in a federation. The Constitution which they drafted incorporated aspects of the written Constitutions of the United States and Canada, and the concept of responsible government derived from the British tradition. The elements were mixed in the Constitution to meet the Founders' perception of a uniquely Australian Federation. In respect of executive power, however, that perception was not finely resolved.
57. Quick and Garran distinguished the "Federal Executive power" conferred by s 61 from "the Executive power reserved to the States."**[114]** The executive power of the Commonwealth as a united political community was divided into two parts: "that portion which belongs to the Federal Government, in relation to Federal affairs ... and that portion which relates to matters reserved to the States"**[115]**. Nevertheless, federal executive power and State executive power were "of the same nature and quality"**[116]**.
58. The tension between the operation of executive powers and functions under a system of responsible cabinet government and a federal constitution with a bi-cameral legislature**,** one element of which was a States' House, represented a difficulty for some leading figures in the Federation movement. Professor Winterton wrote that there was "a direct conflict between responsible government as practised in Britain and the federal model the framers adopted from the United States."**[117]** Quick and Garran attributed to Sir Samuel Griffith, Sir Richard Baker, Sir John Cockburn, Inglis Clark and Mr GW Hackett the view that "the Cabinet system of Executive is incompatible with a true Federation."**[118]** At the 1891 Convention at Sydney,

Hackett said, in words which have frequently been quoted, "either responsible government will kill federation, or federation ... will kill responsible government."**[119]** That sentiment was repeated by the Chair of Committees at the Convention, Sir Richard Baker, in a speech at Adelaide in 1897 in which he said**[120]**:

> "if we adopt this Cabinet system of Executive it will either kill Federation or Federation will kill it; because we cannot conceal from ourselves that the very fundamental essence of the Cabinet system of Executive is the predominating power of one Chamber."

As Quick and Garran observed, the views of the objectors were not accepted. The system of responsible government under the British Constitution was embedded in the federal Constitution and cannot now be disturbed without amendment to that Constitution**[121]**. This Court has acknowledged the centrality of responsible government in the Constitution**[122]**. Quick and Garran predicted correctly that the system of responsible government would "tend in the direction of the nationalization of the people of the Commonwealth, and [would] promote the concentration of Executive control in the House of Representatives."**[123]** To accept the correctness of that prediction is not to reflect upon the desirability or otherwise of the way in which the operation of our constitutional system of government has developed.

59. Quick and Garran characterised s 61 as grafting the "modern political institution, known as responsible government" onto the "ancient principle of the Government of England that the Executive power is vested in the Crown"**[124]**. The difficulty, as they explained it, was**[125]**:

> "in a Federation, it is a fundamental rule that no new law shall be passed and no old law shall be altered without the consent of (1) a majority of the people speaking by their representatives in one House, and (2) a majority of the States speaking by their representatives in the other house; that the same principle of State approval as well as popular approval should apply to Executive action, as well as to legislative action; that the State should not be forced to support Executive policy and Executive acts merely because ministers enjoyed the confidence of the popular Chamber".

Much has changed in the expectations and practices of government since the time of the Conventions. The financial dominance of the Commonwealth Government in relation to the States was no doubt anticipated by some delegates, although almost certainly not to the degree which has eventuated, particularly in the field of taxation, the use of conditional grants under s 96 and the erroneous reliance upon the appropriations provisions of the Constitution as a source of spending power. Another important development has been the expansion of the functions of government into "activities of an entrepreneurial or commercial kind which, in general, were previously engaged in only by subjects of the Crown."**[126]**

60. 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.

61. 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."**[127]** 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 and which, along with responsible government, is central to the Constitution.

The executive capacity to contract and spend

62. The Commonwealth's principal submissions located the contractual and spending powers of the Executive in that aspect of executive power analogous to the capacities of a legal person. Those submissions invite reflection upon the way in which contractual and other "capacities" of the Executive have been considered by this Court in the past.

63. An early example of such consideration concerned the power of the Executive to undertake inquiries. It was described by Griffith CJ in *Clough v Leahy***[128]** as "not a prerogative right" but "a power which every individual citizen possesses"**[129]**. That characterisation does not convey any coercive element in the power. However, coercion could be supported by statute. As O'Connor J said in *Huddart, Parker & Co Pty Ltd v Moorehead***[130]**:

> "The right to ask questions, which, as was pointed out by this Court in *Clough v Leahy*, the Executive Government has in common with every other citizen, is of little value unless it has behind it the authority to enforce answers and to compel the discovery and production of documents."
> (footnote omitted)

Importantly, the extent of the "power" was not at large. It was at least constrained by the distribution of powers in the Constitution. In *Colonial Sugar Refining Co Ltd v Attorney-General (Cth)***[131]** the Court divided equally on the question whether s 51(xxxix) of the Constitution authorises legislation, incidental to the executive power, compelling persons to give evidence on matters outside the constitutional authority of the Commonwealth**[132]**. Griffith CJ, who viewed the question from a federal perspective, rejected the proposition, as one which**[133]**:

> "implicitly denies the whole doctrine of distribution of powers between the Commonwealth and the States, which is the fundamental basis of the federal compact."

On appeal to the Privy Council, pursuant to s 72 of the Constitution, the view of the Chief Justice and Barton J prevailed**[134]**.

64. Even within fields of activity referable to heads of legislative power, the capacities of the Commonwealth Executive analogous to those of a juristic person did not give it free rein. In *Heiner v Scott***[135]** Griffith CJ rejected the proposition that the carrying on of ordinary banking business was a function of the Executive Government of the Commonwealth conferred by the Constitution. He said**[136]**:

> "It may be that the carrying on of such a business is not unlawful in the sense of being forbidden by law, but the liberty to do so cannot be regarded as anything more than a permissive faculty, permitted only in the sense of not being prohibited by positive law."

Powers J also observed that it was "not seriously contended that the Constitution gave the Commonwealth special power to establish an ordinary trading bank for profit"**[137]**. The question was not considered by the other Justices. In any event it was not suggested by anyone in that case that the conferral upon the federal Parliament, by s 51(xiii), of a power to make laws with respect to banking, could support the existence of an executive power to carry on the business of banking.

65. Section 61 was invoked by the Commonwealth as a source of contractual power in the *Wool Tops case***[138]**. The Commonwealth had made agreements, without statutory backing, under which it would give necessary regulatory consents**[139]** for the acquisition of wool and sheepskins and the manufacture and sale of wool tops by the Colonial Combing, Spinning and Weaving Co Ltd. Section 61, however, did not confer power directly on the Commonwealth to make or ratify the agreements. In so holding, Knox CJ and Gavan Duffy J accepted that Ministers could make contracts in the administration of their departments pursuant to s 64**[140]**. The impugned agreements had not been made on that basis. Isaacs J held that the Crown's discretion to make contracts involving the expenditure of public money would not be entrusted to Ministers unless sanctioned either by direct legislation or by appropriation of funds**[141]**.

66. An attempt by the Commonwealth to invoke s 61 in support of an agreement for the supply of plant made by a Commonwealth statutory authority was unsuccessful in *The Commonwealth v Australian Commonwealth Shipping Board***[142]**. The primary debate was about the scope of the statutory powers conferred on the Shipping Board and their constitutional underpinning. Knox CJ, Gavan Duffy, Rich and Starke JJ, however, noted that the executive power of the Commonwealth had been touched on in submissions and said**[143]**:

> "it is impossible to say that an activity unwarranted in express terms by the Constitution is nevertheless vested in the Executive, and can therefore be conferred as an executive function upon such a body as the Shipping Board."

67. As a general rule the power of the Commonwealth to make agreements has always been

regarded as subject to statutory constraints[144]. So much was explained in *The Commonwealth v Colonial Ammunition Co Ltd*[145]. The appropriation provisions of the Constitution could not be relied upon to support an exercise of executive power involving expenditure which was dependent for its validity upon the satisfaction of a statutory condition[146]. A general appropriation was sufficient to satisfy "one 'necessary legal condition of the transaction'"; it did not satisfy all other legal conditions[147].

68. The question whether the Commonwealth required statutory authority to enter into contracts was discussed in testimony given at the Royal Commission on the Constitution of the Commonwealth by Owen Dixon KC, speaking on behalf of a Committee of Counsel of Victoria. He criticised the view that the words of extension in s 61 were words of limitation restricting the Executive in effect "to operating under and in pursuance of the laws made by Parliament."[148] While acknowledging that there was room for flexibility within that interpretation, he doubted whether the propounded restriction was intended or in practice observed[149]. The restrictive view, applied to the power of the Commonwealth to make contracts, would mean[150]:

> "that, unless a contract was in some way incidental to the administration of a statute it would be outside the power of the executive to make it."

Against a background of judicial decisions which required prior appropriation to support a Crown contract he said[151]:

> "We cannot help feeling, however, that the result is unduly to hamper the executive Government if it observes the restrictions, or to inflict great hardship upon the subject who contracts with the Crown if the executive fails to observe the restrictions."

On the other hand, he suggested that it would be competent for the Parliament to pass a General Contracts Act which would remove the difficulty unless it were desired to confer greater contractual power upon the Executive than the subjects of legislative power would permit Parliament to give[152]. It is not necessary for present purposes to express a concluded view on that suggestion. There is no such statute.

69. The Commonwealth looked for a general contracts statute in s 44(1) of the *Financial Management and Accountability Act* 1997 (Cth) ("FMA Act") which provides:

> "A Chief Executive must manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible."

There is a note to that provision which reads:

> "A Chief Executive has the power to enter into contracts, on behalf of the Commonwealth, in relation to the affairs of the Agency. Some Chief Executives have delegated this power under section 53."

In the case of an agency that is a Department of State, the Chief Executive is the

Secretary of that Department for the purposes of the FMA Act**[153]**. The Secretary of a Department is responsible, under s 57(1) of the *Public Service Act* 1999 (Cth), for "managing the Department".

70. The Commonwealth submitted that implicit in the obligation to promote "proper use" of "Commonwealth resources for which the Chief Executive is responsible" is the power to direct those resources to government policies identified in Portfolio Budget Statements as falling within the scope of an appropriation, and any applicable Administrative Arrangements Order made by the Governor-General. Performance of that function, it was said, is impossible unless in conferring it, Parliament is understood to have conferred on the Executive Government power to spend money that has been appropriated and to enter into contracts that relate to such expenditure. The note to s 44(1) was inserted by the *Financial Framework Legislation Amendment Act* 2008 (Cth). It was relied upon by the Commonwealth as extrinsic material, to which regard might be had pursuant to s 15AB(2)(a) of the *Acts Interpretation Act* 1901 (Cth). The note was said to confirm that s 44(1) confers a statutory "power" to enter into contracts on behalf of the Commonwealth in relation to the affairs of the agency that is capable of being delegated under s 53(1) of the FMA Act. The Commonwealth submitted that the DHF Agreement was signed for the State Manager (South Australia) of DEST, acting as a delegate of the Secretary of the Department, exercising the Chief Executive's power under s 44 of the FMA Act.
71. The plaintiff directed attention to the collocation "manage the affairs of the Agency" in s 44(1) and the similarity of its language to s 57(1) of the Public Service Act. The plaintiff submitted that neither the purported entry by the Commonwealth into the DHF Agreement nor its performance occurred in the course of the Secretary of DEST and then of DEEWR performing a managerial function. That submission should be accepted. As is pointed out in the reasons of Gummow and Bell JJ**[154]**, the provisions of the FMA Act are directed to the prudent conduct of financial administration. It is not a source of power to spend that which is to be administered.
72. Suffice it to say for present purposes, there was no statute, general or specific, identified by the parties, which could be invoked as a source of executive power to enter into the DHF Agreement and to undertake the challenged expenditure.
73. In *Attorney-General (Vict) v The Commonwealth* ("the *Clothing Factory case*")**[155]** the Commonwealth successfully argued that it had statutory authority to conduct a clothing factory providing uniforms for defence purposes and for public and private sector employees. Rich J accepted that the legislative power of the Parliament enabled it to authorise the Executive to establish and conduct a clothing factory to supply all the needs of the Commonwealth Government. However, his Honour was not prepared to accede to the argument that**[156]**:

> "without legislative power, the Commonwealth Executive can enter into business operations simply because it is a juristic entity, and in conducting business is not exercising governmental power over the subject."

That view seems to have been echoed in *Australian Woollen Mills Pty Ltd v The Commonwealth***[157]**. The decision in that case turned on a finding that a contractual claim against the Commonwealth failed for want of a contract. Nevertheless the Court said**[158]**:

> "Questions of general constitutional law have ... been excluded from consideration, but, if there was an intention on the part of the Government to

> assume a legal obligation, one would certainly have expected statutory authority to be sought".

74. An important support for the exercise of contractual power by an executive government in advance of parliamentary appropriation was established by the decision of this Court in *New South Wales v Bardolph*[159]. The case is authority for the proposition, applicable to the Commonwealth, that the Executive Government of New South Wales could enter into a binding contract absent prior parliamentary appropriation for the expenditure of money under the contract. The case concerned a contract made by the Tourist Bureau of New South Wales for the provision of advertising services. The Tourist Bureau had been recognised for many years, both in Parliament and out, as part of the established service of the Crown[160]. Rich J characterised the making of the contract for advertising services as "an ordinary incident of this particular function of Government"[161]. Starke J made observations to similar effect[162]. Dixon J, with whom Gavan Duffy CJ agreed[163], made a similar point, saying that[164]:

> "No statutory power to make a contract *in the ordinary course of administering a recognized part of the government of the State* appears to me to be necessary in order that, if made by the appropriate servant of the Crown, it should become the contract of the Crown, and, subject to the provision of funds to answer it, binding upon the Crown." (emphasis added)

The words emphasised in the judgment of Dixon J reflect a characterisation of the contract in issue in *Bardolph* upon which all the members of the Court agreed. That characterisation suggests that the State executive power considered in *Bardolph* was analogous to the powers of Commonwealth Ministers, derived from s 64 of the Constitution, in relation to the administration of government departments. The case is not authority for the existence of a general contractual power derived from s 61 capable of exercise without statutory authority.

75. Professor Enid Campbell criticised the apparent discrimen in *Bardolph* which would confine its application to contracts "for the public service as are incidental to the ordinary and well recognized functions of Government"[165]. She made the point that a rule which made the validity of non-statutory Crown contracts dependent upon the normality of their subject matters as an aspect of public administration had "the effect of enlarging the area of executive authority by prescription."[166] In the context of s 61 of the Constitution and its relationship to s 64, she said[167]:

> "The Crown's power to contract is not, it is true, a prerogative power, but if the power to contract without statutory authorization has to be found within the terms of The Constitution, s 61 seems to provide just as defensible a constitutional basis as does s 64."

76. Professor Leslie Zines expressed his agreement with Professor Campbell, observing[168]:

> "What activities the government should engage in is the province of the executive. What is normal or not will depend partly on what policies and activities have in the past been pursued and for what length of time. Why should this matter to the issue of whether parliamentary authorisation is needed?"

Having regard to the sufficiency of parliamentary control of appropriations, it was "hard

to see how the supposed distinction between types of contracts leads to any significant bolstering of responsible government."[169] Professor Zines pointed to a passage from the judgment of Dixon J in *Bardolph* where, without referring to any limitations, he said[170]:

> "the principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available."

77. Doctor Nicholas Seddon has observed, in reflecting upon Professor Campbell's view, that in contrast to the executive power of New South Wales, the Commonwealth's power is limited. Further, as he has correctly pointed out, the assumption that the Commonwealth is not exercising powers that are peculiarly governmental when entering into a contract is increasingly unable to be justified[171]. Professor Winterton, who thought that the Commonwealth would have power to enter into contractual relations about matters outside the sphere of its legislative power, also observed that[172]:

> "bearing in mind the ability of governments to use their contract power to achieve *de facto* regulation of an activity, the significance of the federal contract power should not be underrated." (footnote omitted)

Professor Cheryl Saunders and Kevin Yam, in a paper published in 2004, pointed to the increasing use of government contracts for the performance of governmental functions and their use as a regulatory tool[173]. That is perhaps illustrated in this case by the quasi-regulatory setting in which the DHF Agreement was made. That setting included the NSCP Guidelines, issued by the responsible department. Under those guidelines, participating schools and their communities were required to "engage a school chaplain and demonstrate how the services provided by the school chaplain achieve the outcomes required by the [NSCP]." Funding provided under the program could "only be used for expenditure that directly relates to the provision of chaplaincy services." Funding was provided "subject to the provision of appropriate project performance reporting."

78. The DHF Agreement was itself prescriptive about the nature of the services to be delivered by SUQ in the Darling Heights State School and required SUQ chaplains used in the school to sign the NSCP Code of Conduct which formed part of the DHF Agreement. Its implementation was amenable to the grant of supervision and control appropriate to the delivery of a governmental service. The agreement provided that funding was conditional upon, inter alia, the submission of "a detailed financial statement regarding all income and expenditure relating to the [NSCP]" and progress reports. It was also agreed that in the event of a breach of the NSCP Code of Conduct by the school chaplain, the Commonwealth might require SUQ to repay some or all of the funding provided.
79. In considering criticisms of the taxonomy of government contracts referred to in the judgments in *Bardolph*, it is necessary to bear in mind that that case concerned the power of the Executive in a setting analogous to that of a unitary constitution. It was not a case about the relationship between Commonwealth and State Executives and their contractual and spending powers under a federal constitution. Nor did it involve a consideration of the relationship between the

executive power conferred by s 61 of the Constitution and the administration of departments of State of the Commonwealth for which s 64 of the Constitution provides. The latter section may give rise to questions of classification. Any consideration of its operation must recognise that it is a constitutional provision written to accommodate change in governmental practice. It is not a repository for bright line categories. As Gleeson CJ said in *Re Patterson; Ex parte Taylor*[174]:

> "The concept of administration of departments of State, appearing in s 64, is not further defined. This is hardly surprising. The practices and conventions which promote efficient and effective government administration alter over time, and need to be able to respond to changes in circumstances and in theory."

In similar vein, Gummow and Hayne JJ observed[175]:

> "The Court should favour a construction of s 64 which is fairly open and which allows for development in a system of responsible ministerial government."

Although both those comments were made in a case concerning the validity of the appointment of two persons to administer the same government department, they have a more general application relevant to the scope of the concept of departmental administration with which s 64 is concerned. It is sufficient for present purposes to say that the issue before the Court in *Bardolph* did not involve consideration of the powers of the Executive Government of the Commonwealth acting under ss 61 and 64 of the Constitution. Moreover, subsequent commentary about the application of that case to the Commonwealth Executive occurred in a setting in which parliamentary appropriations were thought to be a source of substantive power to spend public money.

80. A wide view of the executive power to make contracts pursuant to s 61 has been expressed by a number of academic writers[176], although not without misgivings[177]. Professor Winterton, in his seminal textbook *Parliament, the Executive and the Governor-General*, said[178]:

> "As the common law powers of the Crown have been incorporated into the executive power of the Commonwealth in s 61, the Crown in right of the Commonwealth has inherited this common law power; accordingly, the Commonwealth government has power to enter into contracts without prior parliamentary authorization." (footnotes omitted)

He cited in support a comment by Viscount Haldane in *Kidman v The Commonwealth*[179], and an observation by Aickin J, with which Barwick CJ agreed, in *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth*[180].

81. In *Kidman*, Viscount Haldane, in the course of argument in the Privy Council, referred to the decision of the Privy Council in *Commercial Cable Co v Newfoundland Government*[181] and said[182]:

> "In that case we distinctly laid it down ... that the Governor-General, as

> representing the Crown, could enter into contracts as much as he liked, and even, if he made the words clear, to bind himself personally."

In an obiter observation, Aickin J said in *Ansett Transport Industries***[183]**:

> "It is plain that even without statutory authority the Commonwealth in the exercise of its executive power may enter into binding contracts affecting its future action."

82. *Ansett Transport Industries* was primarily a case about the power of the Executive to agree to exercise statutory powers in a particular way. The agreements in issue in that case had received parliamentary approval in a statute. The case did not raise for consideration the issues which have been raised in this case and particularly the federal dimension which this case raises. Viscount Haldane's remarks in *Kidman* harked back to a decision made in the somewhat different setting of the British North America Act. Neither of the quoted passages are, with respect, of assistance in the resolution of the matter now before this Court.

Conclusion

83. Neither the DHF Agreement nor the expenditure made under it was done in the administration of a department of State in the sense used in s 64 of the Constitution. Neither constituted an exercise of the prerogative aspect of the executive power. Neither involved the exercise of a statutory power, nor executive action to give effect to a statute enacted for the purpose of providing chaplaincy or like services to State schools. Whatever the scope of that aspect of the executive power which derives from the character and status of the Commonwealth as a national government, it did not authorise the contract and the expenditure under it in this case. The field of activity in which the DHF Agreement and the expenditure was said, by the Commonwealth, to lie within areas of legislative competency of the Commonwealth Parliament under either s 51(xxiiiA) or s 51(xx) of the Constitution. Assuming it to be the case that the DHF Agreement and expenditure under it could be referred to one or other of those fields of legislative power, they are fields in which the Commonwealth and the States have concurrent competencies subject to the paramountcy of Commonwealth laws effected by s 109 of the Constitution. The character of the Commonwealth Government as a national government does not entitle it, as a general proposition, to enter into any such field of activity by executive action alone. Such an extension of Commonwealth executive powers would, in a practical sense, as Deakin predicted, correspondingly reduce those of the States and compromise what Inglis Clark described as the essential and distinctive feature of "a truly federal government".
84. I would answer the questions posed in the special case in the terms set out in the judgment of Gummow and Bell JJ**[184]**.

GUMMOW AND BELL JJ.

Introduction

85. The plaintiff challenges, for lack of authority under the Constitution, the provision by the

Commonwealth of funding pursuant to what is known as the National School Chaplaincy Programme ("the NSCP"). The action in the original jurisdiction of this Court has led to argument in the Full Court upon a Special Case. There have been interventions by all the States and the Court also received submissions, as amicus curiae, by the Churches' Commission on Education Incorporated.

86. On 5 October 2009, the three eldest of the plaintiff's four children were enrolled at the Darling Heights State Primary School in Queensland. The youngest child was enrolled there on 27 January 2010. As their father, the law gave the plaintiff parental responsibilities, including responsibilities for their education**[185]**.
87. At the time of the enrolment of the four children, there was in force with respect to their school an agreement for funding under the NSCP between the Commonwealth (the first defendant) and Scripture Union Queensland ("SUQ") (the fourth defendant) with a term of three years from 8 October 2007 ("the Funding Agreement"). SUQ is incorporated under the *Corporations Act* 2001 (Cth) as a public company limited by guarantee. On 13 May 2010, the term of the Funding Agreement was extended to 31 December 2011.
88. The funding of the NSCP is not provided under any statute of the Parliament. There is no law enacted, for example, in reliance upon the power conferred by s 51(xxiiiA) of the Constitution to make laws with respect to "the provision of ... benefits to students". Nor is the funding provided by the Commonwealth under s 96 of the Constitution as the "grant [of] financial assistance to any State on such terms and conditions as the Parliament thinks fit". Rather, for its power to spend so as to fund the NSCP, the Commonwealth relies upon "the executive power of the Commonwealth", which is identified in Ch II of the Constitution, particularly in s 61.
89. It is important to bear in mind that, when ascertaining the limits of the executive power of the Commonwealth, attention is to be paid by the Court both to the position of the States in the federal system established by the Constitution and to the powers of the other branches of the federal government established by Ch I (the Parliament) and Ch III (the Judicature) of the Constitution**[186]**.
90. In that regard, it should be noted that, unlike the situation in *Pape v Federal Commissioner of Taxation***[187]**, where the validity of a statute, the *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth), was in question, here there has been no engagement of the Parliament in supplementation of the exercise of the executive power by a statute supported by s 51(xxxix) of the Constitution. That paragraph confers upon the Parliament power to make laws with respect to "matters incidental to the execution of any power vested by this Constitution ... in the Government of the Commonwealth ... or in any department or officer of the Commonwealth". There has been no involvement by legislation of the Parliament in the NSCP beyond the passage of appropriation Acts. Hence the significance here of the positions both of the States and of the Parliament.
91. It also should be emphasised at the outset that a conclusion reached on this Special Case that spending upon the NSCP is not supported as an exercise of the executive power would not foreclose any issue whether further provision of the substance of the NSCP could be achieved either by grant pursuant to s 96 of the Constitution or by legislation of the Parliament said to be supported, for example, by s 51(xxiiiA). Nothing in these reasons should be taken as expressing any view upon the scope of s 51(xxiiiA) or any other head of legislative power.

The NSCP and the Funding Agreement

92. The Funding Agreement incorporated a document identified as the "National School Chaplaincy Programme Guidelines" ("the Guidelines"), first issued in December 2006 by the Department of Education, Science and Training.

93. The Funding Agreement was described on its title page as "For the provision of funding under the [NSCP] on behalf of Darling Heights State School". Under the heading "Your Obligations", the Funding Agreement stated that SUQ was to provide the chaplaincy services which it had described in its application and was to ensure that those services were "delivered" as they had been identified in the application and in accordance with the Guidelines. The only obligation imposed upon the Commonwealth by the Funding Agreement was to provide the funding for these services, subject to the availability of sufficient funds and compliance by SUQ with the terms on which the Commonwealth provided the funding.
94. The section of the Funding Agreement entitled "Project description" stated that the purpose of the funding was "to contribute to the provision of chaplaincy services at [the] school", and "to assist [the] school and community in supporting the spiritual wellbeing of students". The services to be provided included the provision of "comfort and support to students and staff, such as during times of grief" and "being approachable by all students, staff and members of the school community of all religious affiliations". The width and generality of these statements should be noted.
95. The Guidelines which accompanied the Funding Agreement, under the heading "Overview", stated:

> "School chaplains are already making valuable contributions to the spiritual and emotional wellbeing *of school communities* across Australia, and the Australian Government has responded to the call that their services be made more broadly available.
> The [NSCP] aims to support schools and their communities that wish to establish school chaplaincy services or to enhance existing chaplaincy services.
> It is a voluntary [p]rogramme that will assist *schools and their communities* to support the spiritual wellbeing of their students. This might include support and guidance about ethics, values, relationships, spirituality and religious issues; the provision of pastoral care; and enhancing engagement with the broader community.
> Funding of up to $30 million per annum for three years will be available, commencing in the 2007 school year. Government and non-government schools and their communities can apply for up to $20,000 per annum (and a maximum of $60,000 over the life of the [NSCP]) to establish school chaplaincy services or to enhance existing chaplaincy services.
> [NSCP] funding will be appropriated annually by Parliament and administered by the Department of Education, Science and Training ...
> The nature of chaplaincy services to be provided, including the religious affiliation of the school chaplain, is a matter which needs to be decided by the local school and its community, following broad consultation. However, students will not be obliged to participate, and parents and students will be informed about the availability and the voluntary nature of the chaplaincy services.
> Access to advice, support and guidance about ethics, values and relationships may already be available at schools through existing services, such as counsellors, youth workers, social workers and psychologists. While the [NSCP] complements these services, there are also clear differences between [the NSCP] and existing services, which include the focus on spiritual and religious advice, support and guidance.
> *It is not the Australian Government's intention that this initiative will in any way diminish or replace existing careers advice and counselling services*

funded by state and territory governments." (emphasis added)

96. On 21 November 2009, the Prime Minister announced an extension of the NSCP to December 2011, with additional funding of $42 million over the 2010 and 2011 school years.
97. The plaintiff emphasises that the Guidelines do not require that a recipient of funding under the NSCP have the character of a trading corporation. Rather, the Guidelines stipulate that payments will not be made to schools without entry into agreements with either a "School Registered Entity", a State or Territory education authority or a "Project sponsor". The term "School Registered Entity" applies to a "Government School Community Organisation" for certain government schools, and to the "legal entity for any Independent and Catholic school". Payments may also be made to a "Project sponsor" nominated by a school to manage the chaplaincy service, being "a legal entity, affiliated with or working with a religious institution to provide a school chaplain and deliver chaplaincy services in schools".
98. The plaintiff refers to these provisions in the Guidelines to emphasise that the implementation of the NSCP was so designed as to be indifferent to the corporate nature of recipients of funding, and that had the Commonwealth sought to implement the NSCP by legislation s 51(xx) of the Constitution would not have provided a basis for doing so. The point was developed by Victoria by emphasising that a law permitting the Commonwealth to enter contracts for the payment of moneys to entities, indifferent to whether those entities be trading corporations, would not be a law supported by s 51(xx).
99. It should be noted that at least since 1998 the Queensland Department of Education and Training has specified requirements for the provision of chaplaincy services in Queensland State schools. Since 2007 it has operated a funding programme for those chaplaincy services. On 24 January 2011, the State of Queensland entered into an agreement with SUQ for the provision by SUQ for the term of one year of "Chaplaincy Services"; this involves support (which may have a religious or spiritual component) to students attending Queensland State schools, regardless of religious or non-religious beliefs, and it is to be provided "through the delivery of inclusive religiously and culturally respectful activities and programs". In the year 2010, SUQ received $781,000 in "chaplaincy funding" by Queensland; in the same year it received $11,012,000 from the Commonwealth under the NSCP. SUQ employs approximately 500 school chaplains in Queensland.
100. For many years the Parliament has legislated for the provision of financial assistance to the States on the condition that the funds be applied for educational purposes. The *Schools Assistance Act* 2008 (Cth) provides for the provision of financial assistance to the States for non-government schools. The *Nation-building Funds Act* 2008 (Cth)**[188]** provides for the grant of financial assistance for educational purposes on terms agreed between the Commonwealth and the States.
101. However, as noted above, the NSCP is not the creature of statute. Rather, the NSCP is administered by the second defendant, the Minister for School Education, Early Childhood and Youth. The NSCP is given effect by a series of funding arrangements for particular schools, of which the Funding Agreement is an example. On 14 November 2007, 15 December 2008 and 2 December 2009, SUQ received from the Commonwealth three payments each of $22,000 (inclusive of GST), upon invoices from SUQ for the provision of services under the Funding Agreement. On 11 October 2010, SUQ received a payment of $27,063.01 for the period until 31 December 2011.
102. The third defendant, the Minister for Finance and Deregulation, administers the *Financial Management and Accountability Act* 1997 (Cth) ("the FMA Act"). Part 7 (ss 44-53) of the FMA Act imposed "special responsibilities" upon the Secretary (as "Chief Executive") of the Department of Education, Employment and Workplace Relations ("the Department") administered by the second defendant. These included the implementation of a fraud control plan (s 45), the establishment of an audit committee (s 46) and ensuring that the accounts and

records of the Department were kept as required by Orders made by the third defendant under s 63 of the FMA Act (s 48). These specific requirements were directed to the efficient, effective and ethical use of the Commonwealth resources for which the Secretary was made responsible by s 44 in managing the affairs of the Department.

103. The Commonwealth contended that Pt 7 of the FMA Act, and in particular s 44, went further. It was said that s 44 conferred upon the Department power to expend appropriated moneys and, in that regard, to enter into and make payments under the Funding Agreement. The structure of Pt 7 indicates that its provisions are directed elsewhere, to the prudent conduct of financial administration, not to the conferral of power to spend that which is to be so administered. There is applicable here the statement made by Mr Dennis Rose QC with respect to the predecessor of the FMA Act, the *Audit Act* 1901 (Cth), and the Finance Regulations made thereunder. He wrote that**[189]** these were "drafted on the basis that the power is derived elsewhere, and [were] concerned only with regulating the exercise of that power".
104. The payments to SUQ were made in exercise of drawing rights issued by the third defendant to the Secretary of the Department pursuant to Pt 4, Div 2 (ss 26, 27) of the FMA Act. The Secretary had delegated the exercise of those drawing rights, pursuant to s 53 of the FMA Act, to a departmental officer.
105. The effect of regs 8 and 9 of the Financial Management and Accountability Regulations 1997 ("the Regulations"), at the time the NSCP was entered, had been to oblige the second defendant, the Secretary of the Department, or an authorised person to give approval to the expenditure proposed under the Funding Agreement before entry into it. No distinct issue arises with respect to compliance with the Regulations.
106. The plaintiff challenges the legality of the payments to SUQ under the NSCP on various grounds. One of these may be dealt with immediately.

Section 116 of the Constitution

107. Section 116 of the Constitution states that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth". The plaintiff contends that the "school chaplain" is an "office ... under the Commonwealth" and that the definition of "school chaplain" in the Guidelines imposes a religious test for that office. To qualify as a "school chaplain", a person must be recognised "through formal ordination, commissioning, recognised qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service".
108. However, the plaintiff's case under s 116 fails at the threshold. Questions 2(b) and 4(b) presented by the Special Case should be answered accordingly.
109. The chaplains engaged by SUQ hold no office under the Commonwealth. The chaplain at the Darling Heights State Primary School is engaged by SUQ to provide services under the control and direction of the school principal. The chaplain does not enter into any contractual or other arrangement with the Commonwealth. 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.
110. It has been said in this Court that the meaning of "office" turns largely on the context in which it is found**[190]**, and it may be accepted that, given the significance of the place of s 116 in the Constitution**[191]**, the term should not be given a restricted meaning when used in that provision. Nevertheless, the phrase "office ... under the Commonwealth" must be read as a whole. If this be done, the force of the term "under" indicates a requirement for a closer connection to the Commonwealth than that presented by the facts of this case. The similar terms in which the "religious test clause" is expressed in Art VI, cl 3 of the United States Constitution

was emphasised by the plaintiff but there is no clear stream of United States authority on this provision which points to any conclusion contrary to that expressed above.

Standing of the plaintiff

111. The plaintiff also asserts both the lack of any appropriation to fund the drawing of money from the Consolidated Revenue Fund under s 83 of the Constitution, and the absence of power in the Executive Government to spend, giving rise to the invalidity of the Funding Agreement and of payments which have been made thereunder to SUQ.
112. The Commonwealth parties (which hereafter refers to the first, second and third defendants) and SUQ to varying degrees contest the standing of the plaintiff. But, in exercise of the right of intervention given by s 78A of the *Judiciary Act* 1903 (Cth), Victoria and Western Australia extensively support that part of the plaintiff's case which challenges the existence of the spending power and the validity of the Funding Agreement. In this respect, the questions of standing may be put to one side. Even without s 78A, any State would have a sufficient interest in the observance by the Commonwealth of the bounds of the executive power assigned to it by the Constitution to give the State standing**[192]**. It should be added that New South Wales, Queensland, South Australia and Tasmania also intervene in support of the plaintiff, but on grounds more limited than those of Victoria and Western Australia.

The absence of appropriations

113. The plaintiff challenges the payments to SUQ on the ground that the drawing rights relied upon appropriations for the ordinary annual services of the Government**[193]**, which did not in their terms refer to the implementation of the NSCP as a new policy**[194]**.
114. Several points should be made. First, the following passage in the reasons of French CJ, Gummow and Crennan JJ in *ICM Agriculture Pty Ltd v The Commonwealth***[195]** should be noted. With reference to *Pape*, their Honours said:

> "[I]t is now settled that the provisions ... in s 81 of the Constitution for establishment of the Consolidated Revenue Fund and in s 83 for Parliamentary appropriation, do not confer a substantive spending power and that the power to expend appropriated moneys must be found elsewhere in the Constitution or the laws of the Commonwealth." (footnote omitted)

115. Secondly, the Commonwealth parties correctly submit that the issue of the validity of the Funding Agreement is not determined by the presence (or absence) during its term of appropriations by the Parliament to satisfy the obligations thereunder of the Commonwealth to make payments to SUQ. Rather, as Rich J explained in *New South Wales v Bardolph***[196]**:

> "[I]t is no more than a condition implied in the contract that before payment is made Parliament must appropriate the necessary money, but that a contract otherwise within the authority of Government is binding subject to that condition. [Part IX, especially s 65, of the] *Judiciary Act* is designed to give effect to the condition."

Dixon J added**[197]**:

> "Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of its control over the expenditure of public moneys. But the principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available."

116. Thirdly, whether the payments which have been made to SUQ under the Funding Agreement are, by reason of the absence of an appropriation, moneys had and received by SUQ to the use of the Commonwealth and recoverable as such by the Commonwealth**[198]** is not the subject of any contest between the parties to the Special Case. Fourthly, any failure in supply by the Parliament of the necessary appropriations, if established, could be put right by subsequent appropriation**[199]**.
117. In these circumstances, two considerations are presented. First, even if the plaintiff made good his case as to the absence of an appropriation, that would not impeach the Funding Agreement, which is the focus of his case. Secondly, there is a real issue as to the existence of a sufficient interest in the plaintiff to found a claim by him to declaratory relief upon the alleged absence of appropriations by the Parliament**[200]**. The Commonwealth parties accept only that the plaintiff has a sufficient interest with respect to the final payment made to SUQ on 11 October 2010 in reliance upon the appropriation Act for the financial year 2010-2011, but this acceptance is limited to the plaintiff's standing to challenge the satisfaction of the conditions precedent to that payment and does not extend to any challenge by the plaintiff to the underlying appropriation. Moreover, the interventions by the States in support of the plaintiff do not extend to this aspect of the litigation. Hence, it is preferable to proceed immediately to the alleged absence of power for the Commonwealth to enter into the Funding Agreement and to make the payments to SUQ.

The validity of the Funding Agreement

118. Question 2(a) of the Special Case asks whether the Funding Agreement is invalid, in whole or in part, by reason that entry into it was beyond the executive power of the Commonwealth. This must be read with Question 4(a), which asks whether the making of the payments under the Funding Agreement was "unlawful" by reason of the absence from the executive power of the Commonwealth of the power to pay those moneys to SUQ. This issue would be presented whether the payments were made to SUQ as grants or in discharge of contractual obligations. It will be necessary to return to this, the essential aspect of the litigation, but it is convenient first to say something respecting contracts made by the Commonwealth.
119. Where the efficacy of a contract entered into by the Commonwealth, other than in exercise of authority conferred by or under a law made by the Parliament**[201]**, is challenged, two issues may arise. The first is the authority to bind the Commonwealth which was vested in those who purported to act on its behalf**[202]**. The Funding Agreement was expressed to be signed on behalf of the Commonwealth by a named officer of the Department of Education, Science and Training, the predecessor of the Department. No challenge is made to the authority of that officer to execute the Funding Agreement**[203]**.
120. It is the second issue which is in contention. This is the existence of the power of the Executive Government to enter into the Funding Agreement and to spend moneys in its performance. It appears to be accepted that entry into the Funding Agreement and spending thereunder must be supported, if at all, as an exercise of the executive power of the Commonwealth.

The Commonwealth executive power

121. This Court has eschewed any attempt to define exhaustively the content of the "executive power" which is identified but not explicated in s 61 of the Constitution**[204]**. Hence the attention in these reasons to partial but not necessarily complete descriptions of the executive spending power. To some degree this state of affairs in the analysis of s 61 may reflect the considerations expressed by Professor Crommelin in a passage in his study of the drafting of the sparse provisions of Ch II of the Constitution, which was quoted in *Re Patterson; Ex parte Taylor***[205]**. The passage reads**[206]**:

> "The reasons were understandable, if not entirely convincing. The executive branch of government was shrouded in mystery, partly attributable to the uncertain scope and status of the prerogative. The task of committing its essential features to writing was daunting indeed. Moreover, the price of undertaking that task would be a loss of flexibility in the future development of the executive. Politicians who were the beneficiaries of half a century of colonial constitutional development placed a high value upon such flexibility."

Further, in *Melbourne Corporation v The Commonwealth***[207]**, Dixon J observed that the framers of the Constitution, chiefly by the text of ss 51, 52, 107, 108 and 109, had performed the task of distributing power between State and Commonwealth by reference to legislative powers.

122. The immediate issues in this litigation require, among other matters, consideration of the relationship between the federal Executive and the legislative powers of the federal Parliament. A distinction is to be made here. The distinction is between the capacity of the Parliament to qualify or abrogate at least some aspects of the executive power, and the scope of the executive power in respect of matters which could be the subject of legislation. The Commonwealth parties rely on the latter to support the Funding Agreement. But something should be said to contrast the former.

123. In *Cadia Holdings Pty Ltd v New South Wales***[208]** Gummow, Hayne, Heydon and Crennan JJ said:

> "The executive power of the Commonwealth of which s 61 of the Constitution speaks enables the Commonwealth to undertake executive action appropriate to its position under the Constitution and to that end includes the prerogative powers accorded the Crown by the common law**[209]**. Dixon J spoke of common law prerogatives of the Crown in England, specifically the prerogative respecting Crown debts, as having been 'carried into the executive authority of the Commonwealth'**[210]**."

In *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd***[211]**, Evatt J distinguished what he classified as the "executive prerogatives" from those "common law prerogatives" conferring certain preferences, immunities and exceptions which were denied to the subject. The latter, particularly with respect to fiscal matters**[212]**, from time to time have been qualified or abrogated by the Parliament**[213]**. When a prerogative power is directly regulated by statute, the Executive Government must act in accordance with the statutory regime**[214]**.

124. The present case concerns not these "common law prerogatives" but rather the submission that the scope of the executive power with respect to spending may be measured by that of the legislative power but in the absence of legislation conferring any authority upon the Executive Government.

The executive power of the Commonwealth with respect to spending

125. 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**[215]**, appears to have had a source in the Opinion given on 12 November 1902 by Alfred Deakin as Attorney-General**[216]**, 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.

126. 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.

127. 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*")**[217]**. But that decision does not provide a sufficient basis for such a broad proposition.

The *AAP Case*

128. 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*, 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".

129. Barwick CJ**[218]** 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**[219]**:

> "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."

130. Gibbs J**[220]**, 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***[221]**; *The Commonwealth v The Australian Commonwealth Shipping Board***[222]**. 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.

131. Mason J**[223]** 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**[224]**. 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**[225]**) and by Victoria (that s 61 of the Constitution does not confer executive power beyond the execution of

laws made by the Parliament[226]). Mason J did so in these qualified terms[227]:

> "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."

132. 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[228], along with Barwick CJ[229], of the application to s 51(ii) of the Constitution[230] of the United States doctrine, exemplified in *United States v Butler*[231], that because the power of Congress to tax is "unlimited" the power to spend is also "unlimited".
133. On the other hand, Murphy J[232] appears to have accepted the application in Australia of *Butler*, and Jacobs J[233] 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)".
134. 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.
135. 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[234]. 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 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[235], the Executive cannot create a new offence[236], and cannot dispense with the operation of any law[237].
136. 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[238]. 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[239]. 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[240].

137. 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

138. 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.
139. 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**[241]**. These functions would vary from time to time**[242]**, but would include the operation of the Parliament**[243]**, 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**[244]**. 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.
140. 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.
141. 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***[245]**, would be supported upon the plaintiff's thesis.
142. 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.
143. 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.

144. In *Pape*[246], approval was given to the statement by Mason CJ, Deane and Gaudron JJ in *Davis v The Commonwealth*[247] 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"[248]. This consideration reflects concern with the federal structure and the position of the States.

145. 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.
146. 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[249]. 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.
147. 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*[250] 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.
148. 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[251]:

> "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."

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

The Commonwealth parties' ultimate submission

150. 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.
151. 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*[252] 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"[253].

152. 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[254]. Other examples are given in the reasons of Crennan J[255].
153. 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*[256], 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*[257]. 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"[258].
154. 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)[259], and identified in covering cl 6.
155. 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*[260]. 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.

156. 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**[261]**.

157. 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**[262]**. 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.

158. 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**[263]**.

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

Conclusions

160. Question 1(a) asks whether the plaintiff has standing to challenge the validity of the Funding Agreement. It should be answered "Yes". Question 1(c) asks the same question with respect to the making of payments by the Commonwealth to SUQ pursuant to the Funding Agreement for the financial years beginning 2007-2008 and ending 2011-2012. This also should be answered "Yes". Question 1(b) is directed to the drawing of money from the Consolidated Revenue Fund for the purpose of making those payments. It should be answered: "Unnecessary to answer".

161. Question 2(a) asks whether the Funding Agreement is invalid as beyond the executive power of the Commonwealth under s 61 of the Constitution, and should be answered "Yes". Question 2(b) asks the same question but with respect to s 116 of the Constitution and should be answered "No".

162. Question 3 asks questions with respect to the authorisation of payments by appropriation Acts beginning with that for 2007-2008 and ending with that for 2011-2012. It should be answered:

"Unnecessary to answer".

163. Question 4(a) asks whether the making of the relevant payments by the Commonwealth to SUQ was "unlawful" by reason of the lack of the executive power under s 61 of the Constitution to make those payments. It should be answered: "The making of the payments was not supported by the executive power of the Commonwealth under s 61 of the Constitution".
164. Question 4(b) asks the same question with respect to s 116 of the Constitution. It should be answered: "No".
165. Question 5 asks what relief sought in the statement of claim should be granted to the plaintiff. This should be answered: "The Justice disposing of the action should grant the plaintiff such declaratory relief and make such costs orders as appear appropriate in the light of the answers to Questions 1-4 and 6".
166. Question 6, as to the costs of the Special Case, should be answered: "The first, second and third defendants". We would not make a costs order against SUQ, the fourth defendant.

167. HAYNE J. The facts and circumstances which give rise to the questions of law that have been stated by the parties for the opinion of the Full Court, in the form of a Special Case, are described in the reasons of Gummow and Bell JJ. They need not be repeated.
168. I agree with the reasons given by Gummow and Bell JJ for answering Question 1 (concerning the standing of the plaintiff) and Questions 2(b) and 4(b) (concerning s 116 of the Constitution) as they propose. I agree that it is not necessary to answer Question 3 (concerning whether identified Appropriation Acts authorised the drawing of money from the Consolidated Revenue Fund for the purpose of making the disputed payments). I also agree with the answers Gummow and Bell JJ propose to Questions 5 and 6.
169. These reasons are directed to the issues about executive power that are raised in the matter. It is necessary to begin consideration of those issues (raised by Questions 2(a) and 4(a) of the Special Case) by identifying the question which is raised by the complaint that the plaintiff makes.

The question

170. The plaintiff alleged that there was no power for the Executive Government of the Commonwealth to pay Scripture Union Queensland ("SUQ") moneys which the Commonwealth had agreed with SUQ should be paid under the Darling Heights Funding Agreement. The central issue in the matter is the ambit of the Commonwealth Executive's power to spend money.
171. The spending in question was in satisfaction of an obligation which the Commonwealth had undertaken by making a contract with SUQ, the Darling Heights Funding Agreement. The obligation to pay money was the only obligation which the Commonwealth undertook by that contract as made and later varied. The Darling Heights Funding Agreement made detailed provisions regulating how SUQ was to apply the moneys it received from the Commonwealth. The Commonwealth thus agreed to pay money to SUQ on terms. But to ask only whether the Commonwealth had power to make the particular *contract* which it made with SUQ is to obscure the more fundamental question which the arrangement presented: did the Commonwealth have power to *spend* money on terms? The particular legal framework by which the Commonwealth chose to provide for the payments, or to provide for the terms on which they were made, is beside the point if, as the plaintiff asserted, the Executive Government had no power to spend the money.
172. The ultimate question in this matter is: did the Executive Government of the Commonwealth, with no authority other than whatever authority was given by the relevant Appropriation Acts**[264]**, have power to make the impugned payments to SUQ in accordance with the Darling

Heights Funding Agreement? The broader question whether the Executive Government of the Commonwealth, with no authority other than whatever authority is given by an Appropriation Act, may spend money for a purpose that is identified in that Appropriation Act is cast at a level of generality that presents issues that need not be decided in this case.

Three fundamental propositions

173. Nonetheless, the question that has been identified as the ultimate question in this matter directs attention to, and requires consideration of, three fundamental propositions, each of which is necessarily expressed at a high level of abstraction and each of which must be given more particular content before it is capable of application to a particular case. First, the expenditures in issue (the disputed payments) are expenditures made by the executive government of a polity – an artificial legal person – and are expenditures of public moneys – not moneys which are in any relevant sense the polity's "own" moneys. Second, the legislative branch of the federal polity, the Parliament, is the branch of government that controls the raising and expenditure of public moneys. Third, the legislative branch has limited legislative powers; the Constitution distributes legislative power by giving the Federal Parliament only limited legislative powers.
174. Other equally fundamental observations about accounting for and control of public expenditures hover in the background of the issues that must be decided. They include such matters as the requirements of ss 53, 54 and 56 of the Constitution, which regulate parliamentary practice in relation to money Bills. They include the (relatively recent) adoption by the Parliament and the Executive of output accounting practices. They include the (now long-standing) practice of identifying the purposes for which the Consolidated Revenue Fund is appropriated at a very high level of abstraction. But despite the importance of these and other like considerations which loom in the background, some of which will later be considered, chief attention must be directed, at least for the most part, to the three fundamental propositions that have been identified. Attention to those propositions is required by the way in which the first, second and third defendants ("the Commonwealth parties") put their arguments about the extent of the Executive's power to spend.

The arguments of the Commonwealth parties

175. The Commonwealth parties submitted that "[w]hat is truly in issue [in this case] is whether the executive power of the Commonwealth extends to making the payments". That submission proceeded on the basis that this Court decided in *Pape v Federal Commissioner of Taxation***[265]** that s 81 of the Constitution is not to be treated as an "appropriations power" that implicitly authorises the expenditure of money "for the purposes of the Commonwealth". Rather, the Commonwealth parties' submissions continued, "s 81 (with s 83) merely confirms that parliamentary appropriation is a prerequisite for the lawful availability of money for expenditure. *Authority to spend such money must be found in the executive power or in legislation enacted under a head of power in ss 51, 52 or 122***[266]**." (emphasis added) In this case the Commonwealth parties submitted, at least initially, that the authority to spend was found in the executive power, not in any legislation.
176. The Commonwealth parties proffered alternative submissions about the relevant ambit of the executive power: what was described as a "narrow basis" and a "broad basis". The narrow basis was that the executive power of the Commonwealth, in all its aspects, is:

> "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**[267]** or their magnitude and urgency**[268]**, are peculiarly adapted to the government of the country and otherwise could not be carried on for the public benefit)".

On that basis the making of the Darling Heights Funding Agreement and the payments to SUQ were submitted to be within the executive power of the Commonwealth in that:

> "the Agreement provides for, and its performance involves, the provision of benefits to students (cf s 51(xxiiiA)) ... and ... the Agreement was entered into with, and provides for assistance to, a trading corporation formed within the limits of the Commonwealth (cf s 51(xx))".

That is, the Commonwealth parties submitted that the disputed payments *could have been* authorised by a valid law made by the Parliament and that, because there could have been a valid law, the Executive had power to make the payments even though there was no legislative authorisation for their making.

177. The broad basis advanced on behalf of the Commonwealth parties was that the Executive's power to spend money lawfully available to it was, in effect, unlimited. It was said that the "capacities" of the Executive to spend money lawfully available to it, or to enter into a contract,

> "do not involve interference with what would otherwise be the legal rights and duties of others. Nor does the Commonwealth, when exercising such a capacity, assert or enjoy any power to displace the ordinary operation of the laws of the State or Territory in which the relevant acts take place." (footnote omitted)

And in amplification of and support for these propositions, the Commonwealth parties further submitted that neither s 51(xxxix) (the incidental power) nor s 96 (the grants power) required some other conclusion.

178 Several important propositions underpinned these submissions. First, as has been noted, they proceeded from the premise that there was no legislative authorisation for the disputed payments or the Darling Heights Funding Agreement. But in supplementary submissions, filed by leave after the close of oral argument, the Commonwealth parties submitted that, if legislative authority to enter the Darling Heights Funding Agreement was required, that authority was provided by s 44 of the *Financial Management and Accountability Act* 1997 (Cth)**[269]**. And as will later be explained, the premise that there was no legislative authorisation for the disputed payments may require closer examination of the terms of the Appropriation Acts than was given in argument of this matter.

179. The second proposition that underpinned the Commonwealth parties' initial submissions founded on the narrow basis was that the ambit of the Executive's power to spend money that has been the subject of a valid appropriation is fixed by whether the payment *could have been* validly authorised by a law of the Parliament. And at first the focus of the plaintiff and of the

interveners fell only upon whether the payments *could have been* authorised by a law of the Parliament, rather than upon whether it was right to say that (assuming a valid appropriation) the Executive can spend in any manner and for *any* purpose that could validly be authorised by legislation, regardless of whether the payment is authorised in that way.

180. The third proposition that underpinned the Commonwealth parties' initial submissions, at least on the broad basis, was that the "capacity" of the Commonwealth Executive is the same as that of a natural person.

181. Each of these three propositions – there was no legislative authority; the executive power to spend extends to any expenditure the Parliament could authorise; and the Executive's capacities are relevantly unbounded – will require consideration of the three fundamental propositions described at the start of these reasons.

How the issues are considered

182. The balance of these reasons will proceed in the following manner. The Commonwealth parties' broad basis submission is examined first. In considering that submission it is convenient to begin by noticing that submissions to the same general effect as the broad basis submission made by the Commonwealth parties in this matter have been made, but not accepted, in those (relatively few) earlier decisions of this Court in which the validity of Commonwealth expenditure has been in issue. Next, the notion of the "capacities" of the Commonwealth, which lay at the heart of the broad basis submission, is considered. Then these reasons will turn to consider the nature and extent of parliamentary control over the expenditure of public moneys. That requires consideration of both the provisions made by the Constitution establishing, and exercises by the Parliament of, parliamentary control over the expenditure of public moneys, and consideration (by reference to the text and structure of the Constitution) of the bounds on the Commonwealth's executive power to spend. These reasons will thus demonstrate that the Commonwealth parties' broad basis submission should be rejected.

183. The Commonwealth parties' narrow basis submission will then be examined. That entails consideration of the correct approach to examining whether action by the Executive Government is supported by the executive power, of notions of competition with and sufficiency of State legislative and executive power, and ultimately – on the assumption that the approach initially taken by the parties and interveners is correct – of whether the Parliament could have passed a valid law authorising the disputed payments. These reasons will demonstrate that the Parliament could not by law have authorised the disputed payments. Because the Parliament could not by law have authorised the payments, their making was not a valid exercise of the executive power of the Commonwealth. It is, then, not necessary to consider whether (if there had been power to enact such a law) specific legislative authority to make the disputed payments (in addition to the relevant Appropriation Acts) would have been necessary to their being validly made.

184. Finally, attention will be given to Question 2(a), in which the parties asked whether the Darling Heights Funding Agreement was "invalid". As already indicated, the central issue in the case concerned the Commonwealth's power to perform the only obligation it undertook under that agreement – the obligation to make the disputed payments. Because these reasons conclude that the Commonwealth did not have power to make the disputed payments, it follows that the Commonwealth could not validly undertake an obligation to make them. The answer given to Question 2(a) should expressly reflect that absence of power, rather than risk obscuring the point by an answer couched only in terms of "invalidity".

185. It is convenient to deal first with the course of authority in this Court.

Earlier decisions

186. In the relatively few cases where Commonwealth expenditure has been in issue, the Commonwealth has made submissions, along the lines of those advanced in the present case, that its power to expend public moneys, duly appropriated, is unlimited.

187. As early as 1908, the Commonwealth submitted that "the Parliament is invested with the same powers of appropriation for specific purposes as are the State Parliaments in respect of their revenue"**[270]**. In 1945, the Commonwealth argued**[271]** that s 81 (read with s 83) of the Constitution is akin to Art I, §8, cl 1 of the United States Constitution, which was said to confer a "power to spend ... as wide as the power to tax". The Commonwealth power to tax, and by implication its power to spend, was said**[272]** to be "perhaps, for all practical purposes unlimited". In 1975, at a time when it was thought that ss 81 and 83 conferred power to spend public moneys, the Commonwealth submitted**[273]** that "[i]t is for Parliament and not the courts to determine what are purposes of the Commonwealth" (referred to in s 81) and that "[o]nce money has been appropriated by a valid law its devotion to the purpose of the appropriation may be secured *by executive action* or by legislation" (emphasis added). In 1990, the Commonwealth submitted**[274]** that "*all* that is required [to permit expenditure] is an available appropriation" (emphasis added).

188. This expansive view of the Commonwealth's power to spend has never been accepted by a majority of this Court. Despite the contrary views expressed by some Justices, the Court has recognised that the text and structure of the Constitution require the conclusion that the Commonwealth's power to spend public moneys is not and cannot be unlimited.

189. The source of the Commonwealth's power to spend was a matter of some dispute until the decision in *Pape*. Submissions of the kind described above assumed or asserted, and judgments of some Justices of the Court appeared to proceed on the assumption**[275]**, that s 81, or some combination of ss 81, 83 and 51(xxxix), conferred power on the Commonwealth to expend public moneys. (So also in *Combet v The Commonwealth***[276]**, the Solicitor-General of the Commonwealth stated in argument that Appropriation Acts "merely authorise the drawing of money from the Treasury of the Commonwealth *and its expenditure*" (emphasis added).) In light of the assumption that was made, a limit, perhaps the limit, on the Commonwealth's power to spend was discerned in the words "for the purposes of the Commonwealth" in s 81. Construed in the light of the text and structure of the Constitution – in particular, the enumerated but limited heads of Commonwealth legislative power (especially ss 51, 52 and 122) and the finance provisions (especially ss 87, 94 and 96) – these words were seen as limiting the purposes for which s 81 (with or without ss 83 and 51(xxxix)) authorised appropriations *and expenditure* to be made**[277]**. But a conclusive statement of that limit proved to be elusive. As Gibbs J said in *Victoria v The Commonwealth and Hayden* ("the *AAP Case*") **[278]**:

> "This question was fully discussed in the *Pharmaceutical Benefits Case***[279]**. There Latham CJ and McTiernan J held that 'the purposes of the Commonwealth' within s 81 are such purposes as the Parliament determines, and that the Courts have no power to declare that an Appropriation Act is invalid on the ground that the appropriation was made for an unauthorized purpose**[280]**. However, this view, that s 81 does not impose any effective limitation on the purpose for which an appropriation may be made, and that the Parliament may appropriate moneys for any purpose whatever, was not accepted by Rich, Starke, Dixon, and Williams JJ, the other members of the Court. Both Starke J and Williams J were of the opinion that the words referred to the purposes of the Commonwealth as an organized political body**[281]**. ...