

# LIMITATIONS ON EXECUTIVE POWER FOLLOWING *WILLIAMS V* *COMMONWEALTH*

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*The recent High Court decision of Williams v Commonwealth was significant in delineating limitations on Federal Executive power under the Australian Constitution. Notably, the majority of the Court determined that no analogy may be drawn between the legislative heads of power and executive power. The Court also made pronouncements on the so-called 'nationhood' power, the Executive's capacity to contract and s 116 of the Constitution. This case note provides an overview of the implications of the case on executive power under the Australian constitutional structure.*

## I INTRODUCTION

On 20 June 2012 the High Court of Australia handed down its decision in *Williams v Commonwealth*<sup>1</sup> (*Williams*). The 6:1 majority in *Williams* accepted submissions that the Federal Executive does not have a general power to spend on programs in areas where the Commonwealth lacks legislative capacity to undertake such enterprises. The principal finding of the Court was that the Commonwealth acted ultra vires in entering into an agreement to fund the provision of school chaplains in Queensland state schools. The decision in *Williams* induced a rapid response from the Australian Parliament which gave legislative authority for a large number of existing programs, including for the provision of school chaplains. The decision in *Williams* is another addition to the debate surrounding the poorly defined Federal executive power. The case also made clear pronouncements on the imposition of religious tests under s 116 of the *Constitution* and provided another discussion of the so-called 'nationhood' power. The Court conclusively determined that the Commonwealth's capacity to contract differs from that of a natural person.

This case note will deal with the findings of the Court in relation to the scope of Federal executive power (including nationhood), the status of the Commonwealth as compared to a natural person when contracting, and will provide an overview of the Court's findings in relation to s 116.

The case turned on whether executive power vested under the *Constitution* per se was a sufficient basis for the Commonwealth to undertake the program. Importantly, the majority rejected the assumption that the Commonwealth Executive may expend public money on any subject falling within a head of

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<sup>1</sup> [2012] HCA 23 (High Court of Australia, 20 June 2012, French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

Commonwealth legislative competence. However, three members of the Court stated that the executive and legislative powers of the Commonwealth are interrelated. This case note summarises the majority and minority view.

The final section briefly considers the Parliament's legislative response to the decision. In particular, it evaluates the adequacy of the response to the determinations made in *Williams*.

## II BACKGROUND

The National School Chaplaincy Program (NSCP) was announced by the Prime Minister on 29 October 2006.<sup>2</sup> The Commonwealth Government engaged private service providers to deliver chaplaincy services to public schools. The nature of those services included counselling students, staff and parents; assisting in classrooms; and working through emotional difficulties. The program has since been renewed by successive governments. From 2007, the program extended to the Darling Heights State School in Queensland through an arrangement between the Commonwealth and a private service provider, Scripture Union Queensland.<sup>3</sup> Ronald Williams, a parent of four children who attended the Darling Heights State School, challenged the program in the High Court.<sup>4</sup> Mr Williams objected to the program singling out his children on the basis that they did not subscribe to any religious faith.

The NSCP is administered by the Minister for School Education, Early Childhood and Youth Allowance. It was accepted amongst the parties that the Commonwealth had not passed legislation to undertake the program (save for the appropriation of money for the ordinary annual services of the government). The Commonwealth instead sought to rely upon its executive power as authority to undertake the NSCP.

Mr Williams' principal argument was that the NSCP was invalid under s 116 of the *Constitution* because of its religious flavour. This submission was swiftly rejected by all members of the Court. The judgments dealt in much greater detail with the issues surrounding executive power and the capacities of the Commonwealth to contract.

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<sup>2</sup> Prime Minister of Australia, 'National School Chaplaincy Program' (Media Release, 29 October 2006) available for download at [http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/D7MV6/upload\\_binary/d7mv61.pdf;fileType=application%2Fpdf#search=%22media/pressrel/D7MV6%22](http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/D7MV6/upload_binary/d7mv61.pdf;fileType=application%2Fpdf#search=%22media/pressrel/D7MV6%22)>; Rhianna King, 'Chaplains for all religions in school plan' *The West Australian*, 30 October 2006; Jason Koutsoukis, 'School chaplain plan gets go-ahead', *Sunday Age*, 29 October 2006.

<sup>3</sup> The Darling Heights State Primary School had chaplaincy services available from 1998. It was not until 4 April 2007 that the school principal sought funding under the federal scheme to increase the chaplaincy services. Until that point, the program had been funded by the State of Queensland.

<sup>4</sup> There was relatively little disagreement between the parties as to Mr Williams' standing to mount the challenge.

### III THE NSCP AND APPROPRIATION ACT

In the 2009 decision of *Pape v Federal Commission of Taxation*<sup>5</sup> (*Pape*), the High Court determined that the mere capacity to appropriate moneys under ss 81 and 83 of the *Constitution* does not per se amount to a power for the Commonwealth to engage in spending. This was a significant divergence from the commonly held understanding until that time. The High Court has since comprehensively endorsed this position.<sup>6</sup> Consequently, in *Williams* the Commonwealth needed to demonstrate a specific power for funding the NSCP. The NSCP had not been undertaken in reliance upon any special statute introduced by the Commonwealth Parliament pursuant to one of its legislative heads of power.<sup>7</sup> As was the case in *Pape*, the Commonwealth sought to rely upon its executive power for the maintenance of the program.<sup>8</sup>

Section 61 of the *Constitution* grants executive power:

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.<sup>9</sup>

### IV HIGH COURT DECISION

There were four principal aspects to the decision, each of which is summarised below:

1. A majority of the Court held that the Commonwealth Executive does not have power to spend money merely because it is the subject of a Commonwealth legislative power (French CJ, Gummow, Crennan and Bell JJ). In contrast, Hayne, Heydon and Kiefel JJ held that the Commonwealth Executive does have power to spend money if the subject matter falls within a Commonwealth legislative competence.
2. The Commonwealth's capacity as a legal person does not give it the same capacity to contract and spend as a natural person (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
3. The Commonwealth's capacity to undertake enterprises peculiarly adapted to the government of a nation does not extend to the NSCP (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ – Heydon J not dealing with the issue).
4. Payments made, and consequently the program undertaken, by the Commonwealth for the purpose of the NSCP are not prohibited by s 116 of the *Constitution* (The Court).

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<sup>5</sup> (2009) 238 CLR 1.

<sup>6</sup> *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169 (French CJ, Gummow and Crennan J); and *Williams* [2012] HCA 23, [2] (French CJ), [114], (Gummow and Bell JJ), [189] (Hayne J), [478] (Crennan J), [559] (Kiefel J).

<sup>7</sup> *Williams* [2012] HCA 23, [2] (French CJ).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Constitution of the Commonwealth of Australia*.

A *Executive and Legislative Power – The Majority View*

Four members of the Court held that the Commonwealth does not have an executive power to commit expenditure to programs without legislative authority, save for prescribed exceptions.<sup>10</sup> The Chief Justice stated that an express statutory authority was not always required for every executive action. His Honour made particular reference to circumstances where an executive action would fall under the administration of departments or involve activities ‘characterised as deriving from the character and status of the Commonwealth as a national government’.<sup>11</sup>

The majority rejected the submission that the NSCP fell within the field of executive power. French CJ reiterated that:

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.<sup>12</sup>

His Honour set out particular extensions of s 61 as being powers that are:<sup>13</sup>

1. necessary or incidental to the execution and maintenance of a law of the Commonwealth;
2. conferred by statute;
3. part of the Crown prerogative;
4. defined by the existence of the Commonwealth as a legal person; and
5. derived from the character and status of the Commonwealth as a national government.

The Chief Justice rejected the submission that the legislative heads of power under the *Constitution* support any executive action falling within that subject matter.<sup>14</sup> His Honour quoted Isaacs J that the ‘Executive cannot change or add to the law; it can only execute it.’<sup>15</sup> That is, the subject matters for the legislature are solely for the purpose of conferring power to the Commonwealth Parliament, not to the Executive. His Honour emphasised that there is insufficient support for the proposition ‘that the Executive Government... can do anything about which the Parliament of the Commonwealth *could* make a law.’<sup>16</sup>

Likewise, Gummow and Bell JJ described the proposition that the Executive can undertake any activity supported by a legislative head of power as ‘too broad’.<sup>17</sup> In

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<sup>10</sup> *Williams* [2012] HCA 23, [4], [82] (French CJ), [138] (Gummow and Bell JJ), [544] (Crennan J).

<sup>11</sup> *Williams* [2012] HCA 23, [34].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Williams* [2012] HCA 23, [22].

<sup>14</sup> *Williams* [2012] HCA 23, [27].

<sup>15</sup> *Ibid.*, citing *R v Kidman* (1915) 20 CLR 425, 441.

<sup>16</sup> *Williams* [2012] HCA 23, [30] (emphasis added).

<sup>17</sup> *Williams* [2012] HCA 23, [135].

agreement, Crennan J held that the proposition would disregard ‘the constitutional relationship between the Executive and Parliament.’<sup>18</sup>

A strength in the argument described by the majority is that the drafters of the *Constitution* deliberately provided less detail to the description of executive power when compared with legislative power.<sup>19</sup> It does not appear that the intention of the drafters was for the legislative powers in ss 51 and 52 to be applied to the Executive. This argument gains traction when one looks to s 51(xxxix) of the *Constitution* which provides legislative power for ‘matters incidental to the execution of any power vested by this Constitution in the Parliament...’<sup>20</sup> The incidental power is evidence that the drafters were mindful of a distinction between executive power and the legislative powers set out in s 51.

### *B Executive and Legislative Power – The Minority View*

In contrast, Hayne, Heydon and Kiefel JJ held that there is an executive power to spend even in the absence of relevant statute when the matter is the subject of a Commonwealth head of legislative power.<sup>21</sup> The ‘minority view’ in *Williams* supported what was described as the ‘Common Assumption’. The Common Assumption was that the Executive has power in relation to subject matters falling within the legislative competence of the Federal Parliament.

Hayne and Kiefel JJ concluded that in this case the NSCP did not fall within any such legislative subject matter. While Hayne J stated that the decision in *Pape* did not advance the proposition that the Executive can undertake spending simply because the ‘expenditure *could* be authorised by statute’,<sup>22</sup> his Honour went on to quote Barwick CJ in *Victoria v Commonwealth and Heydon* as stating:

it will be the capacity of the Parliament to make a law to govern the activities for which the money is to be spent, which will determine whether or not the appropriation is valid... [T]he executive may only do that which has been or could be the subject of valid legislation.<sup>23</sup>

Kiefel J also quoted Barwick CJ, emphasising the words ‘or could be...’<sup>24</sup> This interpretation suggests that the capacity of a legislature to enter a particular field alone grants a power of the Executive to, at the least, spend money in that particular field even in the absence of legislation.

Hayne J held that such an interpretation was subject to the decision in *Pape* where some power may exist outside of the express grants of legislative power in particular circumstances, where there is no conflict with State

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<sup>18</sup> *Williams* [2012] HCA 23, [544].

<sup>19</sup> Crommelin, “The Executive”, in Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, (1986), vol 6, 127, 147, quoted in *Williams* [2012] HCA 23, [121] (Gummow and Bell JJ). See also *Williams* [2012] HCA 23, [561] (Kiefel J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 462-463.

<sup>20</sup> *Australian Constitution*.

<sup>21</sup> *Williams* [2012] HCA 23, [255]-[257] (Hayne J), [403] (Heydon J), [594] (Kiefel J).

<sup>22</sup> *Williams* [2012] HCA 23, [194].

<sup>23</sup> (1975) 134 CLR 338, 362 (Barwick CJ) quoted in *Williams* [2012] HCA 23, [255] (Hayne J).

<sup>24</sup> *Williams* [2012] HCA 23, [566].

powers.<sup>25</sup> Nevertheless, in the particular circumstances his Honour concluded that there was a conflict with State legislative competence. In particular, he was persuaded by the fact that Queensland presently operates a chaplaincy program in schools outside of the Commonwealth program.<sup>26</sup>

In a dissenting judgment, Heydon J held that the law as it stands is that the Executive has the power in relation to Commonwealth heads of legislative power, even in the absence of statute. His Honour listed three exceptions to the rule:

- (1) the power to raise taxes;
- (2) the power to alter rights or liabilities arising under State law; and
- (3) the power to curtail the capacity of the States to function as governments.<sup>27</sup>

The basis for Heydon J's dissent on the primary issue was that his Honour viewed the Commonwealth as having the legislative power to undertake the program, whereas Hayne and Kiefel JJ held the program did not fall under one of the heads of power.<sup>28</sup>

### *C Status as a legal person*

The Commonwealth argued that the executive power permitted it to enter contracts and spend money without specific legislative authority. There was a stream of argument that, following the Common Assumption, the Executive had the capacity to contract to the same extent that the Parliament may contract. Another stream turned on the Commonwealth's status as a legal person.

The Commonwealth submitted that its status as a legal person permitted it to enter contracts and spend money lawfully, in so far as its expenditure did not 'involve interference with what would otherwise be the legal rights and duties of others.'<sup>29</sup> The reasoning in the *Williams* decision is now a crucial footnote to the oft-quoted reasoning of Evatt J in *Bardolph v New South Wales*:<sup>30</sup>

No doubt the King has special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects.

The words of Evatt J are now limited to the extent that the majority in *Williams* distinguished the contracting capacity of the Executive from that of a private person.<sup>31</sup>

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<sup>25</sup> *Williams* [2012] HCA 23, [256].

<sup>26</sup> *Williams* [2012] HCA 23, [257]. Crennan J also picked up on this point at [497]-[498].

<sup>27</sup> *Williams* [2012] HCA 23, [397]-[400].

<sup>28</sup> *Williams* [2012] HCA 23, [408]-[441] (Heydon J).

<sup>29</sup> Commonwealth of Australia, Minister for School, Education, Early Childhood and Youth, and Minister for Finance and Deregulation, 'Amended Submissions of the First, Second and Third Defendants', Submission in *Williams v The Commonwealth*, No S307 of 2010, 23 July 2011, [20].

<sup>30</sup> (1924) 52 CLR 455, 475.

<sup>31</sup> *Williams* [2012] HCA 23, [62] (French CJ), [151] (Gummow and Bell JJ), [204] (Hayne J), [518] (Crennan J), [577] (Kiefel J).

The crucial difference between a private person and the Executive is that the latter has ‘public moneys that are involved.’<sup>32</sup> The Chief Justice recognised that, at the least, the power of the Commonwealth to make agreements is limited by statutory constraints.<sup>33</sup> Consequently, the Parliament’s power to contract is larger and the Common Assumption is rejected to that extent.

Hayne J rejected that the Commonwealth ‘has all of the capacities ... to contract and spend that a natural person has.’<sup>34</sup> His Honour cited an absence of legal basis for such a proposition.

Crennan J held that the capacities of the Commonwealth to contract and spend differ from those of a non-government legal person.<sup>35</sup> Her Honour had five bases for this conclusion:

1. The funds of the Commonwealth can be distinguished from those of non-government bodies, in particular to the extent that they are raised from the public.
2. The Commonwealth’s capacity to contract and spend is limited by s 81 of the *Constitution*.
3. The Commonwealth’s capacity to contract and spend can take a regulatory form and thus must have greater restraints placed upon it.
4. The capacity to contract and spend in areas of state legislative competence could interfere with the protection of s 109 of the *Constitution*.
5. The absence of executive immunity in the *Constitution* does not alter the capacities of the Commonwealth to contract and spend.<sup>36</sup>

#### D Capacity as a national government

The Commonwealth cited the example of *Pape* where the High Court held that the Executive had the power to respond to a national economic crisis in the absence of a legislative power.<sup>37</sup> It argued that this so-called ‘nationhood’ power permitted the Executive to enter the field of school chaplaincy programs. Gummow and Bell JJ in *Williams* distinguished a national crisis of the kind in *Pape* from the circumstances before them.<sup>38</sup> Their Honours held that the situation (and program) in *Pape* dealt with extensive payments made over a short period of time, in urgent circumstances, whereas no such sense of urgency or necessity existed for the execution and maintenance of the NSCP.

Additionally, Gummow, Kiefel and Bell JJ had regard to the practical and legal capacity of the States to undertake the NSCP.<sup>39</sup> The State of Queensland had a

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<sup>32</sup> *Williams* [2012] HCA 23, [151] (Gummow and Bell JJ) quoting *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424, 461 (Dixon CJ, Williams, Fullagar and Kitto JJ).

<sup>33</sup> *Williams* [2012] HCA 23, [67].

<sup>34</sup> *Williams* [2012] HCA 23, [204].

<sup>35</sup> *Williams* [2012] HCA 23, [518].

<sup>36</sup> *Williams* [2012] HCA 23, [519]-[523] (Crennan J).

<sup>37</sup> Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 199 (SJ Gageler for the Commonwealth).

<sup>38</sup> *Williams* [2012] HCA 23, [146].

<sup>39</sup> *Williams* [2012] HCA 23, [146] (Gummow and Bell JJ), [589]-[591] (Kiefel J).

complementary program to the one being challenged. That Queensland already had the capacity to undertake the program rendered the discussion of ‘nationhood’ moot in the eyes of five justices of the High Court.<sup>40</sup> This reiterates the importance of the qualification ‘not otherwise carried on’ when discussing the power of the Federal Executive to undertake activities deriving from ‘the character and status of the Commonwealth as a national government.’<sup>41</sup> It is difficult for any matter to be ‘peculiarly adapted’ to the government of a nation when that matter is already being dealt with by the States.<sup>42</sup>

An interesting divergence of the Court in *Williams* is that, compared to recent cases on the so-called ‘nationhood’ power, the Court did not discuss any need for the NSCP, had it fallen within the executive power, to be followed-up with enabling legislation (as distinct from an appropriation). This is in contrast to the decisions in *Pape* and *Davis v Commonwealth*<sup>43</sup> where the Parliament legislated in reliance on the implied executive power.

### E NSCP and Section 116

The applicant’s primary submission was that the NSCP involved the employment of a school chaplain and that this amounted to imposing a religious test as a qualification for an office of the Commonwealth, in violation of s 116 of the *Constitution*.<sup>44</sup> Section 116 states:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and **no religious test shall be required as a qualification for any office or public trust under the Commonwealth.**<sup>45</sup>

It must be noted that this provision does not apply to the States. This is important to the extent that the NSCP affected a state government school and was undertaken by a Queensland corporation.

The Court was united in rejecting the s 116 submission. The primary judgment on this issue was delivered by Gummow and Bell JJ. Their Honours found that the chaplains would not hold an office under the Commonwealth but rather would be employed by Scripture Union Queensland.<sup>46</sup> They held that the provision must be read as a whole. The term ‘office ... under the Commonwealth’ requires a ‘closer connection to the Commonwealth than that presented by the facts of this

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<sup>40</sup> *Williams* [2012] HCA 23, [146] (Gummow and Bell JJ), [196] (Hayne J), [497]-[498] (Crennan J), [591] (Kiefel J).

<sup>41</sup> Quoting *Victoria v Commonwealth and Heydon* (1975) 134 CLR 338, 396 (Mason J).

<sup>42</sup> Cf *Davis v Commonwealth* (1988) 166 CLR 79, 94 where Mason CJ, Deane and Gaudron JJ expressly noted that the States may still have a role to play in an area to which the ‘nationhood’ power applies.

<sup>43</sup> (1988) 166 CLR 79.

<sup>44</sup> Ronald Williams, ‘Plaintiff’s Amended Submissions’, Submission in *Williams v Commonwealth*, No S307 of 2010, 28 June 2011, [78]-[84].

<sup>45</sup> *Australian Constitution* (emphasis added).

<sup>46</sup> *Williams* [2012] HCA 23, [108]-[110].

case.<sup>47</sup> French CJ, Hayne, Crennan and Kiefel JJ agreed with the reasons of Gummow and Bell JJ to this extent.<sup>48</sup>

Heydon J, in a separate judgment, left open the question of whether there was a religious requirement for performing the functions under the NSCP at all.<sup>49</sup> Whilst agreeing with the other members of the Court that the chaplains were not employed ‘under the Commonwealth’, his Honour went a step further by finding that, under the terms of the agreement, the job could possibly have been undertaken by a layperson who did not meet a religious test.<sup>50</sup> This meant that no religious test was imposed in any event.

His Honour agreed with the other members of the Court that the chaplains were not employed ‘under the Commonwealth’.<sup>51</sup> However, he went further in holding an office ‘is a position under constituted authority to which duties are attached.’<sup>52</sup> To that end, a direct relationship between the Commonwealth and the employee is required. On the facts, no such relationship existed.<sup>53</sup> This is a narrow interpretation of the provision when compared with the submission of the plaintiff that the substance (rather than form) of the relationship was employment. A basis for the submission that the relationship was in substance one of employment was that the chaplains were expected to abide by the Commonwealth’s Code of Conduct. The plaintiff made a policy argument that a narrow interpretation of s 116 allows the Commonwealth to circumvent the provision by employing sub-contractors.

## V LEGISLATIVE RESPONSE

The *Financial Framework Legislation Amendment Bill (No 3) 2012* entered the Commonwealth Parliament on 26 June 2012 and received Royal Assent just two days later. The Act commenced immediately after Assent.<sup>54</sup> The *Financial Framework Legislation Amendment Act (No 3) 2012* (the Amendment Act) was a direct response to the High Court decision.<sup>55</sup>

The Amendment Act altered the *Financial Management and Accountability Act 1997* by giving the Executive specified powers to fund a range of programs including the NSCP.<sup>56</sup> The specified powers are to be set out by regulations.

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<sup>47</sup> *Williams* [2012] HCA 23, [110] (Gummow and Bell JJ).

<sup>48</sup> *Williams* [2012] HCA 23, [4] (French CJ), [168] (Hayne J), [476] (Crennan J), [597] (Kiefel J).

<sup>49</sup> *Williams* [2012] HCA 23, [448].

<sup>50</sup> *Williams* [2012] HCA 23, [306].

<sup>51</sup> *Williams* [2012] HCA 23, [444].

<sup>52</sup> *Ibid.*

<sup>53</sup> *Williams* [2012] HCA 23, [445] (Heydon J).

<sup>54</sup> *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) s 2.

<sup>55</sup> Commonwealth *Parliamentary Debates*, House of Representatives, 26 June 2012, 8041 (Nicola Roxon).

<sup>56</sup> The programs were in fact specified by an amendment to the *Financial Management and Accountability Regulations 1997* (Cth) Sch 1AA.

Despite this response, a couple of hurdles may exist if the program is challenged again.<sup>57</sup>

For the new program to be constitutionally valid, the Commonwealth may need to demonstrate that the legislation (and regulations) fall within one of the Parliament's heads of power under the *Constitution*. In *Williams*, Hayne, Heydon and Kiefel JJ considered the hypothetical scenario of statute being legislated in reliance of ss 51(xx) or 51(xxiiA) of the *Constitution* for the specific purpose of the NSCP.

Section 51(xx) is the corporations power of the Commonwealth. Hayne J held that the program is not an exercise of power under s 51(xx) because there was never a requirement that the project be administered by a trading or financial corporation.<sup>58</sup> Nor would any hypothetical law instigating the program authorise or regulate with respect to corporations.<sup>59</sup> Kiefel J's findings were substantially the same.<sup>60</sup>

More interestingly, s 51(xxiiA), introduced into the *Constitution* by referendum in 1946, grants inter alia the Commonwealth Parliament power to legislate for the provision of benefits to students. It is stated in the following terms:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), **benefits to students** and family allowances.<sup>61</sup>

Hayne J rejected the submission that s 51(xxiiA) empowers the Parliament to legislate for this program.<sup>62</sup> His Honour applied the definition of 'benefits' in *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth*<sup>63</sup> in finding that the program *only* amounted to the provision of a service rather than the allocation of funds for any identifiable student.<sup>64</sup> His Honour distinguished between a benefit *to a* student, the term used in the section, rather than benefits to or services *for* students.<sup>65</sup> He reasoned that the program fell under the latter category.<sup>66</sup> It was held that the absence of such a distinction would mean an unlimited power of payments that would advantage students.<sup>67</sup>

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<sup>57</sup> Mr Williams has indicated an intention to commence new proceedings in the High Court to challenge the Amendment Act: Jane Lee, 'Father to take Canberra on again over chaplains', *The Age* (Melbourne), 7 July 2012, 6.

<sup>58</sup> *Williams* [2012] HCA 23, [271].

<sup>59</sup> *Williams* [2012] HCA 23, [272] (Hayne J).

<sup>60</sup> *Williams* [2012] HCA 23, [575].

<sup>61</sup> *Australia Constitution* (emphasis added).

<sup>62</sup> *Williams* [2012] HCA 23, [272].

<sup>63</sup> (1987) 162 CLR 271.

<sup>64</sup> *Williams* [2012] HCA 23, [279].

<sup>65</sup> *Williams* [2012] HCA 23, [280].

<sup>66</sup> *Williams* [2012] HCA 23, [285].

<sup>67</sup> *Williams* [2012] HCA 23, [281] (Hayne J).

Kiefel J had similar reasoning. Her Honour made the distinction that '[t]he power given is to provide benefits to students, not funding to schools.'<sup>68</sup> She was influenced by the fact that the chaplaincy services were also for the benefit of staff and members of the 'wider school community.'<sup>69</sup>

In contrast, Heydon J, in dissent, did find that s 51(xxiiiA) gave the Parliament the power to legislate for the program.<sup>70</sup> His Honour rejected the narrow definition of the section propounded by the plaintiffs and distinguished the authorities. He declined to limit the provision to 'goods or services for which students would otherwise be obligated to pay.'<sup>71</sup> Heydon J preferred a literal reading of s 51(xxiiiA)<sup>72</sup> and described the argument that 'benefits to students' required demonstration of a benefit to a particular student as flawed.<sup>73</sup>

French CJ, Gummow, Crennan and Bell JJ did not need to decide on the legislative competence of the Parliament because they held that the legislative heads of power do not empower the Executive in any event.<sup>74</sup>

If the opinions of Hayne and Kiefel JJ in relation to the legislative heads of powers are adopted by two other members of the Court (ie, of those who did not decide the issue) it would appear that the Parliament's legislative response to the *Williams* decision may be tenuous. This is because the Parliament would not have the power to legislate for the program. It must be acknowledged that the Parliament's response to the High Court decision was designed to protect more than just one program. But, as a response solely in relation to the NSCP, it may not be enough.

An additional issue, that may cause discomfort with the High Court as a separation of powers issue, is that the Parliament has delegated authority to the Federal Executive to prescribe programs that it may allocate funding towards.<sup>75</sup> This effectively allows the Executive to recite itself into power. However, the regulations are subject to Parliamentary supervision.

## VI CONCLUSION

The majority decision in *Williams* was that the NSCP was invalid in its 2011 form. The divergence in opinion on the relevance of the legislative heads of power in determining the scope of executive power will be a source of debate going forward in the legal community.

The question may re-emerge before the High Court in light of the questions raised about the reactionary legislation. It continues to be the case that the Commonwealth could have undertaken this expenditure through a grant under s 96 of the *Constitution*. This seems to be another in a trend of cases where the

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<sup>68</sup> *Williams* [2012] HCA 23, [573].

<sup>69</sup> *Ibid.*

<sup>70</sup> *Williams* [2012] HCA 23, [429].

<sup>71</sup> *Williams* [2012] HCA 23, [426], responding to submissions of the plaintiff.

<sup>72</sup> Citing *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte National Airways Pty Ltd* (1964) 113 CLR 207, 225 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

<sup>73</sup> *Williams* [2012] HCA 23, [440].

<sup>74</sup> *Williams* [2012] HCA 23, [83] (French CJ), [91] (Gummow and Bell JJ), [537] (Crennan J).

<sup>75</sup> *Financial Management and Accountability Act 1997* (Cth) ss 32B and 65.

Commonwealth has declined to take the grant option, perhaps for political reasons. In any event, the case leaves unanswered some of the questions about executive power. In particular, whether the majority or minority view concerning the relationship of the legislative heads of power and executive power will be favoured by the Court in future cases. These can be decided on another day – perhaps with similar facts.