WILLIAMS V COMMONWEALTH: MUCH ADO ABOUT NOTHING

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In Williams v Commonwealth,1 Heydon J’s dissenting judgment is to be preferred to those of the majority and, in any event, the Commonwealth’s response contained in s 32B of the Financial Management and Accountability Act 1997 (Cth) does provide the necessary statutory umbrella to validate expenditure to the myriad of programs listed in Schedule 1AA. This is no different to the notion of a General Contracts Act proposed by Sir Owen Dixon to the 1929 Royal Commission on the Constitution of the Commonwealth.

It will also be contended that critics of the Commonwealth’s solution to Williams are wedded to an anachronistic view of the Constitution. The High Court has, since 1920, consistently given a broad interpretation to the heads of power contained in s 51 of the Constitution, supplemented by a carte blanche interpretation of the grants power under s 96. Section 32B is the next logical step in an efficient distribution of Commonwealth funds whose sole constitutional ‘sin’ appears to be that of by-passing the States. Just as the Senate is no longer the States’ House, so too the States are no longer the bulwark against a rampant Commonwealth. The programs listed in Schedule 1AA of the Financial Management and Accountability Act 1997 (Cth) benefit all Australians, and there is no valid reason why such expenditure should be channelled through the States.

I INTRODUCTION

Let me be that I am and seek not to alter me.2

In Williams v Commonwealth,3 a majority (6:1) of the High Court held that a funding agreement between the Commonwealth of Australia and the Scripture Union of Queensland (SUQ), for the provision of chaplaincy services at a State school in Queensland, was invalid. The reasoning was not founded on s 116 of the Constitution which relevantly provides that ‘no religious test shall be required as a qualification for any office or public trust under the Commonwealth’. Rather, payments by the Commonwealth to SUQ under the funding agreement were invalid because they were not supported by s 61 of the Constitution, which relevantly provides that the executive power of the Commonwealth ‘extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth’.

In response to the High Court’s decision in Williams, the Commonwealth passed the Financial Framework Legislation Amendment Act (No 3) 2012, which had the effect of amending the Financial Management and Accountability Act 1997 (Cth). The key amendment was the insertion of a new Division 3B which purported to establish a supplementary power for the Commonwealth to make commitments to spend public money where there is no existing legislative authority. The purpose was to protect over

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2 William Shakespeare, Much Ado About Nothing, Act 1, Scene 3.
3 [2012] HCA 23.
400 existing Commonwealth programs, which were placed in doubt by the High Court’s decision in *Williams*, because these programs had no supporting legislation.

The Commonwealth’s legislative response to *Williams* is now itself the subject of a second High Court challenge, on two grounds. First, that the supplementary power to make commitments to spend public money, contained in s 32B of the *Financial Management and Accountability Act 1997* (Cth), is not itself supported by a head of power under s 51 of the Constitution. Secondly, implied in the *Constitution* is a limit on the power of the Executive to expend money without the engagement of the Senate beyond the appropriation process, the consequence of which is to prevent the Commonwealth Parliament from conferring on the Executive a general power to expend public monies co-extensive with the legislative power of the Commonwealth.\(^4\)

## II THE MAJORITY VIEW

*Why, what’s the matter,*  
*That you have such a February face,*  
*So full of frost, of storm and cloudiness?*\(^5\)

In the absence of legislation authorising the Commonwealth to enter into the Funding Agreement with the SUQ, the Commonwealth relied upon the executive power under s 61 of the Constitution. The majority held that in the absence of statutory authority, s 61 did not empower the Commonwealth to enter into the Funding Agreement. The majority distinguished the Commonwealth’s executive power from the power of the Commonwealth Parliament to authorise the Executive to enter into agreements or contracts. This is consistent with *Pape v Commissioner of Taxation*,\(^6\) where the High Court held that ss 81 and 83 of the *Constitution* do not themselves authorise any expenditure but instead require Parliamentary appropriation and an independent legislative or executive head of power. An important difference between *Williams* and *Pape*, is that the ‘tax bonus’ in *Pape* was supported by legislation.\(^8\)

In *Pape*, the High Court held that the *Tax Bonus Act* was a valid law of the Commonwealth Parliament under s 61 of the Constitution supported by the incidental power under s 51 (39) of the Constitution.\(^9\) Yet, as French CJ acknowledged in

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\(^4\) Statement of claim filed on 8 August 2013 in the High Court of Australia, No S154 of 2013, between Ronald Williams, Plaintiff and Commonwealth of Australia, First Defendant, Minister for Education, Second Defendant, and Scripture Union of Queensland, Third Defendant, 20 [58].
\(^6\) [2009] HCA 23.
\(^7\) Section 81. Consolidated Revenue Fund. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution, Section 83. Money to be appropriated by law. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.
\(^8\) *Tax Bonus for Working Australians Act* (No 2) 2009 (Cth).
\(^9\) *Australian Constitution*, s 61. 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 the Constitution, and of the laws of the Commonwealth.
\(^10\) *Australian Constitution* s 51. Legislative powers of the Commonwealth. The Parliament shall, subject to this Constitution, have powers to make laws for the peace, order and good government of the Commonwealth with respect to: … (xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House
Williams, the High Court had previously placed a caveat on the executive power of the Commonwealth in Pape.

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 contrary to a long-standing assumption, parliamentary appropriation is not a source of spending power.

The appropriate test for the engagement of s 51(39) to extend the power of s 61 was said to be:

[T]o expend public moneys for the purpose of avoiding or mitigating the large scale adverse effects of the circumstances affecting the national economy disclosed on the facts of this case, and which expenditure is on a scale and within a time-frame peculiarly within the capacity of the national government.

In Williams, the provision of chaplaincy services did not qualify as ‘peculiarly within the capacity of the national government’. This led to a focus on the ‘contours’ of executive power under s 61 and the validity of the common assumption that such contours ‘generally follow those of legislative power’. This assumption was rejected by the High Court, which held that the Commonwealth Executive cannot expend public moneys on any subject matter falling within a head of Commonwealth legislative power.

Furthermore, the High Court also rejected the Commonwealth’s contention that Part 7 of the Financial Management and Accountability Act 1997 (Cth), and s 44 in particular, conferred upon the Department of Education, Employment and Workplace Relations power to expend appropriated monies.

The structure of Part 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.
However, there were some indications in *Williams* that the High Court may refine its position in the second Williams challenge. For example, French CJ, having noted that the Commonwealth’s argument that s 44(1) of the *Financial Management and Accountability Act 1997* (Cth) provided for a general contracts statute should not be accepted because ‘[i]t is not a source of power to spend that which is to be administered’, continued with the following general observation.

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.

Thus, an important point for the *Second Williams Case* will be whether the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) overcomes the objections raised by the High Court to the Commonwealth’s previous reliance on s 44(1) of the *Financial Management and Accountability Act 1997* (Cth) for a general contracts provision. This issue will be discussed in more detail in Part IV of the article.

### III THE MINORITY VIEW

*And we are here as on a darkling plain*  
*Swept with confused alarms of struggle and flight,*  
*Where ignorant armies clash by night.*

The sole dissenter in *Williams* was Heydon J, who endorsed the common assumption that the Executive could spend money in any area within the legislative powers of the Commonwealth. His Honour pointed out that the initial written submissions from both sides of the case adhered to the common assumption. His Honour then cited copious authority in support of the common assumption starting with the Constitutional Convention Debates of 1891, through the opinions of Commonwealth Attorneys-General such as Deakin and Groom, and ending with the views of modern constitutional scholars including Winterton, Zines and Seddon.

For present purposes, attention will be focused on the passage of Heydon J’s judgment dealing with the later submissions attacking the common assumption principle. One line of argument was that the executive power should be limited to laws actually enacted by the Commonwealth Parliament as otherwise there would be the potential for the collision of Commonwealth and State executive power. Heydon J convincingly addressed this strand of the argument as follows:

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19 Ibid [71] (French CJ). His Honour endorsed the reasons of Gummow and Bell JJ at [102] - [103].

20 Ibid [72].

21 Matthew Arnold, *Dover Beach* (poem), cited by Heydon J in reference to the great *renversement des alliances* when the government interveners withdrew their assertion of the common assumption: *Williams v The Commonwealth* [2012] HCA 23 [343].

22 Ibid [344].


25 Ibid [392].
Any inconsistency between exercises of State executive power and Commonwealth executive power can be terminated by the Commonwealth enacting legislation which regulates or abolishes State executive power. That is so whether the source of the State executive power is non-statutory (in the prerogative or elsewhere) or in legislation. In the former case the Commonwealth legislation will prevail over non-statutory law; in the latter it will prevail by virtue of s 109 of the Constitution.26

A second line of argument against the common assumption was that if the Commonwealth’s executive power was extended to the potential power to legislate, then it would operate both free of legislative control and with immunity from statutory judicial review.27 As with the potential for collision argument, Heydon J dealt with objection to the potential power to legislate argument in a pragmatic and entirely realistic manner.

The answer to the first point is that the use of executive power can be controlled by the legislature enacting legislation … The answer to the second point is that … common law principles of judicial review can be invoked in this Court under s 75(iii) or (v) of the Constitution and s 30(a) of the Judiciary Act 1903 (Cth) and in the Federal Court of Australia under s 39B(1) and (1A)(a) and (b) of that Act.28

A third line of argument covered the federal considerations of the extent of the executive power. French CJ was particularly troubled by the common assumption being ‘in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power’.29 Whilst acknowledging the notion that the Senate was a protector of the States ‘may now be vestigial’30 and that the Executive dominates the Parliament, the Chief Justice took the overall view that these developments had ‘not resulted in any constitutional inflation of the scope of executive power’.31 Heydon J answered the federal considerations argument by pointing out that the Senate was not a political eunuch: ‘The Senate is not in the same position as some almost impotent post-Asquithean House of Lords.’32 The modern role of the Senate will be analysed in more detail in Part V of this article.

Having found that ‘the common assumption should be treated as law’,33 Heydon J then held that ‘benefits to students’ in s 51 (23A) ‘would support legislation authorising the provision of “chaplaincy services” by the fourth defendant [SUQ] using money provided by the Commonwealth’.34 His Honour interpreted ‘benefits to students’ in s 51 (23A) broadly, citing in support British Medical Association v Commonwealth35 and Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth.36 Only Hayne and Kiefel JJ, in separate judgments, considered the scope of ‘benefits to students’ and both judges took a narrower and more traditional view of the word ‘benefit’, sufficient to hold that the provision of chaplaincy services did not fall within the meaning of ‘benefits to students’ in s 51 (xxiiA).37

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26 Ibid [393], citing Winterton, above n 16, 47.
27 Ibid [394].
28 Ibid.
29 Ibid [60].
30 Ibid [61].
31 Ibid.
32 Ibid [396].
33 Ibid [403].
34 Ibid [441].
35 (1949) 79 CLR 201.
At this juncture, it would appear that even if the Commonwealth Government was to pass specific legislation in relation to chaplaincy services, thereby addressing the High Court’s rejection of the common assumption, a real possibility exists that a majority of the High Court may endorse the narrow view of ‘benefit’ taken by Hayne and Kiefel JJ in holding the existing chaplaincy program cannot be supported by a federal head of power. A detailed examination of the other 400 plus programs similarly affected by Williams may reveal that a number of these programs also lack a clear link to a federal head of power. In light of this possible outcome, it is scarcely surprising that the Commonwealth Government, supported by the Opposition, turned to a generic solution in the form of the Financial Framework Legislation Amendment Act (No 3) 2012 (Cth). The alternative, a bureaucratic nightmare, was to unpick all the 400 plus existing programs and to channel them through the States and Territories under the grants power contained in s 96 of the Constitution.

IV  A GENERAL CONTRACTS ACT

'I can see he’s not in your good books,' said the messenger.
'No, and if he were I would burn my library.'

The key to the Commonwealth’s solution to Williams is s 32B(1) of the Financial Management and Accountability Act 1997 (Cth) and Schedule 1AA of the Financial Management and Accountability Regulations 1997 (Cth).

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

(1) If:
(a) Apart from this subsection, the Commonwealth does not have power to make, vary or administer:
   (i) an arrangement [arrangement includes contract, agreement or deed] under which public money is, or may become, payable by the Commonwealth; or
   (ii) a grant of financial assistance to a State or Territory; or
   (iii) a grant of financial assistance to a person other than a State or Territory; and
(b) the arrangement or grant, as the case may be:
   (i) is specified in the regulations [Schedule 1AA]; or
   (ii) is included in a class of arrangements or grants, as the case may be, specified in the regulations; or
   (iii) is for the purposes of a program specified in the regulations;

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

38 William Shakespeare, Much Ado About Nothing, Act 1, Scene 1.
39 It would appear that the Public Governance, Performance and Accountability Act 2013 (Cth), which comes into operation on 1 July 2014, may have the effect of repealing s 32B(1) of the Financial Management and Accountability Act 1997 (Cth), as over time it is intended to replace the Financial Management and Accountability Act 1997 (Cth). It is presently unclear how the Commonwealth intends to replace s 32B(1), although it can be assumed that a more constitutionally ‘robust’ section is being considered which will have the advantage of addressing criticisms of the present ‘solution’ in 32B(1).
A power conferred on the Commonwealth by subsection (1) may be exercised on behalf of the Commonwealth by a Minister or a Chief Executive.

There have been comments that the passage of the Financial Framework Legislation Amendment Act (No 3) 2012 (Cth) ‘was a provocative act of defiance of the High Court’. The former Chief Justice of the Supreme Court of New South Wales, James Spigelman, weighed in and suggested that some of over 400 programs ‘are identified in such general language that they could not withstand constitutional scrutiny’. However, Spigelman has also drawn attention to a mechanism in the Act to deal with challenges by regulation.

The Financial Framework Legislation Amendment Act (No. 3) 2012 set out in Part 4 a long list of grants of financial assistance to ‘persons other than a State or Territory’. Interestingly, Part 2 entitled ‘Financial assistance to a State or Territory’ is empty, with an annotation ‘Reserved for future use’. In the future, for any program which is found to be invalid, a regulation can quickly be made to move the program from the direct grant to a third party Part of the Act into the grant to a State or Territory Part, subject to conditions that it be passed on to the original recipient.

The Commonwealth is clearly keeping all options open, relying on a combination of the unlikelihood of a constitutional challenge and the need for standing to limit the number of programs it may have in the future to switch into a State or Territory grant.

As Blackshield and Williams have noted, ‘this broad legislative authority to enter into arrangements such as contracts and to spend money pursuant to them echoes an idea put by Sir Owen Dixon to the 1929 Royal Commission on the Constitution of the Commonwealth’. In Williams v Commonwealth, French CJ had referred to Dixon’s observation, noting that he had ‘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” ’. French CJ continued by noting that Dixon had ‘suggested that it would be competent for the Parliament to pass a General Contracts Act which would remove the difficulty [of hampering the executive Government] unless it were desired to confer greater contractual power upon the Executive than the subjects of legislative power would permit Parliament to give’. This extraordinarily prescient observation by Sir Owen Dixon as far back as 1927, fully anticipates the dominance of the Federal Government over the States and the need for the efficient distribution of public monies by contracting directly with recipients of grants.

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42 Ibid.


44 [2012] HCA 23 [68].

45 See above n 9.


47 Ibid.
Orr and Isdale have suggested that ‘[s]uch a formulaic response, however efficient, makes a mockery of the Court’s platitudes about legislative authority promoting responsible government.’ 48 Leaving aside the significant reference to efficiency, which is developed in Part V of this article, the fact that both sides of Parliament embraced the use of delegated legislation to cover a suite of programs puts the onus squarely on the High Court to expand on its litmus test of constitutional validity: namely, the power of the Commonwealth Parliament to authorise the Executive to enter into agreements or contracts.

The options open to the High Court in the Second Williams Case are either to strike down s 32B of the Financial Management and Accountability Act 1997 (Cth) in whole; invalidate only the program in question (chaplaincy services) in Schedule 1AA; or validate s 32B by endorsing the legislation as fitting Sir Owen Dixon’s concept of a General Contracts Act by not exceeding the heads of power under s 51 of the Constitution. To strike down the legislation, the High Court will have to place a caveat on the power of the Commonwealth Parliament to authorise the Executive to enter into agreements or contracts, such that s 32B of the Financial Management and Accountability Act 1997 (Cth) is not itself supported by a head of power under s 51 of the Constitution.

If, instead, the High Court invalidates the legislation in endorsing the narrow view of ‘benefit’ taken by Hayne and Kiefel JJ in holding that the existing chaplaincy program cannot be supported by a federal head of power, then the Second Williams Case will be a Pyrrhic victory as the Commonwealth can quickly make a regulation ‘to move the program from the direct grant to a third party Part of the Act into the grant to a State or Territory Part’. 49 However, as moving a program between Parts of the Act would require upsetting existing Federal administrative arrangements and substituting six State and two Territory bureaucracies, such an outcome is not desired by the Commonwealth. Nevertheless, only if the High Court strikes down s 32B in its entirety as lacking a head of power, will this Commonwealth stratagem of moving programs between Parts of the Act fail, for few of the 400 plus programs listed in Schedule 1AA of the Financial Management and Accountability Regulations 1997 (Cth) will be constitutionally challenged.

It is difficult to predict whether a majority of the High Court will go so far as to strike down s 32B in its entirety, given Sir Owen Dixon’s stature. At the very least, the High Court will have to consider whether any form of General Contracts Act is potentially constitutionally valid, a question which did not need to be resolved in Williams. Much will depend on the High Court’s view of federalism. The issue would appear to reduce to whether the High Court continues its retreat from the WorkChoices decision of 2006, 50 in finding a rejuvenated role for the States, or whether, in light of a consensus in Federal Parliament as to the efficiency of delegated legislation to administer programs and the success at the 2013 Federal election of ‘micro’ parties in securing representation in the Senate, 51 the purported constitutional bastion of the States, the time has come to recognise the practical political realities in 21st century Australia.

49 Spigelman, above n 41.
51 See, for example, the success of the Australian Motoring Enthusiast Party’s Victorian senator-elect, Mr Ricky Muir, who secured the sixth Victorian Senate seat with just 17,083 first preference votes out of the 483,076 quota required: Australian Electoral Commission, ‘Virtual Tally Room’ (2013) <http://vtr.aec.gov.au/External/SenateStateDop-17496-VIC.pdf>. For an insightful analysis of the preference deals negotiated on the advice of political consultant, Mr Glen Druery, which ultimately propelled Mr Muir over the sixth
The High Court could validate a General Contracts Act with the proviso that programs listed in Schedule 1AA must come under a federal head of power. This would have the effect of re-instating the common assumption that the ‘contours’ of executive power under s 61 generally follow those of legislative power. Such an outcome would also be consistent with Sir Owen Dixon’s view of the competence of the Federal Parliament to pass a General Contracts Act.52

V AN ANACHRONISTIC VIEW OF THE CONSTITUTION

An unrepresentative swill.53

The starting point in seeking the most appropriate response to the constitutional implications of s 32B of the Financial Management and Accountability Act 1997 (Cth) is to address the correct question. The correct question is not to focus on portraying the Second Williams Case as a tug of war between s 61 and s 51, but to ask who loses from a General Contracts Act. The only possible answer is the States, but not in concrete terms - only in political terms of sharing in the credit and exercising some leverage in negotiating the details of the programs.

Such an intangible political ‘benefit’ has to be seen in the context of the vertical fiscal imbalance between the Commonwealth and the States “which sees the States (including local government) raising less than 20 per cent of public revenue”.54 Clarke, Keyzer and Stellios illustrate the point with a Table showing that for 2010-11, the proportion of revenue collected under Commonwealth and State legislation is 75.5 per cent and 24.5 per cent respectively, with the proportion of all State revenue from Commonwealth transfers being 50.0 percent.55 Commonwealth transfers to States, which include general revenue transfers and specific purpose payments have increased from $12.8 billion in 1980-81 to $98.5 billion in 2010-11.56

Does this vertical fiscal imbalance strike at the heart of federalism? The answer is ‘no’ if a ‘service and provider’ model of federalism is adopted, where the Commonwealth provides the funding and the States and individual contracted parties, including the third tier of government, deliver the services and programs.

An example of a general ‘service and provider’ model is the Goods and Services Tax (GST), which was introduced on 1 July 2000. All the revenue raised by the GST, which now exceeds $54.3 billion,57 flows back to the States, except for an amount...
dedicated to health and hospital services which is based on actual health expenditure by the States.

The Australian government distributes the GST to the States as an untied grant based on the principle of horizontal fiscal equalisation (HFE), which takes into account the relative revenue raising capacity and expenditure needs of each of the States.  

True it is that the States decide which services will benefit and in what proportions from their individual untied grant allocation under the GST distribution, whereas by contrast under a General Contracts Act the States have no role to play. However, if modern federalism includes local government, then a ‘service and provider’ model is appropriate given the vertical fiscal imbalance between the proportion of revenue collected under Commonwealth and State legislation.

Furthermore, as Orr and Isdale point out ‘only Heydon J … seemed to be wise to the implications of the majority decision for Commonwealth funding of education’. The learned authors ask the question whether the direct funding of universities by the Commonwealth is constitutional under the Pape doctrine: ‘Certainly not if the ratio is limited to emergencies; but perhaps so if Pape’s ratio only requires endeavours whose scope is ‘peculiarly’ national.’ This would open up a Pandora’s box, and would lead to every program in Schedule 1AA of the Financial Management and Accountability Regulations 1997 (Cth) being subjected to a ‘peculiarly’ national test. For example, would the Roads to Recovery Program pass such a test? Perhaps, more to the point, who with the necessary standing would challenge the Roads to Recovery Program? The beneficiaries of this Program are local governments, one tier below state governments but far closer and more identified with their regional residents than the ‘capital centric’ States.

Forcing the Commonwealth to deal with State governments as a go-between to the ultimate recipient of the funding has three negative effects. First, it adds to administrative costs and promotes duplication of reporting. Secondly, it delays the delivery of the funds through tortuous negotiations with the States, particularly those States politically opposed to the Commonwealth government. Thirdly, it adds to the political ‘distortion’ process, which as the recent ICAC inquiry into the granting of mining licences in New South Wales revealed, should not be underestimated. The cost-benefit analysis is in favour of the Commonwealth dealing directly with the recipients of the funding, notwithstanding concerns over a purported ‘fiscal illusion’ that the recipients of the funding are operating under the illusion that the benefits are ‘free’. Applicants for federal funding are well

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59 Orr and Isdale, above n 48, 7.
60 Ibid.
61 Independent Commission Against Corruption, Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others (Report, 2013). This ICAC inquiry is the most recent in a long history of state corruption evidenced by the former Premier of Western Australia, Brian Burke, being jailed in 1994, and the Fitzgerald inquiry (1987-1989) revealing widespread corruption in Queensland under the government of Sir Joh Bjelke-Petersen.
62 Suri Ratnapala, ‘Fiscal Federalism in Australia After Williams v The Commonwealth’ (Paper presented at After Williams Colloquium, Toowoomba, 4 October 2013) 17 (included in this volume). Ratnapala cites James Buchanan and Richard Wagner, ‘Democracy in Deficit: The Political Legacy of Lord Keynes’ in The Collected Works of James M. Buchanan, Volume 8 (Liberty Fund, 1999) in support. ‘Democratic accountability is enhanced when it is clear who bears the costs of benefits and conversely is diminished when there is confusion of the
aware of the vertical fiscal imbalance, and are seeking to access the federal tax ‘surplus’ directly without State interference or redistribution.

However, if the wrong question is addressed and the Second Williams Case is considered solely in the anachronistic and sterile context of the interaction between s 61 and s 51 of the Constitution, then the danger is that the needs of Australia in the 21st century will be determined by the High Court through the lens of the 1890s. As Orr and Isdale note ‘Australia is a nation in ways unforeseeable in 1900’. 63

Federalists will argue that the words in s 51 must mean something and giving carte blanche to the Commonwealth begs the question of the future role of the High Court itself. However, it is the High Court through the Uniform Taxation Cases64 and the excise case of Ha,65 who has eroded the capacity of the States to raise revenue. Such a fundamental vertical fiscal imbalance is not going change, and it seems perverse in this context for the High Court to make the 400 plus programs in Schedule 1AA of the Financial Management and Accountability Regulations 1997 (Cth) the ‘line in the sand’ for a revamped federalism.

The Commonwealth’s ability to select the membership of the High Court does give the Federal government an advantage over the States. Since Williams, there have been two changes on the High Court: Gummow and Heydon JJ have been replaced by Gageler and Keane JJ. Commentators regularly speculate on the prospective views of incoming High Court judges, and Spigelman has offered this assessment of Gageler J’s approach to the Second Williams Case.

Justice Gageler’s approach is to recognise that the principal constraint inherent in the conferral of judicial power by the Australian Constitution, arises from the primacy which that very Constitution gives to the political processes of responsible government. In his past writings he focused on the strength of the institutional structures of parliamentary democracy. Where political accountability is, as he put it, ‘inherently strong’, the judiciary should defer to the Parliament. However, where political accountability is ‘inherently weak or endangered’, there is a need for judicial vigilance.66

It is a moot point whether the passage of the Financial Framework Legislation Amendment Act (No 3) 2012 through the Federal Parliament within 48 hours demonstrates inherently strong or weak political accountability in the eyes of the High Court. In any event, the High Court will have to expand on its notion of ‘responsible government’ and whether the use of delegated legislation abdicates Parliamentary control of expenditure. The construction of tests, set by unelected members of the judiciary, on the relative strength of political accountability, places the High Court on a very slippery slope indeed.
VI CONCLUSION

‘The first thing we do, let’s kill all the lawyers’.\(^{67}\)

This article has argued that the Second Williams Case be decided under the principle that the High Court should strike down legislation only when it violates an express provision of the Constitution, and not rest its rationale on vague concerns over federal balance and responsible government or that the Senate has not considered each provision individually. Section 61 is an opaque provision whose breadth was left open by the framers of the Australian Constitution.

It is all too late for the High Court to attempt to reverse the vertical fiscal imbalance its own constitutional jurisprudence has caused. The better view is for the High Court to vacate the field on fiscal issues between the Commonwealth and the States. At a minimum, the High Court should reinstate the common assumption, although the clearest outcome would be for the High Court to endorse the Commonwealth’s broader position during litigation in Williams that the Executive can expend public monies even outside the contours of federal powers.

The operative question is to ask: who loses from a General Contracts Act? The cost-benefit analysis favours the direct delivery of the funding of the programs in Schedule 1AA of the Financial Management and Accountability Act 1997 (Cth) to the contracted party,\(^{68}\) which includes local government and represents the opportunity for federalism to embrace the third tier of government. If the proposed constitutional amendment to recognise local government is resurrected and passed,\(^ {69}\) then it would be a ‘constitutional game changer’.\(^ {70}\)

Significantly, the Financial Framework Legislation Amendment Act (No 3) 2012 passed speedily through both Houses of the Federal Parliament, which is arguably supported by the incidental power under s 51 (xxxix) of the Constitution,\(^ {71}\) and as such formally responds to the ratio in Williams. Such passage is the traditional test of responsible government. However, like the Lemaean Hydra in Greek mythology, the Commonwealth may have a more powerful version of s 32B of the Financial Management and Accountability Act 1997 (Cth) up its legislative sleeve.\(^ {72}\)

Furthermore, as Twomey has noted, now that expenditure in the ordinary administration of the functions of government has been established as an exemption from the Commonwealth’s need for legislation to support its expenditure:\(^ {73}\)

It is likely, however, that the Commonwealth will take a much broader view of this exception in the future, trying to shift it from departmental running costs to covering any payments made by a department to fund programs and any grants to third parties

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\(^{67}\) William Shakespeare, Henry VI, Part 2.

\(^{68}\) This is similar to the Whitlam government’s rationale in Victoria v The Commonwealth and Hayden (1975) 134 CLR 338.

\(^{69}\) The deferred referendum sought to amend the Australian Constitution by giving financial recognition to local government by amending s 96 of the Constitution as follows: ‘During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State, or to any local government body formed by a law of a State, on such terms and conditions as the Parliament thinks fit.’ (Proposed amendment underlined.)

\(^{70}\) Ratnapala, above n 62, 21.

\(^{71}\) See above n 10.

\(^{72}\) See above n 39.

\(^{73}\) Williams v Commonwealth [2012] HCA 23 [139] (Gummow and Bell JJ).
that it administers in the implementation of government policies unsupported by legislation.74

In the Second Williams Case, the High Court has the opportunity to continue the logic of expanding federal fiscal power or pursuing a reversal of vertical fiscal imbalance in Federal/State fiscal relations. Centralists will be hoping for the former; federalists the latter.

74 Anne Twomey, ‘Post-Williams Expenditure – When can the Commonwealth and States Spend Public Money without Parliamentary Authorisation’ (Paper presented at After Williams Colloquium, Toowoomba, 4 October 2013) 22 (paper included in this volume).