Chapter Twelve

The Constitutionality of the Commonwealth's School Chaplaincy Program

*Williams v Commonwealth of Australia & Ors (***HCA: S307/2010)**

A. J. Stoker

The challenge mounted by Mr Ronald Williams of Toowoomba, Queensland, to the constitutionality of federal funding of the National School Chaplaincy Program (NSCP) has sparked a public debate, led by those who share his views, about whether there is a place for those with religious beliefs to work in support roles in government schools.

At first glance, the matter appears to be a case that is just about section 116 of the Constitution. In fact, that was not the focus of the submissions made before the High Court, and the section 116 argument was not, in my view, the strongest in the Plaintiff's arsenal.

More importantly, the matter presents an important opportunity for the Court to re-evaluate the nature and scope of the executive power of the Commonwealth.

This paper, prepared at a time when the Court's judgment is reserved, considers the arguments mounted by the parties, their strengths and some potential implications of the decisions that are open to the Court.

The Funding Arrangements

*T*he NSCP and Darling Heights State School Funding Agreement

The NSCP is not a creature of statute. It is an executive program administered by the Department of Education, Employment and Workplace Relations (DEEWR), formerly the Department of Education, Science and Training (DEST), through a series of funding agreements concerning specific schools. Upon its inception in 2007, the program made available funding to be distributed to government and non-government schools for the purpose of establishing school chaplaincy services or for enhancing such services where they already existed. Participation by schools in the NSCP is voluntary, as is participation by individual students if the school that they attend receives funding.[1]

The definition of school chaplain under the NSCP Guidelines is a person who is recognised:

1. by a local school, its community and the appropriate governing authority of the school as having the skills and expertise and experience to deliver school chaplaincy services to the school and its community; and
2. through formal ordination, commission, recognised qualifications or endorsement by a recognised or accepted religious institution or a State/Territory government approved chaplaincy service.

The mandate of a school chaplain under the NSCP Guidelines is to provide general religious and personal advice to those students who seek it, to provide grief support where necessary, and to support the development of an environment of respect, tolerance and cooperation for the various spiritual practices of students at a school.

On 9 November 2007, the Darling Heights State School Funding Agreement (the Agreement)

was made between the Commonwealth and Scripture Union Queensland (SUQ) for the provision of funding under the NSCP. The Agreement incorporated the NSCP Guidelines for the conduct of school chaplains and contemplated the making of payments by the Commonwealth to SUQ upon compliance by the latter with various obligations relating to the provision of chaplaincy services at the school. The Agreement expired on 31 December 2011 and all payments due to SUQ under the Agreement had been made at the time the matter was heard.[2]

The challenge

The challenge brought by the Plaintiff, Mr Ronald Williams, was met with joint submissions from the Commonwealth as First Defendant, the Minister for School Education, Early Childhood and Youth as Second Defendant, and the Minister for Finance and Deregulation as Third Defendant. The Fourth Defendant, Scripture Union Queensland, made separate submissions. Each of the States and the Churches' Commission on Education Incorporated intervened and made submissions.

The proceedings were commenced in the original jurisdiction of the High Court conferred by section 75(iii) and 75(v) of the Constitution and section 30 of the *Judiciary Act* 1903 (Cth).

Issues before the Court

The Plaintiff called upon the Court to decide the following questions:

1. **Standing:** Does the Plaintiff, Mr Ronald Williams, have standing to bring a challenge and subsequently seek the relief claimed in his writ of summons?
2. **Appropriations:** Is the drawing and expenditure of funds from the Consolidated Revenue Fund for the purposes of the NSCP, and therefore for the purpose of making payments pursuant to the Funding Agreement, authorised by the relevant appropriation legislation?
3. **Executive Power:** Is the Funding Agreement beyond the executive power of the Commonwealth to the extent that the executive power of the Commonwealth includes:
    a. the power to enter into contracts in respect of which the Constitution confers legislative power of the Commonwealth?
    b. the power to enter into contracts in respect of benefits for students within the meaning of section 51 (xxiiiA) of the Constitution?
    c. the power to enter into contracts in respect of trading corporations within the meaning of section 51 (xx) of the Constitution?
4. **Section 116**: Does the Funding Agreement breach the requirement in section 116 of the Constitution that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth?"

Standing

The first issue considered by the Court was whether the Plaintiff had the necessary standing to bring a challenge.

Questions of standing are subsumed within the constitutional requirement that there be a "matter" or "justiciable controversy" for the Court to decide.[3] Justice Gibbs (as he then was) in *Australian Conservation Foundation v Commonwealth*[4] said that for a person to have standing before the Court they must have a special interest in the matter. That must be something more than "a mere intellectual or emotional concern." As His Honour put it:

> a person is not interested . . . unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds, or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.[5]

The arguments with regards to standing can be broken down into two components:

1. Does the Plaintiff have a necessary special interest in the matter?
2. Would success in the matter confer upon the Plaintiff the necessary advantage, given that all payments under the agreement had been made and it was due to expire?

Special interest

The Plaintiff's case was brought before the High Court in his capacity as a parent of students at the Darling Heights State School. The Plaintiff objected[6] to the presence of chaplains at the school, and said that their work had resulted in there being a non-secular, pro-Christian culture at the school. He argued that there should be a "wall of separation" between the church and the state, and that the presence of chaplains in public schools has eroded that separation.

The Plaintiff said that he had the "special interest" necessary to challenge the Agreement, because his children attend a school in respect of which funds have been expended by the Commonwealth.[7]

The Commonwealth did not dispute the Plaintiff's standing to challenge the validity of the Agreement and the power of the Commonwealth to continue to make payments under it, relying on the principle that a contract which bound the Commonwealth to do something which it was not constitutionally permitted to do would be invalid.[8] However, the Commonwealth contested the Plaintiff's standing to challenge the validity of the drawing of money from the Consolidated Revenue Fund. It argued that the Plaintiff's special interest in the *expenditure* of Commonwealth money does not give him standing to challenge the appropriation itself or to raise questions as to its scope. Further, the Plaintiff has no interest in the appropriation of money from the Consolidated Revenue Fund beyond that of any other member of the public – a class of persons too remote to have standing.[9]

The Commonwealth noted that the High Court in *Victoria v The Commonwealth* (*the AAP Case*) held that Appropriation Acts are fiscal rather than regulatory in character[10] and, therefore, "a citizen has no interest in money standing to the credit of the Consolidated Revenue Fund such as to support a contention that a payment to another from the Fund is not authorised by an appropriation."[11] This submission was adopted by Queensland[12] and South Australia.[13]

Of course, the Attorney-General of Queensland was correct to observe that the concessions made by some parties as to standing do not bind the Court.[14]

The Plaintiff had relied on the decision of the Court in *Pape v Commissioner of Taxation*[15] as it related to standing. In *Pape* it had been argued against the plaintiff that although he had sufficient interest to challenge the payment to him of a $900.00 "tax bonus" from the Commonwealth, he did not have standing to seek a wide declaration that the Act providing for it was invalid. The Court held that Mr Pape did have the necessary standing for both purposes. It was noted by Heydon and Kiefel JJ that to hold otherwise would have serious implications for the rule of law.[16]

Queensland argued that the facts of *Pape* could be distinguished from the Plaintiff's circumstances. Mr Pape was a personal recipient of the payment he challenged. In contrast, Mr Williams is not a direct party to the Agreement or even an indirect recipient of its benefits.[17] Mr Williams's children have never participated in the NSCP, nor do they have an obligation to do so. There was nothing before the Court to suggest Mr Williams wished to be a counsellor or a mentor to other children at the Darling Heights State School and that the Agreement provides an obstacle to him by imposing a religious observance.[18]

Effluxion of time

For a constitutional "matter" to exist, there must be a real, as opposed to theoretical, controversy between the parties. The Commonwealth and SUQ argued that, because the Agreement had been signed two years before Mr Williams' children enrolled at the school, and all relevant monies had been paid by the time of the challenge, there was no longer such a controversy.[19]

The Plaintiff argued "that funds expended during financial years prior to the enrolment of any of his children at the School assisted in entrenching a program which now affects his children at that School", such that there remained a justiciable controversy.[20]

There can be no standing where the matter to be heard is one over which the Court could not grant a remedy. SUQ argued, "As no further payments are due to be made under the Agreement, and no further funds are to be drawn prior to the expiry of the agreement on 31 December 2011 pursuant to any Appropriation Act, there is no proper basis for any relief to be granted against the defendants."[21] Even if Mr Williams's arguments were good, in circumstances where the contract had run its course there would be no remedy available to correct the wrong identified. If there is no legal remedy for a wrong, there can be no matter for the purposes of Chapter III of the Constitution.[22]

The Plaintiff's answer to this was that the mere fact of the Agreement's expiry does not deprive him of standing to allege that there was no appropriation. As his Counsel expressed it, there is just a much standing in order to put an argument based upon the current arrangement and its efficacy and validity, given the obvious intention that the scheme continue, as there would be if there were still payments about to be made under the current arrangement . . . [because] there is no suggestion this is intended to be a one-off arrangement.[23]

In my view there is some strength in the arguments made by the Commonwealth and Queensland, and the Court's decision will be an interesting development in this field.

Appropriations

The Plaintiff argued that the Commonwealth had not passed a valid appropriation to authorise the funding of the NSCP. He said:

> [T]he relevant Appropriation Acts, beginning with the 2006-2007 *Appropriation Act (No 3)* (Cth) and continuing with the 2011-2012 *Appropriation Act (No 1)* (Cth) – each entitled 'An Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government and for related purposes' – did not and do not authorise the drawing of money from the Consolidated Revenue Fund for the purposes of the NSCP on the basis that the NSCP was and remains outside of the concept of 'ordinary annual services of the Government' as understood between the Houses of Parliament.[24]

The Plaintiff's submission is based on the notion that there is an understanding between the House of Representatives and Senate to the effect that new policies, which have not been authorised by their own legislation, will not be provided for within Appropriation Acts, which are reserved for drawings for the "ordinary annual services of the Government."[25] He argued that the 2006-2007 *Appropriation Act (No 3)* (Cth), which was the first Act to allocate funds for the NSCP, did so for a new policy initiative in breach of this understanding.

This argument must be considered against the background of section 53 and section 54 of the *Constitution*, which together relevantly provide that the Senate does not have the power to amend proposed laws appropriating revenue for the ordinary services of the government, and that such laws shall deal only with such an appropriation.

The understanding on which the Plaintiff relies is what is known as the "1965 Compact,"[26] an agreement between the Senate and the Government that arose from an attempt by the Government

to "place in the non-amendable annual appropriation bills provision for some matters which were traditionally regarded as not forming part of the ordinary annual services [of the Government]."

A statement was made on behalf of the Government, indicating that certain items would not be regarded as falling within the scope of the definition of the ordinary services of the government. Those items included construction of public works and buildings, acquisition of land and buildings, capital expenditure on plant and equipment, section 96 grants to the States and "new policies not authorised by special legislation, subsequent appropriations for such items to be included in the appropriation bill not subject to amendment by the Senate."[27]

The Compact was reaffirmed by resolution of the Senate in 1977[28] and adjustments to the inclusions have been made on a number of occasions since that time. Most notably, from 2005 to 2008 there were instances both of the inclusion of expenditure outside the definition of the ordinary services of the Government and calls from Senate committees to clarify and resolve the position in relation to spending of that kind.[29]

The Commonwealth argued that the Plaintiff's argument must fail because:

1. The relevant Appropriation Acts clearly and expressly authorised the drawing of funds for the purposes of the NSCP, such that there is no need to resort to the consideration of the long title to understand the operation of those Acts;[30]
2. The history of the Australian Parliament does not support the existence of an "understanding" between the Houses which is so settled that it should be enforced. Rather, since 1965 there has been an "ongoing and unresolved dialogue" about this issue;[31]
3. Even if the first time an appropriation was made for the NSCP, in 2006-2007 *Appropriation Act (No 3)* (Cth), there had been reasonable cause for objection, the subsequent Appropriation Acts dealt with truly continuing, rather than new policies and so fall within that definition of the ordinary services of the government. To the extent that the Plaintiff has the right to challenge the appropriation (which was not conceded[32]), he could only do so for the current one, which the Commonwealth argued was without defect.[33]

The Scripture Union also observed that the practice enunciated in the 1965 Compact was variously adopted and abandoned in the period from 1901 to 1965, demonstrating that it was not a convention fixed for all time.

On balance, the first argument expressed by the Commonwealth is likely to be preferred.[34]

Executive power

The most interesting, and potentially the most significant, arguments in the case centre upon the scope of the executive power.

The Plaintiff argued that neither:

1. the executive's power to enter into contracts outside the scope of matters within the legislative power of the Commonwealth; nor
2. the executive's power to contract in respect of benefits to students under section 51 (xxiiiA); nor
3. the executive's power to contract in respect of trading corporations, under section 51 (xx);

were sufficient to support the Darling Heights Funding Agreement and by extension, all contracts to effect the NSCP are invalid.

Section 61 – the power of the Executive Government to enter into the Agreement

The first of the Plaintiff's three questions is one of great significance. To use some of the words mentioned in the submissions made before the Court, it requires examination of the largely untested

assumption that executive power shadows the heads of legislative power in section 51 of the Constitution.[35]

It is useful at this juncture to summarise the sources of Commonwealth executive power:

1. those conferred under section 61 (as supplemented by those conferred on the Governor-General);
2. those conferred by statute;
3. those derived from the prerogatives of the Crown;
4. those emanating from the status of the Crown as a person; and
5. those deriving from Australia's status as a nation.[36]

This case particularly examined the power of the executive to contract, a power emanating from the status of the Crown as a person.

The executive power of the Commonwealth to enter into contracts is not unlimited, and extends at least to the capacity to contract in relation to matters which have been or could be the subject of valid legislation.[37] It also extends to those powers and capacities derived from the character and status of the Commonwealth as a national polity,[38] which include circumstances such as those which were considered by the Court in *Pape*.[39] This power is limited to engagement by the executive "in activities and enterprises peculiarly adapted to the government of the country," and does not extend to "any subject, which the Executive Government regards as of national interest and concern."[40]

When considering the areas into which the executive power will extend based on that national character, regard must be had to the distribution of powers between the Commonwealth and the States. As Western Australia said in its submissions,

> [t]he 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.[41]

The Plaintiff,[42] New South Wales,[43] Tasmania,[44] Victoria[45] and Western Australia argued that where there is no relevant head of legislative power, the Funding Agreement must be outside the scope of the executive power of the Commonwealth because it cannot be described as arising peculiarly from the status of Australia as a national polity.[46]

In contrast, the Commonwealth and SUQ[47] argued that while the executive powers of a governmental nature and special privileges enjoyed by the Crown are to be exercised only to the extent that to do so is consistent with the division of legislative powers effected by the Constitution, that rule should not apply in relation to the capacity of the Commonwealth to spend money. That is because the power to spend is not something uniquely governmental or an aspect of the prerogative, but it is in the nature of an act within the power of *any* person. They added that Commonwealth spending does not displace the laws of a State or territory, such that it might impinge on the principle in *Davis v The Commonwealth.*[48]

The Commonwealth relied upon the following comment by Gummow, Crennan and Bell JJ in *Pape*:

> What are the respective spheres of exercise of executive power by the Commonwealth and State governments? We have posed the question in that way because it is only by some constraint having its source in the position of the Executive Governments of the States that the government of the Commonwealth is denied the power, after appropriation by the Parliament, of expenditure of moneys raised by taxation imposed by the Parliament. Otherwise, there appears to be no good reason to treat the executive power recognised

> in section 61 of the *Constitution* as being, in matters of the raising and expenditure of public moneys, any less than that of the executive in the United Kingdom at the time of the inauguration of the Commonwealth.[49]

Relying upon this statement, the Commonwealth contended that it was not excluded from spending in relation to certain areas to leave the field clear for the States, because its spending posed no "threat to the position" of the States' executive governments.

The Commonwealth added that to confine its power to spend in line with the distribution of legislative power in the Constitution would ignore the effect of its broad taxing power. In doing so, it cited the same judgment in *Pape*:[50]

Further, to say that the power of the Executive Government of the Commonwealth to expend moneys appropriated by the Parliament is constrained by matters to which the federal legislative power may be addressed gives insufficient weight to the significant place in section 51 of the power to make laws with respect to taxation.

In essence, the Commonwealth argued that because the power to tax is broad, so too is the executive's power to spend.

It is worth examining the way in which the Court has, during recent decades, clarified (and to some extent expanded), the scope of executive power that may be exercised without a head of legislative power.

In 1975, Gibbs J in the *AAP Case* stated the principle as: "[T]he executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth."[51] In oral argument, at least Gummow and Hayne JJ commented that this was today "too narrow" a construction of the executive's power.

By 1988, in *Davis v Commonwealth,* it was held by Mason CJ, Deane and Gaudron JJ that the executive could act beyond the legislative competence of the Commonwealth, where that action had the following character: "[T]he 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."[52]

In the same case, Brennan J said that the process of determining whether a certain act lies within the executive power of the Commonwealth: "[I]nvites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question or the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit."[53]

By 2009 executive power had, by the decision in *Pape*, been expressed to include, as well, short-term fiscal measures to respond to a national crisis in economic conditions. Other cases had also held that it included the power to establish a body for commemoration of the bicentenary[54] and the making of a request to a foreign state for the detention of a fugitive.[55]

In this case the High Court may decline to further fill out the meaning and scope of executive power. However, if it chooses to walk through the door opened ever-so-slightly by *Pape*, it could have a dramatic impact upon the relationship between the States and the Commonwealth.

In my view, it is this point that will provide the most fertile ground for the development of the law.

Benefits to students

The parties argued their cases upon the (reasonable) basis that if there were an intersection between section 61 and a head of legislative power, it would provide a footing for the exercise of the executive power to spend money on the NSCP.

In my view the strongest of the arguments made in favour of the validity of the arrangements for funding the NSCP was that which relied on the intersection between section 61 and section 51 (xxiiiA) which provides that the Commonwealth shall have power to make laws with respect to "the

provision of . . . benefits to students." That is, the Commonwealth would have executive power to fund the NSCP under section 61 provided that the program could be shown to fall within the scope of this head of legislative power.

The case made against validity on this ground

The Plaintiff, Western Australia and Victoria argued that the intersection of section 61 and section 51(xxiiiA) would not support the constitutionality of the NSCP.

The meaning of "benefits"

First, it was argued that the use of the word "benefits" in that subsection should be understood to refer solely to payments of money directly to the party in individual need, as opposed to the payment of funds to a third party (SUQ) for it to provide services to students. The Plaintiff characterised appropriations of the latter kind as of general social benefit, rather than a direct benefit to a particular student.[56] In support of this view, the Plaintiff cited the decision of Dixon J in *British Medical Association v The Commonwealth*,[57] in which His Honour considered the history of the use of the word "benefits" in the vocabulary of friendly and benefit societies to refer to payments in money and provision of medical attention for contributing members and their dependants.[58]

The Plaintiff contended that there was a distinction between "a benefit", which refers to a particular result that is generally beneficial, and "benefits", which is a reference to a monetary payment directed to a particular individual. It was argued that, to fall within section 51(xxiiiA), a benefit needed to be, first, a benefit in money or money's worth to or for individual students and not simply students as a class or as a whole; and, second, it must be money directed to meeting a need in their capacity as a student.[59] The Plaintiff suggested that the manner in which section 51(xxiiiA) was discussed in the lead-up to the referendum regarding whether it should be inserted into the Constitution reflects an understanding that it was intended to encompass the payment of various social security-style benefits, rather than the indirect provision of social services.[60]

Chaplaincy as the provision of education

Second, it was argued that the structure of section 51(xxiiiA) could not support the provision of educational services. This argument is closely related to the first, and is about whether or not the provision of the service has a sufficient relationship to the activity of being a student. The Plaintiff argued that the provision of chaplaincy services benefits students in the same way that the existence of the education system as a whole, or a school department, benefits students, but that it does not fall within the idea of "benefits to students" in the sense it is used in section 51(xxiiiA).[61]

Western Australia explained the argument thus: the use of the word "students" in section 51(xxiiiA) means that eligibility for any "benefit" under the section is predicated on the person being already enrolled in an educational institution. The implication is that the power cannot extend to the establishment of schools and other educational institutions, or the provision of education by the Commonwealth. As chaplaincy services comprise part of the operation of a school, they cannot be within the scope of the power.

A benefit to students alone

Third, it was argued by the Plaintiff and Western Australia that chaplaincy services cannot be characterised as a benefit that is given to students, because it is not given to students alone. Rather, it is provided to the whole of a school community, including teachers and parents.

This argument takes a practical view of the role of chaplains. SUQ argued that the availability of chaplaincy services in schools is a direct resource available to students in their journey of learning. Any assistance they provide to other members of the school community is a mere incident of their primary role and does not detract from the validity of the arrangement.

The case made in favour of validity on this ground

The Commonwealth,[62] Scripture Union,[63] Queensland[64] and South Australia[65] argued that the NSCP came within the scope of the head of power in section 51(xxiiiA) such that the executive power could be used to give effect to the Agreement.

The Churches' Commission on Education Incorporated largely agreed with the submissions made by these parties.[66]

The meaning of "benefits"

In essence this argument was that the word "benefits" should be understood to encompass direct payments to students as well as the provision of goods and services to them, whether conferred directly or indirectly.

In *British Medical Association v The Commonwealth,* Dixon J said:

> The general sense of the word 'benefit' covers anything tending to the profit advantage or gain or good of a man and is very indefinite. But it is used in a rather more specialised application in reference to what are now called social services; it is used as a word covering provisions made to meet needs arising from special conditions with a recognised incidence in communities or from particular situations or pursuits such as that of a student, whether the provision takes the form of money payments or the supply of things or services.[67]

This statement, in my view, provides some support for an understanding of "benefits" that encompasses both direct payments of money and the indirect provision of money for the supply of services. The Court expressed a similar view in *Alexandra Private Hospital v The Commonwealth*: "the concept intended by the use in the paragraph of the word 'benefits' is not confined to a grant of money or some other commodity. It may encompass the provision of a service of services."[68]

In my view, this is the better view on the definition of "benefits".

Chaplaincy as the provision of education

The same parties argued that, upon an interpretation of the section using all of the generality that the words used admit,[69] the Commonwealth was not prevented from involving itself in the provision of education. In the event that such a limit existed, it would not prevent the provision of services to students that overlapped or interacted with learning itself.

In its submission, Queensland explained that the *Education Act* 1945 (Cth), which existed at the time of the insertion of section 51(xxiiiA), and the validity of which cannot have been intended to be disturbed by the amendment, provided for a Universities Commission with broad powers to arrange for the training of discharged members of the armed forces, and to assist other persons to obtain training. It argued that this suggests the section was intended to encompass a broad range of services and (perhaps less relevantly) a broad definition of "students."[70] This example weighs against Western Australia's argument that the Commonwealth must not fund the provision of education services.

A benefit to students alone

The Commonwealth further argued that where services were also provided incidentally to other members of the school community (such as parents or teachers) this would not mean the chaplaincy was any less a "benefit to students."

Conclusion on "benefits to students"

On balance, I think the view of the Commonwealth, SUQ, the Churches' Commission and Queensland should be preferred on this point. The remarks of the Court in *Alexandra Private Hospital*

and *British Medical Association,* along with the historical context of the *Education Act* 1945 (Cth), support a meaning for the word "benefits" that is not so confined as was argued by the Plaintiff.

Is Scripture Union Queensland a trading corporation?

The High Court heard argument from the parties about whether or not the executive had power to enter into the Funding Agreement because it came within the scope of the head of power in section 51 (xx) of the Constitution.

With reference to its activities, objects and sources of income, the Plaintiff argued that SUQ could not be characterised as a trading corporation[71] and further submitted that even if it could be so characterised, that alone would be insufficient for the Funding Agreement to come within the ambit of the Commonwealth's power.[72] The Plaintiff noted that the Funding Agreement does not require that a recipient of funding under its terms be a trading corporation, and that the Guidelines contemplate agreements with "school registered entities" and State and Territory authorities. He argued that it would be an absurdity for a funding arrangement to be valid purely on the basis of the structure of the entity receiving funding, rather than on the basis of the character of the arrangement.

Most of the States also argued that the Funding Agreement could not be supported on this basis.[73] New South Wales contended that even if SUQ is a trading corporation, that does not mean the Agreement is authorised by section 51(xx), because it is the subject matter of the contract, rather than the identity of the contracting party, which is relevant to determining whether section 51(xx) applies in the circumstances of the case. To hold otherwise would allow the executive to contract its way into power simply by entering a contract with a constitutional corporation.[74]

The Commonwealth analysed the activities, characteristics and capacities of SUQ and determined that "both the Commonwealth's entry into the Agreement and the payment of money to SUQ pursuant to that agreement are within the executive power of the Commonwealth, by reason of SUQ's character as a trading corporation."[75] SUQ made the same argument.

Without delving into the history of the authorities on the scope of the corporations power, the recent authority of the Court in *Work Choices*[76] makes it clear that the most substantial limit on the corporations power is the character of corporations with respect to which laws may be made. In my view, SUQ's true character is charitable. Its objects are for the advancement of religion, all of its income is applied to that purpose, and there is no mechanism for the distribution of profit to members, as would be the case in a commercial enterprise. Taking into account the activities of the SUQ,[77] the limited degree to which trading activity characterises its overall operations and the purposes for which that trade occurs, in my view, the Court is unlikely to hold that the Funding Agreement is supported on this basis.

Section 116

It is this facet of the case that has most captured public debate.

The Plaintiff argued that section 116 of the Constitution, which provides, *inter alia*, that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth," prohibits the federal funding of school chaplains.

The Plaintiff argued that school chaplains, as defined by the NSCP (that definition is set out under the heading "The NSCP and Darling Heights State School Funding Agreement"), hold an office under the Commonwealth, and that there is effectively a religious test for the role.

Office under the Commonwealth

The Plaintiff contended that the NSCP Guidelines and Code of Conduct regulate interactions between chaplains and consumers of their services to such an extent that DEEWR has effective power to control the commencement and cessation of chaplaincy services. The Plaintiff contended that this level of control is consistent with the proposition that school chaplains are holders of offices

under the Commonwealth within the meaning of section 116 of the Constitution.[78]

The Commonwealth, SUQ, Queensland and South Australia all contended that a SUQ chaplain does not hold an office "under the Commonwealth" within the meaning of section 116 because the chaplains are not engaged in the exercise of public power, nor are they under the effective control of the Commonwealth.[79]

The Commonwealth explained that "office . . . under the Commonwealth" is to be understood as meaning a position in which there is a direct relationship between the Commonwealth and an office. It argued that, "school chaplains are not paid by, do not report to and have no direct relationship with the Commonwealth, but rather school principals are responsible for overseeing the delivery of chaplaincy services within schools. Accordingly, there is no warrant in section 116 for such a broad notion of 'office' and this approach, if accepted, would also radically expand the scope of section 75(v)."[80]

On this score, the Commonwealth is right. Were this arrangement to constitute an office under the Commonwealth, one could expect consequences rippling across every entity with which the Commonwealth contracts.[81] It is unlikely to succeed.

Religious test

SUQ referred to the NSCP Guidelines and asserted, "In any event, the Agreement and the NSCP do not require a chaplain to satisfy a religious test . . . as in order to qualify for funding under the Agreement and NSCP, chaplains can be from any religious persuasion or may be a secular pastoral worker."[82] Although the NSCP Guidelines indicate that persons of any religious affiliation can be a chaplain, it could be argued that the requirement for chaplains to state their religious affiliation in general could constitute a religious test.

> Even if this were to be the case, SUQ rightly notes that: the fact that the Commonwealth is the source of funding for the engagement of the chaplain by SUQ cannot transform the chaplain's legal relationship with the SUQ and the Darling Heights school principal into a relationship under which the chaplain is holding any office under the Commonwealth. Likewise, because the State of Queensland also provides funding for chaplains . . . this does not result in the chaplains holding any office under the State.[83]

Conclusion on section 116

Mr Williams's argument on section 116 must fail. For it to succeed, "an office under the Commonwealth" would be defined to include a person neither appointed by the Commonwealth, nor with powers conferred upon him or her by statute. Here, the chaplain was employed by SUQ and provided services as determined between the school and SUQ. If the argument were to succeed, it would have an absurd result for a whole range of circumstances in which people are employed to provide a service by non-government entities that receive some government funding, or who work for entities that contract with the Commonwealth.

This part of section 116 of the Constitution was based on Article IV of the United States Constitution.[84] While there is little Australian jurisprudence on the meaning of the word "office" in this context, in United States jurisprudence the term has been understood as a delegation of sovereign power to the person in question for the service of the public.[85] An NSCP chaplain does not meet this definition.

One also observes that the definition of chaplain in the NSCP Guidelines contemplates the inclusion of secular but appropriately qualified pastoral care workers, not merely those provided through religious organisations. This provides a further practical reason why the challenge on this ground should not succeed.

There is some irony in the fact that this is the argument that has most members of the public

interested in the case. The misconception of many commentators is that section 116 demands a complete separation of church and state in Australia, and in public debates and commentary about the case, this is the issue that dominates. In reality, section 116 provides a far narrower restriction.

Further Observations

What is the current status of the NSCP?

The case arises in an interesting political context. Both major parties have during their time in government supported Commonwealth funding of school chaplains. The program was announced by then Prime Minister, John Howard, in 2006, and re-affirmed in 2009 by then Prime Minister, Kevin Rudd.

In August 2010, Prime Minister Julia Gillard announced that a further $222 million would be provided so that schools with existing funding arrangements under the NSCP would have their programs funded up to the end of 2014. This will also allow the program to expand to up to 1,000 additional schools, including those in rural, remote and disadvantaged locations. In August 2011 major changes to the Program were announced and the program was subsequently renamed the National School Chaplaincy and Student Welfare Program.

Conclusion

Given the nature of Mr Williams's complaint, one might have expected the challenge to centre on section 116 of the Constitution. Although this ground is argued, the real prospects of the case lie in the scope of the power of the executive.

The High Court's decision on the validity of the arrangements in place for the federal funding of school chaplaincy have the potential to have a substantial impact on the economic relationship between the Commonwealth and the States. Furthermore, if the Court were to take the opportunity to walk through the door opened by Gummow, Crennan and Bell JJ in *Pape*, it would widen the scope of the executive power of the Commonwealth.

Finally, it is worth noting that, whilst the work of school chaplains would be disrupted by a finding that the NSCP is unconstitutional, there is no barrier to the continuation of funding using tied grants under section 96 of the Constitution. The only obstacle would be political will, and if the major parties stay true to their previous public statements, that should be a hurdle easily overcome. In contrast, however, the effect upon the federal balance arising from a finding of a broad executive power would be an egg not easily unscrambled.

* Amanda Stoker gratefully acknowledges the assistance of Stephanie Nielsen in the preparation of this paper.

Endnotes

1. Plaintiff's Amended Submissions, 24 June 2011, p 2.
2. Ibid, 3.
3. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 68 (Gummow, Crennan and Bell JJ).
4. (1980) 146 CLR 494.
5. (1980) 146 CLR 494, 530-31.

6. On his website: www.highcourtchallenge.com, and in media interviews.

7. In contrast to the non-state parties in *Attorney-General (Victoria) ex rel Black v Commonwealth* (the DOGS Case) (1981) 146 CLR 559, 597. Plaintiff's Amended Submissions, 24 June 2011, 10 at [41].

8. Submissions of the First, Second and Third Defendants, 11 July 2011, 6.

9. Ibid, p 2; *Anderson v Commonwealth* (1932) 47 CLR 50; *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

10. *Victoria v The Commonwealth (AAP Case)* (1975) CLR 338, 386-87 (Stephen J), 392-93 (Mason J).

11. Submissions of First, Second and Third Defendants, 11 July 2011, p 2; *AAP Case* (1975) 134 CLR 338, 402 (Mason J); see also *Attorney-General (Vict.) v The Commonwealth* (Pharmaceutical Benefits Case) (1945) 71 CLR 237, 248 (Latham CJ).

12. Written Submissions of the Attorney-General for Queensland (Intervening), 20 July 2011, 2.

13. Written Submissions of the Attorney-General for South Australia (Intervening), 20 July 2011, 2.

14. Queensland submitted that the Court has never been bound to accept the concessions of parties as to constitutional issues and referred to *Coleman v Power* (2004) 220 CLR 1, 231-32 (Kirby J), 298 (Callinan J), 318 (Heydon J) and *Croome v Tasmania* (1997) 191 CLR 119, 127 where the Court considered the "correctness" of concessions that were made, and contended that a concession made by the parties should never be determinative.

15. (2009) 238 CLR 1.

16. (2009) 238 CLR 1, 99 at [274], although their Honours did not find it necessary to finally decide the matter.

17. The Plaintiff further argued that "being a stranger to a contract does not, of itself preclude one from obtaining a declaration that the contract is wholly or partly void, provided one can establish the requisite interest to support such relief." Plaintiff's Submissions in Reply, p 4; *Adamson v New South Wales Rugby League Limited* (1991) 31 FCR 232, 265-66; *Buckley v Tutty* (1971) 125 CLR 353.

18. Written Submissions of the Attorney - General for Queensland (Intervening), 20 July 2011, p 4.

19. Plaintiff's Amended Submissions, 24 June 2011, p 3 "The plaintiff has had children enrolled at the School since 5 October 2009." Submissions of the First, Second and Third Defendants, 11 July 2011, p 6.

20. Plaintiff's Amended Submissions, p10.

21. Fourth Defendant's Submissions, p 4 at [18].

22. Ibid, pp 3, 5.

23. Transcript of Proceedings, *Williams v Commonwealth of Australia & Ors* [2011] HCATrans 198 (9 August 2011), p14 at [542] – [547].

24. First, Second and Third Defendant's Submissions, 20 July 2011, 2 – 3.

25. Plaintiff's Amended Submissions, 24 June 2011, 12 – 15.

26. A detailed history of the Compact can be found in Odgers, *Australian Senate Practice*, 6th Ed

(1991), 580 – 83.

27. *Odgers' Australian Senate Practice*, 12th Ed., chapter 13, available online at http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers/chap13

28. 17 February 1977, see *Odgers'*, ibid.

29. *Odgers'*, ibid. See also the Fourth Defendant's Submissions, 26 July 2011, 12 - 16.

30. Submissions of the First, Second and Third Defendants, 11 July 2011, 3.

31. Submissions of the First, Second and Third Defendants, 11 July 2011, 3 – 4. As the Fourth defendant described it at p 13 of its submissions, "The Compact of 1965 does not, by any means, represent the final word on the ordinary annual services of Government."

32. Submissions of the First, Second and Third Defendants, 11 July 2011, 6.

33. Submissions of the First, Second and Third Defendants, 11 July 2011, 5 – 6.

34. Also advanced by SUQ and Queensland: Fourth Defendant's Submissions, 26 July 2011, 17-19; Submissions of the Attorney-General for Queensland (Intervening), 20 July 2011, 2. Tasmania, Western Australia, South Australia, New South Wales and Victoria made no submissions with respect to this ground.

35. *Williams v Commonwealth of Australia & Ors* [2011] HCATrans 198 (9 August 2011), p 6, [181]-[183].

36. A. Twomey, 'Pushing the Boundaries of Executive Power – Pape, the Prerogative and Nationhood Powers,' (2010) 34 MULR 280.

37. *AAP Case* (1975) 134 CLR 328, 362-63 (Barwick CJ).

38. *Davis v The Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ).

39. (2009) 238 CLR 1, 83 (Gummow, Crennan and Bell JJ) at [214] – [215].

40. (2009) 238 CLR 1, 88 (Gummow, Crennan and Bell J) [228].

41. Written Submissions of The Attorney-General of Western Australia (Intervening), 1 July 2011, 3 citing *Davis v The Commonwealth* (1988) 166 CLR 79, 93 – 94, (Mason CJ, Deane and Gaudron JJ).

42. Plaintiff's Amended Submissions, 24 June 2011, 5.

43. Submissions of the Attorney-General for New South Wales (Intervening), 18 July 2011, 11.

44. Tasmania adopted New South Wales Submissions; Written Submissions of the Attorney-General of Tasmania (Intervening) 20 July 2011, p 2; Submissions of the Attorney-General for New South Wales (Intervening), 18 July 2011, 11.

45. Submissions of the Attorney-General For Victoria (Intervening), 20 July 2011, 18.

46. Written Submissions of The Attorney-General of Western Australia (Intervening), 1 July 2011, 3.

47. Fourth Defendant's Submissions, 26 July 2011, p 15.

48. (1988) 166 CLR 79.

49. (2009) 238 CLR 1, 85 (Gummow, Crennan and Bell JJ) at [220].

50. (2009) 238 CLR 1, 91 (Gummow, Crennan and Bell JJ) at [240].

51. *Victoria v The Commonwealth & Hayden* (the AAP Case) (1975) 134 CLR 338, 362.

52. (1988) 166 CLR 79, 93-94.

53. (1988) 166 CLR 79, 111.

54. *Davis v The Commonwealth* (1988) 166 CLR 79.

55. *Barton v The Commonwealth* (1974) 131 CLR 477.

56. Transcript of Proceedings, *Williams v Commonwealth of Australia & Ors* [2011] HCATrans 198 (9 August 2011), p 28, at [1145] – [1151], [1179] – [1185].

57. (1949) 79 CLR 201.

58. (1949) 79 CLR 201, 259.

59. Transcript of Proceedings, *Williams v Commonwealth of Australia & Ors* [2011] HCATrans 198 (9 August 2011), p 29 at [1216] – [1223].

60. Ibid, pp 32 – 33, at [1370] – [1411].

61. Transcript of Proceedings, *Williams v Commonwealth of Australia & Ors* [2011] HCATrans 198 (9 August 2011), p 30 at [1253] – [1269].

62. Submissions of the First, Second and Third Defendants, 11 July 2011, 7 -9.

63. Fourth Defendant's Submissions, 26 July 2011, 6 -9.

64. Written Submissions of the Attorney-General for Queensland (Intervening), 20 July 2011, 4 -7.

65. Written Submissions of the Attorney-General for the State of South Australia (Intervening), 20 July 2011, 14 – 16.

66. Proposed Submissions on Behalf of the Churches' Commission of Education Incorporated (Applicant For Leave to Intervene), 29 July 2011, 6-15.

67. (1949) 79 CLR 201, 260.

68. (1987) 162 CLR 271 at 279.

69. *Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479, 492 at [16].

70. Written Submissions of the Attorney-General for Queensland (Intervening), 20 July 2011, 6-7.

71. Plaintiff's Amended Submissions, 24 June 2011, 9.

72. Ibid, 8.

73. Submissions of the Attorney-General of Western Australia (Intervening), 1 July 2011, 4-15; Submissions of the Attorney General for Tasmania, 20 July 2011, 2; Submissions of the Attorney-General for the State of South Australia (Intervening), 20 July 2011, 9 -13; Submissions of the Attorney-General for Victoria, 20 July 2011, 4 - 10; Submissions of the Attorney General for New South Wales, 18 July 2011, 12 - 15.

74. Submissions of the Attorney General for New South Wales, 18 July 2011, 13 – 14.

75. Submissions of the First, Second and Third Defendants, 11 July 2011, 14.

76. *New South Wales v The Commonwealth* (2006) 229 CLR 1 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

77. *R v Trade Practices Tribunal*; *ex-parte St George County Council* (1974) 130 CLR 533.

78. Plaintiff's Amended Submissions, 24 June 2011, 19-20.

79. Submissions of the First, Second and Third Defendant, 11 July 2011, p 17 – 19; Fourth Defendant's Submissions, 26 July 2011, 16 – 17; Written Submissions of the Attorney-General for Queensland (Intervening), 20 July 2011, 7 – 8; Written Submissions of the Attorney-General for the State of South Australia (Intervening), 20 July 2011, 16-20.

80. Submissions of the First, Second and Third Defendant, 11 July 2011, 18.

81. Submissions of the First, Second and Third Defendant, 11 July 2011, 19.

82. Fourth Defendant's Submissions, 26 July 2011, 17.

83. Fourth Defendant's Submissions, 26 July 2011, 17.

84. Quick and Garran, *Commentaries on the Constitution,* 952.

85. Opinion of the Justices, 3 Greenl. (Me.) (1822) 481 at 482.