Chapter 1

Williams Revisited
The Commonwealth Constrained but Chaplains Resurrected

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Tradition would have it that Henry II once fatefully asked, "Will no one rid me of this turbulent priest?" Ron Williams might well ask himself the same question in relation to chaplains in his children's school.

Williams (No 1)

Mr Williams first challenged the Commonwealth's chaplaincy program in 2010. The argument that motivated his objection to the chaplaincy program – that the Commonwealth could not financially support a chaplaincy program because there was a constitutional separation of Church and State – was rejected by the High Court in *Williams v Commonwealth (No 1)*.[1] The Court, however, upheld his argument that the chaplaincy scheme was invalid because it was not supported by legislation. It was an executive scheme, undertaken by way of grants, guidelines and contracts, with the only legislation involved being the appropriation of the relevant funds by the Parliament.

The High Court had previously held in *Pape v Commissioner of Taxation* that an appropriation is not enough – there must also be a head of Commonwealth power to support expenditure.[2] In *Williams No 1* the Court built on this finding by holding that not only must there be a head of legislative power, but in many cases there must be actual legislation to support the expenditure.[3] The Court, in reaching this conclusion, placed reliance on the principle of federalism,[4] the importance of parliamentary scrutiny of executive action[5] and the fact that it is "public money" that is being expended,[6] so that proper scrutiny and care is important.

The Commonwealth's response

After *Williams No 1,* the Commonwealth responded by the enactment of amendments to the *Financial Management and Accountability Act 1997* (Cth).[7] This included the insertion of section 32B into that Act, which gave statutory validation and authorisation to expenditure that falls within any of more than 400 programs described in the regulations. Some of these descriptions were quite specific, but others were unreasonably broad, such as programs for "Domestic Policy" or "Diversity and Social Cohesion". The legislation was rushed through Parliament in little more than 24 hours with little debate and certainly no scrutiny of the individual programs for which Parliament had given the Executive *carte blanche* to spend. This appeared to defy the point made strongly by the High Court in *Williams No 1* concerning the need for parliamentary scrutiny of executive spending. One of the programs authorised by the legislation was Program 407.013 – "National School Chaplaincy and Student Welfare Program".

Williams (No 2)

This was a red rag to a bull for Ron Williams. He launched a further High Court challenge. This time he challenged the constitutional validity of section 32B and Schedule 1AA of the Regulations which lists the programs authorised by section 32B. Williams argued that they were not supported by a head of legislative power and impermissibly delegated power to the Executive to spend on any matter that could come within these broad and often indeterminate categories. He also argued that there was no head of Commonwealth legislative power to support expenditure on the chaplaincy program in particular.

The Commonwealth responded by arguing that section 32B was supported by every head of Commonwealth power that could be used to support spending on any of the programs set out in the regulations. It argued that there were two heads of power that supported spending upon the chaplaincy program – the corporations power in section 51(xx) of the Constitution and the power to make laws with respect to benefits to students in section 51(xxiiiA).

Mr Williams won again. The High Court in *Williams v Commonwealth (No 2)* unanimously held that there was no head of power to support the chaplaincy program. It was therefore not validly authorised by legislation and was invalid.[8] Yet no one will rid Mr Williams of those turbulent chaplains. Despite the fact that chaplaincy providers had wrongfully received Commonwealth money and were legally obliged to pay it back, the Commonwealth Attorney-General immediately announced that the Minister for Finance had waived any obligation for the repayment to the Commonwealth of the illegally spent money.[9] Not only do chaplaincy providers get to keep the illegally received funds, but the Commonwealth's chaplaincy program, despite being invalid, is continuing to operate in schools throughout the country, with no legal regulation until at least the end of 2014.[10] After that, it will be replaced by conditional grants to the States under section 96 of the Constitution, assuming the States accept the grants offered. Unlike the previous two attempts, this method of funding the chaplaincy scheme will be constitutionally valid. Mr Williams may have won two battles in the High Court, but he appears to have lost the war.

Interesting aspects of the judgments in *Williams (No 2)*

There are a number of interesting aspects to the judgments in *Williams (No 2)*. One of the most neglected, so far, has been the narrow scope given to both the corporations power and the power to legislate with respect to benefits to students. We are so used to the High Court giving ever more expansive interpretations of Commonwealth power that it tends to come as rather a shock when it does not do so.

While this paper will concentrate on the heads of power and the potential ramifications of the High Court's interpretations, it will also conclude with some observations about the continuing doubt concerning the validity and operative effect of section 32B and the High Court's third denial of the Commonwealth's claim to be all powerful when it comes to spending public money.

The Corporations Power

In *Williams No 1,* two Justices raised the prospect that the corporations power in section 51(xx) may not be sufficient to support the expenditure of money by way of grants to trading or

financial corporations. Hayne and Kiefel JJ noted, first, that the chaplaincy scheme was not directed at payments to trading corporations, or, indeed, any corporation. It simply applied to any legal entity affiliated with a religious institution.[11] Secondly, the scheme did not involve the regulation of the business or conduct of the trading corporation or its capacity to make the contract or its relationship with its employees or others. It could therefore not be characterised as being "with respect to" trading or financial corporations.[12] The other Justices considered that they did not need to decide the point.

In *Williams No 2,* six Justices held that the corporations power did not support the chaplaincy scheme, even if the bodies providing the chaplaincy services could be regarded as trading corporations and even if the law was directed specifically at trading or financial corporations.[13] Again the Justices noted that the law involved "makes no provision regulating or permitting any act by or on behalf of" any trading corporation and does not regulate its activities, functions, relationships or business, unlike the law in the *Work Choices* case. It was therefore not a law with respect to trading or financial corporations.[14]

Interestingly, in doing so, the judgment of French CJ, Hayne, Kiefel, Bell and Keane JJ in *Williams No 2* cuts and pastes from the discussion of the question by Hayne J in *Williams No 1*.[15] In both passages the test from *Work Choices* for identifying the type of law that falls within the corporations power was truncated by leaving out reference to laws that extend to "the creation of rights, and privileges belonging to such a corporation [and] the imposition of obligations on it".[16] These missing words are important as it is at least arguable that the making of grants to a trading corporation involves the conferral of rights and interests on the relevant trading corporation.

The problem may have been that the law in question in *Williams No 2*, section 32B, only conferred power on the Commonwealth to make, vary or administer an arrangement under which money is payable by the Commonwealth. It conferred no right on behalf of the recipient to receive the money and no obligations with respect to its use. Perhaps a law making grants to corporations which did confer such rights or interests or imposed obligations on the trading corporation might fall within the corporations power. On the other hand, it may be that the High Court is now reading the corporations power more narrowly than the Court had previously done in the *Work Choices* case. Unfortunately, as the Court did not explain why it had described the *Work Choices* test more narrowly or make any distinction with respect to the application of section 32B, its reasoning remains unknown.

If one takes the *Williams No 2* judgment at face value, the Court has now found by a large majority that a law that merely grants money to a trading corporation is not supported by section 51(xx). This, however, leaves open a further ambiguity as to whether a law that *both* regulates a corporation and grants it money will be supported by the corporations power, or whether the part of the law conferring the grant will not have a sufficient connection with the head of power. If the issue was just about putting the two things in the one Act, that would seem to be a case of form rising over substance. The Commonwealth could give grants to particular corporations simply by adding them to a schedule to the *Corporations Law,* because that law already regulates trading and financial corporations. Such an outcome would seem unlikely. However, there is a more plausible argument that where a grant of money is incidental to the

regulation of a trading corporation, then it is supported by section 51(xxxix) – the incidental power.

On this basis, stand alone grants to trading corporations would seem not to be supported by the corporations power, although they might survive if either: (a) the law making the grant conferred a right on the part of the recipient trading corporation to receive the grant and imposed obligations concerning how the grant was to be used or administered; or (b) the grant was incidental to some form of statutory regulation of the trading corporation, its activities, functions, relationships or business.

As it is, it would seem that the type of *ad hoc* assistance that governments give to particular corporations, such as car manufacturers,[17] vegetable processing plants,[18] or aluminium smelters[19] through the medium of section 32B, may not be supported by the corporations power. They could, of course, be supported by other heads of power. For example, section 51(iii) allows the Commonwealth to make laws with respect to bounties on the production or export of goods, but such bounties have to be uniform throughout the Commonwealth, so it would rule out *ad hoc* assistance for particular manufacturers. The Commonwealth can also legislate with respect to overseas and interstate trade and commerce, but not where it involves intra-state trade and commerce, which would again rule out most grants to manufacturers, because they sell within the State as well as interstate or overseas.

Accordingly, it would be fair to say that a considerable amount of corporate assistance provided by the Commonwealth may in fact amount to illegal payments and be vulnerable to challenge.

Benefits to Students

The second power which the Commonwealth claimed supported its chaplaincy program was section 51(xxiiiA). Section 51 (xxiiiA) permits the Commonwealth to make laws with respect to benefits to students.

Section 51(xxiiiA) of the Constitution is one of the few provisions to be successfully inserted by referendum. It was inserted in 1946 after the High Court struck down the validity of the Commonwealth's pharmaceutical benefits scheme.[20] It is essentially a social security provision, permitting the Commonwealth to pay maternity allowances, widows' pensions, child endowment, unemployment benefits, pharmaceutical, sickness and hospital benefits, medical and dental services, benefits to students and family allowances. Until its enactment, there was nothing in the Constitution that dealt with education, as this was regarded as a State matter. Since 1946 the question has been how far the notion of "benefits to students" allows the Commonwealth to intervene in education. Does it only support "social security" style payments to or in respect of students, or can it also support the provision of services, such as chaplaincy services to students?

The High Court had previously held that section 51(xxiiiA) is not confined to monetary payments and may extend to paying for sickness and hospital benefits to a nursing home provider for the provision of care to nursing home patients.[21] In *Williams No 2,* however, the Court took a very narrow view of the power. It saw it as limited to welfare payments addressed to identified or identifiable students where the payments are directed to the consequences of being a student (such as lack of income and the need to pay for educational expenses).[22] It does

not cover payment for the provision of general services in the school that may or may not be used by particular students. Justice Crennan wrote separately on the point, but agreed that section 51(xxiiiA) did not cover the chaplaincy scheme because it was not a scheme for the provision of services to students "as prescribed and identifiable beneficiaries".[23]

Schools funding

This may affect the validity of a range of Commonwealth grants in the education sphere. For many, it is doubtful whether any head of power supports their existence.[24] These include:

- 407.002 – Child Care Services Support – to assist child care services to provide, support, promote and improve access to quality child care and early learning for children, families and communities.
- 407.005 – School Support – To support initiatives that aim to improve the quality outcomes for all Australian students.
- 407.006 – Teach Next – to address areas of teacher shortages in regional and hard-to-staff schools and to reduce the number of teachers currently teaching outside their subject areas.
- 407.007 – National Trade Cadetship – To deliver a school-based program that provides opportunities for students to undertake vocational learning and develop work readiness skills.
- 407.009 – Australian Baccalaureate – To develop a new voluntary recognised senior school qualification, the Australian Baccalaureate.
- 407.015 – Quality Outcomes – To provide projects that support the objective of improved student learning outcomes in schools and a national leadership role in school education.
- 407.017 – Local Schools Working Together – To encourage Catholic and independent schools to work together to develop shared educational facilities.
- 407.018 – Student Resilience and Wellbeing – To support student resilience and wellbeing.
- 407.036 – Empowering local schools – To support participating schools to make decisions, to better respond to the needs of students and the school community.

Apart from the constitutional validity of these grants, a more fundamental question arises as to why the Commonwealth is funding such programs. Many of them may be worthy, but the point is that it is the States that run education systems, including schools. For the Commonwealth to interfere selectively, dropping money like confetti for pet projects here and there and giving schools incentives to distort their work in order to scrabble for money, is the very *least* efficient way of dealing with education. One can only assume that these programs exist because there is a Commonwealth Department of Education and it takes the view that it should do something or be seen to be doing something, given that it does not have an education system to run. This is not a sensible way to run a government. It will be interesting to see whether the likely invalidity of these grants deters the Commonwealth in any way or nudges it back towards section 96 grants to deal with education.

Universities

More complex issues arise in relation to Commonwealth payments to universities, many of which may now also be suspect. Commonwealth funding to universities, which commenced in 1951, was previously undertaken by way of grants to the States. In 1974, the Whitlam Government offered to take over full funding responsibility for universities in return for the

abolition of fees. The States agreed and the Commonwealth is now the primary source of income for universities, along with student fees. Despite the Commonwealth's financial take-over, its funding continued to be provided by way of Commonwealth grants to the States under section 96 of the Constitution. It was the Keating Government in 1992 which terminated this system and replaced it with direct funding to universities under the *Higher Education Funding Amendment (No 2) Act 1992* (Cth). The constitutional basis for this was believed at the time to be section 81 of the Constitution, perhaps supported by the corporations power and the benefits to students power.[25]

The High Court in the *Pape* case clarified that section 81 only supports appropriations – not the expenditure of the money appropriated.[26] Another head of power is, therefore, needed to support these direct grants to universities.

The High Court in *Williams No 2* put in doubt the application of the corporations power to university funding. The Federal Court had previously held in 2001 in *Quickenden v O'Connor*[27] that the University of Western Australia was a trading corporation for the purposes of section 51(xx). Since then it has been assumed by the Commonwealth that universities are trading corporations, although there remain good reasons to doubt whether the High Court would make such a finding today.[28] In any event, we now know from *Williams No 2* that the corporations power is not sufficient to support the making of stand-alone grants to trading corporations. At the very least, the law that makes the grant must confer rights and impose responsibilities on the trading corporation or be closely connected with, and incidental to, the regulation of the trading corporation by the Commonwealth. While there is a great deal (too much) of Commonwealth regulation of universities, doubt must now be raised as to whether general grants to universities have sufficient connection to that regulation to be supported by the corporations power.

The High Court also made clear in *Williams No 2* that the power to provide benefits to students would not be sufficient to support general university funding, although section 51(xxiiiA) is likely to support direct funding of identifiable students through loans to students and the subsidisation of Commonwealth Supported Places.[29] Crennan J noted that section 51(xxiiiA) would only support subsidies paid to universities where they relate to "education services provided to real or actual persons as prescribed recipients or beneficiaries entitled to those education services".[30] One cannot help but think that she was dropping a hint about where the problems are likely to arise, especially as the *Williams No 2* case concerned schools, not universities.

Division 41 of the *Higher Education Support Act 2003* (Cth) sets out a long list of grants that may be made to universities which would not appear to fall within the scope of section 51(xxiiiA). They include:

- Grants to promote equality of opportunity;
- Grants to promote productivity;
- Grants to support capital development;
- Grants to assist with superannuation liabilities;
- Grants to foster collaboration and reform;
- Grants to support diversity and structural reform;
- Grants to support structural adjustment; and
- Grants to support the development of systemic infrastructure.

Such grants could, of course, validly be made to universities as conditional grants to the States under section 96 of the Constitution. There are also other Commonwealth heads of power that may support some direct grants to universities. For example, it is likely that grants in relation to national research would be supported by the nationhood power;[31] grants in relation to communications infrastructure would be supported by the Commonwealth's power in relation to postal, telegraphic, telephonic and other like services;[32] and grants in relation to international research projects may be supported by the external affairs power. Nonetheless, a wise Commonwealth Government would be reassessing all these grants to ensure that it is not spending money illegally and that university funding is on a sound footing.

The validity of *Financial Management Accountability Act 1997* (Cth), section 32B

Another of the surprising aspects of the *Williams No 2* case was that the High Court's judgments were quite restrained despite enormous provocation by the Commonwealth. The Court could have struck down section 32B in its entirety, but chose not to do so on this occasion. Instead, it read down section 32B so that it only gave statutory authorisation to a spending program where it was supported by a Commonwealth head of power.[33] As there was no head of power to support the chaplaincy program, the Court did not need to go further to decide the additional argument that section 32B and the relevant regulations amounted to an invalid delegation of legislative power.[34] It left this point undecided, so that it may arise again in a future challenge.

One of the other problems faced by the High Court in determining whether section 32B was effective in its validation of the chaplaincy program, as specified in the regulations, was that the description of the program was so general that it was extremely difficult to determine whether or not it would fall within a head of power. The parties had to resort to Commonwealth guidelines in order to ascertain the scope of the program to assess its validity. The High Court, however, queried how reference could properly be made to the guidelines in order to construe the relevant legislative provisions and determine their validity.[35] This exposes one of the great flaws of the legislative scheme enacted by the Commonwealth, which makes it virtually impossible to assess whether money may validly be expended upon any Commonwealth program specified in the regulations. It is another reason why it would be preferable to find both section 32B and the associated regulations invalid.

The reinforcement of federalism and limits on Commonwealth Executive power

The Commonwealth's response to hearing from the Court that it has less power than it believes it ought to have has consistently been to ignore such statements or reject them. In *Williams No 2*, the Commonwealth argued that the High Court was simply wrong in *Williams No 1* and ought to overturn it. In so arguing, it contended that the principles in *Williams No 1* had not been carefully worked out over a series of cases, that *Williams No 1* did not contain a "single answer" to the question of when legislative authority was needed for spending and that it "led to considerable inconvenience with no significant corresponding benefits".[36]

One might well argue, on the contrary, that forcing the Commonwealth to legislate before it spends on new programs has the considerable public benefit of better planned, executed and

administered programs which are publicly defensible, but plainly the Commonwealth could not see beyond the "inconvenience" of being engaged in the democratic processes of Parliament.

It is probably not surprising that the High Court rejected all these arguments and, instead, reinforced its previous statements in *Williams No 1*. It effectively said that just because the Commonwealth does not like a judgment does not mean that it is wrong.

The Commonwealth tried to reassert broad expenditure powers by arguing that it had a wide "nationhood" power that would support executive power to contract and spend in relation to "all matters that are reasonably capable of being seen as of national benefit or concern; that is, all those matters that befit the national government of the federation, as discerned from the text and structure of the Constitution".[37] The Court noted the breadth of this submission, observing:

> It is hard to think of any program requiring the expenditure of public money appropriated by the Parliament which the Parliament would not consider to be of benefit to the nation. In effect, then, the submission is one which, if accepted, may commit to the Parliament the judgment of what is and what is not within the spending power of the Commonwealth, even if, as the Commonwealth parties submitted, the question could be litigated in this Court. It is but another way of putting the Commonwealth's oft-repeated submission that the Executive has unlimited power to spend appropriated moneys for the purposes identified by the appropriation.[38]

The Court again rejected the Commonwealth's argument. It pointed to the "false assumption" drawn by the Commonwealth about the ambit of its executive power. This assumption was that the Commonwealth Government should have all the power befitting a national government such as the Government of the United Kingdom.[39] The High Court stressed that the Commonwealth was simply the "central polity of a federation in which independent governments exist in the one area and exercise powers in different fields of action carefully defined by law".[40] It squashed the Commonwealth's pretentions to the power of a unitary government and again made it clear that the Commonwealth does not have the same power to spend and contract as the British Government.

The Commonwealth's response

As noted at the Society's 2013 conference, the Abbott Government faced a timing dilemma in relation to the application of section 32B. This was because in the dying days of the Gillard Government, new legislation was enacted to regulate the Commonwealth's financial management system. This new Act, the *Public Governance, Performance and Accountability Act 2013* (Cth), was required by law to come into effect by 1 July 2014. The Act was intended to replace the *Financial Management and Accountability Act 1997*, but did not contain an equivalent of section 32B.

Cognisant of this timing issue, the High Court handed down its judgment in *Williams No 2* on 19 June 2014, leaving the Commonwealth Government time to deal with the issue before 1 July. It did so on 24 June 2014 with the introduction of the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill* into Parliament. With eerie echoes of the original enactment of section 32B, which was rushed through the Parliament with no real

scrutiny a week after *Williams No 1,* this new Bill was also rushed through the Parliament in two days, with virtually no scrutiny within a week of *Williams No 2*. It appears that whichever party is in government, respect for the merits of parliamentary scrutiny and accountability is in short supply.

What this Act did, amongst other things, was to strip out most of the *Financial Management and Accountability Act,* but to preserve section 32B and associated provisions and regulations, and rename the Act the *Financial Framework (Supplementary Powers) Act.*[41] Hence, constitutionally doubtful section 32B and the highly misleading regulations were preserved to be challenged another day. Both sides of Parliament can now take responsibility for giving effect to what is at best a highly dubious attempt to give Parliament's blind imprimatur to *carte blanche* executive spending. Neither should be proud of their efforts.

The outcome

The outcome for Mr Williams is that after a great deal of time, effort and expense, he still has chaplains in his children's school. For the Commonwealth, the outcome is that a significant amount of its spending may well be illegal, leaving it either to reform its current expenditure or hope that no one will follow Mr Williams' example and bring a challenge to it, given the pyrrhic nature of his victory. Parliament remains degraded through its purported surrender of its responsibility to authorise executive spending. If nothing else, however, the High Court has had the satisfaction of putting the Commonwealth in its place by telling it that it is only one government in a federation, and a government of limited powers at that.

Endnotes

1. (2012) 248 CLR 156, [9] (French CJ); [107]-[110] (Gummow and Bell JJ); [168] (Hayne J); [442]-[448] (Heydon J); [457] and [476] (Crennan J); and [597] (Kiefel J) (hereafter "*Williams No 1"*).

2. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [8] and [111] (French CJ); [178]-[183] (Gummow, Crennan and Bell JJ); [320] (Hayne and Kiefel JJ) and [601]-[602] (Heydon J).

3. For a close analysis of when legislative authority is required, see: Anne Twomey, "Post-*Williams* expenditure – When can the Commonwealth and States spend public money without parliamentary authorisation?" (2014) *University of Queensland Law Journal* 9.

4. *Williams No 1* (2012) 248 CLR 156, [54] (French CJ); [143] and [155] (Gummow and Bell JJ); [192]-[199] and [248] (Hayne J); and [395] (Heydon J).

5. *Williams No 1* (2012) 248 CLR 156, [60] (French CJ); [136] and [145] (Gummow and Bell JJ); [173] and [219] (Hayne J); [516] (Crennan J); [579] (Kiefel J).

6. *Williams No 1* (2012) 248 CLR 156, [151] (Gummow and Bell JJ); [173]] and [216] (Hayne J); [519] (Crennan J); and [577] (Kiefel J).

7. *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth).

8. *Williams v Commonwealth No 2* (2014) 88 ALJR 701, [48] and [51] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (hereafter *"Williams No 2"*). Crennan J agreed generally with the joint judgment at [99]. Gageler J did not sit.

9. Commonwealth, *Parliamentary Debates,* Senate, 19 June 2014, 51 (Senator Brandis). Query whether this action is constitutionally valid, as it would appear to be a backdoor way of maintaining an unconstitutional action contrary to the principle that "what cannot be done directly under the Constitution cannot be done indirectly": *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 633, 662-4.

10. John Sandeman, "Chaplains Will Continue to be Paid", *Eternity Newspaper,* 20 June 2014: http://www.biblesociety.org.au/news/national-school-chaplain-program-will-continue-despite-high-court-funding-ruling [viewed 14 July 2014].

11. *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, [271] (Hayne J); [575] (Kiefel J).

12. *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, [272] (Hayne J); [575] (Kiefel J).

13. *Williams No 2* (2014) 88 ALJR 701, [49] (French CJ, Hayne, Kiefel, Bell and Keane JJ); and [99] Crennan J.

14. *Williams No 2* (2014) 88 ALJR 701, [50] (French CJ, Hayne, Kiefel, Bell and Keane JJ); and [99] Crennan J.

15. Compare the wording in (2012) 248 CLR 156, [271] (Hayne J) with that in (2014) 88 ALJR 701, [50] (French CJ, Hayne, Kiefel, Bell and Keane JJ) concerning the *Work Choices* test. It is identical but for the fact that, in *Williams No 1*, reference is made to a hypothetical law, whereas in *Williams No 2* it refers to an actual law.

16. *New South Wales v Commonwealth* (2006) 229 CLR 1, [178] and [181] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). My thanks to Geoff Lindell for pointing out this anomaly.

17. *Financial Framework (Supplementary Powers) Regulations* 1997, Sched 1AA: Programs 318.002 – Ford Australia – Environmental Innovation Grant; and 318.003 – General Motors Holden – next generation.

18. *Financial Framework (Supplementary Powers) Regulations* 1997, Sched 1AA: Program 318.001 – Assistance to upgrade Simplot's processing plants in Australia.

19. *Financial Framework (Supplementary Powers) Regulations* 1997, Sched 1AA: Program 318.005 – Alcoa Point Henry assistance.

20. *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237.

21. *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271.

22. *Williams No 2* (2014) 88 ALJR 701, [46] – [47] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

23. *Williams No 2* (2014) 88 ALJR 701, [102] (Crennan J).

24. Of course, if such payments are made under the umbrella of national partnership plans and supported by section 96 grants, they will be valid.

25. Kim Jackson, "Higher Education Funding Policy", Parliamentary Research Service, E-Brief, December 2000: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/hefunding. See also: Advice by Minter Ellison to Australian Vice Chancellors' Committee, 13 April 1999.

26. *Pape v Commissioner of Taxation* (2009) 238 CLR 1, [8] and [111] (French CJ); [178]-[183] (Gummow, Crennan and Bell JJ); [320] (Hayne and Kiefel JJ) and [601]-[602] (Heydon J).

27. (2001) 184 ALR 260.

28. George Williams and Sangeetha Pillai, "Commonwealth Power over Higher Education" (2011) UQLJ 287, 299-302.

29. See, e.g.: *Higher Education Support Act 2003* (Cth), Chapter 3.

30. *Williams No 2* (2014) 88 ALJR 701, [109] (Crennan J).

31. See, eg: *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 397 (Mason J); 412-3 (Jacobs J); and 419 (Murphy J).

32. Commonwealth Constitution, section 51(v). This power has been interpreted as extending to radio and television and is most likely to support laws with respect to the internet and other forms of electronic communications infrastructure.

33. *Williams No 2* (2014) 88 ALJR 701, [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

34. *Williams No 2* (2014) 88 ALJR 701, [30] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

35. *Williams No 2* (2014) 88 ALJR 701, [40]-[41] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

36. *Williams No 2* (2014) 88 ALJR 701, [59] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

37. *Williams No 2* (2014) 88 ALJR 701, [70] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

38. *Williams No 2* (2014) 88 ALJR 701, [71] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

39. *Williams No 2* (2014) 88 ALJR 701, [78]-[79] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

40. *Williams No 2* (2014) 88 ALJR 701, [83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

41. The *Financial Management and Accountability Regulations 1997* (Cth) were also renamed the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth).