

CASE NOTE

***WILLIAMS v COMMONWEALTH [NO 2]***\*

**COMMONWEALTH EXECUTIVE POWER AND  
SPENDING AFTER *WILLIAMS [NO 2]***

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*In Williams v Commonwealth [No 2] the High Court unanimously rejected the contention that Commonwealth funding for a national program providing support for chaplains in state schools was authorised by the Financial Management and Accountability Act 1997 (Cth). The Court held that this statute was not supported by a head of Commonwealth legislative power in the Constitution insofar as the chaplaincy program was concerned. In the course of the decision, the Court affirmed the broader principle established in recent cases that the Commonwealth's executive power to contract and spend is not unlimited. In this case note, we examine the two separate judgments in Williams v Commonwealth [No 2] in light of the reasoning in earlier cases, and go on to consider the implications of the decision for other Commonwealth spending programs.*

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\* *Williams v Commonwealth [No 2]* (2014) 252 CLR 416.

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## I INTRODUCTION

*Williams v Commonwealth [No 2]* (*'Williams [No 2]'*)<sup>1</sup> is the most recent decision in a line of High Court authority<sup>2</sup> that has fundamentally reshaped understandings of federal executive power in Australia.<sup>3</sup> Prior to this line of cases, it was arguable that the scope of the Commonwealth's capacities to spend money and enter into contracts was analogous to that of a natural person, and so was effectively unlimited. Alternatively, a more restrained, but still broad conception of these capacities might have suggested that they were limited only in breadth by the contours of the federal legislative powers in ss 51, 52 and 122 of the *Constitution* and in depth by principles derived from the concepts of responsible government, separation of powers, and rule of law.<sup>4</sup> It was also arguable that no further legislative authority was necessary

<sup>1</sup> (2014) 252 CLR 416.

<sup>2</sup> This line includes *Pape v Commissioner of Taxation* (2009) 238 CLR 1 and *Williams v Commonwealth* (2012) 248 CLR 156.

<sup>3</sup> See acknowledgment by the Court of the creation of a new principle, which was first established in *Pape v Commissioner of Taxation* (2009) 238 CLR 1 and then expanded upon in *Williams v Commonwealth* (2012) 248 CLR 156: *Williams [No 2]* (2014) 252 CLR 416, 463–4 [60] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J). See also Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253, 256.

<sup>4</sup> George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 29–30; Cheryl Saunders, 'The Sources and Scope of Commonwealth Power to Spend' (2009) 20 *Public Law Review* 256, 259; Appleby and McDonald, above n 3, 255.

for the expenditure of money beyond an ordinary appropriation under s 81 of the *Constitution*.<sup>5</sup>

The High Court decisions in *Pape v Commissioner of Taxation* ('*Pape*')<sup>6</sup> and *Williams v Commonwealth* ('*Williams [No 1]*')<sup>7</sup> turned these conceptions of executive power on their head. It is now accepted that Commonwealth executive power to enter into contracts or spend public money is in most cases limited to that for which it has authority positively conferred on it by statute.<sup>8</sup> The exceptions arise when Commonwealth expenditure can be supported by some other recognised aspect of executive power, such as the 'nationhood power',<sup>9</sup> the power to expend moneys in the ordinary annual services of government,<sup>10</sup> or the prerogative powers inherited from the common law powers of the Crown.<sup>11</sup> In the absence of any of those, Commonwealth spending must be authorised by legislation, and so supported by a source of federal legislative power. The High Court has made clear that the mere earmarking of expenditure by way of an appropriation Act will not suffice for this purpose.<sup>12</sup>

*Williams [No 2]* is a further, important decision in this line of cases. This case note examines the decision in two parts. In Part II, we critically analyse the joint judgment and the concurrence of Crennan J in light of the Court's earlier decisions. We follow in Part III with an analysis of the implications of the decision in *Williams [No 2]* for Commonwealth spending more broadly.

<sup>5</sup> Anne Twomey, 'Pushing the Boundaries of Executive Power — *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 313–14.

<sup>6</sup> (2009) 238 CLR 1.

<sup>7</sup> (2012) 248 CLR 156.

<sup>8</sup> This was the position of four members of the Court in *Williams [No 1]* (2012) 248 CLR 156, 187 [27], 192–3 [36]–[37], 216–17 [83] (French CJ), 236–9 [150]–[159] (Gummow and Bell JJ), 353 [524] (Crennan J). On this point, the other two members of the majority did not reach a view: at 281 [288] (Hayne J), 366 [569] (Kiefel J).

<sup>9</sup> *Pape* (2009) 238 CLR 1, 63–4 [133] (French CJ), 89 [232] (Gummow, Crennan and Bell JJ), 119 [337] (Hayne and Kiefel JJ); *Victoria v Commonwealth* (1975) 134 CLR 338, 398 (Mason J) ('*AAP Case*'); *Davis v Commonwealth* (1988) 166 CLR 79, 93–5 (Mason CJ, Deane and Gaudron JJ), 110 (Brennan J). See also Twomey, above n 5.

<sup>10</sup> *New South Wales v Bardolph* (1934) 52 CLR 455, 493 (Gavan Duffy CJ), 508 (Dixon J), which may be analogous to the Commonwealth power to contract in the administration of government departments in s 64 of the *Constitution*: *Williams [No 1]* (2012) 248 CLR 156, 211–12 [74] (French CJ).

<sup>11</sup> *Williams [No 1]* (2012) 248 CLR 156, 179–80 [4], 216–17 [83] (French CJ), 356–7 [539] (Crennan J). See also Winterton, above n 4, 48–9.

<sup>12</sup> *Pape* (2009) 238 CLR 1, 55 [111] (French CJ), 73–4 [178]–[183] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 210–11 [601]–[602] (Heydon J).

## II WILLIAMS [NO 2]

## A Background

The decision in *Williams [No 2]* must be read alongside *Pape* and *Williams [No 1]*, since the principles established in those cases form much of the basis upon which it was decided.<sup>13</sup> The *Pape* case of 2009 involved a constitutional challenge to the validity of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) (*'Tax Bonus Act'*). The Act purported to distribute a one-off financial payment to an identified category of Australian residents as part of an economic stimulus strategy.<sup>14</sup> By a slim majority of 4:3, the Court upheld the validity of the Act, finding it supported by the 'nationhood' aspect of the Commonwealth's executive power in s 61 operating in conjunction with the incidental power in s 51(xxxix) of the *Constitution*. However, all members of the Court were unanimous in their rejection of the Commonwealth's alternative contention that the enactment of the *Tax Bonus Act* could be supported by the appropriations power in s 81 operating in conjunction with the incidental power in s 51(xxxix).<sup>15</sup> The Court concluded that the power to appropriate money from consolidated revenue in ss 81 and 83 did not also confer upon the Commonwealth a substantive power to spend that money on any subject matter.<sup>16</sup> Such a power had to be found elsewhere in the *Constitution* or in the statutes made under it.

Less than three years after *Pape*, in *Williams [No 1]*, the High Court was once again faced with a challenge to the scope of the Commonwealth's spending power. This time, the case concerned the constitutional validity of the National School Chaplaincy Program ('NSCP'), which was created in October 2006 with the stated purpose of assisting schools in 'providing greater pastoral care and supporting the spiritual wellbeing of their students'.<sup>17</sup> Funds for the program were appropriated from the Consolidated Revenue Fund under successive appropriation Acts, but otherwise the NSCP

<sup>13</sup> *Williams [No 2]* (2014) 252 CLR 416, 455 [25] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>14</sup> *Pape* (2009) 238 CLR 1, 26–7 [19], 29 [30] (French CJ).

<sup>15</sup> *Ibid* 33 [43] (French CJ).

<sup>16</sup> *Ibid* 55 [111] (French CJ), 73–4 [178]–[183] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 210–11 [601]–[602] (Heydon JJ).

<sup>17</sup> John Howard, 'National School Chaplaincy Program' (Media Release, 29 October 2006).

was unsupported by any Commonwealth statute.<sup>18</sup> Under the NSCP, a contractual arrangement was entered into between Darling Heights State School and a chaplaincy service provider known as Scripture Union Queensland ('SUQ')<sup>19</sup> for the installation of a chaplain at the school. The plaintiff — Mr Ron Williams — was a father of four students who attended the school and objected to the appointment of a religious chaplain at his children's school. Mr Williams' primary contention<sup>20</sup> was that the widely held 'common assumption',<sup>21</sup> that Commonwealth executive power to contract and spend matched the potential scope of Commonwealth legislative power, was a fallacy. Instead, he argued that, except where some other recognised aspect of Commonwealth executive power could provide support, the Commonwealth required statutory authority before it could enter into contracts to spend public moneys.

A 6:1 majority of the High Court held that the agreement providing for payments to SUQ for the placement of chaplains in schools was invalid for lack of authority to spend for this purpose. In reaching that conclusion, four members of the majority dismissed the common assumption that the scope of the Commonwealth's executive power to spend, even absent statutory authority, correlated with the areas falling within Parliament's legislative ambit.<sup>22</sup> Hayne J and Kiefel J, while still in the majority on the result, declined to reach a position on the correctness of the common assumption, since they were of the view that the Commonwealth lacked legislative power to enact the chaplaincy scheme in any case.<sup>23</sup> All members of the majority further dismissed the Commonwealth's even broader assertion that the capacities of the Commonwealth executive were unlimited.<sup>24</sup>

<sup>18</sup> *Williams [No 1]* (2012) 248 CLR 156, 179 [2] (French CJ), 217–18 [88] (Gummow and Bell JJ).

<sup>19</sup> *Ibid* 217 [87] (Gummow and Bell JJ).

<sup>20</sup> Mr Williams also argued that the scheme was invalid for imposing an impermissible religious test as a qualification for office under the Commonwealth, in contravention of the prohibition contained in s 116 of the *Constitution*. This submission was not accepted by any member of the Court: *ibid* 181–2 [9] (French CJ), 222–3 [108]–[110] (Gummow and Bell JJ), 240 [168] (Hayne J), 286 [306] (Heydon J), 341 [476] (Crennan J), 374 [597] (Kiefel J).

<sup>21</sup> *Williams [No 1]* (2012) 248 CLR 156, 295–6 [341]–[343] (Heydon J). See also Appleby and McDonald, above n 3, 258–9.

<sup>22</sup> *Ibid* 187 [27], 192–3 [36]–[37] (French CJ), 232–3 [134]–[137] (Gummow and Bell JJ), 356–8 [539]–[544] (Crennan J).

<sup>23</sup> *Ibid* 281 [288] (Hayne J), 366 [569] (Kiefel J).

<sup>24</sup> *Ibid* 191–2 [35] (French CJ), 236–9 [150]–[159] (Gummow and Bell JJ), 353 [524] (Crennan J), 368–74 [576]–[595] (Kiefel J).

The effect of the decision was to immediately put into doubt the validity of a vast array of other federal programs, amounting to somewhere between 5–10 per cent of all Commonwealth government spending.<sup>25</sup> In an attempt to overcome the impact of the case, the Gillard government drafted a legislative rescue package, which was passed by Parliament within days of the decision being handed down. The emergency legislation<sup>26</sup> involved two key amendments. The first was to insert a new s 32B into the *Financial Management and Accountability Act 1997* (Cth) (*FMA Act*) to delegate to the Commonwealth the authority to ‘make, vary or administer’ any arrangements, grants or programs stipulated in the regulations. The second was to directly insert a new sch 1AA to the *Financial Management and Accountability Regulations 1997* (Cth) (*FMA Regulations*) listing over 400 different programs in relation to which, by virtue of s 32B, the Commonwealth now had authority to spend. Item 407.013 in sch 1AA, when read with pt 5AA of the *FMA Regulations*, identified school chaplaincy as a relevant ‘program’ for the purposes of s 32B under its new name: the National School Chaplaincy and Student Welfare Program (‘NSCSWP’). As a result, Commonwealth funding for the school chaplaincy program continued as it had done prior to *Williams [No 1]*.

### B *The Challenge in Williams [No 2]*

Dissatisfied by the Commonwealth’s legislative response to *Williams [No 1]*, Mr Williams launched a second High Court challenge to the chaplaincy scheme in late 2013. He presented his challenge on a broad basis, contending that the emergency legislation was wholly invalid for failing to properly delegate authority to the executive, and also on a narrower basis, under which he argued that the specific payments made to the SUQ were invalid for want of proper authority.<sup>27</sup> Since the NSCSWP was included directly in the list of programs placed in the regulations by the amending legislation, the Court concluded that it was unnecessary to decide if the legislation impermissibly delegated legislative power to the executive.<sup>28</sup>

<sup>25</sup> Joe Kelly and Nicola Berkovic, ‘Urgent Move to Close Loophole and Keep Chaplains in Schools’, *The Australian* (Canberra), 26 June 2012, 4.

<sup>26</sup> *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth).

<sup>27</sup> *Williams [No 2]* (2014) 252 CLR 416, 449 [7] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J).

<sup>28</sup> *Ibid* 455 [30] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J).

In answer to any suggestion that s 32B was invalid for having ‘a very wide field of actual and potential application,’ the Court held that ordinary principles of statutory construction would lead it to reject a literal reading of the provision. Rather it ought to be read as ‘providing power to the Commonwealth to make, vary or administer arrangements or grants only where it is within the power of the Parliament to authorise the making, variation or administration of those arrangements or grants’.<sup>29</sup> This had the effect of bringing the text within constitutional power.

### C Standing

The Commonwealth conceded Mr Williams’ standing to challenge the payments made to SUQ. Critical to the Court’s decision to accept the Commonwealth’s concession was the conclusion reached early in the joint judgment that it was unnecessary to decide broader questions surrounding the delegation of power. Since only payments being made to SUQ were at issue, Mr Williams had standing by way of his children being affected at their school.

Of concern, however, was the Court’s observation that the Commonwealth had correctly made its concession in light of the States intervening in support of Mr Williams’ position.<sup>30</sup> The relevance of the position of the States as interveners in establishing Mr Williams’ standing is difficult to understand. By operation of s 78A of the *Judiciary Act 1903* (Cth), intervention can only take place in proceedings relating to a matter. It follows that an individual litigant in the circumstances of Mr Williams must have standing in his or her own right to institute proceedings relating to a matter for a state Attorney-General to then intervene. Relying on subsequent state intervention to establish the very standing which forms the basis of the intervention involves circular reasoning.<sup>31</sup>

<sup>29</sup> Ibid 457 [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J).

<sup>30</sup> Ibid 455 [29] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J).

<sup>31</sup> See Shipra Chordia, Andrew Lynch and George Williams, ‘Williams v Commonwealth: Commonwealth Executive Power and Australian Federalism’ (2013) 37 *Melbourne University Law Review* 189, 194–6; Appleby and McDonald, above n 3, 259–60. See also Peter Johnston, ‘Pape’s Case: What Does It Say About Standing as an Attribute of “Access to Justice”?’ (2010) 22(3) *Bond Law Review* 16, 34 n 75. The approach of the Court in *Williams [No 2]* can be contrasted with the more rigorous view of standing taken by Heydon J in *Williams [No 1]* (2012) 248 CLR 156, 288–93 [315]–[331].

D *Reopening Williams [No 1]: The Scope of Commonwealth Executive Power*

In a last ditch attempt to avoid the far-reaching implications of *Williams [No 1]*,<sup>32</sup> and to underpin its otherwise precarious arguments relating to the appropriations and incidental powers,<sup>33</sup> the Commonwealth sought leave in *Williams [No 2]* to reopen the earlier case. This attempt was dealt with towards the conclusion of the joint judgment, almost as an aside.<sup>34</sup> It is, however, the part of the judgment that has the broadest significance for the developing conception of executive power that has emerged since *Pape* was decided in 2009.

The Commonwealth put forward a number of grounds in its attempt to convince the Court that *Williams [No 1]* ought to be reconsidered. First, the principles identified in the case had not been ‘worked out in a significant succession of cases’.<sup>35</sup> The Court responded simply that *Williams [No 1]* was a decision that depended upon *Pape* and that although it may have established new principle, there had to be something more for the Court to reopen a decision of six justices (five of whom were still on the bench) that had been made less than two years prior.<sup>36</sup> Secondly, the Commonwealth contended that the Court had reached its conclusions in the earlier case without receiving sufficient argument or material by way of constitutional facts.<sup>37</sup> Again, the Court refused to accept this reasoning on the orthodox basis that there had been no evidence of procedural unfairness; if the Commonwealth had wished to raise the constitutional ‘facts’ to which it now referred, it had been open to it to do so in the earlier case.<sup>38</sup> Thirdly, in response to the Commonwealth’s contention that *Williams [No 1]* did not provide a comprehensive answer to

<sup>32</sup> Concerns over the implications of *Williams [No 1]* for the Commonwealth’s direct funding of federal programs has been well documented. Speaking to the Senate, Senator George Brandis — deputy leader of the opposition in the Senate at the time — described *Williams [No 1]* as creating a ‘constitutional lacuna’: Commonwealth, *Parliamentary Debates*, Senate, 27 June 2012, 4650.

<sup>33</sup> Commonwealth, ‘Annotated Submissions of the First and Second Defendants’, Submission in *Williams [No 1]*, No S154/2013, 4 April 2014, 26–30.

<sup>34</sup> *Williams [No 2]* (2014) 252 CLR 416, 463–5 [57]–[69] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>35</sup> *Ibid* 463 [59].

<sup>36</sup> *Ibid* 463–4 [60] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J).

<sup>37</sup> *Ibid* 463 [59] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>38</sup> *Ibid* 464 [61]–[62] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J).



the question of when statutory authority was needed for Commonwealth (or state) executive expenditure, the joint judgment pointedly observed that there was no onus on the Court to answer questions beyond those immediately at issue in the case.<sup>39</sup> Finally, the Court rejected out of hand the Commonwealth's argument that the decision resulted in 'considerable inconvenience' without 'significant corresponding benefits'.<sup>40</sup> The joint judgment stated that this contention was of 'no greater content than that the Commonwealth parties wish[ed] that the decision in *Williams [No 1]* had been different'.<sup>41</sup>

Despite emphatically declining the Commonwealth parties' application to reopen *Williams [No 1]*, the Court addressed their substantive arguments.<sup>42</sup> The motivations for doing so are unclear, but one might speculate from the tone of the reasoning that this may have been a reprimand from the Court for the Commonwealth's continued refusal to accept the principles established in *Pape* and *Williams [No 1]*. On the other hand, it may simply have been an opportunity for the Court to reiterate the authority of *Williams [No 1]* and emphasise the relevant principles with the weight of a joint opinion rather than a series of individual judgments.

The Commonwealth's submissions were at times difficult to follow and were criticised by the Court as displaying 'internal inconsistency'.<sup>43</sup> The Commonwealth sought to distinguish what it called the 'content' of executive power from 'limitations' that ought to be applied to its exercise. It argued that the content was informed by two considerations: '(a) a polity must possess all the powers that it needs in order to function as a polity; and (b) the executive power is all that power of a polity that is not legislative or judicial power'.<sup>44</sup> Those were broad parameters, within which limitations could be sourced in the history of executive power in England, and later Britain, as modified by Australian constitutional features. On this basis, there were several relevant limitations on executive power, including that the executive was precluded from entering 'an area reserved for legislative power', that an

<sup>39</sup> Ibid 463 [59], 464 [64] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J).

<sup>40</sup> Ibid 464–5 [65] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>41</sup> Ibid.

<sup>42</sup> This approach can be contrasted with the Court's approach to the issue of whether a valid delegation of authority had been made in s 32B of the *FMA Regulations*. The Court considered that 'wider questions' in relation to that issue were not 'reached in this case and they should not be considered': ibid 457 [36].

<sup>43</sup> Ibid 466–7 [72].

<sup>44</sup> Commonwealth, 'Annotated Submissions of the First and Second Defendants,' Submission in *Williams [No 1]*, No S154/2013, 4 April 2014, 36.

appropriation in legislation was necessary for the withdrawal of funds from the Consolidated Revenue Fund and that s 51 of the *Constitution* ‘provides every power necessary for the Parliament to prohibit or control the activity of the Executive in spending’.<sup>45</sup>

According to the Court, these ‘limitations’ were broadly cast and effectively repeated the Commonwealth’s ‘broad basis’ submission in *Williams [No 1]*, a line of reasoning that had categorically been rejected by the six-member majority in that case.<sup>46</sup> In the Court’s view, absent from the Commonwealth’s contentions was any limitation on executive power by reference to the areas or subjects upon which the Commonwealth may spend or contract. When pressed on that front, the Commonwealth submitted that if such a limitation was considered necessary, then it could only be put in the broadest of terms:

executive power to contract and spend under s 61 of the *Constitution* extends to all those 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*.<sup>47</sup>

The Court retorted that this was not a limitation at all but simply ‘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’.<sup>48</sup> More fundamentally, the Court identified what it considered to be the false premise upon which these arguments rested: that the executive power of the Commonwealth should be assumed to be no less than that of the British executive. After noting that even the scope of British executive power was controversial,<sup>49</sup> the Court complained about the selectivity of looking to those constitutional provisions which highlighted the historical connection to British constitutional practice in order to sustain an assumption of parity between the Commonwealth executive and that of the United Kingdom. In the Court’s view, this ignored the many provisions, particularly in ch IV of the *Constitution*, which suggested key differences.<sup>50</sup>

<sup>45</sup> *Williams [No 2]* (2014) 252 CLR 416, 465 [68] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>46</sup> *Ibid* 465 [69].

<sup>47</sup> *Ibid* 466 [70] (emphasis in original).

<sup>48</sup> *Ibid* 466 [71] (citations omitted).

<sup>49</sup> *Ibid* 468 n 161.

<sup>50</sup> *Ibid* 468–9 [80].

Although British constitutional history might inform the question, ‘the determination of the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must be the same as the ambit of British executive power’.<sup>51</sup>

Significantly, in making this point, the Court emphasised Australia’s federal character. Direct analogies drawn between the executive powers of the Commonwealth and Britain ignored that in Australia there is a ‘distribution of powers and functions between the Commonwealth and the States’ and that ‘independent governments exist in the one area and exercise powers in different fields of action carefully defined by law’.<sup>52</sup> These concerns were reminiscent of French CJ’s reflections in *Williams [No 1]* regarding the ‘impact of Commonwealth executive power on the executive power of the States’.<sup>53</sup>

It is possible to speculate that had the Commonwealth emphasised a more cautious line of argument, its defeat might not have been so resounding. In *Williams [No 1]*, Hayne J and Kiefel J — two justices who also sat in *Williams [No 2]* — seemed to show some hesitation in joining their majority colleagues in the conclusion that *prior* Commonwealth legislative authority was necessary for executive contracting and spending. For them, the question could be avoided in that case since they were of the opinion that the Commonwealth did not possess the legislative power to provide the necessary authority in any event. Bearing this in mind, in *Williams [No 2]*, the Commonwealth might have developed its arguments concerning the scope of Commonwealth executive power along the lines of its fourth suggested limitation that s 51 ‘provides every power necessary for the Parliament to prohibit or control the activity of the Executive in spending’.<sup>54</sup> This proposition might conceivably have been refined in such a way as to satisfy the Court’s search for a ‘limitation by reference to the areas in which (in the sense of subjects for or about which) the Commonwealth may spend or contract’.<sup>55</sup> It also accords with the ordinary principles of responsible government<sup>56</sup> and might have garnered a more sympathetic response, at least

<sup>51</sup> Ibid 469 [81].

<sup>52</sup> Ibid 469 [83].

<sup>53</sup> (2012) 248 CLR 156, 193 [38].

<sup>54</sup> (2014) 252 CLR 416, 465 [68] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>55</sup> Ibid 466 [70].

<sup>56</sup> As Dixon J observed in *New South Wales v Bardolph* (1934) 52 CLR 455, 509: ‘the principles of responsible government do not disable the Executive from acting without the prior ap-

from Hayne J and Kiefel J in light of their hesitation in the earlier case. On the other hand, those two justices may have viewed themselves as obliged to accept the authority established by the reasoning of the other four majority justices in *Williams [No 1]* which limited the effectiveness of even this more narrow line of argument.

#### E Section 51(xxiiiA) — *Student Benefits Power*

The issues on which *Williams [No 2]* actually turned were defined narrowly by the Court. They related to whether the Commonwealth's payments to the SUQ, and therefore the NSCSWP more generally, were supported by valid statutory authority. On that basis, the Court considered whether Parliament possessed sufficient legislative power to enact the authorising legislation under the student benefits power in s 51(xxiiiA), the power to make laws with respect to trading or financial corporations in s 51(xx), the appropriations power in ss 81 and 83, or the incidental power in s 51(xxxix).

Whether s 51(xxiiiA) provided the required authority had, in fact, already been considered by three members of the Court in *Williams [No 1]*. As discussed above, in that case Hayne J and Kiefel J did not consider it necessary to reach a view on the question of whether statutory authority was required for executive contracting and spending.<sup>57</sup> In declining to set aside the common assumption as to the Commonwealth's executive power, their Honours considered the scope of that power by reference to the Commonwealth's legislative capacity to enact the NSCP. They found there was no relevant head of power within the *Constitution* for this hypothetical statute. The student benefits power in s 51(xxiiiA), in particular, did not provide the necessary constitutional authority.<sup>58</sup> Heydon J disagreed. For his Honour, the power was sufficient to support legislation authorising the provision of chaplaincy services using Commonwealth funds.<sup>59</sup>

In answer to the question in *Williams [No 2]* of whether the *FMA Act* and the *FMA Regulations* could be supported by the student benefits power, the reasoning of the Court reflected that of Hayne J and Kiefel J in

proval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament'. See also Winterton, above n 4, 45.

<sup>57</sup> *Williams [No 1]* (2012) 248 CLR 156, 274 [261] (Hayne J), 366 [569] (Kiefel J).

<sup>58</sup> *Ibid* 277 [273], 280–1 [286] (Hayne J), 367–8 [574] (Kiefel J).

<sup>59</sup> *Ibid* 328–33 [426]–[441].

*Williams [No 1]*. The joint judgment began by drawing upon cases in which the term ‘benefits’ had not been limited to pecuniary benefits. In *British Medical Association v Commonwealth* (‘*BMA Case*’),<sup>60</sup> McTiernan J defined ‘benefits’ as ‘material aid given pursuant to a scheme to provide for human wants ... under legislation designed to promote social welfare or security’.<sup>61</sup> His Honour said that material aid could be provided in various ways, including benefits in the form of ‘a pecuniary aid, service, attendance or commodity’.<sup>62</sup> In *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (‘*Alexandra Hospitals Case*’), the Court accepted that the concept of benefits could ‘encompass the provision of a service or services’.<sup>63</sup> What was critical was that ‘the intended ultimate beneficiary’ of the benefit was a particular patient: the identified patient in respect of whom a particular payment was made.<sup>64</sup> Thus, ‘benefits’ had to be made or quantified with specificity as to the number of individual recipients, rather than the provision of benefits to a collective from which different individuals will access or draw varying individual value.

After reviewing the list of circumstances identified in s 51(xxiiiA), the joint judgment in *Williams [No 2]* further concluded that the benefit had to be in the relief of a material want generated by the relevant condition provided for in the benefits power; for example, being unemployed, requiring pharmaceuticals, or being sick. Thus, ‘benefits to students’ had to be ‘material aid provided against the human wants which the student has *by reason of being a student*’.<sup>65</sup>

According to the Court, the provision of chaplaincy services under contracts with the SUQ failed in both respects. In terms of specificity in the provision of ‘benefit’, the joint judgment concluded that the chaplaincy scheme did ‘not provide material aid in the form of any service rendered or to be rendered to or for any identified or identifiable student’.<sup>66</sup> As was noted, the ‘objective’ set out in item 407.013 of the *FMA Regulations* referred only to assisting ‘school communities to support the wellbeing of their students’, with ‘support’ further described as ‘strengthening values, providing pastoral care

<sup>60</sup> (1949) 79 CLR 201.

<sup>61</sup> *Ibid* 279.

<sup>62</sup> *Ibid*.

<sup>63</sup> (1987) 162 CLR 271, 280 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ).

<sup>64</sup> *Ibid*.

<sup>65</sup> *Williams [No 2]* (2014) 252 CLR 416, 459–60 [46] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (emphasis added).

<sup>66</sup> *Ibid* 460 [47].

and enhancing engagement with the broader community'.<sup>67</sup> In the view of the joint judgment, the school chaplaincy service, although administered through the course of a school day, was therefore not one 'directed to the consequences of being a student'.<sup>68</sup>

In a separate judgment, Crennan J concurred with the joint judgment in most respects, particularly in the conclusion drawn from the *BMA Case* and the *Alexandra Hospitals Case* that the benefits in s 51(xxiiiA) could not 'include services provided to undifferentiated persons', but only recipients 'identified as entitled to some benefit'.<sup>69</sup> The caveat her Honour applied, however, was to refrain from reaching any conclusion that the services of student welfare workers or counsellors 'could not be the subject of a federal government scheme ... within the scope of s 51(xxiiiA)'.<sup>70</sup> The implication from her Honour's reservation is that a program sufficiently targeted at students and stipulating relief targeted at the condition of being a student might be found constitutionally valid.

The approach in the joint judgment in *Williams [No 2]* is notable because, while it follows the general contours of the reasoning of Hayne J and Kiefel J in *Williams [No 1]*, it does so without any express references to the concern raised by their Honours in the earlier case that such an interpretation is justified in order to guard against s 51(xxiiiA) approaching 'a general power to make laws with respect to education'.<sup>71</sup> A restrictive interpretation given to s 51(xxiiiA) on that basis alone would no doubt have invited the charge that the scope of the provision was being artificially narrowed. The dissenting judgment of Heydon J in *Williams [No 1]* effectively illustrates this criticism. Heydon J insisted that an expansive reading of 'benefits to students' was required by the general principle that, in the absence of any contrary indication, the text of the *Constitution* 'should be construed with all the generality which the words used admit'.<sup>72</sup> His Honour complained that to 'treat the

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid 474–5 [107]–[108].

<sup>70</sup> Ibid 476 [111].

<sup>71</sup> *Williams [No 1]* (2012) 248 CLR 156, 279 [281] (Hayne J). Kiefel J expressed a similar concern: at 367 [573].

<sup>72</sup> Ibid 328 [427], quoting *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225–6 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ). The principle itself derives from *Jumbunna Coal Mine*

absence of express Commonwealth legislative power over education as a reason for limiting the meaning of s 51(xxiiiA) defied that principle, and indeed that might be perceived by some as bearing too close a resemblance to discredited reserved powers reasoning.<sup>73</sup>

Avoiding those dangers, the discussion around ‘benefits to students’ was presented by the joint judgment largely as a technical matter of the application of precedent, with no direct reference to the *Constitution*’s division of responsibilities between the Commonwealth and the states. This reflected the Court’s orthodox approach to the construction of federal legislative power, which discourages any reference to concepts such as the ‘federal balance’. The difficulty with this approach being applied here is that it does not seem to present the full story, at least in the minds of some members of the Court. A look alone at the concerns aired by Hayne J and Kiefel J in *Williams [No 1]* supports such a view.<sup>74</sup> This approach is also at odds with the different approach developed by the Court in the context of understanding the scope of executive power, where such federal considerations can play a key role.<sup>75</sup>

The joint judgment did not set out the historical context of s 51(xxiiiA),<sup>76</sup> even though this would have supported the Court’s narrow reading of the provision. The absence of this contextual material is particularly striking given the rarity with which the Court is afforded the opportunity to examine provisions of the *Constitution* affected or introduced by way of amendment. By contrast, Crennan J did refer to the origins of the provision at the 1946 referendum and connected its intended purposes with the conclusion reached in the *BMA Case* and the *Alexandra Hospitals Case* that a ‘benefit’ is a personal entitlement ‘predicated invariably upon there being prescribed, hence identifiable, persons as beneficiaries’.<sup>77</sup> It follows that allowing

*NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309, 367–8 (O’Connor J). See also *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

<sup>73</sup> *Ibid* 328 [427].

<sup>74</sup> (2012) 248 CLR 156, 279 [281] (Hayne J), 369 [573] (Kiefel J).

<sup>75</sup> See David Hume, Andrew Lynch and George Williams, ‘Heresy in the High Court? Federalism as a Constraint on Commonwealth Power’ (2013) 41 *Federal Law Review* 71.

<sup>76</sup> Such analysis was, however, undertaken by Hayne J and Kiefel J in *Williams [No 1]*. Both judges there emphasised the context in which s 51(xxiiiA) was added to the *Constitution* in 1946. Hayne J described it as ‘a constitutional amendment evidently intended to provide federal legislative power with respect to the provision of various forms of social security benefit, including benefits which were then and for some time had been provided by the Commonwealth’: at 279 [281]. Kiefel J quoted the Attorney-General’s second reading speech expressly on that same point: at 366 [570].

<sup>77</sup> *Williams [No 2]* (2014) 252 CLR 416, 473 [104].

s 51(xxiiiA) to empower advantages to be provided to students as a *general* class of person would be somewhat divorced from a historical understanding of the 1946 referendum.

The unwillingness in the joint judgment to engage with matters of history in its interpretation of the power meant that there was very little basis for recognising that the circumstances in which ‘benefits to students’ might be understood have evolved since the *BMA Case* and the *Alexandra Hospitals Case* were decided.<sup>78</sup> As Simon Evans has observed, contemporary ‘education policy has sought to address the implications of the fact that student learning is embedded in a wider social context, of family and community’.<sup>79</sup> In his view, McTiernan J’s understanding of the power — which is presented so determinatively in the joint judgment — is ‘rather time worn, reflecting the thinking about welfare at the dawn of the modern welfare state’.<sup>80</sup> This echoes the more holistic understanding of ‘benefit’ favoured by Heydon J in *Williams [No 1]*, who observed:

the primary function of the ‘chaplains’ is to provide benefits to students. And there is a close connection between the wellbeing of parents, teachers and the wider School community on the one hand and the wellbeing of students on the other ... The proposition that the NSCP assisted schools and school communities does not deny the proposition that it benefited students, because schools and communities which have been assisted are likely to benefit students.<sup>81</sup>

In any case, the interpretation supported by all members of the Court in *Williams [No 2]* confirms that the many ways in which the Commonwealth has become accustomed to spending in education cannot be sustained simply by being shoehorned into s 51(xxiiiA).

<sup>78</sup> Such reasoning would be analogous to that accepted by the Court in *Sue v Hill* (1999) 199 CLR 462 with respect to whether the United Kingdom now constitutes a ‘foreign power’ for the purposes of s 44(i) of the *Constitution*.

<sup>79</sup> Simon Evans, ‘*Williams [No 2]* Symposium: Simon Evans on Benefits to Students’ on *Opinions on High* (23 June 2014) <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/06/23/evans-williams/>>.

<sup>80</sup> *Ibid.*

<sup>81</sup> (2012) 248 CLR 156, 333 [439].



### F Other Arguments

In its separate submissions, the SUQ argued that the power in s 51(xx) to make laws with respect to trading and financial corporations could provide the necessary authority for the spending. The Court curtly dismissed this argument by observing that the impugned laws were not ones ‘authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation’,<sup>82</sup> and thus were distinguishable from those considered in *New South Wales v Commonwealth* (‘*Work Choices*’).<sup>83</sup> Some commentators have queried the omission in *Williams [No 2]* of that portion of Gaudron J’s understanding of s 51(xx) which referred to ‘the creation of rights, and privileges belonging to such a corporation’<sup>84</sup> and which was adopted by the Court in *Work Choices*.<sup>85</sup> For example, Anna Olijnyk observes that aspect of the power ‘seemed most relevant to the issue in *Williams (No 2)*’ and yet the Court gave no indication as to why it was not mentioned.<sup>86</sup> It is possible that the joint judgment’s use of ‘authorising’ (not found in Gaudron J’s earlier formulation) was intended as a shorthand expression to capture the aspect of the power enabling the creation of rights and privileges, but there is some ambiguity. It is not hard to see that an argument that s 51(xx) supplies the necessary constitutional power for the Commonwealth to enter into contracts and make payments for services, simply because they are supplied by a constitutional corporation, has the potential to loosen the clamp applied to Commonwealth spending in recent years. The omission of the express words regarding that aspect of the power might signal a narrowing by the joint judgment in *Williams [No 2]* in order to avoid such a consequence. But in the absence of anything more, this cannot transcend mere speculation.

The rejection of any possible relevance of s 51(xx) to the law in *Williams [No 2]* rendered it unnecessary to consider the ‘larger questions left open in *Work Choices* about the meaning of “trading or financial corporations formed

<sup>82</sup> *Williams [No 2]* (2014) 252 CLR 416, 461 [50] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J).

<sup>83</sup> (2006) 229 CLR 1, 114–15 [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>84</sup> *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 375 [83].

<sup>85</sup> (2006) 229 CLR 1, 114–15 [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>86</sup> Anna Olijnyk, ‘*Williams v Commonwealth (No 2)*: A Discussion of the Implications for Federal Spending and Legislative Power’ on *Public Law Blog* (19 August 2014) <<http://blogs.adelaide.edu.au/public-law-rc/2014/08/19/williams-v-commonwealth-no-2-a-discussion-of-the-implications-for-federal-spending-and-legislative-power/>>.

within the limits of the Commonwealth”.<sup>87</sup> It was also unnecessary to decide whether SUQ fell within that meaning.

An alternative argument proffered by the Commonwealth revolved around the appropriations Acts for 2011–12, 2012–13 and 2013–14 (the ‘Appropriations Acts’). It was submitted that these authorised the Treasurer to ‘apply’ moneys identified in the Act for the purposes of achieving an identified outcome for a relevant department. Since the school chaplaincy program was listed as an administered item, the Commonwealth argued that its expenditure was supported by each of three Appropriations Acts it referred to.<sup>88</sup> In addressing the submission, the Court did not entertain Mr Williams’ contention that any reliance on the Appropriations Acts was barred since the same arguments were open to the Commonwealth in *Williams [No 1]* but were not advanced.<sup>89</sup> Instead, it reached the conclusion — by applying *Pape* — that any authorisation within the Appropriations Acts would need to find support under some other head of power. As the Court had made clear in *Pape*, ss 81 and 83 were not in themselves sufficient to authorise executive expenditure, they merely provided the necessary power to segregate moneys from the Consolidated Revenue Fund.

The Court also rejected the related submission that the incidental power in s 51(xxxix) supported the enactment of appropriations Acts or s 32B of the *FMA Act*. In the case of the former, the Commonwealth’s assertion assumed that the expenditure of moneys would always be incidental to its earmarking. That would mean, in direct contradiction to *Pape*, that all appropriations were sufficient to substantively authorise spending. In relation to s 32B, the Commonwealth’s submission that its enactment was incidental to an exercise of executive power denied the authority of both *Pape* and *Williams [No 1]*. In particular, it relied on the assumption that was rejected in those cases that the Commonwealth possessed a broad and unfettered spending power.<sup>90</sup>

<sup>87</sup> *Williams [No 2]* (2014) 252 CLR 416, 461 [51] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>88</sup> *Ibid* 461–2 [52]–[53] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J).

<sup>89</sup> *Ibid* 462 [54] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J).

<sup>90</sup> *Pape* (2009) 238 CLR 1, 55 [111] (French CJ), 73–4 [178]–[183] (Gummow, Crennan and Bell JJ), 112–13 [319]–[320] (Hayne and Kiefel JJ), 212 [604] (Heydon J); *Williams [No 1]* (2012) 248 CLR 156, 186–7 [26]–[27], 191–3 [35]–[38] (French CJ), 236–9 [150]–[159] (Gummow and Bell JJ), 270–1 [251]–[253] (Hayne J), 343–4 [488], 355 [534] (Crennan J), 373–4 [595] (Kiefel J).

### III IMPLICATIONS FOR FEDERAL SPENDING

#### A *The School Chaplains and Other Education Schemes*

In the wake of the decision in *Williams [No 2]*, the most obvious way in which Commonwealth funding for the school chaplains scheme could continue was through the making of conditional grants to the states under s 96 of the *Constitution*. This provides an alternative mechanism for the expenditure of federal funds via the states. It is not limited by any of the restrictions identified by the High Court as applying to federal executive power. An arrangement under s 96 would require the states to administer the program in exchange for Commonwealth funds. While the Commonwealth hesitated to simply respond to the decision by following that course, the lack of viable alternatives eventually forced its hand. Hence, in August 2014, the Abbott government announced that it would be seeking to channel funding to the program through the states.<sup>91</sup>

While this solution circumvented the immediate practical ramifications of the decisions in *Williams [No 1]* and *Williams [No 2]*, the involvement of the states might have meant that, at least in some jurisdictions, the school chaplains program would not have survived in the form preferred by the current Commonwealth government. In May 2014, the federal parliamentary secretary to the Minister for Education announced that the Commonwealth was seeking to reverse reforms that had introduced options for secular counsellors to be employed under the scheme.<sup>92</sup> In the terms it attached to grants to the states and territories for the future operation of the scheme, the Abbott government returned to the original version instituted by the Howard government in 2006 under which Commonwealth funding would be provided for *religious* chaplains only.<sup>93</sup> The Minister for Education, Christopher Pyne,

<sup>91</sup> 'School Chaplains Back in Spirit', *The Australian* (Canberra), 28 August 2014, 6; Matthew Knott and James Massola, 'Tony Abbott to Keep Secular Workers out of School Chaplaincy Program', *The Sydney Morning Herald* (online), 27 August 2014, <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-to-keep-secular-workers-out-of-school-chaplaincy-program-20140827-1091u0.html>>.

<sup>92</sup> See Scott Ryan, 'Keeping Our Commitments: Funding a National School Chaplaincy Programme' (Media Release, 13 May 2014).

<sup>93</sup> Matthew Knott, 'Chaplaincy Program Leaves Secular Workers with No More than a Prayer', *The Sydney Morning Herald* (Sydney), 21 May 2014, 4.

justified the decision by saying that '[c]ounselors and social workers in schools are really the responsibility of the states and territories'.<sup>94</sup>

In negotiations, New South Wales, Tasmania, South Australia and the Australian Capital Territory (which can be the subject of federal funding under the territories power in s 122 of the *Constitution*) initially indicated that they would be seeking to modify the structure of the scheme so it offered schools the opportunity to choose between religious and secular support workers.<sup>95</sup> New South Wales went so far as to table with the Commonwealth an independent review commissioned by its Department of Education in which a three-year study of secular student support officers found that they had had a 'significant impact' on the schools in which they worked.<sup>96</sup> The Commonwealth, however, continued to maintain its position that it would not fund alternatives to religious chaplains. New South Wales, Tasmania, and the Australian Capital Territory in response dropped their resistance, conceding that some federal funding is better than no funding at all.<sup>97</sup> The other states and territories soon followed suit, with all jurisdictions now accepting that eligible chaplains must be 'recognised through formal ordination, commissioning, recognised religious qualifications or endorsement by a recognised or accepted religious institution'.<sup>98</sup> The outcome illustrates the way in which the fiscal dominance of the Commonwealth presents a real challenge to the view

<sup>94</sup> Daniel Hurst, 'Budget: It Will Be Chaplains, Not Secular Social Workers, at Schools', *The Guardian* (online), 14 May 2014 <<http://www.theguardian.com/world/2014/may/14/budget-it-will-be-chaplains-not-secular-social-workers-at-schools>>.

<sup>95</sup> Alexandra Smith, 'Piccoli Backs Secular Welfare Workers', *The Sydney Morning Herald* (Sydney), 30 August 2014, 4; Primrose Riordan, 'Chaplaincy Mavericks Deemed Not to Have a Prayer of Getting Funding', *Canberra Times* (Canberra), 16 September 2014, 6; Tom Nightingale, 'National School Chaplaincy Program: Tasmania Wants Secular Counsellors Included in Scheme', *ABC News* (online), 27 September 2014 <<http://www.abc.net.au/news/2014-09-27/tasmanian-government-wants-secular-workers-in-nscp/5773624>>.

<sup>96</sup> Smith, 'Piccoli Backs Secular Welfare Workers', above n 95, 4.

<sup>97</sup> Alexandra Smith, 'Chaplains Get the Nod over Youth Workers', *The Sydney Morning Herald* (Sydney), 11 October 2014, 3; Kathleen Dyett, 'School Chaplaincy Program Agreed to by ACT Government', *ABC News* (online), 6 October 2014 <<http://www.abc.net.au/news/2014-10-06/school-chaplaincy-program-agreed-to-by-act-government/5791816>>; Riordan, above n 95, 6.

<sup>98</sup> Commonwealth, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, Australian Capital Territory and Northern Territory, *Project Agreement for the National School Chaplaincy Programme* (October–November 2014) <[http://www.federalfinancialrelations.gov.au/content/npa/education/school\\_chaplaincy\\_programme/Project\\_Agreement.pdf](http://www.federalfinancialrelations.gov.au/content/npa/education/school_chaplaincy_programme/Project_Agreement.pdf)>.

held by some members of the Court in *Williams [No 1]* that s 96 wears a 'consensual aspect'.<sup>99</sup>

Other than s 96, there appeared to be few options available to the Commonwealth to continue funding school chaplains. If the reasoning of Crennan J were to be followed, the possibility of taking advantage of the student benefits power in s 51(xxiiiA) might not be entirely foreclosed. The requirement of individuation may conceivably be met, for example, by an entitlement system enabling identifiable student beneficiaries to access chaplaincy services. There would remain, however, the need to ensure such a scheme could be properly described as one that meets the 'material wants' of students as a consequence of their status as such. The approach adopted by the joint judgment to this power presents formidable difficulties in this regard.

That remains the case for Commonwealth funding in other areas of education. Indeed, the list of programs funded by way of sch 1AA to the *FMA Regulations* includes a number in the field of education that appear unlikely to meet the standards set down by the High Court. For example, programs dealing with early childhood education,<sup>100</sup> school support,<sup>101</sup> digital education<sup>102</sup> and the Australian Baccalaureate<sup>103</sup> may now be vulnerable to challenge. Crennan J adverted to further problems that might arise in the tertiary sector in *Williams [No 2]* when her Honour observed that

indirect assistance, for example to students, such as subsidies paid to universities, must relate to education services provided to real or actual persons as prescribed recipients or beneficiaries entitled to those education services.<sup>104</sup>

While federal funding to universities in the form of Commonwealth supported places and scholarships would appear to fall within this category, other payments now appear to lack constitutional support. For example, it is not clear how the Commonwealth can maintain its current funding approach for university research or capital works, which do not meet the requirements of individuation, even if it is accepted that these funds provide benefits to students, albeit indirectly. The sums involved in these areas are often large. For example, direct Commonwealth funding to the Australian Research

<sup>99</sup> *Williams [No 1]* (2012) 248 CLR 156, 234 [143], 235–6 [147]–[148] (Gummow and Bell JJ), quoting *AAP Case* (1975) 134 CLR 338, 357–8 (Barwick CJ).

<sup>100</sup> *FMA Regulations* sch 1AA items 407.001, 407.004.

<sup>101</sup> *Ibid* sch 1AA item 407.005.

<sup>102</sup> *Ibid* sch 1AA items 407.024–407.025.

<sup>103</sup> *Ibid* sch 1AA item 407.009.

<sup>104</sup> (2014) 252 CLR 416, 475–6 [109].

Council alone in 2014–15 will amount to somewhere between \$875 million and \$905 million.<sup>105</sup>

### B *Other Commonwealth Programs*

When considering the programs listed in sch 1AA of the *FMA Regulations*, what perhaps is most striking is the generality of the terms by which they are referred. While the titles and brief descriptions contained in the schedule provide some cursory indication of the general area in which there is an intention to spend, what this actually translates into in terms of real expenditure and policy outcomes requires a detailed assessment on a case by case basis of matters outside the *FMA Regulations* themselves.<sup>106</sup> Thus, caution must be applied in any attempt to categorise Commonwealth spending as constitutionally valid or otherwise by reference only to the language of the *FMA Regulations*.<sup>107</sup> As distinct from a full statutory enactment of an individual scheme, the very limited language with which programs were included in sch 1AA upon enactment, and have since been added by the executive to sch 1AB, means that the task of characterisation facing the Court in this context is both novel and extremely difficult.

As broadly expressed as they are, there does appear to be a nexus between many of the direct funding programs listed in sch 1AA to the *FMA Regulations* and Commonwealth heads of legislative power. For example, spending on a range of overseas development assistance programs<sup>108</sup> would appear to be supported by the external affairs power in s 51(xxix) of the *Constitution*; expenditure in relation to the Pharmaceutical Benefits Scheme<sup>109</sup> would find

<sup>105</sup> Department of Education, 'ARC Budget Statements 2014–15' (D14/267591, 13 May 2014) 173.

<sup>106</sup> For example, *FMA Regulations* sch 1AA item 418.003 is entitled 'Buy Australian at Home and Abroad' and is described simply as having an objective '[t]o increase the productivity, sustainability and growth of industry'. Whether spending under this category would fall within the ambit of the corporations power in s 51(xx) of the *Constitution*, or any other provision, is difficult to ascertain without further investigation into the precise content of the program.

<sup>107</sup> The Hon James Spigelman has suggested that a number of the programs listed in sch 1AA to the *FMA Regulations* are 'identified in such a general language that they could not withstand constitutional scrutiny': James Spigelman, 'Constitutional Recognition of Local Government' (Speech delivered at 116<sup>th</sup> Annual Conference of the Local Government Association of Queensland, Brisbane, 24 October 2012) 10.

<sup>108</sup> *FMA Regulations* sch 1AA items 413.001–413.006.

<sup>109</sup> *Ibid* sch 1AA item 415.008.

support in the pharmaceutical benefits power in s 51(xxiiiA); and funding to the territories<sup>110</sup> would be supported by s 122.

By contrast, programs concerning, for example, the environment,<sup>111</sup> regional development,<sup>112</sup> local government,<sup>113</sup> sport,<sup>114</sup> and the arts,<sup>115</sup> do not obviously correspond to a head of Commonwealth legislative power in s 51. Programs of this kind are also unlikely to find support in the ‘nationhood power’, relied upon in combination with the incidental power in s 51(xxxix), as an alternative source of legislative authority. While it is arguable that a number of programs may, for the sake of convenience,<sup>116</sup> be better administered at the national level, this is not sufficient to trigger the nationhood power. Instead, in *Pape*, it was the lack of any alternative means of avoiding an imminent national financial crisis, other than Commonwealth-level action, that convinced a majority of the Court that ‘nationhood’ might provide the necessary constitutional authority in the circumstances of that case.<sup>117</sup> By contrast, in *Williams [No 1]*, the Court unanimously rejected any notion that the nationhood power might support Commonwealth spending in relation to the school chaplains program.<sup>118</sup> Since most programs listed in sch 1AA are of the ordinary ‘school chaplains’ variety, lacking any exceptional character of the kind that was relevant in *Pape*, few could sustain any connection with the nationhood and the incidental power.

The Commonwealth may be reluctant to respond to the broader implications created by the *Pape*, *Williams [No 1]* and *Williams [No 2]* trilogy of cases for this latter category of programs, lest this expose their constitutional

<sup>110</sup> Ibid sch 1AA item 421.003.

<sup>111</sup> Ibid sch 1AA items 425.001–425.019, subject to referrals of power from the states to the Commonwealth such as with respect to the Murray Darling Basin: Council of Australian Governments, *Agreement on Murray-Darling Basin Reform* (3 July 2008).

<sup>112</sup> *FMA Regulations* sch 1AA item 421.001.

<sup>113</sup> Ibid sch 1AA item 421.002.

<sup>114</sup> Ibid sch 1AA item 421.005.

<sup>115</sup> Ibid sch 1AA item 421.004.

<sup>116</sup> It ought to be recalled that the joint judgment in *Williams [No 2]* seemed to take a dim view of ‘inconvenience’ to the Commonwealth, at least as a basis for asserting that *Williams [No 1]* should be reopened: (2014) 252 CLR 416, 464–5 [65] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>117</sup> (2009) 238 CLR 1, 63–4 [133] (French CJ), 91 [241] (Gummow, Crennan and Bell JJ).

<sup>118</sup> (2012) 248 CLR 156, 191 [34], 216 [83] (French CJ), 235 [146] (Gummow and Bell JJ), 250–1 [196] (Hayne J), 319 [402] (Heydon J), 348 [503] (Crennan J), 373 [594] (Kiefel J).

vulnerability. If it adopts a conservative approach, which is likely,<sup>119</sup> then the fate of such federal spending would depend upon litigants having the standing and inclination to challenge programs on a case by case basis. In most instances, those with standing are also likely to be beneficiaries of Commonwealth programs, making such challenges unlikely in practice. However, the Court's more liberal approach to standing rules in the *Williams [No 1]* and *Williams [No 2]* litigation means that such challenges may not be as infrequent as had been the case.

Questions also linger over future programs. As previously noted, the validity of Parliament's delegation of authority to the executive was not a matter on which the Court in *Williams [No 2]* was required to reach a conclusive position. In obiter, however, the Court appeared disinclined to accept submissions suggesting that the mere width of the potential application of s 32B of the *FMA Act*, to cases in which Parliament does not possess legislative power, would be sufficient to render the entire provision invalid.<sup>120</sup> Rather, it seemed to prefer a narrower construction of the provision as only authorising those spending programs that would be *intra vires*.<sup>121</sup> The obvious implication that follows from such a position is that programs since added to sch 1AB to the *FMA Regulations* by the Commonwealth need to stay within the boundaries of Commonwealth legislative power in order to avoid falling foul of constitutional challenge.<sup>122</sup> Beyond this, it is difficult to see how on current principles a challenge to the delegation could succeed, since both houses of Parliament retain the capacity to control the Commonwealth in all the usual ways,<sup>123</sup> including through the disallowance of tabled regulations.

<sup>119</sup> As Justice Duncan Kerr, prior to his appointment, said of the *Pape* case, the nature of government is that it will not respond to constitutional developments until such time as it is absolutely necessary: Duncan Kerr, '*Pape v Commissioner of Taxation: Fresh Fields for Federalism?*' (2009) 9 *Queensland University of Technology Law and Justice Journal* 311, 319.

<sup>120</sup> Such a submission would be based on Dixon J's observation in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* that '[t]here may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power': (1931) 46 CLR 73, 101 ('*Dignan's Case*').

<sup>121</sup> *Williams [No 2]* (2014) 252 CLR 416, 457 [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>122</sup> See Andrew Lynch, 'Commonwealth Spending after *Williams (No 2)*: Has the New Dawn Risen?' (2015) 26 *Public Law Review* 83.

<sup>123</sup> See *Dignan's Case* (1931) 46 CLR 73, 101–2 (Dixon J); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 265 (Mason CJ, Dawson and McHugh JJ).



## IV CONCLUSION

*Williams [No 2]* is the latest instalment in a line of cases that has fundamentally altered conceptions of the scope of Commonwealth executive power. The result in the case follows the principles set down in its predecessors, *Pape* and *Williams [No 1]*. In *Williams [No 2]*, the Court unanimously rejected the Commonwealth's contention that the *FMA Act*, and *FMA Regulations* made under it, provided sufficient statutory authority for expenditure on a national program funding chaplains in state schools. The Court also unanimously rejected the Commonwealth's application to reopen the decision in *Williams [No 1]*. It reaffirmed the principles set down in that case at least to the extent that Commonwealth executive power to contract and spend can no longer be conceived of as being as broad as it might be within the context of a unitary, rather than federal, government.

The case is significant for the implications that it holds for future Commonwealth spending. There are a large number of federal programs for which sufficient constitutional, and therefore statutory, support will now be difficult to find. While the national school chaplains program appears set to continue largely unaltered by way of separate state-administered programs funded under s 96 of the *Constitution*, the Commonwealth does not appear to have taken any steps to restructure the range of other programs that may be similarly vulnerable to constitutional challenge. The fate of many of those schemes may ultimately depend on the willingness of individuals to mount a constitutional challenge to them — and the High Court's acceptance of such persons having sufficient standing in each instance.