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## The High Court's decision in the second School Chaplains case (*Williams No 2*)

by Gareth Griffith

### 1. Introduction

In July 2012 the NSW Parliamentary Research Service published an [e-brief](#) on the High Court's decision in the first School Chaplains case – [Williams v Commonwealth of Australia](#).<sup>1</sup> That case concerned the constitutional validity of a funding agreement under the Commonwealth's National School Chaplaincy Program (NSCP), specifically an agreement between the Commonwealth and Scripture Union Queensland (SUQ) for the provision of chaplaincy services at a State school in Queensland. The funding for the NSCP was not provided under specific legislation or further to s 96 of the Constitution. Rather, the funding was made under a series of funding arrangements administered by the Commonwealth and only authorised by the relevant Appropriations Acts.

The purpose of this e-brief is to update the position by reference to the second School Chaplains case - [Williams v Commonwealth of Australia](#)<sup>2</sup> – the decision in which was handed down on 19 June 2014.

### 2. *Williams (No 1)*, findings and implications

By majority (Heydon J dissenting), the High Court held in *Williams (No 1)* that the Funding Agreement and payments made to SUQ under that agreement were invalid because they were beyond the executive power of the Commonwealth.<sup>3</sup> As defined by French CJ, the case required:

consideration of the executive power of the Commonwealth, absent power conferred by or derived from an Act of the Parliament, to enter into contracts and expend public money.<sup>4</sup>

As explained in [e-brief 14/2012](#), the decision in *Williams (No 1)* was based on foundations laid in the earlier *Pape case*.<sup>5</sup> The premises underlying the decision in *Pape* were that:

first, that the appropriation of moneys in accordance with the requirements of [ss 81](#) and [83](#) of the [Constitution](#) does not itself confer a substantive spending power and, second, that the power to spend appropriated moneys must be found elsewhere in the [Constitution](#) or in statutes made under it.<sup>6</sup>

In *Pape* the impugned Commonwealth law was found to be valid, based on the exercise of the “executive power” under section 61 of the Commonwealth Constitution at a time of national crisis or emergency. Those circumstances did not apply in *Williams (No1)* where the impugned law was found to be invalid.<sup>7</sup> In effect, for direct Commonwealth funding to be valid in the circumstances of *Williams (No 1)* it would have to be based on legislation that was within a head of power under section 51 of the Commonwealth Constitution.

In *Williams (No 1)* the High Court did not find conclusively that the Funding Agreement at issue was not able to be supported by a section 51 head of power.<sup>8</sup> For the Commonwealth Government, this left the door open for the passing of specific legislation for the Funding Agreement in dispute, as well as for a plethora of other Commonwealth grants and programs. Within a week of the High Court's decision the Commonwealth Government had passed legislation designed to shore up the validity of no fewer than 427 existing grants and programs – the [Financial Framework Legislation Amendment Bill \(No. 3\) 2012](#) (Cth).

It was the validity of this remedial legislative scheme, to the extent that it applied to the financial payments made by the Commonwealth to the SUQ, that was at issue in *Williams (No 2)*. Before turning to that second case, it is worth indicating some of the broader issues raised by *Williams (No 1)*, in particular in terms of its potential for altering the operation of Australia's federal system.

Again building on foundations laid in the *Pape case*,<sup>9</sup> in *Williams (No 1)* federal considerations played a part in limiting the scope of the Commonwealth government's executive power. For example, Kiefel J brought together considerations relating to responsible government and “the distribution of powers as between the Commonwealth and the States”.<sup>10</sup> She went on to observe with approval:

Dixon J, in the *Pharmaceutical Benefits Case*,<sup>11</sup> spoke of the position that the Commonwealth occupies as a national government and suggested that “no narrow view” should be taken of its powers. But his Honour went on to identify limitations on the executive power of a kind mentioned earlier in these reasons, stating that “the basal consideration would be found in the distribution of powers and functions between the Commonwealth and the States”.<sup>12</sup>

By way of an introduction to this broader debate, [e-brief 14/2012](#) stated:

Whether the *Williams case* does in fact indicate the turning of a corner in federal relations in Australia remains to be seen. Certainly the new focus by the High Court on the federal nature of the system of government established by the Constitution is of considerable importance. But precisely how this will play out, especially with changes to the personnel of the High Court immediately pending is unclear.<sup>13</sup>

It is possible, especially if the amending legislation is found to be invalid, that greater reliance will be placed on s 96 grants and that with it a more "consensual" form of federalism will develop. Then again, with the financial reliance of the States on the Commonwealth likely to remain in place, the consensual nature of future federal transactions may lie more in appearance than reality. There are of course strong political reasons why Commonwealth Governments, of any complexion, will not want to relinquish their power to spend on grants and programs. The amending legislation that was passed in such haste and with the agreement of all parties is evidence enough of that.

Still, *Williams* is an interesting decision, one that may be pregnant with possibilities for the future of Australian federalism. No less interesting are the implications for Commonwealth spending on programs that are on the margins of federal legislative power. Professor George Williams said in this respect:

The complexities of this decision mean it will probably play out over the next 20 years in what the Commonwealth spends money on and how it does that.<sup>14</sup>

### 3. The decision in *Williams (No 2)*

The High Court's unanimous decision in *Williams (No 2)* was handed down on 19 June 2014. In brief, at issue in the case was the constitutional validity of the payments made under the SUQ Funding Agreement further to the remedial legislation that was passed in 2012, notably s 32B of the *Financial Management and Accountability Act 1997* (Cth), which provides the Commonwealth with a power to make, vary or administer arrangements and grants where these are specified in regulations. Section 32B(1) reads:

(1) If:

- (a) apart from this subsection, the Commonwealth does not have power to make, vary or administer:
  - (i) an arrangement under which public money is, or may become, payable by the Commonwealth; or
  - (ii) a grant of financial assistance to a State or Territory; or

(iii) a grant of financial assistance to a person other than a State or Territory; and

(b) the arrangement or grant, as the case may be:

(i) is specified in the regulations; or

(ii) is included in a class of arrangements or grants, as the case may be, specified in the regulations; or

(iii) is for the purposes of a program specified in the regulations;

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

Significantly, the High Court restricted its consideration and judgment to the specific issue of the SUQ Funding Agreement, with the joint judgment stating that:

it is not necessary to determine whether, as Mr Williams and some of the interveners submitted, s 32B of the FMA Act is wholly invalid because it constitutes an impermissible delegation of legislative power.<sup>15</sup>

The decision of the Court was that "In their relevant operation, the impugned provisions are not valid laws of the Commonwealth". In particular, it was found that that, in their relevant operation, the impugned provisions were neither laws with respect to the provision of benefits to students within section 51(xxiiiA) of the Commonwealth Constitution,<sup>16</sup> nor laws with respect to trading or financial corporations within section 51(xx).<sup>17</sup> For the Commonwealth, constitutional validity was also claimed on the basis of the "incidental power" within section 51(xxxix), in respect to which the joint judgment stated:

85. For the most part, the submissions which the Commonwealth parties made about s 51(xxxix) depended upon the success of other arguments they advanced but which have been rejected. Thus the Commonwealth parties submitted that, in so far as the Appropriation Acts provided authority to spend appropriated moneys, the Appropriation Acts were supported by s 51(xxxix) as laws incidental to the power to appropriate. They further submitted that s 32B of the FMA Act was supported by the incidental power as a law incidental to the power to appropriate or the executive power under s 61 to spend and contract.

86. Both of those arguments must be rejected. To hold that the Parliament may make a law authorising the expenditure of any moneys lawfully appropriated in accordance with ss 81 and 83, no matter what the purpose of the expenditure may be, would treat outlay of the moneys as incidental to their ear-marking. But that would be to hold, contrary to *Pape*, that any and every appropriation of public moneys in accordance with ss 81 and 83 brings the

expenditure of those moneys within the power of the Commonwealth.

87. Likewise, to hold that s 32B of the FMA Act is a law with respect to a matter incidental to the execution of the executive power of the Commonwealth (to spend and contract) presupposes what both *Pape* and *Williams (No 1)* deny: that the executive power of the Commonwealth extends to any and every form of expenditure of public moneys and the making of any agreement providing for the expenditure of those moneys.

#### 4. Responses to *Williams (No 2)*

At least two questions arise, one specific to the future finding of the school chaplaincy program, the other concerning the future operation and validity of the other federal grants and programs provided for under the 2012 remedial legislation, of which there are over 400 in number.

As to the first, the political response from the Prime Minister was to confirm his Government's support for the school chaplaincy program, saying "This is a policy that was invented by the Coalition, it was supported by the Coalition...we very much support it and we want it to continue".<sup>18</sup> From an academic standpoint, Professor Anne Twomey is reported to have said that

the federal government would only be able to continue the chaplaincy program by providing grants to state governments rather than directly to chaplains: "This is the only real option. They can do that and they probably will".<sup>19</sup>

Professor Andrew Lynch, the Director of the Gilbert & Tobin Centre of Public Law suggested the same solution might apply more generally, stating:

The government would obviously be thinking about how they could future proof these other schemes...The solution, if they are really wedded to anything, and this applies to chaplains particularly, is to keep funding them by giving them money through state governments.<sup>20</sup>

As to the broader question of constitutional validity, Professor Lynch has also commented that *Williams (No 2)* has confirmed that each of the 400 plus Commonwealth schemes "must be able to be connected to a source of commonwealth legislative power". He added:

For some that might be easy enough, but for many, like the chaplains program, it is apparent that the commonwealth has been acting beyond its constitutional capacity.<sup>21</sup>

Professor Twomey would seem to be in broad agreement, reportedly stating that:

most of the other programs will "probably" be valid, because they fall under one of these powers. But she said the decision left it open for those that were not to be similarly challenged in the High Court.<sup>22</sup>

Gabrielle Appleby, senior lecturer at the University of Adelaide Law School made the point that "For all the other funding programs, the Commonwealth will now have to point to a federal power that supports them". She went on to say:

There are over 400 programs authorised by that legislation. A number of them relate to areas that are highly unlikely to have the necessary connection – including funding for sporting programs, local government programs, health and education programs.<sup>23</sup>

*The Australian* reported that, for his part, the federal Attorney General, George Brandis:

played down the impact of the decision on other government programs, dismissing suggestions by opposition finance spokesmen Tony Burke that a range of spending schemes had been put at risk. "The court did not decide that any other commonwealth program was invalid" he said.<sup>24</sup>

### 5. Comment

The above represent only the very first commentaries on the case and its implications. Specifically in relation to the school chaplains program it is clear that the Commonwealth is determined to proceed with it and that an alternative means of finance will be found, possibly through section 96 grants to the States.

More broadly, the limited scope and nature of the High Court's decision leaves all the other relevant Commonwealth programs subject to constitutional challenge, particularly it is suggested those programs in such areas as sport, the arts, roads and the environment.<sup>25</sup> Precisely how this will play out is hard to predict. It may be that the more vulnerable programs will be the subject of rolling challenges, with the issue of standing to be determined in each case. It may be that the Court would permit a number of related challenges to be heard together. It could also be the case that little, or nothing, will happen, at least in the immediate future, in part because of the time, energy and expense required to mount a High Court case, but also when one considers in whose interests it would be to challenge certain programs; for example, those designed to improve roads and local infrastructure. One area the decision may impact on is that of future pork barrelling, the building of sports halls in marginal constituencies and the like.

As for the broader significance of the *Williams* cases for Australian federalism, this remains to be determined. There may be a sense in

which, by the workings of legal practice and reasoning, the seemingly transformative potential raised by *Williams (No 1)* has been reduced to something more mundane and piecemeal in *Williams (No 2)*. But that is not to underestimate the potential significance of these decisions, placing as they do the requirements of the heads of power under section 51 of the Constitution at the centre of Commonwealth expenditure. The influence of these cases may yet be significant in subtle and nuanced ways, causing doubts and questions to be raised about programs on the margins of federal legislative power. If section 96 grants are relied on to a greater extent, in place of direct Commonwealth funding, that in itself shifts the mechanisms by which the Australian federation operates. Professor Twomey has said in this regard:

It's basically coming back to basic principles of federalism,...The commonwealth can by all means give the states money in relation to it, but can't do it itself.<sup>26</sup>

For further commentary on *Williams (No 2)* follow the [High Court Blog](#).

<sup>1</sup> [2012] HCA 23 (20 June 2012) – henceforth *Williams (No 1)*.

<sup>2</sup> [2014] HCA 23 (henceforth *Williams (No 2)*).

<sup>3</sup> Note that Hayne J's decision as to invalidity rested on a narrower basis. He concluded that it was not necessary to answer the broader question of whether the Commonwealth Executive could ever "spend money lawfully available for expenditure without legislative authority" (para 288). Note also that a majority held that s 44 of the *Financial Management and Accountability Act 1997* (Cth) did not provide the Commonwealth with the necessary statutory authorisation to enter into the Funding Agreement or to make payments to SUQ under that agreement. Note, too, that the High Court unanimously dismissed that part of *Williams*' challenge based on s 116 of the Constitution ("freedom of religion").

<sup>4</sup> [2012] HCA 23 (20 June 2012) at para [1] (French CJ).

<sup>5</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

<sup>6</sup> [2014] HCA 23 (19 June 2014) at para [25].

<sup>7</sup> [2012] HCA 23 (20 June 2012) at para [83] (French CJ), para 146 (Gummow and Bell JJ), para 240 (Hayne J), para 499 (Crennan J), para 594 (Kiefel J).

<sup>8</sup> But see [2012] HCA 23 (20 June 2012) at paras [271-286] (Hayne J), paras [574-575] (Kiefel J) and e-brief 14/2012, p 7.

<sup>9</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

<sup>10</sup> *Williams* at para 581 (Keifel J).

<sup>11</sup> *Attorney General (Vic) v Commonwealth* (1945) 134 CLR 338 at 398.

<sup>12</sup> [2012] HCA 23 (20 June 2012) at para 584 (Keifel J).

<sup>13</sup> A Lynch, "School chaplains decision opens can of worms for federal funding", [The Australian](#), 3 July 2012.

<sup>14</sup> A Dale and A McMeekin, "Schools chaplain case cash crisis", [Daily Telegraph](#), 21 June 2012.

<sup>15</sup> [2014] HCA 23 (19 June 2014) at para [30].

<sup>16</sup> [2014] HCA 23 (19 June 2014) at para [11].

<sup>17</sup> [2014] HCA 23 (19 June 2014) at para [12].

<sup>18</sup> N Berkovic, "Schools chaplain funding invalid", [The Australian](#), 20 June 2014.

<sup>19</sup> J Lee, B Preiss and M Knott, "Abbott to look at state grants after decision over chaplains", [SMH](#), 20 June 2014.

<sup>20</sup> J Mather and E Fowler, "Court sinks chaplaincy program" [Australian Financial Review](#), 20 June 2014.

<sup>21</sup> N Berkovic, "Schools chaplain funding invalid", [The Australian](#), 20 June 2014.

<sup>22</sup> J Lee and B Preiss, "Why the High Court struck down school chaplaincy funding" [SMH](#), 20 June 2014.

<sup>23</sup> J Mather and E Fowler, "Court sinks chaplaincy program" [Australian Financial Review](#), 20 June 2014.

<sup>24</sup> N Berkovic, "Schools chaplain funding invalid", *The Australian*, 20 June 2014.

<sup>25</sup> J Mather and E Fowler, "Court sinks chaplaincy program" *Australian Financial Review*, 20 June 2014.

<sup>26</sup> D Hurst, "School chaplains funding struck down by high court" *Guardian Australia*, 20 June 2014.

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