



## The High Court's decision in the School Chaplains case: findings and implications

by Gareth Griffith

### 1 Introduction

From time to time a decision of the High Court is considered to have major implications for federalism in Australia. The list of such cases includes the *Engineers case* (1920),<sup>1</sup> the *Uniform Tax cases* (1942 and 1957),<sup>2</sup> the *Tasmanian Dam case* (1983),<sup>3</sup> the excise duties decision in *Ngo Ngo Ha v NSW* (1997),<sup>4</sup> and the *Work Choices case* (2006).<sup>5</sup> In these and other instances, with only minor qualifications,<sup>6</sup> the High Court has found broadly in favour of a "national" as against a "federal" image of the polity created under the Australian Constitution.<sup>7</sup> In *Work Choices* Callinan J (dissenting) went so far as to describe the landmark *Engineers case*, which set aside the reserved powers doctrine, as "that monument to the demolition of State power".<sup>8</sup>

Working against this trend is [Williams v Commonwealth of Australia](#).<sup>9</sup> In that case federal considerations played a part in limiting the scope of the Commonwealth government's executive power. The majority views in *Williams* built on foundations laid in the earlier *Pape case*,<sup>10</sup> where the relevance of federal considerations for the scope of the executive power of the Commonwealth government was recognised. For example, Hayne and

Kiefel JJ said that a broad view of the Commonwealth executive power did not fit easily with the understanding of the Australian constitutional structure "of separate polities, separately organised, continuing to exist as such, in which the central polity is a government of limited and defined powers".<sup>11</sup>

A key difference is that in *Pape* the impugned Commonwealth law - the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) - was found to be valid, whereas in *Williams* the High Court found the impugned funding agreement to be invalid (by a majority of 6:1). The funding agreement was between the Commonwealth and Scripture Union Queensland (SUQ) for the provision of chaplaincy services at a State school in Queensland.

This e-brief presents a summary of the *Williams case* and the background to it, along with an overview of the academic and political responses to the decision. 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). The precise total amount

of these grants and programs is not known.<sup>12</sup> Writing in the *SMH*, Phillip Coorey and Dan Harrison said that:

The affected programs are worth billions, constituting up to 10 per cent of total Commonwealth funding. They include overseas aid, supplementary programs to veterans, arts, health, sport and education grants, industry development schemes, drought assistance and infrastructure projects.<sup>13</sup>

Coorey and Harrison quoted the Commonwealth Attorney General, Nicola Roxon, as saying in response to *Williams*:

Governments on both sides have long relied on a broad view of the Commonwealth's executive authority to spend Commonwealth funds.

## 2 The Commonwealth's legislative power

By way of background to the *Williams* case, the legal and political context relates to the familiar issues arising from Commonwealth financial dominance, on one side, and the Federal Parliament's limited range of express legislative powers primarily under s 51 of the Constitution, on the other. A number of those s 51 powers are by their nature exclusive to the Commonwealth (eg, s 51 (ix) "naturalisation and aliens"), but mostly they are concurrent with State legislative powers, subject to s 109 of the Constitution which provides for federal laws to prevail in the event of inconsistency.<sup>14</sup> As was evident in the *Work Choices case* (2006),<sup>15</sup> in interpreting these s 51 legislative powers the High Court has adopted a broad and liberal construction.

Nonetheless, limits remain. To circumvent its limited legislative power

the Commonwealth has developed a number of strategies, including the use of tied or special purpose grants under s 96 of the Constitution. Section 96 provides that the Commonwealth Parliament may grant financial assistance to the States, subject to terms and conditions, in areas otherwise outside the Commonwealth's legislative power. As Barwick CJ observed as long ago as 1975 in the *AAP case*:

Section 96 ...has enabled the Commonwealth to intrude in point of policy and perhaps of administration into areas outside Commonwealth legislative competence.<sup>16</sup>

Another strategy, which has accelerated in recent times, is the proliferation of inter-governmental agreements, authorised by the Commonwealth's executive power and often involving joint federal-State legislative action for their implementation.<sup>17</sup> There is in addition a proliferation of Commonwealth funded and administered programs. The scope of such funding is evident in the [Financial Framework Legislation Amendment Bill \(No. 3\) 2012](#) (Cth), 60 pages of which is devoted to listing Commonwealth grants and programs which may be affected by the decision in *Williams*.

To a large extent these programs have been authorised on the generalised basis of appropriations legislation and not on the express authority of specific statutes. But, then, it was held in *Pape*<sup>18</sup> that "contrary to a long-standing assumption, parliamentary appropriation is not a source of spending power".<sup>19</sup> The result was that reliance could not be placed on ss 81 ("Consolidated Revenue Fund") and 83 ("Money to be appropriated by law") of the Constitution for the expenditure of public moneys. With reference to

*Pape*, French CJ, Gummow and Crennan JJ said in *ICM Agriculture Pty Ltd v The Commonwealth*.<sup>20</sup>

[I]t is now settled that the provisions ... in s 81 of the Constitution for establishment of the Consolidated Revenue Fund and in s 83 for Parliamentary appropriation, do not confer a substantive spending power and that the power to expend appropriated moneys must be found elsewhere in the Constitution or the laws of the Commonwealth.

### 3 The Commonwealth's executive power

An alternative source of funding power is the Commonwealth's executive power under s 61 of the Constitution. Section 61 provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

According to French CJ, the executive power referred to in s 61 extends to:

- powers necessary or incidental to the execution and maintenance of a law of the Commonwealth;
- powers conferred by statute;
- powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth;
- powers defined by the capacities of the Commonwealth common to legal persons;<sup>21</sup>
- inherent authority derived from the character and status of the Commonwealth as the national government.<sup>22</sup>

*Pape* is authority for the proposition that the executive power referred to in

s 61 of the Constitution confers, in some circumstances, power to spend public moneys. As Hayne J explained:

The decision of a majority of this Court in *Pape* establishes that, in circumstances of national emergency or crisis, the executive power of the Commonwealth supports a determination by the Executive Government that a fiscal stimulus is needed (and that this power, with s 51(xxxix), will support legislation effectuating that payment). This was identified as an example of "activities peculiarly adapted to the government of the country and which otherwise could not be carried on for the public benefit" or measures "peculiarly within the capacity and resources of the Commonwealth Government".<sup>23</sup>

In circumstances of national crisis, therefore, where some extraordinary measures need to be introduced, s 61 may be a valid basis for Commonwealth expenditure on ameliorative programs. But the suggestion in *Pape* is that the power is limited to such circumstances or other initiatives appropriate to the status of the Commonwealth as a national government. Broader questions concerning the relationship between the Commonwealth's executive and legislative powers were not answered in *Pape*.

Prior to the *Williams case* Commonwealth funding of programs was also based on what Heydon J (dissenting) in that case called the "common assumption". This was explained as follows:

that the executive power of the Commonwealth included a power to enter contracts without statutory authority as long as the Commonwealth had legislative power to give it statutory authority.<sup>24</sup>

Thus, it was assumed that "the executive power of the Commonwealth included a power to do what the Commonwealth legislature could authorise the Executive to do by enacting legislation".<sup>25</sup> According to the "common assumption" it did not matter that specific legislation had not been passed; what mattered was the existence of the potential constitutional power or capacity to pass the relevant legislation. The question was what the Commonwealth, as a matter of legislative power, *could* do and not necessarily what it had done.

The validity of the "common assumption", including the breadth of the power of the Commonwealth to enter into contracts for the expenditure of public moneys, was the key issue upon which the *Williams* case turned.

#### **4 The facts in the *Williams* case**

Based on the [summary](#) provided by the High Court, the facts of the case were that, in November 2007, Scripture Union Queensland (SUQ), a public company, entered into a Funding Agreement with the Commonwealth to provide certain chaplaincy services at the Darling Heights State School (the School). The Funding Agreement was entered into pursuant to the Commonwealth's National School Chaplaincy Program (NSCP), first announced in October 2006, the administrative arrangements for which were made under the NSCP Guidelines.

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.

Ronald Williams, the plaintiff in the case, was the father of four children who attended the School. In 2010, Mr Williams commenced proceedings in the original jurisdiction of the High Court challenging the Commonwealth's authority to enter into the Funding Agreement with SUQ, to draw money from the Consolidated Revenue Fund for each of the financial years from 2007-2008 to 2011-2012 inclusive, and to pay the appropriated moneys to SUQ pursuant to the Funding Agreement.

#### **5 The findings in the *Williams* case**

By majority (Heydon J dissenting), the High Court held 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>26</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>27</sup>

Unlike in *Pape*, in the absence of a national crisis or emergency, the "nationhood" aspect of the Commonwealth's executive power did not apply in this instance.<sup>28</sup> Nor were the Crown's prerogative powers (such as to enter a treaty or wage war) relevant.<sup>29</sup> Gummow and Bell JJ said that the case did not concern the "common law prerogatives" but, rather:

the submission that the scope of the executive power with respect to spending may be measured by that of the legislative power but in the absence of legislation conferring any authority upon the Executive Government.<sup>30</sup>

For Crennan J:

The main question for determination is whether s 61 of the Constitution supported the Executive contracting and spending in respect of the NSCP in the absence of legislative support other than the relevant appropriation Acts.<sup>31</sup>

In effect, in arriving at the finding of invalidity, the majority rejected the "common assumption" as articulated by Heydon J (see above). The proposition that the spending power of the executive government is coextensive with those activities which could be the subject of legislation supported by any head of power in s 51 of the Constitution was said to be "too broad".<sup>32</sup> A majority held that the Commonwealth's executive power does not include a power to do what the Commonwealth Parliament could authorise the Executive to do, such as entering into agreements or contracts, whether or not the Parliament had actually enacted the legislation.<sup>33</sup> As French CJ said:

What is rejected in these reasons is the unqualified proposition that, subject to parliamentary appropriation, the executive power of the Commonwealth extends generally to enable it to enter into contracts and undertake expenditure of public moneys relating to any subject matter falling within a head of Commonwealth legislative power.<sup>34</sup>

Various arguments were canvassed by the majority in support of this conclusion, with reference made to the evolving nature of responsible government,<sup>35</sup> to parliamentary scrutiny and control of the spending of public moneys<sup>36</sup> and to considerations relevant to federalism.<sup>37</sup>

The Commonwealth had argued that the impugned Funding Agreement could have been subject to legislation passed either under the "social services power" (s 51(xxiiiA)) or the corporations power (s 51(xx)) of the Constitution. As French CJ said, these are "fields in which the Commonwealth and the States have concurrent competencies". He observed:

The character of the Commonwealth Government as a national government does not entitle it, as a general proposition, to enter into any such field of activity by executive action alone. Such an extension of Commonwealth executive powers would, in a practical sense, as Deakin predicted, correspondingly reduce those of the States and compromise what Inglis Clark described as the essential and distinctive feature of "a truly federal government".<sup>38</sup>

According to French CJ:

There are consequences for the Federation which flow from attributing to the Commonwealth a wide executive power to expend moneys, whether or not referable to a head of Commonwealth legislative power, and subject only to the requirement of a parliamentary appropriation. Those consequences are not to be minimised by the absence of any legal effect upon the laws of the States. Expenditure by the Executive Government of the Commonwealth, administered and controlled by the Commonwealth, in fields within the competence of the executive governments of the States has, and always has had, the potential, in a practical way of which the Court can take notice, to diminish the authority of the States in their fields of operation. That is not a criterion of invalidity. It is, however, a reason not to accept the broad contention that such activities

can be undertaken at the discretion of the Executive, subject only to the requirement of appropriation.<sup>39</sup>

French CJ further observed that:

A Commonwealth Executive with a general power to deal with matters of Commonwealth legislative competence is in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power. It would undermine parliamentary control of the executive branch and weaken the role of the Senate.<sup>40</sup>

Likewise, Kiefel J brought together considerations relating to responsible government and "the distribution of powers as between the Commonwealth and the States".<sup>41</sup> She went on to observe with approval:

Dixon J, in the *Pharmaceutical Benefits Case*,<sup>42</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>43</sup>

In oral argument the Commonwealth articulated an even broader proposition, to the effect that there was "no relevant limitation upon the power of the Commonwealth Executive to spend monies". As explained by Kiefel J:

That is so, it is said, because it has a capacity to contract that is not limited by reference to the division of legislative powers effected by the Constitution, a capacity which is

analogous to that of a natural person.<sup>44</sup>

This proposition was rejected by the majority, with Kiefel J concluding "The Executive is not authorised by the Constitution to expand its powers by contract".<sup>45</sup> According to French CJ this broader proposition was abandoned by the Commonwealth, which:

accepted that, unlike a natural person, its power to pay and to contract to pay money was constrained by the need for an appropriation and by the requirements of political accountability.<sup>46</sup>

As to whether the Commonwealth Executive's capacity to contract is analogous to that of a natural person, Hayne J stated:

There is no basis in law for attributing human attitudes, form, or personality either to the federal polity that was created by the Constitution or, as the Commonwealth parties sought to do, to one branch of the government of that polity – the Executive. The argument asserting that the Executive Government of the Commonwealth should be assumed to have the same capacities to spend and make contracts as a natural person was no more than a particular form of anthropomorphism writ large. It was an argument that sought to endow an artificial legal person with human characteristics. The dangers of doing that are self-evident.<sup>47</sup>

Hayne J continued:

The Commonwealth, as a polity, can make contracts and can outlay public moneys. It is the Executive's function, not the Parliament's, to make contracts and expend public

moneys. But neither the Executive nor the polity itself can be assumed to have the *same* powers (or capacities) to contract and spend as a natural person.<sup>48</sup>

One important point to note is that, of the majority justices, only Hayne and Kiefel JJ expressly found that the Funding Agreement at issue in the case could not have been supported by either ss 51(xx) or (xxiiiA) of the Constitution.<sup>49</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.

## 6 Academic responses to *Williams*

### 6.1 Practical implications

According to [Simon Evans](#) from the University of Melbourne Law School:

The practical ramifications are that it puts in doubt funding for local governments, some roads and infrastructure, some school and tertiary education programs - the Commonwealth will have to fundamentally review if not rethink the way it operates a number of policies...It's not a crisis, but the Commonwealth will find it harder to do some things - it'll have to negotiate with the states to allow some things, or have to do them through the Parliament, rather than just handing out grants.<sup>50</sup>

[Professor George Williams](#) suggested that:

Direct federal funding of local government, including the Roads to Recovery program, continues to be subject to considerable doubt. The Commonwealth might also be on vulnerable ground in the education sector generally. Questions can be

raised about direct federal funding of private schools and universities. Support for some community groups, the arts and sports might also be an issue.<sup>51</sup>

Similarly, Professor Simon Marginson from the University of Melbourne wrote that:

While the decision was not about universities, it opens the present Higher Education Support Act to possible challenge, along with the national programs in private schooling, local government and roads, sport, the arts and other areas.<sup>52</sup>

For the Australian Local Government Association, the decision in *Williams* strengthened the case for a referendum on the constitutional recognition of local government under the Australian Constitution.<sup>53</sup>

### 6.2 Implications for federalism

In terms of constitutional interpretation, the main departure in *Williams* is to be found in the emphasis placed by the High Court, by the Chief Justice in particular, on the federal system of government established under the Constitution. On this issue, Andrew Lynch commented:

The importance of "federal considerations" to the result in *Williams* cannot be overemphasised. It contrasts sharply with the role that federalism has more typically played in constitutional interpretation.<sup>54</sup>

According to [Professor Anne Twomey](#):

This will come as a bit of a shock to some people in Canberra who think the federal government is the be-all and end-all and the states are a nuisance...this is a really interesting case because for the first time in a very long time the High Court is

supporting the federal concept, where power is not centralised but shared between the state and national levels of government.<sup>55</sup>

In respect to the Commonwealth's spending on grants and programs, [Professor George Williams](#) had this to say:

Williams did not win a victory on the ground of separation of church and state, but did achieve a major win for the states. Chief Justice French in particular emphasised how the power to spend should be read in light of the creation by the constitution of a "truly federal government".

The result of the case could be major, long-term changes in how federal funding programs are undertaken. It is likely to mean that the Commonwealth will spend more money via the states. Although this emphasises the federal character of the constitution, it will come at a cost of enormous complexity and uncertainty.<sup>56</sup>

Specifically on the subject of higher education funding, Professor Marginson said that:

National government might return to funding higher education via section 96 of the Constitution, which enables grants to the States. This would make the consent of the States essential to policy implementation.<sup>57</sup>

## 7 Political responses to *Williams*

The Gillard Government was quick to respond to ensure the continuation of the Chaplaincy Program and other affected programs. After taking legal advice from the Acting Solicitor General, Robert Orr QC, on 25 June 2012 the Attorney General, Nicola Roxon, the Minister for Finance and

Deregulation, Penny Wong, and the Minister for School Education, Peter Garrett, [announced](#) the Government would introduce legislation on the next day - the [Financial Framework Legislation Amendment Bill \(No. 3\) 2012](#). The Attorney-General was reported as saying that:

the government had been planning for such a decision and was already prepared to legislate, alter funding arrangements and possibly hold a referendum to ensure none of the services were affected.<sup>58</sup>

In her Second Reading speech the Attorney General said that the Chaplaincy Program:

needs to be put on a firm legal basis as a matter of urgency, to enable payments to resume for the benefit of schools and students relying on the program.

Ms Roxon continued:

*Williams* also has implications for the validity of Commonwealth spending programs that are not supported by legislation other than an appropriation act, where there may be a constitutional need for legislative support to be provided.

Ms Roxon explained that the *Williams* decision has no implications for Commonwealth grants to the States or, in her view, for spending programs and agreements already authorised by legislation. She added:

Despite this, there remain a significant number of other spending programs and arrangements that are not supported by legislation other than an appropriation act. This bill will provide such legislative authority for those programs and arrangements.



These programs range from helping children with autism through to overseas aid payments. They include a number of payments to veterans that are not part of the social security system. They include a wide range of different programs such as industry development programs, environmental programs, education programs and health programs.

The Bill, which was described by Ms Roxon as a "measured, appropriate and necessary" response to the *Williams* decision, amended the *Financial Management and Accountability Act 1997*, and regulations under that Act, to provide legislative authorisation for existing programs that have already been approved by the Parliament through the Appropriation Acts. The legislation also included a regulation-making power for additional programs that might be identified in the future. Such future regulations would be disallowable by the Parliament. Introduced into the House of Representatives on 26 June 2012, the Bill was assented to two days later without amendment, becoming Act No 77 of 2012.

Commenting on the policy position of non-government parties and independents, the [Commonwealth Parliamentary Library's Bills Digest](#) said that:

The Coalition has expressed reservations about the constitutionality of the proposed Bill. They have proposed that a 'sunsetting' clause be introduced to cease the operation of the provisions on 31 December 2012. Nonetheless, the Coalition has stated that it will support the Bill.

The Greens have welcomed the High Court's decision in *Williams*

because it will allow greater scrutiny of expenditure by Parliament.<sup>59</sup>

The Attorney General is quoted as saying that every federal politician:

has an interest in making sure that the Commonwealth's reach of power and ability to spend on programs that have been supported for many decades can continue.<sup>60</sup>

## 8 Validity of the amending legislation

Comment has been made about the validity or effectiveness of the amending legislation. The [Commonwealth Parliamentary Library's Bills Digest](#) said that:

The scheme implied by *Williams* and *Pape* appears to be that, firstly, the Commonwealth must have a legislative basis for the spending money beyond an Appropriation Act, and secondly, the law authorising the expenditure must have a constitutional basis evident from the enumerated or implied heads of legislative power found within the Constitution. The Bill, however, merely asserts that all the programs listed in the regulations are within power; there is no nexus to an enumerated or implied legislative head of power for any specific program.<sup>61</sup>

The same source went on to suggest that the legislation "would appear to be problematic for several reasons". For example, it said that:

it is questionable whether or not the mere inclusion of multiple programs within a regulation and then—apparently—leaving it for the Executive or a court to determine—item by item—whether or not each program was within the power of the Commonwealth would be a valid exercise of legislative power by the Parliament; that is, it is questionable

whether the Bill meets the constitutional conception of a 'law'.

Andrew Lynch from the University of NSW said that the Act sought to secure a legislative basis for the existing programs "as a job lot". But he added that it was not at all obvious that the legislation would "end uncertainty about which existing programs – including the chaplaincy scheme – the commonwealth has power to run". He went on to say:

Yet it is unclear how generic parliamentary approval can extend to individual schemes which the Parliament lacks legislative capacity to support separately. For this reason, the bill is unlikely to stop challenges to these programs.<sup>62</sup>

Writing in a similar vein, [Professor George Williams](#) observed in respect to the School Chaplaincy Program:

The problem for the government is that it is not clear that this type of scheme can be supported by legislation. The Federal Parliament can pass laws only in certain areas, and has no general power over education.<sup>63</sup>

For Professor Anne Twomey the legislation was an instance of "Parliament's abject surrender to the Executive". She [blogged](#):

Yesterday, the House of Representatives committed its own act of hara-kiri, passing a Bill in just over three hours that gave full authority to the Executive to spend money on whatever it wants without the need for further legislation or parliamentary scrutiny. It was an abject surrender of its powers of financial scrutiny to the Executive, and all to save a few chaplains (possibly ineffectively).<sup>64</sup>

Twomey said that the legislation:

gives the Executive carte-blanc to enter into such programs in the future without any parliamentary scrutiny at all as long as the program or grant comes under one of the existing broad descriptions in the regulations, or with only the need to amend the regulations (by executive action), if a new category needs to be inserted.

Simon Breheny, a research fellow at the Institute of Public Affairs, went so far as to say:

The government's hasty solution is a piece of legislation that completely usurps Parliament's power to approve public spending. It is radical, unnecessary, excessive and unprecedented.<sup>65</sup>

## 9 Conclusion

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>66</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>67</sup>

- <sup>1</sup> *Amalgamated Society of Engineers v The Adelaide Steamship Co and Others* (1920) 28 CLR 129.
- <sup>2</sup> *SA v Commonwealth* (1942) 65 CLR 373 (the First Uniform Tax case); *Victoria and NSW v Commonwealth* (1957) 99 CLR 575 (the Second Uniform Tax case).
- <sup>3</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1.
- <sup>4</sup> *Ngo Ngo Ha v NSW* (1997) 189 CLR 465.
- <sup>5</sup> *NSW v Commonwealth* (2006) 229 CLR 1.
- <sup>6</sup> Notably in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.
- <sup>7</sup> L Zines, "The Commonwealth" in G Craven ed, *Australian Federation: Towards the Second Century*, Melbourne University Press 1992, pp 70-100.
- <sup>8</sup> *NSW v Commonwealth* (2006) 229 CLR 1 at para 764.
- <sup>9</sup> [2012] HCA 23 (20 June 2012) – henceforth *Williams*.
- <sup>10</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.
- <sup>11</sup> (2009) 238 CLR 1 at para 325.
- <sup>12</sup> Commonwealth Parliamentary Library, [Financial Framework Legislation Amendment Bill \(no 3\) 2012](#), Bills Digest No 175, 2011-12, 26 June 2012.
- <sup>13</sup> P Coorey and D Harrison, "Chaplaincy ruling forces bid for urgent legislation", *SMH*, 26 June 2012.
- <sup>14</sup> See G A Moens and J Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia*, 7<sup>th</sup> ed, Butterworths 2007, p396.
- <sup>15</sup> *NSW v Commonwealth* (2006) 229 CLR 1.

- <sup>16</sup> *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 357.
- <sup>17</sup> *R v Duncan; ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 53 at 560 (Mason J).
- <sup>18</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.
- <sup>19</sup> *Williams* at para 2 (French CJ).
- <sup>20</sup> (2009) 240 CLR 140 at para 41.
- <sup>21</sup> But note that, as decided in *Williams*, the contractual capacities or powers of the Commonwealth Executive are not coextensive with those of natural persons. The Commonwealth Executive power to contract is not at large, therefore, but constrained by federal considerations and the requirement that the spending of public moneys be subject to parliamentary scrutiny.
- <sup>22</sup> *Williams* at para 22 (French CJ).
- <sup>23</sup> *Williams* at para 196 (Hyane J).
- <sup>24</sup> *Williams* at para 341 (Heydon J).
- <sup>25</sup> *Williams* at para 340 (Heydon J).
- <sup>26</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>27</sup> *Williams* at para 1 (French CJ).
- <sup>28</sup> *Williams* at para 83 (French CJ), para 146 (Gummow and Bell JJ), para 240 (Hayne J), para 499 (Crennan J), para 594 (Kiefel J).
- <sup>29</sup> *Williams* at para 484 (Crennan J); para 582 (Kiefel J).
- <sup>30</sup> [*Williams* at para 124 (Gummow and BellJJ).
- <sup>31</sup> *Williams* at para 480 (Crennan J).
- <sup>32</sup> *Williams* at para 134-135 (Gummow and BellJJ).
- <sup>33</sup> French CJ made it clear that this articulation of the executive power of the Commonwealth was specific to that polity. Whereas in that context limits might be derived from the federal nature of the Constitution, for the States the powers of

their Executives operate in a "setting analogous to that of a unitary constitution" - *Williams* at para 79 (French CJ); *NSW v Bardolph* (1934) 52 CLR 455 distinguished. The issue was discussed in *Pape*, an account of which is found in A Twomey, "Future directions in federalism – where will the High Court go?" (2011) 6 *Public Policy* 133.

<sup>34</sup> *Williams* at para 4 (French CJ).

<sup>35</sup> *Williams* at para 516-517 (Crennan J).

<sup>36</sup> *Williams* at para 60 (French CJ), para 219-224 (Hayne J).

<sup>37</sup> *Williams* at paras 37 and 63 (French CJ), para 143-144 (Gummow and Bell JJ), para 198 (Hayne J), para 500-501 (Crennan J), para 584-590 (Kiefel J).

<sup>38</sup> *Williams* at para 61 (French CJ).

<sup>39</sup> *Williams* at para 37 (French CJ).

<sup>40</sup> *Williams* at para 60 (French CJ).

<sup>41</sup> *Williams* at para 581 (Keifel J).

<sup>42</sup> *Attorney General (Vic) v Commonwealth* (1945) 134 CLR 338 at 398.

<sup>43</sup> [2012] HCA 23 (20 June 2012) at para 584 (Keifel J).

<sup>44</sup> *Williams* at para 576 (Keifel J). See also the formulation at para 35 (French CJ).

<sup>45</sup> *Williams* at para 595 (Keifel J).

<sup>46</sup> *Williams* at para 35 (French CJ).

<sup>47</sup> *Williams* at para 204 (Hayne J).

<sup>48</sup> *Williams* at para 217 (Hayne J).

<sup>49</sup> *Williams* at paras 271-286 (Hayne J), paras 574-575 (Kiefel J).

<sup>50</sup> P Hartcher, "Fundamental rethink as states' powers affirmed", *SMH*, 21 June 2012.

<sup>51</sup> G Willams, "School chaplains ruling alters concept of federal funding", *SMH*, 21 June 2012.

<sup>52</sup> S Marginson, "States hamstrung by Canberra's control of cash", *The Australian*, 27 June 2012.

<sup>53</sup> H Grennan, "Federal promise broken but referendum still possible", *SMH*, 26 June 2012.

<sup>54</sup> A Lynch, "School chaplains decision opens can of worms for federal funding", *The Australian*, 3 July 2012.

<sup>55</sup> P Hartcher, "Fundamental rethink as states' powers affirmed", *SMH*, 21 June 2012.

<sup>56</sup> G Willams, "School chaplains ruling alters concept of federal funding", *SMH*, 21 June 2012.

<sup>57</sup> S Marginson, "States hamstrung by Canberra's control of cash", *The Australian*, 27 June 2012.

<sup>58</sup> P Coorey and D Harrison, "Federal funding bombshell", *SMH*, 21 June 2012.

<sup>59</sup> Commonwealth Parliamentary Library, [Financial Framework Legislation](#)

[Amendment Bill \(no 3\) 2012](#), Bills Digest No 175, 2011-12, 26 June 2012.

<sup>60</sup> M Grattan, "New laws to protect threatened funding", *SMH*, 26 June 2012.

<sup>61</sup> Commonwealth Parliamentary Library, [Financial Framework Legislation Amendment Bill \(no 3\) 2012](#), Bills Digest No 175, 2011-12, 26 June 2012.

<sup>62</sup> A Lynch, "School chaplains decision opens can of worms for federal funding", *The Australian*, 3 July 2012.

<sup>63</sup> G Willams, "School chaplains ruling alters concept of federal funding", *SMH*, 21 June 2012.

<sup>64</sup> A Twomey, "Parliament's abject surrender to the Executive", [University of Sydney's Constitutional Reform Unit Blog](#), 27 June 2012.

<sup>65</sup> S Breheny, "Democracy sidelined in panic over chaplains", *SMH*, 5 July 2012.

<sup>66</sup> A Lynch, "School chaplains decision opens can of worms for federal funding", *The Australian*, 3 July 2012.

<sup>67</sup> A Dale and A McMeekin, "Schools chaplain case cash crisis", *Daily Telegraph*, 21 June 2012.

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