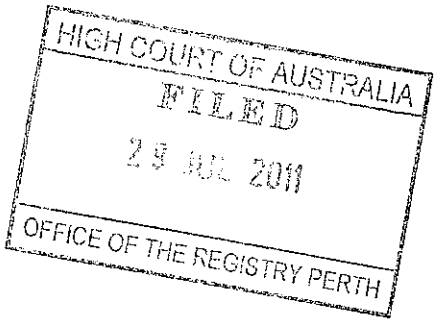
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S307 of 2010



BETWEEN:

RONALD WILLIAMS
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR SCHOOL EDUCATION, EARLY CHILDHOOD AND YOUTH
Second Defendant

MINISTER FOR FINANCE AND DEREGULATION
Third Defendant

SCRIPTURE UNION QUEENSLAND
Fourth Defendant

AMENDED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Date of Document: 29 July 2011

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PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to s. 78A of the *Judiciary Act 1903* (Cth).

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: APPLICABLE LEGISLATION

4. The legislation applicable to the determination of this matter is set out in the submissions of the Plaintiff.

PART V: SUBMISSIONS

Western Australia's Contentions

5. Western Australia contends that the Darling Heights Funding Agreement is invalid as entry into it is beyond the executive power of the Commonwealth, so that the answer to question 2(a) of the Special Case is "Yes".

6. In particular, Western Australia submits that:

   (a) In the circumstances of the present case, the executive government would have power to enter into the Funding Agreement only if authorising entry into that Agreement was within the legislative power of the Commonwealth Parliament;[1]

   (b) Section 51(xx) of the Constitution would not empower the Commonwealth Parliament to authorise the executive to enter into the Funding Agreement as the Scripture Union Queensland is not one of the "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" referred to in that paragraph;[2]

   (c) Section 51(xxiiiA) of the Constitution would not empower the Commonwealth Parliament to authorise the executive to enter into the

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1 See paragraphs [7]-[11] below.
2 See paragraphs [12]-[45] below.

Funding Agreement as the Funding Agreement is not concerned with the "provision of ... benefits to students".[3]

Section 61 - Power of the executive to enter into the Funding Agreement

7. The executive power of the Commonwealth to enter into contracts and like arrangements is not unlimited. It extends to matters within the legislative power of the Commonwealth Parliament so that, at least for contracts made in the ordinary course of administering a recognised part of the Government of the Commonwealth,[4] the executive has the capacity to contract in relation to matters which have been or could be the subject of valid legislation.[5] Western Australia's submissions as to whether the Commonwealth Parliament could authorise the executive to enter into the Funding Agreement pursuant to either ss. 51(xx) or (xxiiiA) of the Constitution, are set out below.[6] No other head of power has been advanced by the Defendants.

8. The Commonwealth's executive power also extends beyond the subject matters of Commonwealth's legislative power, to those powers and capacities derived from the character and status of the Commonwealth as a national polity.[7] This aspect of s. 61 of the Constitution authorises the engagement by the executive in activities and enterprises peculiarly adapted to the government of the country and which otherwise could not be carried on for the public benefit and the benefit of the nation.[8]

9. However, this aspect of the Commonwealth's executive power is limited, and will not support the notion that s. 51(xxxix) of the Constitution confers on the Commonwealth Parliament power to legislate with respect to anything that it regards as being of national interest and concern.[9] Further, in considering the scope of this

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3 See paragraphs [46]-[55] below.

4 See *New South Wales v Bardolph* (1934) 52 CLR 455 at 496 per Rich J, 502 per Starke J, 508 per Dixon J (Gavan Duffy CJ concurring); See also *The Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 432 per Knox CJ and Gavan Duffy J.

5 *Victoria v The Commonwealth (AAP Case)* (1975) 134 CLR 338 at 362-3 per Barwick CJ.

6 Following *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, s. 81 cannot be relied upon as the source of executive power (at 23, [11] and 55, [111] per French CJ, 74-75, [182]-[186] and 82-83, [210] per Gummow, Crennan and Bell JJ, 102-104, [288]-[292] and 113, [320] per Hayne and Kiefel JJ, and 210-215, [600]–[609] per Heydon J).

7 *Victoria v The Commonwealth (AAP Case)* (1975) 134 CLR 338 at 361-2 per Barwick CJ; *Davis v The Commonwealth* (1988) 166 CLR 79 at 93 per Mason CJ, Deane and Gaudron JJ; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 83, [214]–[215] per Gummow, Crennan and Bell JJ.

8 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 63, [133] per French CJ, 91-2, [242] per Gummow, Crennan and Bell JJ; *Victoria v The Commonwealth (AAP Case)* (1975) 134 CLR 396-7 per Mason J; *Davis v The Commonwealth* (1988) 166 CLR 79 at 111 per Brennan J; *R v Duncan* (1982) 158 CLR 535 at 560 per Mason J.

9 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 87-88, [228] per Gummow, Crennan and Bell JJ; *Davis v The Commonwealth* (1988) 166 CLR 79 at 102-3 per Wilson and Dawson JJ, 111 per Brennan J; *R v Hughes* (2000) 202 CLR 535 at 554-5, [38]-[39] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

aspect of s. 61, regard must be had to the legislative distribution of powers between the Commonwealth and the States.[10] The existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence.[11]

10. Examples of executive action falling within this aspect of executive power include:

(a) short-term fiscal measures to meet adverse economic conditions affecting the national as a whole;[12]

(b) the establishment of a corporation to administer the commemoration of the bicentenary;[13]

(c) the making of a request to a foreign state for the detention of a fugitive offender alleged to have committed an offence against the laws of Australia;[14]

11. The Funding Agreement, and the School Chaplaincy Program in general, cannot be described as stemming from the "character and status of the Commonwealth as a national government". There is nothing in the Funding Agreement and/or the School Chaplaincy Program which can be described as being peculiarly adapted to the government of Australia, or which could not otherwise be carried out for the public benefit.[15] The capacity of the executive government of the Commonwealth to enter into the Funding Agreement therefore depends on the legislative power of the Commonwealth Parliament under ss. 51(xx) or 51(xxiiiA) of the Constitution enabling the Commonwealth Parliament to authorise the executive to enter into the agreement.

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10 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 60, [127] per French CJ, 115-6, [327] per Hayne and Kiefel JJ; *Victoria v The Commonwealth (AAP Case)* (1975) 134 CLR 338 at 398 per Mason J; *Davis v The Commonwealth* (1988) 166 CLR 79 at 93 per Mason CJ, Deane and Gaudron JJ, 103-104 per Wilson and Dawson JJ; *R v Duncan* (1982) 158 CLR 535 at 560 per Mason J as cited in *R v Hughes* (2000) 202 CLR 535 at 554-5, [38] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

11 *Davis v The Commonwealth* (1988) 166 CLR 79 at 93-4 per Mason CJ, Deane and Gaudron JJ.

12 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 63, [133] per French CJ 89, [233] and 91-2, [242] per Gummow, Crennan and Bell JJ.

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

14 *Barton v The Commonwealth* (1974) 131 CLR 477 at 498-9 per Mason J.

15 In this regard, Queensland independently has a form of school chaplaincy services in existence: Amended Special Case, Supplementary SCB Part 2, 119 at [19]-[24].

Section 51(xx) – Corporations Power

12. For the following reasons it is submitted that the Scripture Union of Queensland is not a "trading or financial corporation" within the meaning of s. 51(xx) of the Constitution, so that this power is not available to support the Commonwealth's entry into the Funding Agreement.

The activities test

13. In 1974 Barwick CJ postulated that at the time of federation:[16]

> "Trading corporations were both known and referred to as such. But there does not appear to have been any generally accepted definition of a trading corporation. It was assumed, I think, that such a corporation could be identified by its activities. If its nature was being sought, it was to be found in what it did."

14. Barwick CJ to went on to express the view that:[17]

> "The [corporations] power quite obviously, in my opinion, is given to the Parliament to enable it by legislation to control amongst other things at least some of the activities of corporations which fall within its description. It seems to me that the activities of a corporation at the time a law of the Parliament is said to operate upon it will determine whether or not it satisfies the statutory and therefore the constitutional description. Thus, in my opinion, the identification of the corporation which falls within the statutory definition will be made principally upon a consideration of its current activities."

15. Barwick CJ went on to indicate that the activity with which he was concerned was the activity of trading in goods or services, concluding that a corporation "whose predominant and characteristic activity is trading whether in goods or services" would satisfy the constitutional description.[18] In reaching this conclusion he observed that:[19]

> "It seems to me that the reason why a corporation trades as its sole or predominant and characteristic activity is irrelevant to the description of the corporation for present purposes, that is to say, the ends which such a corporation seeks to serve by trading are irrelevant to its description. As I have indicated, the purpose of the grant of legislative power includes the control of the corporate activities of the corporation: it is not so concerned with the motives which prompt those activities, nor the ultimate ends which those activities hope to achieve. If, upon that consideration, the corporation can fairly be described by reason of those activities, their extent and relative significance in the affairs of the corporation as a 'trading corporation' it will, in my opinion, be nothing to the point that it is also a government or State or municipal corporation. The effect of the trading activities of such a corporation upon and in the community will not be lessened or necessarily affected by the fact that it is a State or municipal instrumentality."

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16 *R v Trade Practices Tribunal; ex parte St George County Council* (1974) 130 CLR 533 at 541.
17 *R v Trade Practices Tribunal; ex parte St George County Council* (1974) 130 CLR 533 at 542-3.
18 *R v Trade Practices Tribunal; ex parte St George County Council* (1974) 130 CLR 533 at 543.
19 *R v Trade Practices Tribunal; ex parte St George County Council* (1974) 130 CLR 533 at 543.

16. The view of Barwick CJ, that the character of a trading or financial corporation was to be determined by its activities at the time the Commonwealth law was applied to it, came to be adopted by a majority of members of this Court in the cases decided over the following decade.[20] However, later cases did not require that the trading activity be a predominant or characteristic activity.[21] The effect of that approach to the construction of the words "trading corporation" was identified by Mason J as being that:[22]

> "Essentially it is a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation."

17. Western Australia submits that this Court should not accept the view that the ends to which trade is directed are always wholly irrelevant to the characterisation of a corporation for the purposes of s. 51(xx) of the Constitution. This is so for two principal reasons.

Subsequent decisions as to the Scope of the corporations power

18. First, subsequent decisions of this Court show the corporations power to be of broader scope than indicated by Barwick CJ in the passages quoted at paragraphs 14 and 15 above. The majority of the Court in the *Work Choices Case*[23] adopted the following description of the ambit of that power advanced by Gaudron J in *Pacific Coal*:[24]

> "I have no doubt that the power conferred by s 51(xx) of the *Constitution* extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business."

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20 *R v Federal Court of Australia; ex parte WA National Football League* (1974) 143 CLR 190 at 208 per Barwick CJ, 233 per Mason J (Jacobs J concurring), 239 per Murphy J; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 305 per Mason, Murphy and Deane JJ; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 155-6 per Mason J, 179 per Murphy J, 240 per Brennan J and 292-3 per Deane J.

21 Ibid.

22 *R v Federal Court of Australia; ex parte WA National Football League* (1979) 143 CLR 190 at 233, a passage quoted in *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 304 per Mason, Murphy and Deane JJ and *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 293 per Deane J.

23 *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 114, [178] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

24 *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375, [83].

19. The most substantial limit on the corporations power, as explained by the majority in *Work Choices*, is the character of the corporations with respect to which laws may be made. If the central focus of the corporations power is not simply the regulation of the activities of trading and financial corporations, the nature and scope of the power does not provide a reason to think that those corporations are to be identified by reference to their activities without any regard to other features of the corporation that affect its character. Contrary to the view of Barwick CJ in *St George County Council*,[25] the motives or ends of the activities of a trading or financial corporation are not outside the concern of the corporations power.

History

20. Secondly, Barwick CJ's conclusions about history of the concept of a "trading corporation" does not take account of the legislation in the United Kingdom and Australia at federation which distinguished between the incorporation of:

(a) a trading company formed for the purpose of carrying on a business that had as its object the acquisition of gain by the company or its members; and

(b) other associations formed for the purpose of promoting art, science, religion, charity or any other like object, not involving the acquisition of gain by the association or its members.

21. The United Kingdom legislation in force at federation, upon which legislation in the Australian colonies was based, was the *Companies Act 1862* (UK) ("the 1862 Act"). The long title to the 1862 Act was:[26]

> "An Act for the incorporation, regulation, and winding up of Trading Companies and other Associations."

22. Section 4 of the 1862 Act provided for the compulsory registration of particular companies, associations and partnerships:

> "No company, association, or partnership consisting of more than ten persons shall be formed, after the commencement of this Act, for the purpose of carrying on the business of banking unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent; and no company, association, or partnership consisting of ore than twenty persons shall be formed, after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or

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25 *R v Trade Practices Tribunal; ex parte St George County Council* (1974) 130 CLR 533 at 543.

26 The preamble also referred to "Trading Companies and other Associations" (AG WA Book of Materials Tab 1, p. 1).

> of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries." (emphasis added)

23. Section 6 of the 1862 Act provided for non-compulsory registration of associations:

> "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without liability."

24. Commentary published in the late 19th Century recognised that s. 6 of the 1862 Act applied to associations formed for "purposes not of gain",[27] including charitable associations. In contrast, the *Joint Stock Companies Act 1844* (UK) "applied only to joint stock companies for the purpose of profit and it was repeatedly held... that associations which very closely resembled joint stock companies did not require registration under that Act".[28]

25. Section 21 of the 1862 Act provided:

> "No company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land; but the Board of Trade may, by licence under the hand of one of their principal secretaries or assistant secretaries, empower any such company to hold lands in such quantity and subject to such conditions as they think fit." (emphasis added)

26. Further, s. 23 of the *Companies Act 1867* (UK) ("the 1867 Act"), which was to be construed as one with the 1862 Act,[29] provided:

> "Where any association is about to be formed under the Principal Act as a limited company, if it proves to the Board of Trade that it is formed for the purpose of promoting commerce, art, science, religion, charity, or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income of the association, in promoting its objects, and to prohibit the payment of any dividend to the members of the association, the Board of Trade may, by licence under the hand of one of the secretaries, or assistant secretaries, direct such association to be

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27 Buckley, *The Law and Practice Under the Companies Act 1862 to 1893* (1897), p. 7; James Smith, *The Handy Book of the Law of Joint Stock Companies* (2nd ed, 1889), p. 7 (AG WA Book of Materials Tab 23, p. 110); (see also 1st ed, 1866), p. 6 (AG WA Book of Materials Tab 22, p. 100).

28 See *In Re Jones* (1898) 2 Ch 83 at 91. The first edition of *The Law and Practice of Joint-Stock Companies* (1861), which was published prior to the introduction of the 1862 Act, defined a joint stock company as "an association of persons united together for the common purpose of carrying on a trade, or other useful enterprise capable of yielding profit" (emphasis added): Thring, *The Law and Practice of Joint-Stock Companies* (1861), p 1; see also p. 14 (AG WA Book of Materials Tab 24, p. 117 and 130). It appears that the *Joint Stock Companies Act 1856* (UK) had a broader application than the 1844 Act. In particular, it enabled seven or more persons "associated for any lawful purpose" to form an incorporated company by registration. In contrast, in the fourth edition, which was published in 1880, the "Preface to the Second Edition" states that "To understand the full scope of the Consolidating Act, it must be recollected that the term "Companies" includes charitable associations and every other association that chooses to avail itself of the Act of 1862: Thring, *The Law and Practice of Joint-Stock Companies* (4th ed, 1880), p. vii (AG WA Book of Materials Tab 25, p. 148).

29 Section 2 of the 1867 Act (AG WA Book of Materials Tab 2, p. 4).

> registered with limited liability, without the addition of the word limited to its name, and such association may be registered accordingly, and upon registration shall enjoy all the privileges and be subject to the obligations by this Act imposed on limited companies, with the exceptions that none of the provisions of this Act that require a limited company to use the word limited as any part of its name, or to publish its name, or to send a list of its members, directors or managers to the registrar, shall apply to an association so registered." (emphasis added).

27. By federation, the English courts had recognised that the *Companies Acts* distinguished between commercial undertakings by trading companies and the literary or charitable purposes of other associations. In *In Re Arthur Average Association for British, Foreign, and Colonial Ships; Ex Parte Hargrove*[30] Jessel MR was required to determine whether a mutual marine insurance association fell within the scope of the compulsory registration requirement in section 4 of the 1862 Act. He was of the view that section 21 of that Act threw light on the meaning of section 4.[31] In respect of section 21, he said:[32]

> "It is to be observed that the objects mentioned in section 21 of the Act are all objects which, according to the definition which the Court of Chancery gives to the words 'charitable objects', are charitable objects. They are all objects which, if described in a testator's will as the objects of bounty, could be well supported as a charity, and therefore the 'like objects' are obviously objects of the same sort. It was quite right to put in the words "not involving the acquisition of gain by the company", because, no doubt, under the cloak of religion or charity you might establish a company which really had the private gain of the individuals in view. But the words describing the objects, I think, throw some light upon what was meant by gain. All the objects mentioned are such as *prima facie* would lead to expenditure as distinguished from profit. In other words, a company or an association formed for any of those objects would rather be a company or an association formed to regulate the spending of the members' money than the acquisition of any money by any of the members; it would be in the position of a company for giving away or spending as distinguished from a company for getting or acquiring anything. We see, therefore, that the Legislature had in its contemplation companies and associations formed for charitable objects, which include the expending or giving away of money by the members of those companies or associations."

28. His Honour contrasted the terms of section 4, stating:[33]

> "The 4th section applies to companies or associations having for their object the acquisition of gain either by the company or association or the individual members thereof. Now, if you come to the meaning of the word 'gain' it means acquisition. It has no other meaning that I am aware of. Gain is something obtained or acquired. It is not limited to pecuniary gain. We should have to add the word 'pecuniary gain' so to limit it. And still less is it limited to commercial profits. The word used, it must be observed, is not 'gains', but 'gain', in the singular. Commercial profits, no doubt, are gain, but I cannot find anything limiting the gain simply to a commercial profit. I take the words as referring to a company which is formed to acquire something, or in which the individual members are to acquire something, as distinguished from a company formed for spending something, and in which the individual members are simply to give something away or to spend something, and not to gain anything."

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30 (1875) 10 Ch 542.
31 (1875) 10 Ch 542 at 546.
32 (1875) 10 Ch 542 at 546.
33 (1875) 10 Ch 542 at 546-547.

29. Jessel MR concluded:[34]

> "It seems to me that the Act broadly means this: all commercial undertaking shall be registered. It distinguishes in so many words – it intends to distinguish – between commercial undertakings on the one hand, in which insurance companies certainly are included... and what we may call literary or charitable associations on the other hand, in which persons associate, not with a view of obtaining a personal advantage, but for the purpose of promoting literature, science, art, charity, or something of that kind. If that broad distinction is kept in view, I think there will no difficulty in putting a fair and reasonable, and also a literal and grammatical construction on the words of the Act.

30. In *Smith v Anderson*[35] Brett LJ (as he then was) expressed doubts as to the correctness of the opinion of Jessel MR in *Re Arthur Average*, however those doubts were withdrawn in *In re Padstow Total Loss*.[36] A majority of this Court in the *Work Choices Case*[37] accepted Jessel MR's characterisation of the distinctions drawn by the 1862 Act in relation to commercial undertakings and "what we may call literary or charitable associations".

31. The decision in *Re Arthur Average* is referred to in company law text books published in the late nineteenth century. For example, *Buckley on the Companies Act* (1897), states that:[38]

> "The Act broadly means that all commercial undertakings as distinguished from literary or charitable associations shall be registered. Under the expression, 'commercial undertakings' as here used are to be included all such companies as are formed for spending something, and in which the individual members are to acquire something, as distinguished from companies formed for spending something, and in which the individual members are simply to give something away or to spend something, and not to gain anything."

32. In Australia the colonial legislatures had, by federation, adopted legislation based on the *Companies Acts* which included provisions equivalent to ss. 4 and 6 of the 1862 Act which invoked the concept of a company formed for the purpose of carrying on a business which had as its object the acquisition of gain by the company or its members.[39] Provisions equivalent to s. 21 of the 1862 Act or s. 23 of the 1867 Act

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34 (1875) 10 Ch 542 at 548.

35 (1880) 15 Ch Div 247.

36 (1882) 20 Ch Div 137 at 148.

37 (2006) 229 CLR 1 at 91-2, [102] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

38 Buckley, *The Law and Practice Under the Companies Act 1862 to 1893* (1897), p. 2 (AG WA Book of Materials Tab 19, p. 58). See also: Healey et al, *A Treatise on the Law and Practice Relating to Joint Stock Companies* (1894), p. 6-7 (AG WA Book of Materials Tab 20, p. 72-73); Thring, *The Law and Practice of Joint-Stock Companies* (4th ed, 1880), p. 168 (AG WA Book of Materials Tab 25, p. 172); Manson, *The Law of Trading and Other Companies* (2nd ed, 1893), p. 12 (AG WA Book of Materials Tab 21, p. 87); See also Halsbury, *Laws of England* (1907-1917), Volume VI pp. 304-305 (AG WA Book of Materials Tab 27, p. 200-201).

39 *The Companies Act 1863* (Qld) ss. 3 and 5 (AG WA Book of Materials Tab 3, p. 7-); *The Companies Act 1864* (SA) ss. 4 and 6 (AG WA Book of Materials Tab 4, p. 11); *The Companies Act 1869* (Tas) ss. 4 and 6 (AG WA Book of Materials Tab 6, p. 14-15); *The Companies Act 1874* (NSW) ss. 3 and 5

also existed in most colonies.[40] In all jurisdictions other than Victoria and Western Australia the long title of the colonial companies legislation referred to the incorporation etc of "trading companies and other associations".[41]

33. The drafting history of the Constitution recorded in the Convention debates provides little assistance in determining what constitutes a trading corporation, as there was little discussion of that topic which indicates the contemplated scope of the corporations power.[42] The following drafting history may be noted however:

(a) The draft adopted by the Constitutional Committee on 9 April 1891 provided for a federal power in relation to "[t]he Status in the Commonwealth of Foreign Corporations, and of Corporations formed in any State or part of the Commonwealth."[43] On 12 April 1897, the draft was revised to refer to "Foreign Corporations and trading corporations formed in any State or part of the Commonwealth."[44] On 17 April 1987, the draft was revised to include the words "or financial".[45]

(b) In rejecting the proposition that the corporations power should cover the incorporation of companies, Sir Samuel Griffiths, noting that "[i]t is sometimes difficult to say what is a trading corporation", stated:[46]

> "There are a great number of different corporations. For instance, there are municipal, trading and charitable corporations, and these are all incorporated in different ways according to the law obtaining in different states."

(AG WA Book of Materials Tab 7, p. 17-18); *Companies Act 1890* (Vic) ss. 4 and 5 (AG WA Book of Materials Tab 8, p. 23-24); *The Companies Act 1893* (WA) ss. 7 and 9 (AG WA Book of Materials Tab 10, p. 35); *Companies Act 1899* (NSW) ss. 4 and 5 (AG WA Book of Materials Tab 7, p. 21C-21D). It may be noted that s. 5 of the *Companies Act 1893* (WA) provided that the Act did not generally apply to any Friendly Society, Benefit Society, or Building Society, nor to any company or partnership that carries on the business of life insurance or the business of banking (AG WA Book of Materials Tab 10, p. 35).

40 *The Companies Act 1874* (NSW) ss. 54 and 55 (AG WA Book of Materials Tab 7, p. 125-6); *Companies Act 1890* (Vic) s. 181 (AG WA Book of Materials Tab 8, p. 25); *Companies Act 1899* (NSW) ss. 52 and 53 (AG WA Book of Materials Tab 7, p. 21E). In Western Australia the *Associations Incorporation Act 1895* (WA) made provision for the incorporation of "religious and other bodies" formed for various charitable purposes other than "the purpose of trading or securing pecuniary profit to the members from the transactions thereof" (s. 2) (AG WA Book of Materials Tab 11, p. 38-39). The Western Australian provisions reflected the terms of *The Associations Incorporation Act 1890* (SA) (AG WA Book of Materials Tab 9, p. 27-28).

41 In Victoria, earlier companies legislation, *The Companies Statute 1864* (Vic), also referred to "companies and other associations" in its long title (AG WA Book of Materials Tab 5, p. 12).

42 *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 97 [121] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

43 Convention Debates, 9 April 1891, Sydney, at 952 (AG WA Book of Materials Tab 16, p. 52).

44 Convention Debates, 12 April 1897, Adelaide, at 439. At Melbourne, after the Fourth Report, the words "within the limits of the Commonwealth" were substituted for the words "in any state or part of the Commonwealth" (AG WA Book of Materials Tab 17, p. 53).

45 Convention Debates, 17 April 1897, Adelaide, at 793 (AG WA Book of Materials Tab 18, p. 54).

46 Convention Debates, 3 April 1891, Sydney, at 686 (AG WA Book of Materials Tab 15, p. 51).

(c) There was little discussion in relation to the addition of the words "or financial".[47] It may be that these words were inserted out of an abundance of caution in light of the separate treatment of financial corporations in some legislation[48] and the financial scandals involving financial institutions in Victoria in the late 19th Century.[49] That history is consistent with the words "trading or financial corporation" being a composite phrase evoking a single concept, rather than identifying two distinct types of corporation.

34. Shortly after federation proposed alterations to the Constitution were submitted to the Australian electorate which excepted from the proposed extension of Commonwealth legislative power corporations formed under the law of a State "solely for religious, charitable, scientific or artistic purposes, and not for the acquisition of gain by the corporation or its members".[50] Those referendums may be of little assistance in determining the scope of the corporations power.[51] However, their language provides evidence of the contemporary understanding of the concept of a "trading corporation" at the time of federation. The view that charitable corporations were not trading corporations was also expressed by Isaacs J in *Huddart Parker*.[52]

35. In the *Incorporation Case*[53] Deane J noted:

> "... reference to writings current at the time of Federation lends strong support for the view that the phrase 'trading or financial corporations' in par. (xx) should be construed as being adequate to encompass companies formed for the purpose or engaged in the pursuit of profit as distinct from the special classes of company which were seen as falling outside the scope of ordinary company law (see, e.g., *Lindley, Treatise on the Law of Companies, 5th ed. (1889), p. 10*: 'Companies formed for merely scientific, literary, artistic, or charitable purposes, and not with any view to the acquisition of gain or the avoidance of loss by themselves or their members do not fall within the scope of this treatise ... ')."

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47 Convention Debates, 17 April 1897, Adelaide, at 793 (AG WA Book of Materials Tab 18, p. 54).

48 For example, s. 5 of the *Companies Act 1893* (WA) excluded certain financial institutions from its operation (AG WA Book of Materials Tab 10, p. 35). Legislation in the form of s. 4 of the 1862 Act had a separate clause dealing with banking businesses.

49 Noted in *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 95 and 96, [114] and [116] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

50 *Constitution Alteration (Legislative Powers) Act 1910* (Cth) s. 3 (AG WA Book of Materials Tab 12, p. 46); *Constitution Alteration (Corporations) Act 1912* (Cth) s. 2 (AG WA Book of Materials Tab 13, p. 48). The *Constitution Alteration (Industry and Commerce) Act 1926* (Cth) adopted a similar formula, although it referred to "any corporation formed solely for religious, charitable, scientific or artistic purposes, or any corporation not formed for the acquisition of gain by the corporation or its members" (emphasis added) (AG WA Book of Materials Tab 14, p. 49-50). All these proposals were defeated at referenda: see House of Representatives Standing Committee on Legal and Constitutional Affairs, *Constitutional Change: Select Sources on Constitution ~~Positional~~ Change in Australia 1901-1997* (1997), pp. 65-9 and 76-7 (AG WA Book of Materials Tab 26, p. 177-181 and 182-3).

51 *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 100-1, [131]-[134] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

52 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 393.

53 *New South Wales v The Commonwealth ("The Incorporation Case")* (1990) 169 CLR 482 at 511-12.

Save that the reference to the "pursuit of profit" should be to the "acquisition of gain", Deane J's view of the historical understanding of the composite phrase "trading or financial corporation" should be accepted as correct. While the majority in the *Incorporation Case* did not adopt that view, they did not express a contrary view in any manner critical to their ultimate conclusion in that case.[54]

36. Legislation at the time of federation recognised the concepts of "trading companies" formed for the purpose of carrying on a business that has for its object the acquisition of gain by the company or its members, and "other associations" formed for charitable purposes which did not involve the acquisition of gain by the company or its members. The reference to "financial corporations" appears to have been inserted out of an abundance of caution. Against that constitutional background the term "trading or financial corporation" should be understood as a composite phrase designating a corporation formed for the purpose of carrying on, or which carries on, a business for the acquisition of gain. It excludes a corporation formed for charitable purposes not involving the acquisition of gain by the company or its members, the activities of which are carried out in furtherance of that purpose.

37. Even in the case of a corporation formed for charitable purposes not involving the acquisition of gain by the corporation or its members, it may be relevant to have regard to the activities of the corporation in determining its character for constitutional purposes. In such a case it may be open to inquire as to whether the activities of the corporation are carried on in furtherance of a charitable purpose. A corporation formed for a charitable purpose not involving the acquisition of gain may become a trading or financial corporation if it in fact ceases to carry out that purpose or begins to carry out a business for the acquisition of gain. However, in such a case the inquiry is not concerned with the extent of trading activities but is rather addressed to their purpose. For example, a company of the kind considered by this Court in *Word Investments*[55] would not be a trading or financial corporation notwithstanding that most of its activities were of a trading character.

Previous Authority

38. Thirdly, observations made in the course of previous decisions of this Court do not compel an acceptance by this Court of the proposition that the purposes for which trade is undertaken by a corporation are always wholly irrelevant to the question of whether it is to be characterised as a trading or financial corporation.

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54 See (1990) 169 CLR 482 at 503 per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ.

55 *Commissioner of Taxation* (Cth) *v Word Investments Ltd* (2008) 236 CLR 204.

39. In *State Superannuation Board* Mason, Murphy and Deane JJ observed[56]:

> "a corporation whose trading activities take place so that it may carry on its primary or dominant undertaking, e.g., as a sporting club, may nevertheless be a trading corporation. The point is that the corporation engages in trading activities and these activities do not cease to be trading activities because they are entered into in the course of, or for the purpose of, carrying on a primary or dominant undertaking not described by reference to trade. As the carrying on of that undertaking requires or involves engagement in trading activities, there is no difficulty in categorizing the corporation as a trading corporation when it engages in the activities.
>
> Indeed, we would go on to say that there is nothing in *Adamson* which lends support for the view that the fact that a corporation carries on independent trading activities on a significant scale will not result in its being properly categorized as a trading corporation if other more extensive non-trading activities properly warrant its being also categorized as a corporation of some other type."

40. In making those observations their Honours were not faced with the task of characterising a corporation formed to undertake, and undertaking, a charitable purpose not involving the acquisition of gain. The State Superannuation Board[57] was established to carry on a business for the acquisition of gain, rather than a charitable purpose. The commercially operating sporting clubs in *Adamson's Case* and the shelf company in *Fencott v Muller* were clearly companies formed to carry out a non-charitable business that had as its object the acquisition of gain. The same may be said of the Hydro-electric Commission of Tasmania, which was formed to operate a commercial undertaking involving the supply of electricity for reward with a resulting contribution to Tasmania's consolidated revenue.[58] In those cases the reasoning of the plurality in *State Superannuation Board* may be apposite. It may be accepted that the fact that a corporation is an instrumentality of a State government provides no reason, of itself, for denying the corporation the character of a trading or financial corporation. However, adopting a different approach in relation to corporations (whether or not funded by government[59]) formed to undertake, and undertaking, charitable purposes not involving the acquisition of gain would not require this Court to over-rule the result in any of its previous decisions.

41. If the above argument were accepted it would be unnecessary in the present case to determine whether certain kinds of "municipal corporations" were, or were not, trading corporations.[60] The peculiar kind of municipal corporation whose status was

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56 (1982) 150 CLR 282 at 304.

57 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282.

58 See the summary of the provisions of the *Hydro-Electric Commission Act 1944* (Tas) in *Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 111-116 per Gibbs CJ.

59 The decision of this Court in *Central Bayside General Practice Association Limited v Commissioner of State Revenue of the State of Victoria* (2006) 228 CLR 168 at 184-5, [39]-[40] per Gleeson CJ, Heydon and Crennan JJ establishes that the fact that a charitable organisation is funded by, and has the same or similar goals to, the government is not inconsistent with its charitable status.

60 As to which see *AWU (Qld) v Etheridge Shire Council* (2008) 171 FCR 102.

at issue in *St George County Council*[61] would properly have been characterised as a trading corporation on that basis that all the Council did was to trade in electricity and electrical goods, and that trading was the principal, if not the sole, purpose of its incorporation.[62]

42. However, it may be that a different result would follow in the case of some decisions of the Federal Court. For example, in *Quickenden v O'Connor*[63] the University of Western Australia might not be characterised as a trading corporation having regard to the charitable purposes which its trade was undertaken to fund.[64] The correctness of the result in other cases where charitable corporations have been held to also be trading corporations would be open to doubt.[65]

43. In the present case the Scripture Union is clearly not formed for the purpose of a commercial undertaking or for the acquisition of gain. Rather it is a corporation formed for the charitable purpose of advancing religion.[66] So much is apparent from the constitutions of the Scripture Union, which include provisions that:

(a) the objects of the Scripture Union are for advancing religion;[67]

(b) all of the income and property of the Scripture Union is to be applied towards the religious objects of the mission;[68]

(c) the Scripture Union may not permit any portion of its income or property to be paid to its members;[69] and

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

62 See *R v Federal Court of Australia; ex parte WA National Football League* (1979) 143 CLR 190 at 209 per Barwick CJ.

63 (2001) 109 FCR 243.

64 See (2001) 109 FCR 243 at 249-50 [113], 261 [49] per Black CJ and French J.

65 See for example *E v Australian Red Cross Society* (1991) 27 FCR 310 at 337-45 per Wilcox J; *Orion Pet Products v RSPCA* (2002) 120 FCR 191 at 215-219 [144]-[171] per Weinberg J; see also *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (1998) 83 FCR 346 at 9-10 per Marshall J.

66 The advancement of religion is an established category of charitable purpose: *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583; *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 666-70 per Barwick CJ (McTiernan and Windeyer JJ concurring); *Association of Franciscan Order of Friars Minor v City of Kew* (1967) VR 732 at 733, *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* [1957] 3 All ER 281 at 285; *Presbyterian Church (NSW) v Property Trust v Ryde Municipal Council* (1977) 1 NSWLR 620 at 630.

67 Clause 2.1(a)–(b) of the 2009 Constitution (SCB Vol 1, 69); clause 3.1.1-3.1.2 of the 1998 Memorandum of Association (SCB Vol 1, 38).

68 Clause 2.3(a) of the 2009 Constitution (SCB Vol 1, 72); clause 4.1 of the 1998 Memorandum of Association (SCB Vol 1, 39).

69 Clause 2.3(a) of the 2009 Constitution (SCB Vol 1, 72); clause 4.2 of the 1998 Memorandum of Association (SCB Vol 1, 39).

(d) any property remaining after a winding up of the Scripture Union is not to be distributed among its members but is to be applied to the same charitable purpose.[70]

44. The activities of the Scripture Union are in furtherance of its charitable purpose. Apart from administration and marketing expenses associated with the fundraising, revenue generated by the various fundraising activities of the Scripture Union[71] is directed to the engagement of chaplains and the pursuit of the charitable objects of the corporation.[72]

45. In those circumstances the Scripture Union is to be characterised as a religious or charitable corporation which is not formed for the purpose of the acquisition of gain by the corporation or any of its members, and is therefore not a trading or financial corporation within the meaning of s. 51(xx) of the Constitution.

Section 51(xxiiiA) – Provision of Benefits to Students

46. In identifying "the provision of ... benefits to students" which may be the subject of laws enacted under s. 51(xxiiiA) of the Constitution, several aspects of the structure of the provision should be noted:

(a) The term "benefits" has a broader meaning than the terms "allowances", "pensions" and "endowment", which signify only the provision of financial assistance.[73] A "benefit" which may be the subject of laws made under s. 51(xxiiiA) can include the provision of goods and services.[74]

(b) However, the power to make laws with respect to the provision of benefits to students is not allied with a power to make laws with respect to the provision of education services. This is in contrast with the power to make laws with respect to the provision of "pharmaceutical, sickness and hospital benefits" which is allied with the power to make laws with respect to the provision of "medical and dental services".

(c) Further, the qualification to the power to make laws with respect to medical and dental services, namely that the power does not authorise any form of

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70 Clause 16.1 of the 2009 Constitution (SCB Vol 1, 91-92); clause 4.1 of the 1998 Memorandum of Association (SCB Vol 1, 39).

71 Described at Amended Special Case, Supplementary SCB Part 21, 110-116 at [14]-[16].

72 See Amended Special Case Supplementary SCB Vol Part 2, 109-110 at [17]-[18].

73 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 259 per Dixon J.

74 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 230 per Latham CJ (Webb J concurring at 295), 260 per Dixon J, 279 per McTiernan J; *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 280.

civil conscription, does not operate to condition the power to make laws with respect to the provision of benefits to students.[75] This is not because s. 51(xxiiiA) authorises the Commonwealth Parliament to conscript teachers. Rather, as Dixon J noted in *British Medical Association v The Commonwealth*:[76]

> "The inference is, I think, that it was not supposed that a legislative power with respect to the provision of the allowances, pensions, endowments and benefits that are mentioned in the paragraph as distinguished from 'services' could extend to the imposition of duties amounting to a form of civil conscription."

(d) The "provision" with which laws made under s. 51(xxiiiA) are concerned is the provision of benefits by the Commonwealth.[77]

(e) The other "benefits" to which s. 51(xxiiiA) refers are defined by reference to the character of the benefit: "unemployment, pharmaceutical, sickness and hospital". This list of "benefits" does not include "education benefits". By contrast, the limb of s. 51(xxiiiA) with which we are presently concerned defines benefits by reference to the character of the person who receives them: the benefits must be benefits to students. A person will be a student only when enrolled in a course of study offered by a provider of educational services; so that the provision assumes that the person to whom the benefit is provided already has that status. This counts against the power being concerned with laws with respect to the provision of educational services to students, as enrolment in an educational course is the means by which the status of "student" is attained.

47. The above structure suggests a limit in the kind of services which may constitute a "benefit" within the meaning of s. 51(xxiiiA) of the Constitution. That is, the power to make laws with respect to the provision of benefits to students should not extend to the establishment of schools and other educational institutions, or the provision of education, by the Commonwealth. If the concept of "benefit" generally extended so far then the reference to "medical and dental services" would be otiose. It would also leave the Commonwealth free, by a law enacted under s. 51(xxiiiA), to conscript persons to work for the Commonwealth in providing education to students.

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75 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 254-5 per Rich J, 261 per Dixon J, 281-2 per McTiernan J; 286 per Williams J, Latham CJ contra at 250, Webb J not deciding at 292; *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 279.

76 (1949) 79 CLR 201 at 261; to similar effect see McTiernan J at 282 and see also Williams J at 286-7.

77 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 243 per Latham CJ (Webb J concurring at 295), 254 per Rich J, 260 per Dixon J, 279 per McTiernan J, Williams J not deciding at 286-7; *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 279.

48. Rather, s. 51(xxiiiA) should be construed as enabling the Commonwealth to provide financial assistance, such as payment of educational fees and living allowances, equipment and services which do not themselves amount to the provision by the Commonwealth of education services such as the operation of a school or university. To the extent that the chaplaincy services at the Darling Heights State School comprise part of the operation of the school they stand outside the concept of "benefits" in s. 51(xxiiiA).

49. Further, for a law to be supported by s. 51(xxiiiA) of the Constitution, it is essential that the benefit be characterised as one provided by the Commonwealth to students. The power is to make laws with respect to the provision of benefits to students, not laws with respect to provisions which benefit students. In that regard there is a critical distinction to be drawn between the provision of a benefit by the Commonwealth to a person who provides benefits to students, and the provision of a benefit by the Commonwealth to a student. The latter kind of benefit is a subject within Commonwealth legislative power, the former stands outside the scope of s. 51(xxiiiA) of the Constitution. The benefits provided for by the Funding Agreement are of the former kind:

(a) The payment is made to the Scripture Union by the Commonwealth.[78]

(b) That payment does not discharge any existing or prospective liability which any student would otherwise bear.

(c) The purpose of the funding is to contribute to the provision of chaplaincy services at the Darling Heights State School[79] through a chaplain who must "deliver services to the school and its community".[80]

(d) The Scripture Union is not an employee, partner or agent of the Commonwealth.[81]

50. To be characterised as a benefit to students the benefit must be specifically directed towards students. It is not enough that there is a benefit to students and others. For example, it is of benefit to people who are students to have efficient telecommunications, power and water services. That does not bring the provision of those services to the broader community within the legislative power conferred by s. 51(xxiiiA) of the Constitution (although provision of funds to students for

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78 Clause C7 and M1 of Scehdule 1 to the Funding Agreement (SCB Vol 2, 639 and 645).
79 Clauses C1 and C4 of Schedule 1 to the Funding Agreement (SCB Vol 2, 638 and 639).
80 Clause C3 of Schedule 1 to the Funding Agreement (SCB Vol 2, 638).
81 Clause 18 of Schedule 2 to the Funding Agreement (SCB Vol 2, 651).

telecommunications, power and water bills would be within the head of power). In the present case the chaplaincy services are provided for the benefit of staff and members of the school community as well as students at the school. The fact that the "spiritual wellbeing" of students, as well as others, may be advanced by the availability of chaplaincy services is not sufficient to characterise the provision of those services as "benefits to students".

51. That is, s. 51(xxiiiA) of the Constitution authorises the Commonwealth Parliament to make laws for the provision by the Commonwealth to students of financial assistance by way of fee payments and living allowances, material assistance such as the provision of books, computers and other educational equipment and the provision of services such as child care. It does not extend to the operation of schools or the provision of educational services by the Commonwealth itself. Nor does s. 51(xxiiiA) authorise laws with respect to the provision of benefits to persons other than students, merely on the basis that students will also benefit from the provision.

52. In the present case if the assistance is regarded as the payment of funds then the benefit is to the Scripture Union, not to students. If the assistance is regarded as the engagement of a chaplain to deliver services to the Darling Heights State School and its community then:

(a) that assistance is not a "benefit" for the purposes of s. 51(xxiiiA), to the extent that chaplaincy services form part of the operation of the school;

(b) any benefit is provided to the school and its community, so that while students may benefit from the services provided pursuant to the Funding Agreement the benefits are not provided to students;

(c) any benefit to students is provided by the Scripture Union, not the Commonwealth.

53. The above approach is consistent with the history of the provision of benefits by the Commonwealth to students. Prior to the introduction of s. 51(xxiiiA) into the Constitution the provision of benefits to students by the Commonwealth was in the form of financial assistance:

(a) Part III of the *National Security (Universities Commission) Regulations 1943* (Cth) provided, under the heading "financial assistance to students",

for the payment of tuition and other non-voluntary University fees and an allowance.[82]

(b) The *Education Act 1945* (Cth) established a Universities Commission with functions that, by s. 14, included:

> "(a) to arrange, as prescribed, for the training in Universities or similar institutions, for the purpose of facilitating their re-establishment of persons who are discharged members of the Forces within the meaning of the *Re-establishment and Employment Act 1945*;
>
> (b) in prescribed cases or classes of cases, to assist other persons to obtain training in Universities or similar institutions;
>
> (c) to provide, as prescribed, financial assistance to students at Universities and approved institutions ..."

(c) The *Universities Commission (Financial Assistance) Regulations 1946* (Cth) made provision for the payment to students of tuition and other non-voluntary fees and an allowance.[83]

54. The principal purpose of the introduction of s. 51(xxiiiA) into the Constitution was to confirm the power of the Commonwealth to continue making payments of this kind,[84] following the decision of this Court in the *Pharmaceutical Benefits Case*.[85] Nothing in the Parliamentary or referendum material suggested that the power would authorise Commonwealth laws establishing schools and other educational institutions or regulating their operations. The purpose of the amendment was not to alter the position, noted by Rich J in *R v University of Sydney; ex parte Drummond*[86], that:

> "...it is outside the power of the Commonwealth Parliament to exercise general control of education in the schools or universities of Australia, prescribe what children, and how many of them, shall attend the schools, the method of qualification for entrance, regulate the number of students entitled to matriculate, discriminate between faculties and restrict the number of students to be admitted to or enrolled in any faculty, determine the course of study and curricula in the various faculties of the universities, the nature and subjects of examinations, and set the standards for passing the examinations."

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82 Regulations 17-18 of, and item 2 of the Second Schedule to, the *National Security (Universities Commission) Regulations 1943* (Cth) (AG WA Book of Materials Tab 29, p. 212 and 214).

83 Regulation 3(1) of, and item 2 of the Second Schedule to, the *Universities Commission (Financial Assistance) Regulations 1946* (Cth) (AG WA Book of Materials Tab 30, p. 218-219).

84 Hansard 27 March 1946 at pages 646-8 (Dr Evatt's second reading speech) (AG WA Book of Materials Tab 31, p. 221-223); *Referendums: The Case For and Against* pages 5-6 (note that "benefits to students" was not one of the "new" social services referred to at pages 7-8 of that pamphlet) (AG WA Book of Materials Tab 34, p. 239-242).

85 *Attorney General (Vic) v The Commonwealth* (1945) 71 CLR 237.

86 (1943) 67 CLR 95 at 105; see also Starke J at 107, Williams J at 113. Although the reference by Williams J to the power to legislate with respect to education being "reserved to the States" must now be regarded as outdated, his proposition that "the Constitution does not confer upon the Commonwealth any specific power to legislate with respect to education" remains relevant.

55. Commonwealth would have power to provide funding for chaplaincy services by way of a grant made to the States under s. 96 of the Constitution, subject to the condition that the funds be used for that purpose. It may also itself be able to offer counselling and like services to students, so long as that service can be characterised as being provided by the Commonwealth to students otherwise than as part of the operation of a school. However, neither of these available methods was adopted in the present case. It follows that the Commonwealth Parliament could not have authorised the Commonwealth's entry into the Funding Agreement under s. 51(xxiiiA) of the Constitution.

10 **Conclusion**

56. For the above reasons Commonwealth executive power did not extend to entry into the Funding Agreement.

Dated the 29th ~~1st~~ day of July 2011

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