IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S307 of 2011**

BETWEEN:

HIGH COURT OF AUSTRALIA
FILED
19 AUG 2011
THE REGISTRY ADELAIDE

RONALD WILLIAMS
Plaintiff

and

THE 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

FURTHER WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA PURSUANT TO LEAVE GRANTED ON 10 AUGUST 2011

Date of Document:
Filed on behalf of the Intervener by:

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Solicitor for the Attorney-General for the State of South Australia (Intervening)

The issue:

1. At the hearing of this matter on 10 August 2011 the Attorneys-General for South Australia was granted leave by the Court to file written submissions in relation to the ambit of the executive power of the Commonwealth. In particular, as to whether the ambit of the executive power extends to spending money lawfully appropriated in execution of purposes for which the Commonwealth Parliament could have, but has not, made a law permitting or requiring its expenditure, and where such purpose:

10 i. is not undertaken in the execution or maintenance of the Constitution; and
ii. is not undertaken in the exercise of the implied power to undertake activities peculiarly adapted to a national government.

2. In the context of this case the issue may be further refined: does the concept of the "executive power" conferred on the Commonwealth by s61 of the Constitution include the common law capacities of a natural person?

South Australia's position:

20 3. Consistent with the submission already put to the Court on behalf of the Attorney-General for South Australia it is submitted that the executive power of the Commonwealth includes the common law capacities of a natural person but that the exercise of those capacities is limited to the ambit of the legislative power, the execution or maintenance of the Constitution, and to the performance of activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.

The Commonwealth executive power includes the personal capacities:

4. Section 61 of the Constitution confers "executive power" on the Commonwealth but does
30 not define what that expression means.[1] The content of that phrase needs to be understood in light of Australian legal history.[2]

5. At the time of federation the British Crown enjoyed all of the common law capacities of a natural person.[3]

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1 *Davis v Commonwealth* (1988) 166 CLR 79 at 92 (Mason CJ, Deane & Gaudron JJ); A Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of the Commonwealth" in Brazil and Mitchell (eds) *Opinions of Attorneys-General of the Commonwealth of Australia, v 1: 1901-14* (1981) 129 at 130; B Selway, *Constitutional Assumptions and 'The Executive Power of the Commonwealth'* (2003) 31 *Federal Law Review* 496 at 498.

2 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 60, [127] (French CJ); B Selway, "Constitutional Assumptions and 'The Executive Power of the Commonwealth'" (2003) 31 *Federal Law Review* 496 at 505; G. Winterton, *The Limits and Use of the Executive Power by Government* (2003) 31 *Federal Law Review* 421.

3 Whether this followed from the status of the British Crown as a corporation sole or from the fact that the British Crown was held by a natural person was the subject of some dispute at the time of federation. Maitland rejected the view that the Crown was a corporation sole: F Maitland, "The Crown as Corporation" (1901) 17 LQR 131. However, the weight of authority was against him: W Wade, "Crown, Ministers and Officials: Legal Status and Liability" in M Sunkin & S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (1999), 24, fn 6. See also, *Willion v Berkley* (1559) 1 Plowden 223 at 242 & 250; *Sutton's Hospital* (1612) 10 Co Rep 1a, 29b; W Blackstone, *Commentaries on the Laws of England* (1765) v 1, 469; J Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (1820) at 230. The freedom of the British Crown to exercise the capacities of a natural person is evident from the semantic debate between Blackstone and Dicey when attempting to define the prerogatives of the Crown. Blackstone was of the view that the term prerogative "can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects": W Blackstone, *Commentaries on the Laws of England* (1765) v 1, 232. Dicey took the view that the prerogatives of the Crown included "[e]very act which the executive government

6. The framers intended to confer no lesser powers upon the Commonwealth executive than had been enjoyed by the British Crown under the unwritten constitution of the United Kingdom (subject to appropriate modification necessary to accord with the new federal compact and so as to respect the imperial prerogatives of the Crown in right of Britain):[4]

6.1 Sir Samuel Griffith, referring to Cl 8 of the 1891 draft *Constitution*, said: "This part of the bill practically embodies what is known to us as the British Constitution as we have it working at the present time".[5] Subsequently, Sir Samuel proposed an amendment to Cl 8 which became the current s61. In proposing that amendment he said:

> This afternoon I have circulated an amendment which I propose to make in this clause. It does not alter its intention, though it certainly makes it shorter.[6]

6.2 In the context of the debate on Cl 14 Mr Wrixon sought to ensure that the Constitution "would clothe them with all the vast constitutional powers which, under the system of English government, belong to responsible ministers of the Crown".[7]

6.3 In that same context, the interchange between Sir Alfred Deakin and Sir Samuel Griffith is telling. It included:[8]

- Deakin: The power of the Crown itself is nowhere defined, and cannot be denied under this constitution. It is vast and vague; but all the power which the Crown exercises ministers must be able to exercise when the need arises, and it can scarcely be possible even in this constitution, excellent as it is in most respects, to embody all possible contingencies.[9]

- Griffith: If the Hon member will point out any power which can be exercised by the sovereign authority which is not expressed by the words, I shall not only be willing, but anxious to supply the defect. But I cannot see the defect he is pointing to.[10]

- Griffith: For my part, I believe that all the prerogatives of the Crown exist in the governor-general as far as they relate to Australia. I never entertained any doubt upon the subject at all – that is so far as they can be exercised in the Commonwealth.[11]

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can lawfully do without the authority of an Act of Parliament": A Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed, 1959) at 424-425. Neither Blackstone nor Dicey doubted that the British Crown could exercise the common law capacities; they simply differed about whether these capacities should be characterised as prerogatives. As to the continuing capacity of the British Crown to exercise the common law capacities see: W Wade, "Procedure and the Prerogative in Public Law" (1985) 101 LQR 180 at 191; B Harris, "The 'Third Source' of Authority for Government Action" (1992) 108 LQR 626 and B Harris, "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225.

4 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 85, [220] (Gummow, Crennan & Bell JJ). As submitted in writing and orally, modifications upon the exercise of these powers are drawn from the federal nature of the Constitution, the principle of responsible government implied from the *Constitution* and the provisions of the *Constitution* providing for financial federalism.

5 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 31 March, 1891 at 527, quoted in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 56 [115] (French CJ).

6 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 6 April 1891 at 777.

7 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 6 April 1891 at 766.

8 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 6 April 1891 at 769-773. These passages are set out more fully in M Crommelin "The Executive" in G Craven (ed) *The Convention Debates 1891-1898: Commentaries, Indicies and Guides* (1986) at 133-134.

9 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 6 April 1891 at 769

10 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 6 April 1891 at 770.

11 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 6 April 1891 at 772.

- Deakin: What we say is ... that we should embody in these clauses the claim of ministers of the commonwealth to exercise all the prerogatives of the Crown which may be necessary in the interests of the commonwealth... [A]s regards the interest of the commonwealth, ministers of the Crown here should have the same powers as have ministers of the Crown in Great Britain, distinguishing Great Britain of course from the empire at large.[12]

It is clear from these passages that the framers had a broad conception of "executive power", which was to be checked and delineated by the doctrine of responsible government. The debates speak decisively against any intention on the part of the framers that the common law capacities of the Crown were to be excluded from the powers that would be exercisable by the Commonwealth executive. It must be recalled that the references to the "prerogative" found in the debates included the common law capacities of the Crown because in 1901 Dicey's definition of that term was ascendant.[13]

7. The vesting of the executive power of the Commonwealth in "the Queen" is strongly suggestive of an intention on the part of the framers to include in the grant of executive power the common law capacities enjoyed by the Queen under the constitution of the United Kingdom. This may be contrasted to Article 2(1) of the *United States Constitution* which confers executive power on the President.[14]

8. It is accepted that the notion of "executive power" in s61 of the Constitution includes the prerogative powers of the Crown:

> The prerogatives of the Crown because the setting in which the Crown is invested with executive power is that of the common law and the prerogatives of the Crown are those rights, powers, privileges and immunities which it possesses at common law.[15]

It would be anomalous if the notion of executive power were held to pick up some of the powers possessed by the British Crown at the time of federation but not others.

9. The intention of the framers to confer common law capacities upon the Commonwealth executive is consistent with the view of Sir Alfred Deakin expressed shortly after federation.[16] It is also consistent with this Court's decision in *Clough v Leahy*.[17]

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12 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 6 April 1891 at 773.

13 A Dicey, *An Introduction to the Study of the Law of the Constitution* (6th ed, 1902) at 369; F Pollock & F Maitland, *The History of English Law Before the Time of Edward I*, (1898, 2nd ed) at 512-513. Indeed, the framers cited Dicey's text direct: see, for example, Mr Barton, 19 April 1897 at 911 (Adelaide).

14 B Selway, "The Constitutional Role of the Queen of Australia" [2003] *Common Law World Review* 248 at 264-265; B Selway, "Constitutional Assumptions and 'The Executive Power of the Commonwealth'" (2003) 31 *Federal Law Review* 496 at 499. As such, the executive powers of the United States do not include the prerogative powers formerly exercised by the British Crown: *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 at 585 (1952); L Tribe, *American Constitutional Law* (2000, 3rd ed) v 1 at 633-674.

15 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 438 (Dawson, Toohey & Gaudron JJ); see also 426 (Brennan J). See the various reference collected in B Selway, "Constitutional Assumptions and 'The Executive Power of the Commonwealth'" (2003) 31 *Federal Law Review* 496 at 497 fn 15 and 17. Prior to Australian independence the power to exercise these prerogatives was shared with the Imperial Crown. It is still shared with the Crown in right of the States.

16 A Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of the Commonwealth" in Brazil and Mitchell (eds) *Opinions of Attorneys-General of the Commonwealth of Australia, v 1: 1901-14* (1981) 129 at 132.

17 *Clough v Leahy* (1904) 2 CLR 139 at 157 (Griffith CJ), 163 (Barton and O'Connor JJ). Cf *Victoria v Australian Building Construction Employees and Builders Labourer's Federation* (1982) 152 CLR 25 at 88-89 (Mason J), 155-6 (Brennan J); *Commonwealth v John Fairfax & Sons* (1980) 147 CLR 39 at 52 (Mason J).

10. This view was confirmed by this Court in *NSW v Bardolph*[18] in which it was held that the Crown shares the same capacity to enter a contract as a natural person.[19] It is erroneous to limit the ratio in *Bardolph* only to contracts entered into "in the ordinary course of government administration" for three reasons:

10.1 References to contracts being entered into for these purposes in *Bardolph* were directed to the issue of ostensible authority, not as a limitation upon the power to enter contracts.[20]

10.2 The contract for advertising of the Tourist Bureau in question in *Bardolph* itself was entered into "as a matter of Government policy".[21]

10.3 Attempts to draw distinctions between activities that are inherently governmental in nature and those that are not are notoriously unstable.[22]

11. Cases preceding the decision in *Bardolph* were not inconsistent with it. These cases were primarily concerned with an argument that the Commonwealth cannot enter into a contract without a prior appropriation:

11.1 *Wooltops*: The discussion of Isaacs J in *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd ("Wooltops")*[23] regarding the requirement for legislative approval prior to expenditure by the Commonwealth executive must be read in light of the following passage of His Honour's judgment:

> the Crown's discretion to make contracts involving the expenditure of public money would not be entrusted to Ministers unless Parliament had sanctioned it, either by direction legislation *or* by appropriation of funds.[24] (emphasis added)

It is clear from this passage that Isaacs J considered that the appropriation of funds was sufficient legislative authorisation to enable the Commonwealth executive to spend.[25] No further Parliamentary approval is required.

Further, Knox CJ and Gavan Duffy J agreed that Ministers:

> ... would probably be authorized to make such contracts on behalf of the Commonwealth as might from time to time be necessary in the course of such administration.[26]

11.2 *Kidman*[27] *& Colonial Ammunition*[28]: These cases do not suggest that an appropriation is insufficient authority to spend money. Rather, the defect in authority in these cases was the absence of an Order in Council as required by s63 of the *Defence Act*.[29] This understanding is consistent with the statement of Isaacs and Rich JJ:

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18 *NSW v Bardolph* (1934) 52 CLR 455.
19 *NSW v Bardolph* (1934) 52 CLR 455 at 468-475 (Evatt J), 501-503 (Starke J), 507-509, 515 (Dixon J).
20 *NSW v Bardolph* (1934) 52 CLR 455 at 507-508 (Dixon J).
21 *NSW v Bardolph* (1934) 52 CLR 455 at 498 at 503 (Starke J).
22 E Cambell, "Commonwealth Contracts" (1970) 44 ALJ 14 at 15.
23 *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421.
24 *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 451 (Isaacs J).
25 *NSW v Bardolph* (1934) 52 CLR 455 at 469 (Evatt J).
26 *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 432.
27 *Kidman v The Commonwealth* (1925) 37 CLR 233.
28 *Commonwealth v Colonial Ammunition Co Ltd* (1923-1924) 34 CLR 198.
29 See *Commonwealth v Colonial Ammunition Co Ltd* (1923-1924) 34 CLR 198 at 219-220 (Isaacs and Rich JJ); and *Kidman v The Commonwealth* (1925) 37 CLR 233 at 240-241 (Isaacs J); 247-249 (Higgins J).

> If Parliament in authorising a payment were supposed to see or know the contents of every relevant document, the circumstance of its execution, whether on the side of the Crown or the subject, and to inform itself of every fact and phase relative to they payment it is asked to sanction, it would be deemed to undertake a novel and, we venture to assert, an impossible task.[30]

For these reasons the decisions in *Wooltops*, *Kidman* and *Colonial Ammunition* stand only for the proposition that legislative authorisation, at least in the form of a valid appropriation must exist, before the Commonwealth executive may expend money. This proposition flows from ss81 and 83 of the *Commonwealth Constitution*. It is not inconsistent with *Bardolph*.

12. Even if these cases can be interpreted as supporting the proposition contended for by the Plaintiff and Queensland (although for the reasons given immediately above, it is submitted that they do not), any ambiguity on this issue was resolved by *Bardolph*. It has been said to support what has now become the orthodox view that the executive power of the Commonwealth includes the common law capacities.[31] The principle should not now be disturbed.

13. Consistent with the authorities referred to above, it appears it was accepted in *Pape* that the executive power of the Commonwealth includes the common law capacities.[32]

14. Concern that the exercise of the common law capacities of the Commonwealth executive, without prior statutory or constitutional authority, is unwarranted. Particular concerns arising from the expenditure of public money are the subject of the provisions of the *Constitution* dealing with appropriation. Further, the suggestion that the executive branch must have prior legislative or constitutional authorisation to exercise the common law capacities, as proposed by the Plaintiff and Queensland, in order to comply with the doctrine of responsible government or the rule of law is specious. Since federation the Commonwealth Parliament has possessed the legislative power to pass laws regulating the exercise of the common law capacities, pursuant to s51. It has exercised this control from time to time.[33] The Commonwealth Parliament may, in its discretion, curtail or even abolish the capacity of the Commonwealth executive to exercise the common law capacities. Hence in *Bardolph* Dixon J stated:

> ... It is a function of the Executive, not of Parliament, to make contracts on behalf of the Crown. The Crown's advisers are answerable politically to Parliament for their acts in making contracts. Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of its control over the expenditure of public moneys. But the principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available.[34]

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30 *Commonwealth v Colonial Ammunition Co Ltd* (1923-1924) 34 CLR 198 at 223.

31 G Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (1983) at 44-45; D Rose, "The Government and Contract" in P Finn (ed) *Essays on Contract* (1987) at 246 quoted in *Commonwealth v Ling* (1993) 44 FCR 397 at 430 (Beaumont J); L Zines, "The Inherent Executive Power of the Commonwealth" (2005) 16 PLR 279 at 280; L Zines, *The High Court and the Constitution* (2008, 5th ed) at 341-346; N Seddon, *Government Contracts* (2009) at 64-65, 70; *R v Hughes* (2000) 2020 CLR 535 at 554-5, [38] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ)

32 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 60 [126] (French CJ), 85 [220] (Gummow, Crennan & Bell JJ).

33 See, for example, the *Financial Management and Accountability Act 1997* (Cth).

34 *New South Wales v Bardolph* (1934) 52 CLR 55 at 509 see also 502 (Starke J), 523 (McTiernan J).

15. Standing appropriations may have the consequence that scrutiny by the Parliament is less. But that is the product of a "voluntary surrender by Parliament of what is supposed to be its most important power".[35]

16. The above submission does not impermissibly conflate the notion of the States and the Commonwealth, found in the *Constitution*, with the Crown.[36] Rather, it attempts to identify the content of the expression "executive power" found in s61 of the *Constitution* by reference to Australian legal history.

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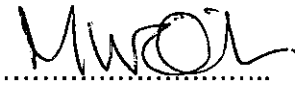
Dated: 19 August 2011



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35 *Alcock v Fergie* (1867) 4 WN & a'B (L) 285 at 319 cited in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [64] (French CJ); see also, E Campbell, *Commonwealth Contracts* (1970) 44 ALJ 14 at 16.

36 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1997) 189 CLR 253 at 282-284 (McHugh and Gummow JJ); *Commonwealth v Mewett* (1997) 191 CLR 471 at 546 (Gummow and Kirby JJ); *Commonwealth v Western Australia* (1999) 196 CLR 392 at 410-411 (Gleeson CJ and Gaudron J), 429-436 (Gummow J); *Sue v Hill* (1999) 199 CLR 462 at 497-503 (Gleeson CJ, Gummow and Hayne JJ).