IN THE HIGH COURT OF AUSTRALIA

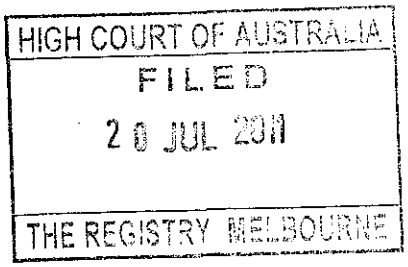
SYDNEY REGISTRY **No S307 of 2010**

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

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR VICTORIA (INTERVENING)

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I. PUBLISHABLE ON THE INTERNET

1. The Attorney-General for the State of Victoria (**Victoria**) certifies that these submissions are in a form suitable for publication on the Internet.

II. BASIS AND NATURE OF INTERVENTION

2. Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) to submit that the Darling Heights Funding Agreement (the **Agreement**) between the First Defendant (the **Commonwealth**) and the Fourth Defendant (**SUQ**) is invalid. In particular, Victoria intervenes, partly in the interests of the Plaintiff, and partly in the interests of the Defendants, to make submissions in support of the following propositions:

   2.1. Even assuming the availability of funds by virtue of a valid appropriation, the Commonwealth required power under s 61 of the Constitution to enter into the Agreement.

   2.2. The power under s 61 extended to the entry into the Agreement only if:

      (a) the Parliament could have legislated to authorise the Commonwealth to enter into the Agreement; or

      (b) the entry into the Agreement was peculiarly adapted to the government of the country by the Commonwealth as the national polity.

   2.3. The Commonwealth was not authorised to enter into the Agreement by s 61 read with s 51(xx) of the Constitution.

   2.4. The Commonwealth was not authorised to enter into the Agreement by s 61 read with s 51(xxiiiA) of the Constitution.

   2.5. The entry into the Agreement was not peculiarly adapted to the government of the country by the Commonwealth as the national polity.

   2.6. Had s 61 afforded power to enter into the Agreement, the Commonwealth would not have been precluded from doing so by s 116 of the Constitution.

IV. APPLICABLE LEGISLATIVE PROVISIONS

3. The relevant legislation is adequately set out in the submissions of the Plaintiff.

V. SUBMISSIONS

The potential sources of power for entry into the Agreement

4. The two potential sources of power for the Commonwealth's entry into a contract are: (a) valid legislation; and (b) the executive power conferred by s 61 of the Constitution.[1] Any common law power to contract that was sourced in surviving prerogative powers of the Crown has been eclipsed by, or included in, the executive power enshrined in s 61.[2]

5. As there is no legislation authorising the Commonwealth's purported entry into the Agreement, the proceeding concerns the width of the Commonwealth's executive power to contract under s 61 of the Constitution.

6. The executive power of the Commonwealth to enter into contracts extends to the power to enter into contracts under which it assumes liabilities to do certain things that it could instead validly have done by the exercise of Commonwealth legislative power.[3] The only express heads of legislative power relied upon by the Defendants in this regard are ss 51(xx) and (xxiiiA). However, the executive power of the Commonwealth to enter into contracts also extends to contracts under which the Commonwealth agrees to do certain things that are peculiarly adapted to the government of the country. It is submitted that the power extends no further.

Nature of required connection with legislative power

7. The Commonwealth's executive power to contract is an adjunct to its (limited) legislative powers, although of course subordinate to those legislative powers.[4] In

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1 *Pape v Federal Commissioner of Taxation* ***(Pape)*** (2009) 238 CLR 1 at 55 [111] (French CJ).

2 *Barton v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J); *Davis v Commonwealth* (1988) 166 CLR 79 at 93-94 (Mason CJ, Deane and Gaudron JJ), 108-109 (Brennan J); *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369; *Ruddock v Vardarlis* (2001) 110 FCR 491 at 540 [183] (French J, with whom Beaumont J agreed); *Pape* (2009) 238 CLR 1 at 60 [126]-[127] (French CJ), 83 [215] (Gummow, Crennan and Bell JJ); *Cadia Holdings Pty Ltd v New South Wales* (2010) 84 ALJR 588 at 598 [30]-[31] (French CJ).

3 See, for example, *Victoria v Commonwealth and Hayden (the* ***AAP Case****)* (1975) 134 CLR 338 at 362 (Barwick CJ), 379 (Gibbs J) and 396-397 (Mason J).

4 See Seddon, *Government Contracts: Federal, State and Local* (4th ed, 2009), at 70 [2.12]; see also Zines, *The High Court and the Constitution* (5th ed, 2008), at 349-38. The proposition is implicit in what this Court said in *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 at 10 (Knox CJ, Gavan Duffy, Rich and Starke JJ); *AAP Case* (1975) 134 CLR 338; *Davis v Commonwealth* (1988) 166 CLR 79 and *Pape* (2009) 238 CLR 1 and was specifically endorsed and applied by Beaumont J in *Commonwealth v Ling* (1993) 44 FCR 397 at 430, citing Rose, "The Government and Contract" in Finn (ed), *Essays on Contract* (1987), at 246. See also, for example, Richardson, "The Executive Power of the Commonwealth" in Zines (ed), *Commentaries on the*

constitutional principle, this proposition draws it support from the text of s 61, and from the structure of the Constitution, from which the prescription for executive responsibility to Parliament, subject to certain narrowly confined exceptions,[5] may be discerned.[6] Sir Samuel Griffith regarded the proposition as axiomatic.[7]

8. The voluntary entry by the Commonwealth into a contract that imposes on the Commonwealth an enforceable obligation to do something (in the case of the Agreement, a conditional obligation to pay certain sums of money to SUQ) cannot be valid where the Commonwealth would, but for the contract, have had no executive power to do that thing.[8] Otherwise, the Commonwealth could recite itself into power merely by obtaining the consent of a contracting party; this would offend the principle articulated in the *Communist Party Case*.[9]

9. However, while the executive power extends to agreeing to do things that could have been done by Commonwealth legislation, it is submitted that s 61 is not to be read as a power to agree to do things "with respect to" the matters enumerated in s 51.[10] If it were, the Commonwealth could, for instance, enter into any contract at all with a party falling within the description of a "trading or financial corporation". A law permitting the Commonwealth to enter into a contract with a trading or financial corporation would not, without more, be characterised as a law with respect to trading or financial corporations.[11] It would be a *law* with respect to the subject matter of the contract in question, to which the status of the contracting party would be only incidental. But the entry into the contract could be described as an *action* with respect to trading or financial corporations, by virtue of the status of the contracting party.

Australian Constitution (1977), at 74-75; Winterton, "The Limits and Use of Executive Power by Government" 31 *Federal Law Review* 421 at 428. See further, paragraph 46 below.

5 For a discussion of such exceptions, see Zines, *The High Court and the Constitution* (5th ed, 2008), at 362 ff.

6 See, for example, *Commonwealth v Kreglinger* (1926) 37 CLR 393 at 413 (Isaacs J); *AAP Case* (1975) 134 CLR 338 at 406 (Jacobs J); *Brown v West* (1990) 169 CLR 195 at 202.

7 See *Convention Debates*, 1891, Sydney, at 527. A subsequent amendment to the terms of what ultimately became s 61 of the Constitution was carried without debate. Griffith had explained that the proposed amendment "does not alter its intention, though it certainly makes it shorter": see ibid, at 777.

8 Cf Campbell, "Commonwealth Contracts" (1970) 44 *Australian Law Journal* 14 at 18.

9 *Australian Communist Party v Commonwealth* (1953) 83 CLR 1.

10 Cf Fourth Defendant's Submissions, [26]-[28].

11 If it were properly so characterised, the Commonwealth had the power to provide the things set out in s 51(xxiiiA) by means of a trading corporation without the need for that provision's inclusion in the Constitution. See *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368 (McHugh J).

10. If the Commonwealth had power to enter into any contract it wished with a trading or financial corporation, this would be destructive of the allocation of powers and responsibilities between the States and the Commonwealth.

10.1. It would be anomalous if the Commonwealth, having limited legislative powers, had effectively unlimited executive power by virtue of being able to perform any executive act it wished through the medium of a trading or financial corporation.

10.2. Such an outcome would mean that the Commonwealth's executive power failed to follow the "contours" of legislative power.[12]

10.3. Section 96 enables the Commonwealth to achieve outcomes outside its field of legislative power by making conditional payments to the States. That process, by its nature, requires the agreement of the States concerned to accept the payments.[13] In so far as the Commonwealth could, by resort to executive power, make payments to a trading or financial corporation on such conditions as it saw fit, it would defeat the scheme of s 96, which requires that the States are party to such processes.

11. Accordingly, the first question to consider is whether s 61 read together with any express power in s 51 authorised the Commonwealth to enter into the Agreement. If the answer to that question is "no", the next question is whether s 61 authorised the Commonwealth to enter into the Agreement on the basis that it requires the Commonwealth to do things peculiarly adapted to the government of the country.

Section 61 read with s 51(xx)

12. It is submitted that s 61 read with s 51(xx) of the Constitution did not authorise the Commonwealth's entry into the Agreement. This is because, for the reasons that follow, SUQ ought not be characterised as being a "trading or financial corporation" at the time of the execution of the Agreement. Attention is confined in the following submissions to the issue whether SUQ was a trading corporation.

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12 *Pape* (2009) 238 CLR 1 at 181 [520] (Heydon J).

13 See, for example, *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 at 592 (Gibbs J).

The existing approach to identification of a trading corporation

13. The decisions of the Court in *R v Federal Court of Australia; Ex parte Western Australian Football League* (***Adamson's Case***)[14] and *State Superannuation Board (Vic) v Trade Practices Commission* (***State Superannuation Board Case***)[15] – the leading authorities on the criteria for a corporation to satisfy the constitutional description of a "trading or financial corporation" – are generally considered to stand for the following propositions:[16]

    13.1. The word "trading" does not limit the scope of the constitutional expression to those corporations whose constitutions define their sole or predominant purpose as trading.[17]

    13.2. A corporation will satisfy the constitutional description of a trading corporation if trading is such a "substantial" or "sufficiently significant" part of its activities so as to merit that description.[18]

    13.3. In having regard to the activities of a corporation for the purpose of ascertaining its trading character, the court must look beyond its "predominant and characteristic activity".[19]

14. The Court has always accepted that the mere fact that a corporation trades is insufficient to merit the description of a "trading corporation" for the purposes of s 51(xx).[20] What has been controversial is the threshold at which the trading activities of a corporation are such as to merit the corporation being described as a "trading corporation".

15. The existing activities test, though possessing a "protean" quality, tends to restate rather than resolve this critical issue. The circularity in the test was observed by

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14 (1979) 143 CLR 190.

15 (1982) 150 CLR 282.

16 See, for example, *Quickenden v O'Connor* (2001) 109 FCR 243 at 258-260 [41]-[47]. Cf *State Superannuation Board Case* (1982) 150 CLR 282 at 294 (Gibbs CJ and Wilson J); *Fencott v Muller* (1983) 152 CLR 570 at 588 (Gibbs J); *Australian Workers' Union of Employees (Queensland) v Etheridge Shire Council* (2008) 131 FCR 102.

17 *Adamson's Case* (1979) 143 CLR 190 at 207-208 (Barwick CJ), 232-233 (Mason J, with whom Jacobs J agreed), and 239 (Murphy J).

18 *Adamson's Case* (1979) 143 CLR 190 at 208 (Barwick CJ), 233 (Mason J, with whom Jacobs J agreed), and 239 (Murphy J); cf the dissenting opinions of Gibbs J (at 213), and Stephen J (with whom Aickin J agreed) (at 220-221)

19 *State Superannuation Board Case* (1982) 150 CLR 282 at 304 (Mason, Murphy and Deane JJ).

20 See, for example, *Reg v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 at 546 (McTiernan J), 554 (Menzies J), 562 (Gibbs J) and 572 (Stephen J).

Spender J in *Australian Workers' Union of Employees (Queensland) v Etheridge Shire Council.*[21] In the absence of a clear standard, courts have on the whole taken a liberal approach, finding corporations for which the sale of goods and services represents only a small fraction of their total revenue to be "trading corporations": including, for example, a public hospital (approximately 18%),[22] a university (approximately 17%),[23] and a non-profit organisation (approximately 4%).[24] However, the absence of any clear standard has inevitably produced mixed results and has therefore generated considerable uncertainty.[25]

Proposed refinement to the identification of a trading corporation

10 16. It is submitted that:

16.1. The underlying question in each case should be: is the corporation properly characterised as a trading corporation? In other words, what is the corporation's true character?

16.2. Generally speaking, and especially in light of modern company law, the most reliable evidence of a corporation's true character will be its present activities.[26]

16.3. A corporation with activities that include trading will not satisfy the constitutional description of a "trading corporation" unless trading is, at the relevant time,[27] its "predominant or characteristic" activity.

20 16.4. Trading is not the "predominant or characteristic" activity of a corporation with trading operations that are incidental to a non-trading activity. In particular, but without limitation, a corporation whose predominant or characteristic activity is a charitable, religious or "public" activity (as

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21 (2008) 171 FCR 102 at 118 [78].

22 *E v Australian Red Cross Society* (1991) 27 FCR 310 at 344-345.

23 *Quickenden v O'Connor* (2001) 109 FCR 243 at 261.

24 *E v Australian Red Cross Society* (1991) 27 FCR 310 at 343-344.

25 See Gouliaditis, "The meaning of 'trading or financial corporations': Future directions" (2008) 19 *Public Law Review* 110 at 113-119.

26 In *Fencott v Muller* (1983) 152 CLR 570 at 589-590, Gibbs J described the objects clause of a corporation's memorandum of association an "inadequate and [possibly] misleading guide"; see also *Reg v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 at 542 (Barwick CJ). One example of an exceptional case may be that of a "shelf company" that is yet to engage in any activities: see, for example, *Fencott v Muller* (1983) 152 CLR 570.

27 The character of a corporation may change over time: see, for example, *New South Wales v Commonwealth* (the *Incorporation Case*) (1990) 169 CLR 482 at 503.

revealed by its activities generally viewed in the context, especially in the case of a statutory corporation, of its governing statute or objects) is not a trading corporation within the meaning of s 51(xx) even though it may engage in trade to support its performance of that charitable, religious or public activity.

17. This approach is consonant with the existing focus on a corporation's activities, especially since corporate "purpose" is now a largely redundant concept in company law following the declining relevance of the doctrine of *ultra vires* in light of the *Corporations Act 2001* (Cth).[28] Further, for the reasons outlined by Barwick CJ in *Reg v Trade Practices Tribunal; Ex parte St George County Council* (the ***St George County Council Case***)[29] and rehearsed elsewhere by Gibbs J,[30] it is (at least generally) preferable to focus on the *actual* activities in which corporations engage, rather than on the activities in which they might potentially lawfully engage. However, for statutory corporations whose constituting statutes limit their capacity to act by reference to prescribed objects, those objects necessarily assume greater significance in identifying the corporation's true character.[31] Thus, the true character of a corporation that carries on trading is not that of a trading corporation if the trading is incidental to a non-trading activity, even if such trading could in some abstract sense be characterised as "substantial" or "significant".

18. This approach revives the higher threshold ("predominant or characteristic") that is traceable to the dissenting judgment of Barwick CJ in the *St George County Council Case*.[32] This threshold was subsequently embraced by Gibbs J in his dissenting judgment in *Adamson's Case*[33] and by Wilson J (with Gibbs J) in his dissenting judgment in the *State Superannuation Board Case*.[34] It was applied by Spender J in *Australian Workers' Union of Employees (Queensland) v Etheridge Shire Council*.[35]

19. A test which looks at the activities which a corporation does (or may) carry on and asks merely whether they include activities of a trading nature – even to a substantial

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28 This is manifest in ss 124 and 125 of the *Corporations Act 2001* (Cth).
29 (1974) 130 CLR 533 at 542.
30 *Adamson's Case* (1979) 143 CLR 190 at 208 at 213; *Fencott v Muller* (1983) 152 CLR 570 at 589.
31 *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117.
32 (1974) 130 CLR 533 at 543.
33 (1978) 143 CLR 190 at 213.
34 (1982) 150 CLR 282 at 294.
35 (2008) 171 FCR 102 at 118-119 [78]-[86].

or significant extent – fails to ask the critical question whether the corporation has the character of a "trading corporation". As Gibbs J explained in the *St George County Council Case*,[36] the only possible reason for the use of the adjectives "foreign", "trading" and "financial" to describe corporations within the power conferred by s 51(xx) is to exclude other types of corporation from the scope of the power. Thus, the ultimate inquiry must be directed to ascertaining whether the "true character" of a corporation is that of a "trading" corporation, to be distinguished from corporations whose true character is otherwise.[37]

20. In contrast to the existing activities test, the proposed approach looks to the relationship between any trading activity of any corporation, and its other activity or activities, to assess whether any trading activity is merely incidental to another characteristic activity or activities. Thus, as Gibbs CJ and Wilson J explained in the *State Superannuation Board Case* in relation to the cognate expression "financial corporation":[38]

> [T]he financial activities of a corporation may be substantial in a quantitative sense and yet be no more than incidental and therefore insignificant in relation to the other activities of the corporation. In such a case the financial activities may be both substantial and yet ancillary and therefore insufficient to fix their character to the corporation. ... It is not a question solely of substantiality in either a quantitative or relative sense but whether the activity is the predominant or characteristic activity.

21. The proposed approach finds support in the judgment of Mason J in *Adamson's Case*,[39] where his Honour observed that the trading activity of a corporation m*ay be "so slight and so incidental to some other principal activity*, viz. religion or education in the case of a church or school, that it could not be described as a trading activity". Thus, when a corporation engages in trading activities for purposes which do not include the making of profit, its trading activities are likely to be incidental to its characteristic activities so that it is not aptly designated a "trading corporation".

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36 (1974) 130 CLR 533 at 562.

37 Cf *St George County Council Case* (1974) 130 CLR 533 at 562-565 (Gibbs J); *Fencott v Muller* (1983) 152 CLR 570 at 588 (Gibbs J) and 623 (Dawson J); *Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 158 CLR 1 at 117 (Gibbs J).

38 (1982) 150 CLR 282 at 296. See *Adamson's Case* (1979) 143 CLR 190 at 220-221 (Stephen J).

39 *Adamson's Case* (1979) 143 CLR 190 at 234 (emphasis added). Cf 233, where his Honour states that "[e]ssentially" the constitutional expression "trading corporation" "is a description ... 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" (emphasis added).

22. Whether the trading activities of a particular corporation are sufficient to merit the corporation being characterised as a trading corporation is still a "question of fact and degree", but such assessment must be performed by reference to a clear standard. No elliptical inquiry need be undertaken as to whether a particular proportion of a corporation's activity is, in some abstract sense, "substantial" or "significant". So, for example, as Spender J concluded in *Australian Workers' Union of Employees (Queensland) v Etheridge Shire Council*, a statutory corporation whose trading activity is merely incidental to the performance of its legislative and executive functions (its "*raison d'etre*") will not be a trading corporation.[40]

The Commonwealth's submissions

23. The Commonwealth submits that the approach which best reflects the purpose to which s 51(xx) is directed is one which regards constitutional corporations as being all corporations "which may cause harm if not properly regulated".[41] Whilst the purpose of the investiture of the Parliament with power with respect to trading corporations must bear on the construction of the constitutional expression,[42] the Commonwealth's submission is overly broad. It effectively writes the words "trading or financial" out of s 51(xx).

24. In the *Work Choices Case*, the Court tacitly recognised the importance of giving "due weight" to the words "foreign", "trading" and "financial" in considering the application of s 51(xx).[43] Given the amplitude of the power conferred by s 51(xx) with respect to trading corporations – which was confirmed in the *Work Choices Case* – the only way of construing s 51(xx) so as to attribute any real significance to the word "trading" is to assess whether trading is the predominant or characteristic activity of a corporation the subject of regulation.

SUQ is not a trading corporation

25. Applying this approach, SUQ ought not to be characterised as a "trading corporation" at the time of the execution of the Agreement because:

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40 (2008) 131 FCR 102, esp. at 117-119 [75]-[86].

41 Commonwealth's submissions at [34].

42 *St George County Council Case* (1974) 130 CLR 533 at 541.

43 *New South Wales v Commonwealth* (2006) 229 CLR 1 at 111 [165], referring to *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 182 (Gibbs J). See also *Australian Workers' Union of Employees (Queensland) v Etheridge Shire Council* (2008) 171 FCR 102 at 107 [16].

25.1. trade accounted for only a small proportion of its SUQ's income and expenditure, such that without donations SUQ would have been running at a sizeable loss;[44]

25.2. it can be inferred from this fact, considered in the light of the objects of SUQ, that trade is not the predominant or characteristic activity of SUQ, but that it is merely incidental to its predominant or characteristic activity, namely to engage in activities that promote the objects of SUQ, which are:[45]

(a) "to make God's Good News known to children, young people and the their families"; and

(b) "to encourage people of all ages to meet God daily through the Bible and prayer so that they may come to personal faith in our Lord Jesus Christ, grow in Christian maturity and become both committed church members and servants of a world in need".

Section 61 read with s 51(xxiiiA)

26. It is submitted that s 61 read with s 51(xxiiiA) of the Constitution also does not support the Commonwealth's entry into the Agreement. This is because, for the reasons that follow, the chaplaincy services provided by SUQ under the Agreement do not constitute "benefits to students".

The social welfare power

27. Section 51(xxiiiA) (the **social welfare power**) confers power on the Commonwealth Parliament to provide eleven specified things, including "benefits to students". The others things are "maternity allowances", "widows' pensions", "child endowment', "unemployment, pharmaceutical, sickness and hospital benefits", "medical and dental services (but not so as to authorise any form of civil conscription)" and "family allowances".

28. Section 51(xxiiiA) was inserted into the Constitution in 1946 in response to the High Court's decision in *Attorney-General (Vic) v Commonwealth* (the *Pharmaceutical Benefits Case*),[46] which held invalid the *Pharmaceutical Benefits Act 1944* (Cth).

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44 Special Case Book, Volume 1 at 4-6; cf Commonwealth's submissions at [29].
45 Special Case Book, Volume 1 at 38-39.
46 (1945) 71 CLR 237.

Chaplaincy services in schools are not "benefits" in the sense used in s 51(xxiiiA)

29. No court has considered the scope of the expression "benefits to students". However, consideration has been given to the meaning of the word "benefits" in the composite expression "unemployment, pharmaceutical, sickness and hospital benefits".

30. In *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth,*[47] the Court (Mason CJ, Wilson, Brennan, Deane and Dawson JJ) adopted the meaning ascribed to the word "benefit" by McTiernan J in *British Medical Association v Commonwealth* (the ***BMA Case***):[48]

> The material aid given pursuant to a scheme to provide for human wants is commonly described by the word "benefit". When this word is applied to that subject matter it signifies a pecuniary aid, service, attendance or commodity made available for human beings under legislation designed to promote social welfare or security: the word is also applied to such aids made available through a benefit society to members of their dependents. The word "benefits" in par (xxiiiA) has a corresponding or similar meaning.

31. In contrast, Dixon J (in the *BMA Case*[49]) said that while the general sense of the word "benefit" covered anything tending to the profit, advantage, gain or good of a man and is very indefinite, the word was used in s 51(xxiiiA) "in a rather more specialized application in reference to what are now called social services":[50]

> "it is used as a word covering provisions made to meet needs arising from special conditions with a recognized incidence in communities or from particular situations or pursuits such as that of a student, whether the provision takes the form of money payments or the supply of things or services".

32. It is submitted that, with one qualification to be mentioned below, the latter formulation of the scope of "benefit" is more apt in the context of "benefits to students". This is because the head of power for "benefits to students", in contrast to the heads of power for unemployment, pharmaceutical, sickness and hospital benefits, is defined by the character of the persons to whom benefits are to be provided, not the nature of the benefits themselves.

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47 (1987) 162 CLR 271 at 280.

48 (1949) 79 CLR 201 at 279. See also 246 (Latham CJ), 286-287 (Williams J) and 292 (Webb J).

49 (1949) 79 CLR 201.

50 (1949) 79 CLR 201 at 260. Dixon J described the "character of the things for the provisions of which laws may be made" as "recognized social services the establishment of which is now considered to be within the province of government": at 260.

33. The meaning of "benefits" in the context of the sickness and hospital benefits with which the *Alexandra Hospital* case was concerned is affected by the presence in s 51(xxiiiA) of the power for the provision of medical services which supports a broader notion of "benefits" in that context. However, s 51(xxiiiA) carefully distinguishes between the provision of benefits and the provision of services. These terms are to be given distinct meanings. There is no power for the provision of educational services, in contrast to the power with respect to medical and dental services, and the power to provide benefits to students therefore cannot be read as encompassing such a broad power. Thus, Victoria's adoption of Dixon J's formulation of the scope of "benefit" in the context of "benefits to students" is subject to this qualification.

34. The Agreement makes no provision for money payments or the supply of things to students. As such it could not be supported by an exercise of the power to make laws with respect to the provision of benefits to students under s 51(xxiiiA).

35. Alternatively, adopting the approach of Dixon J set out above, it is the "provisions made to meet needs arising from ... [the] pursuits ... of a student" which must be identified.

36. The chaplaincy services provided by SUQ under the Agreement do not constitute the provision of benefits to students in the requisite sense. While material assistance – such as the provision of books, computers and other educational equipment[51] – may readily be seen as meeting a need arising from the pursuits of a school student, the fostering of general "spiritual wellbeing" is not. There is no sufficient relationship between the chaplaincy services to be provided under the Agreement, and the particular needs of a *student*. For example, the services are not confined to services needed as a result of being a student (such as addressing bullying), but extend to any chaplaincy services that members of a school community, including staff and students, might require. In the case of students, this extends to services that may be required irrespective of the fact of being a student or not; the services would extend to counselling in respect of matters not arising at all from the pursuits of a student (for example, following the death of a family member).

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[51] Cf Western Australia's submissions at 18 [51].

37. It is true that the chaplaincy services are to be provided within a school setting and in accordance with educational objectives. Thus, for example:

37.1. the purpose of the Commonwealth's funding of SUQ is to contribute to the provision of chaplaincy services at a school;[52]

37.2. the chaplain(s) must deliver services to the school (and its community);[53]

37.3. the Agreement incorporates the National School Chaplaincy Programme (**NSCP**)[54] Guidelines and requires chaplains to abide by the NSCP Code of Conduct;[55]

37.4. the chaplain(s) must operate within an ethical framework that supports and upholds the "Values for Australian Schooling".[56]

38. However, this does not suggest that the services are properly to be characterised as benefits to students in the requisite sense. On the contrary, it suggests that the services ought not to be characterised as being designed to meet a need arising from the pursuits of school students, but rather as forming part of the broader scholastic program of a school. Consistently with Western Australia's submissions, Victoria submits that this is beyond the power conferred by s 51(xxiiiA).

Chaplaincy services in schools are not benefits "to students"

39. In any event, even if the chaplaincy services provided by SUQ under the Agreement qualified as "benefits" in the sense used in s 51(xxiiiA), those services are not benefits "to students" but rather to the broader school community.

40. Thus the Agreement and the various documents incorporated by it require chaplains to:

40.1. support school students and the wider school community in a "range of ways";[57]

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52 Clause C1 of Schedule 1 of the Agreement, Special Case Book, Volume 2 at 638.
53 Clause C3 of Schedule 1 of the Agreement, Special Case Book, Volume 2 at 638.
54 SUQ describes the NSCP as "quintessentially a national education program": SUQ's submissions at [79].
55 Clauses B2 and C3 of Schedule 1 of the Agreement, Special Case Book, Volume 2 at 638.
56 Clause C3 of Schedule 1 of the Agreement, Special Case Book, Volume 2 at 638.
57 NSCP Code of Conduct, Special Case Book, Volume 2 at 622.

40.2. assist schools and their communities to support the spiritual wellbeing of their students and to provide greater pastoral care, general religious and personal advice and comfort to all students and staff;[58]

40.3. be approachable by all students, staff and members of the school community of all religious affiliations;[59]

40.4. provide general religious and personal advice to those seeking it, and comfort and support to students and staff;[60]

40.5. support students and staff to create an environment of cooperation and respect;[61]

40.6. respect the range of religious views and cultural traditions in the school and the broader community, as well as the rights of parents and guardians to ensure the religious and moral education of their children is in line with their own convictions;[62]

40.7. work in a wider spiritual context to support students and staff of all religious affiliations;[63] and

40.8. act as a reference point for students, staff and other members of the school community on "religious, spiritual issues, values, human relationships and wellbeing issues".[64]

41. The Agreement therefore travels well beyond the provision of services to students. As a result, exercise of the power in s 51(xxiiiA) to authorise the Commonwealth's entry into the Agreement could not be characterised as a law with respect to the provision of benefits to students unless the support of the school community, staff and parents that is effected by the Agreement is incidental to the object of providing benefits to students at the relevant school.[65]

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58 Clause 1.3 of the 2010 Guidelines for the NSCP refers to this as the objective of the NSCP: Special Case Book, Volume 2 at 607-608.

59 Clause C3 of Schedule 1 of the Agreement, Special Case Book, Volume 2 at 638.

60 Clause C3 of Schedule 1 of the Agreement, Special Case Book, Volume 2 at 638.

61 Clause C3 of Schedule 1 of the Agreement, Special Case Book, Volume 2 at 638.

62 Clause C3 of Schedule 1 of the Agreement, Special Case Book, Volume 2 at 638.

63 Clause C3 of Schedule 1 of the Agreement, Special Case Book, Volume 2 at 638.

64 NSCP Code of Conduct, Special Case Book, Volume 2 at 622.

65 Cf SUQ's submissions at [38].

42. In considering whether there is a sufficient connection between an impugned legislative provision and a relevant law, it is material to consider whether the provision is capable of being reasonably considered to be appropriate and adapted to the end in view.[66] The same analysis ought to inform any attempt to invoke the incidental area of a legislative head of power as an aid to the executive power to enter into a contract.

43. Thus, the incidental power has been described, in relation to the social welfare power, as supporting measures for:

43.1. taking precautions against fraud by the recipients of benefits;[67]

43.2. administering the distribution of benefits so as to prevent the useless or dishonest expenditure of the benefits;[68]

43.3. establishing a scheme to ensure the provision of benefits would be effective and capable of being held within reasonable budgetary limits;[69]

43.4. stipulating qualifications for entitlement to, and for continuing entitlement to, benefits;[70] and

43.5. imposing disqualifications on entitlement to, and continuing entitlement to, benefits.[71]

44. These measures all relate to the implementation, machinery and integrity of the provision of benefits that fall within the core area of the power. However, the incidental power does not extend the reach of the social welfare power to enable the conferral of benefits on persons other than students, even if such an extension could be considered convenient or efficient given the proximity between the students and those other persons.[72] Such a measure cannot reasonably be considered to be appropriate and adapted to what is put as being the purported objective of the Agreement (the provision of chaplaincy services to students), but is instead properly characterised as

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66 See, for example, *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 297 (Mason CJ); *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 286 (Deane and Gaudron JJ); cf *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 (Dixon CJ).

67 *BMA Case* (1949) 79 CLR 201 at 246 (Latham CJ).

68 *BMA Case* (1949) 79 CLR 201 at 246 (Latham CJ).

69 *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at 281-282 (the Court).

70 *Higgins v Commonwealth* (1998) 79 FCR 528 at 532 (Finn J).

71 *Higgins v Commonwealth* (1998) 79 FCR 528 at 532 (Finn J).

72 Cf Commonwealth's submissions at 9 [25].

an element of the more extensive objectives of the Agreement (to enable the provision of chaplaincy services to the broader school community).

Section 61 absent an available head of power

45. It is submitted that s 61 of the Constitution alone does not support the Commonwealth's entry into the Agreement.

46. The limits of the Commonwealth's executive power to spend money apply equally to the Commonwealth's executive power to enter into a contract that obliges it to spend money (such as the Agreement). These limits (in the context of legislation made under the incidental power in s 51(xxxix)) were considered in some detail in *Pape*. The relevant principles emerging from that case may be summarised as follows:

46.1. The executive power (including the executive power to spend money) enables the Commonwealth to undertake actions that are "appropriate to the position of the Commonwealth and to the spheres of responsibility vested in it by the Constitution", including actions that are "peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation".[73]

46.2. The application of this criterion "invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in cooperation with the States) to secure the contemplated benefit".[74]

46.3. The executive power cannot be invoked to set aside the distribution of powers between Commonwealth and States.[75]

46.4. While Commonwealth executive power may extend to areas beyond the express grants of legislative power, the identification of these areas "will ordinarily be clearest where Commonwealth executive or legislative action

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73 (2009) 238 CLR 1 at 61 [129]-[130] (French CJ), 83 [214] and 87 [228] and 91-92 [241]-[242] (Gummow, Crennan and Bell JJ), 115-117 [327]-[330] (Hayne and Kiefel JJ), cf 198-199 [567] (Heydon J), referring to *Barton v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J) and the *AAP Case* (1975) 134 CLR 338 at 397 (Mason J).

74 (2009) 238 CLR 1 at 62 [131] (French CJ), 91 [239] (Gummow, Crennan and Bell JJ), referring to *Davis v Commonwealth* (1988) 166 CLR 79 at 111 (Brennan J).

75 (2009) 238 CLR 1 at 60 [127] and 63 [132] (French CJ), 85 [220] (Gummow, Crennan and Bell JJ), 124 [357] (Hayne and Kiefel J).

involves no real competition with State executive or legislative competence".[76]

47. That part of the executive power that permits the Commonwealth to spend money that cannot be characterised as being with respect to the subjects, purposes and persons described in the enumerated legislative heads of power may not strictly be considered to be the executive analogue of the "nationhood" power, being an implied head of legislative competence.[77] Nevertheless, as is apparent in the authorities relied upon in the Court's articulation of the principles set out in paragraph 46 above, both powers share similar constitutional foundations and constraints. Thus, guidance as to the scope of any executive power to spend *outside* the enumerated heads of legislative competence may be derived from cases that have considered the availability of the nationhood power.

48. Even if the executive power to spend money extends beyond matters to which Commonwealth legislative power may be addressed,[78] the assessment of the existence and extent of any "real competition" between the Commonwealth expenditure and State executive or legislative competence ought to take account of any established practice of State involvement in the area of public administration in respect of which a contemplated benefit is sought to be achieved by the Commonwealth expenditure.[79] (In particular, in this case, it ought to be taken into account that Queensland (for example) maintains its own funding program for chaplains in schools.[80]) Such assessment ought to be informed by the constitutional requirement identified in the *Melbourne Corporation Case* for "separate polities, separately organised, continuing to exist as such, in which the central polity is a government of limited and defined powers", but ought not to be limited to any narrow question as to whether the particular Commonwealth expenditure in itself destroys, curtails or interferes with a State's capacity to function as a government.[81]

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76 (2009) 238 CLR 1 at 62 [131] (French CJ) and 90-91 [239]-[240] (Gummow, Crennan and Bell JJ), referring to *Davis v Commonwealth* (1988) 166 CLR 79 at 93-94.

77 *Pape* (2009) 238 CLR 1 at 63 [133] (French CJ).

78 See *Pape* (2009) 238 CLR 1 at 91 [240] (Gummow, Crennan and Bell JJ).

79 See Kerr, "Pape v Commissioner of Taxation: Fresh Fields for Federalism" (2009) 9 *QUT Law and Justice Journal* 311 at 317; cf *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 24 [9] (French CJ).

80 Special Case Book, Volume 1 at 13.

81 (1947) 74 CLR 31. Cf *Pape* (2009) 238 CLR 1 at 91 [240] (Gummow, Crennan and Bell JJ) and 115 [325] (Hayne and Kiefel JJ).

49. In light of these principles, the following submissions are made.

49.1. There is no basis for characterising the purported entry by the Commonwealth into the Agreement, which gave rise to a conditional obligation of the Commonwealth to spend money, as an action that is peculiarly adapted to the government of the nation, and which cannot otherwise be carried on for the benefit of the nation.

49.2. Each of the States – including Queensland – clearly has sufficient legal and practical capacity effectively to engage in the funding of an organisation for the deployment of chaplains in schools in order to secure the contemplated benefit. There is no analogy to be made with the Court's decision in *Pape*, where the "short-term" and urgent nature of the payments, the fact that the payments were directed to address an issue "affecting the nation as a whole", and the fact that the payments practically needed to be made to taxpayers, necessitated that they be made by the Commonwealth directly[82] rather than by the States directly or indirectly (in accordance with the mechanism provided for in s 96 of the Constitution).

49.3. The established practice of State involvement in primary and secondary school education and, in particular, the fact that Queensland maintains its own funding program for chaplains in schools, means that the Commonwealth's contractual commitment to spend money in consideration for the provision of chaplaincy services at schools gives rise to "real competition" with State executive competence.

50. Accordingly, absent support from ss 51(xx) or (xxiiiA), s 61 of the Constitution does not authorise the Commonwealth's entry into the Agreement.

The constraint imposed by s 116

51. It is submitted that if, contrary to the submissions above, the Commonwealth *was* authorised to enter into the Agreement by s 61 of the Constitution, s 116 would not have constrained the Commonwealth from doing so.

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82 (2009) 238 CLR 1 at 60 [127] and 63 [133] (French CJ); 91 [241]-[242] (Gummow, Crennan and Bell JJ); cf 121 [345] ff (Hayne and Kiefel JJ).

52. As Isaacs J said in *R v Murray and Cormie; Ex parte Commonwealth*[83] in relation to the reference to an "officer of the Commonwealth" in s 75(v) of the Constitution, "[a]n officer connotes an 'office' of some conceivable tenure, and connotes an appointment, and usually a salary". The reference to the requirement for an appointment may be taken, in context, to mean an appointment by the Commonwealth or by a person exercising power on behalf of the Commonwealth. Clearly, cognate considerations must bear upon the construction of the expression "office ... under the Commonwealth" in s 116.[84]

53. The Agreement does not authorise the Commonwealth to appoint chaplains. Nor is it open to conclude that SUQ in any relevant sense acts on behalf of the Commonwealth in employing chaplains to provide the chaplaincy services described in the Agreement. In this regard, cl 18 of Schedule 2 to the Agreement provides as follows:[85]

> 18.1 [SUQ] will not, by virtue of this Agreement, be or for any purpose be deemed to be [the Commonwealth's] employees, partners or agents.
>
> 18.2 [SUQ] must not represent [SUQ], and must ensure that [SUQ's] employees, partners, agents or sub-contractors do not represent themselves, as being [the Commonwealth's] employees, partners or agents.

54. Accordingly, s 116 would not have constrained the Commonwealth from entering into the Agreement, had it otherwise had power to do so.

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83 (1916) 22 CLR 437 at 452, cited in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 140 [161] (Hayne J).

84 Cf *Crittenden v Anderson* (1950) 51 ALJ 171.

85 Special Case Book, Volume 2 at 651.