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, CHILDHOOD AND YOUTH

Second Defendant

MINISTER FOR FINANCE AND DEREGULATION

Third Defendant

SCRIPTURE UNION QUEENSLAND

Fourth Defendant

PROPOSED SUBMISSIONS ON BEHALF OF THE CHURCHES' COMMISSION ON EDUCATION INCORPORATED (APPLICANT FOR LEAVE TO INTERVENE)

Date of document: 29 July 2011
Filed on behalf of: The Churches' Commission on Education Incorporated

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Ref: MD/BJD File: 02-5504-5568

I. SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

II. BASIS OF INTERVENTION

2. By way of a summons filed on 5 May 2011, the Churches' Commission on Education Incorporated (the **Commission**) applies for leave to intervene in these proceedings. The Commission's application is supported by the Affidavit of Stanley Victor S/O Jeyaraj Jesudeson sworn on 5 May 2011 (the **Jesudeson Affidavit**)[1].

3. The Commission seeks leave to intervene in these proceedings on the following bases:

   (1) its legal interests are likely to be substantially affected by the Court's judgment[2]; and

   (2) the parties to the proceeding may not fully present the submissions on certain issues, being submissions which the Court should have to assist it to reach a correct determination[3]. Those issues are set out at paragraphs 9 and 10 below, but broadly concern: first, the meaning of "benefits to students" in s51(xxiiiA) and, secondly, the scope of s116 of the Constitution; and

   (3) further and alternatively, it has "an interest in the subject of litigation greater than a mere desire to have the law declared in particular terms"[4].

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1 In addition, the Commission relies upon a supplementary Affidavit of Stanley Victor S/O Jeyaraj Jesudeson sworn on 28 July 2011, which annexes the Certificate of Incorporation of the Commission.

2 *Levy v Victoria* (1997) 189 CLR 579 per Brennan CJ at 602-603.

3 *Levy* (1997) 189 CLR 579 per Brennan CJ at 603.

4 *Kruger v Commonwealth* (Transcript, 12 February 1996), where Brennan CJ announced the decision and order of the court (by majority) refusing the application of the Australian Section of the International Commission of Jurists for leave to intervene or to be heard as amicus curiae. See the discussion by Christopher Staker in "Application to Intervene as Amicus Curiae in the High Court" (1996) 70 ALJ 387-389. The extract cited in these submissions refers to Brennan CJ's identification of the test applicable to applications for leave to intervene.

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

4. The Commission is an incorporated association, incorporated pursuant to the *Incorporated Associations Act* 1987 (WA), whose membership currently includes 13 different churches in Western Australia[5].

5. The Commission is the largest provider of school chaplains in Western Australia, currently providing 261 school chaplains to public schools in Western Australia[6].

6. The National School Chaplain Program (the **NSCP**) funds 95% of the Commission's school chaplains[7]. The Commission enters into separate funding agreements with the Department of Education, Employment and Workplace Relations in relation to each of the public schools to which the Commission provides chaplaincy services[8]. Put simply, the Commission receives its funding under the NSCP in precisely the same manner as the fourth defendant. As a result, the Commission's legal interests are likely to be substantially affected by the Court's judgment. That is, if the plaintiff succeeds, the Commission is at a very real risk of losing its NSCP funding, which funds 95% of the Commission's school chaplains.

7. In any event, whether or not the Commission's interests are likely to be "substantially affected", the Commission submits that leave should nevertheless be granted on the basis that it has "an interest in the subject of litigation greater than a mere desire to have the law declared in particular terms"[9].

8. The Commission seeks leave to intervene in support of the defendants. Nevertheless, the Commission only seeks leave to make submissions with respect to Questions 2(a) and (b), and Questions 4(a) and (b) of the Amended Special Case.

9. The Commission's proposed submissions address the following issues not dealt with by the defendants:

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5 Jesudeson Affidavit at [11].

6 Jesudeson Affidavit at [23].

7 Jesudeson Affidavit at [48].

8 Jesudeson Affidavit at [49]. An example of a funding agreement to which the Commission is a party is exhibited to the Jesudeson Affidavit as Exhibit "SJ4". That agreement is relevantly identical to the agreement with the fourth defendant at SC Vol 2 635.

9 *Kruger v Commonwealth* (12 February 1996, unreported) (Full Court of the High Court of Australia), discussed in "Application to Intervene as Amicus Curiae in the High Court" (1996) 70 ALJ 387-389.

(a) Whether "benefits to students" includes the provision of "services", a matter assumed by the parties but contested by Victoria[10]; and

(b) Whether the object of the advancement of the "spiritual wellbeing" of students, as well as others, by chaplaincy services is such that the provision of those services may not be characterised as "benefits to students[11].

10. Additionally, the Commission's proposed submissions more fully develop the following issues raised by the parties:

(a) The contention by the plaintiff that s51(xxiiiA) applies only to benefits to students provided **directly** by the Commonwealth including the plaintiff's submission in reply (not addressed by the defendants), seeking to distinguish *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*[12];

(b) Whether benefits provided by the NSCP cannot be characterised as "benefits to students" within the meaning of s51(xxiiiA) because persons other than students, such as staff and the school community, may benefit from the services[13];

(c) Aspects of the history of s51(xxiiiA), particularly in the context of its extension to "services"; and

(d) The construction of Commonwealth power generally in light of the provisions of s116 of the *Constitution*.

11. Accordingly, the Commission submits that its proposed submissions may assist the Court in the determination of several of the important issues in these proceedings.

IV. APPLICABLE STATUTORY PROVISIONS

12. The legislation applicable to the determination of this matter is set out in the Plaintiff's Submissions.

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10 Victoria's Submissions at [32]-[34].

11 A submission made by Western Australia at [50]-[51] and Victoria at [36]. Whether the intangible nature of aspects of the NSCP give rise to issues of justiciability was also raised, by reference to *Gilmour v Coats* [1949] AC 426, by Gummow J in the course of a directions hearing on 26 July 2011.

12 *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271.

13 A submission made, in particular by Western Australia at [50] and Victoria at [38]-[41].

V. SUBMISSIONS

13. If leave to intervene is granted, the Commission seeks only to be heard in relation to Questions 2 and 4 of the Amended Special Case.

14. In that regard, the Commission will submit that the answer to each of Questions 2(a), 2(b), 4(a) and 4(b) is "No". In particular, by way of these written submissions and, if appropriate, oral submissions, the Commission proposes to make submissions on the following issues:

    (a) that the entry into, and payments under, the Darling Heights Funding Agreement (the **Agreement**) by the Commonwealth (and the NSCP generally) are within the executive power of the Commonwealth (pursuant to s61) as being matters within the competence of the Commonwealth Parliament pursuant to s51(xxiiiA) of the *Constitution*; and

    (b) that the entry into, and payments under, the Agreement by the Commonwealth (and the NSCP generally) are not prohibited by s116 of the *Constitution*.

15. The Commission submits that, as the above conclusions are sufficient to answer each of Questions 2(a), 2(b), 4(a) and 4(b) "No", it is unnecessary to consider the broader scope of the executive power of the Commonwealth contended for by the Commonwealth (at paragraphs 41-48) and SUQ (at paragraphs 57-80). Should that issue arise for determination, the Commission adopts those submissions but otherwise does not seek to be heard on the issue.

Section 51(xxiiiA) – "benefits to students"

16. The Commission submits that the entry into, and payments under, the Agreement by the Commonwealth (and the NSCP generally) are within the executive power of the Commonwealth (pursuant to s61) as being matters within the competence of the Commonwealth Parliament pursuant to s51(xxiiiA) of the *Constitution*[14].

17. The contentions to the contrary, made by the plaintiff, Western Australia and Victoria, may be summarised as follows:

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[14] That the executive power, at least, extends to matters in respect of which the Commonwealth legislative power may be engaged is accepted by all the named parties (Plaintiff's Further Amended Submissions (**Plaintiff's Submissions**) at [17]; Commonwealth's Submissions at [20]; SUQ's Submissions at [25]).

(a) that, to fall within the scope of s51(xxiiiA), the benefit provided by the Commonwealth must be provided directly by it to the students and not, as in the case of the NSCP, by providing funding to persons providing a service to students[15];

(b) that "benefits to students" within the scope of s51(xxiiiA), does not include the provision of "services" [16];

(c) that the benefits provided by the NSCP cannot be characterised as "benefits to students" because persons other than students, such as staff and the school community, may benefit from the services[17]; and

(d) that the advancement of the "spiritual wellbeing" of students, as well as others, by chaplaincy services is not sufficient to characterise the provision of those services as "benefits to students"[18].

18. The Commission submits that none of these matters take the Agreement or the NSCP outside the scope of the Commonwealth's executive power, read together with s51(xxiiiA).

Benefits need not be provided directly to students

19. The plaintiff's principal submission in this regard, namely that benefits within s51(xxiiiA) must be provided *directly* to students, is, as other parties have submitted,[19] contrary to the decision of the Court in *Alexandra Private Geriatric Hospital*[20]. In that case, the Court concluded that the payment of money by the Commonwealth to the proprietor of a nursing home in consideration of the care provided to the patient was capable of being supported as a law for the provision of sickness and hospital benefits by the Commonwealth.

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15 This submission is made in the plaintiff's Submissions at [31], Western Australia's Submissions at [49] and, most fully, by the plaintiff in reply at [7]-[8].

16 Victoria's Submissions at [32]-[34].

17 This submission is not made in the plaintiff's Submissions but appears in Western Australia's Submissions at [50] and Victoria's Submissions at [39]-[41].

18 This submission is not made in the plaintiff's submissions but appears in Western Australia's Submissions at [50]-[51].

19 See Commonwealth's Submissions at [22], SUQ's Submissions at [42]-[44] and South Australia's Submissions at [42]-[43].

20 *Alexandra Private Geriatric Hospital* (1987) 162 CLR 271 per Mason ACJ, Wilson, Brennan, Deane & Dawson JJ at 280-281.

20. The plaintiff's submissions, in reply, seek to distinguish *Alexandra Private Geriatric Hospital* by submitting that that decision is to be explained on the basis that the nursing care subsidy in that case "conferred a direct benefit upon the recipient of such care, namely a partial discharge of the payment obligation owed by him or her to the proprietor of the relevant nursing home"[21].

21. The Commission submits that the distinction sought to be drawn by the plaintiff is unsupported by either principle or authority.

22. First, as a matter of principle, the consequence of the plaintiff's submission in this respect would appear to be that payments by the Commonwealth under the NSCP could validly be made by the simple expedient of creating a nominal "debt" between the service provider and the recipient of the services. The Commission submits that the construction of the word "benefit" (and, in consequence, the validity of a scheme such as the NSCP or the provision of nursing home care considered in *Alexandra Private Geriatric Hospital*) is to be determined as a matter of substance and not form[22]. The resolution of these issues by reference to whether some nominal debt is owed to the service provider would, it is submitted, be a triumph of form over substance.

23. Secondly, as regards authority, there is nothing in the decision in *Alexandra Private Geriatric Hospital* to suggest that the "benefit" conferred by the scheme in that case consisted of the "discharge" of a debt or payment obligation owed by the patient. The reasons for decision make no reference to "discharge", "obligation" or "debt" at all, and there is nothing in those reasons to suggest that it was necessary that there be any prior obligation on the recipient of the ultimate services to the service provider before funding of that provider could be characterised as a relevant "benefit" provided by the Commonwealth.

24. Indeed, the Court made clear that the payment by the Commonwealth to a service provider providing such services "voluntarily" was within power[23]:

> If it be accepted, as the plaintiffs accept, that the Parliament could legislate for the establishment of Commonwealth hospitals to provide nursing home care directly to patients in need of such care, there can be no objection to it adopting what Smithers J. described as "a private enterprise approach to the problem"

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21 Plaintiff's Submissions in reply at [7].

22 *Street v Queensland Bar Association* (1989) 168 CLR 461 per Deane J at 524-525; *Austin v The Commonwealth* (2003) 215 CLR 185 per Gaudron, Gummow & Hayne JJ at 257 [143].

23 *Alexandra Private Geriatric Hospital* (1987) 162 CLR 271 per Mason ACJ, Wilson, Brennan, Deane & Dawson JJ at 282.

> (*Howells v. Nagrad Nominees* (1982) 66 FLR 169, at p 177; 43 ALR 283, at p 291) by inviting proprietors of private nursing homes voluntarily to undertake to provide the necessary services in return for a government subsidy. In that approach to the problem it is to be expected that the Parliament should be concerned to see that the intended real beneficiary, the patient, receives care of a quality appropriate to the cost of the programme.

25. In this context, the principle established in previous cases[24] that s51(xxiiiA) is concerned with the provision of benefits *by the Commonwealth* should not be understood as referring in any way to the mechanism (direct or indirect) by which the Commonwealth provides such benefits. On the contrary, those cases should be understood as excluding from the ambit of s51(xxiiiA) laws that are directed simply at controlling the provision of such benefits by others *in the absence of* the provision of any benefit by the Commonwealth.

26. The analogy with the taxation power in s51(ii), referred to by Latham CJ in *British Medical Association v The Commonwealth* is, it is submitted, instructive in this regard. That power, as Latham CJ observed, "would not authorize Federal laws prescribing the forms or methods of taxation by the States or laws authorizing private persons to impose taxation"[25]. It is, similarly, the exclusion of laws controlling welfare benefits by others, such as "the extrusion of a State or ... private person or association from any field of charity or welfare work"[26] (or their compulsion), that the requirement for benefits *by the Commonwealth* is directed; not the mechanism by which it chooses to deliver benefits it considers appropriate.

Benefits to Students includes Services

27. That the provision of "services" falls within the meaning of "benefits" under s51(xxiiiA) was described as settled by the Court in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*[27]. This conclusion, as the Court noted, was recognised by the majority of the Court in *British Medical Association v The Commonwealth*, which accepted a meaning of the word "benefit" as signifying "a

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[24] *British Medical Association v The Commonwealth* (1949) 79 CLR 201 per Latham CJ at 242-243, Rich J at 254, per Dixon J at 260, per McTiernan J at 279, Webb J at 292; *Alexandra Private Geriatric Hospital* (1987) 162 CLR 271 per Mason ACJ, Wilson, Brennan, Deane & Dawson JJ at 279.

[25] *British Medical Association v The Commonwealth* (1949) 79 CLR 201 per Latham CJ at 243.

[26] *British Medical Association v The Commonwealth* (1949) 79 CLR 201 per McTiernan J at 279.

[27] *Alexandra Private Geriatric Hospital* (1987) 162 CLR 271 per Mason ACJ, Wilson, Brennan, Deane & Dawson JJ at 279-280.

pecuniary aid, service attendance or commodity made available to human beings"[28].

28. A more narrow or technical approach to the meaning of "benefits to students" is advocated in the submissions of Western Australia[29] and Victoria[30], to the extent that Victoria submits that the word "benefits", where it appears twice in s51(xxiiiA), is to be given two different meanings[31].

29. In addressing the meaning of "benefits to students", the plaintiff (correctly) directs the Court's attention to the legislative history of s.51(xxiiiA), including the second reading speech for the *Constitutional Alteration (Social Services) Bill* 1946 (Cth) (the ***Alteration Bill***)[32]. In the Commission's submission, however, the second reading speech warrants further consideration than has been given by any of the parties in their written submissions.

30. In the second reading speech for the *Alteration Bill*, the Attorney-General for the Commonwealth, Dr Evatt, stated that the Bill's object was to "place Australian social service legislation on a sound legal footing"[33]. Concern about the constitutional authority for such legislation had, according to Dr Evatt, been raised in 1944 and was heightened by the High Court's decision in the *Pharmaceutical Benefits* case[34].

31. In the course of the second reading speech, Dr Evatt incorporated into *Hansard* a "tabular statement" analysing the opinions given by five eminent counsel concerning the effect of the *Pharmaceutical Benefits* case on a range of Commonwealth statutes[35]. The constitutional amendment was considered necessary to "authorize the continuance" of such legislation (which was described as "providing benefits in the nature of social services") and "to authorize the Parliament in the future to confer benefits of a similar character"[36].

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28 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 per McTiernan J at 279.

29 Western Australia's Submissions at [47]-[48].

30 Victoria's Submissions at [29]-[38].

31 Victoria's Submissions at [32]-[34].

32 Plaintiff's Submissions at [30].

33 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 647.

34 *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237, discussed by Dr Evatt in Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 647.

35 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 647-648.

36 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 648.

32. Significantly, three of the statutes referred to in Dr Evatt's table provided for "benefits" other than monetary payments to eligible persons[37]. For example, the *National Fitness Act* 1941 (Cth) provided for the appointment of a Commonwealth Council for National Fitness, to advise on "the promotion of national fitness"[38]. The *National Fitness Act* also established a National Fitness Fund[39], and permitted the relevant Minister to apply the moneys in the Fund to various purposes, including "to promote physical education in schools, universities and other institutions"[40].

33. Although there is no discussion in the second reading speech of the meaning of "benefits to students", it is emphasised several times that the benefits contemplated by the *Alteration Bill* were "benefits of a social service character"[41]. This is broad language, suggesting a concern to ensure that the Commonwealth Parliament would not be restricted in the future in "conferring benefits" of a "social services" nature. The broad language is entirely consistent with the diversity of benefits conferred by the legislation referred to by Dr Evatt, which ranged from what might be described as tangible or direct financial benefits (such as a maternity allowance) to what might be described as more intangible or indirect benefits such as the promotion of national fitness.

34. For these reasons, in the Commission's submission, it would be contrary to the purpose of s.51(xxiiiA) to adopt the narrow or technical approach to the meaning of "benefits to students"[42] that is proposed by Western Australia[43] and Victoria.[44]

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37 *Education Act* 1945 (Cth); *Re-establishment and Employment Act* 1945 (Cth); and *National Fitness Act* 1941 (Cth).

38 *National Fitness Act* 1941 (Cth), s.3.

39 *National Fitness Act* 1941 (Cth), s.4.

40 *National Fitness Act* 1941 (Cth), s.5.

41 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 647, 648, 649.

42 In this regard, an analogy may also be drawn with the approach taken by the High Court in construing "beneficial" legislation such as equal opportunity legislation, where it is established that a liberal approach to construction must be adopted. See, eg, *IW v The City of Perth* (1997) 191 CLR 1 per Brennan CJ and McHugh J at 12, Toohey J at 27 and Kirby J at 58. See also *Purvis v State of New South Wales* (2003) 217 CLR 92 per McHugh and Kirby JJ at 103-04; *Waters v Public Transport Corporation* (1991) 173 CLR 349 per Mason CJ and Gaudron J at 359.

43 Western Australia's Submissions at [47]-[48].

44 Victoria's Submissions at [29]-[38].

Benefits to others does not deprive the NSCP of the character of "benefits to students"

35. Western Australia submits, at paragraphs 50-51, that to be characterised as a "benefit to students" it is not sufficient that a service benefits the broader community generally (of which students incidentally form a part) and gives, as an example, the benefit of "telecommunications, power and water services". It then proceeds to argue that the chaplaincy services in the present case cannot be characterised as a "benefit to students" because staff and other members of the school community may benefit from those services.

36. Western Australia's submissions in this regard, it is submitted, fail to distinguish between:

(a) services for the community generally, which incidentally benefit persons who happen to be students (e.g. telecommunications, power and water services); and

(b) services directed to benefiting students, which incidentally benefit persons other than those students or benefit persons closely connected to the welfare of those students.

37. That a law, or spending, falls within the latter category, cannot, it is submitted, thereby take it outside the scope of s51(xxiiiA).

38. In that respect, it is to be expected that many benefits that are provided to students will involve incidental benefits to other persons. Accommodation allowances (which Western Australia appears to accept would be "benefits to students") will necessarily benefit a student's spouse, partner or living companion. Similarly, "benefits to students" may involve the direct provision of services to another person, as in the case of "child care"; a service which Western Australia similarly accepts is a "benefit to students" (at [51]). The fact that a student's child, spouse or partner benefits from the provision of "student child care" does not cease to make it a "benefit to students".

39. Ultimately, the characterisation of the NSCP as a benefit "to students" is to be determined by whether there is a "sufficient connection" between the program and "benefits to students", giving those words all the generality which they will admit[45]. Taking such an approach, and having regard to the characteristics of the

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[45] *Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479 per the Court at [16].

NSCP identified at paragraphs 41 to 43 below, it is submitted that the Agreement and the NSCP do have such a connection.

40. That is, chaplaincy services provided under the NSCP and the Agreement as a whole, it is submitted, fall with the category of a "service" to students. Even where interaction occurs between a chaplain and another person (such as a teacher or parent), the functions of the chaplain are relevantly directed to the welfare of the students, in those cases through persons who are intimately connected to their welfare.

41. Section 1.5 of the NSCP Guidelines operative from December 2006 to the present time make clear that, although the "key tasks" of a school chaplain may vary depending on the needs of a particular school, such tasks could include[46]:

(a) "assisting school counsellors and staff in the delivery of student welfare services";

(b) "supporting students to explore their spirituality";

(c) "providing guidance about spiritual, values and ethical matters"; and

(d) "facilitating access to the helping agencies in the community, both religious-based and secular".

42. Additional services provided by chaplains, as contemplated by the Guidelines operative from December 2006 to the present time, include[47]:

(a) providing general religious and personal advice to those seeking it;

(b) providing comfort and support to students and staff (for example, during times of grief); and

(c) supporting students and staff to create an environment of cooperation and respect.

43. The NSCP Code of Conduct describes the school chaplain's role as follows: "to support school students and the wider school community in a range of ways, such as assisting students in exploring their spirituality; providing guidance on religious, values and ethical matters; helping school counsellors and staff in

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[46] See SC Vol 2 511, 543, 574, 609.

[47] See SC Vol 2 510-511, 542-43, 573-74, 609.

offering welfare services and support in cases of bereavement, family breakdown or other crisis and loss situations"[48].

Chaplaincy services capable of being "benefits to students"

44. Western Australia submits, at paragraph 50, that "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'"[49]. In this regard, Western Australia's submission appears to go beyond the criticism that persons other than students may benefit from the NSCP by focussing on the nature of the services themselves. In particular, Western Australia's submissions go on, in paragraph 51, to identify a variety of services which it submits *are* within power: fee payments, living allowances, books, computers, educational equipment and child care. It later includes "counselling and like services to students" (at [55]).

45. No authority is cited by Western Australia for the inclusion of services such as "child care" and "counselling", but the *exclusion* of chaplaincy services, from the scope of s51(xxiiiA). Nor is any basis in principle identified for drawing any distinction between the "benefits" described: given that Western Australia includes direct payments, material support and services which may be directed to personal wellbeing (such as counselling).

46. In particular it is submitted that the fact that part of the services provided by chaplains may be described as directed to "spiritual wellbeing", does not, as Western Australia submits, deprive those chaplaincy services of the character of a "service" and, thereby, a "benefit" to students.

47. In this regard it does not form part of the characterisation of a programme or scheme as a "benefit to students", for the purposes of s51(xxiiiA), for the Court to make a determination as to the efficacy of the program or the service made available to students. The "benefit", for the purposes of s51(xxiiiA), is the thing provided (e.g. the nursing care) not the *effect* on the recipient of the service (e.g. the health of the resident). Whether the "benefits" provided are efficacious in achieving the result desired of the program is a matter going to "the justice and

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[48] See SC Vol 2 680.

[49] A similar submission is made by Victoria at [36].

wisdom of the [expenditure]". As in the case of the creation of laws, these are matters of legislative and executive choice[50].

48. The intangible (and unmeasurable) nature of "spiritual wellbeing" does not (as implied by Western Australia) deprive the chaplaincy services of the character of "services" or "benefits" any more than would the similarly intangible nature of "comfort and support ... during times of grief"[51], provided by counsellors or chaplains.

49. In this regard, some analogy may be drawn with the manner in which the courts have approached "intangible" benefits in the context of charitable gifts for the advancement of religion. In that context, while some courts have required that a service be open to the "public" in order to amount to a charitable bequest[52], it is not necessary to consider the *efficacy* of the service. As Lord Reid stated in *Gilmour v Coats*[53]:

> "A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it."

50. In those circumstances it is the identification of a service "to the public" that is justiciable, not the efficacy or outcome of the particular service[54]. Similarly, it is the substantial connection of an identifiable service (whatever that service may be) as being "to students" that is sufficient to include it with the scope of s51(xxiiiA).

51. In this regard, the approach to be taken in identifying a benefit (given the breadth to be accorded s51(xxiiiA)) is similar to that described by Gleeson CJ in *Combet v*

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50 *Burton v Honan* (1952) 86 CLR 169 per Dixon CJ at 179; *Leask v The Commonwealth* (1996) 187 CLR 579 at 602; *Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479 per the Court at 492 [16].

51 See SC Vol 2 510.

52 This explains, for example, the exclusion, from charitable purposes, of trusts for wholly contemplative purposes in cases such as *Gilmour v Coats* [1949] AC 426. Even in this respect, the authority of *Gilmour v Coats* [1949] AC 426 has been doubted in Australia (see *Crowther v Brophy* [1992] 2 VR 97 at 100).

53 [1949] AC 426, 459.

54 See, for example, *In re Hetherington* [1900] 1 Ch 1 per Sir Nicholas Browne-Wilkinson VC at 12.

The Commonwealth[55], in relation to whether an appropriation achieves a prescribed objective:

> "Whether a particular form of expenditure on goods or services (output) is likely to contribute to that objective might be contestable. For such a contest to give rise to a justiciable issue, as distinct from a political or scientific controversy, the issue could not be formulated appropriately by stating the outcome and asking whether the expenditure would contribute to it. The generality, and the value-laden content of the outcome would make that impossible. It would be possible to frame an issue in terms of relevance. A court might ask whether a particular expenditure could rationally be regarded as having been made in pursuit of, and as being in that sense related to, the stipulated outcome. A negative answer to that question would need to have due regard to the breadth of expression of the outcome, and to the consideration that the court's capacity to make a judgment about issues of policy formation and implementation is likely to be limited. A judge's intuition may be an insecure foundation for a denial of any rational connection between an output and an outcome."

52. As submitted above, the "outputs" of the NSCP - being the proposed activities of the school chaplains set out in paragraphs 41 to 43 above - evidence a sufficient connection between the NSCP and "the provision of ... benefits to students", such as to be within the legislative and executive power of the Commonwealth.

Scope of Section 116

53. The Commission adopts the submissions of the Commonwealth as to whether the chaplains engaged to provide services under the NSCP hold an "office under the Commonwealth"[85].

54. More broadly, the Commission submits that there is no warrant for interpreting s 116 of the *Constitution* as implying some overarching scepticism or antipathy toward religion that may guide the construction of Commonwealth power (as may be implied by Western Australia's reference to "spiritual wellbeing" being outside the scope of benefits to students).

55. In this respect there is no doubt that s116 imposes limits on Commonwealth power, and that (broadly speaking) those limits concern religion. While the meaning of s116 has been the subject of little judicial consideration, it is submitted that what can be said is that it only prohibits what it prohibits. It does not create an over-arching scepticism or antipathy (or indeed preference) toward religion.

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55 *Combet v The Commonwealth* (2005) 224 CLR 494 per Gleeson CJ at 525-526 [12].

85 Commonwealth's Submissions at [49]-[54].

56. This view is reflected in the reasons of the majority in *Attorney-General (Vic) (Ex Rel Black) v Commonwealth* (**the *DOGS Case***)[86].

57. Stephen J, for example, stated[87]:

> "The very form of s 116, consisting of four distinct and express restrictions upon legislative power, is also significant. It cannot readily be viewed as the repository of some broad statement of principle concerning the separation of church and state, from which may be distilled the detailed consequences of such separation. On the contrary, by fixing upon four specific restrictions of legislative power, the form of the section gives no encouragement to the undertaking of any such distillation."

58. Similarly, Barwick CJ, observed[88]:

> "It is apparent to my mind that, if for no other reason, the inclusion in s. 116 of the prohibition of any law imposing any religious observance or for prohibiting the free exercise of any religion and the proscription of any religious test indicate clearly enough the precise limits of the total inhibition of the section. The absence of any prohibition upon the giving of aid to or encouragement of religion from the entire collocation of s 116 is eloquent. No imposed observance: free exercise of religion: no religious test. No established religion. Otherwise the powers with respect to subject matter and in the nomination of the conditions of a grant to States is plenary and without limitation except in so far as the description of the subject matter may import limitation."

See also Gibbs J at 603, Mason J at 616 and Wilson J at 652.

59. Accordingly, providing the four restrictions in s116 are observed, the Commonwealth Parliament may make laws recognising certain religious denominations for certain statutory purposes or otherwise make provision to preserve the free exercise of religion by Australian citizens[89].

60. A comparable approach to limitations on Commonwealth power may be observed in relation to the principle of representative democracy. In *McGinty v Western Australia*[90], for example, Brennan CJ cautioned against treating the principle as a constitutional imperative beyond the extent to which it is actually found in the text or structure of the *Constitution*. In that regard his Honour stated that "[t]he

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86 *Attorney-General (Vic) (Ex Rel Black) v Commonwealth* (1981) 146 CLR 559.

87 *Attorney-General (Vic) (Ex Rel Black) v Commonwealth* (1981) 146 CLR 559 at 609.

88 *Attorney-General (Vic) (Ex Rel Black) v Commonwealth* (1981) 146 CLR 559 at 582.

89 See, for example, *Nelson v Fish* (1990) 21 FCR 430 at 434-435.

90 (1996) 186 CLR 140.

constitutional question is whether there is inconsistency with the text and structure of the Constitution".[91]

61. This approach was confirmed to be the correct one by the Court in *Lange v Australian Broadcasting Corporation*[92], where their Honours observed:

> Under the *Constitution*, the relevant question is not, "What is required by representative and responsible government?" It is, "What do the terms and structure of the *Constitution* prohibit, authorise or require?"

62. Similarly, as Stephen J stated in the *DOGS case*, s116 is not to be viewed as some "broad statement of principle concerning the separation of church and state, from which may be distilled the detailed consequences of such separation"[93], so as, for example, to affect how "benefits" might be interpreted under s51(xxiiiA).

Dated: 29 July 2011

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91 (1996) 186 CLR 140 at 170. See also McHugh J at 234.

92 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 per the Court at 567.

93 *Attorney-General (Vic) (Ex Rel Black) v Commonwealth* (1981) 146 CLR 559 at 609.