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 FIRST, SECOND AND THIRD DEFENDANTS IN RESPONSE TO THE FURTHER WRITTEN SUBMISSIONS OF TASMANIA AND SOUTH AUSTRALIA

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The breadth of Commonwealth executive power is ascertained by reference to constitutional text and structure rather than the matters in respect of which legislative power has been exercised

1. The view that the executive power of the Commonwealth supports executive action dealing at least with matters within the enumerated heads of Commonwealth legislative power has formed part of the accepted understanding of the Constitution since the time of the Convention debates. It has formed part of the basis upon which successive Commonwealth governments have acted, and upon which numerous cases have been decided.

1.1. As recorded by French CJ in *Pape v Federal Commissioner of Taxation*,[1] cl 8 of Ch II of the draft Constitution introduced by Sir Samuel Griffith in 1891 expressly extended the "executive power and authority of the Commonwealth" to "all matters with respect to which the legislative powers of the Parliament may be exercised", with an exception relating to matters dealt with by current State legislation. The clause was then put into a form substantially similar to the closing words of s 61, without any intention of altering its import.

1.2. The later exchange between Sir Samuel and Mr Deakin at the 1891 Convention concerning the powers of Ministers (under what became s 64)[2] revealed a consensus that the "vast and vague" powers of the Crown were to vest in the Governor-General and to be exercised by Ministers with the same authority as possessed by Ministers of the Crown in Britain. This conception of the role of the "Queen's Ministers of State for the Commonwealth" is inconsistent with any understanding of Commonwealth executive power as limited to carrying into effect the particular provisions of the Constitution and acting pursuant to legislative authority.

1.3. Mr Deakin expressed the same view, as Commonwealth Attorney-General, in his opinion of 12 November 1902 concerning the *Vondel* incident.[3] In the course of that opinion he said:

> Shorn of prerogative powers, the Commonwealth Executive would be a mere appendage to the Parliament – a board of subordinate officers exercising such powers as might be conferred upon it, but without independent authority of any kind. Such a conception of the executive is wholly at variance, not only with every principle of English constitutional law, but with the clear and unmistakeable provisions of the Constitution. Responsible government, though far more clearly established there than in any of the State Constitutions, would then be much more restricted in authority, character and domain than it is in the States under

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1 (2009) 238 CLR 1 at 56-57 [115]-[117] (***Pape***).

2 *Official Report of the National Australasian Convention Debates* (1891), 769-772 (referred to in the Further Submissions of South Australia at [6.3]).

3 "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, vol. 1: 1900-1914* (1981), 129-135.

their less explicit charters. 'The King's Ministers of State for the Commonwealth' – so described for the first time in a great constitutional document – would, individually and collectively, be less His Majesty's Ministers than are the members of the State Executives; the vast fund of powers held by the Crown in trust for the people would disappear; and the Commonwealth, instead of inheriting the fullest development of constitutional rights and privileges, would find its new political organisation had dwindled from a national to a municipal body, for making and executing continental by-laws.[4]

1.4. Mr Deakin had earlier expressed the same view in an opinion dated 28 May 1901, where he observed:

> The executive power of the Commonwealth unlike the legislative is derived directly and independently from its fountain head – the Crown. It may be contended that it has a higher and larger scope than that of the States (see sections 61 and 64) but it is not necessary to discuss such a claim here. Its powers are at least coextensive with its legislative charter.

1.5. Mr Groom took the same view as Attorney-General in 1907, in an opinion concerning grants of permission for the landing of foreign troops and warship crews.[5]

1.6. The majority in the *Clothing Factory case*[6] held that the operation of the factory was authorised under the *Defence Act 1903* and that the relevant provisions of that Act were within power,[7] and thus found it unnecessary to consider the executive power.[8] Rich J (concurring) although not prepared ("as presently advised") to accept that the Commonwealth Executive could enter into business operations "simply because it is a juristic entity", appears to have contemplated that the existence of legislative power to authorise the activity would be sufficient to justify that activity.[9] To similar effect, Starke J (dissenting) observed that "it may well be that the executive power 'is co-extensive with the responsibility and power of the Commonwealth' and not limited 'to matters connected with departments actually transferred or matters upon which the Commonwealth has power to make laws and has made laws'".[10] His Honour did not consider that the legislative power extended to authorising the activities in issue.

1.7. In *Barton v The Commonwealth*, Mason J observed of the executive power:[11]

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4 Ibid at 131.

5 "Executive Power of the Commonwealth – Whether Coextensive with Legislative Power: When is State Executive Power Displaced: Whether Commonwealth has Power by Executive Act to Permit Landing of Foreign Troops or Crews", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, vol. 1: 1900-1914* (1981), 358-362.

6 *Attorney-General (Vict.) v The Commonwealth* (1935) 52 CLR 533.

7 (1935) 52 CLR 533 at 558.

8 (1935) 52 CLR 533 at 559.

9 (1935) 52 CLR 533 at 561-562.

10 (1935) 52 CLR 533 at 567 (quoting Keith, *Responsible Government in the Dominions*).

11 (1974) 131 CLR 477 at 498. McTiernan and Menzies JJ, at 491, agreed with Mason J.

It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution.

1.8. The view that the Commonwealth's executive power extends at least to the subject matters of Commonwealth legislative power was also accepted in the *AAP case*[12] by Barwick CJ,[13] Gibbs,[14] Mason[15] and Jacobs JJ;[16] in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* by Mason J;[17] in *Davis v The Commonwealth* by Mason CJ, Deane and Gaudron JJ;[18] in *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* by McHugh[19] and Gummow JJ;[20] in *R v Hughes* by Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ;[21] in *Western Australia v Ward* by Callinan J;[22] and is reflected in observations in *Pape v Commissioner of Taxation* by French CJ,[23] Gummow, Crennan and Bell JJ,[24] Hayne and Kiefel JJ[25] and Heydon J.[26]

The executive power includes power to enter into contracts and spend money, even without legislative authority (other than an appropriation)

2. The position, repeatedly affirmed, that the executive power derives its scope at least in part from the Constitution's allocation of legislative *powers* is inconsistent with any suggestion that the *enactment* of legislation by the Commonwealth is a prerequisite for the existence of executive power (to enter into contracts or in any other respect) in relation to particular subject matters. Nor does the course of authority in this Court support the view that the executive power to enter into contracts, or to spend money that has been appropriated, is limited by a requirement for specific legislative authority.

2.1. To the extent that it suggests such a requirement, the *Wooltops* case is based on an incorrect understanding of s 61 and should not be followed. So far as three of the agreements considered in that case are concerned, the actual decision is explicable on the basis that the carrying out of those agreements amounted to the imposition of taxation

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12 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338.
13 (1975) 134 CLR 338 at 362.
14 (1975) 134 CLR 338 at 379.
15 (1975) 134 CLR 338 at 396-397.
16 (1975) 134 CLR 338 at 405-406.
17 (1983) 158 CLR 535 at 560.
18 (1988) 166 CLR 79 at 93-94. See also at 110-111 per Brennan J.
19 (1997) 190 CLR 410 at 455.
20 (1997) 190 CLR 410 at 464.
21 (2000) 202 CLR 535 at 554-555 [38] (quoting Mason J in *R v Duncan*).
22 (2002) 213 CLR 1 at 391 [962].
23 (2009) 238 CLR 1 at 60 [127].
24 (2009) 238 CLR 1 at 83 [214].
25 (2009) 238 CLR 1 at 115-116 [327]-[329]
26 (2009) 238 CLR 1 at 198-199 [567]-[568].

(which on any view cannot be accomplished without legislative authority).[27] The fourth agreement bound the Commonwealth to make payments out of public funds; and its invalidity can be explained as an application of the then-accepted doctrine that such a promise, absent an existing appropriation, cannot be carried out and is thus *ultra vires*.[28]

2.2. The *Wooltops* case was cited by two Justices in the *Colonial Ammunition case* as establishing that "no authority short of parliamentary authority could sustain the bargain".[29] However, the bargain alleged in that case was one by which the Commonwealth undertook to provide an indemnity; and the passage in *Wooltops* to which their Honours referred comprised Isaacs J's discussion of the fourth agreement (which had failed for want of an appropriation). In any event, the plaintiff failed on the construction of the documents said to comprise the bargain.[30] The case therefore does not stand for any general principle requiring statutory authority as a condition of the validity of Commonwealth contracts.

2.3. *Kidman v Commonwealth* was decided by this Court on the basis that the appellants were not entitled to challenge the validity of the contracts in question, having submitted to arbitration of a dispute arising under them. Isaacs J observed that there was no lack of legislative authority for the contracts, provided that the ships thereby acquired were for defence purposes.[31] Higgins J referred to the *Wooltops* case but also regarded the contracts as authorised under statute, provided that they were for defence purposes.[32]

2.4. The unsuccessful plaintiff in *Kidman* sought special leave to appeal to the Privy Council, which was refused owing to the lack of merit in the plaintiff's position.[33] When the validity of the contracts arose in argument Viscount Haldane referred to *Commercial Cable Co v Newfoundland Government*[34] as establishing that:[35]

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27 (1922) 31 CLR 421 at 433-434, 443-445 per Isaacs J, 460-461 per Starke J. This consideration may also inform the observation of Knox CJ and Gavan Duffy J that none of the agreements was "prescribed or even authorised by the Constitution itself": at 432.

28 (1922) 31 CLR 421 at 434, 445-451 per Isaacs J. (His Honour expressly refrained from concluding that this agreement was invalid "on general principles": at 446.) This doctrine was criticised by Mr Dixon KC in his evidence to the Royal Commission on the Constitution (Royal Commission on the Constitution of the Commonwealth Vol 1, *Minutes of Evidence* (1929), 781) in terms that foreshadowed his judgment in *New South Wales v Bardolph* (1934) 52 CLR 455 and is now regarded as incorrect: eg Hogg, *Liability of the Crown* (3rd ed 2000), 220-222.

29 *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 220 per Isaacs and Rich JJ.

30 (1924) 34 CLR 198 at 207 per Knox CJ, Gavan Duffy and Starke JJ, 218-219 per Isaacs and Rich JJ.

31 (1925) 37 CLR 233 at 241 per Isaacs J; see also 251 per Rich J.

32 (1925) 37 CLR 233 at 246-248.

33 (1925) 32 ALR 1.

34 [1916] 2 AC 610.

35 (1925) 32 ALR 1 at 2.

> the Governor-General, as representing the Crown, could enter into contracts as much as he liked, and even, if he made the words clear, to bind himself personally. But he was presumed only to bind the funds which might or might not be appropriated by Parliament to answer the contract, and if they were not, that did not make the contract null and *ultra vires*; ....

2.5. The *Commonwealth Shipping Board case* turned on the statutory powers of the Board, which was incorporated under the *Commonwealth Shipping Act 1923*.[36]

2.6. *New South Wales v Bardolph* involved two issues: the *authority* of particular officers to bind the Crown; and the *capacity* of the executive government to make a binding contract for the payment of money without legislative authority.[37] It is to the first of these issues that various statements concerning "ordinary activities or functions of government" are relevant.[38] As to the second (and presently relevant) issue, it was unanimously held that the absence of legislative authority did not render a contract for the expenditure of public funds invalid (although the contract must be read as providing for expenditure only out of money duly appropriated).[39]

2.7. The circumstances in *Australian Woollen Mills Pty Ltd v The Commonwealth* were said to bear no resemblance to *Bardolph's* case, and the Court considered that statutory authority would have been sought if it had been intended to create contractual relations.[40] However, the apparent lack of authority of the officers who made the "vital announcement" loomed large in that analysis; and the reasoning of the Court does not touch upon the capacity of the Executive Government of the Commonwealth to enter into contracts without statutory authority.

2.8. In *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* the contracts in issue had been approved by statute; but Aickin J (Barwick CJ agreeing) considered it "plain that even without statutory authority the Commonwealth in the exercise of its executive power may enter into binding contracts affecting its future action".[41] That observation was quoted with approval by Gibbs CJ in *A v Hayden*.[42] In the latter case, while a contractual duty of confidentiality

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36 *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 at 8-9 per Knox CJ, Gavan Duffy, Rich and Starke JJ, 10 per Isaacs J, 13 per Higgins J.

37 (1934) 52 CLR 455 at 505-506 per Dixon J.

38 (1934) 52 CLR 455 at 496 per Rich J, 502-503 per Starke J, 507-508 per Dixon J (Gavan Duffy CJ agreeing).

39 (1934) 52 CLR 455 at 497-498 per Rich J, 501-502 per Starke J, 508-516 per Dixon J (Gavan Duffy J agreeing), 523 per McTiernan J. In reaching this conclusion their Honours agreed with Evatt J at 475.

40 (1954) 92 CLR 424 at 455 per McTiernan J, 461 per Fullagar J.

41 (1977) 139 CLR 54 at 61, 113.

42 (1984) 156 CLR 532 at 543.

was held to be unenforceable in the circumstances, no doubt was expressed as to the capacity of the Commonwealth to enter into contracts without statutory authority.

3. The Commonwealth has acted on the basis that it may engage in executive activities involving contracting and expenditure without the need for specific legislative authorisation, for example by conducting a shipping service in inter-State and overseas trade between 1916 and 1923,[43] commencing the Snowy Mountains Scheme,[44] dealing with its own property to provide housing to immigrant families,[45] incurring liabilities under departmental works programmes in anticipation of appropriation by Parliament,[46] purchasing aircraft for use by the Commonwealth,[47] incorporating a company to carry out and implement a plan or program for the commemoration of the bicentenary of Australian settlement,[48] conducting employment services through a contractor,[49] providing a financial assistance scheme to beneficiaries of insurance policies held with an insolvent insurer[50] and providing compensation for detriment caused by defective administration.[51]

4. Trial and intermediate appellate courts have also proceeded on the basis that the Commonwealth may validly contract – and therefore seek and be subjected to contractual remedies – without specific legislative authority to contract. In *Commonwealth v Crothall Hospital Services (Aust)*[52] the Commonwealth sought to resist a contractual claim on grounds which included non-compliance with regulations made under the *Audit Act 1901* (Cth) which governed the variation of contracts. Ellicott J, with whom Blackburn and Deane JJ agreed, held that the contract was binding according to common law principles regardless of non-compliance with the regulation. In *Hawker Pacific v Freeland*[53] Fox J rejected the argument that a decision by the Commonwealth to award a contract for the supply of aircraft was a decision "under an enactment" on the basis that, following *Bardolph*,

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43 See Renfree, *The Executive Power of the Commonwealth of Australia* (1984), 456.

44 Ibid.

45 See *Commonwealth of Australia v Bogle* (1952) 89 CLR 229 at 250 per McTiernan J, 259-260 per Fullagar J.

46 Annual Report of the Auditor-General (30 June 1953), Appendix H, 115-119 (appending an opinion of the Acting Solicitor-General to the Auditor-General dated 11 May 1953).

47 M Campbell 'Australian Government Contracts', Royal Commission on Australian Government Administration 1974-6, Research Paper No 47, 20-21; *Hawker Pacific Pty Ltd v Freeland* (1983) 52 ALR 185 at 186 per Fox J.

48 *Davis v The Commonwealth* (1988) 166 CLR 79 at 94-95 per Mason CJ, Deane and Gaudron JJ.

49 *Team Employment & Training Network Pty Ltd v Secretary, Department of Employment, Workplace Relations & Small Business* [1999] FCA 1792 at [20] per Cooper J.

50 *HIH Claims Support Limited v Insurance Australia Limited* [2011] HCA 31 at [7] per Gummow ACJ, Hayne, Crennan and Kiefel JJ.

51 *Smith v Oakenfull* (2004) 134 FLR 413 at 418 [20] per Dowsett J80 ALD 333, [20].

52 (1981) 54 FLR 439; (1981) 36 ALR 567.

53 (1983) 52 ALR 185, 189. See, to similar effect, *Abe Copiers Pty Ltd v Secretary, Department of Administrative Services* (1985) 7 FCR 94 at 95 per Fox J; *Team Employment & Training Network Pty Ltd v Secretary, Department of Employment Workplace Relations & Small Business* [1999] FCA 1792 at [20] per Cooper J.

the power to contract is an inherent prerogative or governmental power. In *Commonwealth v Ling* Beaumont J held that the Commonwealth had the power to enter contracts under which it acquired the right to recover student fees. His Honour, relying on *Bardolph*, Barton and the views of academic commentators, rejected an argument that legislative authority was required for such contracts.[54] The decision was upheld on appeal by Gummow, Lee and Hill JJ.[55] The New South Wales Court of Appeal proceeded on the same basis in *Coogee Esplanade Surf Motel Pty Ltd v Commonwealth*.[56]

5. Academic commentary, both as to the powers of the Crown in British dominions generally[57] and as to the Executive Government of the Commonwealth specifically,[58] has overwhelmingly treated the position emerging from *Bardolph's* case as correct.

6. The Commonwealth's capacity to enter into contracts is not limited to matters that fit the description of "ordinary" or "well-recognised" governmental activities or functions, or any similar phrase. As noted above, the references to such activities in *Bardolph's* case are properly understood as going to the question whether the relevant officer had authority to enter into the contracts rather than whether the Crown had capacity to do so. If there were such a limit on the *capacity* of the Crown, it would clearly limit the executive powers of the States as well as the Commonwealth and thus affect the totality of government power in Australia.[59] Further, as this Court has noted on a number of occasions, identifying the limits of power by reference to such concepts is unworkable and constitutionally unsound.[60] In any case, if this were a necessary element of the inquiry, the scope of the ordinary activities of government must depend upon the activities actually undertaken by government from time to time.[61] The only material bearing upon that issue that is before the Court is the successive versions of the NSCP Guidelines

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54 (1993) 44 FCR 397 at 429.

55 *Ling v Commonwealth* (1994) 51 FCR 88.

56 (1976) 50 ALR 363, 376-377 per Hutley JA (Moffitt P agreeing at 364).

57 See Chitty, *On Contracts* (28th ed, 1999), 542 [10-005]; Mitchell, *The Contracts of Public Authorities* (1961), 68-80; Hogg, *Liability of the* Crown (1971), 120-125.

58 See Renfree, *The Executive Power of the Commonwealth of Australia* (1984), 455-457; Campbell, 'Commonwealth Contracts' (1970) 44 *Australian Law Journal* 14.

59 See *New South Wales v Commonwealth* (the *Seas and Submerged Lands case*) (1975) 135 CLR 337, 498 per Jacobs J (and cf, as to legislative powers, *XYZ v Commonwealth* (2006) 227 CLR 532, 542 [16] per Gleeson CJ).

60 *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees' Association* (1906) 4 CLR 488 at 538-539 per Griffith CJ, Barton and O'Connor JJ; *South Australia v The Commonwealth* (1942) 65 CLR 373 (*First Uniform Tax Case*) at 423 per Latham CJ; *Re Professional Engineers' Association* (1959) 107 CLR 208 at 235 per Dixon CJ, 274 per Windeyer J; *Victoria v Commonwealth* (1971) 122 CLR 353 (*Payroll Tax Case*) at 382-383 per Barwick CJ; *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 at 288-289 per Gibbs CJ; *Re Lee; Ex parte Harper* (1986) 160 CLR 430 at 452-453 per Mason, Brennan and Deane JJ; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 213-214 per Mason J; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 228-230 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

61 Cf *Australian Education Union* (1995) 184 CLR 188, 230.

and the repeated appropriations for the NSCP under the rubric of "ordinary annual services of government", as described in the Portfolio Budget Statements. This material gives the expenditure the requisite character of being for an ordinary or well-recognised governmental activity. As to the relevance which notions of ordinary governmental activities may have to the authority of individual officers, no issue arises in the present case regarding the scope of the authority of the officer who executed the Darling Heights Funding Agreement on behalf of the Commonwealth.

Considerations of text and structure do not support a narrower view of the executive power

7. The existence of concurrent legislative powers does not (as Tasmania appears to suggest)[62] lead to any necessity for Commonwealth executive power to be limited to the execution and maintenance of laws actually enacted by the Commonwealth Parliament. In particular, concern about the potential for "concurrent but inconsistent exercise of Commonwealth and State executive power" is misplaced.

7.1. The present case concerns what have been referred to as "capacities", equivalent to those of a natural person, which the Crown was understood to possess at the time of federation.[63] Whatever may be the origin of that understanding, the important point for present purposes is that, in spending money available to it or contracting to spend, the executive government does not effect any interference with existing legal rights; and, for that reason, it is submitted that considerations arising from the federal structure of the Constitution do not compel any limitation as to subject-matter.[64] Even if that particular submission is not accepted, the absence of any interference with legal rights means that there is simply no potential for issues of "inconsistency" (in the sense in which that term applies to Commonwealth and State laws for the purposes of s 109) to arise between a contract entered into by the Commonwealth and contracts entered into by a State; or between Commonwealth expenditure and State expenditure. The two contracts or expenditures may serve different, perhaps contradictory, objectives in terms of policy; but there cannot be any constitutional clash that requires one to be given precedence over the other. Both operate according to their terms and within the limits of the general law.

7.2. The same point would supply the answer in the event of any clash between obligations owed under a contract to which the Commonwealth was a party, and the exercise of prerogative power by the executive government of a State (such as an assertion of the right to treasure

62 Further Submissions of Tasmania at [20]-[24].

63 See the Further Written Submissions of South Australia at [4].

64 Submissions of the First, Second and Third Defendants at [41]-[48].

trove or royal metals).[65] Where the executive government of a State has power to override rights arising under the general law, any rights or obligations of the Commonwealth that arose purely as a matter of contract would necessarily give way to the exercise of that power.[66]

7.3. The detailed allocation of prerogative powers between the Commonwealth and the States raises issues, "still not fully resolved",[67] which do not arise in the present case and therefore need not be pursued. Some of the traditional prerogatives have been the subject of decision by this Court: eg, priority of Crown debts.[68] Others, such as the powers relating to relations with foreign states, will clearly fall entirely to either the Commonwealth or the States as a consequence of the Constitution's structure or express provisions.[69] Other prerogatives may require division and therefore raise more complicated questions: for example, it may well be that the prerogative of mercy is only exercisable by the Commonwealth or a State in relation to offences against its own laws. In these issues of allocation, where the nature of the particular power does not demand a particular result, the allocation of legislative powers will provide a touchstone. Such issues are not issues of "inconsistency" between competing exercises of power; rather, the question will be which polity is entitled to exercise the relevant power, or assert the relevant privilege, in particular circumstances (and always subject to the principle that the Crown, whether in right of the Commonwealth or a State, cannot dispense with the law).

8. Nor (as Tasmania also argues)[70] is the proposed limitation on executive power supported by a need for control to be exerted over the executive by Parliament and the courts.

8.1. However far the executive power of the Commonwealth may extend, s 51(xxxix) of the Constitution supports laws controlling its exercise. The Parliament may thus forbid the Executive Government entering into a particular contract or a class of contracts.[71] (The issue presently

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65 Although, as to royal metals, see *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 225-227 [85]-[89] per Gummow, Hayne, Heydon and Crennan JJ.

66 The situation would be more complicated if any prerogative power, privilege or immunity of the Commonwealth were involved.

67 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 226 [87] per Gummow, Hayne, Heydon and Crennan JJ.

68 *Commonwealth v Cigamatic Pty Ltd* (1962) 108 CLR 372 at 376-377 per Dixon CJ, 382-383 per Taylor J, 389-390 per Menzies J; *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 286 per Latham CJ, 291 per Rich J, 294 per Starke J, 301-302 per Dixon J.

69 An example of the latter is the coining of money, taken from the States by s 115 (but also now displaced by legislation under s 51(xii)).

70 Further Submissions of Tasmania at [24].

71 As to which see for example s 18(5) of the *Public Works Committee Act 1969* and s 70B of the former *Audit Act 1901*. See also s 37 of the *Financial Management and Accountability Act 1997*, which finds support in s 51(iv).

being debated is therefore an issue of the method, rather than the availability, of parliamentary control.)

8.2. Further, responsible government does not call for the executive power to be limited to carrying legislation into effect. Rather, as explained by Mr Deakin, responsible government as conceived by the framers involved Ministers exercising "the vast fund of powers held by the Crown in trust for the people".[72] Responsible government as reflected in the Constitution requires that the executive government retain the confidence of the House of Representatives, and persuade both Houses to pass its Appropriation Bills. By these mechanisms, Parliament exerts control over the executive to the extent that it wishes to do so.

8.3. Purported exercises of the executive power are subject to the jurisdiction of this Court under s 75(iii) and (v) of the Constitution and s 30(a) of the *Judiciary Act 1903*, as well as the jurisdiction of the Federal Court under s 39B(1) and (1A)(a) and (b) of the Judiciary Act. Whether decisions not referable to statute ought to be subject to statutory judicial review, in addition to such causes of action as arise under the general law, is a matter for the Parliament. The absence (so far) of such provision does not provide any basis for a narrow understanding of the executive power.

9. The words "and extends to ..." in s 61 are not words of limitation.[73] Read in the light of the framers' understanding of responsible government, s 61 assumes the existence of executive power and makes provision for its exercise.[74] Even if the closing words of the section do mark the "external boundaries" of the executive power,[75] the "execution and maintenance of this Constitution" is a broad concept, connoting "the existence of a wide sphere of Commonwealth executive power, which it would be dangerous, if not impossible, to define,"[76] and including the prerogatives and capacities of the Crown.[77] The breadth of such power flows from the nature of the Constitution which is to be executed and maintained – a Constitution which:

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72 *Vondel* opinion at 131.

73 Cf the *Vondel* opinion at 130.

74 See also s 52(i) of the Constitution, which assumes a capacity on the part of the Commonwealth to acquire property for 'public purposes' going beyond the purposes for which the Parliament can make laws (and thus not pursuant to legislative authority) (*Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 at 125 per Windeyer J, cited in *Pape* at 86-87 [226] per Gummow, Crennan and Bell JJ; and ss 69, 84 and 85 of the Constitution dealing with the transfer of certain departments of the public service of the States (and resulting obligations) to the Commonwealth in the absence of legislation.

75 Cf the *Wooltops case* (1922) 31 CLR 421 at 437 per Isaacs J; also 431 per Knox CJ and Gavan Duffy J and 454 per Higgins J.

76 *Vondel* opinion at 130.

77 See *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 242 CLR 195 at 210 [30] per French CJ, 226 [86] per Gummow, Hayne, Heydon and Crennan JJ, *Pape* (2009) 238 CLR 1 at 60 [127] per French CJ, 83 [215] per Gummow, Crennan and Bell JJ; *Re Residential Tenancies Tribunal (NSW); Ex p Defence Housing Authority* (1997) 190 CLR 410 at 424 per Brennan CJ,

9.1. draws on common law conceptions of the Crown and its powers;

9.2. creates a new polity with the attributes of a national government;

9.3. confers on that polity the institution of responsible government, including provision for the creation of "departments of State" (without any limit as to their number or responsibilities) administered by officers who are described as "the Queen's Ministers of State for the Commonwealth".

10. For these reasons Gummow, Crennan and Bell JJ were correct to observe in *Pape* that any constraint on the power of the government of the Commonwealth to spend money after appropriation by the Parliament (and, it may be added, subject to the controls imposed by and under the *Financial Management and Accountability Act 1997* (Cth) (***FMA Act***) - see in particular regulations 8 and 10 made under the *FMA Act*) would necessarily have its source "in the position of the Executive Government of the States".[78] The nature and extent of that constraint have been addressed in the submissions in chief.

If statutory authority is required, such authority exists

11. In any event, if legislative authority to enter into the Darling Heights Funding Agreement was required, that authority was provided by s 44 of the *FMA Act*, subsection (1) of which provides:

> A Chief Executive must manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible.
>
> Note: A Chief Executive has the power to enter into contracts, on behalf of the Commonwealth, in relation to the affairs of the Agency. Some Chief Executives have delegated this power under section 53.

12. Implicit in the obligation to promote "proper use" of "Commonwealth resources for which the Chief Executive is responsible",[79] is power to direct those resources to government policies identified in Portfolio Budget Statements as falling within the scope of an appropriation, and any applicable Administrative Arrangements Order made by the Governor-General. Performance of that function is impossible unless, in conferring it,

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438 per Dawson, Toohey and Gaudron JJ, 459 per McHugh J, 474 per Gummow J; *Davis v The Commonwealth* (1988) 166 CLR 79 at 108 per Brennan J; *Victoria v The Commonwealth (AAP Case)* (1975) 134 CLR 338 at 405-406 per Jacobs J; *Barton v The Commonwealth* (1974) 131 CLR 477 at 498 per Mason J; *Federal Commissioner of Taxation v Official Liquidator of E.O. Farley Ltd* (1940) 63 CLR 278 at 303-304 per Dixon J, 321 per Evatt J; *Ruddock v Vardarlis* (2001) 110 FCR 491 at 495 [9] per Black CJ, 537-539 [176]-[180] per French J.

78 (2009) 238 CLR 1, 85 [220].

79 The Chief Executive of an agency that is a Department of State is the Secretary of that Department (s 5 of the FMA Act). The Secretary of a Department is responsible for managing the Department (s 57(1) of the *Public Service Act 1999*). The Commonwealth resources for which a Chief Executive is responsible thus include the amounts specified in the administered items in the annual Appropriation Acts that may be expended for the purpose of contributing to achieving outcomes for that agency (see for example s 8(1) of the *Appropriation Act (No 1) 2008-2009*).

Parliament is understood to have conferred on the Executive Government (represented by the Chief Executive and the officers to whom he or she delegates such power: see s. 53(1)) power to spend money that has been appropriated and to enter into contracts that relate to such expenditure.

13. This understanding of s 44(1) is confirmed by the note, which was inserted by the *Financial Framework Legislation Amendment Act 2008* (Cth). While the note is not part of the *FMA Act*, it is extrinsic material to which regard may be had in accordance with s 15AB(2)(a) of the *Acts Interpretation Act 1901* (Cth) (**AI Act**).[80] The note confirms that s 44(1) confers a statutory "power" to enter into contracts on behalf of the Commonwealth in relation to the affairs of the Agency that is capable of being delegated under s 53(1) of the *FMA Act*.

14. The Darling Heights Funding Agreement was in fact signed for the State Manager (South Australia) of DEST (SCB Vol 2, 636), acting as a delegate of the Chief Executive of the Agency (ie the Secretary of the Department exercising the Chief Executive's power under s 44 of the *FMA Act*: see s 5 of the *FMA Act*). The presumption of regularity applies.[81]

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80 Amendments to the AI Act will commence on 28 December 2011. Section 13 of the current AI Act will be repealed and will be substituted with a provision which provides that all material in an Act from the first section to the end of the last section or Schedule is to be treated as part of that Act (see item 22 of Sch 1 of the *Acts Interpretation Amendment Act 2011,* which received Royal Assent on 27 June 2011). This amendment will apply to Acts in force at the time of its commencement (item 1 of Sch 3 to the *Acts Interpretation Amendment Act 2011*) as well as to new Acts. From the commencement of the amendments, s 13 of the AI Act will therefore require internal notes in Acts, including the note to s 44(1) of the *FMA Act*, to be treated as part of the Act itself.

81 Heydon and Byrne, *Cross on Evidence* (8th ed 2010), 30-34. In any event, it is the fact that there was a delegation by the Chief Executive pursuant to s 53(1) of the *FMA Act* to the relevant officer. The delegation is not included in the Special Case, as no issue as to the delegation arose on the pleadings.