ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S307 of 2010

BETWEEN

RONALD WILLIAMS
Plaintiff

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AND

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR SCHOOL EDUCATION, EARLY CHILDHOOD AND YOUTH
Second Defendant

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MINISTER FOR FINANCE AND DEREGULATION
Third Defendant

SCRIPTURE UNION QUEENSLAND
Fourth Respondent

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PLAINTIFF'S AMENDED SUBMISSIONS

Date of Document: 24 June 2011

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Part I: Publication of Submissions

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

Part II: Issues

2. These proceedings were commenced in the original jurisdiction conferred upon this Court by s 75(iii) and (v) of the *Constitution* and s 30 of the *Judiciary Act 1903* (Cth). The issues arising on the pleadings, and in the proceedings generally, are as follows:

   (a) Is the Funding Agreement dated 9 November 2007 ("**the Funding Agreement**") between the First Defendant ("**the Commonwealth**") and the Fourth Defendant ("**SUQ**") for the provision of funding under the National School Chaplaincy Programme ("**the NSCP**") on behalf of the Darling Heights State School ("**the School**"), invalid by reason of being beyond the executive power of the Commonwealth:

      (i) to the extent that the executive power of the Commonwealth includes power to enter into contracts in respect of matters other than those in respect of which the *Constitution* confers legislative power of the Commonwealth;

      (ii) to the extent to the executive power of the Commonwealth includes power to enter into contracts in respect of benefits for students within the meaning of s 51(xxiiiA) of the *Constitution*; or

      (iii) to the extent that the executive power of the Commonwealth includes power to enter into contracts in respect of trading corporations within the meaning of s 51(xx) of the *Constitution*?

   (b) To the extent necessary for the purpose of answering (a)(iii) above, is SUQ a trading corporation within the meaning of s 51(xx) of the *Constitution*?

   (c) Does the plaintiff have standing to challenge the drawing of money from the Consolidated Revenue Fund for the purpose of making payments pursuant to Funding Agreement for any of the following financial years:

      (i) 2007-2008;

      (ii) 2008-2009;

      (iii) 2009-2010;

      (iv) 2010-2011?

   (d) If the answer to any of (c)(i) to (iv) is yes, is it permitted and appropriate to have regard to the practices of Parliament with respect to determining "the ordinary annual services of the Government" within the meaning of s 54 of the *Constitution* in construing an Appropriation Act (No. 1)?

   (e) Having regard to the answer to (c), was the drawing and expenditure of funds from the Consolidated Revenue Fund for the purposes of the NSCP, and therefore for the purpose of making payments pursuant to the Funding Agreement, authorised by:

      (i) *Appropriation Act (No. 1) 2006-2007* (Cth);

      (ii) *Appropriation Act (No. 3) 2006-2007* (Cth);

      (iii) *Appropriation Act (No. 1) 2007-2008* (Cth);

      (iv) *Appropriation Act (No. 1) 2008-2009* (Cth);

      (v) *Appropriation Act (No. 1) 2009-2010* (Cth);

(vi) *Appropriation Act (No. 1) 2010-2011* (Cth),

with the result that the drawing of funds from the Consolidated Revenue Fund for the purpose of making payments pursuant to the Funding Agreement was authorised by any of (iii) to (vi) above?

(f) If the answer to (e) is no, should the Court in its discretion make the declarations sought in prayers 1 to 6 of the Writ of Summons filed 21 December 2010?

(g) Is the definition of "school chaplains" in the Guidelines for the NSCP updated 16 February 2010 ("**the Guidelines**"), as incorporated in the Funding Agreement, void by reason of imposing a religious test as a qualification for an office under the Commonwealth, in contravention of s 116 of the *Constitution*?

Part III: Notices under section 78B of the *Judiciary Act 1903*

3. Notices under s 78B of the *Judiciary Act 1903* (Cth) have been served.

Part IV: Reasons for judgment in the Court below

4. Not applicable.

Part V: Material Facts

5. The relevant facts are set out in the Special Case ("**SC**"). The following is provided by way of background.

The NSCP

6. The NSCP is not a creature of statute. Rather, it is administered by the Department of Education, Employment and Workplace Relations ("**DEEWR**"), formerly the Department of Education, Science and Training ("**DEST**"), through a series of funding agreements concerning specific schools. Section 2.3 of the Guidelines identifies the organisations eligible to enter into a funding agreement for the purposes of the NSCP [SC, Vol 2, 610].

7. On its inception in 2007, the programme made available funding of up to $30 million per annum for three years, to be distributed to government and non-government schools in the form of grants of up to $20,000 per annum for the purpose of either establishing school chaplaincy services or enhancing such services where they existed [SC, Vol 2, 493]. On 21 November 2009, the then Prime Minister announced an extension of the NSCP to December 2011, with additional funding of $42 million over the 2010 and 2011 school years [SC, Vol 2, 502]. Participation by schools in the NSCP is voluntary, as is participation by individual students if schools receive funding [SC, Vol 2, 608].

8. Section 1.5 of the current NSCP Guidelines ("**Guidelines**") defines the expression "school chaplain" to mean a person who is recognised:

(a) by a local school, its community and the appropriate governing authority of the school as having the skills and experience to deliver school chaplaincy services to the school and its community; and

(b) through formal ordination, commissioning, recognised qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service ("**the Eligibility Criteria**"),

though in particular circumstances secular pastoral care workers may be employed. Each chaplain is required to sign a Code of Conduct [SC, Vol 2, 608-609].

9. The services expected to be provided by a school chaplain under the NSCP include, among other things:

(a) providing general religious and personal advice to those seeking it, and providing comfort and support to students and staff, such as during times of grief; and

(b) supporting students and staff to create an environment of cooperation and respect, and promoting an understanding of diversity and the range of religious affiliations and their traditions [SC, Vol 2, 609].

The Funding Agreement

10. On 9 November 2007, the Commonwealth and SUQ entered into the Funding Agreement, which incorporates the Guidelines by reference [SC, Vol 2, 635]. That agreement, the term of which has been extended to 31 December 2011 [SC, Vol 2, 697], contemplates the making of payments by the Commonwealth to SUQ upon compliance by the latter with various obligations relating to the provision of chaplaincy services at the School [SC, Vol 2, 645]. These included reporting and auditing obligations [SC, Vol 2, 642, 647].

11. Significantly, the Code of Conduct also forms part of the Funding Agreement [SC, Vol 2, 639, 675]. It is a term of that agreement that in the event of any breach of that Code by the relevant chaplain, the Commonwealth may require all or some of the funding provided for the chaplaincy services to be repaid [SC, Vol 2, 639-638]. Under the Code of Conduct, chaplains are obliged, among other things:

(a) to recognise, respect and affirm the authority of the school principal and/or school governing body, and will work in consultation with them;

(b) to respect the rights of parents/guardians to ensure the religious and moral education of their children is in line with their own convictions;

(c) to avoid unnecessary physical contract with a student, recognising however that there may be some circumstances where physical contact may be appropriate such as where the student is injured or distraught; and

(d) not to put himself or herself, or allow himself or herself, to be placed in a compromising situation, recognising that there are circumstances where confidentiality may be sought by the child [SC, Vol 2, 686].

12. The payments that have been made to date under the Funding Agreement, the first of which occurred on 14 November 2007, are detailed at [SC, Vol 1, 19 (at Par [65]-[73])].

13. The plaintiff has had children enrolled at the School since 5 October 2009 [SC, Vol 1, 1 (at Par [2])].

School chaplains in Queensland

14. Something should now be said concerning the attitude of the Queensland Government towards school chaplaincy services. Since November 1998, following the publication by the Queensland Department of Education and Training of procedure "SM-03: Chaplaincy Services in Queensland State Schools" [SC, Vol 1, 372], the Queensland Government has permitted State schools to offer such services. This is now regulated by procedure "SCM-PR-012: Chaplaincy Services in Queensland State Schools", which was published by the Queensland Department on 17 July 2007 [SC, Vol 1, 381]. SUQ has, pursuant to that procedure, entered into an Agreement for Chaplaincy Services with the State of Queensland [SC, Vol 1, 408].

15. Moreover, since July 2007, the Queensland Government has operated a State Government Chaplaincy/Pastoral Care Funding Program ("**the Queensland Program**"), the stated purpose of which is to provide funds to schools "to engage, through community organisation, the services of a chaplain, pastoral care coordinator, youth worker, Youth

Support Coordinator or other type of support worker to provide direct support to vulnerable students" [SC, Vol 1, 13 (at Par [21])].

Part VI: Plaintiff's Argument

Standing

16. The Commonwealth denies the plaintiff's standing to assert that the expenditure of funds for the purposes of the NSCP, and therefore under the Funding Agreement, was not supported by an appropriation. In contrast, SUQ concedes the plaintiff's standing to the extent that relief is claimed in respect of the 2009-2010 financial year and following. No question of standing thus arises in so far as the plaintiff either asserts that the Funding Agreement is not supported by the executive power of the Commonwealth or calls in aid s 116 of the *Constitution*. It is, for that reason, convenient to address standing as part only of the plaintiff's submissions concerning the absence of the requisite appropriations.

Executive power

17. There appears to be no dispute between the parties that the executive power of the Commonwealth, in relation to entry into contracts, extends at least to matters in respect of which Commonwealth legislative power may be engaged. And whilst it has been suggested that the Commonwealth's power to enter into contracts is unconstrained by the ambit of its legislative power,[1] that proposition, if correct, would be at odds with the reasoning in, say, the *Clothing Factory Case*,[2] in which regard was had to s 51(vi) of the *Constitution* in order to determine the extent to which the Commonwealth could engage in a commercial enterprise.[3] Indeed, to insist upon the absence of constraints on the Commonwealth's contracting power on the basis that the formation of a contract does not involve the exercise of legislative power[4] is either to ignore the circumstance that the executive power of the Commonwealth is itself limited or to suggest that the Executive has capacities at common law which are separate from, and more extensive than, the power conferred by s 61 of the *Constitution*. This last proposition incorrectly elevates the common law capacities of the Crown in Britain over the *Constitution*'s text.[5]

18. Nonetheless, there remains a question as to the extent to which the executive power of the Commonwealth may venture beyond matters to which Commonwealth legislative power may be addressed. In the *AAP Case*, Mason J drew a distinction between the Commonwealth's power to spend, which was said to be capable of being deployed "for such purposes as Parliament may determine",[6] and its power to engage in specific activities associated with such spending, the scope of which his Honour regarded as dependent upon the extent of the Commonwealth's legislative, executive and judicial powers.[7] In this case, the only obligation assumed by the Commonwealth under the Funding Agreement is an obligation to pay certain sums of money upon the fulfilment of various conditions [SC, Vol 2, 645]. There is thus no question of the Commonwealth engaging in an enterprise of the sort epitomised by the Australian Assistance Plan.

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[1] E Campbell, "Commonwealth Contracts" (1970) 44 *ALJ* 14.
[2] *Attorney-General (Vic) v The Commonwealth* (1935) 52 CLR 533.
[3] (1935) 52 CLR 533 at 558, 561-562. See also *In re K L Tractors Ltd* (1961) 106 CLR 318 at 334, 337.
[4] (1970) 44 *ALJ* 14 at 18.
[5] See *Re Ditford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369.
[6] (1975) 134 CLR 338 at 396.
[7] (1975) 134 CLR 338 at 396-398.

19. However, in drawing the distinction referred to above, Mason J proceeded upon the premise that s 81 of the *Constitution* confers a power to appropriate, and thus to authorise spending,[8] with the consequence that the width of that power is to be understood by reference to the expression "for the purposes of the Commonwealth". This view of the significance of s 81 was rejected in *Pape v Federal Commissioner of Taxation*.[9] Accordingly, if the power of the Commonwealth Executive in matters of spending is to be distinguished from, and seen as broader than, its power to engage in activities or enterprises, then this must be upon some other basis than s 81. This being so, there is little assistance to be derived from circumstance that the word "purposes" was substituted in the 1898 draft form of s 81 for the phrase "Public Service" so as to accommodate the distribution of surplus revenues contemplated by s 94.[10] That, in the plaintiff's submission, is not a sufficient basis for concluding that s 61 of the *Constitution* should be construed as permitting the Commonwealth Executive to expend funds upon the full panoply of matters encompassed in the notion of "the public service of the Crown".[11]

20. Consequently, the starting point for analysis must be s 61 itself. The text of that provision does not readily accommodate a distinction between the Executive's power in respect of the raising and expenditure of public moneys and its power to engage in activities. It is true that ss 81 and 83 of the *Constitution* separate expenditure from other forms of conduct by the Executive, but this is only in the context of regulating one aspect of the relationship between the Executive and Parliament.[12] Neither provision speaks to the width of the executive power in matters of spending.

21. This is crucial because, in considering the class of activities and enterprises in which the Commonwealth Executive may engage, this Court has been mindful of "the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers".[13] Thus, for Mason J in the *AAP Case*, the recognition in the Executive of "a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation"[14] was accompanied by the warning that this aspect of the executive power is not to be given "a wide operation".[15] Hence also the emphasis placed, in this field of discourse, upon questions of competition with State executive or legislative competence,[16] as well as the need to consider both the sufficiency of State power and the necessity of national action in order to secure the contemplated benefit.[17]

22. SUQ, in its Amended Defence, ascribes a diminished significance to these various matters. Its primary contention is that the executive power of the Commonwealth extends to such powers, functions and discretions that are exercised for public purposes or in the national interest on behalf of the Commonwealth. This is provided that such exercise is not inconsistent with the distribution of legislative and executive power to the Federal and State polities or with any express or implied limitations on Federal power ~~[SC, Vol A, 83]~~. There are, however, two difficulties with this contention. First, any attempt at defining Commonwealth executive power by reference to that which is not inconsistent with the

[8] (1975) 134 CLR 338 at 391-392, 396.
[9] (2009) 238 CLR 1 at 55 [111], 73 [178], 113 [320], 210-213 [600]-[607].
[10] *Pape* (2009) 238 CLR 1 at 43 [75], 80-81 [203]-[205], 107 [301].
[11] The content of this notion was considered at length in *Pape* (2009) 238 CLR 1 at 78-79 [198]-[200].
[12] *Pape* (2009) 238 CLR 1 at 104 [292].
[13] *AAP Case* (1975) 134 CLR 338 at 398.
[14] (1975) 134 CLR 338 at 397.
[15] (1975) 134 CLR 338 at 398.
[16] *Davis v The Commonwealth* (1988) 166 CLR 79 at 93-94.
[17] (1988) 166 CLR 79 at 111.

distribution of, amongst other things, executive power effected by the *Constitution* would be attended by circularity. And secondly, if SUQ's contention were correct, s 51(xxxix) of the *Constitution* would confer upon the Commonwealth Parliament the power to legislate with respect to all matters incidental to the exercise of the Executive's power to undertake any activity for public purposes or in the national interest. That proposition needs only to be stated in order to be rejected.

23. Of course, this is not to deny the position of comparative superiority accorded the Commonwealth by the *Constitution*. Nor is it to suggest that the power of the Commonwealth Executive to expend moneys appropriated by Parliament is constrained by those matters in respect of which federal legislative power has expressly been conferred. It is rather to say that, given what is now recognised to be the limited role and effect of s 81, there is no textual or other basis for attributing to the executive power in matters of spending a greater width than Mason J ascribed to the range of activities in which the Commonwealth Executive may engage. Moreover, the scope of the Commonwealth's legislative power with respect to taxation (s 51(ii)) does not suggest otherwise. In his evidence to the Royal Commission on the *Constitution*, Sir Robert Garran explained the width of that power by reference to the notion that "[p]olitical and national emergencies" are "unknown and unknowable". Nothing in these submissions would constrain the Executive's power to expend money for the purpose of meeting emergencies of that sort.

24. In any event, the use of the taxation power as a guide to determining the width of Executive's power to spend must be tempered by the recognition that s 96 of the *Constitution* provides a powerful mechanism for directing Commonwealth funds towards matters which are neither covered by a grant of Commonwealth legislative power nor sufficiently national to satisfy Mason J's test. As his Honour noted, the very presence of s 96 confirms that "there is a very large area of activity which lies outside the executive power of the Commonwealth but which may become the subject of conditions attached to grants" under that provision.[18] Indeed, why have s 96 if, as SUQ asserts ~~[SC, Vol A, 82-83]~~, the executive power of the Commonwealth includes a power to provide financial assistance in respect of any matter for which States have legislative power, or for which States have primary responsibility? That assertion is said to proceed from the fact that the *Constitution*, in various sections, "provides for" Commonwealth-State co-operation. But even if that were so, to construct from such provision a power that exceeds s 96, in the sense that relevant grants of assistance need not specifically be the subject of a law enacted by Parliament, is to ignore the admonition that "no amount of co-operation can supply power where none exists".[19] It is also to ignore the circumstance that s 96 was inserted into the 1898 draft Bill for the *Constitution* in response to suggestions that, in its absence, the Commonwealth would have power only to incur expenditures within its own heads of power.[20]

25. It is presently worth noting that it was in reliance upon s 96 that the Commonwealth enacted the *Schools Assistance Act 2008* (Cth) (and its predecessor, the *Schools Assistance (Learning Together – Achievement Through Choice and Opportunity) Act 2004* (Cth)). Pursuant to these statutes, grants of financial assistance were, and continue to be, provided to the States on the condition that those grants are then to be distributed to schools, with the governing authorities of which the Commonwealth has entered into funding agreements, for the purpose of defraying what are termed "recurrent expenditures". This suggests that, subject to s 116 of the *Constitution*, the provision of financial support to

[18] (1975) 134 CLR 338 at 398.
[19] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 577 [113].
[20] (2009) 238 CLR 1 at 108 [304].

schools that engage school chaplains is not something which "cannot otherwise be carried on for the benefit of the nation".

26. Furthermore, whilst the purposes of the Queensland Program are not perfectly congruent with those of the NSCP, its existence indicates the extent to which the provision of pastoral care in schools falls squarely within the executive and legislative competence of the States and do not require national action in order to be addressed. It is thus not an activity "peculiarly adapted to the government of a nation".

27. Accordingly, the validity of the Funding Agreement is not supported by those aspects of the Commonwealth's executive power that extend beyond the matters the subject of an express grant of legislative power.

The defendants' alternative position on executive power

28. Nonetheless, the defendants rely upon other aspects that do coincide with those matters, and in particular, upon the intersection of s 61 with s 51(xxiiiA) and (xx) of the *Constitution*. It has been said in this context that one must first identify the subject matter of the relevant contract and then ask whether that subject matter is within the Commonwealth's enumerated or implied powers.[21] One might also ask whether in entering into the relevant contract, the Executive is doing something other than "that which has been or could be the subject of valid legislation".[22] Upon either formulation, the defendants' contentions must fail.

"Benefits to students"

29. It is well settled that s 51(xxiiiA) of the *Constitution* is concerned with the provision by the Commonwealth of the benefits and measures identified in that placitum (including benefits to students),[23] as distinct from "provisions made by State Governments, public bodies, voluntary associations, trading companies and private persons".[24]

30. This conclusion is supported by the legislative history of that provision.[25] In his second reading speech on the *Constitutional Alteration (Social Services) Bill 1946* (Cth), the passage of which initiated the process by which s 51(xxiiiA) was inserted into the *Constitution*, the then Commonwealth Attorney-General stated that the Bill's object was "to alter the *Constitution* so that *this Parliament can continue to provide directly* for promoting social security in Australia" (emphasis added).[26] Referring to s 51(xiv) and (xxii) of the *Constitution*, the Attorney-General then said that "[a]ny other social service payments *made by the Commonwealth* must ... rest on some other foundation" (emphasis added).[27] Similarly, at the subsequent 1946 referendum on the proposed s 51(xxiiiA), the pamphlet setting out the "YES" case[28] stated that the Commonwealth:

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[21] N Seddon, *Government Contracts: Federal, State and Local*, 4th Ed (2009) at 73. This recalls Gibbs J's suggestion in the *AAP Case* (1975) 134 CLR 338 at 379 that "the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth".

[22] *AAP Case* (1975) 134 CLR 338 at 362.

[23] *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 242-243 per Latham CJ, 254 per Rich J, 260-261 per Dixon J, 297, 282 per McTiernan J and 292 per Webb J; *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 per curiam.

[24] *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 260.

[25] As to the relevance such history, see *Cole v Whitfield* (1988) 165 CLR 360 at 385 and *Wong v The Commonwealth* (2009) 236 CLR 573 at 582 [18]-[20].

[26] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946, p 646.

[27] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946, p 647.

[28] See the *Referendum (Constitution Alteration) Act 1906* (Cth), s 6A.

"provides **maternity allowances, widows' pensions, child endowment, unemployment, sickness and hospital benefits, and benefits to students.** But because of a legal decision last year, the *Constitution* now needs altering to **make sure this can continue**" (emphasis in original).

31. Significantly, the Funding Agreement is not a contract, pursuant to which the Commonwealth provides benefits to any students. It is instead a contract by which the Commonwealth provides financial assistance to entities that provide a specified service to those students who desire it. If therefore the Commonwealth had sought to establish the NSCP by legislation, it could not have done so on the basis of s 51(xxiiiA). Whatever the extent, then, of the Executive's power to provide benefits to students by means of contract, that power was not engaged in relation to the Funding Agreement.

SUQ as a trading corporation

32. It is then said that the fact of SUQ being a trading corporation (which is not conceded) is sufficient to bring the Funding Agreement within the ambit of the Commonwealth's executive power. In other words, a contract formed between the Commonwealth and a trading corporation will be valid and supported by the executive power, even if:

    (a) the contract neither mentions trading corporations nor requires that the relevant company be a trading corporation;

    (b) its subject matter does not otherwise have a sufficient connection with any of the heads of Commonwealth legislative power; and

    (c) performance of its terms would not involve the Commonwealth engaging in an activity or enterprise peculiarly adapted to the government of a nation.

33. If the defendants' proposition were correct, the validity of such a contract would depend upon a matter which is wholly fortuitous and, given that the question whether a specific company is a trading corporation is one of fact and degree, not always apparent to the parties at the time of formation of the relevant contract. One must also ask what would happen if, during the life of the contract, the company in question ceases to answer the description of a trading corporation. Is the contract thereby discharged? And if so, would this discharge operate *in futuro* or *ab initio*? These observations demonstrate the difficulty, if not the absurdity, involved in attempting to answer the question whether a contract is supported by the executive power of the Commonwealth by focusing merely upon the identity of the Commonwealth's counterparty, as distinct from the terms of the contract. It is the subject matter of that contract, as disclosed by those terms, which is of relevance for present purposes.

34. Crucially, the Funding Agreement does not require that a recipient of funding under its terms be a trading corporation. Indeed, the Guidelines, which are incorporated into the Funding Agreement, contemplate that the agreement may be entered into by what are termed "school registered entities", as well as State and Territory education authorities [SC, Vol 2, 610-611]. The Funding Agreement is thus an agreement to provide financial assistance in respect of school chaplaincy services, not to a trading corporation, but rather to an entity falling within a specified class, irrespective of whether it is a trading corporation. Accordingly, to the question whether the Commonwealth could have legislated to establish such a scheme, there can only be a negative answer, putting the Funding Agreement beyond the scope of its executive power.

35. In any event, the material in the Special Case does not establish that SUQ is a trading corporation. The test for ascertaining such a corporation was a matter in respect of which

the majority in *Work Choices* emphatically refrained from expressing a view.[29] And there is force in the suggestion that "a corporation cannot take its character from activities which are uncharacteristic, even if those activities are not infrequently carried on".[30] But even if the test involved determining whether trading constitutes "a sufficiently significant proportion of [a corporation's] overall activities",[31] this would not assist the defendants.

36. The only activities in which SUQ engages that might be said to constitute trading, particularly (though not only) in the sense that the revenues generated are not drawn from grants, are sales of such various goods as books, its provision of youth work courses as part of its Youth Ministry Internship Scheme, its provision of workshops at its State Professional Development Conference, the activities associated with its "Stock up for Hope" event, ticket sales for its annual "Build the Future" dinner and its running of camps. However, since 1 April 2007, the annual revenue generated from these activities has exceeded one-tenth of the total annual revenue of SUQ in only one period, namely, from 1 April 2007 to 31 December 2007.[32] Of course, that observation is of only limited utility for present purposes, as proportion of revenue is hardly a perfect proxy for proportion of overall activities directed towards trading. The same might be said of the expenses incurred by SUQ. The materials before the Court might well permit the conclusion that SUQ expended significant sums for the purposes of its trading activities, but even the conduct of trade as an insubstantial proportion of a corporation's overall activities may involve significant expenditure.

37. The observations made above must also be considered alongside the suggestion in SUQ's own financial statements that its principal activities are:

    (a) to make God's Good News known to children, young people and 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 [SC, Vol 1, 190, 226, 263-264, 304, 341].

    This alone is not determinative of SUQ's character, but it does form part of the context in which its revenue and expenditure figures are to be read. In circumstances where those figures provide no clear indication as to the proportion of SUQ's overall activities which may be described as trading, that matter of context serves to confirm the extent to which the materials before the Court do not sufficiently establish SUQ as a trading corporation. But even if it were otherwise, for the reasons already given, the terms of the Funding Agreement render the mere fact of SUQ being a trading corporation irrelevant for the purposes of the present inquiry.

38. The executive power of the Commonwealth thus did not extend to entry into the Funding Agreement. It follows that no appropriation could validly have been made authorising payments under that agreement. But even if the Funding Agreement were valid, then for the reasons set out below, no such payment was supported by an appropriation.

The absence of appropriations for the NSCP

Standing

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[29] (2006) 229 CLR 1 at 74 [55], 75 [58], 108-109 [158] and 117 [185].
[30] *Fencott v Muller* (1983) 152 CLR 570 at 588.
[31] *Commonwealth v Tasmania* (1983) 229 CLR 1 at 233.
[32] In the period 1 April 2007 to 31 December 2007, the revenue generated from these activities was $1,487,842 out of total revenue for SUQ of $10,936,576; in 2008, $2,226,034 out of total revenue of $24,603,381; in 2009, $2,435,000 out of total revenue of $29,894,000; and in 2010, $2,195,000 out of total revenue of $27,955,000.

39. That "[p]rivate challenges to spending arrangements have ... encountered standing difficulties"[33] is well-recognised. But this is not to say that no person may, in proceedings, challenge Commonwealth expenditure on the basis that there is no, or no valid, appropriation unless he or she is a member of Parliament, as the plaintiff in *Brown v West* was. Indeed, the Court's conclusion on standing in *Pape* was at odds with any such proposition. It is true that the standing of the plaintiff in that case was conceded in part by the Commonwealth, but given that questions of standing in federal jurisdiction are subsumed within the constitutional requirement of a "matter",[34] the Commonwealth's concession could not have created a "matter" where none existed.

40. Questions concerning the validity and scope of appropriations are thus not prevented, whatever the circumstances of a given case, from being ventilated by individuals. And given the nature of the relief sought in these proceedings, any question of standing must be resolved by reference, not to the character of the law at the centre of the current controversy (namely, appropriation Acts), but rather to those matters which were identified in *Ainsworth v Criminal Justice Commission*[35] as marking out the boundaries of judicial power when declaratory relief is sought. Principal among these was the "real interest" of the person seeking relief.

41. The plaintiff does not bring these proceedings as a mere matter of "intellectual and emotion concern",[36] or in an attempt to give effect to his beliefs or opinions on a matter "which does not affect him personally except in so far he holds beliefs or opinions about it".[37] His children attend a school in respect of which funds have been expended by the Commonwealth. That expenditure is the subject of his claim for relief. Unlike the non-State plaintiffs in the *DOGS Case*,[38] the plaintiff is not a parent of children enrolled at a school or a given class of school seeking to impugn the provision of funds by the Commonwealth to another school or some other class of school.

42. And to the extent that funds expended during financial years prior to the enrolment of any of his children at the School assisted in entrenching a program which now affects his children at that School, then he has a sufficient interest in the legality of that expenditure to constitute his claim in respect of it a justiciable controversy. The plaintiff's standing is thus broader than SUQ asserts.

The 2006-2007 Appropriation Acts

43. On the case pleaded by the First, Second and Third Defendants, an appropriation was first made in respect of the NSCP by *Appropriation Act (No. 3) 2006-2007* (Cth) ("**the 2006-2007 Appropriation Act (No. 3)**").[39] In contrast, SUQ contends that the provisions of *Appropriation Act (No. 1) 2006-2007* (Cth) ("**the 2006-2007 Appropriation Act**") afforded sufficient authorisation, subject to there being a relevant spending power, for the expenditure of funds in the implementation of that program.[40]

44. Given SUQ's position, it is convenient to begin with the earlier of these statutes, and in particular s 15 thereof, which relevantly provides that "[t]he Consolidated Revenue Fund is appropriated as necessary for the purposes of this Act". Significantly, as was the case the

[33] *Pape* (2009) 238 CLR 1 at 34 [49].
[34] *Croome v Tasmania* (1997) 191 CLR 119 at 132.
[35] (1992) 175 CLR 564 at 582-582.
[36] *Australian Conservation Foundation Incorporated v The Commonwealth* (1978) 146 CLR 493 at 530.
[37] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 37.
[38] (1981) 146 CLR 559 at 597.
[39] Defence at the particulars to [50.2].
[40] Amended Defence at [11]-[15].

statute considered in *Combet v The Commonwealth*,[41] the 2006-2007 Appropriation Act distinguished between:

(a) "departmental items", in relation to which amounts issued out of the Consolidated Revenue Fund could only be applied for the departmental expenses of an entity (s 7(2)); and

(b) "administered items", in relation to which amounts issued could only be applied for expenditure for the purpose of carrying out activities for the purpose of contributing to the achievement of an outcome of an entity (s 8(2)).

45. In order to understand the distinction between these so-called "items" and their relationship with what were termed the "outcomes" of various entities, it is necessary to have regard to Schedule 1 to the Act. That Schedule purports to identify, in relation to each Commonwealth portfolio, the "[s]ervices for which money is appropriated". It does so in a manner which is best apprehended by reference to the provisions therein made in respect of DEST:

EDUCATION, SCIENCE AND TRAINING PORTFOLIO

Appropriation (plain figures) – 2006-2007
Actual Available Appropriation (italic figures) – 2006-2007

	Departmental Outputs	**Administered Expenses**	**Total**
	$'000	$'000	$'000
DEPARTMENT OF EDUCATION, SCIENCE AND TRAINING			
Outcome 1 – Individuals achieve high quality foundation skills and learning outcomes from schools and other providers	119,824 *110,671*	196,677 *145,004*	316,501 *255,675*
Outcome 2 – Individuals achieve relevant skills and learning outcomes from post school education and training	241,173 *218,598*	1,034,745 *899,736*	1,275,918 *1,118,334*
Outcome 3 – Australia has a strong science, research and innovation capacity and is engaged internationally on science, education and training to advance our social development and economic growth	68,113 *70,503*	347,655 *310,754*	415,768 *381,257*
Total: Department of Education, Science and Training	**429,110** *399,772*	**1,579,077** *1,355,494*	**2,008,187** *1,755,266*

[41] (2005) 224 CLR 494.

46. The expression "departmental item" is defined in s 3 to mean "the total amount set out in Schedule 1 in relation to an entity under the heading 'Departmental Outputs'", whereas the term "administered item" is defined to mean "an amount set out in Schedule 1 opposite an outcome of an entity under the heading 'Administered Expenses'". Administered items are thus tied to the outcomes stated in Schedule 1, whereas departmental items are not. The pleadings suggest that issue has been joined in relation to whether or not the NSCP is covered by an administered item in each of the Appropriation Acts the subject of these proceedings. As a consequence, the defendants cannot now avail themselves of the argument upon which the Commonwealth succeeded in *Combet*, namely, that the sums set out under the heading "Departmental Outputs" and opposite the outcomes of a given entity are merely notional.

47. Mention should be made at this point of Portfolio Budget Statements ("**PBSs**"). These are documents intended to inform members of Parliament and Senators as to the proposed allocation of sums appropriated for a given financial year. Subsection 4(1) of the 2006-2007 Appropriation Act declares the PBSs that accompanied the Bill for that statute to be "relevant documents" for the purposes of s 15AB of the *Acts Interpretation Act 1901* (Cth). Moreover, if these Statements indicate that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then by virtue of s 4(2), expenditure for the purpose of carrying out those activities is to be taken to be expenditure for the purpose of contributing to the achievement of the outcome. It should be noted that there is no reference to the NSCP in the 2006-2007 PBSs for DEST.

48. In language, structure and the numbering of its sections, the 2006-2007 Appropriation Act (No. 3) is similar to the 2006-2007 Appropriation Act. One difference between the two statutes is that s 4 of the later Act refers, not merely to PBSs, but also to "Portfolio Additional Estimates Statements". The definition of that expression indicates that these were tabled in one or other of the Houses of Parliament in relation to the Bill for the 2006-2007 Appropriation Act (No. 3). In the 2006-2007 Agency Additional Estimates Statement for DEST, the NSCP was identified as a measure to which part of the administered item for Outcome 1 of that department or entity would be allocated. It will be necessary later in these submissions to address this reference to the NSCP.

"The ordinary annual services of the Government"

49. The expression "the ordinary annual services of the Government" is to be found in ss 53 and 54 of the *Constitution*, the relevant combined effect of which is:

    (a) to deprive the Senate of the power to amend proposed laws appropriating revenue for such services; and

    (b) to afford the Senate some measure of protection from prejudice[42] by requiring that any such proposed law deal only with such appropriation.

50. That a breach of s 54 is neither justiciable nor capable of rendering a resulting appropriation act invalid[43] is not contested. Nor is it contested that the content of the phrase "the ordinary annual services of the Government" is a matter for Parliament to determine. And indeed, in the plaintiff's submission, Parliament has so determined, most prominently in the accommodation reached between the Houses of Parliament known as "the Compact of 1965". That accommodation contemplated the division of annual appropriation Bills into two classes – one for the ordinary annual services; and the other for expenditure on: (a) the construction of public works and buildings; (b) the acquisition

[42] J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 674.
[43] *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 578.

of sites and buildings; (c) items of plant and equipment which are clearly definable as capital expenditure; (d) grants to the States under s 96 of the *Constitution*; and (e) new policies not authorised by special legislation. Given subsequent developments in parliamentary practice, the Compact of 1965 does not, by any means, represent the final word on the ordinary annual services of the Government. Nonetheless, it is the plaintiff's contention that with Parliament having addressed that concept in the course of developing practices conducive to its compliance with s 54 of the *Constitution*, those practices should be considered an aid to the proper construction of the statutes the subject of these proceedings. That proposition is no more heterodox than the use made of such practices in the reasoning of the Court in *Brown v West*,[44] which neither the parties nor the Court in *Combet*[45] saw fit to doubt.

51. In relation to the practices themselves, the following points may be made. First, in so far as this branch of the plaintiff's argument is concerned, the current proceedings relate to the interpretation of an Act, or rather, of a series of appropriation Acts. The practices of Parliament are relevant to that issue. Subsection 16(5) of the *Parliamentary Privileges Act 1987* (Cth) thus applies to the published parliamentary records that evidence those practices. This is notwithstanding that the matter connecting those practices with the statutes in question is s 54 of the *Constitution*.

52. Secondly, the practices have evolved over time, reflecting different and changing views within Parliament as to the meaning of "the ordinary annual services of the Government". This might account for the adoption and subsequent abandonment of the practice, which prevailed from 1901 to 1965, of separating annual appropriations for ordinary annual services from those for works and buildings [SC, Vol 1, 24 (at Par [93]-[96])]. The strictures of the Compact of 1965 should thus not be treated as fixed for all time.

53. Thirdly, differing views have, in the past, been taken by the Executive and by Parliament as to compliance with these practices, and even the meaning of the Compact itself. This is exemplified by the contrasting positions taken in 1973 by then Treasurer and by Senate Estimates Committee C in relation to the appropriateness of including in Appropriation Bill (No. 1) (for the ordinary annual services) proposed expenditure for the National Health Insurance Plan and the National Commission on Social Welfare [SC, Vol 4, 1437-1455]

54. In these proceedings, the plaintiff does not ask the Court to adjudicate upon any such dispute between Parliament and the Executive. That would plainly be non-justiciable. But in any event, the views of the Executive as to the categories of item that fall within the ambit of the ordinary annual services of the Government are irrelevant as an aid to the construction of an Appropriation Act (No. 1). It is true that by reason of s 56 of the *Constitution*, the Executive initiates the process of appropriation. However, a recommendation by the Governor-General of the purpose of an appropriation is merely a condition precedent to the passage of a proposed law for the appropriation of revenue or moneys. The requirement for that statement of purpose does not detract from the circumstance that an appropriation Act, once passed, represents an expression of the will, not of the Executive, but of Parliament. It is thus "to be expounded according to the intent of the Parliament that made it",[46] and not of the Executive whose expenditure it authorises.

55. Reference has already been made to the terms of the Compact of 1965. That arrangement was subsequently modified to accommodate two more recent developments. The first was

[44] (1990) 169 CLR 195 at 211.
[45] (2005) 224 CLR 494 at 575 [155].
[46] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161.

the introduction in 1988 of the "running costs" system of appropriation, the salient features of which were set out in a letter dated 22 August 1988 from the Minister for Finance to then President of the Senate [SC, Vol 4, 1494]. That system required some adjustment to the Compact of 1965 so as to include expenditure on certain minor items of equipment and fitout in appropriation Bills for the ordinary annual services [SC, Vol 4, 1497]. The second, and more relevant, development was the adoption in 1999 of accruals budgeting by the Commonwealth Government, and with it, a new method of specifying the purpose of an appropriation in an annual appropriation Bill – that is, by reference to outcomes and outputs, as distinct from programs and inputs [SC, Vol 4, 1544]. It was in the budgeting framework thus established that the appropriation Acts the subject of these proceedings were enacted.

56. Significantly, in order to accommodate that framework, the Senate Standing Committee on Appropriation and Staff ("**the Senate Appropriation Committee**"), in its Thirtieth Report published in March 1999, recommended the following changes to the "interpretation" of the Compact on 1965, as proposed by the Minister for Finance: (a) items regarded as equity injections and loans by regarded as not part of the ordinary annual services; (b) all appropriation items for continuing activities for which appropriation have been made in the past be regarded as part of ordinary annual services; and (c) all appropriations for existing asset replacement by regarded as provision for depreciation and part of ordinary annual services [SC, Vol 4, 1512]. By a resolution passed on 22 April 1999, the Senate endorsed this recommendation [SC, Vol 4, 1515]

57. Two points should presently be made concerning the matters outlined above. First, following the adoption of the Compact of 1965, Parliament, and in particular the Senate, has repeatedly affirmed the notion that the ordinary annual services do not include new policies either not authorised by special legislation or in respect of which no appropriation has been made in the past. Indeed, by a resolution passed on 17 February 1977, the Senate clarified, among other things, that special legislation authorising a new policy was required to have been enacted "previously" for any appropriation in relation to that policy to fall within the ordinary annual services [SC, Vol 4, 1491-1492]. The Senate subsequently resolved in similar terms on 22 June 2010 [SC, Vol 5, 1911].

58. Secondly, it appears that with the introduction of accruals budgeting, the Executive took a different view, namely, that the ordinary annual services encompass any activity directed towards achieving an outcome for which an appropriation has previously been made [SC, Vol 4, 1517-1542]. This would presumably be so, notwithstanding that any such activity might answer the description of a new policy. It is hardly surprising, given the position described in the preceding paragraph, that the Senate has resisted this notion, and in particular, that the Senate Appropriations Committee should have, in a series of reports, questioned whether expenditure on certain activities by the Executive, as foreshadowed in certain PBSs, was properly authorised by various appropriation Bills for the ordinary annual services [SC, Vol 4, 1685-1686, 1727-1728, 1793].[47] That the Bills in question were subsequently passed by the Senate without amendment [SC, Vol 1, 31 (at Par [116] and [118])] should not be taken as signalling parliamentary acquiescence in the views of the Executive. After all, neither House of Parliament had the power to amend the PBSs in which the controversial expenditure was foreshadowed, and for the reasons that will be developed below, it would be an error to conclude that the content of a PBS conclusively determines the scope of the authorisation conferred by an annual appropriation Act. If that

[47] While this is hardly determinative of the present matter, it is worth noting that one of the activities in relation which such questions were raised was the NSCP [SC, Vol 4, 1793].

is correct, then the passage of such an Act without amendment would afford no basis for suggesting that every item of expenditure described in an accompanying PBS received the imprimatur of Parliament.

59. This is not to say that the Court must now choose between the various positions taken by the Executive and by Parliament as to the meaning of the Compact of 1965 in the era of accruals budgeting. For the reasons already given, the Executive's view of what may properly be included within an appropriation Bill for the ordinary annual services is of no relevance. Rather, the question is whether recourse may be had to Parliament's view, as expressed in its practices, as an aid to the construction of such a bill or Act.

60. In this regard, it is significant that this Court in *Brown v West*[48] referred to, and relied upon, the terms of the Compact of 1965 in concluding that the *Supply Act (No. 1) 1989-1990* (Cth) did not contain an appropriation for such new policies as the provision of a supplement to the postal allowance enjoyed by members of Parliament. It is similarly significant that the plurality in *Combet* found support for its preferred construction of *Appropriation Act (No. 1) 2005-2006* (Cth) by inferring, on the basis of a consideration of past practice, "that at least since the mid-1980s the chief means of limiting expenditures made by departments of State that has been adopted in annual appropriation Acts has been to specify the *amount* that may be spent rather than further define the purpose or activities for which it may be spent" (emphasis in original).[49] And while it is true that this was said in relation to departmental expenses, the point remains: if the construction of an appropriation act can be informed by inferences drawn from parliamentary practice, so can it also be informed by the positions expressly articulated by Parliament as to the content and meaning of its practices.

61. Given then Parliament's repeated insistence upon the exclusion from the ordinary annual services of new policies for which an appropriation had not previously been made, and given also that Parliament is presumed, where possible, to have legislated in compliance with the *Constitution*,[50] an appropriation Act, the long title of which speaks of appropriations for the ordinary annual services of the Government, should not readily be construed as having made an appropriation for expenditure upon the implementation of new policy, unless it does so in the clearest terms.

The proper construction of the Appropriation Acts the subject of these proceedings

62. It follows that upon its proper construction, the 2006-2006 Appropriation Act did not, whatever the width that might be attributed to Outcome 1 of DEST in Schedule 1, appropriate moneys for expenditure in relation to the NSCP. Indeed, the NSCP had not been announced at the time when that statute received Royal Assent, on 23 June 2006, and as noted above, there was no mention of the NSCP in the relevant PBSs.

63. Of course, in light of the reference to that program in relation to Outcome 1 in the Agency Additional Estimates Statement for DEST that accompanied the Bill for the 2006-2007 Appropriation Act (No. 3), the position with respect to that latter statute is more complicated. After all, ss 4(2) and 8(2) of that Act would thus appear to link the NSCP to the administered item set out in Schedule 1 opposite Outcome 1 of DEST. It must, however, be borne in mind that the effect of s 8(2), which must be read with s 4(2), was merely to authorise the expenditure of amounts issued in respect of an administered item

[48] (1990) 169 CLR 195 at 207.
[49] (2005) 224 CLR 494 at 577 [161].
[50] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [ ] [71].

for a prescribed purpose. It did not make an appropriation in respect of the sum specified in an administered item. That task was left to s 15.

64. It has been said that the effect of an appropriation is to operate as a "provisional setting apart or diversion from the Consolidated Revenue Fund of the sum appropriated".[51] Section 15 thus set apart a sum of public money "for the purposes of this Act", and s 8(2) then authorised the expenditure of part of that sum for certain, more specific purposes. However, s 8(2) did not authorise the expenditure of any money which did not form part of what was set apart by s 15. Significantly, that which was set apart by s 15 was defined, not merely by the sums of money identified in the statute, but also by the expression "for the purposes of this Act". Those purposes are to be discerned by reference, not merely to the balance of the provisions of the Act, including s 8(2), but also to its object, as disclosed in its long title, which speaks of an appropriation "for the ordinary annual services of the Government, and for related purposes".

65. Given what is said at [61] above, and given the absence of a contrary indication in its terms, s 15 of the 2006-2007 Appropriation Act (No. 3) should be construed as effecting the setting apart from the Consolidated Revenue Fund of a sum for the ordinary annual services of the Government *only*. In other words, if a sum of money was sought in the 2006-2007 financial year to be expended for a purpose other than the ordinary annual services, it could not have formed part of, or come from, the greater sum set apart from the Consolidated Revenue Fund by s 15. And because s 8(2) only operated upon what had first been set apart by s 15, that provision could not authorise any such expenditure. Put simply, the combination of ss 4(2) and 8(2) of the 2006-2007 did not authorise spending for purposes other than the ordinary annual services.

66. Therefore, because it was a policy for which no appropriation had been made in the past, the reference to the NSCP in the Portfolio Additional Estimates Statement for DEST did not bring it within the scope of the 2006-2007 Appropriation Act (No. 3). Expenditure on the NSCP was thus not covered by an appropriation for the 2006-2007 financial year. And more importantly, it was not, for the purposes of the 2007-2008 financial year, a policy or activity for which an appropriation had been made in the past, prompting the question whether expenditure on the NSCP was authorised by the *Appropriation Act (No. 1) 2007-2008* (Cth) ("**the 2007-2008 Appropriation Act**").

67. This latter statute is substantially identical to the 2006-2007 Appropriation Act, and the Bill for it was accompanied by a PBS for DEST which identified the NSCP as a program directed towards Outcome 1 of that department. However, for the reasons given above in relation to the 2006-2007 Appropriation Act (No. 3), the reference to the NSCP in the 2007-2008 PBS for DEST is an insufficient basis for suggesting that the 2007-2008 Appropriation Act should be construed as making an appropriation for a policy, such as the NSCP, for which no appropriation had previously been made.

68. It is necessary at this point to say something concerning the language of *Appropriation Act (No. 1) 2008-2009* (Cth) ("**the 2008-2009 Appropriation Act**"), which differs in one significant respect from that of the 2006-2007 Appropriation Act and which provided the model for the Appropriation Acts (No. 1) enacted after it. The distinction between departmental items and administered items is preserved in that statute, as is the mode of their presentation in Schedule 1. The appropriating provision is s 19, pursuant to which the Consolidated Revenue is "appropriated as necessary for the purposes of this Act, including the operation of this Act as affected by the *Financial Management and*

[51] *Surplus Revenue Case* (1908) 7 CLR 179 at 190-191.

Accountability Act 1997". This is presumably a reference to Div 3 of Pt 4 of the *Financial Management and Accountability Act 1997* (Cth) ("**the FMA Act**"), which deals in large part with the accounting of appropriated sums. Regard should then be had to s 8(1), which states that "[t]he amount specified in an administered item for an outcome for an Agency may be applied for expenditure for the purpose of contributing to achieving that outcome". Subsection 8(2) then reproduces the language of s 4(2) of the 2006-2007 Appropriation Act, linking activities identified in the PBSs to expenditure for the purpose of contributing to the achievement of outcomes.

69. The 2008-2009 PBS for what had now become DEEWR identifies the NSCP as an activity directed towards Outcome 2 of that department, which is expressed in Schedule 1 to the 2008-2009 Appropriation Act as follows: "School education – Schools and other educators provide high quality teaching and learning to all Australian children, creating good foundation skills and positive life opportunities".

70. However, in a manner similar to s 8(2) of the 2006-2007 Appropriation Act (No. 3), s 8(1) of the 2008-2009 Appropriation Act could only operate upon what had been set apart from the Consolidated Revenue Fund by s 19 of that statute. And, given the long title of that statute, in a manner similar to s 15 of the 2006-2007 Appropriation Act (No. 3), s 19 of the 2008-2009 Appropriation Act should be construed as effecting the setting apart of a sum for the ordinary annual services of the Government *only*. If, therefore, what is said above concerning the absence of an appropriation for the NSCP in the 2006-2007 and 2007-2008 financial years is correct, then there was also no such appropriation made in the 2008-2009 Appropriation Act, notwithstanding the reference to the NSCP in the PBS for DEST. The same would also hold, *mutatis mutandis*, for each of *Appropriation Act (No. 1) 2009-2010* (Cth) and *Appropriation Act (No. 1) 2010-2011* (Cth). Accordingly, at no point during its history was the expenditure of public money for the purposes of the NSCP authorised by an appropriation.

Section 64 of the Judiciary Act

71. SUQ contends that by reason s 64 of the *Judiciary Act 1903* (Cth), it was legally entitled to payments from the Commonwealth under the Funding Agreement, and that the Commonwealth was thus afforded statutory authority to make those payments. Three points should be made in this regard. First, s 64 only applies "[i]n any suit in which the Commonwealth ... is a party". In the absence of such a suit, s 64 would confer no rights upon SUQ beyond those it had under the law of contract. Secondly, assuming the validity of the Funding Agreement, SUQ's rights under the law of contract are irrelevant, as these have no bearing upon whether the payments purportedly made in pursuance of the Funding Agreement were authorised by Parliament. And thirdly, s 64 is not expressed to be, and cannot be construed as, a standing appropriation (and see also ss 65 and 66).

Drawing rights

72. Section 26 of the FMA Act provides that an official or Minister must not do any of the following except as authorised by a valid drawing right: (a) make a payment of public money; (b) request that an amount be debited against an appropriation; or (c) debit an amount against an appropriation. The power to issue drawing rights is conferred upon the Finance Minister by s 27, which power may be delegated pursuant to s 62. Relevantly, pursuant to s 27(5), a drawing right has no effect to the extent that it claims to authorise the application of public money in a way that is not authorised by an appropriation.

73. The drawings rights relied upon in making payments under the Funding Agreement are identified in SC [86]-[89]. It follows from what is said above that these were not effective to support the making of such payments.

Relief

74. In the *AAP Case*,[52] Jacobs J spoke of the difficulty in "carefully and precisely and exhaustively" defining the public expenditure that is to be restrained by an injunction sought in proceedings contesting the existence of an appropriation, or a valid appropriation, for such expenditure. That difficulty does not arise in this case. The injunctive relief sought in these proceedings is tied precisely to the Funding Agreement or any agreement in respect of the School that incorporates the Guidelines. If therefore the plaintiff's substantive arguments were correct, the Court would not need to be troubled, as it was in *Combet*,[53] by the prospect of withholding injunctive relief and making bare declarations where its jurisdiction under s 75(v) of the *Constitution* had been invoked.

75. Moreover, the offence created by s 26 of the FMA Act is one to which Ch 2, and in particular s 5.6, of the *Criminal Code* applies. It thus has a fault element, namely, intention. That being so, the declarations sought by the plaintiff in relation to the drawing rights referred to above would not have the effect, as the plurality in *Combet* feared,[54] of declaring that certain Commonwealth officers have committed an offence.

76. The only discretionary matter that might affect the making of those declarations is the fact that the drawing rights have been revoked, and the operation of the appropriation Acts enacted in respect of financial years prior to the current one has been exhausted. The First, Second and Third Defendants plead that the declarations sought in respect of these matters should not be made as they would not speak to any contested subsisting or future right. Those declarations have been sought for completeness, and the plaintiff does not make submissions in relation to them save to say that in the absence of those declarations, the Court's conclusions as to previous financial years would operate only to create an issue estoppel binding between the parties and no more. Given the potential public ramifications of these proceedings, there may be some incongruity in such an outcome.

77. In any event, nothing said in the preceding paragraph detracts from the entitlement of plaintiff to declaratory relief in relation to the current financial year.

***Section 116 of the* Constitution**

78. Section 116 of the *Constitution* provides, among other things, that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth". These words appear to have been drawn from the "religious test" clause in Article IV of the United States Constitution. That clause has largely escaped judicial scrutiny, as cases in which governments, both State and Federal, have required a person "to profess a belief or disbelief in any religion" have been thought to engage the First Amendment.[55]

79. In any event, it has been said that s 116 prohibits religious tests, whether imposed by law or otherwise.[56] In the plaintiff's submission, the Eligibility Criteria clearly impose such a test. The fact that the Guidelines permit the engagement of "secular pastoral care" "in particular circumstances", and thus as an exception to the Eligibility Criteria, suggests the centrality of religion and religious qualification to those criteria. It might be said that a

[52] (1975) 134 CLR 338 at 412.
[53] (2005) 224 CLR 494 at 578-579 [165].
[54] (2005) 224 CLR 494 at 579 [165].
[55] *Torcaso v Watkins* 367 US 488 (1961).
[56] *DOGS Case* (1981) 146 CLR 559 at 605.

person with qualifications from "a state/territory government approved chaplaincy service" is not required to be of any faith, but the fact that this is the sole alternative, under the Eligibility Criteria, to being ordained or commissioned by a religious institution does not render those criteria any less a religious test. Importantly, s 116 does prohibit "solely religious tests".

80. The question then is whether a school chaplain engaged under the NSCP holds an office under the Commonwealth. It is significant in this regard that the word "office" takes its meaning largely from the context in which it is found.[57] The expression "office under the Commonwealth" may be distinguished from, say, "office of profit under the Crown", which appears in s 44(iv) of the *Constitution*. The latter has been held to denote a permanent officer of the executive government,[58] and crucially, the omission of the words "of profit" in s 116 suggests that something less than a relationship of employment between the relevant officer and the Commonwealth was contemplated. A distinction may also be made with the phrase "officer of the Commonwealth" in s 75(v) of the *Constitution*. The use of the possessive "of" in this latter expression is apt to indicate a person engaged or appointed by the Commonwealth, whereas the preposition "under" in s 116 speaks more to the exercise of supervision or control by the Commonwealth over the officer concerned.

81. Having regard to the object of s 116, such a construction should be favoured. Let it be assumed that the Commonwealth Executive has entered into a range of contracts pursuant to which various governmental functions and the provision of public services are to be carried out by private entities. If a narrow understanding of the notion of an office under the Commonwealth were adopted, it would be permissible for the Commonwealth to insert into each such contract a provision to the effect that the employees or independent contractors engaged by the private entities in question adhere to a given religious faith. It would be to deprive the "religious test" clause in s 116 of much force if the Commonwealth were able to circumvent its prohibition on religious tests merely by "sub-contracting" whole swathes of governmental activity.

82. In relation to the NSCP, the Code of Conduct regulates interactions between chaplains on the one hand, and students and parents on the other. It is required to be signed before a chaplain can commence providing chaplaincy services under the NSCP [SC, Vol 2, 617]. In the event of a breach of the Code, the school chaplain is required immediately to cease providing chaplaincy services [SC, Vol 2, 625], and such cessation must persist unless and until the Commonwealth, by DEEWR, gives its written agreement for chaplaincy services to continue. This is reflected in the Funding Agreement [SC, Vol 2, 639-640]. These stipulations confer DEEWR the power to control the commencement and cessation of chaplaincy services.

83. The Guidelines also indicate that payment will only be made under the NSCP upon acceptance by DEEWR of progress reports in relation to the provision of chaplaincy services [SC, Vol 2, 618]. Furthermore, DEEWR reserves to itself the right to conduct various monitoring activities, including:

    (a) responding to approaches from members of the school community and seeking feedback;

    (b) conducting site visits; and

    (c) examining documentation associated with claims for payment [SC, Vol 2, 618-619].

[57] *Sykes v Cleary* (1992) 176 CLR 77 at 96-97.
[58] *Sykes v Cleary* (1992) 177 CLR 77 at 96.

84. These matters all indicate a level of control by DEEWR consistent with the proposition that school chaplains are holders of offices under the Commonwealth within the meaning of s 116 of the *Constitution*. That being so, the Eligibility Criteria, as incorporated into the Funding Agreement, are void.

Part VII: Applicable constitutional provisions, statutes and regulations

85. The applicable constitutional provisions are ss 51(xx), (xxiiiA), 61 and 116 of the *Constitution*, which are set out in the Schedule to these submissions.

86. The statutes referred to in paragraph 2(e) above, and accompanying PBSs, are relevantly extracted at SC, Vol 2, 742-Vol 3, 1345.

10 **Part VIII: Orders sought**

87. The questions stated for the Full Court's consideration should be answered as follows:

1. (a) Yes.
   (b) Yes, as to (i) to (iv).
   (c) Yes, as to (i) to (iv).
2. (a) Yes.
   (b) Yes, to the extent that the definition of "school chaplains" in Section 1.5 of the NSCP, as incorporated into the Funding Agreement, is void.
3. (a) No.
   (b) No.
20 (c) No.
   (d) No.
4. (a) Yes.
   (b) No. If the answer to 4(a) is no, the circumstance that the definition of "school chaplains" in Section 1.5 of the NSCP, as incorporated into the Funding Agreement, is void would not affect the making of payments under the Funding Agreement.
5. The entirety of the relief sought in the Writ of Summons filed 21 December 2010.
6. The defendants.

30 **Date: ~~24~~ 28 June 2011**

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