

**THE WILLIAMS LITIGATION —
THE COMMONWEALTH AND THE CHAPLAINS**

**Notes to a short presentation at the
Gilbert + Tobin Centre of Public Law Conference**

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Art Gallery of New South Wales

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A — INTRODUCTION

Case name: *Ronald Williams v Commonwealth & Ors* (HCA: S307 of 2010)

Judgment reserved: The *Williams* case was heard by the High Court on 9–11 August 2011. The Court reserved its judgment. At the time the paper was ‘booked’ it was anticipated that there would be a decision by the time of the G + T Public Law Conference (17 February 2012). Unfortunately, judgment was still reserved on the eve of the conference.

Purpose of the notes: These notes accompany a short oral presentation on the litigation. The purpose of the notes is to identify the main issues and arguments presented to the High Court. The focus of the presentation is on the executive power arguments.

Qualification: There are obvious limitations in analysing a case that has not yet been decided. The notes do not purport to be a summary of all the arguments presented by the parties.

Available public sources

These notes were prepared on the basis of the public sources of information available at the time. These were:

- The plaintiff’s Amended Writ of Summons.
- The submissions of the parties: <http://www.hcourt.gov.au/cases/case-s307/2010>.
- The transcript of the 9–11 August 2011 hearings: [2011] HCA Trans 198–200: <http://www.austlii.edu.au/au/other/HCATrans/2011>.

B — PARTIES AND JURISDICTION

The plaintiff: Mr Ronald Williams, a father of schoolchildren attending the Darling Heights State Primary School in Toowoomba, Queensland (*the School*). The School participated in the National School Chaplaincy Program.

Meet the plaintiff at: <http://www.abc.net.au/7.30/content/2011/s3290571.htm>
<http://www.youtube.com/watch?v=fdU0srtPGws>. Excerpts from the transcript of the first clip:

TIM MANDER, SCRIPTURE UNION QLD: We’re very concerned that the future of school chaplains could be determined on a legal technicality.

TRACY BOWDEN (ABC): Ron Williams’ family is at heart of his challenge. When he enrolled his oldest child at the local public school in Toowoomba, he was troubled by the messages his son brought home.

RON WILLIAMS: The case of our son, we’d asked that he be excluded from religious instruction, and so other children, or a couple of other children, probably zealous kids, had told him that he’d go to hell because he wasn’t doing RI.

...

TRACY BOWDEN: Are you driven by the fact that you’re anti-religion?

RON WILLIAMS: Oh, no, ... I’m not anti-religion at all. I am a fervent believer in the constitutional separation of church and state. I do believe that our state schools should be secular spaces for our children.

The Commonwealth defendants: The Commonwealth of Australia (D1), The Minister for School Education, Early Childhood and Youth (D2) and the Minister for Finance and Deregulation (D3).

Fourth defendant: Scripture Union of Queensland (*SUQ*) (the chaplaincy service provider to the School).

Interveners: The States of New South Wales, South Australia, Tasmania, Queensland, Victoria and Western Australia; and the Churches’ Commission on Education Incorporated.

Jurisdiction

The proceedings were commenced in the original jurisdiction of the High Court conferred by Constitution s 75(iii) and 75(v) of the *Constitution* and *Judiciary Act 1903* (Cth), s 30.

C — THE FACTS

The NSCP

The School engaged a chaplain in April 2006. That chaplain was eventually replaced by other chaplains who were provided by SUQ under the National School Chaplaincy Program (**NSCP**) between 2007 and 2011.

The NSCP was announced by the Prime Minister in October 2006. Under the NSCP, the Commonwealth promised to invest up to \$30 m annually for 3 years for the provision of chaplaincy services in schools, to a maximum of \$20k per school per year. This was later extended to additional funding of \$42 m for the school years 2010 and 2011.

The NSCP is administered by DEEWR (formerly DEST) through a series of funding agreements and a set of NSCP Guidelines. Participation in the scheme is voluntary for schools, and is also voluntary for students within a school that has decided to participate in the program.

The Guidelines defined a ‘*school chaplain*’ as a person who is recognised, either by the school or by reason of qualification or endorsement as a person having the skills and experience to deliver a chaplaincy service. In particular circumstances, a school could employ a ‘*secular pastoral care worker*’ where a chaplain was not available.

The services included:

- (a) providing general religious and personal advice to those seeking it, and providing comfort and support to students and staff in times of grief.
- (b) supporting the creation of an environment of cooperation and respect and promoting an understanding of diversity and the range of religious affiliations and their traditions.

The funding arrangements

- The School applied for, and received funding from, DEST for a chaplaincy service in early 2007.
- The Commonwealth then entered into the Darling Heights Funding Agreement with SUQ on 9 November 2007 (***the Funding Agreement***). It was later extended to 31 December 2011. The features of the Funding Agreement are:
 - The Commonwealth pays SUQ for the provision of chaplaincy services by SUQ to the school and the performance of other obligations such as a Code of Conduct (for the chaplains) and reporting and auditing obligations.
 - The Code of Conduct and the NSCP Guidelines form part of the Funding Agreement.
- The defendants pleaded that appropriations had been made for the NSCP, but the Commonwealth parties identified the *Appropriation Act (no 3) 2006–2007* (Cth), whereas SUQ relies on an earlier appropriation statute.
- ‘Drawing rights’ out of the Consolidated Revenue Fund were issued under section 27 of the *Financial Management Act 1997* (Cth) in respect of the ‘administered item’ for an ‘outcome’ to be produced by DEST.
- SUQ issued a tax invoice to DEST, and the Commonwealth (through DEST) paid on that invoice.
- The procedure of (i) passing an appropriation statute; (ii) issuing drawing rights; and (iii) Commonwealth payment on a DEST invoice was repeated for all relevant years of the School’s chaplaincy program.

The Queensland government program

Some parties attributed significance to a set of Queensland government policies which provided a parallel source of funding, but which also, in part, ‘enveloped’ the federally-funded NSCP. (For example: SUQ argued that the cooperation of Queensland was in the NSCP allowed the scheme to be supported under the ‘implied nationhood power’ aspect of the executive power or as a s 96 grant).

The main features of the Queensland system were:

- Queensland published a policy permitting, but also regulating, the provision of chaplaincy programs in Queensland State Schools.
- SUQ had entered into an Agreement for the Chaplaincy Services with the State of Queensland.
- Queensland operated a State Government Chaplaincy/Pastoral Care Funding Program which was directed at funding chaplaincy services for State Schools.

Relief sought in the Amended Summons

Simplifying the language and proposition form of the Amended Summons, the relief sought was:

1. *Declarations:*

- a. That the appropriation statutes did not authorise the Commonwealth payment to SUQ pursuant to the Funding Agreement or the drawing of funds from Consolidated Revenue
- b. That the drawing rights were of no effect
- c. That the Funding Agreement was of no effect.
- d. That the Commonwealth lacks executive power to expend the funds under the Funding Agreement or any other agreement
- e. That the definition of ‘school chaplain’ under the NSCP Guidelines was void and of no effect.

2. *Injunctions:* restraining the various funding actions.

D — THE MAIN ISSUES

The striking feature of the hearing of this case, was the High Court’s willingness to consider a more restrictive view of the section 61 power than *any* of the parties had thought possible. *All* parties prepared written submissions and approached the hearing on the ‘orthodox’ assumption that the Commonwealth executive may only do that which has been, or could be, the subject of valid Commonwealth legislation.

This expectation was reversed *at the hearing*. All parties had to re–craft their submissions on the nature of the executive power. This affected the ‘architecture’ of the cases put in a very fundamental way.

Procedural reform query: When, after examining the papers, the Court forms the view that it wishes to consider a departure from settled law, and this is not known to the parties, procedural fairness would require adequate advance notice of that intention to the parties. This is particularly so in the case of ‘institutional’ parties which may require a longer timespan to obtain instructions. What would be a useful *standard internal and external procedure* for the Court to adopt for this purpose?

Structure of the plaintiff’s original argument

The plaintiff’s original argument contained these basic steps:

1. There is no valid appropriation. (If this is correct, the plaintiff would obtain most of the relief sought without having to proceed further).
2. But even if there is a valid appropriation, then the spending is beyond the Commonwealth’s executive power because —
 - a. it involves entry into a contract ‘in respect of matters other than those in respect of which the Constitution confers legislative power to the Commonwealth’
 - b. it involves something that is beyond the meaning of a ‘benefit’ in s 51(xxiiiA)
 - c. it involves an entity that is not a ‘trading corporation’ within the meaning of s 51 (xx).

3. Even if there is a valid exercise of Commonwealth executive power, the definition of ‘school chaplain’ under the NSCP Guidelines involves the imposition of a religious test as a qualification for an office under the Commonwealth, contrary to section 116 of the Constitution.

Plaintiff’s final position (‘Position E’ below)

Although the plaintiff retained steps 1 and 3 of his argument, step 2 had to be reformulated to accommodate the Court’s signalled departure from the ‘orthodox’ assumption. The plaintiff then put this position:

Even if there was a valid appropriation and no violation of s 116, then the Funding Agreement, and payments under it, were beyond the executive power of the Commonwealth, because:

- a. They involved action not authorised by legislation.
- b. They were not referable to that part of the executive power which is the residue of the sovereign prerogative powers (eg powers to declare war, make treaties etc).
- c. They were not referable to that part of the executive power labelled as the ‘implied nationhood power’ (*Pape and Davis v Commonwealth* (1988) 166 CLR 79).
- d. They were not contracts ‘incidental to the ordinary and well-recognized functions of Government’/ or ‘in the ordinary course of administering a recognized part of government’ (from *New South Wales v Bardolph* (1934) 52 CLR 455, 496 & 508). The latter expression should be tied to the ‘departments of State’ (Constitution s 64).

Issue 1 — The character of the section 61 power

This now turns out to be the fulcrum of the case. This is addressed separately in *Part E* below.

Issue 2 — The validity of the appropriation

Several issues arose to be considered under this heading:

- The significance of the distinction between ‘departmental items’ and ‘administered items’ and their respective relationship to stated ‘outcomes’ in the appropriation statutes supporting the NSCP — satisfaction of the test in *Combet v Commonwealth of Australia* [2005] HCA 61; (2005) 224 CLR 494.
- The interpretation of the phrase ‘the ordinary annual services of government’ in section 54 of the Constitution; and whether the appropriations covered expenditure on ‘new’ policies.
- The ability of the Court to use Parliamentary and Executive understandings of the requirement and what constituted compliance with the requirement: The significance of the ‘Compact of 1965’ and subsequent revisions of it to accommodate the ‘running costs’ system of appropriation and the accrual system of accounting (*Combet and Brown v West* (1990) 169 CLR 195, 211).

Issue 3 — The meaning of ‘benefit’ under section 51(xxiiiA)

- The significance, if any, of the indirect method by which the benefit was provided (ie payment under a contract between the Commonwealth and SUQ).
- What type of service to students would the section support? Would it support the provision of education services itself?
- Consideration of the historical context of the 1946 constitutional amendment: *British Medical Association v The Commonwealth* (1949) 79 CLR 201.

Issue 4 — The test for a ‘trading corporation’ under section 51(xx)

- This part of the argument entered into matters left undecided in *Australian Workers’ Union & Anor v Commonwealth (Work Choices Case)* [2006] HCA 52; (2006) 229 CLR 11 and, to a certain extent, *New South Wales v Commonwealth (the Incorporation case)* (1990) 169 CLR 482.

- The historical meaning of ‘trading or financial corporations’.
- The use of a *purposes test* (advocated by the Commonwealth) or an *activities test* (advocated by the plaintiff) or some mixture of the two to identify a ‘trading corporation’.

Issue 5 — The grant theory

SUQ put an argument in the alternative, that the Commonwealth executive action was referable to a grant to a State, under section 96 of the Constitution.

Issue 6 — Whether section 44(1) of the FMA Act¹ provided adequate legislative authority

The submission that FMA Act s 44(1) provided legislative authority for the Funding Agreement was a ‘last round’ submission put by the Commonwealth when it became clear that the Court would be looking hard to find legislative authority for the contract.

Issue 7 — Standing

- The Commonwealth accepted that as a parent of children attending the School, the plaintiff had standing to challenge the validity of the Funding Agreement and payments made under it.
- The Commonwealth challenged the nexus between this acknowledged standing and any ‘flow-on’ standing to challenge the appropriation itself and the issuing of drawing rights upon it.
- Some of the parties argued a constitutional ‘matter’ based concept of standing to suggest that anything related to past expenditure did not generate a ‘real controversy’ based on a right, an obligation or the determination of privilege or status (*In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 266-7).
- The Commonwealth relied on the interest formula in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27. The plaintiff relied on the broader test stated in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; 194 CLR 247.

Issue 8 — Section 116 of the Constitution

- Whether the ‘eligibility criteria’ in the NSCP Guidelines imposed a religious test for a ‘chaplain’. Whether a school chaplain engaged under the NSCP holds an office under the Commonwealth.
- Ironically if the plaintiff succeeds, he will succeed on the executive power point and the High Court might not need to determine the s 116 issue. The gap in executive power could be addressed by the Commonwealth through other means. And Mr Williams might have to consider a further challenge.

E — RECONSIDERATION OF THE NATURE OF THE EXECUTIVE POWER

The old assumptions

It is a commonplace that section 61 ‘describes’ but does not ‘define’ the executive power of the Commonwealth. Much of the older case law on the executive power developed —

1. Within the context of assumptions developed on the basis of *the AAP case* (1975) 134 CLR 338, that section 81 and 83 authorised spending. This meant that one did not have to find a source outside these sections for government spending.

This assumption was exploded in *Pape v Federal Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1: Section 81 & 83 *do not* confer a substantive spending power. The power to spend

¹ The *Financial Management and Accountability Act* 1997 (Cth).

appropriated moneys must be found elsewhere in the Constitution or in statutes made under it.

2. On the assumption that ‘the executive may only do that which has been or could be the subject of valid legislation’.²

This assumption was exploded in the hearing of *Williams*.

A taxonomy of the sources of executive power

Before examining the field of possibilities that may be opened up by *Williams*, it is useful to establish a taxonomy of the *sources* of executive power that the Commonwealth may exercise:³

1. Executive powers conferred under section 61, but also powers conferred on the Governor General by ss 5, 72, 58 and 68.
2. Executive powers conferred by statute.
3. Executive powers forming part of the ancient prerogatives of the Crown
4. Executive powers which derive from the status of the Crown as a person.
5. Executive powers deriving from Australian’s status as a nation (Mason J in *AAP*, *Davis*, *Pape*).

The argument in *Williams* focused on how category 4 could be accommodated within a new account of the content of section 61.

The possibilities

Towards the close of the hearing in *Williams*, Heydon J offered a helpful 4 position schema for classifying various theories of the section 61 power put by the parties.⁴

Position A — The broadest position

The capacities of the Crown as a person (including the power to spend and gather information) *are not limited by the federal division of legislative powers* effected by the Constitution in the way that the prerogative powers [category 3 above] are limited. ‘These [personal] capacities do not involve interference with what would be the rights and duties of others. Nor does the Commonwealth, when exercising such a capacity, assert or enjoy any power to displace the ordinary operation of the laws of the State or Territory in which the relevant acts take place. The exercise of the capacity does not of itself impose any obligation or purport to displace any rights or obligations existing under the ordinary law’.⁵

Position B — The ‘orthodox assumption’

In the exercise of its capacity as a natural person, the Commonwealth executive may only do that which has been or could be the subject of valid Commonwealth legislation.⁶

[This was the original fall-back position for the Commonwealth if Position A failed]

² *Victoria v Commonwealth* (‘the *AAP* case’) (1975) 134 CLR 338, 362–3 (Barwick CJ). See also 134 CLR 338 at 378–9 (Gibbs J), 396–7 (Mason J); *Davis v Commonwealth* (1988) 166 CLR 79, 93–4 (Mason CJ, Deane and Gaudron JJ), 103 (Wilson and Dawson JJ), 110–11 (Brennan J); *Ruddock v Vadarlis* (‘the *Tampa* case’) [2001] 1329, [176], [179]–[180], [183], [192] (FFC, French J).

³ I have adopted the statement by A Twomey, ‘Pushing the Boundaries of Executive Power — *Pape*, the Prerogative and Nationhood Powers’ (2010) 34 *MULR* 280 which systematises some of the earlier academic commentary on the subject.

⁴ [2011] HCA Trans 199, 144–145.

⁵ Put in the Submissions filed by the Commonwealth Defendants (D1–D3) on 11 July 2011, [41].

⁶ This position was assumed by all parties at the commencement of the hearing. The Commonwealth treated this position as the ‘fallback’ to Position 1.

Position C — A further intermediate position for the Commonwealth⁷

The executive power of the Commonwealth to spend does not require legislation, because it is limited by the following features of the constitutional system —

- (i) The system of responsible government implied by section 64.
- (ii) Parliamentary control of the Executive (section 83).
- (iii) Auditing and review of the Executive (section 97) and other parliamentary controls over Commonwealth expenditure.
- (iv) The entrenched jurisdiction of the High Court (ss 75(iii) and 75(v)).

This was the position that the Commonwealth put as a further fall-back position should the orthodox assumption be withdrawn. It is in fact broader than Position B.

Position D — The Queensland position

As best as I can reconstruct it from the transcript,⁸ this position was as follows:

- (i) All of the content of category 3 executive power (the historical prerogatives) should be reallocated to category 5 (implied nationhood powers).
- (ii) All aspects of executive power are subject to the federal division of legislative powers effected by the Constitution.
- (iii) What falls within category 4 (the natural capacities of the Commonwealth) can only be exercised pursuant to legislative authority *except for* where executive action is required for ‘the execution or maintenance’ of a Commonwealth statute.⁹

To Heydon J’s taxonomy, one must now add the plaintiff’s revised position:

Position E — the plaintiff’s *Bardolph* exception position

The capacities of the Commonwealth can only be exercised pursuant to legislative authority except for contracts necessary for the ‘departments of State’ (cf Constitution s 64) ‘as are incidental to the ordinary and well-recognized functions of Government’/ or are ‘in the ordinary course of administering a recognized part of government’.

⁷ The need for such a position was put by members of the Court to the Commonwealth at [2011] HCA Trans 199, 144–146. This placed the Commonwealth in the difficult position of seeking to suggest its own limits in the alternative, rather than meeting a limit formulated by an opponent in this middle ground.

⁸ This position was put in oral argument only: [2011] HCA Trans 199, 97–113.

⁹ This was put as an alternative to the formula in *New South Wales v Bardolph* (1934) 52 CLR 455 regarding action ‘in the ordinary course of government administration’.

Idle thoughts on a new executive power theory while waiting for judgment

1. *Judicial Review of non-statutory executive action*

Of late, the Court seems to be avoiding confrontation with the question whether exercises of non-statutory executive power are subject to judicial review. See, for example: *Plaintiff M61/2010E & Anor v Commonwealth of Australia* [2010] HCA 41; (2010) 243 CLR 319, [15], [36], [52], [61], [67]–[74]. In England, it is clear that exercises of non-statutory power are subject to judicial review.¹⁰ But in this country, a ‘common law’ account of the judicial review power would have to be squared with the Constitution.¹¹

Is the Court pushing as much executive action onto a statutory base, and by this means pushing judicial review of executive action onto the ‘implied legislative intention’ theory of judicial review? See transcript: [2010] HCA Trans 198, 41–42.

Can the Commonwealth maintain Position C and still hope to make the submission that it made in *Plaintiff M61* that no such review is available?

2. *Weakness of the ‘ordinary services of government’ exception in *Bardolph**

Enid Campbell exploded the *Bardolph* distinction based on the ‘ordinary’ course of government administration in 1970, and every other academic commentator has followed that lead.¹² It is not a good idea to resurrect it.

The distinction does not work because both (i) the functions of government and (ii) the institutional arrangements for their performance, are historically fungible (‘small government’/‘big government’; the corporatisation of departments, government by contract etc).

3. *Loose flanks: The nationhood power and s 51(xxxix)*

After *Pape*, the implied nationhood aspect of the executive power (category 5) is ‘ill-define’ and ‘ill-confined’.¹³ The argument in *Williams* indicated that the Court was not concerned with tightening the definition of this aspect of the power. It will be an odd result if this aspect of the power is left wide open, while category 4 is pegged down more tightly to legislation.

In addition, any new theory of section 61 will have to develop a theory of its interrelation with section 51(xxxix) so that the limit on the power is not subverted.

4. *Executive action to enter into and implement intergovernmental agreements*

The Court expressed concern for the categorisation of the executive power needed to enter into these agreements. If they are not in category 3 (the prerogative), they must be in category 4 (natural capacities). Will they always require legislation?

16 February 2012

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¹⁰ See generally: M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed, 2009), ¶3.55; and N Seddon, *Government Contracts: Federal, State and Local* (4th ed, 2009), ¶¶8.12–8.13.

¹¹ See, for example: B Selway, ‘The Principle Behind Common Law Judicial Review of Administrative Action - The Search Continues’ (2002) 30 *FL Rev* 217.

¹² E Campbell, ‘Commonwealth Contracts’ (1970) 44 *ALJ* 14. See generally Seddon (above n 10), ¶2.6.

¹³ Twomey, above n 3, p 280.

APPENDIX — RELEVANT CONSTITUTIONAL PROVISIONS

51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

...

(xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;

...

(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

...

54 Appropriation Bills

The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

...

61 Executive power

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

...

81 Consolidated Revenue Fund

All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

...

83 Money to be appropriated by law

No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law....

...

96 Financial assistance to States

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

...

116 Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.