The result in Williams 2 turns primarily upon a head of legislative power not often judicially considered – s 51(xxiiiA). At the same time it is the final instalment in a trilogy of recent decisions which have undone the hitherto ‘common assumption’ about the Commonwealth’s executive power to contract and spend. I want to address both these aspects of the Williams 2 case before considering its subsequent impact on parliamentary scrutiny. I also begin by acknowledging that my comments draw upon collaborations with my colleagues Shipra Chordia and George Williams.

Facts

As the law challenged in Williams 2 was swiftly enacted in direct response to the result in Williams 1 in 2012, it makes sense to briefly recap. As I am sure everyone recalls, in Williams 1 the Court held 6:1 that an agreement by which the Commonwealth paid Scripture Union Queensland for the placement of chaplains in schools was invalid. The agreement was one made under the National School Chaplaincy Program, a 2006 non-statutory initiative of the Howard government that continued under Labor. Mr Williams succeeded in his challenge when the Court ruled that, excepting certain circumstances, the Commonwealth executive requires statutory authority to enter into contracts for the expenditure of public monies.

In reaching that conclusion, four members of the majority dismissed the so-called ‘common assumption’ that the Commonwealth’s executive power essentially correlated or ‘mapped’ the areas identified as within its legislative capacities. For the other two members, Justices Hayne and Kiefel, the chaplaincy program’s invalidity
could be determined without setting aside the common assumption since the Commonwealth lacked legislative power to enact the scheme. In addressing that specific question they essentially foreshadowed the Court’s judgment in *Williams 2*.

The Gillard government, keen to shore up the chaplains plus over 400 other Commonwealth spending programs, responded to *Williams 1* by amending the *Financial Management and Accountability Act 1997* (‘the FMA’). New section 32B aimed to provide statutory authorisation for arrangements under which public money was, or may become, payable by the Commonwealth…for the purposes of those programs specified in the regulations. Despite considerable scepticism – most relevantly voiced by the then Shadow Attorney-General, Senator Brandis – as to its sufficiency as a cure for the doubt *Williams 1* cast over many of those spending programs, the legislation was passed.

In due course, Mr Williams returned to the High Court in a second bid to remove the chaplains from his children’s Toowoomba school, this time challenging the legislative response to his initial victory. He again succeeded in a case decided by a joint judgment of Chief Justice French and Justices Hayne, Kiefel, Bell and Keane, with a short concurrence from Justice Crennan.

**Preliminaries**

I do not wish to reflect on the issue of Mr Williams’ standing, beyond merely noting that the Commonwealth conceded the point and the Court’s acceptance of that was eased by its view that the broader aspect of Mr Williams’ challenge – that s 32B was wholly invalid as an impermissible delegation of legislative power – was unnecessary to decide. Confining the question to the validity of the chaplains program not only
simplified the standing issue but also reflected that the programs listed in Sch 1AA of the regulations were in fact placed there directly by Parliament.

At the time of its enactment, section 32B was described by Senator Brandis as both an ‘umbrella form of statutory validation’ and a ‘fig-leaf’ – rather contradictory images but neither of them meant kindly. To the extent the words of the provision literally purported to supply the power to make a grant or pay money ‘if, apart from this subsection’ the Commonwealth lacked it, s 32B was, unsurprisingly, read down by the Court in *Williams 2*. The section may provide the statutory authorisation required by the Court in *Williams 1* but only so far as those acts of expenditure to which it applies are otherwise within the legislative competence of the Parliament. It remains necessary to identify the source of constitutional power which sustains that provision in concert with the relevant program in the regulations – in this case, being the chaplaincy program.

**Benefits to students**

The power primarily submitted by the Commonwealth as supplying that validity was that element of s 51(xxiiiA) which empowers laws for the provision of ‘benefits to students’. The ‘objective’ of the program stated in the FMA Regulations was to assist ‘school communities to support the wellbeing of their students’. Similar language was used in various iterations of the scheme’s guidelines – and signalled a problematic breadth of the scheme beyond the scope of simple ‘benefits to students’.

Two previous authorities underpinned the Court’s approach. In *British Medical Association v The Commonwealth* (1949) (‘the BMA Case’) McTiernan J defined ‘benefits’ as ‘material aid given pursuant to a scheme to provide for human wants’. That material aid may be provided in various ways; as ‘a pecuniary aid, service,
attendance or commodity’. That view was endorsed in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987). In that case the Court was flexible about what exactly constituted the ‘benefit’ - money paid to the service provider or the services themselves as the quid pro quo for that payment. What mattered was that ‘the intended ultimate beneficiary of the benefit was a particular patient: the identified patient in respect of whom a particular payment was made’.

In *Williams 2*, the Court distinguished the funding of school chaplains from ‘benefits’ in these earlier cases, since it ‘does not provide material aid in the form of any service rendered or to be rendered to or for any identified or identifiable student’.

Then there was the *nature* of the benefit itself. The joint judgment said this must be aid ‘to or for individuals for human wants arising as a consequence of the several occasions identified’ – unemployment, illness and so on. The chaplains program was rejected as a service directed to the consequences of being a student. Its aims may be desirable, but seeking to achieve them in the course of the school day did not suffice to render the payments to chaplains a ‘benefit to students’.

The only caveat Crennan J applied through her separate concurrence is on this point. Her Honour wished to emphasise that the Court’s decision need not depend on a view that the services of student welfare workers or counsellors ‘could not be the subject of a federal government scheme within the scope of s 51(xxiiiA)’.

An alternative approach to these questions was demonstrated by Heydon J’s dissent in *Williams 1*. He adopted the broader conception of ‘benefit’ expressed by Dixon J in the *BMA Case* as meeting ‘needs arising from special conditions with a recognised incidence in communities or from particular situations or pursuits such as that of a student’. However, Heydon J’s elision between providing benefits to persons as a
consequence of them being students and providing benefits to students whose
vicissitudes are perhaps ‘more connected with the fact of being a young person’ but
‘may be rendered more acute by the school environment’ seems problematically
open-ended.

In that case, Hayne and Kiefel JJ were more direct than the joint judgment in
*Williams 2* about the danger. Hayne J said: ‘If ‘benefits’ to students encompasses
every form of payment that provides advantage, the power … is a large power which
approaches a general power to make laws with respect to education.’ A slightly
different way of expressing the same risk is that the power becomes akin to a
‘persons’ power’ enabling anything that the Commonwealth submits is beneficial to
anyone who is within the class of persons who are ‘students’.

Additionally, in *Williams 1*, both judges stressed the context in which s 51(xxiiiA) was
added to the Constitution in 1946. Hayne J described it as ‘a constitutional
amendment evidently intended to provide federal legislative power with respect to
the provision of various forms of social security benefit, including benefits which were
then and for some time had been provided by the Commonwealth’, while Kiefel J
quoted the Attorney-General’s second reading speech expressly on that same point.
It is striking how devoid of that material is the joint judgment in *Williams 2*. Not only
is that odd given the rarity with which the Court examines constitutional provisions
affected or introduced by amendment, but also Heydon J had presented an
alternative reading of the history to advance his preferred interpretation of the power.
In *Williams 2* it fell to Crennan J to refer to the origins of the provision and connect its
apparent purposes to the articulation of the power by McTiernan J in the *BMA Case*. 
The joint judgment’s reticence on the historical purpose of s 51(xxiiiA) inevitably makes starker the question of whether the Court has interpreted the relevant text ‘with all the generality that the words used admit’. In *Williams 1*, Justice Heydon claimed that principle was offended by treating the absence of express Commonwealth legislative power over education as a reason for limiting the meaning of s 51(xxiiiA). The joint judgment in the 2014 case avoids any direct suggestion that its reading of the Commonwealth power is influenced by such considerations. More broadly, we might reflect on the contrasting methodology in answering the different questions in the respective *Williams* decisions: federalism was rampant throughout the majority opinions in *Williams 1*, but with the primary focus in *Williams 2* on the Commonwealth’s legislative power, any importance it has as an overarching interpretative consideration was distinctly muted.

What we are left with is an exposition of the ‘benefits to students’ aspect of s 51(xxiiiA) which is heavily reliant on precedent – fairly old and not much of it. The trouble with that approach is that (1) a richer account was certainly possible – the persuasive candour of Hayne and Kiefel JJ’s separate opinions in *Williams 1* appears to have been sacrificed to the blandness of collective decision-making; and (2) it fails to satisfy those who are critical of the consequence. In that camp is Melbourne’s [Professor Simon Evans](#) who has lamented the twin limitations applied to the power. As to the focus on individual recipients of benefits, Evans, writing as much as a senior university administrator as a professor of constitutional law, remarked that modern ‘education policy has sought to address the implications of the fact that student learning is embedded in a wider social context, of family and community’. On the requirement that the benefit meet ‘human wants’ stemming from one’s status as a student, Evans is surely correct that what this means is far from
clear cut in respect of many programs. His final assessment of McTiernan J’s understanding of the power – presented as so determinative in Williams 2 – was as ‘rather time worn, reflecting the thinking about welfare at the dawn of the modern welfare state’ – with nothing to commend its adoption in 2014.

Those criticisms have a force that I think stems largely from the joint judgment’s reticence about matters of history and principle in its interpretation of the power. Addressing these more directly might have resulted in a more satisfying explanation of why the many ways in which the Commonwealth has become accustomed to spending in education cannot now be easily shoehorned into s 51(xxiiiA).

**Reopening Williams 1 and Executive Power**

I turn now to the attention given to executive power in Williams 2. This can be brief because much of what was said was simply an affirmation of Williams 1 – albeit with the greater clarity of a single voice.

The Commonwealth attempted to reopen that decision on four grounds, each of which was tersely dismissed. The tenor of this part of the joint judgment is best captured by its rejection of the final ground, that Williams 1 had caused ‘considerable inconvenience’, as revealing ‘no greater content than that the Commonwealth parties wish that the decision…had been different’.

The Court nevertheless went on to explain the flaws in the Commonwealth’s substantive arguments. The Commonwealth had submitted that Williams 1 was wrong to decide that executive spending required legislative authorisation, saying there were only seven limitations on that power. These were broadly structural in character and the bench was dissatisfied by the lack of any limitation by reference to
the *areas or subjects* upon which the Commonwealth may spend or contract. When pressed, the Commonwealth said that *if* such a limitation was considered necessary, then:

[E]xecutive power to contract and spend under s 61 of the Constitution extends to *all* those matters that are *reasonably capable* of being *seen* as of national benefit or concern; that is, *all* those matters that befit the national government of the federation, *as discerned from the text and structure of the Constitution*.

The joint judgment responded that ‘[i]t is hard to think of any program … which the Parliament would not consider to be of benefit to the nation’. Essentially, the argument was a repetition of the Commonwealth’s broader submission in *Williams 1*, itself an adaptation of arguments going back to the *AAP Case* (1975) on the meaning of ‘purposes of the Commonwealth’ in s 81.

Another aspect of the decision is worth highlighting. The Court discerned that the Commonwealth’s submissions as to the *content* of its executive power were premised on an assumption that this should be no less than that of the British Executive, before any limitations upon its *exercise* were applied. That premise was rejected as false. Warning against selectivity in looking to those constitutional provisions which highlighted the historical connection to British constitutional practice, the Court was explicit that ‘the determination of the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must be the same as the ambit of British executive power.’

**What of the Future?**
Having funded chaplain providers in advance for all of 2014 the Abbott government had a window in which to consider its options. It kept that window open (and chaplains in schools) by waiving the debt to the Commonwealth arising from the ruling that the payment was invalid. Although it appeared reluctant to abandon the direct funding of chaplains, after two defeats it was clear that section 96 grants to the States were the surest way forward.

Adapting the program so as to secure it under the corporations power – which the Scripture Union had unsuccessfully raised in *Williams 2* – was not tempting. Quite apart from the scale of the changes necessary to give the program a regulatory flavour, the uncertain status of chaplaincy providers as ‘constitutional corporations’ would risk giving the Court cause to revisit what it referred to as the ‘larger questions left open in the *Work Choices Case* about the meaning of “trading or financial corporations formed within the limits of the Commonwealth”,

All six States, the ACT and the Northern Territory have now accepted grants of Commonwealth funding to support chaplains in their schools. The government has made it a condition that the chaplains are adherents to a religious faith, undoing Labor’s earlier expansion of the program to cover secular counsellors and social workers. This has met with complaint, especially from schools which have had to let go secular chaplains who had become part of their community over the last few years. But the Education Minister’s defence of this outcome is that the provision of school counsellors and social workers is not a Commonwealth responsibility.

So far as the constitutionality of other programs is concerned, many are clearly able to be connected to constitutional power, but more than a few are precarious. Most vulnerable are those concerning the environment, localised infrastructure, sport and
arts. Senator Brandis – in perfect contradiction to his reaction to Williams 1 – described the claim by the Labor Opposition that Williams 2 had implications for programs other than the chaplains as ‘erroneous and ignorant’. What’s more he has preserved the Labor government’s response to Williams 1, with amendments passed quickly in June to rollover s 32B and its dependant regulations as the Financial Framework (Supplementary Powers) Act.

After the Pape decision, Duncan Kerr, then a former senator and now a Federal Court judge, said the nature of government is that it will not respond to constitutional developments until such time as it is absolutely necessary. There are now signs we have reached that point and the full ramifications of the Williams litigation are biting.

There are occasional reports of government departments ending programs because they cannot satisfy the Williams requirements. An example reported before Christmas was the Defence department’s withdrawal of funding, already pledged for 2015, from a high school education program in maths and science problem-solving.

Additionally, in August the Senate’s Standing Committee on Regulations and Ordinances considered new programs added to Sch 1AB of the FMA Regulations. These ranged across eleven ministerial portfolios and included online language learning for preschool children, the Solar Towns Programme, support for the car manufacturing industry, and the loan from the UK government of the original chart of Australia made by Captain Matthew Flinders. The Committee said that ‘in light of Williams (No.2), the Explanatory Statement for all instruments specifying programs for the purposes of section 32B should explicitly state, for each new program, the constitutional head of power that supports the expenditure.’
The Minister for Finance responded in November by acknowledging that the result of the two Williams decisions is that spending activities will often require legislative authority in addition to an appropriation. But he went on to say that ‘the Government does not agree, however, that this means explanatory statements must in effect set out the constitutional and other legal reasoning taken into account in formulating legislation and expenditure programmes.’ The Minister provided a table listing the source of power claimed in respect of each of the new 54 programs in the instrument but signalled the government would not be doing so as a matter of course.

In response the Committee dug its heels in, repeating its expectation that the ES accompanying further delegated legislation involving expenditure will explicitly state the supporting head of constitutional power. It pointed out that Senate Standing Order 23 requires the committee to ensure that such instruments do not breach a number of scrutiny principles, the first of which is that they are made in accordance with their authorising Act – and also any constitutional requirements.

In its December report, three new items added to Sch 1AB via the s 32B mechanism were considered by the Committee. For only one of them did the ES identify the source of constitutional power. Of the other two, one is a grant to fund the operational costs of the National Office of Life Education Australia associated with the ongoing development and implementation of school-based student resilience and wellbeing programs and resources for schools. It will be interesting to see the Minister’s response to the Committee’s request to identify the power supporting this expenditure.

In conclusion, although Bryan Pape and Ronald Williams both failed, in different ways, to get the outcome they sought from their trips to the High Court, the extent of
their success in challenging the previously unbounded practice of Commonwealth spending is now hitting home. In *Williams 2* the Court made it clear that it was not for turning. Now the executive and the legislature are starting to adapt – in their own distinctive ways – to the new order.