The High Court’s New Spectacles
Questions after the School Chaplains Case

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Introduction

I’d like to thank Stephen McDonald, who is my co-author in an upcoming article on the *Williams* decision in the *Sydney Law Review*, from which many parts of this paper are drawn.¹

Federation heralded a new constitutional order in Australia. The new Constitution carefully divided the legislative powers between the Commonwealth and the States. But it left the division of executive powers between them largely unclear. Since Federation, it had generally been accepted, and reflected in the Commonwealth’s conduct, that the Commonwealth’s executive power extended at the least to the power to spend and contract within the spheres of the Commonwealth’s legislative competence. This was largely informed by a *British* understanding of the responsibility of the Executive to the Parliament and the nature of the Executive itself. In *Williams*, the majority of the High Court reminded us that it is now through *Australian* spectacles that we must view our constitutional provisions.

Factual Background

Ron Williams sent four of his children to the Darling Heights State School. In April 2007, the School successfully applied for a federal grant for its school chaplaincy program, which was run by the Scripture Union Queensland, an incorporated body.

In November 2007, the Scripture Union entered into an agreement with the Commonwealth Government to provide chaplaincy services to the Darling Heights School – The Darling Heights Funding Agreement. The Queensland Government had previously and continued to provide funding to the Scripture Union for the provision of the same services.

The Darling Heights Funding Agreement was part of the National School Chaplaincy Program, a Commonwealth policy relying for support only upon the annual appropriation legislation and the Commonwealth’s executive power.

The Agreement incorporated the National School Chaplaincy Guidelines. It was for the provision of services that included ‘general religious and personal advice to those seeking it, comfort and support to students and staff, such as during times of grief.’

Mr Williams objected to the religiosity of the program, provided at public expense, at a public school at which his children attended. In 2010, he commenced a High Court challenge against it.

Nature of the challenge

The three main issues that fell for consideration in the challenge were:

1. Whether Mr Williams had standing to challenge the validity of the Funding Agreement and payments made under it?
2. Whether the Funding Agreement was invalid on the basis it was prohibited under s 116 of the Constitution, and specifically that the religious qualifications of a chaplain amounted to requiring a ‘religious test’ as a qualification for an ‘office under the Commonwealth’?
3. Whether the funding Agreement was supported by the executive power of the Commonwealth under s 61 of the Constitution?

In a 6:1 decision it was held that the Commonwealth’s entry into the Agreement was not supported by the executive power and therefore it, and payments made under it, were unconstitutional. French CJ wrote separately, Gummow and Bell JJ wrote a joint judgment and Crennan, Hayne and Kiefel JJ also wrote separately; Heydon J dissented.

Standing

The approach of the majority to the question of Mr Williams’ standing to challenge the agreement deserves greater attention than I will be able to give it today.

Gummow and Bell JJ (with whom French CJ, Hayne, Crennan and Kiefel JJ agreed) held that, because the plaintiff’s contentions were extensively supported by the intervening Victorian and Western Australian Attorneys-General, who unquestionably would have had the standing to challenge the constitutionality of the Agreement, ‘the questions of standing may be put to one side.’ This reasoning has the potential to dramatically increase constitutional litigation if it starts to be applied generally.

Section 116 of the Constitution

Unanimously, the High Court dismissed the argument that the Funding Agreement was invalid on the basis of s 116. The judges did not accept that the Commonwealth’s funding to the Scripture
Union, which employed and paid the chaplain, was a sufficiently close relationship to make the office one ‘under the Commonwealth’ so as to engage s 116. Gummow and Bell JJ (with whom French CJ, Hayne and Kiefel JJ agreed) referred to the fact that the chaplain was engaged by the Scripture Union, controlled and directed by the school principal, and had no contractual relationship with the Commonwealth. Similarly, Heydon J noted that the Commonwealth could not appoint, select, approve, dismiss or direct the chaplains.

The finding narrowly interprets s 116, and may also have implications for the High Court’s supervisory jurisdiction in s 75(v) of the Constitution in respect of persons employed by private service providers engaged by the Commonwealth.

**Legal Background to Executive Power**

Before Federation, the Australian colonies’ executive power was sourced in the English Crown, exercised in limited form by local Governors.

The powers of the English Crown are divided into three categories.

1. The powers bestowed directly by statute
2. The powers, privileges and immunities the Crown enjoys alone – Blackstone’s ‘prerogative’
3. The powers shared in common with other legal persons – Blackstone’s ‘common law capacities’

After Federation, the source and extent of the Crown’s powers in the different jurisdictions were complicated by the overlay of the Commonwealth Constitution and the creation of a federal system.

How was the executive power divided between the two levels in the constitutional order? The framers of the Constitution left the matter unclear, defining the Commonwealth executive power in s 61:

> 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.

Until 20 June 2012, the date of the *Williams* decision, it was generally accepted – including by the Commonwealth as demonstrated by its policies and actions – that the Commonwealth’s executive power had the following aspects:

(a) Powers reasonably necessary for the execution and maintenance of constitutional provisions and Commonwealth laws.
(b) Prerogatives appropriately exercised by the Commonwealth

(c) The ‘nationhood’ dimension of the executive power – a power enabling the Commonwealth to engage in activities ‘peculiarly adapted to the government of a nation and which otherwise cannot be carried on for the benefit of the nation’ (Justice Mason in the AAP Case).

(d) The common law capacities, at least in so far as they followed the breadth of the Commonwealth’s legislative powers.

In 2009, the High Court held in *Pape v Federal Commissioner of Taxation* that a parliamentary appropriation passed as required by ss 81 and 83 of the Constitution was not the source of the Commonwealth’s capacity to spend monies. In *Pape*, the High Court told us that the source of this capacity had to be found elsewhere. After *Pape*, it was assumed that the capacity to spend could either be sourced in the nationhood dimension of the executive power, or in the common law capacities of the Crown. In *Pape*, a majority accepted that a legislative spending program that formed part of a national stimulus package responding to the Global Financial Crisis was supported by a combination of the nationhood dimension of the executive power and the incidental power. In *Williams*, it was thought that the capacity to spend money on the National School Chaplaincy Program would be supported by the common law capacities.

Prior to *Williams*, the breadth of the common law capacities of the Commonwealth executive had not been definitively expounded by the High Court. It had been accepted – by commentators, practitioners and the Commonwealth itself – that its breadth at the least followed the contours of the Commonwealth’s legislative power. That is, the Commonwealth possessed those capacities that could be given statutory authority by a valid Commonwealth law, even if no such law existed. This gave rise to the quest for a ‘hypothetical law’. This position was referred to by Heydon J as the ‘common assumption’.

The common assumption was held by all the parties in the *Williams* litigation – right up until the first day of hearing.

**The Commonwealth’s Two Arguments**

The Commonwealth had made two arguments about the breadth of its capacities. One was the breadth based on the common assumption – and an argument that the Funding Agreement could be supported by a hypothetical law with respect to s 51(xx) (the corporations power) and/or 51 (xxiiiA) (student benefits power).
The second submission was broader still – the executive power of the Commonwealth extended to all of the capacities of an individual, unlimited in its breadth. The argument was advanced on the basis that the exercise of the capacities creates no legal rights or duties, and creates no laws that would engage s 109.

All of the judges, with the exception of Heydon J (who did not decide the point) rejected this second, ‘unlimited capacities’ argument. This left the common assumption. A majority (French CJ, Gummow and Bell JJ and Crennan J) also rejected the common assumption. Heydon J accepted it. Hayne and Kiefel JJ found it unnecessary to decide the point because, in any event, they could find no valid ‘hypothetical law’ that would support the Funding Agreement.

After Williams, it appears that the executive power now incorporates the following aspects:

(a) Powers reasonably necessary for the execution and maintenance of constitutional provisions and Commonwealth laws.
(b) Prerogatives appropriately exercised by the Commonwealth
(c) The ‘nationhood’ dimension of the executive power. This may, as in Pape, extend to Commonwealth spending in some circumstances
(d) Spending, in the absence of statutory authority, in connection with the ‘ordinary and well-recognised functions of government’. The precise scope of this expression is unclear. It might be limited by spending and contracting in the course of administering a government department under s 64, or Crennan J hinted that it may be spending that relates to ‘the ordinary services of the Government’ under ss 53 and 54 of the Constitution – although this phrase has previously considered to be defined through parliamentary compromise, and the words do not therefore appear to be particularly amenable to operate as such a criterion.
(e) The other common law capacities – these were not considered in Williams, and I believe that given the concern the judges evinced about the particular nature of spending – and its potential to be used to regulate conduct and achieve policy objectives, and its origin as public monies – these probably remain unchanged.

The majority rejected the argument that the Commonwealth’s entry into the Darling Heights Funding Agreement and the spending under it could be undertaken without statutory authority – that is, it did not fall within (c) or (d).

The majority’s decision was heavily influenced by two strands of reasoning that drew on “federal considerations” and responsible government respectively. The majority emphasised the need to look at the context and structure of the Constitution, and focussed on a number of constitutional
provisions and features. However, I would submit that after reading the judgments one is left with the sense that the Court was actually looking beyond these constitutional features to the way that the federation and the Parliament is operating – that is, the outcomes seem heavily influenced by our working Constitution.

Turning first to “federal considerations”, the particular constitutional features that the High Court relied upon were:

1. The role of s 96 of the Constitution and the ‘bypassing’ of this mechanism by direct funding programs, and therefore the bypassing of the States’ ability to consent to and thereby control, negotiate or influence Commonwealth spending, and also the Parliament and the Senate. This position requires understanding s 96 as performing a role in the Constitution as a restrictor giving rise to a negative implication, rather than seeing its inclusion as facilitating grants to the States.

2. The role of the Senate as the ‘States’ House’ and the limits on the powers of the Senate with respect to appropriation under s 53 and therefore its limited capacity to supervise executive spending through this process.

The majority doesn’t actually appear to engage with what they identify as a weakness in the Senates’ powers under s 53 of the Constitution. The solution of the majority still accepts that the Commonwealth must be able to spend funds in the absence of statutory authority in connection with the ordinary and well-recognised functions of government. Thus the Senate is still limited in its supervision of this type of spending.

The majority position also seems to ignore the Senate’s prior disinclination to properly supervise the Executive’s spending through the mechanisms it does have available to it – namely the appropriations process and the Parliament’s overarching powers to regulate non-statutory executive power. It’s not necessarily that the Senate doesn’t have the power to supervise Cth spending, it’s that it has chosen not to.

Perhaps, the judges are expressing a more general concern with the appropriations process in Australia, and particularly the use of broad purposes to express appropriations (albeit this is a practice the High Court endorsed and no doubt thereby encouraged in Combet v
Commonwealth). In Williams, High Court is giving the Parliament a second opportunity to scrutinise executive spending.

3. The ‘impact of Commonwealth executive power on the executive power of the States’ and the possibility of conflicts between exercises of State and federal executive power that don’t engage s 109.

This argument overlooks the non-coercive nature of the capacities – their inability to create rights and duties that would create a conflict with the exercise of State executive power; it also overlooks the States’ ability to regulate the Commonwealth’s capacities, at least within constitutional limits of the Cigamatic doctrine.

What the judgments focus upon, rather, is the increased use, in practice, by the Commonwealth executive to achieve policy objectives, and regulate the conduct of individuals, through its contractual and funding programs, in areas of concurrent Commonwealth and State power and even outside the legislative competency of the Commonwealth. These operate beyond the supervision of the Parliament (and the Senate) and outside of s 96. Perhaps, again, the judges are expressing concern about the current operation of the federal system and closing a loophole being exploited by the Commonwealth.

These first three arguments each focus upon the need for the States to be more involved in the supervision of the Commonwealth executive’s spending – whether that be through the funnelling of Commonwealth expenditure through the States using s 96, or engaging their elected representatives in the Senate to supervise Commonwealth spending.

4. The final feature stands alone somewhat. French CJ, Gummow and Bell JJ refer to the fact that some s 51 powers, such as the taxation power (s 51(ii)) would permit legislation that could not be the subject of executive action – that is, some s 51 powers are ‘inapt’ for exercise by the Executive. I can’t see how this is a question of breadth and not of depth. For example, while it must be accepted that the Executive cannot levy taxes in the absence of statutory authority, that still leaves activities such as funding the employment of tax advisers in large workplaces in the lead up to tax time.
The central tenet of the reasoning that drew on responsible government, the second strand, was that the Parliament, as the directly elected representatives of the people, must have control over the expenditure of moneys by the Executive. The striking feature of this part of the judgments, was that the judges were insisting on control beyond the British understanding of requiring a parliamentary appropriation. The insistence on more supervision seems therefore to be a reaction to a perceived inadequacy of the current use of appropriations by the Parliament.

A further ‘accountability’ consideration evident in the judgments is the public nature of the moneys spent by the Commonwealth Executive – which differentiates the government from a natural person, breaking the analogy on which the common assumption rests and highlighting the need for parliamentary supervision.

**A New Understanding of Commonwealth Executive Power**

I am going to conclude by making some observations about where I think Williams leaves our understanding of the Commonwealth executive, and the Commonwealth executive’s spending power. Much is still unknown. There is the potential for the decision to impact the State Executive. I have struggled a lot with this question. There were many strings to the bow of the majority judgments, and it is hard to know to what extent the outcome was dictated by any one over the others. Some of the strings apply to the States. Others wouldn’t. There is also the impact on the other common law capacities of the Commonwealth Executive is also another unknown, although as I have already said, I doubt that these will be impacted just due to the nature of the majority’s concerns with the spending power).

The new limits on the Commonwealth’s executive power take us away from a British conception of the Crown. Was this what the framers intended? I think you can read the debates in one of two ways.

1. There is evidence that the framers intended section 61 to pick up the powers of the English Crown.
2. There is also evidence however, that the framers were well aware that the adoption of English traditions, and particularly the relationship between the Executive and the Parliament, sat in tension with the principles of federalism, and they could not predict how they would operate.

Williams takes us away from the British traditions in the name of protecting federalism. Responsible government remains, but in a form unknown to the unitary British Constitution. Gummow and Bell JJ
tell us that 'constitutional coherence' is now key to understanding the Executive's powers under the Constitution. The majority reasoning in Williams directs us to three specific constitutional features that they say require the Commonwealth executive's spending power to be scrutinised by the States in one form or another.

However, I have tried to demonstrate that the conclusions of the majority don’t simply draw on the constitutional provisions or implications that may come from them. The judgments need to be understood against the broader concerns expressed by the judges about the practical workings of our federation today, and specifically the two aspects that I have already highlighted:

1. The extensive use, since the 1970s, of direct funding initiatives by the Commonwealth to regulate conduct without parliamentary oversight and in areas of competence held concurrently with the States, or even beyond the legislative competencies of the Commonwealth. Much of this spending is not necessary for the day to day functioning of the government, but is used as an alternative method to achieve the government’s policy objectives; and
2. The failure by the Cth Parliament to engage in any meaningful scrutiny of the government's expenditure through the appropriations process.

There are, however, other features of our working constitution that will operate to undermine the Court's objectives of increasing responsibility of executive spending to federal institutions. Reduced scrutiny of appropriations is a political choice that has been made by the Parliament, including the Senate, which has not operated in practice like a States house for a long time. If the passage of the legislation in response to the High Court’s decision in Williams is anything to go by, this is a decision that has translated across to how the Parliament will approach its new responsibility of providing parliamentary authorisation to government expenditure. Indeed, the Parliament has now delegated the role of authorising executive expenditure to the Executive itself.

The second feature is the weak financial position that the States find themselves in, and the broad interpretation given to s 96 of the Constitution. The financial position of the States is exacerbated by a VFI that can be traced back to decisions of the High Court; and the High Court is also responsible for the broad reading given to s 96, despite Dixon’s misgivings. In practice, the States have little room to negotiate, let alone control, grants from the Commonwealth using s 96.
If I am right, that it is concerns about the practical operation of our Constitution that lies behind the Court’s approach in Williams, maybe these other aspects of our working Constitution will be next to find themselves into the High Court’s sights.