

***WILLIAMS V COMMONWEALTH* AND THE SHIFT FROM RESPONSIBLE TO REPRESENTATIVE GOVERNMENT**

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The decision in *Williams v Commonwealth*¹ has significantly restricted Commonwealth executive power. The High Court held that the Commonwealth funding agreement in question must be authorised by valid legislation. In response, the *Financial Framework Legislation Amendment Act (No.3) 2012* (Cth) was passed in an attempt to provide legislative authority for a wide range of government programs placed in doubt by the decision. This comment briefly sets out the basis of the decision in *Williams* and explores the implications that a shift from executive to legislative power (and from responsible to representative government) will have for the role of the court in reviewing government expenditure.

Background

Under the Commonwealth Government's National School Chaplaincy Programme (the NSCP), the Scripture Union Queensland (SUQ), a public company incorporated under the *Corporations Act 2001* (Cth), was contracted to provide chaplaincy services to, among other schools, Darling Heights State Primary School in Queensland (the Agreement). SUQ also had a contract with the Queensland State government to provide similar services to Queensland state schools. Ronald Williams, the Plaintiff, whose children were enrolled at the School, brought proceedings against the Commonwealth, relevant Ministers and the SUQ challenging the authority of the Commonwealth to provide funding under the Agreement. Declaratory and injunctive relief was sought in the High Court's original jurisdiction under s 75(iii) and (v) of the *Constitution* and s 30 of the *Judiciary Act 1903* (Cth). An agreed amended special case was removed to the Full Court.² Each of the States intervened on the Constitutional questions raised, and the Churches Commission on Education appeared as *amicus curiae*.

The amended special case raised three key issues: (1) whether there had been a valid appropriation for the Agreement; (2) whether the expenditure of funds under the agreement was authorised by the executive power of the Commonwealth under s 61 of the Constitution; and (3) whether the Agreement infringed s 116 of the Constitution by establishing a religious test as a qualification for an office under the Commonwealth. The Plaintiff's standing to raise these issues was also questioned. The majority of the Court³ concluded that the Agreement was beyond the executive power of the Commonwealth, and that as such it was unnecessary to answer the questions relating to the appropriation of funds, but that it was not prohibited by s 116. The Plaintiff was held to have standing to raise those questions answered by the Court.

Government is different

The Commonwealth's ultimate submission claimed that the Executive enjoyed the capacity to contract and spend money lawfully available, in common with other legal persons,

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because this did not ‘involve interference with what would otherwise be the legal rights and duties of others’.⁴ This was unanimously rejected. Some judges drew a distinction between the *capacity* to enter into contracts on behalf of the Commonwealth,⁵ and the *power or authority* to do so. Others suggested that the expenditure of public moneys requires questions of contractual capacity ‘to be regarded “through different spectacles”’.⁶

The judges therefore accepted that the role of the government in the expenditure of public funds was substantively different from consensual arrangements entered into by non-government persons. The government contract was recognised as a powerful regulatory tool⁷ which gave rise to a ‘need to protect the community from arbitrary government action’⁸. ‘[B]y contract the Commonwealth may fetter future executive action in a matter of public interest.’⁹ Financial dealings with the Commonwealth also give rise to criminal sanctions.¹⁰ For these reasons some limits had to be placed on the Commonwealth’s capacity to contract and spend money.

Exploding common assumptions

Many of the written submissions prior to oral argument made what was termed a ‘common assumption’¹¹ that the executive power of the Commonwealth included a power to do what the Commonwealth legislature *could* authorise the executive to do. Thus one of the main issues raised in the submissions was the extent to which the NSCP fell within the legislative heads of power under s 51 of the *Constitution*, and in particular s 51(xx) given SUQ’s status as a trading corporation or s 51(xxiiiA) as a form of benefit to students. Only Heydon J¹² was prepared to accept this argument and to find that the funding would be supported s 51(xxiiiA). Hayne J¹³ and Kiefel J¹⁴ each rejected the potential for valid legislative backing of the program. Thus even if the potential to legislate was sufficient to authorise executive action, the NSCP could not be authorised on that basis.

The judgments of French CJ, Gummow and Bell JJ, and Crennan J, however, were prepared to assume that the Commonwealth could have legislated to give effect to the Programme. This was not sufficient. Actual legislative authority was required to enter into the Agreement and for the valid expenditure of the funds. Much of the discussion in the various judgments involved demonstrating that this conclusion was not excluded by previous judicial statements which arguably suggested otherwise. However, the principal justifications for restricting executive power involved two related elements: the Constitutional relationship between legislative and executive power, and the requirements of federalism.

Gummow and Bell JJ pointed to the unsuitability of many of the Constitutional heads of legislative power to frame executive power. The heads of power include provision for taxation and offences, complement the jurisdiction of federal courts over matters arising, and are not suitable to executive decree. French CJ goes further in rejecting ‘the location of the contractual capacity of the Commonwealth in a universe of hypothetical laws which would, if enacted, support its exercise’ as the means by which to determine the scope of executive power.

Gummow and Bell JJ also stated that reliance on the possibility of statutory support would ‘undermine the basal assumption of legislative predominance inherited from the United Kingdom’.¹⁵ The responsibility of Ministers to parliament is not sufficient to satisfy the needs of representative government, at least ‘where an executive spending scheme has no legislative engagement for its creation or operation beyond the appropriation process’ and where that appropriation process involves limited involvement of the Senate.¹⁶

Other judges also referred to the distinction between responsible and representative government, but only to counter the argument that government executive power was

potentially unbounded. Crennan J recognised the rise of ‘responsible government’ in the sense of a government which is responsive to public opinion and the electorate as much as to Parliament. She referred to the various forms of accountability beyond direct legislative implementation as permitting ‘the ventilation, accommodation and *effective* authorisation of political decisions’.¹⁷

The principles of accountability of the Executive to Parliament and the Parliament’s control over supply and expenditure operate inevitably to constrain the Commonwealth’s capacities to contract and to spend.¹⁸

Kiefel J referred to responsible government as establishing the relationship between parliament and the executive and requiring only that the scope of Commonwealth executive power be susceptible of control by statute. Parliament can therefore oversee executive action through the possibility of disapproval as well as positive authorisation. On this view the potential influence or impact of the executive action in question is not alone sufficient to invoke representative concerns.

The most strongly supported arguments for requiring statutory authority relied on concerns that the expansion of Commonwealth executive power impacted on State interests. As French CJ put it:

Expenditure by the Executive government of the Commonwealth, administered and controlled by the Commonwealth, in fields within the competence of the executive governments of the States has, and always has had, the potential, in a practical way of which the Court can take notice, to diminish the authority of the States in their field of operation.¹⁹

Allowing the Commonwealth government to enter, without statutory authority, into a field where the Commonwealth and State governments have concurrent competencies might give rise to questions of inconsistency without the reconciliation effected by s 109²⁰ and would undermine the availability of the grants power under s 96.²¹ It would ignore the distinctions drawn in identifying those aspects of non-statutory power which derive from the peculiar capacities of the Commonwealth government to Act in a way the States cannot.²² And the role of the Senate, even if it be ‘vestigial’²³ in representing State interests, is impeded through the limited ability of the Senate to scrutinise appropriation Bills under s 53 of the Constitution.

It thus appears that the requirement for statutory authorisation is primarily derived from the need to limit the potential interference with State interests, through more direct reliance on various heads of legislative power and the capacity for legislative predominance over mere executive action or s 109 to resolve any inconsistencies.

Where to now for executive power

The judgments suggest that the scope for executive action is limited to that which is:

- an exercise of the prerogative power unique to the Crown as attributable to the Commonwealth;
- incidental to giving effect to the execution and maintenance of a valid law of the Commonwealth;
- carried out in the administration of a department of State in the sense used in s 64 of the Constitution; or
- an exercise of inherent authority derived from the character and status of the Commonwealth as a national government.²⁴

In *NSW v Bardolph*²⁵ it was suggested that no statutory power is required to make a contract in the ordinary course of administering a recognised part of the government.²⁶ Several comments in *Williams* indicate that this proposition may not be generally applicable to the Commonwealth,²⁷ at least as it purports to extend beyond the administration of a department of state under s 64 of the Constitution²⁸ or the entering into agreements with the States.²⁹

Office ... under the Commonwealth

The majority made short work of the argument that the Program requires a religious test as a qualification for an office under the Commonwealth contrary to s 116 of the Constitution. The chaplain in question is 'under the control and direction of the school principal' and is not under any 'contractual or other arrangement with the Commonwealth'.³⁰ The provision of Commonwealth funding is not enough. It was argued that even if the meaning of 'office' is not restricted in s 116, unlike other provisions like s 75(v) perhaps, the term 'under' requires 'a closer connection to the Commonwealth than that presented by the facts in this case'.³¹

Heydon J, however, dismissed the importance of 'under' suggesting rather that an 'office' is a position under constituted authority to which duties are attached.³² This requires a direct, legal relationship with the Commonwealth. Contractual obligations enumerating standards and monitoring compliance by parties not directly subject to the contract are not sufficient. Otherwise the original jurisdiction of the High Court under s 75(v) would be widened even beyond its beneficial limits.

All judges therefore accepted that a more direct relationship is required before the parameters of an 'office' under or of 'the Commonwealth' are breached. Whether a more direct contractual relationship might suffice was not considered by the majority, but there is little to indicate that statutory authorisation of the contracts in question would affect this question.

Standing

The question of standing is no clearer. All judges except Heydon J agreed with the conclusion of Gummow and Bell JJ that standing was established to challenge the validity of the Agreement and the making of payments under it.³³ However, Gummow and Bell JJ avoided detailed consideration of the question given that Victoria and Western Australia also sought to challenge the scope of executive power. Even in the absence of any power to intervene any State would have standing to challenge 'the observance by the Commonwealth of the bounds of the executive power assigned to it by the Constitution'.³⁴

The 'real issue' as to the Plaintiff's standing to challenge the sufficiency of the appropriation by Parliament was recognised, but not pursued given it did not affect the validity of the funding agreement which was the focus of the case. It appears that the grant of standing was therefore based on the acceptance by the Commonwealth of the Plaintiff's standing to challenge funding arrangements which affected the Plaintiff's children while they attended the school and which continued in operation at the time proceedings were commenced. Only Heydon J examined this point at any length, concluding that, on the Plaintiff's submission, chaplains funded by the Agreement were directly involved in the education of his daughters, which was sufficient to give rise to a sufficient special, if non-material, interest in having a judicial determination of the validity of at least one payment under the Agreement.³⁵

So the funding agreement is therefore subject to challenge only due to the direct involvement of the Plaintiff in the activities funded by the agreement. The nature of that involvement and the extent to which it extends to other ways third parties may be affected through the awarding of contracts or spending was not considered.

The legislative response

A week after the *Williams* decision, Parliament passed the *Financial Framework Legislation Amendment Act (No.3) 2012* (Cth) (the *Amendment Act*).³⁶ The *Amendment Act* purports to provide legislative authority to a wide variety of government programs whose validity was thrown into doubt by the decision in *Williams*. It inserts s 32B into the *Financial Management and Accountability Act 1997* (Cth) (the *FMA Act*). Section 32B provides that, where it did not otherwise have power, the Commonwealth has the power to make, vary or administer agreements³⁷ or grants included in the Regulations. The Act also amends the *Financial Management and Accountability Regulations 1997* (Cth) to insert Schedule 1AA, which includes a list of 'Grants of financial assistance to persons other than a State or Territory', and a list of 'Programs', collected under the respective Department or administering body and providing only the title and brief objective.

Section 44 of the *FMA Act* is also amended by taking the Chief Executive's responsibilities to manage the affairs of the Commonwealth in s 44(1) to include, and have included, the power to make, vary and administer agreements on behalf of the Commonwealth, though not in relation to a power conferred by the new s 32B. This is intended to provide the power to spend money where that is related to the affairs of the agency in question. The majority in *Williams* had characterised s 44 of the *FMA Act* as only being directed to the prudent conduct of financial administration.³⁸

Transitional provisions provide that arrangements and purported arrangements that would have been authorised by the new s 32B(1) but which were made prior to the amendments and in force immediately before the commencement of these provisions are taken to have effect as if they had been made under the new s 32B(1).

The amendments also exclude decisions made under the new s 32B³⁹ from review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the *ADJR Act*).

Questions arising

The legislative response suggests that the decision in *Williams* will not significantly expand the role of the Senate in supervising government expenditure. Whether arrangements for new spending programs will be subject to greater scrutiny prior to enactment remains to be seen. The threat of Constitutional challenges based on exceeding a Commonwealth head of power remains. However, it is unclear whether the shift to statutory authority for the broad range of programmes listed in the amendments will have significant implications for government contracting more generally.

Excluding decisions made under the new s 32B from review under the *ADJR Act* may be considered unnecessary given the test in *Griffith University v Tang*.⁴⁰ It remains to be seen whether the principles set out in that test, and in particular the requirement that the decision under review have the capacity to affect rights and obligations derived from a public source of authority, are applicable to other avenues for review, and particularly if they apply differently depending on whether executive or legislative power is exercised.⁴¹ The Explanatory Memorandum for the amendments states that review under s 75 of the *Constitution* and s 39B of the *Judiciary Act 1903* would still be available,⁴² but where the only rights and obligations that arise under the newly statute-based spending agreements derive from contract, the extent of any review beyond constitutional conformity will be very limited.

While it is accepted that the power to enter into contracts *can* be subject to statutory constraint, the nature of those constraints and the extent to which they affect the validity of any contract is a question of statutory construction.⁴³ The new s 32B provides authority to

enter into the particular arrangement or grant directly or 'for the purpose of a program specified in the regulations'. Given the programs are defined by no more than a title and broadly stated objective it is difficult to derive limits on the nature of the arrangements which might meet that purpose. It may be that there are some express or implied limits that would be required to meet constitutional requirements for a valid law.⁴⁴ However, the terms of s 32B do not appear to impose more restrictions than would apply if the legal authority for the arrangements were sourced in executive power.

The authority provided by the new s 32B conditions the grant of power as subject to compliance with the *FMA Act* and regulations, Finance Minister's Orders, special instructions and any other law.⁴⁵ Given the varied and indistinct nature of many of these requirements it is unlikely that they condition the validity of any contracts or grants made. The nature of decisions made relating to the exercise of rights and obligations arising under the contracts, such as the application of criteria for entering into or enforcing performance of contracts is thus not likely to be conditioned through additional criteria imposed through the statutory authorisation contained in the *Amendment Act*.

Other elements of *Williams* may also have a limited effect on the capacity to challenge the range of contracts or grants in question. The States will continue to have standing to challenge the constitutional basis of any arrangements; individuals may have standing to challenge only when directly affected by the contract or grant in question. The s 32B grant of authority to the Minister or Chief Executive will not of itself bring other parties to the contract or third parties involved in fulfilling any grant conditions, within the definition of an 'office' either under or of the Commonwealth.

The extent to which the *Williams* decision applies to other forms of executive power, including the power to make inquiries, remains uncertain.⁴⁶ An inquiries power may not have the same regulatory effect as funding agreements, may be more readily classified as within the administration of a department of state and arguably has less impact on State interests. However, the same question arises as to whether the shift to statutory authority will substantially change the available grounds of judicial review.

The judgments in *Williams* do recognise the expanded role of government contracting in achieving regulatory objectives in modern government, but the shift to representative accountability is required principally for compatibility with State, rather than individual, interests. But the States gain little in the way of protection of those interests if the degree of parliamentary scrutiny required is as limited as the amendments to the *FMA Act* would suggest, and may now be concerned with the consistency of their own programs with those of the Commonwealth.⁴⁷

Gummow and Bell JJ refer to the need for parliamentary engagement with the 'formulation, amendment or termination' of expenditure programs. Crennan J similarly refers to a parliamentary process of 'scrutiny and debate',⁴⁸ and the need for 'some details about the policy being authorised'.⁴⁹ However, neither of these requirements seems justiciable. Whether or not the decision in *Williams* will be accompanied by the required statutory source of authority to impose additional criteria of validity, and in the process create incentives for enhanced parliamentary consideration of express criteria, are questions which await clear answers.

Endnotes

- 1 [2012] HCA 23. All references to paragraph numbers in this comment are taken from this case.
- 2 See [7]-[8] per French CJ.
- 3 French CJ, Crennan J and Kiefel J separately agreeing with the answers given in the joint judgment of Gummow and Bell JJ, Hayne J agreeing in part, and Heydon J dissenting.

- 4 [150] per Gummow and Bell JJ.
- 5 See [21] and [38] per French CJ; [577] per Kiefel J.
- 6 [151] per Gummow and Bell JJ, drawing comparisons with *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51.
- 7 [38] per French CJ.
- 8 Crennan J at [521], Gummow and Bell JJ agreeing at [152]. Particularly as the capacity to legislate for more coercive measures under s 51(xxxix) that might be then permitted. See [521] per Crennan J; [581] per Kiefel J; but cf French CJ at [63] discussing the extent to which the executive power to undertake inquiries could authorize legislation compelling the giving of evidence outside Commonwealth legislative competence.
- 9 [152] per Gummow and Bell JJ.
- 10 [158] per Gummow and Bell JJ.
- 11 See [340]–[344] per Heydon J, characterizing the withdrawal from the common assumption through the non-cited quotation of Matthew Arnold's *Dover Beach*: 'So the Court was on a darkling plain, swept with confused alarms of struggle and flight, where ignorant armies clash by night.' [343].
- 12 At [408]–[441].
- 13 At [271]–[286].
- 14 At [574] and [575].
- 15 [136].
- 16 [136].
- 17 [136] emphasis added.
- 18 [516].
- 19 [37].
- 20 [83] per French CJ; [522] per Crennan J (Gummow and Bell JJ agreeing at [152]). See also Heydon J at [406].
- 21 [143]–[148] per Gummow and Bell JJ; [501] per Crennan J. See also [243] per Hayne J.
- 22 [544] per Crennan J.
- 23 [61] per French CJ.
- 24 See eg French CJ at [4], [34]; Crennan J at [484].
- 25 (1934) 52 CLR 455.
- 26 French CJ at [74] quoting Dixon J, with whom Gavan Duffy CJ agreed: (1934) 52 CLR 455 at 493.
- 27 [532] per Crennan J.
- 28 [79] French CJ; [139] Gummow and Bell JJ.
- 29 [141] per Gummow and Bell JJ.
- 30 [109].
- 31 *Ibid.*
- 32 Citing *Sykes v Cleary* (1992) 176 CLR 77 at 96.
- 33 [112] Per Gummow and Bell JJ (French CJ at [9]; Hayne J at [168]; [475] per Crennan J; [557] per Kiefel J agreeing).
- 34 [112].
- 35 [327]–[331].
- 36 Passed both houses on 27 June 2012, received royal assent on 28 June 2012.
- 37 The Amendment Act refers to arrangements as including contracts, agreement or deed. See s 32B(3).
- 38 [102]–[103] Gummow and Bell JJ (French CJ agreeing [71]–[72], Kiefel J at [596]); [260] Hayne J; [547] Crennan J.
- 39 As well as, arguably, other decisions relating to the terms and conditions of the financial assistance when given to a State or Territory (see s 32C).
- 40 [2005] HCA 7; 221 CLR 99.
- 41 See Daniel Stewart, 'Griffith University v Tang, Under an Enactment and Limiting Access to Judicial Review' (2005) 33 *Federal Law Review* 525; Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1.
- 42 *Financial Framework Legislation Amendment Bill (No.3) 2012, Explanatory Memorandum*, p.5.
- 43 Eg *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454.
- 44 Eg *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513. For a further discussion of the entrenchment of minimum statutory restrictions see Will Bateman, 'The 'Constitution' and the Substantive Principles of Judicial Review: the Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463.
- 45 See s 32B(1).
- 46 This was raised in argument but did not have to be decided by the majority in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31 but see the comments by French CJ and Kiefel J that an inquiry preliminary to a consideration of a statutory power was within that aspect of the executive power which 'extends to the execution and maintenance...of the laws of the Commonwealth' at [51].
- 47 However, it is unclear to what extent the mere authorisation of funding or entering into contracts would give rise to any inconsistency which could be resolved through the Commonwealth statute prevailing over State non-statutory action, or through s 109. Note that the reliance in *Williams* on legislative power and the role of s 109 to avoid potential inconsistencies between Commonwealth and State programs may suggest that a limit might be placed in the future on State executive power, though it was accepted in *Williams* that the States have the legal and practical capacity to provide for a scheme such as the NSCP (see eg [146] per

Gummow and Bell JJ). See also the discussion in *Pape* concerning the relative relationship between Commonwealth and State executive capacities: *Pape v Commissioner of Taxation* [2009] HCA 23, [220]–[225] per Gummow, Crennan and Bell JJ.

48 [532].

49 [531].