

The power of the Commonwealth Executive to contract, post *Williams v Commonwealth of Australia*

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ABSTRACT

The Williams case afforded the High Court the opportunity to review the basis on which the Federal Executive commits the Commonwealth to contracts, especially where those contracts are entered into without parliamentary debate or scrutiny. It was also an opportunity for the state attorney generals to challenge the continued encroachment of Commonwealth contracts, into areas not expressly identified in the Federal Constitution.

I INTRODUCTION

The limits to the capacity of the Commonwealth, and specifically the executive, to enter into contracts had not previously been the subject of a definitive statement by the High Court.¹ In the recent case *Williams v. Commonwealth of Australia (Williams)* [2012] HCA 23, the plaintiff asked the High Court to rule on the legitimacy of the federally funded National Schools Chaplaincy Program (NSCP). It was a function of the plaintiff's argument in *Williams*, that the plaintiff had to disprove any possible basis for the contractual validity of the Funding Agreement. As such, the case provided the High Court an opportunity to rule on the limits of the executive power of the Commonwealth.

The plaintiff's initial submission was made on the basis of an orthodox view of s61 of the Constitution. However during the hearing, the High Court signalled that it was considering a departure from settled law and the following grounds for the invalidity of the NSCP were to be considered in legal arguments:

- 1) there is no valid appropriation;
- 2) even if there was a valid appropriation and no violation of s116, then the Funding Agreement and payments under it were beyond the executive power of the Commonwealth because:

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¹ Nicholas Seddon, *Government Contracts — Federal, State and Local* (Federation Press, 4th ed, 2009) [2.2].

- a) they involved actions not authorized by legislation;
 - b) they were not referable to any part of the executive power which is the residue of the sovereign prerogative powers (e.g. powers to declare war or make treaties etc);
 - c) they were not referable to that part of the executive power labeled as the ‘implied nationhood power’ (*Pape v Commissioner of Taxation*² and *Davis v Commonwealth*³); and
 - 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*⁴); and
- 3) even if it involves 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 officer under the Commonwealth, contrary to s116 of the Constitution.

In June 2012, the High Court announced its decision.⁵ In a 6-1 decision (Heydon J dissenting), the High Court found that the NSCP funding agreement was ‘beyond the executive power of the Commonwealth under s61 of the Constitution’. Legal commentators immediately saw this as a redefinition of the boundaries of Federalism and considered that the ruling potentially invalidated numerous Commonwealth government programs.⁶ The Federal Government announced legislation to legitimize the NSCP,⁷ which the plaintiff announced he planned to challenge on constitutional grounds.

II BACKGROUND OF *WILLIAMS V COMMONWEALTH OF AUSTRALIA*

The Federal Government announced the NSCP in October 2006. Under the NSCP, the Commonwealth promised to invest up to \$30 million annually for 3 years for the provision of chaplaincy services in schools, to a maximum of \$20,000 per school per year. Subsequently this was extended with additional funding of \$42 million for the school years 2010 and 2011. The NSCP is administered by the Department of Education, Employment and Work Place Relations (DEEWR), through a series of funding agreements and the NSCP Guidelines. Participation in the scheme is voluntary for both schools and students. In this case, money is paid from DEEWR to the Scripture Union of Queensland under a funding agreement.

² *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

³ *Davis v Commonwealth* (1988) 166 CLR 79

⁴ *New South Wales v Bardolph* (1934) 52 CLR 455 (*Bardolph*).

⁵ <http://www.austlii.edu.au/au/cases/cth/HCA/2012/23.html>.

⁶ <http://www.theaustralian.com.au/national-affairs/ruling-on-chaplains-leaves-federal-funding-in-disarray/story-fn59niix-1226403576617>.

⁷ <http://www.theaustralian.com.au/national-affairs/urgent-move-to-close-loophole-and-keep-chaplains-in-schools/story-fn59niix-1226408342822>.

Ron Williams has six children who attend the Darling Heights State School in Toowoomba. Mr Williams wished his children to attend a secular school; one that is neutral when it comes to organized religion. In an interview with the ABC, Ron Williams expressed his motivation as follows:⁸

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.

In response, Williams launched a High Court action claiming that the NSCP breached the Australian Constitution. In addition to Mr Williams', the Commonwealth government's, the Minister for School Education, Early Childhood and Youth's, the Minister for Finance and Deregulation's and the Scripture Union of Queensland's involvement in the case, each of the State Governments and the Churches Commission on Education sought (and were granted leave) to intervene.

III THE ELEMENTS OF *WILLIAMS*

A *Element 1 : No Valid Appropriation*

Ultimately the High Court found that it was not required to determine whether the NSCP was funded under a valid appropriation. However in discussing the appropriation question, the High Court provided some future guidance. Hayne J, rejected the broad proposition put forward by the Commonwealth 'that the Executive's power to spend money lawfully appropriated is unlimited'.⁹ Similarly Gummow and Bell JJ, endorsed by French CJ, refuted the Commonwealth proposition that 'the executive power extends to entry into contracts and the spending of money without any legislative authority beyond an appropriation'.¹⁰

B *Element 2a : Actions Not Authorised by Legislation*

Where Parliament passes constitutionally valid legislation and that legislation confers a specific contract making power on the executive, the source of that power to contract lies in the statute. The NSCP was not created by statute; as such the DEEWR funding agreements

⁸ 'Campaign against chaplaincy program reaches the High Court', *The 7.30 Report*, 10 August 2011, <<http://www.abc.net.au/7.30/content/2011/s3290571.htm>> accessed 29th March 2013.

⁹ *Williams v Commonwealth of Australia* [2012] HCA 23, [253].

¹⁰ *Williams v Commonwealth of Australia* [2012] HCA 23, [138].

cannot derive their contractual validity, from executive power via an underlying statute.¹¹ The Commonwealth accepted this as a true statement of fact in its submission.¹²

C Element 2b : No Violation of S116

Section 116 of the *Constitution* provides, in part, that ‘no religious test shall be required as a qualification for any office or public trust under the Commonwealth’. The plaintiff argued that due to the criteria for selecting chaplains under the NSCP guidelines, NSCP chaplains hold an office under the Commonwealth. The justification for an ‘office under the Commonwealth’ supposedly arose from the prescriptive contract terms applied by DEEWR in the funding agreement, which effectively granted the Commonwealth control over the chaplains.

The Commonwealth argued that the ‘control’ obligations in the DEEWR funding agreement related to the provision of uniform national standards, rather than conferring power over the hiring or firing of individual chaplains. The view upheld by Gummow and Bell JJ at [107-110¹³] and agreed by French CJ, Crennan, Kiefel, Heydon and Hayne JJ, was that Commonwealth sourced funding is not sufficient, without immediate control and direction, to constitute an office under the Crown.¹⁴

D Reworked Element 2b : The Residue of the Sovereign Prerogative Powers

Prerogative powers source their power in royal authority historically exercised, by custom or necessity. Those powers are recognised by the common law and by the Australian courts.¹⁵ The plaintiff argued that the power of the sovereign to enter into a contract should be considered that of a natural person, rather than a prerogative power of a sovereign but that if such a prerogative power had ever existed for the Commonwealth, that power had been specifically abrogated by the limiting effects of the Constitution. French CJ confirmed that neither the funding agreement, nor the expenditure funded under it, constituted an exercise of the prerogative aspect of executive power.¹⁶

If the unfettered prerogative power to enter into a contract had been extinguished, was there still an express power to enter into contracts, derived from the Sovereign? In *New South Wales v Bardolph*¹⁷ (*Bardolph*), Evatt J stated that:

¹¹ Ronald Williams, ‘Plaintiff’s further amended submission’, Submission in *Williams V Commonwealth*, S307, 29 July 2011, [6].

¹² Commonwealth of Australia, Minister for School Education, Early Childhood & Youth and Minister for Finance & Deregulation, ‘First to third respondents amended submission’, Submission in *Williams V Commonwealth*, S307, 23 July 2011[4].

¹³ *Williams v Commonwealth of Australia* [2012] HCA 23 [107-110].

¹⁴ *Williams v Commonwealth of Australia* [2012] HCA 23, [109].

¹⁵ *Ruddock v Vadarlis* (2001) 66 ALD 25.

¹⁶ *Williams v Commonwealth of Australia* [2012] HCA 23, [83].

¹⁷ *New South Wales v Bardolph* (1934) 52 CLR 455, [474-475].

No doubt the king has special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subject.

At [5875]¹⁸ Gummow J sought to draw the distinction between the Commonwealth contracting as a ‘natural person’ and as an ‘artificial legal entity’. The Solicitor General of the Commonwealth accepted that the Commonwealth contracts as a ‘artificial legal entity’ and at [5930]¹⁹ accepted that the powers of a natural person are, in the Commonwealth’s case, fettered by the provisions of the Constitution and by the responsibilities of the executive to the Parliament. However in subsequent submissions the Commonwealth tried to revive the proposition, that executive power supports executive action dealing at least with matters within the enumerated heads of Commonwealth legislative power.²⁰

In the plaintiff’s submission it was considered that the Commonwealth’s power to enter into contracts was constrained by the ambit of its legislative power, drawing on the reasoning from *Attorney General (Vic) v Commonwealth*²¹ (*Clothing Factory Case*), in which regard was had to s 51(vi) of the *Constitution* in order to determine the extent to which the Commonwealth could engage in a commercial enterprise.

Heynes J²² specifically focused on equating executive powers to those of a natural person. His view was that equating the natural person with the Executive, ignores that it is public money being spent and that a complex system of checks and balances has evolved and is reflected in the Constitution over the raising and expenditure of public monies. As such ‘neither the Executive nor the polity itself can be assumed to have the same powers (or capacities) to contract and spend as a natural person’.²³

Separately, French CJ confirms that ‘[T]he Commonwealth is not just another legal person like a private corporation or a natural person with contractual capacity’.²⁴ French CJ approves the reasoning of Professor Winterton,²⁵ where Winterton seeks to limit the power of the executive, as follows:

Important governmental powers, such as the power to make contracts, may be attributed to this source [power as natural person], but the general principle must not be pressed too far. It can be applied only when the executive and private actions are identical, but this will rarely be so,

¹⁸ Transcript of Proceedings *Williams v Commonwealth of Australia & Ors* (High Court of Australia, S307, French CJ, Gummow, Dell, Hayne, Heydon, Kiefel & Crennan JJ, 9 August 2011, [5875].

¹⁹ Transcript of Proceedings *Williams v Commonwealth of Australia & Ors* (High Court of Australia, S307, French CJ, Gummow, Dell, Hayne, Heydon, Kiefel & Crennan JJ, 9 August 2011, [5930].

²⁰ *Williams v Commonwealth of Australia* [2012] HCA, [26] (French CJ).

²¹ *Attorney General (Vic) v Commonwealth* (1935) 39 CLR 1.

²² *Williams v Commonwealth of Australia* [2012] HCA 23, [15-217].

²³ *Williams v Commonwealth of Australia* [2012] HCA 23, [217].

²⁴ *Williams v Commonwealth of Australia* [2012] HCA 23, [38].

²⁵ George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press 1983)

because governmental action is inherently different from private action. Governmental action inevitably has a far greater impact on individual liberties, and this affects its character.²⁶

As a result of the judgments, the view that the Executive has the same power to contract of a natural person is generally refuted, with potential applications severely limited by the test proposed by Winterton.

E Reworked Element 2b : Implied Nationhood Power

In *Victoria v Commonwealth and Hayden*²⁷ (AAP Case) Mason J considered that the Commonwealth executive should have ‘a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation’²⁸ (‘the implied nationhood power’), even when these enterprises and activities do not fall within a legitimate head of power under the Constitution. Mason J considered that this power was sourced in s51(xxxix), coupled with s61 and that it permitted the Parliament to authorise the expenditure of money on such matters as the Commonwealth saw fit and to legislate on prerogative matters. Subsequently in *Davis v Commonwealth*²⁹, the scope of the power was expanded with the requirement for national exclusivity falling away. Post *Williams* the scope of the ‘implied nationhood power’ has decreased, with the limitation on the executive power to enter a contract proposed by Crennan J being:

the fact that an initiative, enterprise or activity can be ‘conveniently formulated and administered by the national government’,³⁰ or that it ostensibly does not interfere with State powers, is not sufficient to render it one of ‘truly national endeavour’³¹ or ‘pre-eminently the business and the concern of the Commonwealth as the national government’.³²

F Reworked Element 2b : Ordinary Course of Administering a Recognised Part of Government

The legislative powers of the Commonwealth are mainly to be found in Part V, Chapter I of the Constitution. Section 61 of the Constitution is the source of executive power for the Federal Parliament and provides that:

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.

²⁶ George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press 1983), [121].

²⁷ *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338.

²⁸ *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, [397].

²⁹ *Davis v Commonwealth* (1988) 166 CLR 79.

³⁰ *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, [398] (Mason J).

³¹ *The Commonwealth v Tasmania* (1983) 158 CLR 1, [253] (Deane J).

³² *Davis v Commonwealth* (1988) 166 CLR 79, [94] (Mason CJ, Deane and Gaudron JJ).

In 1922, the High Court, in *Commonwealth v Colonial Combing, Spinning & Weaving Co*³³ (the *Wooltops* case) considered the capacity of the executive to enter into contracts without the approval of Parliament. The Court took a narrow view of section 61, deciding that the executive could not enter contracts without Parliament's prior approval:

apart from any authority conferred by an Act of Parliament of the Commonwealth or by regulations thereunder, the Executive Government of the Commonwealth had no power to make or ratify any of the agreements.

Four years later in *The Commonwealth v Australian Commonwealth Shipping Board*³⁴, the High Court again took a narrow view. Knox CJ, Gavan Duffy, Rich and Starke JJ confirmed that the Federal Parliament only has such power 'as is expressly or by necessary implication vested in it by the Constitution'.³⁵ Neither Parliament nor the Executive Government had constitutional power to set up a manufacturing business for general commercial purposes.³⁶ The Commonwealth's executive power did not enable the Government to engage in an activity otherwise 'unwarranted in express terms by the Constitution'.³⁷

The scope for Commonwealth contracts was subsequently expanded in *Attorney General (Vic) v Commonwealth*³⁸ where it was held by a majority, that a business which had been established to make military clothing was incidental to the s51(vi) defence power and was lawful. The key argument was that maintenance of a defence capability in peacetime may require defence factories to undertake non-defence work. A similar argument was raised in *Re KL Tractors Ltd.*³⁹

In 1934 the High Court returned to the issue of the Commonwealth's power to contract in *Bardolph's* case.⁴⁰ Here, on behalf of the Labor Government, a contract was entered into for weekly insertions of Tourist Bureau advertisements in the plaintiff's newspaper. When the new State Government came into power it sought to overturn the contract, on the basis that there was no statutory authority or authority by Order in Council or Executive Minute. In his decision, Dixon J said:⁴¹

No statutory power to make a contract in the ordinary course of administering a recognized part of the government of the State appears to me to be necessary in order that, if made by the appropriate servant of the Crown, it should become the contract of the Crown, and subject to the provision of funds to answer it, binding on the Crown.

The two elements arising from the principle in *Bardolph's* case were that the contract:

³³ *Commonwealth v Colonial, Spinning and Weaving Co* (1921-1922) 31 CLR 421.

³⁴ *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR.

³⁵ *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1, 9.

³⁶ *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1, 9.

³⁷ *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1, 10.

³⁸ *Attorney General (Vic) v Commonwealth* (1935) 52 CLR 533.

³⁹ *Re KL Tractors Ltd* (1961) 106 CLR 318.

⁴⁰ *New South Wales v Bardolph* (1934) 52 CLR 455.

⁴¹ *New South Wales v Bardolph* (1934) 52 CLR 455.

- a) must be ‘in the ordinary course of administering a recognised part of the government of the state’, otherwise the contract will be *ultra vires* and void; and
- b) must be made by an ‘appropriate servant of the Crown’.

IV WILLIAM’S CONCLUSION

A *Distinguishing Bardolph and Williams*

French CJ states that *Bardolph* erred in extending a decision on contracting and spending powers in a unitary constitution (that of NSW) to the arena of state and Commonwealth relations, under the federal Constitution.⁴² *Bardolph* did not consider the relationship between the executive power conferred by s61 of the Constitution and the administration of departments of State of the Commonwealth for which s64 of the Constitution provides.⁴³ Specifically French CJ comments upon the applicability of the opinion by Viscount Haldane in *Kidman v The Commonwealth*,⁴⁴ and the observation by Aickin J (with which Barwick CJ agreed) in *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth*⁴⁵ and considers that neither case had the federal dimensions, or the context of *Williams*, and can be distinguished.

Crennan J seeks to distinguish *Williams* from *Bardolph* by looking at the source of funding. As part of their submissions, the Commonwealth relied on *Bardolph* and the proposition that the NSCP involved spending on the ordinary annual services of government. But Crennan J held, that as the NSCP hadn’t been subject to the parliamentary processes of scrutiny and debate and at the time of entry into the Funding Agreement, the NSCP was not (by reason of an appropriation in the previous year) a recognised part of Commonwealth government administration in the sense explained in *Bardolph*, and hence *Williams* can be distinguished from *Bardolph*.⁴⁶

B *The Right of the Commonwealth to Enter into Contracts Post Williams.*

Synthesizing the majority judgments, the following sources of power to contract can be substantiated post *Williams*:

- a) contracts arising out statute (assuming such a statute was constitutionally valid);
- b) contracts arising out of the administration of a department of State, in the sense used in s64 of the Constitution;

⁴² *Williams v Commonwealth of Australia* [2012] HCA 23, [79] (French CJ).

⁴³ *Williams v Commonwealth of Australia* [2012] HCA 23, [79] (French CJ).

⁴⁴ *Kidman v The Commonwealth* [1926] ALR 1.

⁴⁵ *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54, [113], Barwick CJ agreeing, [61]; [1977] HCA 71.

⁴⁶ *Williams v Commonwealth of Australia* [2012] HCA 23, [529] (Crennan J).

- c) contracts arising out of the existence of an existing prerogative power (whether previously identified or not);
- d) contracts arising from the exercise of a statutory power, or arising from executive action to give effect to a statute;⁴⁷ and
- e) contracts arising out of the implied nationhood power, where such contracts involve a ‘truly national endeavour’⁴⁸ or are ‘pre-eminently the business and the concern of the Commonwealth as the national government’⁴⁹ or where for reasons of emergency, such contracts need to be delivered through Commonwealth means.⁵⁰

C *The Legislature’s Response*

In response to *Williams*, the Commonwealth Attorney General introduced the Financial Framework Legislation Amendment Bill (No. 3) 2012 on the 26th of June 2012. Schedule 1 of the bill inserts a new section 32B into the *Financial Management and Accountability Act 1997* (Cth) (FMA Act), to provide the requisite statutory authority for Commonwealth spending, where no other legislative authority exists. It empowers the executive to make, vary or administer arrangements or grants under which public money is, or may become, payable, if the arrangements or grants or programs are specified in regulations. Schedule 1 also clarifies that the proposed amendments will not, by implication, narrow the executive power of the Commonwealth. The stated intent of the bill was to ensure continuity of function for 427 grants and programs (including the NSCP) by ensuring that these grants and programs had specific legislative authority over and above the appropriation acts⁵¹.

D *Conclusion*

Given that the executive can legitimize programs (and their underlying contracts) by amending the delegated legislation component of the proposed bill, the proposed legislation fails the public debate test that Crennan J proposes. Likewise if the executive can add new programs, without those programs having been expressly authorized by the legislature, the express prohibition (on the executive using contracts to expand its powers) by Kiefel J potentially may be ignored.

⁴⁷ As distinct from category a), in that an authority created by statute, can have a wider scope of contracting authority, than that expressed in a single bill for a specific purpose or policy.

⁴⁸ *The Commonwealth v Tasmania* (1983) 158 CLR 1, [253] (Deane J).

⁴⁹ *Davis v Commonwealth* (1988) 166 CLR 79, [94] (Mason CJ, Deane and Gaudron JJ).

⁵⁰ *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

⁵¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2012, (Nicola Roxon, Federal Attorney General), First reading speech for the Financial Framework Legislation Amendment Bill (No. 3) 2012;

<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2Fb9c79f46-7f3a-4739-acb9-ec8d676c1b6b%2F0130;query=Id%3A%22chamber%2Fhansardr%2Fb9c79f46-7f3a-4739-acb9-ec8d676c1b6b%2F0000%22>> accessed 29th March 2013.

The Commonwealth's amendment to section 32B of the FMA Act, is contrary to the ratio from *Williams*, that the Commonwealth's executive power is not coextensive with the scope of its legislative power, and that Commonwealth policies and projects must be supported by legislation, actually enacted by the Federal Parliament.

Immediately after the amendment of the *FMA Act*, Ron Williams stated his intent to re-challenge the National Schools Chaplaincy Program. While the 'National School Chaplaincy and School Welfare Program' is now listed at 407.013 in the *Financial Management and Accountability Regulations 1997* (Cth), based on their *Williams* judgments, Crennan and Kiefel JJ would consider that the listing fails to legislatively legitimize the NSCP. With two subsequent changes to the composition of the High Court (including the departure of the single dissenting judge) and French CJ's pro-federalist statement that:

the character of the Commonwealth Government as a national government does not entitle it, as a general proposition, to enter into any field of activity by executive action alone⁵²,

it seems likely that a subsequent challenge to the National Schools Chaplaincy Program will succeed⁵³.



⁵² *Williams v Commonwealth of Australia* [2012] HCA 23, [83] (French CJ).

⁵³ Ron William's challenge may be frustrated by Commonwealth legislative action, as the Public Governance, Performance and Accountability Bill 2013 (Cth) was tabled in the House of Representatives on the 16th of May 2013. If enacted, the Public Governance, Performance and Accountability Bill 2013 (Cth) will repeal the *Financial Management and Accountability Act 1997* (Cth).