

# THE CHANGED LANDSCAPE OF THE EXECUTIVE POWER OF THE COMMONWEALTH AFTER THE *WILLIAMS CASE*\*

GEOFFREY LINDELL\*\*

*In Williams v Commonwealth, Mr Ron Williams challenged the validity of the National School Chaplain's Program by reference to s 116 of the Constitution and also a long held assumption about the scope of the executive power of the Commonwealth under s 61. The Court upheld the challenge not by relying on s 116 but by rejecting that assumption and finding a deficiency in the same power. This article critically analyses this development and in particular the reduced scope of the executive power of the Commonwealth in the light of this case and its future implications in relation to the Commonwealth's ability to spend money and enter into contracts with and without the approval of the Parliament. It also explores the nature and effectiveness of the swift legislative response to the case and argues in favour of upholding the validity of one important aspect of that response.*

## I INTRODUCTION

In *New South Wales v Bardolph*, Evatt J observed:

No doubt the King had 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 subjects.<sup>1</sup>

This was at least the position until the decision of the High Court in *Williams v Commonwealth* ('*Williams*').<sup>2</sup>

The plaintiff in that case, Ron Williams, challenged the validity of the National School Chaplain's Program under s 116 of the *Constitution* upon the basis of a 'common assumption' regarding the scope of Commonwealth executive

\* The article is based on talks given to the New South Wales and Victorian branches of the Australian Association of Constitutional Law in Sydney on 13 August 2012 and in Melbourne on 28 August 2012, respectively, and also at a Monash Law School Research Seminar on 28 August 2012. The article does, however, elaborate the discussion of the remedial legislation passed by the Federal Parliament to deal with the effect of the *Williams* case. I should disclose that I was retained as a consultant by the Commonwealth to deal with the aftermath of the *Williams* case including any further challenge commenced by Mr Williams against the continued operation of the National School Chaplains Program but any misgivings I express in this article about the *Williams* case were formed before I accepted the consultancy which ended recently. The views expressed in the article are those of the author and not to be taken as representing those of the Commonwealth or its legal advisers.

\*\* Professorial Fellow in Law, University of Melbourne; Adjunct Professor in Law, University of Adelaide.

1 (1934) 52 CLR 455, 475 ('*Bardolph*').

2 (2012) 288 ALR 410.

power under s 61. The Court upheld the challenge by destroying the ‘common assumption’, but did not rely on s 116. In this article, I intend to analyse the Court’s reasoning and its future implications for the scope of the executive power of the Commonwealth including the ability of the Commonwealth to spend money and enter into contracts. I also intend to explore the effectiveness of the swift legislative response to the decision and the need for the Parliament to examine how it will cope with its newly recognised responsibilities in authorising the Executive to enter into contracts and spend public money.

## II FACTS AND BACKGROUND

The facts and background of the case are as follows. The Scripture Union of Queensland (SUQ) was a public company which received funding from the Commonwealth pursuant to a Funding Agreement entered into in November 2007. The Funding Agreement was itself entered into pursuant to the Commonwealth’s National School Chaplaincy Program (NSCP). Under that Agreement, SUQ agreed to provide certain chaplaincy services at the Darling Heights State School in Queensland and those services were required to comply with National Guidelines devised by the Commonwealth. The chaplaincy services included assisting the School and community ‘in supporting the spiritual wellbeing of students’<sup>3</sup> and ‘being approachable by all students, staff and members of the school community of all religious affiliations’.<sup>4</sup> It is important to appreciate at the outset that the funding of the NSCP was not provided under legislation apart from the money which was appropriated for the scheme for each of the financial years from 2007–08 to 2011–12. (The appropriation was included in the appropriation Bills for the ordinary annual services of the government which could not be amended by the Senate, although it could be rejected by it).

The plaintiff in the case was the father of four children who attended the School and objected to the provision of chaplaincy services in state schools. In 2010 he commenced proceedings against the Commonwealth and SUQ in the original jurisdiction of the High Court in which he challenged the authority of the Commonwealth:

- (a) To enter into the Funding Agreement with SUQ;
- (b) To draw money from the Consolidated Revenue Fund (CRF) for each of the financial years already mentioned; and
- (c) To pay the appropriated moneys to SUQ pursuant to the Funding Agreement.

The other defendants in the proceedings were two Commonwealth Ministers, with the states intervening in the proceedings.

3 Ibid 443–4 [94] (Gummow and Bell JJ), 551 [550] (Kiefel J).

4 Ibid 444 [95] (Gummow and Bell JJ).

The questions raised in the amended special case gave rise to the following issues:

1. Whether the plaintiff had standing to maintain the challenge.
2. Whether in the absence of supporting federal legislation apart from parliamentary appropriations, the *Funding Agreement* and *payments* made under it:
  - (a) Exceeded the scope of the *executive* power of the Commonwealth under s 61 of the *Constitution*; and
  - (b) If not, whether they were prohibited by s 116
3. Whether the *drawing of the money* from the CRF for the purpose of making payments under the Funding Agreement was validly authorised by the successive appropriation Acts. (This may have been intended to raise questions concerning the scope of ss 81 and 83).

However, the issue of overriding and primary concern to the plaintiff and his many supporters who helped with the financial support needed to fund his challenge was whether the scheme described breached s 116. As it was his challenge succeeded — at least in the *interim*. This occurred not by reference to s 116 but, instead, by reference to the issue which as it eventuated disclosed a deficiency in the scope of the executive power of the Commonwealth.

### III STANDING

The plaintiff's interest to challenge the validity of the *Funding Agreement* and the *payment of money* under that Agreement was upheld with relatively little discussion or controversy between the parties apart from the standing to challenge the *drawing rights* of the Commonwealth.<sup>5</sup> The reason for upholding his interest seems to have been that this part of the plaintiff's case was extensively supported by certain states exercising their statutory right of intervention under s 78A of the *Judiciary Act 1903* (Cth). It was thought that in this respect the 'questions of standing may be put to one side [because] ... [e]ven without s 78A, any state would have a sufficient interest in the observance by the Commonwealth of the bounds of the executive power assigned to it by the *Constitution*'.<sup>6</sup> This was of course different to the standing of the plaintiff upheld in *Pape v Federal*

5 Ibid 414 [9] (French CJ), 447 [112] (Gummow and Bell JJ), 460 [168] (Hayne J), 536 [475] (Crennan J), 563 [598] (Kiefel J), 497 [315], 499 [325], 501 [331] (Heydon J, dissenting in part).

6 Ibid 447 [112] (Gummow and Bell JJ), with whom the other judges in the majority agreed on the question of standing. Cf Heydon J who, in the absence of contrary argument by any of the parties, accepted the submissions of the Commonwealth Solicitor-General to the effect that states are unable to intervene in cases where there is no matter because a plaintiff lacks standing even if the states would have had standing to commence proceedings in their own right. This was because s 78A only operated if there was a 'pre-existing "matter"': at 499 [326]. There is, with respect, much to commend that view. (Under the provisions of s 78A, the Attorney-General of a state may, on behalf of the state, intervene in proceedings before the High Court proceedings where those proceedings relate to a matter which arises under the *Constitution* or involves its interpretation).

*Commissioner of Taxation*,<sup>7</sup> who was able to use his interest in benefiting from the payment of the Tax Bonus for the unusual purpose of exposing to judicial review federal limits on the power of the Commonwealth to spend public money.<sup>8</sup>

Leaving aside any standing derived from the intervention of the states, the standing of the plaintiff in *Williams* could have been based on his special interest to raise questions concerning the place of religion in state schools as a parent of children who attended the Darling Heights Public School — especially now that special interests need not be confined to material interests.<sup>9</sup> According to this view, his standing would have been upheld in relation to s 61 independently of his standing in relation to s 116, even if there was a chance that the latter issue might not arise if the Agreement and the payments of money were subsequently found not to be authorised by s 61 or indeed any other constitutional provision. This would be similar to the standing accorded to private individuals to challenge legislation on federal grounds when the legislation impinges on their material or proprietary interests except that what is challenged here is the exercise of executive rather than legislative power. No reference was made in the case to *Anderson v Commonwealth*,<sup>10</sup> where the High Court denied standing to a member of the public as a consumer to challenge the sugar agreement between the Commonwealth and the states.

#### IV SECTION 116

Not surprisingly, the primary and overriding objective of the challenge failed with all the members of the Court rejecting the argument that the funding of the NSCP breached s 116 of the *Constitution*.<sup>11</sup> It was argued on behalf of the plaintiff that the definition of school chaplains in the Funding Agreement was invalid because it imposed a religious test as a qualification for an office under the Commonwealth contrary to s 116. This was always going to be difficult to accept because this constitutional prohibition or guarantee does not on its face apply to the states as it does in the *United States Constitution*. The mere fact that

7 (2009) 238 CLR 1 (*Pape*).

8 Mr Pape's interest in challenging the validity of that expenditure might at one time have been labelled as a mere intellectual interest had it not been for his possible liability to repay the Tax Bonus as a result of the principle in *Auckland Harbour Board v The King* [1924] AC 318 (*Auckland Harbour Board*), if the federal limits he relied on were exceeded. Despite difficulties raised in the past regarding the standing of taxpayers to challenge the validity of Commonwealth expenditure, it will seem odd for the Court to deny them such standing in the future when arguably they stand to lose rather than benefit by any increased taxation needed to fund the expenditure (albeit a small amount). This is so especially on the kind of reasoning used by Gummow, Crennan and Bell JJ, who emphasised the importance of the rule of law under the *Constitution*: *Pape* (2009) 238 CLR 1, 68–9 [153]–[158].

9 This was illustrated by the approach taken by Heydon J in *Williams* (2012) 288 ALR 410, 499–501 [327]–[331]. See especially Heydon J's comment that special interests 'can include points of conscience': at 500 [330].

10 (1932) 47 CLR 50. This case was barely mentioned in either *Williams* or *Pape*, and then not for the proposition stated here.

11 *Williams* (2012) 288 ALR 410, 415 [9] (French CJ), 446–7 [108]–[110] (Gummow and Bell JJ), 460 [168] (Hayne J), 531–2 [442]–[447] (Heydon J), 537 [476] (Crennan J), 562 [597] (Kiefel J).

Commonwealth funding was used by the SUQ and the state schools to employ the school chaplains was not sufficient to conclude that they held an ‘office ... under the Commonwealth’. The Commonwealth did not employ or enter into any contractual relationships with the chaplains. This conclusion was reached despite the ramifications of that issue for the meaning of the same phrase in s 75(v) of the *Constitution*, which confers on the High Court original jurisdiction to deal with all matters ‘in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’.

From the Commonwealth’s point of view this proved to be a very small victory, but it does, nevertheless, mean that if the inclusion of the NSCP in the Commonwealth’s remedial legislation is challenged by Mr Williams, he will not be able to invoke the same part of s 116 unless the Court can be persuaded to change its mind on that issue.

## V SECTIONS 81 AND 83 SIDELINED

The Court did not find it necessary to deal with the attack launched against the successive appropriation Acts in so far as they purported to authorise the mere drawing of the *money* from the Consolidated Revenue Fund as distinct from the actual making of the *payments* once the funds were drawn from that Fund. There was a time when this might have been thought to raise questions concerning the scope of ss 81 and 83 of the *Constitution*, but — as we now know, or so we were told — the High Court and others were wrong to ask those questions. It was sufficient for the present Court to reaffirm what was decided in *Pape*, namely that the source of power to *spend* was located elsewhere and outside of ss 81 and 83.<sup>12</sup> All that was strictly necessary for the purposes of the challenge launched by Mr Williams was to be able to attack the validity of the payments made and not the drawing rights in respect of those payments which was in a sense a matter treated as relevant only to the internal workings of the Commonwealth. Hence the Court’s answer that it was unnecessary to answer the question raised in that regard or the standing of the plaintiff to raise them.<sup>13</sup>

12 Ibid 424 [39] (French CJ), 448 [114] (Gummow and Bell JJ), 461 [175], 469 [198] (Hayne J), 537 [478] (Crennan J), 553 [559] (Kiefel J). This effectively sidelined the view followed for many years under which the validity of the expenditure of public funds could not be challenged because the validity of Appropriation Acts was not thought to be normally susceptible to effective legal challenge: see *Davis v Commonwealth* (1988) 166 CLR 79, 95–6 (Mason CJ, Deane and Gaudron JJ). The latter view was itself based on *Victoria v Commonwealth* (1975) 134 CLR 338 (*AAP Case*) because of the view shared by McTiernan, Mason and Murphy JJ to the effect that s 81 enabled the Parliament to appropriate for such purposes as it may determine: at 367–9 (McTiernan J), 396 (Mason J), 417–19 (Murphy J). It was also based on the view taken by Jacobs J that the validity of an appropriation was non-justiciable and therefore was not susceptible to legal challenge: at 410–12. However, neither of those two views by themselves commanded the support of the majority of the Court. Section 81 provides, amongst other things, that ‘[a]ll revenues ... raised or received by the Executive Government of the Commonwealth’ are ‘to be appropriated for the purposes of the Commonwealth’, and s 83 prevents money being drawn from the Commonwealth Treasury ‘except under appropriation made by law’.

13 See the answers given by the Court to Questions 1(b) and 3: *Williams* (2012) 288 ALR 410, 563.

## VI SECTION 61

### A Introduction

In the absence of legislation to authorise the challenged payments apart from the parliamentary appropriations, the source of constitutional authority would have to be found in the executive power of the Commonwealth under s 61 of the *Constitution*. The first part of s 61 of the *Constitution* states that ‘the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative’. The second part goes on to state that the executive power ‘extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth’.

As Professor Lane once wrote, the section ‘allude[s] to rather than prescribe[s]’ the content of executive power<sup>14</sup> and as has frequently been pointed out the Court has refrained from providing an exhaustive definition of its scope. Notwithstanding the absence of such a definition its content was thought to draw on the following sources:

- (1) The common law prerogatives in the narrow sense of those powers — ‘narrow’ in the sense of powers not enjoyed by natural persons under the classic definition of that term.<sup>15</sup>
- (2) The common law capacities of a natural person, at least if they relate to the legislative powers enjoyed by the Commonwealth.
- (3) The performance of ‘activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation’ (the implied nationhood power).<sup>16</sup>
- (4) The execution and maintenance of this *Constitution*, and of the laws of the Commonwealth referred to in s 61.

But as Sir Owen Dixon pointed out, the words of the second limb in s 61 should not be treated as words of limitation.<sup>17</sup> If they were, the Executive could only enter into contracts authorised by legislation which would render those words otiose. Moreover, the words used are ‘extends to’ and not ‘consists of’.

14 P H Lane, *Lane’s Commentary on the Australian Constitution* (Law Book, 2<sup>nd</sup> ed, 1997) 434. For a discussion of the scope of the power after the decision in *Pape* (2009) 238 CLR 1, see Anne Twomey, ‘Pushing the Boundaries of Executive Power — *Pape*, the Prerogative and Nationhood Powers’ (2010) 34 *Melbourne University Law Review* 313. The focus of my article is mostly directed at the extent to which the Commonwealth could exercise the common law capacities of a natural person.

15 The definition favoured in William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1<sup>st</sup> ed, 1765–9) book 1, ch 7, 232, cited in *Williams* (2012) 288 ALR 410, 418 [25] (French CJ).

16 This is the formulation of that power favoured by Mason J in the *AAP Case* (1975) 134 CLR 338, 397.

17 This comment was made in evidence given by him to the Royal Commission on the *Constitution*, when speaking on behalf of a Committee of Counsel in Victoria: see Evidence to Royal Commission on the *Constitution*, Commonwealth, Melbourne, 13 December 1927, 781 (Sir Owen Dixon), cited in *Williams* (2012) 288 ALR 410, 436 [68] (French CJ).

## **B The Common Assumption or Assumptions which Underpinned the Written and Oral Submissions and Arguments of the Parties**

The reader of the judgments in *Williams* is repeatedly confronted with references to the common assumption or assumptions which underpinned the written and oral submissions and arguments of the parties. The reader will also find — it has to be said — some puzzling, sudden and unexpected shifts in written and oral arguments. French CJ spoke of the unanimity of a common assumption underpinning the written submissions in the case not surviving the oral arguments and further submissions filed after the conclusion of the oral argument.<sup>18</sup> Heydon J put it more colourfully when he indicated in his dissent:

The extent to which the common assumption was actually common began to break down when Western Australia began its oral address. It withdrew the relevant part of its written submissions. Victoria and Queensland followed suit. In due course, the plaintiff and most government interveners withdrew their assertion of the common assumption and lined up against the defendants. This great *renversement des alliances* created a new and unexpected hurdle for the defendants. So the court was as on a darkling plain, swept with confused alarms of struggle and flight, where ignorant armies clash by night — although the parties were more surprised than ignorant.<sup>19</sup>

Later in his judgment Heydon J drew attention to the problems created for the Commonwealth by the sudden abandonment of the common assumption by most government interveners during oral argument,<sup>20</sup> and the complaint made by the Commonwealth Solicitor-General in oral argument more than once that the plaintiff and some of the interveners failed to clearly articulate the further limitation on the scope of the executive power, apart from that which was conceded in the common assumption. Heydon J also referred to the fact that this was not addressed in later oral argument or the subsequent written submissions.<sup>21</sup> If his Honour was correct, it would mean that the Commonwealth was not given an adequate opportunity to defend the common assumption and it was left to the Court to articulate the nature of the further limitation on the power.

The common assumption definitely did not encompass one of the submissions put by the Commonwealth, namely, that the powers contained in s 61 were not federally limited by reference to the legislative powers of the Commonwealth Parliament. This relates to what my late friend and colleague, Professor Winterton, referred to as the question concerning the *breadth* of

18 *Williams* (2012) 288 ALR 410, 413 [3].

19 *Ibid* 503 [343].

20 *Ibid* 520 [404]. Although not mentioned by Heydon J, it is possible that the impetus to depart from the assumption came from the Court rather than any of the parties in the case.

21 *Ibid* 515 [386].

executive power,<sup>22</sup> namely, whether the power is limited by reference to the federal distribution of legislative powers effected by the *Constitution*. The making of this submission would have been unlikely had it not been for certain seductive observations by Gummow, Crennan and Bell JJ in *Pape*.<sup>23</sup>

Be that as it may, and not surprisingly, the submission was not accepted by any member of the Court.<sup>24</sup> Although never conclusively decided up to that point, its probable rejection was in line with the prevailing weight of judicial authority<sup>25</sup> and thus, to that extent — but only to that extent — this recognised the complementary nature of the Commonwealth's executive and legislative authority. So much for what I would have thought was a constitutional red herring, but this left the real issue to be decided, namely, what further, if any limitations, were to be placed on s 61.

I should now explain what I understood to be the 'common assumption'. When reduced to its essentials, it was that the Commonwealth had power to enter into the contract to pay money as long as the Parliament would have had the power to give it the statutory authority to enter into that contract.<sup>26</sup> That power could exist

22 The 'breadth' of the power was contrasted with its 'depth'. Thus Professor Winterton stated that '[t]o fix the "breadth" of the executive power of the Commonwealth, that is, the subject matters on which it can operate, the High Court has applied the principle that the contours of executive power generally follow those of legislative power': George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 30 (citations omitted). He wrote that '[t]he High Court has fixed the "depth" of federal executive power by reference to the prerogative, or common law powers of the Crown': at 31 (citations omitted). The dichotomy between the two concepts provides a helpful analysis, and it was used by Heydon J in his dissenting judgment: *Williams* (2012) 288 ALR 410, 513 [379].

23 Their Honours said:

A question thus may arise whether there is applicable to the scope of s 61 that very broad proposition concerning the extent of the common weal which was expressed in the United Kingdom constitutional theory in the notion of the public service of the Crown.

*Pape* (2009) 238 CLR 1, 86 [226]. Those remarks and what followed may have suggested to some observers that their Honours seriously entertained the possible absence of federal limits on the scope of the executive power of the Commonwealth. This was a view which hitherto had only been seriously entertained by the late Professors Campbell and Winterton — and then only in relation to the power of the Commonwealth to contract because of its voluntary character: see Winterton, above n 22, 46–7; Enid Campbell, 'Federal Contract Law' (1970) 44 *Australian Law Journal* 580, 580, cited in Winterton, above n 22, 46.

24 It was rejected either *explicitly* by Hayne, Kiefel and Heydon JJ and, arguably at least, by *necessary implication*, by French CJ, Gummow, Crennan and Bell JJ given their Honours' insistence, as we shall see, on the need for *additional* legislative authority to authorise the Commonwealth to enter into a contract to pay money — the additional legislation would necessarily have had to fall within the legislative powers of the Commonwealth under the *Constitution*. It is true that some contracts were not thought to require legislative authority, namely, those that are incidental to carrying out the ordinary and well-recognised functions of government. But a 'recognised function of government' is now likely to have either required legislative authority the first time it was exercised or is one that was otherwise related to the constitutional responsibilities of the Commonwealth. Hence the probable need to establish a connection with the federal distribution of powers even in relation to those contracts.

25 See, eg, *AAP Case* (1975) 134 CLR 338, 378–9 (Gibbs J), 396–7 (Mason J). See also at 362 (Barwick CJ).

26 See, eg, *Williams* (2012) 288 ALR 410, 502–3 [340]–[342] (Heydon J, dissenting).



for one of two reasons.<sup>27</sup> The first is that the Commonwealth could do anything independently of legislation with respect to which its legislative power extends (a view expressed by Alfred Deakin).<sup>28</sup> The second is that the Commonwealth has the same capacities to contract and spend money as are enjoyed in common with natural persons. But whichever of those two reasons was accepted, there was a need to satisfy in both cases an all-important proviso which followed from the rejection of the Commonwealth's wide proposition described earlier. What was done by the Executive must have been capable of being authorised by legislation passed by the Federal Parliament. Both reasons were further qualified by other limitations, namely, the activities referred to were *non-coercive* activities which do not interfere with the rights of individuals, and also complied with existing valid state or Commonwealth legislation.

Something was always needed to make the assumption work and this was suggested by Barwick CJ in the *AAP Case*, when his Honour said that the Executive 'may only do that which has been or could be the subject of valid legislation'.<sup>29</sup> French CJ described this as locating the contractual capacity of the Commonwealth 'in a universe of hypothetical laws'.<sup>30</sup> The hypothetical law test, as it may be called, necessitated an inquiry into whether the challenged executive activity or act could have been authorised by valid legislation under the heads of power assigned to the Commonwealth Parliament. I turn first to how the case might have been decided if the Court had adhered to the common assumption, and this was illustrated by the approach taken by Hayne and Kiefel JJ and also Heydon J in dissent.

## **C As the Case Would have been Decided According to that Assumption According to Hayne and Kiefel JJ**

### **1 The Corporations Power**

Hayne and Kiefel JJ found that s 51(xx) of the *Constitution* did not empower the Australian Parliament to pass a law to authorise the Australian Government to establish and fund the NSCP. For this purpose their Honours were prepared to assume without deciding that SUQ was a trading corporation formed within

27 It is possible that these two reasons are only two dimensions of a single concept or simply another way of stating the same concept in a way that combines them both together.

28 This view is outlined in *Williams* (2012) 288 ALR 410, 451 [125] (Gummow and Bell JJ), where their Honours cite the advice given by Alfred Deakin as Attorney-General in the famous *Vondel Opinion*, reprinted in Alfred Deakin, 'Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth' in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia with Opinions of Solicitors-General and the Attorney-General's Department* (Australian Government Publishing Service, 1981) vol 1, 129, 131.

29 *AAP Case* (1975) 134 CLR 338, 362.

30 *Williams* (2012) 288 ALR 410, 423 [36].

the limits of the Commonwealth.<sup>31</sup> They decided that such a hypothetical law in its application to SUQ would not have been a law with respect to constitutional corporations because the corporation was not singled out as the object of the (hypothetical) ‘statutory command’<sup>32</sup> and would not have been concerned with the whole range of matters identified in *New South Wales v Commonwealth* (‘*Work Choices Case*’).<sup>33</sup>

Although this conclusion was not surprising, the Court as a whole may well have to confront one day whether the ordinary principles of characterisation require the singling out of constitutional corporations *as a criterion of liability* for the legislation to be authorised under that power or whether it is sufficient that a law of general application applies to such corporations — echoes of a debate which has bedevilled the interpretation of s 90. But even so, the hypothetical law may still have been invalid since the law here in its application to SUQ would have been directed towards assisting the furtherance of its *religious activities*. This may not be enough, on any view of the power, unless the Court comes to accept that *any law* which applies to such corporations is a valid law even though it does not authorise or regulate activities that are relevant or related to their trading (or financial) activities — a view which has yet to command majority support.

## 2 The Student Benefit Power

But what was surprising was that Hayne and Kiefel JJ decided that s 51(xxiiiA) of the *Constitution* did not empower the Australian Parliament to pass a law to authorise the Australian Government to establish and fund the NSCP, although Heydon J strongly dissented on that question.

The background and origin of s 51(xxiiiA) is by now well known. The section was introduced by a successful amendment to the *Constitution* in 1946 — a rare event in itself but especially so when an amendment has the effect of expanding Commonwealth power. The amendment sought to support the various kinds of

31 It was a public company limited by guarantee which was registered in Queensland. French CJ outlined the objects of SUQ in his judgment:

Its objects are ‘to make God’s Good News known to children, young people and their families’ and ‘to encourage people of all ages to meet God daily through the Bible and prayer’. In furtherance of these objects, SUQ shall ‘undertake ... a variety of specialist ministries’, ‘shall preach the need of true conversion and of holiness in heart and life’ and ‘shall aid the Christian Church in its ministries’.

*Williams* (2012) 288 ALR 410, 414 [6]. The NSCP Chaplain’s Code of Conduct required the chaplains to ‘[a]ct as a reference point for students, staff and other members of the school community on religious, spiritual issues, values, human relationships and wellbeing issues’: SUQ, ‘Fourth Defendant’s Submissions’, Submission in *Williams*, S307/2010, 11 July 2011, 7 [33] (citations omitted). Its commercial and financial activities were alleged to involve raising ‘revenues by donations, sales, interest, federal and state government agreements, motor vehicle levies on employees, registered training organisation activities, state conference income, sale of cattle, fundraising events and camps income’: at 11 [51] (citations omitted).

32 Kiefel J found that the relevant legislation was not ‘concerned with the regulation of the activities, functions, relationships and business of a corporation, the rights and privileges belonging to a corporation, the imposition of obligations upon it, or the regulation of the conduct of those through whom it acts’: *Williams* (2012) 288 ALR 410, 557–8 [575] (citations omitted).

33 (2006) 229 CLR 1.

monetary payments which were thrown in doubt by *Attorney-General (Vic) ex rel Dale v Commonwealth* ('*Pharmaceutical Benefits Case*').<sup>34</sup> The relevant part of the section authorises the Parliament to make laws with respect to the provision of various classes of social services which included 'benefits to students'.

I should say something first about what I perceive to be the effect of *Federal Council of the British Medical Association in Australia v Commonwealth* ('*British Medical Association*')<sup>35</sup> and *Alexandria Private Geriatric Hospital Pty Ltd v Commonwealth* ('*Alexandria Hospital*'),<sup>36</sup> which dealt with the power of the Commonwealth to provide medical services and sickness and hospital benefits, respectively. First, s 51(xxiiiA) only authorised a law dealing with the provision of the relevant services and benefits *by the Commonwealth* — not those services or benefits generally, or when they are provided by others. The importance of this limitation is easy to overlook. Secondly, hospital benefits could take the form of monetary payments either to the patients to enable them to pay for services provided by hospitals or instead to the hospitals to enable them to provide hospital care to patients without the patients having to pay for all or some of the costs of those services. Doubtless the benefits in question could be provided unconditionally or conditionally in both cases. Thirdly, and what may be more controversial, is that the power could be used to support legislation which authorised the Commonwealth to provide such services itself — by establishing and running its own hospitals.

If we apply this by analogy to student benefits, this would have authorised the Commonwealth to fund university students directly, instead of through the states under s 96, as had previously been the case for some time and possibly — but no doubt much more radically in the eyes of some — by the Commonwealth establishing and running its own universities in the states. It is worth noting that the Commonwealth funding of schools is however still provided through the states under s 96.

The issue here was whether the analogy of payments made to the hospital could be applied to the payments made to chaplaincy services providers to enable them to provide such services to children in state schools so as to qualify as student benefits. The same would, after all, apply to fund providers of physical fitness education so as to provide such education to students except that such programs would seek to further their physical rather than their spiritual wellbeing. Surprisingly, though, there may have been an argument that benefits could only refer to 'material, tangible things'.<sup>37</sup>

34 (1945) 71 CLR 237. The amendment was the *Constitution Alteration (Social Services) 1946* (Cth). In his second reading speech the Federal Attorney-General, Dr Evatt, indicated that the High Court decision had thrown into 'serious doubt' the 'validity of a number of Acts on the Commonwealth-statute-book, including several acts that provide for what are commonly referred to as "social services": Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 1946, 647. He emphasised that the amendment authorised 'the continuance of Acts' providing such benefits and authorised 'the Parliament in the future to confer benefits of a similar character' which were confined 'in the main, to benefits of a type provided for by legislation already on the statute-book': at 648.

35 (1949) 79 CLR 201.

36 (1987) 162 CLR 271.

37 *Williams* (2012) 288 ALR 410, 528 [433] (Heydon J).

Hayne and Kiefel JJ appeared to accept the authority of the cases mentioned as deciding that benefits were not limited to money and that benefits may extend to services<sup>38</sup> which could be provided through a third party.<sup>39</sup> But Hayne J thought it did not follow that the provision of every service was a benefit: ‘When used in para (xxiiiA), the word “benefits” cannot be read as either “benefits or services” or “benefits and services”’,<sup>40</sup> and it could not be understood as synonymous with ‘benefits to or services for students’.<sup>41</sup> If the same reasoning applied to sickness and hospital benefits, it would have rendered unnecessary the inclusion of the references to ‘medical and dental services’ in s 51(xxiiiA).<sup>42</sup>

Furthermore it was thought that the power of the Commonwealth to provide a benefit was not a power to provide anything which benefited students.<sup>43</sup> It did not embrace ‘any and every form of provision of money or services that is of “advantage” to students’.<sup>44</sup> Nor did it extend to ‘every service which may be supportive of students at a personal level in the course of their education’.<sup>45</sup> There had to be a benefit ‘to students as a class’ and not, as here, the funding of schools or services ‘to the school’s staff and members of the wider school community’.<sup>46</sup> Hayne J did not consider that what was provided here was like the benefits and services sought to be validated by the 1946 amendment.<sup>47</sup> Finally, if the kind of construction of the power which he rejected was adopted it would become a large power which approached a ‘power to make laws with respect to education’.<sup>48</sup>

It is not difficult to identify departures from the received orthodoxy so recently reaffirmed and applied in the Work Choices Case. They are amply highlighted in the dissenting judgment of Heydon J in *Williams*.<sup>49</sup> His Honour did not consider that the views taken by Hayne and Kiefel JJ were consistent with the previous cases mentioned and neither did he consider that the kind of benefit provided here transcended the kind of social services which were sought to be validated by the 1946 amendment. The views he criticised failed to adhere to the following principles:

- (1) Constitutional provisions should be read broadly and not narrowly.<sup>50</sup>

38 Ibid 489 [277] (Hayne J), 557 [571] (Kiefel J).

39 Ibid 489–90 [278] (Hayne J), 557 [573] (Kiefel J).

40 Ibid 489 [277] (emphasis in original).

41 Ibid 490 [280].

42 Ibid 491 [284].

43 Ibid 557 [572] (Kiefel J).

44 Ibid 490 [280] (Hayne J).

45 Ibid 557 [572] (Kiefel J).

46 Ibid 557 [573] (Kiefel J).

47 Ibid 490 [281].

48 Ibid.

49 Heydon J also rejected other narrow arguments advanced which were not relied on by Hayne and Kiefel JJ, eg, the need to show that what is provided by the Commonwealth will operate to discharge an obligation on the part of students to pay money to a third party and the failure of what was provided to benefit identifiable individual students: *Williams* (2012) 288 ALR 410, 526–7 [426], 531 [440].

50 Ibid 527 [427].

- (2) The fact that legislation may be characterised in more than two ways will not result in the invalidity of federal legislation as long as one of those characterisations was valid.<sup>51</sup>
- (3) The third deviation from orthodoxy was the reversion to the doctrine of the reserved powers of the State which was in this case the reliance placed on the absence of an express power over education.<sup>52</sup>

It remains to consider the significance of the views expressed by the judges referred to above regarding the scope of the power of the Commonwealth Parliament to make laws with respect to the provision of ‘benefits to students’. They were not adopted by a majority of the Court. But they may have to be re-visited in any future challenge to the subsequent attempt made by the Commonwealth Parliament to validate payments made under the school chaplaincy program in response to the *Williams* case. Judged by the orthodoxy of the past, the views expressed by Hayne and Kiefel JJ are unlikely to be upheld, but the revival of the Court’s interest in federalism means that there can be no assurance that the more orthodox approach of Heydon J will be followed in the future. It is now possible to move away from that ‘universe of hypothetical laws’ which the Chief Justice spoke about and move to what proved to be the more important part of the way the *Williams* case was decided.

**D Common Assumption Dismantled:  
As the Case was Actually Decided by French CJ, Gummow,  
Crennan and Bell JJ**

How the case was actually decided, instead of how it would have been decided according to the common assumption, invites attention as to ‘depth’ of executive power or, in other words, the extent of the power vis-a-vis its relationship with the Parliament.<sup>53</sup> As will be seen, French CJ, Gummow, Crennan and Bell JJ did not accept the common assumption.

I interpret these judges as concluding that the Funding Agreement and the payment of moneys exceeded the executive power of the Commonwealth under s 61 because:

- (1) They were not entered into or made with legislative authority beyond the appropriation of the moneys concerned; and
- (2) The agreement was not the kind of contract which the Commonwealth Government had the power to enter into independently of statute, namely,

51 Ibid 530–1 [439]. This was important here in relation to whether other persons associated with students benefited from the chaplaincy services, eg, parents and teachers. He was prepared in any event to conclude that, even if such other persons did benefit, this might still be seen as assisting the successful education of the students as long as the service was provided to the child attending the school.

52 Ibid 527 [427]. The criticised views may also depart from the further principle that Hayne and Kiefel JJ may have read down parts of s 51(xxiiiA) by reference to other parts, not unlike the way s 51(i) was once read as qualifying s 51(xx). Heydon J made a similar if not identical point: at 528 [432].

53 See Winterton, above n 22, 31 for the meaning of the word ‘depth’ in this context.

contracts that are part of, or are incidental to, carrying out the ordinary and well recognised functions of government.<sup>54</sup>

Nor could it be justified as part of the inherent authority derived from the character and status of the Commonwealth as a national government.<sup>55</sup> Before I explain what kinds of agreements and payments of money may now be entered into or made without additional legislative authority contrary to the common assumption, it is important to explain why that assumption had been made in the past and why it was rejected in *Williams*.

To repeat again, the nature of the common assumption is that the Commonwealth could do anything independently of legislation with respect to which its legislative power extends (the view expressed by Alfred Deakin).<sup>56</sup> Under an alternative formulation which I always preferred, the Commonwealth enjoyed the same capacities to contract and spend money as were possessed in common with natural persons — as long as the Commonwealth could have been authorised to exercise those capacities by valid federal legislation. The capacities of a natural person who has full juristic personality would have included the right to sue and be sued, to enter into contracts, to acquire, hold and dispose of property, and to accept and make gifts. This explains the remarks quoted earlier from Evatt J in *Bardolph*.<sup>57</sup> In my view the easiest way of showing that the body known as the Commonwealth created by the *Constitution* had at least some of the capacities enjoyed by a natural person was to recognise that it is an emanation of the Crown as a corporation sole. This was necessary so as to give the Commonwealth the legal capacities it needed to exist and carry on its functions.<sup>58</sup>

54 *Williams* (2012) 288 ALR 410, 413 [4], 441–2 [83] (French CJ), 455 [139]–[140], 457–9 [150]–[159] (Gummow and Bell JJ) (assuming, as seems likely, that those justices should be interpreted as having accepted the concession made by the plaintiffs with which the Commonwealth agreed), 547–8 [527]–[534] (Crennan J).

55 *Ibid* 413 [4], 441–2 [83] (French CJ), 458 [156] (Gummow and Bell JJ), 542 [503] (Crennan J).

56 See Deakin, ‘Channel of Communication with Imperial Government’, above n 28.

57 (1934) 52 CLR 455, 475.

58 It appears to be assumed that the Crown is now recognised as having that capacity in the United Kingdom despite the difficulties Maitland had in explaining the way this developed and the meaning of the term ‘Crown’. I have found other justifications unconvincing, namely, that the Crown as represented by the Sovereign, is also a natural person and that under English law a person may do anything which is not prohibited by law. But while the latter justification may explain the amplitude of what the Crown may do if and once it is accepted as a legal person, it presupposes its existence as such a person. For an impressive and contrary analysis which explains and criticises the assumption in the United Kingdom despite the much more extensive judicial support it has received there, see John Howell, ‘What the Crown May Do’ (2010) 15 *Judicial Review* 36. Amongst other things, reference was made in that article to the critical analysis in F W Maitland, *The Constitutional History of England: A Course of Lectures* (Cambridge University Press, 1908) 418 and F W Maitland, ‘The Crown as Corporation’ (1901) 17 *Law Quarterly Review* 131. Howell, above n 58, 37–8, 41–2, 54. Reference was also made to the judicial authority to support the assumption made even though it was criticised: Howell, above n 58, 36–7 and generally. Howell also referred to the assertion that ‘[t]he Crown is a corporation sole or aggregate and so has general legal capacity, including (subject to some statutory limitations and limitations imposed by European law) the capacity to enter into contracts and to own and dispose of property’: LexisNexis, *Halsbury’s Laws of England*, vol 8(2) (Re-issue) (1996) 2 ‘Constitutional Law and Human Rights’ [6], quoted in Howell, above n 58, 44 n 37. (The latter reference in Halsbury refers in turn to supporting judicial authorities cited in *Halsbury’s Laws of England*, vol 8(2) (Re-issue) (1996) 1 ‘Introduction: Basic Principles of the Constitution’ [6] n 4).

The common assumption was not only common to the parties in the case but also to courts, government lawyers and, as was convincingly shown by Heydon J in his dissenting judgment, academic commentators as well.<sup>59</sup> But the fact remains that there was for the most part an absence of High Court authority precisely or directly on point which *decided* rather than just *assumed* the correctness of the common assumption, especially as formulated in the way I favoured despite its acceptance by government lawyers and commentators in the past.<sup>60</sup> Reference has already been made to the remarks of Evatt J in what may be referred to as the depth context, to use the dichotomy favoured by Professor Winterton. In addition, there was the dicta regarding whether s 61 was federally limited which was open to conflicting interpretations made in the breadth context, to use the same dichotomy. For the judges in the majority in this case, the dicta regarding the need to satisfy the federal limitation consisted of what was only a necessary but not a sufficient condition.<sup>61</sup> For others, including the writer, it would have been surprising if the dicta were not intended to be both necessary and sufficient.<sup>62</sup>

By contrast, and although only comparatively recent, there had been an explicit endorsement of the view that the Crown may do whatever a natural person can do by the English Court of Appeal and other courts in that country, as is illustrated by the keeping of directories of employees previously implicated in child abuse,<sup>63</sup> wire tapping,<sup>64</sup> the making of *ex gratia* payments<sup>65</sup> and advertising contracts.<sup>66</sup> It is true that the potential for abuse has given rise to a *judicial* suggestion for limiting the same view by limiting the exercise of such powers for *governmental purposes*.<sup>67</sup> But so far as I am aware the suggestion has yet to be accepted, and

- 59 One of those commentators included Professor Anne Twomey: see generally Twomey, above n 14. Significantly her view was expressed after the decision of the High Court in *Pape* (2009) 238 CLR 1.
- 60 But some of the decisions of the lower courts in Australia rise above a mere assumption, as to which see the cases cited at below n 70 and, in particular, *Commonwealth v Ling* (1993) 44 FCR 397, 428–31 (Beaumont J); *Coogee Esplanade Surf Motel Pty Ltd v Commonwealth* (1976) 50 ALR 363, 364 (Moffitt P), 376–7 (Hutley JA). Leaving those cases aside, the paucity of judicial authority recalls the famous remarks of Lord Justice James in *Panama & South Pacific Telegraph Co v India Rubber* (1875) LR 10 Ch App 515, 526: ‘The clearer a thing is, the more difficult it is to find any express authority or any dictum exactly to the point’, quoted with approval by Lord Macnaghten in *Keighley Maxted & Co v Durant* [1901] AC 240, 245. The difficulty with such assumptions is that they become vulnerable to attack if for one reason or another the consensus which supported the assumption begins to crumble.
- 61 *Williams* (2012) 288 ALR 410, 451–3 [127]–[134] (Gummow and Bell JJ) and probably also 419–20 [29] (French CJ), 549–550 [539]–[540] (Crennan J).
- 62 See *ibid* 508–10 [360]–[369] (Heydon J, dissenting).
- 63 *R v Secretary of State for Health; Ex parte C* [2000] 1 FLR 627.
- 64 *Malone v Metropolitan Police Commissioner* [1979] Ch 344.
- 65 *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681.
- 66 *Jenkins v A-G (UK)* (Unreported, Vacation Court, Griffiths J, 13 August 1971). However, this power was apparently treated as an aspect of the prerogative.
- 67 *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] 3 All ER 548, 563–4 [48] (Carnworth LJ). Cf the judgment of Richards LJ, who was unwilling to accept the suggestion: at 570 [74]. These remarks were only dicta. It is possible that developments in the United Kingdom may come to accept, if they have not already done so, that such common law powers should now be amenable to judicial review by reference to the normal rules of administrative law in the same way that has occurred with at least some prerogative powers. This case and some of the English cases discussed above in the text were also discussed in Richard McManus, ‘The Crown’s Common Law Powers’ (2010) 15 *Judicial Review* 27 and by Twomey, above n 14, 322–3 who also adverted to some of the issues mentioned at above n 58.

neither has there been acceptance of the legal need for legislative authority to carry on such activities.<sup>68</sup>

In Australia, there have been a number of lower court decisions which have at least assumed the existence of a common law authority of the government and its agencies to do what natural persons can do when refusing relief under both the general law and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) as things that are not done ‘under an enactment’ so as not to be the subject of judicial review under that Act.<sup>69</sup> This is illustrated by the cases which have assumed, and in some cases decided, that the Commonwealth may validly contract without specific legislative authority.<sup>70</sup> It is also illustrated by the keeping of a directory by the Australian Capital Territory Bureau regarding suitable accommodation in the same Territory.<sup>71</sup> In another case, the old Commonwealth Employment Service was recognised as having a non-statutory power to keep another directory listing employers against whom complaints had been made for sexual harassment who would not be referred to for persons seeking employment.<sup>72</sup> The Australian Legal Aid Office was, when first created, recognised as having been established pursuant to a directive by the Attorney-General in 1973 in order ‘to provide a service of legal advice and assistance, including assistance in litigation, in co-operation with community organizations, referral services, existing legal aid schemes and the private legal profession’.<sup>73</sup> Furthermore, the conduct of litigation by the Commonwealth in deciding whether to plead the statute of limitations defence was recognised as a non-statutory function.<sup>74</sup>

68 As argued in support of such a need in 2009 by a member of the British Bar in the article already referred to: Howell, above n 58.

69 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1) in the definition of ‘decision to which this Act applies’ when read in conjunction with the definition ‘enactment’ in the same sub-section of that Act.

70 There was no suggestion that additional parliamentary authority was required for either the original contract or the variations to that contract in *Commonwealth v Crothall Hospital Services (Aust) Ltd* (1981) 36 ALR 567. To the contrary, it was stated thought that ‘the ordinary common law rules governing the law of contract would ... have applied to the determination of the rights and obligations’ arising out of a contract entered into by the Commonwealth and its subsequent variation in that case: at 577 (Ellicott J). In addition the alleged breach of Treasury Regulations by public servants, could not be used by the Commonwealth to avoid obligations under the varied contract in that case: at 581–2. See also *Hawker Pacific v Freeland* (1983) 52 ALR 185, 189 (Fox J); *Abe Copiers Pty Ltd v Department of Administrative Services* (1985) 7 FCR 94, 95 (Fox J); *Commonwealth v Ling* (1993) 44 FCR 397, 428–31 (Beaumont J), affd *Ling v Commonwealth* (1994) 51 FCR 88; *Coogee Esplanade Surf Motel Pty Ltd v Commonwealth* (1976) 50 ALR 363, 364 (Moffitt P), 376–7 (Hutley JA). I am grateful to Mr Andrew Buckland, Senior Executive Lawyer at the Australian Government Solicitor, for drawing my attention to Commonwealth, ‘Submissions of First, Second and Third Defendants in Response to the Further Written Submissions of Tasmania and South Australia’, Submissions in *Williams*, No S307 of 2010, 1 September 2011, 7 [3]–[4], where these cases were cited.

71 *MacDonald Pty Ltd v Hamence* (1984) 53 ALR 136, 138–41.

72 *Taranto (1980) Pty Ltd v Madigan* (1988) 81 ALR 208. See also *Team Employment and Training Network Pty Ltd v Department of Employment Workplace Relations & Small Business* [1999] FCA 1792 (20 December 1999) [20] regarding the conduct of employment services through a contractor, cited in Commonwealth, ‘Submissions of First, Second and Third Defendants in Response to the Further Written Submissions of Tasmania and South Australia’, Submissions in *Williams*, No S307 of 2010, 1 September 2011, 7 [3]–[4].

73 *Thurgood v Director of Australian Legal Aid Office* (1984) 56 ALR 565, 569.

74 *Dixon v A-G (Cth)* (1987) 75 ALR 300, 306–7 (Jenkinson J). His Honour held that s 61 was not an ‘enactment’ for these purposes.



To these instances may be added a case decided by the Victorian Court of Appeal dealing with the exercise of state executive power which was not statutory in character. It involved the establishment of a Building Industry Task Force acting under the auspices of the Department of Justice, which published a black list of contractors who were denied the right to tender for government contracts because of collusive tendering on state government projects in the past.<sup>75</sup>

There are also instances where the High Court assumed that the Commonwealth could engage in activities without statutory authority, apart from the need to obtain authority to spend money to carry on those activities. Although it was unnecessary to decide the correctness of the assumption, this was the case in *HIH Claims Support Ltd v Insurance Australia Ltd*,<sup>76</sup> which involved the Commonwealth providing financial assistance to beneficiaries of insurance policies held with an insolvent insurer.

In *Davis v Commonwealth*,<sup>77</sup> the High Court held that the executive power of the Commonwealth extended to the incorporation of a company to further governmental objectives, without there being any suggestion of the need for additional statutory authority for such an activity beyond the need to obtain authority to spend public money.<sup>78</sup> Thus it was stated by Mason CJ, Deane and Gaudron JJ that

[f]rom the conclusion that the commemoration of the Bicentenary falls squarely within Commonwealth executive power other consequences follow. The first is that the executive power extends to the incorporation of a company as a means for carrying out and implementing a plan or programme for the commemoration. There is no constitutional bar to the setting up of a corporate authority to achieve this object or purpose in preference to executive action through a Ministry of the Crown.<sup>79</sup>

75 *Victoria v Master Builders Association of Victoria* [1995] 2 VR 121.

76 (2011) 244 CLR 72, 78 [1], 79 [5]–[7] (Gummow ACJ, Hayne, Crennan and Kiefel JJ). This case was also drawn to my attention by the senior government lawyer and cited in Commonwealth, ‘Submissions of First, Second and Third Defendants in Response to the Further Written Submissions of Tasmania and South Australia’, Submissions in *Williams*, No S307 of 2010, 1 September 2011, 7 [3].

77 (1988) 166 CLR 79.

78 This represented the view taken by Mason CJ, Deane and Gaudron JJ: *ibid* 94. Wilson and Dawson JJ may be taken to have agreed since they agreed with their conclusions and only wished to add comments of their own in relation to the scope of the Commonwealth Parliament’s legislative powers in relation to ‘matters not specifically enumerated in s 51 or elsewhere in the *Constitution*’: at 101. Cf the judgment of Brennan J who was more doubtful about whether the act of incorporation was an act of the executive government as distinct from the act of the subscribers to the incorporation: at 113. A case which assumes but does not decide the point is *Commonwealth v Bogle* (1953) 89 CLR 229, regarding the operations of Commonwealth Hostels Ltd which was formed by the Commonwealth under state law to provide hostel services to newly arrived immigrants in Australia. I am grateful to the senior government lawyer referred to in above n 70 for reminding me of this case.

79 *Davis v Commonwealth* (1988) 166 CLR 79, 94. Their Honours also accepted that:

Section 51(xxxix) of the *Constitution* enables the Parliament to legislate in aid of an exercise of the executive power. So, once it is accepted that the executive power extends to the incorporation of the Authority with the object set out in cl 3 of its memorandum of association, s 51(xxxix) authorizes legislation regulating the administration and procedures of the Authority and conferring on it such powers and protection as may be appropriate to such an authority: at 95.

In *Johnson v Kent* ('Black Mountain Tower Case'),<sup>80</sup> the same Court upheld the construction of a tower without legislative authority beyond the appropriation of funds needed for that purpose. It is true that this was treated as falling within the prerogative powers of the Crown rather than the powers of the Commonwealth as a land owner which was the way I thought the powers should have been treated.<sup>81</sup> There is also the case of *Clough v Leahy*,<sup>82</sup> where it was accepted that the Federal Government had the same power to hold an inquiry as an ordinary person as long as there was no suggestion of exercising any coercive powers over witnesses and documents.

It is important to emphasise that under the common assumption the authority of the Government to engage in activities and transactions without parliamentary authority was not at large. That authority was capable of being controlled by Parliament withholding the necessary funds needed to engage in or perform those activities and transactions (parliamentary appropriations), or enacting legislation to regulate and control them (legislative restrictions), or by supervising the activities and transactions through the powers of parliamentary inquiry. The efficacy of that authority rested on the willingness of Parliament to exercise it. Absent the exercise of such authority, it also enabled the Government to engage in new governmental activities and pursue new policies without Parliament's approval except through the appropriation process, provided the means chosen were essentially the same non-coercive legal capacities as those possessed by ordinary individuals and private companies and that they complied with the existing law.

It is now necessary to turn to cases which were used to reject the common assumption. In *Bardolph*,<sup>83</sup> Evatt J relied on a decision of the NSW Full Court in *Commonwealth v Kidman*<sup>84</sup> as having held that a contract with the Commonwealth was recognised as valid by certain appropriation Acts and payments made under the contract were also held to be made or presumed to be made under the appropriation Acts in question. It is true that the Tasmanian Government — with the support of some other intervener governments — was able to resurrect

80 (1975) 132 CLR 164.

81 The occasional treatment of particular powers of the Crown as prerogative powers when those powers are essentially the same as those enjoyed by ordinary individuals seems to me to render the description of such powers as merely a terminological issue so as to deprive it of any practical significance for present purposes. The essential point to keep in mind is that both kinds of powers fall within s 61 and do not require statutory authorisation for their exercise apart of course for the need to obtain parliamentary appropriation of any money needed to exercise them. The same comment applies to the treatment of the powers by the Full Federal Court in *Ling v Commonwealth* (1994) 51 FCR 88, 92 (the power or authority of the Commonwealth to take assignments of choses in action described as a prerogative power).

82 (1904) 2 CLR 139, where Griffith CJ described this as 'not a prerogative right', but 'a power which every individual citizen possesses': at 156. That case and those remarks were mentioned by French CJ but, with respect, it was not enough to dismiss the case on the ground that royal commissions without coercive powers over witnesses and the production of documents lack effectiveness: *Williams* (2012) 288 ALR 410, 433–4 [63]. The fact that it related to state royal commissions and not the exercise of Commonwealth executive power may perhaps however be more significant: at 433 n 128.

83 (1934) 52 CLR 455, 474.

84 (1923) 23 SR (NSW) 590.

certain cases<sup>85</sup> mentioned in *Bardolph* which may have suggested the need for parliamentary approval to authorise the Commonwealth to enter into contracts. But it is crucial to emphasise that this was at a time when it was thought that appropriations might have sufficed for that purpose.

Possibly under the influence of these cases, the view was expressed with what can now only be described as remarkable prescience in the *Report of the Royal Commission on the Constitution* (1929) that:

The Executive has no power to enter into contracts, except such as are authorised by Parliament, and except, possibly, contracts rendered necessary in the routine administration of a government department, and it does not acquire that power merely because Parliament has appropriated money for the purpose of the contracts.<sup>86</sup>

However that view is not easy to reconcile with the subsequent remarks of Viscount Haldane in *Commonwealth v Kidman*.<sup>87</sup> When considering an application for leave to appeal to the Privy Council, his Honour observed that ‘the Governor-General, as representing the Crown, could enter into contracts as much as he liked’ but ‘was presumed only to bind the funds which might or might not be appropriated by Parliament to answer the contract, and if they were not, that did not make the contract null and ultra vires; it made it not enforceable because there was no *res* against which to enforce it’.<sup>88</sup>

What is even more important was that these cases were thought to have been discarded after *Bardolph* was decided with appropriations only being seen as relevant to the *performance* of a contract and not its *extrinsic validity*. This was so at least where contracts were for the ordinary and recognised purposes of government — the disputed advertising contract in *Bardolph* was thought to fall into that category, having regard to appropriations and other executive acts taken in the past. The need to show that contracts fell into that category has been criticised by commentators over the years on the obvious ground that it does not seem appropriate for a court to determine what is normal as distinct from

85 *Commonwealth and the Central Wool Committee v Colonial Combing Spinning and Weaving Co Ltd* (1922) 31 CLR 421; *Commonwealth v Colonial Ammunition Co* (1924) 34 CLR 198. The influence of the first of those cases in particular can be seen in the restrictive advice provided to the Australian Government in Opinion No 1320 (absence of authority of the Commonwealth to guarantee overdraft by the Commonwealth Bank) and Opinion No 1536 (absence of authority of the Commonwealth and the Shipping Board to lease the Cockatoo Island Dockyard) which were published in Peter Benson and Adam Kirk (eds), *Opinions of the Attorneys-General of the Commonwealth: With Opinions of Solicitors-General and the Attorney’s General’s Department: 1923–45* (Commonwealth of Australia, 2013) vol 3, 10, 340. The tenor of such advice changed after the High Court decided *Bardolph* when in the light of that advice the view was expressed that ‘any agreement entered into by the Executive Government would even without Parliamentary approval of the agreement, be valid’: Opinion No 1683 (authority of the Commonwealth to enter into the Lend Lease Arrangements during the Second World War): at 640.

86 Commonwealth, Royal Commission on the Constitution, *Report* (1929) 49.

87 (1926) 32 Arg LR 1.

88 *Ibid* 2. Cf Evidence to Royal Commission on the Constitution, Parliament of Australia, Melbourne, 13 December 1927, 781 (Sir Owen Dixon), cited in *Williams* (2012) 288 ALR 410, 436 [68] (French CJ). Sir Owen Dixon was highly critical of the view which was subsequently endorsed by the Royal Commission.

extraordinary governmental business.<sup>89</sup> It is also important that at least two of the three judges<sup>90</sup> who referred to the fact that the contract in that case fell into that category may have only been referring to this as a factor which related to whether the government officer who negotiated the contract in that case was authorised to do as a matter of agency law.

What was also not emphasised in *Williams* was the key distinguishing factor that *Bardolph* was not concerned with the validity of government contracts which were covered by valid appropriation Acts, as was the case in *Williams*. It was instead concerned with their validity even when an appropriation Act was lacking to authorise the expenditure of funds needed to enable the contracts to be performed and no other parliamentary authority existed to authorise both the making and performance of the contracts.

In addition, *Bardolph* was instructive for at least three different reasons despite the reliance placed on it in *Williams*. The first was the assertion that it was the business of the executive to administer and make contracts and not Parliament which only controls the executive.<sup>91</sup> The other two reasons were the strong denial by Evatt J of the need for any *additional* legislative authority because this would unduly hamper the activities of the government, and also because of the vulnerable position occupied by third parties who contract with the government. On the latter point such parties faced the consequence of being liable to repay money received from the Crown pursuant to the decision in *Auckland Harbour Board*.<sup>92</sup> It is not surprising that in giving evidence to the Royal Commission on the *Constitution*, Sir Owen Dixon rejected the view that the second limb of s 61 confined the power of the executive to contract only in those cases where the contract arose in the administration of the laws of the Commonwealth as unduly hampering the executive and imposing hardship on those dealing with the Commonwealth.<sup>93</sup>

The impact on those parties as well as the Commonwealth is underlined by the criticism made by Professor Campbell regarding the suggested criterion for determining the validity of those exceptional contracts which will not need parliamentary authority:

How is a court to adjudge whether a contract is made ‘in the ordinary or necessary course of government administration’? Equally important, how

89 See, eg. Enid Campbell, ‘Commonwealth Contracts’ (1970) 44 *Australian Law Journal* 14, 14–16; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008) 349–50.

90 *Bardolph* (1934) 52 CLR 455, 502–3 (Starke J), 505–7 (Dixon J). Cf at 495–6 (Rich J).

91 *Ibid* 472 (Evatt J, at first instance), 509 (Dixon J). Dixon J said: ‘It is a function of the Executive, not of Parliament, to make contracts on behalf of the Crown. The Crown’s advisers are answerable politically to Parliament for their acts in making contracts’: at 509. See also to the same effect *Williams* (2012) 288 ALR 410, 474 [217] (Hayne J).

92 [1924] AC 318.

93 Evidence to Royal Commission on the *Constitution*, Parliament of Australia, Melbourne, 13 December 1927, 781 (Sir Owen Dixon), cited in *Williams* (2012) 288 ALR 410, 436 [68] (French CJ).

can a party negotiating a contract with the Crown be sure whether the proposed contract will be valid?<sup>94</sup>

Furthermore, the days have long since ceased when parties dealing with companies in private enterprise could have been affected by a company exceeding the powers conferred by its memorandum of association. This began to occur even before the abolition of the doctrine of ultra vires given the tendency of such documents to confer on a company the legal power and capacity to do almost anything it liked without regard to its actually intended activities.<sup>95</sup> The analogous doctrine of ultra vires in constitutional law cannot of course be abolished but it can be minimised in government contract cases where any lack of governmental authority to enter into a contract stems from the mere absence of *statutory* rather than constitutional authority. The practical difficulties faced by third parties dealing with governmental bodies and agencies can only be heightened when regard is had to the difficulty of securing legislative authority in addition to satisfying the need for parliamentary appropriations. That difficulty stems from the normal delays and political obstacles encountered in the legislative process even when minority governments are not in office.

It is now necessary to consider the reasons that were given for rejecting the common assumption. First, it was thought that, unlike the Crown in the United Kingdom, the Commonwealth was created by the *Constitution* and was not like a natural person.<sup>96</sup> It is significant that this view may also have had some attractions to Hayne and Keifel JJ,<sup>97</sup> even though their Honours decided the case on the ground already explained. Hayne and Kiefel JJ also seemed critical of the attempt to endow an artificial legal person with human characteristics. Secondly, it was thought that public money could only be used for governmental purposes and was necessarily different from private money.<sup>98</sup> Thirdly, the law of contract was designed to regulate dealings between individuals.<sup>99</sup> Fourthly, the exercise of power enjoyed by ordinary individuals can have a different impact on individuals when exercised by government, which I understood to draw attention to its potential for abuse and as a vehicle for government regulation of the affairs of individuals.<sup>100</sup> Fifthly, attention was drawn to the different nature of representative and responsible government in Australia — especially having regard to the position of the Senate and its inability to amend appropriations for the ordinary annual services of government under s 53 of the *Constitution*,

94 Campbell, 'Commonwealth Contracts', above n 89, 15. The criticisms were directed at the suggested criterion for determining the validity of contracts entered into by the Crown without any statutory authority at all but are now equally applicable to contracts entered into without parliamentary authority apart from parliamentary appropriations.

95 See, eg, *R v Federal Court of Australia; Ex parte WA National Football League Inc* (1979) 143 CLR 190, 208 (Barwick CJ).

96 *Williams* (2012) 288 ALR 410, 458 [154] (Gummow and Bell JJ), who emphasised that the Commonwealth was 'the body politic established under the *Commonwealth of Australia Constitution Act 1900* (Imp), and identified in covering cl 6' (citations omitted).

97 *Ibid* 474 [215]–[217] (Hayne J), 558 [576], 562 [595] (Kiefel J).

98 *Ibid* 457 [151] (Gummow and Bell JJ), 546 [519] (Crennan J), 558 [577] (Kiefel J).

99 *Ibid* 457 [151] (Gummow and Bell JJ).

100 *Ibid* 423–4 [38], 439–40 [77]–[78] (French CJ), 546 [521] (Crennan J).

despite the power of the Senate to reject supply and its ability to make suggestions for the amendment of money bills.<sup>101</sup>

A further reason for rejecting the common assumption was that the executive cannot change or make the law as mentioned by French CJ, Gummow and Bell JJ.<sup>102</sup> That is of course undoubtedly correct, but it was not clear to the writer why this was thought to be relevant since the common assumption was conditioned on the need for the executive to obey the law subject to any immunity which the Federal Government and its agents and instrumentalities impliedly enjoy from the operation of state law.

The final reason discerned in the majority judgements for rejecting the common assumption was the alleged absence of a judicially manageable test for giving effect to the common assumption. Some powers, it was asserted, simply did not lend themselves as relevant to ascertaining the scope of executive power such as, for example, marriage and bankruptcy.<sup>103</sup> But, with respect, the contrary can be demonstrated by examples of the Commonwealth providing marriage guidance counsellors employed or paid by it and similarly as regards bankruptcy for small business operators. A similar kind of example to demonstrate executive involvement could no doubt be envisaged with regard to the establishment of non-statutory advisory services to assist taxpayers to fill out their returns. But even if it were the case that some powers by their very nature did not inform any executive activity, the key question would still remain as to why it should be assumed that all legislative powers and even all parts of each of the legislative powers need to define executive powers as well.

A more substantial assertion is the question of how to construct the hypothetical law, but this can be done in my view by concentrating on the activity undertaken by the executive and the documentation it has used to describe that activity. The question would then be posed whether Parliament could use its legislative powers to authorise the executive to undertake that activity. The Commonwealth would need to bear in mind that the less documentation it provides, the greater the risk it would run of the Court being unable to discern the basis for justifying the constitutional validity of what the executive has done.<sup>104</sup>

At this point it is important to realise that all of the activities and transactions which were previously assumed by courts and others to fall within the executive power of the Commonwealth under s 61 of the *Constitution* will henceforth have to be run through the new prism created by *Williams* in order to determine the correctness of those assumptions. Having dealt with the reasons used to discredit the common assumption, it is now necessary to identify the nature of that prism

101 See also below n 115 and accompanying text. See also *Williams* (2012) 288 ALR 410, 454 [136] (Gummow and Bell JJ).

102 Ibid 419 [27] (French CJ), 454 [135] (Gummow and Bell JJ).

103 Ibid 423 [36] (French CJ), 454 [135] (Gummow and Bell JJ). Gummow and Bell JJ also mention taxation.

104 The Chief Justice asserted that there was a qualitative difference between *legislative* and *executive* power and that subject matters of legislative power were not there to define executive powers. The first part may be accepted but the second asserts what, with respect, needs to be substantiated: ibid 419 [27].

and address the main foundations for arriving at the conclusion reached by the majority regarding the scope of that executive power.

There appear to be three such foundations. Turning first to the judgment of the Chief Justice, his Honour showed, in my view, an abiding concern for the impact that Commonwealth executive power could have in diminishing the authority of the states at least in a *practical* way.<sup>105</sup> It is true that the Chief Justice quoted at the outset, and with approval, the remarks of Alfred Deakin to support the view that the expansion of Commonwealth power necessarily involves reduction in state power.<sup>106</sup> But I think this can only be correct in a *practical* sense<sup>107</sup> as distinct from a legal or analytical sense, given the absence of any priority attributed to the exercise of Commonwealth executive power over state executive power — in other words, the absence of a provision like s 109 to resolve any legal inconsistencies between the exercise of the two powers. If the states are unable to compete it is because of the Commonwealth's financial superiority. This seems to represent an attempt to impliedly reserve state executive powers even though such a method of interpretation is not permissible with legislative powers.<sup>108</sup>

While on the subject of s 109, reference should also be made to the suggestion that the scope of Commonwealth executive power should be narrowed to minimise the occasions for a clash of state and Commonwealth executive power as raised by some of the judges.<sup>109</sup> This suggestion should be rejected since, at their highest, any contradictory instructions to school chaplains would only result in the loss of Commonwealth funds or perhaps even their recovery by the Commonwealth, given the non-coercive nature of executive power.

The second possible foundation may be found in the judgment of Gummow and Bell JJ who were concerned about the importance of not undermining 'the basal assumption of legislative predominance inherited from the United Kingdom' and the importance of not 'distort[ing] the relationship between Ch I and Ch II of the *Constitution*'.<sup>110</sup> Their Honours also stressed the importance of preserving the interests of representative government. What this may refer to is the need to enhance the accountability of the executive to Parliament and thereby also minimise the potential for abuse of executive power as a vehicle for the government regulation of the affairs of individuals. That said, it may be questioned why those concerns are not sufficiently met by the control Parliament has over the appropriation of public funds — unless this is thought to be weakened because of the inequality of the Senate's powers over certain kinds of financial legislation. There is also the ability of Parliament to exercise the legislative predominance mentioned by controlling the exercise of executive power. A further question may be asked

105 Ibid 412 [1], 423 [37], 441–2 [83] (French CJ).

106 Ibid 412 [1], citing Deakin, 'Channel of Communication with Imperial Government', above n 28, 132.

107 As the Chief Justice himself seemed to recognise: see *Williams* (2012) 288 ALR 410, 423 [37], 442 [83].

108 This may be contrasted with the contrary view taken in relation to the devolution of the sale of Crown lands to Australian colonial governments once the power to control the same by legislation passed to their parliaments. The Chief Justice also relied on the drafting history of s 61 but this was strongly contested by Heydon J in dissent: *ibid* 424–33 [40]–[61] (French CJ), 503–6 [346]–[354] (Heydon J).

109 Ibid 546 [522] (Crennan J), 561 [590] (Kiefel J).

110 Ibid 454 [136] (Gummow and Bell JJ).

as to whether the Senate is any more likely to exercise this newfound control over government contracting and spending than that exercised in the past either through legislation to restrict the exercise of executive power or by withholding the appropriation of funds.

Although not easy to understand at first, the approach of Crennan J may perhaps have been based on the need to obtain legislative scrutiny and approval for the undertaking of *new activities* by the executive.<sup>111</sup> This is a concept which was informed by the different appropriation Acts passed to distinguish funding for routine departmental activities — which are not capable of amendment by the Senate — from new activities, which are capable of amendment by the Senate. This does not seem, with respect, to take sufficient account of the power of the Senate to withhold approval and to suggest amendments in the case of the first category of appropriation. Nor does it seem to take account of the possibility of the Senate being able, arguably at least, to seek by way of amendment the removal of any item contained in such an appropriation which does not fall within the category of ordinary annual services of government because of the new nature of the activity proposed. To include such an item could be seen to breach the prohibition on tacking contained in s 54 which provides that '[t]he proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation'. On current authority the High Court is unlikely to be able to intervene to resolve such an issue.<sup>112</sup> But the point to emphasise is that, according to her Honour, the legislative approval needed goes beyond appropriation. If that is so, it may be questioned why such additional approval was not shown to have *ever* been given to the New South Wales Tourist Bureau in *Bardolph* before it came to be recognised as a recognised function of government in New South Wales despite the reliance placed on that case by Crennan J.<sup>113</sup>

It may be thought that the foundation described above for restricting Commonwealth contractual capacity not authorised by legislation relied on by French CJ is different from the foundation relied on by Gummow, Crennan and Bell JJ. But perhaps there is one possible strand in reasoning that may be thought

111 Ibid 538 [487], 540 [490], 540 [493], 545 [515]–[516], 547 [527]–[530], 548 [534] (Crennan J). Note in that regard the refinement of this notion which appeared in Howell, above n 58, 60–6, 71–2 even though it was directed to the position in the United Kingdom before *Williams* was decided.

112 See the text which begins with the sentence accompanied by n 113 and ends with the sentence which immediately follows n 115. See also John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1901) 674–7. Unlike the terms of s 55 which deal with actual laws rather than proposed laws, no remedy is prescribed for breaching the prohibition on tacking in s 54 of the *Constitution*.

113 A close examination of Evatt J's judgment in *Bardolph* by the writer shows that his Honour found that the advertising contracts only became contracts for a recognised function of government by previous successive appropriation Acts and that the contracts were entered into on behalf of New South Wales by a governmental official who occupied an office especially created by the executive to handle such contracts. The Tourist Bureau for which these contracts were made was not a separate legal entity but was instead proclaimed as an industrial undertaking under legislation which only dealt with the disbursement of money for the purposes of those undertakings: *Bardolph* (1934) 52 CLR 455, 462 (Evatt J), 494, 496 (Rich J), 501 (Starke J), 507 (Dixon J). But on the view taken by a majority on appeal those special funds were not relied on to support any expenditure in that case.



common to all those judges who sought to justify the insufficiency of legislative appropriations in order to provide the necessary legislative authority for those contracts which fall outside the ordinary course of administration. That strand is that under ss 53 and 54 of the *Constitution* the Senate occupies a weaker position in approving appropriations than does the House of Representatives.<sup>114</sup>

But if this correctly represents what was thought by these judges, it remains highly questionable whether it is for the courts to remedy perceived deficiencies in the way Parliament has been constituted. The reliance placed on ss 53 and 54 of the *Constitution* gives rise to questions about whether this was consistent with well-established authority which held that those provisions were non-justiciable.<sup>115</sup> Perhaps the non-justiciability does not, and should not, extend to the provisions of the last paragraph of s 53 in relation to whether the Senate enjoys the power to reject a money bill, including a money bill which it cannot amend.<sup>116</sup> Possibly the non-justiciability is confined to other provisions of ss 53 and 54 being used to impugn the validity of legislation which is not passed in accordance with those provisions. It would nevertheless seem odd to allow executive action to be impugned on this ground when legislation cannot be impugned by reference to it.

It remains to speculate on the kind of contracts and payments that will *not* require additional parliamentary authority in the future. Doubtless this category of activity will be read broadly and dynamically. It will include contracts for the administration of departments under s 64 as indicated by French CJ.<sup>117</sup> One may test the position by asking whether this will be sufficient to cover a contract to buy new submarines and comparing the same with a new contract to develop alternative and solar sources of energy. Would those examples and others require the courts to inquire into whether functions fulfilled by these contracts are truly governmental from those that are not, and thus require judges to expose their own subjective values and views on the role of government — something they have tried to avoid in the past in relation to, for example, the vexed question of intergovernmental immunity?

Even if the foregoing difficulty is avoided by adopting the new activity test as a means of identifying the kind of extraordinary contract requiring additional parliamentary approval, that test will turn on the *new nature of the activity* so as to fall outside the recognised category of contracts and payments which do not require the additional legislative authority. If so, the question may be asked why the advertising contracts in *Bardolph* apparently never required additional

114 *Williams* (2012) 288 ALR 410, 433 [60]–[61] (French CJ), 454 [136] (Gummow and Bell JJ), 538 [487] (Crennan J on the assumption, which seems to be correct, that her Honour accepted the contention of the plaintiff described in that paragraph having regard to the conclusions reached regarding the significance of *Bardolph*), 547 [530] (Crennan J). See also Crennan J's conclusions: at 547–8 [531]–[534]. Cf the text above consisting of the four sentences which follow n 111 regarding the true extent of the weakness in the powers of the Senate.

115 See, eg, *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ) ('*Native Title Act Case*').

116 Geoffrey Lindell, 'Duty to Exercise Judicial Review' in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawyer* (Butterworths, 1977) 150, 167–8.

117 *Williams* (2012) 288 ALR 410, 422 [34], 440–1 [79].

legislative approval when the Funding Agreement did so in *Williams*. It needs to be remembered that the contracts in *Bardolph* only appeared to become a recognised function of the New South Wales Government as a result of successive appropriations in the past pursuant to *appropriations* of the necessary funds. Did the contracts of advertising authorised by the Australian Government for the GST (\$15 million) and Work Choices (\$45 million) deal with new policies? And what of the numerous and important two-airline policy agreements which were entered into without statutory authority, at least at the time they were entered into, as mentioned by the late Professor Richardson?<sup>118</sup> To return to one of the original examples above, would it have made any difference if the submarines had been nuclear-powered instead of conventional submarines?

A key question which will now have to be addressed is whether a general contracts Act will suffice<sup>119</sup> and, if so, the extent to which Parliament can delegate its approval — either under its normal powers of delegation or what may need to be a much narrower power of delegation having regard to the purpose in hand. This issue will be addressed further below.<sup>120</sup> One thing we do know is that s 44 of the *Financial Management and Accountability Act* 1997 (Cth), before it was amended by the subsequent remedial legislation, was not found to be sufficient.<sup>121</sup>

What is also important is that I have to this point only adverted to the Commonwealth's ability to contract and spend money, but it is vital to remember that the case has implications for the whole range of governmental activities. Although the decision was of course concerned with those aspects of executive authority, the nature of the reasoning adopted by French CJ, Gummow, Crennan and Bell JJ makes it difficult in point of principle to confine the significance of *Williams* to those activities. A number of other activities were mentioned earlier in this article which involved decisions which were not thought to have been made pursuant to an enactment for the purposes of the judicial review under the *Administrative Decisions (Judicial Review) Act* (Cth) and so were not thought to require additional statutory authority.<sup>122</sup> The fact that such decisions were not made pursuant to an enactment does of course suggest that they were made in the exercise of executive power which was not thought to require any additional legislative authority apart from the legislative authority to spend any public money associated with the exercise of such power. As indicated before, henceforth such activities will have to be run through the new prism created by *Williams*. Other examples include the power of the executive to incorporate and acquire shares in companies and also the power of the executive to establish royal commissions

118 See J E Richardson, 'The Executive Power of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 50, 75.

119 This was an issue pointedly left open by the Chief Justice: *Williams* (2012) 288 ALR 410, 436 [68].

120 See Part VII(B).

121 *Williams* (2012) 288 ALR 410, 437 [71] (French CJ), 445–6 [102]–[103] (Gummow and Bell JJ), 485–6 [260] (Hayne J), 551 [547] (Crennan J), 562 [596] (Kiefel J). Those provisions required the Chief Executive of an Agency to 'manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible': *Financial Management and Accountability Act* 1997 (Cth) s 44(1).

122 See above text and notes in and between nn 70–4.

without coercive powers to inquire into the need to embark on new government policies.

## VII REMEDIAL LEGISLATION — A SWIFT LEGISLATIVE RESPONSE

### A *Nature of the Legislation*

The shortcomings identified above with the reasoning adopted by the majority in *Williams* are today less important for their own intrinsic significance than for highlighting the need to remedy the deficiencies found in the scope of the executive power of the Commonwealth under s 61 of the *Constitution*.

Because of the urgency of the situation created by the *Williams* case, Parliament lost no time in passing the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) (*Amending Act No 1*), which amended the *Financial Management and Accountability Act 1997* (Cth) (*FMA Act*). The former Act represented a necessarily swift legislative response to that case. Briefly summarised, the *Amending Act No 1* creates a power to authorise the executive to enter into arrangements under which money is payable by the Commonwealth and to make grants of money specified in regulations or within a class of such arrangements or grants specified in regulations.<sup>123</sup> It also purported to validate a number of existing programs which included the National School Chaplaincy Program and the Student Welfare Program (which replaced the former program).<sup>124</sup> There were also transitional provisions to deal with such arrangements which were made before the commencement of the Act<sup>125</sup> and an amendment of the statutory power in s 44 of the *FMA Act* found deficient in *Williams*.<sup>126</sup>

The legislative specification of programs harks back to the more detailed way parliamentary appropriations Acts used to operate but, even so, this may prove to

123 *Amending Act No 1* inserted into the *FMA Act* a new s 32B authorising the Commonwealth to make and administer arrangements (defined to include contracts, agreements and deeds in s 32B(3)) and grants, subject to compliance with other laws, if the following conditions are satisfied: (i) The Commonwealth does not otherwise have that power; and (ii) the arrangements and grants are specified in regulations or in a class of arrangements or grants specified in regulations: *Amending Act No 1* sch 1 item 2 s 32B(1).

124 *Amending Act No 1* amended of its own force the *Financial Management and Accountability Regulations 1997* (Cth) (*FMA Regulations*) to specify a range of spending programs for the purposes of the new s 32B in the *FMA Act*, which took effect immediately by reason of the amendment to the regulations being contained in *Amending Act No 1* itself (under s 3(1) when read with sch 2 of *Amending Act No 1*). They are taken to have been set out in Schedules to the *FMA Regulations* by virtue of *Amending Act No 1*: *FMA Regulations* reg 16 when read with sch 1AA of the same regulations. These include in sch 1AA pt 4 item 407.013 of the *FMA Regulations*, the National School Chaplaincy and Student Welfare Program (which replaced the former program) and a large number of other programs. Further programs can be specified.

125 See *Amending Act No 1* sch 1 item 9.

126 *FMA Act* s 44 now empowers the Chief Executive to enter into arrangements including contracts and to overcome the deficiency identified in *Williams* if such a power is not covered by the new s 32B *FMA Act*: ss 44(1A), (1B) as amended by virtue of *Amending Act No 1* sch 1 item 4. Presumably this refers to contracts which could have been entered into without additional legislative authority.

be short lived since, in future, new programs may appear in regulations and not primary legislation, although the regulations will still be subject to parliamentary scrutiny through the disallowance process. The provisions of s 32B which were inserted in the *FMA Act* by the *Amending Act No 1* do not appear to provide legislative authority for the exercise of other legal capacities possessed by a body with full corporate capacity such as, for example, entry into contracts which do not involve any payment of public money by the Commonwealth,<sup>127</sup> and the right to accept and hold *personal* property voluntarily acquired (as distinct from land already provided).<sup>128</sup>

Subsequently the Parliament enacted the *Financial Framework Legislation Amendment Act (No 2) 2013* (Cth) (*Amending Act No 2*), which also amended the *FMA Act* and purports to create similar statutory authority for the Commonwealth to form, or participate in forming, companies, as specified in the regulations.<sup>129</sup> It also confirms the authority for the Commonwealth's existing involvement with the companies specified in the same regulations, as amended by that legislation.<sup>130</sup> This was done in the interests of 'abundant caution' for the avoidance of doubt created by the High Court's decision in the *Williams* case.<sup>131</sup> One important difference with the power to enter into certain arrangements and make grants is that the power to form a company or participate in its formation contained in s 39B of the *FMA Act*, as now amended, is confined to specifically-named companies described in the accompanying regulations and does not appear to extend to companies that only fall within a class of companies described in the regulations. In addition, s 39A of the same Act creates the duty of the Minister to inform Parliament of any involvement in a company by the Commonwealth.

127 A contract for the sale of surplus Commonwealth property such as ships or aircraft might be an example of such a contract. It is true that the legislative authority conferred on a Chief Executive of an Agency under s 44 *FMA Act* as amended seems to extend to all arrangements (including contracts) regardless of whether money is payable by the Commonwealth. However the exercise of that power does not appear to be subject to the power of parliamentary disallowance, which may prove critical if such parliamentary scrutiny is seen as essential in overcoming the effect of the *Williams* case. This is so even though that case was, strictly speaking, only concerned with an agreement of the Commonwealth to pay public funds. Alternatively, the case of the sale of surplus Commonwealth property might be seen as coming within contracts that are part of or are incidental to carrying out the ordinary and well recognised functions of government: see text accompanying above n 54. The latter possibility may go far toward reducing the practical need for any additional legislative authority to cover such contracts.

128 Presumably the power to enter into 'arrangements' as including 'deeds, contracts and arrangements' will mean that as long as the Commonwealth pays money in the course of voluntarily acquiring interests of personal property by the use of such arrangements, it will be covered by the new s 32B *FMA Act*. The acquisition of land is already covered in the *Lands Acquisition Act 1989* (Cth) but the attempt by the Parliament to delegate this power to the executive may be open to the same doubts as are raised above regarding the remedial legislation, if the test for the need to obtain additional legislative authority focuses on new activities and policies. However I have not determined whether acquisitions by agreement are capable of being disallowed by either House of Parliament: see *Lands Acquisition Act 1989* (Cth) s 40.

129 *Amending Act No 2* inserted a new s 39B in the *FMA Act* with the power being created if it does not otherwise exist without the benefit of that provision: *Amending Act No 2* sch 1 item 2.

130 *Amending Act No 2* amended of its own force the *FMA Regulations: Amending Act No 2* sch 2.

131 Explanatory Memorandum, Financial Framework Legislation Amendment Bill (No 2) 2013 (Cth) 5 [21], it being also stated there that '[t]he Commonwealth has always believed and still believes that it may, without legislative authority, form or participate in the formation of a company and acquire shares in or become a member of a company to carry out activities within a head of legislative power'.

The Parliament also recently enacted the *Public Governance, Performance and Accountability Act 2013* (Cth) ('*PGPA Act*') which is designed to replace both the *FMA Act* and the *Commonwealth Authorities and Companies Act 1997* (Cth) when the substantive provisions of the *PGPA Act* come into force by 1 July 2014.<sup>132</sup> The *PGPA Act* also contains provisions in ss 85 and 87 which provide similar legislative authority for the Minister to act on behalf of the Commonwealth regarding the formation of companies, and the participation in the formation of companies, regarding companies formed under the general law. The only difference with the terms of Amending Act No 2 is that the companies concerned must be specified in rules made by the Minister (rather than regulations made by the Governor-General in Council). The rules will still be subject to the usual requirements of tabling and disallowance in Parliament. The *PGPA Act* does not currently replicate the provisions dealing with the power to enter into arrangements and make grants of money already provided for in s 32B of the *FMA Act*. However I understand that the fate of those provisions is at present under review and will be addressed before the substantive provisions of the *PGPA Act* come into force. It is recognised that equivalent provisions will need to be in place after 1 July 2014, possibly as part of a truncated *FMA Act* or otherwise.<sup>133</sup> It therefore seems safe to assume in the meantime that there will be some provisions in place after 1 July 2014 which will replicate the kind of provisions found in s 32B of the *FMA Act* as it presently operates, along with the provisions in ss 85 and 87 of the *PGPA Act*. What follows below deals with the validity of both kinds of provisions in the remedial legislation passed in response to the decision in *Williams*.

## B The Validity of the Legislation

Shortly after the enactment of Amending Act No 1 Mr Williams foreshadowed a new challenge to the continued operation of NSCP (now described as the 'Student Welfare Program'). As already indicated that operation was provided under the *FMA Regulations* as amended by the *FMA Act* and the foreshadowed challenge has now eventuated.<sup>134</sup> This latest action inevitably involves a challenge to the same legislation and invites attention to its possible chances of success from the two perspectives of breadth and depth, to adopt again the Winterton dichotomy for describing the scope of the executive power of the Commonwealth.<sup>135</sup>

The lasting legacies of the *Pape* and *Williams* cases have been to throw open federal spending to increased judicial scrutiny and challenge as going beyond

132 *PGPA Act* s 2(1). It is stated in the Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (Cth) [2] that '[t]he PGPA Bill proposes to replace the current bifurcated model for Commonwealth financial management established through the *Financial Management and Accountability Act 1997* ... and the *Commonwealth Authorities and Companies Act 1997*'.

133 Email from Mr Rod Smith, Acting Assistant Secretary, Governance Branch, Department of Finance and Deregulation, to Geoffrey Lindell, 18 July 2013.

134 Jane Lee, 'Father to Take Canberra on Again over Chaplains', *The Age* (Melbourne), 7 July 2012, 6. See the Writ of Summons filed in the High Court on 8 August 2013 in *Ronald Williams v Commonwealth of Australia, Minister for Education and Scripture Union of Queensland: Action No S154 of 2013*. The details of the Statement of Claim in this action came too late to be examined and analysed in this article.

135 See above n 22.

the scope of the admittedly wide legislative powers enjoyed by the Federal Parliament. These cases have established that whatever limitations exist on the Court's ability to review the validity of a mere appropriation Act, federal spending is treated as part of the executive power which, as I have suggested before, is seen as being federally limited.<sup>136</sup> By contrast the ability of the Federal Parliament under s 96 of the *Constitution* to grant financial assistance to a state, subject to whatever conditions it thinks fit, is not federally constrained although a state is not of course obliged to accept such a grant.<sup>137</sup> A strong theme running through both *Pape* and *Williams* is the revived importance of s 96 despite the ability of the Parliament to terminate its operation by making other provision under s 51(xxxvi).<sup>138</sup> Be that as it may, the failure to use s 96 to validate the National School Chaplaincy Program (NSCP) and its replacement, as well as other programs validated in the remedial legislation, leaves the way open for Mr Williams and others to challenge those programs on the grounds that they exceed the scope of the Commonwealth's legislative powers. Obviously the success of challenges to those various items of federal expenditure will depend on the contours and limits of those powers. Enough has already been said to indicate the writer's preference for the view expressed by Heydon J in his dissenting judgment in *Williams* regarding the scope of the power of the Parliament to provide benefits to students under s 51(xxiiiA) of the *Constitution*. This relates to the challenge to the NSCP and its replacement. No attempt is made in this article to deal with the validity of the other programs sought to be validated by the remedial legislation.

Nor is any attempt made to analyse in detail the extent to which Parliament can authorise the Commonwealth to incorporate, or participate in the incorporation of companies, or acquire shares in companies, as a means of engaging in activities which would fall outside the heads of Commonwealth legislative power. This is a complicated issue which lies beyond the scope of this article. It suffices to say that the issue was not resolved before the Commonwealth obtained from all the states a reference of powers under s 51(xxxvii) of the *Constitution* authorising it to enact laws relating to corporations.<sup>139</sup> While it is true that the same reference did include the power to make laws with respect to the formation of corporations, such a reference has effect only to the extent that the matter is included in

136 See above text and notes between nn 23–5.

137 *South Australia v Commonwealth* (1942) 65 CLR 373 ('*First Uniform Tax Case*'); *Victoria v Commonwealth* (1957) 99 CLR 575 ('*Second Uniform Tax Case*').

138 I am grateful to my colleague Dr Peter Johnston for reminding me of the potent temporal significance of s 96 by reason of the ability of the Parliament to make other provision under s 51(xxxvi) of the *Constitution*.

139 It will be recalled that in *Davis v Commonwealth* (1988) 166 CLR 79, 94–5 Mason CJ, Deane and Gaudron JJ had occasion to observe that there was 'no [constitutional] bar to the incorporation of a company in the Australian Capital Territory', but their Honours very much doubted whether 'this procedure would enable the Commonwealth to circumvent limitations or restrictions which would otherwise attach to the federal executive power'. See also *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117, which involved a company carrying on activities probably having some significance for defence.

the legislative powers of the parliament of the state.<sup>140</sup> There must be at least a serious doubt whether the states possessed the power to enlarge the capacity of the Commonwealth to undertake activities which otherwise fall outside the constitutional authority of the Commonwealth under s 61 of the *Constitution*, ie the authority to form a company which can engage in any activities not otherwise relevant to the distribution of Commonwealth legislative powers. The discussion which follows concerns the real possibility that the remedial legislation may also invite challenge based on the *depth* aspect of the executive power of the Commonwealth.<sup>141</sup> One aspect of the solution adopted by those Acts tests the validity of Sir Owen Dixon's suggestion for a contracts Act which will in turn depend upon whether the normal rules relating to the delegation of legislative power can apply in order to satisfy the need for the additional legislative authority — but with the additional feature that either House of the Commonwealth Parliament will presumably have the power to disallow a regulation made under the *FMA Act* as amended.<sup>142</sup> What is in issue concerns the effectiveness of delegating to the executive the function of authorising the Commonwealth:

- (a) To enter into an arrangement under which public money is paid by the Commonwealth, or make a grant of financial assistance, which are both specified by regulation; and
- (b) To enter into arrangements, or make grants, which are included within a class of such arrangements and grants which are both specified by regulation.

A similar issue arises with the authority of the Commonwealth to form companies or participate in the formation of companies or acquire the shares of companies formed under the general law. This is so particularly if the test of whether additional parliamentary approval is needed turns on the need for Parliament *to approve new activities or new policies*, especially on the Crennan J approach, if that approach is taken as requiring approval of more than the mere legal facilities used to carry on those activities or pursue those policies. The key question which emerges is whether the presumed ability of a House to disallow a regulation will be a sufficient factor to ensure the requisite need for parliamentary supervision as regards future payments and contractual arrangements authorised by regulations or rules made pursuant to the remedial legislation.<sup>143</sup>

140 See the *Corporations (Commonwealth Powers) Act 2001* (Cth) ss 4(1)(b), (2)(b) for all the states except Tasmania, as to which see ss 5(1)(b), (2)(b) of the same Act.

141 See above n 22 for the meaning of 'depth aspect'.

142 The regulations are presumably legislative instruments and are thus capable of being disallowed by either House of Parliament: see *Legislative Instruments Act 2003* (Cth) ss 5 (definition of 'legislative instruments'), 42.

143 It may be a mistake to assume that compliance with the general requirements of the separation of legislative and executive powers doctrine as it operates in Australia will necessarily satisfy the more specific requirements of the newfound need to obtain parliamentary authorisation of *executive activities* so as to render automatically applicable the previous learning and authority on the power to authorise delegated legislation.

The key provision is s 32B of the *FMA Act*, as amended by *Amending Act No 1*, which reads as follows:

- (1) If:
  - (a) apart from this subsection, the Commonwealth does not have power to make, vary or administer:
    - (i) an arrangement under which public money is, or may become, payable by the Commonwealth; or
    - (ii) a grant of financial assistance to a State or Territory; or
    - (iii) a grant of financial assistance to a person other than a State or Territory;
  - (b) the arrangement or grant, as the case may be:
    - (i) is specified in the regulations; or
    - (ii) is included in a class of arrangements or grants, as the case may be, specified in the regulations; or
    - (iii) is for the purposes of a program specified in the regulations;

the Commonwealth has power to make, vary or administer the arrangement or grant, as the case may be, subject to compliance with this Act, the regulations, Finance Minister's Orders, Special Instructions and any other law.

- (2) A power conferred on the Commonwealth by subsection (1) may be exercised on behalf of the Commonwealth by a Minister or a Chief Executive.
- (3) In this section:

***administer:***

- (a) in relation to an arrangement — includes give effect to; or
- (b) in relation to a grant — includes make, vary or administer an arrangement that relates to the grant.

***arrangement*** includes contract, agreement or deed.

***make***, in relation to an arrangement, includes enter into.

***vary***, in relation to an arrangement or grant, means:

- (a) vary in accordance with the terms or conditions of the arrangement or grant; or
- (b) vary with the consent of the non-Commonwealth party or parties to the arrangement or grant.

There is no need to set out here the terms of either s 39B of the *FMA Act*, which are still in operation, or those of ss 85 and 87 of the *PGPA Act* which will commence



to operate by 1 July 2014. Both sets of provisions deal with the authority of the Commonwealth to form or participate in the formation of companies, or acquire shares, in companies formed under the general law. They generally follow the same model and are cast in similar terms to those of s 32B of the *FMA Act* except that, as already explained, the authority created under the latter provisions:

- (a) Extends to companies that are specified in *rules* made by a Commonwealth Minister; and
- (b) Does not extend to those companies within a *class* of companies which are specified by the same rules instead of being specifically named.<sup>144</sup>

It is at the outset very important to emphasise that the deficiency in power brought to light by *Williams* was only concerned with agreements and expenditure entered into or incurred, independently of legislation — in other words, agreements and expenditure which were rendered vulnerable through the absence of parliamentary authority other than the appropriation of public funds. The case did not cast doubt on agreements entered into and money spent pursuant to statutory authority which existed in addition to parliamentary appropriations. The same can be said regarding the authority of the Commonwealth to form or acquire shares in companies formed under the general law.

The remedial legislation described in this article attempts to provide that statutory authority, like the exercise of other legislative authority, should be capable of being delegated to the executive.<sup>145</sup> As was explained before, Parliament has attempted such a delegation here in relation to the power to make regulations specifying certain arrangements or classes of such arrangements which the Commonwealth can enter into. The power to enact legislation which creates that authority is, it is suggested, located in s 51(xxxix) of the *Constitution* when read with ss 51, 52 and 61. As is the case with Commonwealth legislative powers generally, constitutional powers should normally be read as supplementing or adding to each other, and this applies to the legislative powers in ss 51 and 52 and the executive powers in s 61 of the *Constitution*.

In my view the provisions of ss 32B and 39B of the *FMA Act* should be seen as an exercise of the incidental legislative powers when read in combination with the other express legislative powers which can be used to authorise the executive

144 See text between above nn 129–33. As was explained there, the position with regard to the current provisions of s 39B *FMA Act* is broadly the same except that the companies are specified in regulations made by the Governor-General in Council and not rules made by a Minister. But what is significant for present purposes is that both the rules and regulations are legislative instruments which are capable of being disallowed.

145 See, eg, *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (*'Dignan'*). Strictly speaking the Student Welfare Program challenged by Mr Williams and the other programs sought to be validated by the *FMA Regulations* in 2012 could perhaps not be said to raise this issue by themselves because the amendment of those regulations was effected by primary legislation: see above n 124. But if the issue has the effect of invalidating the provisions in *Amending Act No 1* which authorise the Commonwealth to enter into contracts specified in regulations, it may be difficult to sever the provisions of the same Act which attempted to validate both kinds of programs.

to engage in any activity relevant to those powers.<sup>146</sup> Obviously the power of the Parliament to legislate under s 51(xxxix) cannot authorise the remedial legislation to augment the powers of the executive to engage in activities in areas that lie beyond the scope of all the other legislative powers of the Parliament. In this regard the power in s 51(xxxix) is confined to ‘matters incidental to the execution of any power vested by this Constitution in the Parliament’. Any potential for the remedial legislation to exceed the scope of the Commonwealth’s legislative powers can be cured by reading it down with the assistance of s 15A of the *Acts Interpretation Act 1901* (Cth). It is true that to inquire into whether an express legislative power can be so used appears to resemble the kind of inquiry which was needed to operate the common assumption about the scope of the executive power and was rejected in *Williams*. But the inquiry seems essential to the reading down of *actual* legislation, as is involved here with the remedial legislation, and not the uncertain nature of *hypothetical* legislation which was involved in giving effect to the common assumption.

Perhaps it may be thought that the function vested in the Parliament of approving executive activities and transactions is part of its function of supervising and holding the executive to account in a way that is somehow divorced from and not part of its legislative function. The acceptance of this view would render inapplicable the normal rules regarding the delegation of legislative power, but this will not be easy to sustain if, as has been affirmed, ‘[t]he will of a Parliament is expressed in a statute or Act of Parliament’.<sup>147</sup>

Perhaps it may also be thought that the existing capacity of the Commonwealth to carry on activities without the specific approval of the Parliament (in addition to appropriations) should be read as *restricting* and *limiting*, and not merely *empowering*, that capacity. Lurking behind such an argument may be a notion more akin to an American notion of separation of powers. However, what seems more likely is that the concern in the *Williams* case was directed at the question of the accountability of the executive to the Parliament — a concern that is likely to be met by the deliberate decision of the Parliament to widen the power of the executive as long as the widening takes place with the authority of the Parliament. Moreover, the contrary argument runs in opposition to the ‘basal assumption of legislative predominance inherited from the United Kingdom’<sup>148</sup> under which the

146 *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329, 357 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) (‘*Second Fringe Benefits Tax Case*’), regarding laws for the ‘regulation and supervision of the polity’s own activities’; *R v Kidman* (1915) 20 CLR 425, 449–50 (Higgins J), regarding a law making conspiracy to defraud the Commonwealth a criminal offence. See also, by analogy, *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, 571 where Latham CJ said: ‘When the Commonwealth constitutes a department of its own, eg, defence, the provisions of sec 51 are sufficient to give the Commonwealth complete control of that department’.

147 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 226 in relation to the power of the states to refer matters to the Commonwealth Parliament under the *Constitution* s 51(xxxvii). Significantly, the additional approval function established in *Williams* was expressed in terms of parliamentary authority and not an authority which need only be given by both Houses of Parliament.

148 To quote the phrase used by Gummow and Bell JJ in *Williams* (2012) 288 ALR 410, 454 [136].

Legislature should be able within federal limits to *enhance* and *replace* what it can *control*.<sup>149</sup>

The acceptance of the power of the Parliament to enact the depth aspect of the remedial legislation would also go a long way towards alleviating some of the adverse consequences of adopting the view now upheld in *Williams*. It will be recalled that Sir Owen Dixon and Dr Evatt were concerned about hampering the executive and imposing hardship on those dealing with the Commonwealth. This also applies just as much to dealings with any company created by the Commonwealth under the general law as it does to dealings in contract with the Commonwealth.

Underpinning the foregoing considerations is the assumption that our system of government is founded on a presumption of confidence in the decisions of our elected representatives — not the strict separation of powers doctrine followed in the United States, which does not allow for a union between the executive and the legislative branches of government as is the case in Australia and the United Kingdom. The confidence in the elected representative is today presumed rather than actually believed because it reflects the original design of our parliamentary governmental institutions. As Gummow J remarked in *McGinty v Western Australia* (*McGinty*),<sup>150</sup> quoting McHugh J in *Theophanous v Herald & Weekly Times Ltd* (*Theophanous*),<sup>151</sup> ‘the *Constitution* did not specify “the whole apparatus of representative government”’.<sup>152</sup> Gummow J added in *McGinty* that ‘[a]s to much of that, it was, as Barton had said in 1891, a case of “trust the parliament of the commonwealth”. The *Constitution* explicitly proceeds on that footing’.<sup>153</sup>

This parallels the observations of Barwick CJ in *A-G (Cth) ex rel McKinlay v Commonwealth*,<sup>154</sup> when his Honour stated:

In other words, unlike the case of the *American Constitution*, the *Australian Constitution* is built upon confidence in a system of parliamentary Government with ministerial responsibility. The contrast in constitutional approach is that, in the case of the *American Constitution*, restriction on legislative power is sought and readily implied whereas, where confidence in the parliament prevails, express words are regarded as necessary to warrant a limitation of otherwise plenary powers. Thus, discretions in parliament are more readily accepted in the construction of the *Australian Constitution*.<sup>155</sup>

149 *A-G v De Keyzer's Royal Hotel Ltd* [1920] AC 508.

150 (1996) 186 CLR 140.

151 (1994) 182 CLR 104.

152 *McGinty* (1996) 186 CLR 140, 284, quoting *Theophanous* (1994) 182 CLR 104, 203.

153 *McGinty* (1996) 186 CLR 140, 284, quoting *Official Report of the National Australasian Convention Debates*, Sydney, 2 April 1891, 619 (Barton).

154 (1975) 135 CLR 1.

155 *Ibid* 24.

So far as the application in Australia of any theory of the separation of legislative and executive powers is concerned, it is worth recalling by analogy the remarks of Dixon J when he observed:

After the long history of parliamentary delegation in Britain and the British colonies, it may be right to treat subordinate legislation which remains under parliamentary control as lacking the independent and unqualified authority which is an attribute of true legislative power.<sup>156</sup>

Likewise in relation to the regulations made under the remedial legislation which should be taken as representing the will of the Parliament to authorise the executive to enter into the contracts and spend money referred to in those Acts. This was a critical feature which was thought to be lacking with the Funding Agreement in the *Williams* case. The same applies to the authority to form, and participate in the formation of companies under the general law.

## VIII COPING WITH INCREASED PARLIAMENTARY RESPONSIBILITY

It is now desirable to advert briefly the institutionalised arrangements that may have to be developed to enable the Parliament to meet its new responsibilities. The effect of the *Williams* case has been to expand the *supervisory* role presently played by the Houses of Parliament and their committees and officers regarding government contracting and the payment of public moneys, such as the Joint Parliamentary Standing Committee on Public Works, the Joint Committee of Public Accounts and Audit, and the Auditor-General.<sup>157</sup> To that role should now be added that of *authorising* certain executive activities and transactions *before* those activities are entered into or carried on by the government and its agencies.

Even if the remedial legislation is upheld, either House may be able to disallow any regulations specifying the arrangements under which money is paid by the Commonwealth or classes of such arrangements that the government can enter into and the same applies as regards the payment of money out of public funds. This will presumably give rise to the need to provide either or both Houses of the Parliament systematic guidance and advice — something rather like that provided for the disallowance of general regulations and subordinate legislation. However,

156 *Dignan* (1931) 46 CLR 73, 102. His Honour also indicated that the ‘existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law’: at 101–2. This highlights the need to look in this respect to British and not American notions of government. The former notions do not insist on any strict separation of legislative and executive power. The rule which the Newfoundland House of Assembly made which limited the ability of the Government of Newfoundland to enter into certain contracts without the authority of a resolution passed by that House and which was upheld by the Privy Council in *Commercial Cable Co v Government of Newfoundland* [1916] 2 AC 610, seems, to the writer at least, to be exceptional.

157 See *Public Works Committee Act 1969* (Cth); *Public Accounts and Audit Committee Act 1951* (Cth); *Auditor-General Act 1997* (Cth). For the role of the two committees mentioned, see also B C Wright and P E Fowler (eds), *House of Representatives Practice* (Department of the House of Representatives, 6<sup>th</sup> ed, 2012) 649–51.

the standards developed over the years by the Senate Standing Committee on Regulations and Ordinances have concentrated on grounds for disallowance which are concerned with the impact of subordinate legislation on the rights of individuals.<sup>158</sup> The question may be asked whether such a function should be added to those already performed by that Committee or whether this ground for disallowance is sufficiently different for it to be given to a new Committee of either or both Houses.

## IX OTHER MATTERS AND QUESTIONS FOR THE FUTURE

It remains to mention, and in some cases reiterate, a number of unanswered questions for the future. The first is whether the implied nationhood power and powers to enter into agreements with the states can be exercised without legislative approval. There is a suggestion in some of the judgments that the exercise of the nationhood power will not attract the need to obtain additional legislative authorisation.<sup>159</sup> If that is what was meant by those judgments, it would not explain why the concern about accountability should not also apply to the exercise of this power. It would also seem rather odd because, if correct, it would follow that the Tax Bonus payments in *Pape* could be upheld as an exercise of that power without need for legislative approval when the same was not the case with payment for the NSCP. The same might conceivably apply to the government guarantee of large deposits in the banks during the Global Financial Crisis, depending on whether such a guarantee could be justified by reference to the nationhood power rather than the power to make laws with respect to banking under s 51(xiii) of the *Constitution*.<sup>160</sup> There is a reference in the judgment of Gummow and Bell JJ to agreements between the Commonwealth and the states in a way that does not clearly indicate whether legislative approval for those agreements will be necessary.<sup>161</sup>

How significant is *Williams* for the exercise of state executive power? The notions of executive accountability to Parliament could equally apply to state Parliaments as well, given the reliance placed on *Bardolph* which was concerned with an exercise of state executive power. As against that, the significance attached to the role played by the Senate may suggest that it will not apply to the states though similar arguments might be developed with reference to their upper Houses as

158 Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13<sup>th</sup> ed, 2012) 456–8.

159 *Williams* (2012) 288 ALR 410, 422 [34] (French CJ), and possibly 538 [485] (Crennan J). Cf at 550–1 [543]–[544] (Crennan J). The fact that all judges in the majority found it necessary to reject the ability of the Commonwealth to rely on the nationhood power in this case does not necessarily imply that they all assumed it could be exercised without that authority. For a critical analysis of the scope of the nationhood power in the light of *Pape*, which lies beyond the scope of my article, see Twomey, above n 14, 327–43.

160 I was reminded of the reference to this possible exercise of the nationhood power by the senior government lawyer referred to in above n 70.

161 *Williams* (2012) 288 ALR 410, 455 [141]. The reference to such agreements by French CJ contemplated legislative approval: at 413 [4].

well.<sup>162</sup> There is also the fact that the federal considerations relied on by French CJ<sup>163</sup> may suggest that this would be a further reason why he would not see *Williams* as having any application to state executive power, even though he also relied on *Bardolph*.

On a broader plane, the question may be asked as to how *Williams* fits into the trend of modern developments.

- (a) The *Williams* case has confirmed, if confirmation was necessary, what would have been referred to in the past as the narrow view of the Appropriations Power — but only as regards the *expenditure* of public funds as distinct from the *appropriation* of those funds, except that any power to authorise spending must now be found outside of ss 81 and 83. That power will need to ensure that any authority to spend does not exceed Commonwealth legislative powers whether or not the spending is authorised directly as an exercise of legislative powers or through the executive power of the Commonwealth derived from s 61.<sup>164</sup>
- (b) Both *Williams* and *Plaintiff M70/2011 v Minister for Immigration and Citizenship ('Malaysian Declaration Case')*,<sup>165</sup> regarding the sending of asylum seekers to a country which did not have guarantees of compliance with the international *Convention Relating to the Status of Refugees*,<sup>166</sup> seem to mark a certain distrust of the executive. Although it may be dangerous to generalise from these two cases, it remains to be seen whether they mark the beginning of a trend which will develop further in the future.
- (c) At the same time, *Williams* does not sit easily with *Combet v Commonwealth ('Combet')*<sup>167</sup> and the lack of specificity required in the purposes for which the executive can spend funds appropriated by the Parliament which was allowed by that decision. That said, it is interesting to speculate whether the High Court may have been seeking to remedy the deficiency caused by the highly generalised and non-specific details provided in standard appropriations legislation upheld in *Combet* by insisting on more specific details in the additional legislative approval that is now required to authorise executive activities. Arguably the surprising development in *Williams* may not have been necessary if the Court in *Combet* had insisted on

162 See text above accompanying n 101 and between 113–16.

163 See text above between nn 105–8.

164 This is so whether the spending comes within the inherent authority of the Commonwealth to engage in such spending without additional parliamentary authority apart from the appropriation of funds, or is the kind of funding that will require such additional parliamentary authority.

165 (2011) 244 CLR 144.

166 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

167 (2005) 224 CLR 494.

the same kind of authority through the more orthodox mechanism of parliamentary appropriations.

- (d) *Pape* and *Williams* may be seen as a reminder to the Commonwealth that even if the Court has moved very far in the direction of upholding central power, as was exemplified in the *Work Choices Case*, it will at least insist on the observance of federal limits on expenditure as well as ensuring that the same central power must be exercised *by or with the sanction of the Parliament*.<sup>168</sup> The exercise of such power by the executive does not suffice even when conducted through the medium of non-coercive governmental activity which does not interfere with the rights of individuals and does not breach the ordinary law of the land.

One of the main themes in this article has been to stress the effect of *narrowing* the contracts and other activities which the Commonwealth can enter into or undertake without obtaining Parliament's approval. This has had the necessary effect of *increasing and widening* the responsibility of the Parliament to authorise the executive to enter into those contracts or undertake those activities. From a democratic point of view, the case has the undoubted and powerful attraction of ensuring that the *Parliament*, and *not the executive*, should decide what the government does, especially in the way of new activities and policies not previously approved by Parliament.

But I believe this may have come at a high practical cost in terms of governmental efficiency and the hardships created for those who contract with governments. This is because it raises many questions about the uncertain boundary which will separate whether contracts entered into by the Commonwealth will or will not need additional legislative approval. One does not have to be more than a casual observer of political affairs to know, as was suggested before, how difficult it is to obtain parliamentary approval for government policies even without minority governments. Democratic considerations need to be counterbalanced by the additional need for governments not to be hamstrung and prevented from acting decisively and promptly in the face of pressing popular demands. A court that is sensitive to all these considerations in the future may find itself more sympathetic towards upholding the contracts Act solution adopted in the remedial legislation enacted in the light of *Williams* — especially if the exercise of delegated authority is subject to parliamentary supervision through the mechanism of disallowing regulations.

168 It is true that this does however give rise to a lack of symmetry between the distribution of Commonwealth legislative and executive power, especially on the approach taken by French CJ in *Williams*, which can itself be seen to favour of a doctrine of reserved state *executive* power. But perhaps this may be justified by reference to the role of the Senate as a states' House despite its failure to exercise that role in the past. Before the recent revival of judicial interest in federalism in both the United States and Australia, the desirability of relying on the political protection of federalism was indeed one of the justifications that was sometimes advanced in relation to the expansion of federal *legislative* power which was allowed to occur through the judicial interpretation of those powers in both countries.

Another important question for the future relates to whether the Parliament will show itself to be any more willing to exercise the newly recognised level of oversight over the activities of the executive branch of government than it has in the past with its other instruments of parliamentary control. It also gives rise to questions about the nature of the institutions which both Houses will put into place to enable the Parliament to perform its increased responsibilities.

Finally, there is the question of whether the Court was right, as an institution after all these years, to change assumptions held by governments and others, especially in an area of the law where certainty matters to those who deal with governments.