Parliamentary Briefing No 1

Williams v Commonwealth – The shrinking scope of the Executive Power of the Commonwealth and the increased role of the Australian Parliament in authorising its exercise

Mr Williams challenged the validity of the National School Chaplain's Program by reference to section s116 of the Constitution and also a long held assumption about the scope of the executive power of the Commonwealth under section 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: *Williams v Commonwealth* [2012] HCA 23. This address will analyse the scope of the executive power of the Commonwealth in the light of this case and the future implications of that case in relation to the Commonwealth's ability to spend money and enter into contracts with and without the approval of the Parliament when that approval extends beyond the normal need to appropriate funds for that purpose. It will also explore the nature and effectiveness of the swift legislative response to the case.

1. Introduction

1.2 I wish to begin by referring to an article in the *Guardian Weekly* in April of this year

It was headed – **Qte**

The article continued - **Qte** pencilled passage on pp 1 and 2

[1 min 45 secs]

1.3 In the case that now bears his name, the plaintiff challenged the validity of the National School Chaplain's Program by reference to section s116 of the Constitution.

1.4 As it turned out the Court upheld the challenge by a majority of 6:1 but not by relying on s 116.

1.5 I intend in this address to -

(a) Complete the explanation of the facts and the issues raised by the case
(b) The nature and scope of the executive power of the Commonwealth under s 61 of the Constitution according to a long held assumption about the power which prevailed before the decision in the *Williams Case*

- *ie* the kinds of things the Executive may do without parliamentary authority in accordance with that assumption

- that will include the way the case might have been decided if it had followed the same assumption

(c) The way the case was actually decided which involved the rejection of that assumption and the significance of the case for the future

- particularly the Commonwealth's ability to spend money and enter into contracts

- when it seeks to act without parliamentary approval above and beyond the parliamentary appropriation of public funds.

(d) The Commonwealth’s prompt legislative response to the case.

(e) How the Houses of Parliament can cope with the increased responsibility of the Parliament for approving certain contracts and the payment of public funds.

1.6 Finally by way of introduction, I should disclose that I have been retained to give some limited assistance to the Cth in dealing with the aftermath of the *Williams Case* but the views expressed in this talk only represent my own thinking and do not necessarily represent the views of the Cth or the Australian Government Solicitor’s Office. Much of my thinking was formed well before I was asked to give that assistance.

2 Facts and Background

(i) As we have seen the father of children who attended the Darling Heights State School in QLD objected to the provision of chaplaincy services at that school

(ii) Those services were provided by the Scripture Union of Queensland (SUQ) which received funding from the Cth for that purpose pursuant to a Funding Agreement entered into in Nov 2007

(iii) That Agreement was itself entered into pursuant to the Commonwealth's National School Chaplaincy Program (the Program) and National Guidelines were issued by the Cth to regulate the provision of those services

(iv) The funding of the Chaplaincy Program was not provided under legislation apart from the money which was appropriated for the scheme for each of the financial years from 2007-8 to 2011 – 12.

(v) In 2010 the plaintiff commenced an action in the High Court against the Commonwealth and SUQ in which he challenged the authority of the Commonwealth:

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

(vi) The States intervened in the proceedings

3 The issues apart from Con s 61

3.1 The Court had little difficulty in upholding the standing of the plaintiff

- to challenge the validity of the *Funding Agreement* and the *payment of money* under that Agreement -

- on the grounds that they -

  (a) exceeded the scope of the *executive* power of the Commonwealth under Con s 61 ; and
  (b) was also prohibited by s 116

3.2 The primary objective of the action was based on s 116 but it failed because the school chaplains were not employed by the Commonwealth. Accordingly it could not be shown that the Funding Agreement was invalid by imposing a religious test as a qualification for an office under the Commonwealth contrary to s 116

3.3 The Court thought it was unnecessary to consider the challenge to the right of the Commonwealth to draw out money from the Consolidated Revenue Fund since it was sufficient for the plaintiff's purposes to be able to challenge the authority to spend the money – with that authority having to be found outside of ss 81 and 83 as established in *Pape v The Commissioner of Taxation* (2009)

3.4 And so it came pass that the challenge succeeded not by reference to s 116 but, instead, as we shall see, by a deficiency in the scope of the executive power of the Commonwealth

4. The pre-existing assumption about the nature and scope of the Executive power of the Commonwealth under s 61 of the Constitution

4.1 Introduction

4.1.1 Before we can understand why the challenge succeeded because of a deficiency in the scope of the executive power of the Commonwealth I need to explain what is meant by executive power

4.1.2 As the term implies we are dealing here with activities undertaken, and payments made, independently of the legislature apart from the need to obtain authority to expend public funds in the normal appropriation process.

4.1.3 The first part of section 61 of the Constitution states that "the executive power of the Commonwealth is vested in the Queen and is exercisable by the G-G as the Queen's representative…"

The second goes on to state "and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth"

4.1.4 The difficulty is, as has been pointed out by others, that the section alludes to rather than prescribes the content of executive power [1]

Furthermore the Court has refrained from providing us with an exhaustive definition of its scope

4.1.5 Notwithstanding the absence of such a definition its content is thought to draw on the following sources:

(1) The common law prerogatives of the Crown eg to declare war and conduct foreign relations

(2) The implied nationhood power *ie* the performance of activities peculiarly adapted to the government of the nation and which cannot otherwise be carried on for the benefit of the nation – research (CSIRO) and bonus stimulation payments during GFC

(3) The execution and maintenance of this Constitution, and of the laws of the Commonwealth

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[1] P Lane, *Lane's Commentary on the Australian Constitution* (1986) at p 831. (This needs updating to the current edition).

(4) Those legal capacities which the government in common with its citizens enjoys ie at least some of the common law capacities of a natural or juristic person

4.1.6 Only the last of these sources is involved here.

4.2 The long held assumption

4.2.1 I should now explain the nature of the assumption held about the scope of executive power which prevailed until its surprising rejection in the *Williams*

4.2.2 When reduced to its essentials it was that the Cth had power to enter into the contracts to pay money as long as the Parliament had the power to give the Cth the statutory authority to enter into that contract [2] for one of two reasons.

1st that the Cth could do anything independently of legislation with respect to which its legislative power extends (the view expressed by Alfred Deakin) [3]

2nd the Commonwealth has the same capacities to contract and spend money as it enjoys in common with natural persons [4]

4.2.3 But whichever of those two reasons was accepted in both cases there was a need to satisfy a number of important conditions- all of which were satisfied in this case

(1) Parliament must have appropriated any funds needed to make payments of money under the contract

(2) What is done by the Executive must have been capable of being authorised by valid federal legislation

- It is true that certain remarks made by a number of justices in *Pape* led the Cth to argue that the executive power was not constrained by the same federal limitations which constrain the exercise of legislative powers of the Cth

- Not surprisingly, however, this argument was rejected

- But I emphasise that we are not here dealing with *actual* legislation but only *hypothetical* legislation

(3) The activities referred to must not interfere with the rights of individuals or require them to act against their will.

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[2] See eg at [340] – [342] per Heydon J in dissent

[3] Outlined at [125] per Gummow and Bell JJ.

[4] It is possible that the "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.

(4) The same activities must comply with existing valid State or Commonwealth legislation

- since it is axiomatic under our system of law and government that the Executive cannot suspend or dispense with the ordinary law of the land

4.3 Illustration of things done without legislation

4.3.1 To reiterate the assumption that existed before was that -

The Cth had in effect the same capacities and powers to act independently of legislation as an ordinary citizen

As Evatt J observed in *Bardolph* [5] in 1934:

> "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*."

4.3.2 So the powers and capacities of the Cth would have included the legal ability to

- Contract
- Acquire, hold and dispose of property
- To sue and be sued
- Borrow and lend money

Cf dispose of property by a will

4.3.4 Australian judicial authority which pre-dated *Williams* recognised the ability of the Cth Government and its agencies to undertake and enter into the following other activities and legal transactions

- Construction of Black Mountain Tower
- Establishment of Royal Commissions of inquiry without coercive powers of compelling attendance of witnesses or production of documents
- ACT Tourist Bureau which kept directories of suitable accommodation in the ACT [6]
- The old Commonwealth Employment Service recognised as having a non – statutory power to keep another directory listing employees against whom

[5] *Bardolph v New South Wales* (1934) 52 CLR 455 at p 475.

[6] *McDonald v Hamence* (1984) 53 ALR 136.

complaints had been made for sexual harassment who would not be referred to for persons seeking employment [7]

- the establishment of Australian Legal Aid Office 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". [8]

- conduct of litigation by the Commonwealth in deciding whether to plead statute of limitations defence; [9]

4.3.4 Although only comparatively recent, there has 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.

- Eg directories of employees previously implicated in child abuse,[10] wire tapping [11]and advertising contracts **[12]**

4.3.5 When the existence of these powers are taken to their logical conclusion it means that the Executive can develop new government policies without the specific approval of the Parliament other than through the control it exercises in approving the expenditure of public money

- The fiscal parliamentary control may be seen to have been significantly weakened in modern times and esp since the *Combet Case* given the lack of specificity required by the H Ct for items of parliamentary appropriation

- For some this will be seen as having opened what may be termed a serious democratic deficit although I would argue that the deficit could have been largely avoided if the Court had given the provisions of s 83 a stricter operation.

4.3.6 It is worth emphasising here that under our system of government the Parliament has the full authority to control the activities and transactions I described earlier. It can do this by

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[7] *Taranto (19809) Pty Ltd Madigan* (1888) 81 ALR 208
[8] *Thurgood v Director of Australian Legal Aid Office* (19840 56 ALR 565.
[9] *Dixon v Attorney –General (Cth)* (1987) 75 ALR 300 (Con s 61 not "an enactment" for these purposes.)
[10] *R v Secretary of State for Health Ex p C* [2000] HRLR 4000 (CA)
[11] *Malone v Metropolitan Police Commissioner* [1979] Ch 344
[12] *Jenkins v Attorney-General The Times* (London) 14 August 1971 per Griffith J noted in [1971] *Public Law* 301 where however this power was apparently treated as an aspect of the prerogative.

- Exercising its fiscal control
- Enacting legislation to regulate and control them
- Supervising the activities and transactions through the powers of Parliamentary inquiry

4.4 How to make the assumption work: hypothetical laws test

4.4.1 Something was always needed to make the assumption work

As Barwick CJ said in *AAP* that something was that the Executive "may only do that which has been or could be the subject of valid legislation."[13]

- *French CJ* described this as locating the contractual capacity of the Commonwealth "in a universe of hypothetical laws" [14]
- The hypothetical law test as we may call it 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

4.5 How the case might have been decided in accordance with the pre-existing assumption

4.5.1 The approach taken by Hayne and Kiefel JJ and also Heydon J in dissent illustrates how the case *might have been decided* if it had followed the previous assumption

4.5.2 The importance of their approach for the future does not lie in its relevance to the shrinking nature of executive power so much as what would have happened if the School Chaplains Program had been established by *legislation*

- which, as we will see, has actually happened now in response to the decision in *Williams*

4.5.3 For them the issue was whether the Parliament could have legislated to authorise the Cth to enter into agreements to pay money in connection with the Program

- either as an exercise of the power to make laws with respect to constitutional corporation under s 51(20) or failing that the power to provide benefits to students under s 51(23A)

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[13] *Australian Assistance Plan Case* (1975) 134 CLR 338 at p 362.
[14] At [36].

- bearing in mind that ordinary citizens have the capacity at common law to have entered into such agreements

4.5.4 For reasons which I need not elaborate here, Hayne and Kiefel JJ upheld the challenge to the NSCP on the grounds that neither the corporations power nor the power to provide benefits to students would have sustained legislation which enabled the Cth to establish and operate the Program

4.5.5 The insufficiency of the first of these powers was not surprising despite the breadth of that power

But the insufficiency of the second seemed to rest on an unduly narrow view of the student benefit power - as was amply illustrated by Heydon J who was the only judge in the case to uphold the validity of the NSCP J in his dissenting judgment

4.5.6 But the view taken by the other two judges cannot be taken as having been endorsed by a majority of the Court since the four other judges who upheld the challenge found it unnecessary to express an opinion on its correctness

4.5.7 It may, nevertheless, have to be re-visited in any future challenge because of the inclusion of the school chaplaincy s program in the remedial legislation passed by the Cth in response to the *Williams Case*

4.5.8 For what it is worth my own assessment is, that judged by the orthodoxy of the past, the narrow view of the student benefit power is unlikely to be upheld

- but that said, the revival of the Court's interest in federalism means that we cannot be so sure that the more orthodox approach of Heydon J will be followed

4.5.9 We can now move away from that "universe of hypothetical laws" which the Chief Justice spoke about and move to what proved to be the end game

The end game highlights the way in which the executive power of the Cth can be seen to have shrunk

5. How the case was actually decided and the rejection of the pre-existing assumption per French CJ, Gummow, Crennan and Bell JJ

5.1 Introduction:

5.1.1 I now wish to deal with the way the case was actually decided according to the remaining four judges who upheld the challenge

This involved a rejection of the assumption I mentioned before and

I need to deal with the significance of their approach for the future

- particularly the implications of the case in relation to the Commonwealth's ability to spend money and enter into contracts

- without parliamentary approval when that approval extends beyond the normal need to appropriate funds for that purpose.

5.1.2 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) the agreement was 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 Government had the power to enter into independently of statute, namely, in effect contracts that that are part of or are incidental to carrying out the ordinary and well recognised functions of government [15]

(3) Nor could it be justified as part of the inherent authority derived from the character and status of the Cth as a national government [16]

5.2 Rejection of the long held assumption

5.2.1 Before I explain what kinds of agreements and payments of money may not be entered into or made without additional legislative authority contrary to the previous assumption, it is important to explain briefly why that assumption had been made in the past and why it was rejected in *Williams*

5.2.2 The assumption about the past was shared by the parties in the case at least initially until it was surprisingly questioned by the some members of the H Ct during the oral argument in the case

- The reason why the assumption was common to the parties was that it was an assumption which was followed by courts, government lawyers and, as was convincingly shown by Heydon J in his dissenting judgment, academic commentators as well

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[15] At [60] , [83] per French CJ, [139] – [140], [150] - [159] per Gummow and Bell JJ and [534] per Crennan J
[16] At [83] per French CJ, [156] – [157] per Gummow and Bell JJ, [503] per Crennan J.

5.2.4 But there was an absence of judicial authority directly in point - at least in Australia as distinct from England - which *decided* rather than just *assumed* the correctness of the pre-existing assumption

- The paucity of judicial authority recalls the famous remarks in a Nineteenth Century case: "The clearer a thing is, the more difficult it is to find any express authority or any dictum exactly to the point" [17]

- 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

5.2.5 What was surprising about the decision in *Williams* - despite the general paucity of authority directly in point - was that the Courts had dealt with and decided a related issue as far back as 1935

- That issue was whether a contract entered into by the NSW Tourist Bureau for advertising was valid despite the absence of a parliamentary *appropriation* – not I hasten to add any *other statutory authority* over and above an appropriation

- There had been cases suggesting that a government contract was not valid in the absence of an appropriation and these cases were in fact surprisingly resurrected by Tas Govt - with the support of some other intervenor Governments [18]

- It was surprising because these cases were thought to have been discarded after the H Ct held in *Bardolph* that government contracts were valid without any parliamentary appropriation or indeed any other kind of parliamentary authority

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[17] *Keighley Maxtead v Durant* [1901] AC 240 at p 245 quoted with approval by Lord Macnaghton.

[18] *Commonwealth and the Central Wool Committee v Colonial Combing Spinning and Weaving Co Ltd* (1922) 31 CLR 421 and *Commonwealth v Colonial Ammunition Co* (1924) 34 CLR 198. 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 t 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 that power merely because Parliament has appropriated money for the purposes of the contracts" at p 49.. Compare the remarks of Viscount Haldane in *Commonwealth of Australia v. Kidman*, (1926) 32 A. L. R. 1 when considering an application for leave to appeal to the Privy Council he observed that the Governor-General contracting on behalf of the Crown " 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": at pp 1-2. Also compare the evidence given to the Commission by Sir Owen Dixon KC cited in the judgment of French CJ at [68].

- 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 regards 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 extraordinary governmental business [19]

- The case is also instructive for at least three reasons despite reliance placed on it in *Williams*

  - (1) The view of Evatt J at 1st instance an d Dixon J on appeal that it is the business of the Executive to administer and make contracts not the Parliament which only controls the Executive[20]
  - (2) Evatt J strongly denied the need for any *additional* legislative authority because this would unduly hamper the activities of the Government and also because (3) of the vulnerable position occupied by third parties who contract with the Government - such parties faced the consequence of being liable to repay money received from the Crown under *Auckland Harbour Board Case* [21]

- Elsewhere Sir Owen Dixon in giving evidence to the Royal Commission on the Constitution in 1927, had criticised any attempt to limit government contracting in this way as

  - As unduly hampering the Executive and
  - Imposing hardship on those dealing with the Commonwealth [22]

5.2.6 Despite the foregoing considerations and difficulties, the four majority judges in *Williams* refused to equate the position of the Cth with that of an ordinary citizen essentially for three reasons

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[19] See eg E Campbell, (1970) 44 *Australian Law Journal* 14 at pp 14 – 6 and L Zines, The High Court and the Constitution (5th ed, 2008) at 349 – 350. It is also important that at least two of the three judges [19]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

[20] (1934) 52 CLR 455 at p 472 per Evatt J (at first instance) and 509 per Dixon J
[21] *Auckland Harbour Board v The King* [1924] AC 318
[22] Referred to and cited by French CJ at [68].

(1) Unlike the Crown in the UK The Commonwealth was created by the Constitution and was not like a natural person [23]

- Public money can only be used for governmental purposes and is necessarily different from private money [24] and Law of contracts designed to regulate dealings between individuals [25]
- The exercise of power enjoyed by ordinary individuals can have a different impact on individuals when exercised by Government ie the potential for abuse [26]

(2) Different nature of representative and responsible government in Australia

- esp having regard to the position of the Senate and its inability to amend appropriations for the ordinary annual services of government cf power to reject and make suggestions for amendment

(3) Although I respectfully disagree, another reason for rejecting the assumption was the alleged difficulty of constructing hypothetical laws to make the assumption work given the absence of actual legislation

5.2.7 As indicated before, these judges decided that contracts entered into by the Cth require legislative approval or authority apart from any parliamentary appropriation except for a very narrow range of contracts

- Namely those that that are part of or are incidental to carrying out the ordinary and well recognised functions of government [27]

- But they failed to make clear what kinds of contracts fell into that category – something that will need to be clarified in the future

- Although it may seem obvious, the effect of their approach is to increase and widen the responsibility of the Parliament to authorise the Executive to enter into those contracts or undertake those activities

5.3 Reasons given for narrowing the executive power and the narrowed scope of that power in the light of the Williams Case

[23] At [154] per Gummow and Bell JJ who emphasised that the Cth was the body politicestablished by the Commonwealth of Australia Constitution Act 1900 (Imp) and identified in cov cl 6.

[24] At [151] per Gummow and Bell JJ, [519] per Crennan J [577] per Kiefel J

[25] At [151] per Gummow and Bell JJ

[26] At [38], [77] – [78] per French CJ, [521] per Crennan J

[27] At [60] , [83] per French CJ, [139] – [140], [150] - [159] per Gummow and Bell JJ and [534] per Crennan J

5.3.1 It remains to explain the three main foundations for narrowing the scope of executive power as previously understood

Some of those foundations may help to cast some light on the kinds of contracts and activities which will continue not to need parliamentary approval over and beyond parliamentary appropriations

French CJ

The CJ showed an abiding concern for the impact that Cth executive power will have in diminishing the authority of the States at least in a *practical* way [28]

- 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 [29] and is with respect open to other criticisms

Gummow and Bell JJ

They were concerned about the importance of not undermining "the basal assumption of legislative predominance inherited from the UK "and the importance of not "distort[ing] the relationship between Chs I and II" [30]

- They also stressed the importance of preserving the interests of representative government

- Whatever misgivings I may have about it, I think this is meant to point to the need to enhance the accountability of the Executive to Parliament and thereby minimise the potential for abuse of executive power

It seems implicit in their view that the need for such accountability is not sufficiently met by either the fiscal control which Parliament exercises or its ability to regulate and control the exercise of executive power.

Crennan J

The approach taken by Her Honour comes closest to casting light on the kinds of contracts and activities which will continue not to need parliamentary approval apart from parliamentary appropriations

[28] At [1], [37], [83] per French CJ.

[29] Cf 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.

[30] At [135].

Although not easy to understand at first, I believe her concern was based on the need for parliamentary scrutiny and approval in relation to *new activities* undertaken by the Executive [31]

- 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 [32]

But the point to emphasise is that the parliamentary approval needed goes beyond appropriation [33]

5.3.2 It may be thought that the foundation for restricting Commonwealth contractual capacity not authorised by legislation relied on by French CJ is different in character from the foundation relied on by Gummow, Crennan and Bell JJ.

But perhaps there is one possible strand in reasoning that may be common to all four of those judges when they decided that parliamentary appropriations were not sufficient to provide the necessary legislative authority for those contracts which fall outside the ordinary course of administration

- And that is that the Senate occupies a weaker position in approving appropriations than does the House of Representatives [34]

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[31] At [487], [490], [493], [515] – [516], [527] – [530] and [532]. Note in that regard the refinement of this notion which appeared in the paper cited above n 50 even though it was directed to the position in the UK before the *Williams Case* was decided.

[32] Yet the Senate retains the power to withhold approval and to suggest amendments in the case of the first category of appropriation. See also n 92 below.

[33] I put to one side the question why such additional approval was not shown to have *ever* been given to the NSW Tourist Bureau in *Bardolph* before it came to be recognised as recognised function of government in NSW despite the reliance placed on that case? A close examination of his judgment in *Bardolph* shows that Evatt J thought 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 NSW 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: (1934) 52 CLR 455 at p 462 and see also at pp 494 per Rich J, p 501 per Starke J and p 507 per Dixon J, But on the view taken by a majority in that case those special funds were not relied on to support any expenditure in that case.

[34] [60] – [61] [per French CJ, [136] per Gummow and Bell JJ, [487 per Crennan J. But if so it is highly questionable whether it is for the Court to remedy perceived deficiencies in the way the Parliament has been constituted. The reliance placed on Con ss 53 and 54 gives rise to questions about whether this was consistent with well established authority which held that those provisions were non-justiciable: see eg *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at p 482. Perhaps the non-justiciability does not and should not extend to the provisions of the last paragraph of s53 in relation to whether the Senate enjoys the power to reject a money bill including such a bill which it cannot amend: G Lindell, "Duty to Exercise Judicial Review" in L Zines (ed), Commentaries *on the Australian Constitution* (1977) at pp 167 – 168. 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.

5.3.3 I listed earlier a range of executive activities and transaction undertaken or entered into in the past without parliamentary authority apart from parliamentary appropriation of funds

All these activities will now have to be looked afresh through the prism of the narrower range of activities and transactions which can be undertaken or entered into without such authority in the future

5.3.4 Pursuing this theme further 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 [35]

But what about a contract to buy new submarines as compared with contracts to encourage the development of renewable sources of energy?

Will the court have to inquire into whether functions 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 as they have tried to avoid in the past?

Perhaps it is thought that this difficulty can be avoided by adopting the new activity test as a means of identifying the kind of extraordinary contracts requiring additional parliamentary approval. But if so-

- that test will turn on the *new nature of the activity* and

- the question may be asked why the advertising contracts in *Bardolph* never required additional legislative approval when the funding agreement did so in *Williams* [36]

- Did the contracts of advertising for the GST ($15 million) and Work Choices ($45 million) deal with new policies?

[35] At [34] and [83]

[36] It needs to be remembered that the contracts in *Bardolph* only become a recognised function of the NSW Govt as a result of successive appropriations in the past pursuant to *appropriations* - as occurred with the NSCP after 2007

- And what of the numerous and important two – airline policy agreements entered into without statutory authority at the time they were entered into mentioned by the late Prof Richardson ?[37]
- What if the submarines had new and different capabilities by being nuclear submarines ?

- Is a general *Contracts Act* under which the Parliament seeks to delegate its ability to approve government contracts, going to be sufficient[38]

So far I have 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

- Eg what of the power of the Executive to establish Royal Commissions without coercive powers to inquire into the need to embark on new government policies

6. Remedial Legislation – a swift legislative response

6.1 Nature of that legislation

6.1.1 Parliament lost no time in passing the *Financial Framework Legislation Amendment Act* (No 3) 2012 which amends the *Financial Management and Accountability Act* 1997 (Cth) (FMA Act)

Essentially the Amending Act

- creates a power to authorise the Executive to enter into contracts and make grants of money or in a class of contracts or make grants of money both of which specified in *regulations* ; [39] and

- It also purports to validate a number of existing programs which include the National School Chaplaincy and Student Welfare Program (which replaced the former)[40]

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[37] See L Zines (ed), Commentaries on the Constitution (1977) at p 75

[38] An issue pointedly left open by the Chief Justice at [68].

[39] It Inserted a new s 32B authorising the Cth to make and administer *arrangements* (defined to include contracts, agreements and deeds in sub-s 32B (3)) and *grants* subject to compliance with other laws if the following conditions are satisfied – (i) The Cth 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. See s 3(1) Sched1 Item2

[40] The Act amended of its own force the *FMA Regulations* 1997 to specify a range of spending programs for the purposes of the new s32B which takes effect immediately by reason of the amendment to the regulations being contained in the Amending Act itself (under s3 (1) when read with Sch 2 of that Act). They are taken to have been set out in Schedules to the FMA Regulations by virtue of the Amending Act (reg 16 contained in Part

6.1.2 The challenge foreshadowed by Mr Williams - just as soon as he can raise the money - invites attention to its possible chances of success from two perspectives

6.1.3 *First* the solution tests the validity of 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 additional legislative authority requirement –

- But with the additional feature that either House will I assume have the power to disallow a regulation

6.1.4 In addition the solution only covers agreements and payments of money

- What about other powers or capacities enjoyed by a natural or juristic person?

6.1.5 *Secondly* the lasting legacies of the recent *Pape* and *Williams Cases* have been to throw open federal spending to increased judicial scrutiny and challenge as going beyond the scope of the admittedly wide legislative powers enjoyed by the Federal Parliament

- A strong theme running through both *Pape* and *Williams* is the revived importance of s 96

- The failure to use it to validate National School Chaplaincy Program and other Programs validated in the Amending Act leaves the way open for Mr Williams and others to challenge those programs

6.2 Validity

6.2.1 I believe that the H Ct should uphold the legislation

6.2.2 Whether it does will depend on whether it accepts that the *Williams Case* 1) was only concerned with contracts and the expenditure entered into or incurred, independently of any legislation and 2) has nothing to say about contracts entered into and money spent pursuant to statutory authority

- The amending legislation attempts to provides that statutory authority

- Which like the exercise of other legislative authority should be capable of being delegated to the Executive

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5AA when read with Part 3 of Sch 1AA of the same regulations). They include in sub-item 407.013, the National School Chaplaincy and Student Welfare Program (which replaced the former program) and a large number of other programs in Part 4 of Sch 1AA. Further programs can be specified.

- Parliament has attempted such a delegation here in relation to the power to make regulations specifying the contracts or classes of contracts which the Cth can enter into

6.2.3 Whether the High Court will uphold the legislation may also depend upon whether the existing capacity of the Cth to carry on activities without the specific approval of the Parliament (in additional to appropriations)

- is limited to that capacity or

- is capable of being widened and enhanced

6.2.4 If it is limited the narrow range of contracts which the Cth can enter into now marks the limits of its authority to act without the specific approval of the Parliament which cannot be delegated to the Executive so as to protect the need for parliamentary accountability of the Executive

Perhaps it may be argued that

- the function of approving executive activities and transactions is only part of its function of supervising and holding the Executive to account

- in a way that is somehow divorced from its legislative function, so as to render inapplicable the normal rules regarding the delegation of legislative power

- but this will not be easy to sustain if, as has been affirmed that: "The will of a Parliament is expressed in a statute or Act of Parliament". [41]

6.2.5 The contrary argument which I prefer is that because of the legislative predominance inherited from the UK what the Legislature can *control* (*De Keyzer's Royal Hotel Case*) it should also be able to *enhance*.

And as with other powers in the Constitution

- the legislative powers of the Cth Parliament to authorise government contracts and payments of money in ss 51 and 52 of the Constitution

- should be read *in addition to and as supplementing* the existing authority for governments to enter into contracts and make payments of money derived from the executive power of the Cth under s61 of the Constitution

6.2.6 Underpinning both of these considerations is the assumption:

[41] *R v Public Vehicles Licensing Appeal Tribunal (Tas) Ex p Australian National Airways P/L* (1964) 113 CLR 207, 226. Significantly the additional approval function was expressed in terms of parliamentary authority and not an authority which need only be given by both Houses of Parliament.

- that our system of government is founded on trust in the decisions of our elected representatives [42]; and

- not the strict separation of powers doctrine followed in the US which does not allow for a union between the Executive and the Legislative branches of government as we do in Australia.

7. Coping with increased parliamentary responsibility

7.1 I now wish to say something about the institutionalised arrangements that may have to be developed to enable the Parliament to meet its new responsibilities

7.2 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

- Eg the Joint Parliamentary Public Works and Public Accounts Ctees and the Auditor-General

7.3 To that role we now have to add the role of *authorising* certain executive activities and transactions before activities are entered into or carried on by the government and its agencies

7.4 Even if the amending legislation is upheld either House may be able to disallow any regulations specifying the contracts or classes of contract that the government can be enter into

- similarly as regards the payment of money out of public funds

7.5 This will presumably give rise to the need to provide either or both Houses of the Parliament systematic guidance and advice

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[42] Gummow J in *McGinty v WA* (1995) 184 CLR 140 at p 284. (“The particular "entrenched" provisions of the Constitution to which I have referred gave effect to the essential character of representative government which Mill had identified. But, as McHugh J pointed out in Theophanous (598), the Constitution did not specify "the whole apparatus of representative government". As to much of that, it was, as Barton had said in 1891, a case of "trust the parliament of the commonwealth"(599). The Constitution explicitly proceeds on that footing”) *Attorney-General (Cth) v McKinlay* (1975) 135 CLR 1 at p 24) “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”

Something rather like the standards developed for the disallowance of regulations and subordinate legislation for other reasons which presently focus on the width of the delegation and its impact on the rights of individuals

Is such a function to be added to those already performed by the Senate Scrutiny and Regulations and Ordinances Ctees or this ground for disallowance sufficiently different for it to be to be given –

- dare I say it, to yet another Ctee perhaps in the House of Representatives?

8. Concluding remarks

8.1 I now offer some concluding observations.

8.2 One of the main themes of this address has been to stress the effect of narrowing the contracts and other activities which the Cth 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

8.3 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

8.4 But I believe this may 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 how difficult it is to obtain parliamentary approval for government policies even without minority governments

8.5 The question may be asked 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?

- And what institutions will both Houses put into place to enable the Parliament to perform its increased responsibilities?

8.6 There is a further and final question that may be asked and that is 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?

Geoffrey Lindell

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