

Looking at the Executive Power through the High Court's New Spectacles

Gabrielle Appleby* and Stephen McDonald†

Abstract

Federation heralded a new constitutional order in Australia. The new *Constitution* carefully divided legislative power between the two levels of government, but left the division of executive power between them unclear. Since Federation, it had generally been accepted, and reflected in the Commonwealth's policies and conduct, that the Commonwealth executive power includes the capacity to spend and contract, at least within the spheres of the Commonwealth's legislative competence, and perhaps beyond. The Australian understanding of the Executive's responsibility for expenditure to Parliament mirrored our understanding of the responsibility of the British Crown to Parliament. In *Williams v Commonwealth* (2012) 86 ALJR 713, the majority of the High Court challenged our understanding of the Commonwealth's executive capacities and the nature of the relationship between the Commonwealth Executive and Parliament. This article outlines the *Williams* decision on this point, and critically analyses the majority's use of the twin principles of federalism and responsible government to justify their conclusions. We then explore how *Williams* fundamentally changes the Australian understanding of the Commonwealth Executive. We conclude by considering the practical implications this has had, and may have, on executive spending at both federal and state levels.

I Introducing the Executive Power of the Commonwealth

After the tumult of the Stuart Kings in England and the rise of parliamentary sovereignty, the rights, capacities and powers of the English Crown could be divided into three categories. There were those powers bestowed directly by Parliament: the 'statutory powers'. There were those powers that the Crown enjoyed alone and not in common with its subjects: these included the powers to declare war and peace, to enter into treaties, to coin money, to issue Letters Patent for new inventions, to confer honours and to pardon offenders, as well as various rights, immunities and privileges.¹ Following Blackstone,² we shall refer to these

* Senior Lecturer, University of Adelaide Law School.

† Barrister, Hanson Chambers.

¹ For example, title to precious metals and the priority of debts due to the Crown over debts due to a subject: see *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (In Liq)* (1940) CLR 278. See generally H V Evatt, *The Royal Prerogative* (Law Book, 1987) 30–1; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 345–6.

as ‘the prerogative’. And then there were those powers — ‘privileges’ in Hohfeldian terms;³ ‘freedoms’ or ‘liberties’ more colloquially — that were shared in common with other legal persons.⁴ These included the ‘powers’ to contract, to spend, to give money away, to gather information, to hold inquiries, to hold and dispose of property and to sue and be sued. Blackstone termed this last category of powers the ‘common law capacities’.⁵ While the prerogative and common law capacities were not sourced in statute, they were both subject to parliamentary oversight, the legislature always holding the ultimate power to abrogate them or regulate their exercise.

Before Federation, the Australian colonies’ executive power was derived from the British Crown, exercised in limited form by local governors. After Federation, the source and extent of the Crown’s powers in the different jurisdictions (Commonwealth and state) were complicated by the overlay of the *Commonwealth Constitution* and the creation of a federal system.

How was the executive power divided between these two levels in the new constitutional order? The framers of the *Constitution* left the matter unclear, defining the Commonwealth Executive power in what has been described as a ‘broad and general’ manner,⁶ in s 61 of the *Constitution*:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

It has always been troubling that the legislative powers of the Commonwealth are so clearly enumerated, in s 51 of the *Constitution* in particular, while the terms of s 61 of the *Constitution* are so opaque, leaving the scope of the executive power to inference. Mason J considered that s 61:

² Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–69) Book I, 232; Joseph Chitty, *The Prerogatives of the Crown* (Butterworths, 1820) 4; *contra* A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 424, who used the term ‘the prerogative’ to mean all of the rights and capacities which the Crown can exercise by virtue of the common law, and so included within this category what we shall refer to as the ‘personal capacities’ of the Crown. See also *Davis v Commonwealth* (1988) 166 CLR 79, 108 (Brennan J).

³ Wesley Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16, 30ff.

⁴ We note the debate about whether the legal entity of the Crown should be regarded as a natural person, a corporation sole or a corporation aggregate: cf F W Maitland ‘The Crown as Corporation’ (1901) 17 *Law Quarterly Review* 131; Sir William Wade ‘Crown, Ministers and Officials: Legal Status and Liability’ in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 24, fn 6; see also Blackstone, above n 2, Book I, 469; *Town Investments Ltd v the Department of the Environment* [1978] AC 359, 384 (Lord Diplock), 400 (Lord Simon); *M v Home Office* [1994] 1 AC 377, 424 (Lord Woolf); Chitty, above n 2, 230. Regardless of which theory was accepted, it still followed that the Crown, as a legal entity, enjoyed these powers: Blackstone, above n 2, Book I, 475–6.

⁵ Blackstone, above n 2, Book I, 232. In *Williams v Commonwealth* (2012) 86 ALJR 713, 762, [201]–[203] (‘*Williams*’), Hayne J disapproved of the reference to ‘capacity’ rather than ‘power’, noting that the ‘legal capacity’ to enter a contract is a distinct legal term; cf 830 [590] (Kiefel J).

⁶ *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309, 367–8 (O’Connor J).

enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the sphere of responsibility vested in it by the Constitution.⁷

Until 20 June 2012, it was generally accepted by commentators and practitioners that the Commonwealth's executive power extended to:⁸ (a) powers sourced directly in the *Constitution*; (b) powers sourced in statute; (c) the prerogatives that are appropriately exercised by the Commonwealth;⁹ (d) the common law capacities, at least in so far as they followed the breadth of the legislative powers in ss 51, 52 and 122; and (e) what has come to be known as the 'nationhood' dimension of the executive power, a power sourced in the status and nature of the Commonwealth as a sovereign nation and enabling the Commonwealth Executive to engage in certain activities 'peculiarly adapted to the government of a nation'.¹⁰ Within these powers, particularly the 'nationhood' power, there is a level of flexibility dictated by the need to have a national government that can perform the duties of a sovereign with responsibilities to its citizenry and international personhood.¹¹

The rise of the Parliament in British history has meant that the Executive acting alone (that is, without statutory or constitutional authority) cannot lawfully act in certain ways. So, for example, the Executive could not, without statutory authority, create new offences,¹² dispense with the law,¹³ or infringe on fundamental common law rights, such as the right to property.¹⁴ These limits have been referred to by George Winterton as limits on the *depth* of the executive power.¹⁵ The limits on the depth of non-statutory executive power have been driven by principles of separation of powers, responsible government, accountability and the rule of law.¹⁶

Winterton said that executive power could be defined also by its *breadth*. Breadth describes the subject matters over which the executive power extends. The

⁷ *Barton v Commonwealth* (1974) 131 CLR 477, 498.

⁸ See further Anne Twomey, 'Pushing the Boundaries of Executive Power — *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313.

⁹ So there is a division of prerogatives between the Commonwealth and the state, with some, such as the prerogative of mercy, shared. See further *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 320–1 (Evatt J).

¹⁰ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 63 [133] (French CJ), 87 [228] (Gummow, Crennan and Bell JJ), 116 [328]–[329] (Hayne and Kiefel JJ, dissenting) ('*Pape*'); *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J); *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338, 397 (Mason J) ('*AAP Case*'); see also, in relation to the power to spend, *Attorney-General (Victoria); Ex rel Dale v Commonwealth (Pharmaceutical Benefits Case)* (1945) 71 CLR 237, 269 (Dixon J, Rich J agreeing).

¹¹ See *Pape* (2009) 238 CLR 1, 38 [60] (French CJ).

¹² *Case of Proclamations* (1611) 12 Co Rep 74.

¹³ See *Bill of Rights* of 1689, which recited 'That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall'. See *A v Hayden* (1984) 156 CLR 532, 580–1 (Brennan J).

¹⁴ *Entick v Carrington* (1765) 19 St Tr 1029. See *Coco v The Queen* (1994) 179 CLR 427, 435–7 (Mason CJ, Brennan, Gaudron and McHugh JJ).

¹⁵ George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 29–30, 40–4.

¹⁶ Cheryl Saunders, 'The Sources and Scope of Commonwealth Power to Spend' (2009) 20 *Public Law Review* 256, 259.

question of breadth in Australia has been seen as controlled by considerations of federalism.¹⁷ When the *Constitution* divided executive power between the Commonwealth and the states, how was this achieved in the ‘breadth’ dimension?

Prior to *Williams*,¹⁸ the breadth of the Commonwealth Executive’s common law capacities had not been definitively expounded by the High Court. It had been generally accepted since Federation,¹⁹ and reflected in the Commonwealth’s policies and conduct, that the breadth of the Commonwealth Executive’s capacities followed ‘the contours’ of the Commonwealth legislative power.²⁰ This assumption has been displaced by *Williams*.

This article discusses how, after *Williams*, we must now re-envision the executive power within the Australian constitutional framework, lessening the focus on its British ancestry. We start by introducing the facts and outcome in the case. We then engage with the two strands of reasoning offered by the majority in the High Court to justify their conclusions: the twin principles of responsible government and federalism. We point out that the particular limits on executive power to spend and contract, identified by the majority justices, arguably are not fully justified by reference to these two principles. Finally, we argue that *Williams* heralds a new understanding of the Commonwealth Executive. The majority decision advances a unique Australian theory of executive power, informed by the framers’ combination of responsible government with federalism, although not intended or anticipated by them. We conclude by considering the practical implications this has, and may have, on executive spending at both Commonwealth and state levels.

II Introducing Ron Williams and the National School Chaplaincy Program

Ron Williams is a father of seven from Toowoomba. He sent four of his children to the Darling Heights State School. In April 2007, the school successfully applied for a federal funding grant for its school chaplaincy service. This was run by Scripture Union Queensland (‘SUQ’), a body incorporated under the *Corporations Act 2001* (Cth), whose objects include ‘mak[ing] God’s Good News known to children, young people and their families’. In November 2007, SUQ entered into an agreement with the Commonwealth Government to provide chaplaincy services to the Darling Heights School (‘Funding Agreement’). The Queensland Government also provides some funding to SUQ.

¹⁷ Ibid.

¹⁸ (2012) 86 ALJR 713.

¹⁹ For example, Alfred Deakin’s *Vondel Opinion*, written in 1902; 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, Volume 1: 1901–14* (1981) 129; *Williams* (2012) 86 ALJR 713, 787–8 [350] ff (Heydon J).

²⁰ Winterton, above n 15, 30. Leslie Zines has referred to them as ‘riding in tandem’: Zines, above n 1, 347.

This agreement was part of the National School Chaplaincy Program, a Commonwealth policy relying for support only on an annual appropriation and the Commonwealth's executive power.²¹ The Program 'assists school communities to support the spiritual, social, and emotional wellbeing of their students'.²² It started in 2006, initiated by the Howard government, but continued under the Rudd and Gillard governments, with an expansion in 2008 to support non-religious counselling services as well.

The Darling Heights Funding Agreement incorporated the National School Chaplaincy Program Guidelines.²³ The Agreement was for the provision of services, a key element being the provision of 'general religious and personal advice to those seeking it, comfort and support to students and staff, such as during times of grief'.²⁴ The chaplain was not to 'impose any religious beliefs or persuade an individual toward a particular set of religious beliefs'.²⁵ The chaplain was required to abide by the National School Chaplaincy Program Code of Conduct.²⁶ The Agreement imposed reporting obligations on SUQ, and the Commonwealth had power to conduct 'a range of monitoring activities' to verify compliance with the Agreement.²⁷

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

III The Nature of the Challenge in *Williams*

The Full Bench heard argument on the Amended Special Case in *Williams* in August 2011, although it was not until June 2012 that the High Court handed down its decision. The three main issues that fell for consideration by the Court were:

1. whether Mr Williams had standing to challenge the validity of the Funding Agreement and payments made under it;
2. whether the Funding Agreement was invalid on the basis it was prohibited by s 116 of the *Constitution*. It was argued that the religious qualifications of a chaplain amounted to requiring a 'religious test' as a qualification for an 'office under the Commonwealth'. This was the most widely reported aspect of the

²¹ Although later the Commonwealth did try to 'retro-fit' s 44(1) of the *Financial Management and Accountability Act 1997* (Cth) as a source of its power, this was quickly rejected by the Court. See further discussion in text accompanying below n 109.

²² Commonwealth Department of Education, Employment and Workplace Relations, *The National School Chaplaincy and Student Welfare Program* (2012) <<http://deewr.gov.au/national-school-chaplaincy-and-student-welfare-program>>.

²³ Commonwealth Department of Education, Science and Training, *National School Chaplaincy Program Guidelines*, 19 January 2007.

²⁴ *Ibid* cl 1.5.

²⁵ *Ibid*, extracted in *Williams* (2012) 86 ALJR 713, 722 [17] (French CJ).

²⁶ Commonwealth Department of Education, Science and Training, *National School Chaplaincy Program Guidelines*, 19 January 2007, cl 1.5.

²⁷ *Ibid*.

challenge, although constitutionally not the most viable, and it was dismissed unanimously by the Court;²⁸ and

3. whether the Funding Agreement was supported by the executive power of the Commonwealth under s 61 of the *Constitution*.

In 2009, the High Court held in *Pape*²⁹ that a parliamentary appropriation passed as required by ss 81 and 83 of the *Constitution* was not a source of the Commonwealth's capacity to spend monies. The source of that power or capacity had to be found elsewhere. It was thought after *Pape* that the spending power could be sourced, where there was no statutory or constitutional provision, in the executive 'nationhood power', or the common law capacities of the Crown. In *Pape*, a majority of the Court agreed that the legislation authorising the expenditures made as part of a stimulus package in response to the Global Financial Crisis were supported by the executive 'nationhood power' and s 51(xxxix) of the *Constitution*. In *Williams*, it was generally thought that the source, if it existed, would be found in the common law capacities of the Crown.

IV The Arguments and the 'Common Assumption'

It was assumed by *all parties* (and all interveners), until the first day of hearing, that the Commonwealth Executive could *at least* spend monies, and enter into agreements binding the Commonwealth to spend monies, on subjects or for purposes that could be the subject of valid Commonwealth legislation. We shall refer to this as the 'common assumption'. The Commonwealth argued that these agreements were within the federal executive power because they could have been authorised by valid legislation enacted under ss 51(xx) (the corporations power) and/or (xxiiiA) (the power to give 'benefits to students') of the *Constitution*.

The basis of the 'common assumption' is that s 61 confers on the Commonwealth Executive everything understood to be within executive power inherited from the British Crown, subject to limitations necessarily derived from the division of powers between the Commonwealth and the states. The division of powers in s 51 and the presence of s 51(xxxix) indicate that the capacities of the Commonwealth Executive must be limited to the subject matters of the legislative power, lest the grant of executive power (and of legislative power to make laws incidental to the execution of the executive power) undermine the careful division of legislative power in the federation. The need for federal parliamentary control over the Executive in a system based on responsible government also supports the argument that the breadth of the Executive's capacities must be limited by reference to the powers of the Parliament of the Commonwealth.

The Commonwealth's primary submission in the *Williams* case was broader still; it was that the executive power of the Commonwealth (at least insofar as spending and contracting was concerned) included all of the capacities of an

²⁸ *Williams* (2012) 86 ALJR 713, 745 [107]–[110] (Gummow and Bell JJ, French CJ, Hayne, Crennan and Kiefel JJ agreeing), 808–9 [442]–[448] (Heydon J). This article will not consider the reasoning in relation to this issue.

²⁹ (2009) 238 CLR 1.

individual, unlimited as to breadth — in other words, that the Commonwealth could contract and spend money in relation to any subject matter whatsoever.³⁰ This argument was advanced on the basis that the exercise of the capacities would produce no inconsistency between Commonwealth and state legislation,³¹ could not create legal rights and obligations which would displace the operation of state laws,³² and the capacities were thus analogous to those of an individual.³³ The exercise of these capacities would be subject to parliamentary oversight only through the appropriations process. We shall refer to this as the ‘unlimited capacities argument’.

If the Commonwealth’s unlimited capacities argument were correct, the extension of the spending and contracting power beyond the subject matters of Commonwealth legislative power might be thought to create a real incentive for the Commonwealth to rely on spending and contracting to achieve policy outcomes, rather than relying on legislation which would engage the oversight of the Parliament, and which is restricted to limited fields. The potential influence of the Commonwealth through spending and contracting is exacerbated by the infamous vertical fiscal imbalance, which leaves the Commonwealth with more expenditure capacity than expenditure responsibilities.

V Outcome and Reasoning

In a 6:1 decision (Heydon J dissenting), it was held that the Commonwealth’s entry into the Darling Heights Funding Agreement was not supported by the executive power and was therefore unconstitutional. The approach of the majority to the question of Mr Williams’ standing to challenge the agreement may impact future challenges to the spending power. We will deal with this briefly before turning to an analysis of the Court’s reasoning on the executive power.

VI Standing

Gummow and Bell JJ held that, because the plaintiff’s contentions were extensively supported by two of the intervening State Attorneys-General (Victoria and Western Australia), who unquestionably had standing to challenge the Funding Agreement, ‘the questions of standing may be put to one side’.³⁴ French CJ, Hayne, Crennan and Kiefel JJ all agreed with the reasoning of Gummow and Bell JJ on this point.³⁵ As far as we are aware, Gummow and Bell JJ’s reasoning

³⁰ See Commonwealth, Minister for School Education, Early Childhood and Youth and Minister for Finance and Deregulation, ‘Submissions of First, Second and Third Defendants’, in *Williams v Commonwealth* No S307/2010, 11 July 2011, [41].

³¹ *Williams* (2012) 86 ALJR 713, 727 [37] (French CJ).

³² *Ibid* 754 [158] (Gummow and Bell JJ); see further Bruce Harris, ‘The “Third Source” of Authority for Government Action’ (1992) 108 *Law Quarterly Review* 626.

³³ The argument has had academic support. See, eg, Enid Campbell, ‘Commonwealth Contracts’ (1970) 44 *Australian Law Journal* 14, 23; Enid Campbell, ‘Federal Contract Law’ (1970) 44 *Australian Law Journal* 580; Winterton, above n 15, 44–7; Peter Hogg, *Constitutional Law of Canada* (Thomson Carswell, 5th ed, 2007) vol 1, 174–5.

³⁴ *Williams* (2012) 86 ALJR 713, 745 [111]–[112].

³⁵ *Ibid* 721 [9] (French CJ), 754 [168] (Hayne J), 812 [475] (Crennan J), [598] (Kiefel J).

on this point is novel, and appears to have the potential dramatically to increase constitutional litigation if applied generally.

Gummow and Bell JJ's reasoning, we would suggest, is problematic for two reasons. First, it is very difficult to reconcile with the Court's previous emphasis on the relationship between standing and the constitutional requirement for there to be a 'matter',³⁶ which had recently been reiterated in *Pape*.³⁷ The entitlement of Commonwealth and state Attorneys-General to intervene is dependent upon the prior existence of proceedings that relate to a 'matter' arising under the *Constitution* or involving its interpretation.³⁸ If the plaintiff lacked standing, prior to any intervention, proceedings brought by the plaintiff would not relate to a 'matter' and there would, therefore, be no proceedings of a kind in which the state Attorneys-General were entitled to intervene. The argument appears circular and unconvincing (as Heydon J pointed out in his judgment).³⁹

Second, it conflates the intervention of a state Attorney-General, on the one hand, with a state being a moving party in proceedings. In practice, these may be very different decisions, politically. Intervention ensures that the interests of the states are protected in litigation that is already on foot, litigation which the states may well never have commenced themselves because, for example, their governments may politically support the program or policy under challenge. (Both *Williams* and *Pape* are examples of this.) But once litigation has commenced, they must ensure their institutional and constitutional interests are protected in the outcome. Conflating litigation in which a state Attorney-General has intervened with litigation commenced by a state or state Attorney-General appears to raise the possibility of an increase in 'public interest'-style constitutional litigation in the future.

What the reasoning seems to tell us is that the High Court will hear an issue if it wants to, leaving technicalities of standing and the need for a matter to one side.

³⁶ Sections 75 and 76 of the *Constitution* respectively confer original jurisdiction and authorise the Parliament to confer original jurisdiction on the High Court in respect of 'matters'.

³⁷ (2009) 238 CLR 1, 35 [50]–[51] (French CJ), 68 [152] (Gummow, Crennan and Bell JJ, Hayne and Kiefel JJ agreeing). See also *Croome v Tasmania* (1997) 191 CLR 119, 125–7, 132–3; *Abebe v Commonwealth* (1999) 197 CLR 510, 524.

³⁸ *Judiciary Act 1903* (Cth) s 78A.

³⁹ *Williams* (2012) 86 ALJR 713, 784 [326]. We should note, however, that we do not regard all of Heydon J's reasoning on the question of standing as satisfactory. Heydon J (at [319]) accepted that the plaintiff may have established that he had standing to challenge the *expenditure* of funds, but not that he had standing to challenge the *appropriation* of funds. Given that the lawfulness of the expenditure of funds was dependent upon their lawful appropriation, we find it difficult to understand how the question of the plaintiff's standing could admit of different answers in respect of those two aspects of his case. The special interest of the plaintiff in the appropriation of money, beyond that of any other member of the public, was that it affected the lawfulness of the expenditure which he had standing to challenge.

VII Executive Power

All of the judges, with the exception of Heydon J (who did not find it necessary to consider it),⁴⁰ rejected the unlimited capacities argument.⁴¹ This left the position that had been the 'common assumption' of the parties until the first day of the hearing. A majority of the High Court (French CJ, Gummow and Bell JJ and Crennan J) also rejected the 'common assumption'.⁴² Heydon J accepted the 'common assumption'.⁴³ Hayne J and Kiefel J did not have to decide whether the 'common assumption' was correct, and declined to do so, because they each held that there was no valid hypothetical law which could support the chaplaincy program.⁴⁴

It appears to us, having regard to the majority judgments, that the executive power in s 61 of the *Constitution* should now be understood as incorporating the following aspects:

1. The powers which are reasonably necessary for the execution and maintenance of valid laws and constitutional provisions.

⁴⁰ *Williams* (2012) 86 ALJR 713, 801 [407]. Heydon J did conclude that, subject to certain 'exceptions' which he identified, 'the Common Assumption should be treated as the law': at 799 [403].

⁴¹ *Ibid* 724 [27], 727 [35], 741 [83] (French CJ), 752–4 [150]–[159] (Gummow and Bell JJ), 819 [524] (Crennan J), 827–831 [576]–[595] (Kiefel J).

⁴² *Ibid* 724 [27], 727–8 [36]–[37], 741 [83] (French CJ), 748–51 [125]–[137] (Gummow and Bell JJ), 820–2 [535]–[544] (Crennan J).

⁴³ *Ibid* 799 [403]. Heydon J (at 799 [404]) also forcefully argued that the case was not an appropriate one for the matter to be decided: the common assumption was attacked only very late in the fray (after the issue was raised in oral argument by the Court) and the submissions demonstrated signs of disorganisation. The states experienced difficulty obtaining instructions: Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 199 (10 August 2011), lines 5035–42 (M G Hinton QC), 5169–77 (G L Sealy SC). In relation to these procedural issues, see further Christos Mantziaris, *The Williams Litigation — The Commonwealth and the Chaplains* (Paper presented at the Gilbert + Tobin Centre of Public Law Conference, Sydney, 17 February 2012): <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/2011_con_low_conf_papersc_mantziaris.pdf>.

⁴⁴ *Williams* (2012) 86 ALJR 713, 756 [177], 757 [183], 778 [288] (Hayne J), 826 [569] (Kiefel J). The way in which their Honours approached the question of whether the expenditures fell within the head of power is itself a matter of interest. First, both adopted a relatively narrow construction of s 51(xxiiiA) of the *Constitution*: 776–8 [273]–[285] (Hayne J), 826–7 [570]–[574] (Kiefel J); *contra* 801–8 [408]–[441] (Heydon J). Second, Hayne and Kiefel JJ approached the issue relating to s 51(xx) on the basis that the proper question was whether the *chaplaincy program*, considered as a whole, could have been authorised by valid Commonwealth legislation. It was not explained why the 'hypothetical law' had to be a law authorising *all* contracts and expenditure under the chaplaincy program, rather than the specific contract and expenditure under consideration in the case. On the assumption that SUQ was a 'trading corporation', there would seem to be no reason why the Commonwealth Parliament could not make a law authorising the Executive to enter into an agreement in the terms of the Funding Agreement. For example, a law that provided: 'The Commonwealth may enter into an agreement with any trading corporation in the terms of the Funding Agreement' would be such a law. The fact that the Guidelines, and the Funding Agreement itself, are not limited by reference to trading corporations does not seem to be to the point, if the relevant inquiry is whether the Commonwealth Parliament could have made a law authorising the executive action in question (ie, entering into *this* Funding Agreement). Further exposition of these points is beyond the scope of this article.

2. The exercise of the prerogatives of the Crown properly attributed to the Commonwealth.
3. The exercise of the executive power derived from the character and status of the Commonwealth as a national government (the implied executive nationhood power).⁴⁵ We note that the concept of 'nationhood' in this context might well be understood quite broadly, as encompassing the subject matter of inherently 'national' heads of legislative power such as s 51(vi) (defence), s 51(xix) (naturalisation and aliens), s 51(xxvii) (immigration and emigration) and s 51(xxviii) (the influx of criminals).⁴⁶
4. Spending, in the absence of statutory authority, in connection with 'the ordinary and well-recognised functions of government'.⁴⁷ The precise scope of this expression remains unclear. It might possibly be limited to spending and contracting in the course of, or incidental to, the administration of government departments transferred from the states or established under s 64 of the *Constitution*⁴⁸ and/or spending in relation to 'the ordinary annual services of the Government' within the meaning of ss 53 and 54 of the *Constitution*.⁴⁹

The extent to which other 'capacities', such as the capacities to conduct inquiries or to hold property, continue to exist as non-statutory powers was not addressed in the judgments. These capacities differ from the capacity to spend and contract in that it is less obvious that they could be used effectively to regulate conduct, a feature of spending and contracting which the majority emphasised.⁵⁰

The majority rejected the proposition that the Commonwealth Executive's entry into the Funding Agreement and the spending under the chaplaincy program could be undertaken without statutory authority. The majority's decision was heavily influenced by two strands of reasoning.

⁴⁵ *Williams* (2012) 86 ALJR 713, 727 [34] (French CJ), 812 [485] (Crennan J). It was not made clear why the need for legislation should be diminished in relation to schemes 'peculiarly adapted to the government of a nation'. It might be thought that federal considerations are less pressing because such schemes do not 'compete' in areas of state competence. On the other hand, the incapacity of the states, as polities, to influence policy in these areas might be thought to make the involvement of the Senate, as the states' house, even more critical. Moreover, the Parliament, no less than the Executive, is a 'national' institution: the considerations described below as 'accountability considerations' are not diminished.

⁴⁶ See *Ruddock v Vadarlis* (2001) 110 FCR 491, 542 [192] (French J, Beaumont J agreeing).

⁴⁷ See *New South Wales v Bardolph* (1934) 52 CLR 455, 496 (Rich J), 502–3 (Starke J), 508 (Dixon J, Gavan Duffy CJ agreeing), 517–8 (McTiernan J). See also *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 455 (McHugh J).

⁴⁸ See *Williams* (2012) 86 ALJR 713, 738 [74], 740 [79], 741 [83] (French CJ), 751 [139] (Gummow and Bell JJ); *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd (Wool Tops case)* (1922) 31 CLR 421, 432 (Knox CJ and Gavan Duffy J).

⁴⁹ See *Williams* (2012) 86 ALJR 713, 819 [530] (Crennan J).

⁵⁰ See text accompanying below nn 68–79.

VIII First Strand: Federal Considerations

The majority judgments placed varying emphasis on the federal nature of the Commonwealth, but all relied to a greater or lesser degree on 'federal considerations' in holding that the Commonwealth lacked a general executive power to contract and spend in the absence of enabling Commonwealth legislation.

How did the judges incorporate arguments about the federal design into the constitutional discourse? In *Williams*, the understanding of the federal design was taken from the context and structure of the *Constitution*. The particular constitutional features of the federation which were relied upon were:

1. the role of s 96 of the *Constitution*;⁵¹
2. the role of the Senate as the 'states' house' and the limits on the powers of the Senate with respect to appropriation;⁵²
3. the fact that some s 51 powers would permit legislation that could not be the subject of executive action without legislation, or were 'inapt' for exercise by the Executive;⁵³ and
4. the 'impact of Commonwealth executive power on the executive power of the States' and the possibility of conflicts between exercises of state and federal executive power.⁵⁴

A Section 96

Gummow and Bell JJ referred to 'the considerations of federalism, stimulated by the by-passing of s 96'.⁵⁵ The view seems to be that, because the Parliament could effectively spend money by making a grant to a State under s 96 and conditioning the grant on at least some of the grant money being spent in a particular way, direct expenditure of money by the Commonwealth Executive amounts to 'by-passing' that mechanism.

Two comments could be made in response. First, to the extent that 'by-passing' s 96 is seen to be problematic, this seems to rest on an assumption that s 96 is the primary, or the proper, way to spend money, so that 'by-passing' it amounts to excluding the states from a process in which they *should* have been more engaged. That would seem to assume what is sought to be substantiated.

⁵¹ *Williams* (2012) 86 ALJR 713, 751 [143], 752 [148] (Gummow and Bell JJ), 815–16 [501]–[503] (Crennan J).

⁵² *Ibid* 723 [21], 735 [60]–[61] (French CJ), 750 [136] (Gummow and Bell JJ); *contra* 798 [396] (Heydon J).

⁵³ *Ibid* 750 [135] (Gummow and Bell JJ), 818 [522] (Crennan J).

⁵⁴ *Ibid* 727–8 [37]–[38] (French CJ).

⁵⁵ *Ibid* 751 [143] (Gummow and Bell JJ). Hayne J and Kiefel J referred to s 96 only in rejecting the broader Commonwealth submission that the spending power was unlimited: at 770–2 [244]–[248] (Hayne J), 830 [592] (Kiefel J); Crennan J referred to it only in rejecting a submission that the chaplaincy program was an enterprise adapted to the government of the nation, but in that context did refer to 'the bypassing of s 96': at 815–16 [501]–[503].

Second, it surely cannot be denied that the Executive does have capacity to spend if authorised by the Commonwealth Parliament by a law enacted under a head of federal legislative power. In that case, the same ‘federal considerations’ would seem to arise; there would still be a ‘by-passing’ of s 96 and the states, as governments, could not control (or influence or negotiate) the expenditure.⁵⁶

The judgment of Gummow and Bell JJ did not further explain how s 96 was thought to support the conclusion that the Commonwealth Executive could not spend on matters connected with federal legislative power, other than to quote a fairly lengthy passage from the judgment of Barwick CJ in the *AAP Case* and to observe that it was ‘in point’.⁵⁷ However, the quoted passage referred to the implications for federalism of the Commonwealth expenditure ‘to service a purpose which it is not constitutionally lawful for the Commonwealth to pursue’.⁵⁸ It seems clear that Barwick CJ was alluding to the potential expansion of the spheres of Commonwealth influence by reason of spending in areas unrelated to a head of Commonwealth legislative power. That consideration certainly supports restricting the executive spending power to the subject matters of Commonwealth legislative power (that is, it supports the ‘common assumption’), but it does not obviously support any *greater* restriction.

B *The Senate*

French CJ referred to the position of the Senate, and its ‘vestigial’ function as a chamber ‘designed to protect the interests of the States’.⁵⁹ He accepted that the requirement of parliamentary appropriation was only ‘a weak control’ over expenditure by the Executive.⁶⁰ The Senate was said to be in a relatively weak position against an executive government with the confidence of the House of Representatives. Similar observations were made by Gummow and Bell JJ.⁶¹ It is true that the Senate has limited powers to deal with an appropriation Bill, in that s 53 provides that such Bills shall not originate in the Senate, and that the Senate may not amend proposed laws appropriating revenue or money *for the ordinary annual services of the Government*, although it may refuse to pass them and may suggest amendments to be considered by the House of Representatives.

However, the limitations imposed by the *Constitution* on the Senate’s powers with respect to appropriations do not necessitate the conclusion that executive power must, in most cases, be sourced in some statute other than an appropriation passed by the Senate. Why must the Senate be involved in a ‘stronger way’? It certainly does not seem to be a necessary implication from the

⁵⁶ Although note the role of the Senate in protecting the interests of the states, addressed in the text accompanying nn 59–61 below.

⁵⁷ *Williams* (2012) 86 ALJR 713, 752 [148] (Gummow and Bell JJ).

⁵⁸ *AAP Case* (1975) 134 CLR 338, 357–8.

⁵⁹ Under s 7 of the *Constitution*, the Senate is composed so as to protect the interests of the *people* of each state, not the states as polities. French CJ appears to have aligned the two.

⁶⁰ *Williams* (2012) 86 ALJR 713, 735 [61].

⁶¹ *Ibid* 750 [136], 752 [145] (Gummow and Bell JJ). Gummow and Bell JJ also refer to these considerations as ‘representative’ considerations, reflecting the different representative nature of both Houses.

limitation on the Senate's power with respect to appropriations: one might equally draw the opposite conclusion, that the role of the Senate in relation to the parliamentary control of spending (the purpose of the requirement of appropriation), was fully dealt with by s 53 of the *Constitution* and was deliberately made weak.

The judges also did not consider the true strength of the Senate's position. The Senate has full powers with respect to 'ordinary' legislation. The Parliament has undoubted power to pass a Bill restricting the Executive and preventing it from spending in particular ways, or in respect of particular subject matters, or requiring further legislation to enable spending. If the Senate favoured such a Bill and the House of Representatives refused to pass it, the Senate could press the House to pass it and, in the most extreme case, could refuse to deal with other business unless and until the Bill were passed. Admittedly, this is not as effective as a positive requirement to obtain authorisation for executive spending, but it can hardly be said that there can be no Parliamentary control over spending through the mechanism of 'ordinary' legislation, in relation to which the Senate has full power. Moreover, it is only in respect of appropriations for the 'ordinary annual services of the Government' that the Senate is unable to amend a proposed law: and at least on one view that appears to approximate the category of spending for which the majority has held legislative authority is unnecessary.⁶²

There is no doubt whatsoever that all Commonwealth Executive action is subject to legislation and thus to parliamentary control; the only issue is whether the legislation is to be required as a *precondition* to the exercise of executive spending power. It is not obvious why it is *that* implication that should be drawn, as opposed to mere acceptance of the potential for control by the Parliament through both the appropriation requirement and 'ordinary' legislation.⁶³ The latter implication would justify restricting Commonwealth executive spending to subject matters that could be controlled by Commonwealth legislation (that is, the 'common assumption') but would not justify further restriction of the spending capacity of the Commonwealth Executive.

C *Section 51 Powers that Cannot be Exercised by the Executive*

Gummow and Bell JJ attacked the 'common assumption' by means of a *reductio ad absurdum*. They sought to show that, if adopted, it would result in the extension of the executive power in such a way as to enable the Commonwealth Executive to do things which it has been clearly established the Executive cannot do. The distribution of legislative power was thus said to be 'inapt' to define executive power.⁶⁴ Gummow and Bell JJ provided a number of examples. The Executive could not impose taxation. Nor could the prospect of 'marriage and divorce, and bankruptcy and insolvency by executive decree' be entertained. They also referred

⁶² See text accompanying above nn 47–9.

⁶³ The enactment of 'ordinary' legislation, in addition to the requirement of appropriation, has not previously been regarded as necessary to support contracting and expenditure: see, eg, *New South Wales v Bardolph* (1934) 52 CLR 455, 471–4 (Evatt J), 509 (Dixon J).

⁶⁴ *Williams* (2012) 86 ALJR 713, 750 [135]; see also 724 [27] (French CJ).

to the uncontroversial proposition that the Executive could not create new offences, while the legislature, within its heads of power, could.⁶⁵

With the benefit of hindsight, it can be seen that this may also have been the point to which Gummow, Crennan and Bell JJ had been alluding in the following cryptic passage in their joint reasons in *Pape*:

[t]o say that the power of the Executive Government of the Commonwealth to expend moneys appropriated by the Parliament is constrained by matters to which the federal legislative power may be addressed gives insufficient weight to the significant place in s 51 of the power to make laws with respect to taxation (s 51(ii)).⁶⁶

These arguments may be thought to confuse the question of the *breadth* (that is, subject matter) and the *depth* (that is, kind of activity) of executive power.

There would be no inconsistency in holding that the breadth of the executive power extended to the *subject matters* of marriage and divorce, bankruptcy and insolvency, on the one hand, while on the other hand holding that the depth of the executive power did not extend to marriage, divorce, bankruptcy and insolvency ‘by executive decree’. Likewise, the creation of offences is beyond the depth of the executive power; but that fact says nothing about the breadth of executive power. To recognise that there may be things which cannot be achieved by the executive in the absence of legislative warrant is merely to recognise the distinction between legislative and executive power.⁶⁷

In relation to the taxation power, it is well settled that there can be no taxation except under the authority of Parliament. That simply means that, in our system, for historical as well as functional reasons, the imposition of taxation is recognised as an exclusively legislative power.

The argument based on the ‘common assumption’ was not that the powers of the Commonwealth Executive were unlimited providing they related to subject matters of Commonwealth legislative power; it was that the Commonwealth had the power to spend and contract in relation to those subject matters. The basis of the argument was that spending and contracting are ‘personal capacities’ which the Crown shares in common with its subjects. By way of contrast, the imposition of taxation, the creation of offences and marriage, divorce, bankruptcy and insolvency by decree are not ‘capacities’ possessed by natural persons in the absence of special legislative authority.

D ‘Conflicts’ between Exercises of State and Commonwealth Executive Power

Another argument relied upon for rejecting the ‘contours’ theory of executive power was that, if the Commonwealth Executive can act without legislation, it can

⁶⁵ See also *Williams* (2012) 86 ALJR 713, 799 [399] (Heydon J).

⁶⁶ *Pape* (2009) 238 CLR 1, 91 [240].

⁶⁷ On the other hand, it is quite possible to envisage kinds of potential expenditure which would have a sufficient connection with the heads of power to which Gummow and Bell JJ referred; for example, a program of expenditure supporting marriage counselling services.

use its spending and contracting power in a regulatory fashion, and may do so in a manner that is inconsistent either with state law or with exercises of state executive power.⁶⁸

It must of course be accepted that governmental contracting and spending can influence and, in an important sense, control, the behaviour of contractors and recipients of funding.⁶⁹ The offer of contracts or payments on conditions therefore can be, and indeed often is, used as a regulatory tool.⁷⁰

However, while the Commonwealth may undoubtedly use its substantial financial capacity to achieve purposes which it considers to be in the public interest, the exercise of the capacities to spend and contract cannot affect or override legal rights and duties that exist under state legislation. Like conditional grants of financial assistance to the states under s 96 of the *Constitution*, spending and contracting 'wear [a] consensual aspect'.⁷¹ This reality is sometimes reflected in the observation that the powers to contract and spend are 'non-coercive'. In the exercise of common law capacities, the Commonwealth Executive and its agents are generally bound by and subject to state legislation regulating the field in which they act.⁷²

Kiefel J explained how she thought competition between the executive governments of the Commonwealth and the states may occur by reference to the chaplaincy program:

Both governments require adherence to their respective guidelines as a condition of funding and both governments publish those guidelines independently of each other and not co-operatively. A party to a funding agreement such as SUQ, is required to conform to the content of such guidelines as may be determined by the Commonwealth and the State of Queensland respectively. There is clearly the potential for some disparity or inconsistency in what is required.⁷³

In the example given, a potential recipient of funding has a choice as to whether they accept funding from the Commonwealth or the state, or both, on the

⁶⁸ *Williams* (2012) 86 ALJR 713, 818 [522] (Crennan J); see also [590] (Kiefel J). Heydon J appeared to accept that 'collisions' of this kind were possible, but suggested that conflict was unlikely to be prevalent and did not arise in *Williams*: at 797 [392]–[393], 798 [395], 800 [406].

⁶⁹ These are arguments that have been made in academic commentary for some time. See, eg, Cheryl Saunders and Kevin Yam, 'Government Regulation by Contract: Implications for the Rule of Law' (2004) 15 *Public Law Review* 51; Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 4th ed, 2009) 55–65, quoted in part in *Williams* (2012) 86 ALJR 713, 728 [38] (French CJ); see also 818 [521] (Crennan J); Zines, above n 1, 355.

⁷⁰ For example, in Victoria, the government has established a panel of legal services providers to government. A law firm selected to be on the panel must have committed to provide pro bono services between 5 and 15 per cent of the value of the legal fees they derive under the panel arrangements. See further Victorian Government Procurement, *Legal Services Panel*, (16 August 2010) <<http://www.vgpb.vic.gov.au/CA2575BA0001417C/pages/state-contracts-legal-government-legal-services>>. See further explanation of how regulation can be achieved through spending programs in Gabrielle Appleby 'There Must be Limits: The Commonwealth Spending Power' (2009) 37 *Federal Law Review* 93, 97.

⁷¹ *AAP Case* (1975) 134 CLR 338, 357 (Barwick CJ).

⁷² See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410.

⁷³ *Williams* (2012) 86 ALJR 713, 830 [590] (Kiefel J).

conditions offered by each of them. If some inconsistency of obligation should arise because Commonwealth funding is provided on conditions which are inconsistent with or detract from the conditions on which state funding is provided, the private law obligations of the recipient will be determined by the application of the law of contract (that is, the common law, as modified by any applicable and valid state and Commonwealth legislation).

The conferral on one person of the personal capacities to contract and spend is not usually seen as restricting the capacities of other persons. That is so, even if a particular person might utilise those capacities to achieve ends (including 'public policy' ends) which the person considers desirable, and about which others may disagree.

Importantly, the Parliaments of the states may, by legislation, exclude the influence of non-coercive action of the Commonwealth Executive. State Parliaments may do so in two ways. First, they may legislate to alter the general law, including by limiting the conditions which may be included in certain kinds of contracts.⁷⁴ Second, and more importantly, state Parliaments may legislate directly to impose rights and obligations. If the rights and obligations imposed by state legislation are inconsistent with contractual obligations under contracts entered into or proposed to be entered into by the Commonwealth Executive, the regulatory effect of the relevant Commonwealth executive action is correspondingly reduced. In the example provided by Kiefel J, if a state took the view that particular action that was being encouraged by conditions attached to Commonwealth funding was undesirable, it could legislate either to outlaw contractual terms requiring engagement in that activity or to prohibit the activity directly. The most that can be said is that, if the Commonwealth provides funding on particular conditions, the state may have to consider whether it objects strongly enough to the policy being pursued by the Commonwealth to (a) pass legislation, and (b) deprive the recipient of the funding the opportunity to receive it by performing the conditions of the grant.

An additional aspect of this argument was expressed by Crennan J in these terms:

[I]f the Commonwealth's capacities to contract and to spend generally permitted the Commonwealth Executive to intrude into areas of responsibility within the legislative and executive competence of the States in the absence of statutory authority other than appropriation Acts, access to s 109 of the Constitution may be impeded. For example, in the specific circumstances of the NSCP, such a wide view of the scope of s 61 could hypothetically lead to the result that citizens caught by any inconsistency between a State legislature's regulation of chaplaincy services and the Commonwealth

⁷⁴ We have in mind here contracts which include conditions directed to the achievement of particular policy outcomes, whatever the identity of the parties, rather than contracts to which the Commonwealth, in particular, is a party. State legislation which does not single out the relationship between the Commonwealth and its citizens for special treatment would seem less likely to infringe the principles developed in *Commonwealth v Cigamatic Pty Ltd (in Liq)* (1962) 108 CLR 372 and *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410.

Executive's acts in respect of the NSCP would be unable to avail themselves of the constitutional protection in s 109 against inconsistent legislation.⁷⁵

This passage appears to start from the proposition that one function of s 109 of the *Constitution* is to provide 'a degree of real protection to the citizen faced with the otherwise impossible predicament of contemporaneous and conflicting demands of Commonwealth and State laws',⁷⁶ and to extend that sentiment to 'regulation' generally; including regulation effected 'non-coercively' by the offer of contractual arrangements or of conditional grants of money. It is difficult to understand how any relevant unresolved 'inconsistency' could arise: either the Commonwealth's proposed executive action, or a citizen's existing obligations under a contract with the Commonwealth, would be excluded by state legislation or (less likely) state legislation purporting to regulate a particular relationship between the Commonwealth and the citizen would be constitutionally invalid.⁷⁷ Section 109 is concerned to avoid conflict between laws; that is, between lawful exercises of legislative power. There would be no 'conflict' between lawful exercises of power if the Commonwealth Executive attempted use spending programs to 'regulate' the conduct of citizens by inducing them to act in a way that was contrary to state law, or by seeking to enforce supposed contractual obligations that were inconsistent with state law.

There is a further, and more subtle, point that might be made about the regulatory effect of the exercise by the Commonwealth of the capacities to contract and spend. Arguably, the constitutional design is such that, unless and until the Commonwealth *Parliament* by legislation enters into a field of concurrent state and Commonwealth legislative power, the field is left to regulation by the states. Thus, if the Commonwealth Executive may spend and contract without legislative authorisation, the Commonwealth executive power may 'intrude' into areas otherwise left by the Commonwealth Parliament to exclusive state control. This might possibly be what French CJ had in mind when he stated that 'an extension of Commonwealth executive powers would, in a practical sense ... correspondingly reduce those of the States and compromise ... the essential and distinctive feature of "a truly federal government"'.⁷⁸

However, even assuming it were accepted that the existence of concurrent state and federal executive spending power *did* somehow reduce the powers of the state, it is not obvious that the extension of the federal executive power to spend would compromise a 'truly federal government' to any greater extent than does the distribution of concurrent *legislative* power to the Commonwealth Parliament. The majority's focus on the representative and responsible nature of the parliamentary institution may hold the key to this. There seems to be great weight placed on the idea that when *Parliament* chooses to enter these areas of concurrent jurisdiction, otherwise left to the states, this engages a representative institution that contains

⁷⁵ *Williams* (2012) 86 ALJR 713, 818 [522]; see also 741 [83] (French CJ).

⁷⁶ *University of Wollongong v Metwally* (1984) 158 CLR 447, 475 (Deane J).

⁷⁷ Cf *Commonwealth v Cigamic Pty Ltd (in Liq)* (1962) 108 CLR 372, 377 (Dixon CJ).

⁷⁸ (2012) 86 ALJR 713, 741 [83]; see also at 719 [1]. The statement would be more persuasive if confined to the division, between the Commonwealth and states, of the *royal prerogatives* in the strict sense.

both national *and state* representatives. In contrast, the Commonwealth Executive is generally seen to be ‘essentially national in form’.⁷⁹

IX Second Strand: Accountability Considerations

A Parliamentary Control over Executive Spending

Several of the arguments relating to representative and responsible government are closely connected with those relating to federal considerations, although they have a different emphasis. The central argument based on responsible government was that the Parliament, as the directly elected representatives of the people, must have control over the expenditure of money by the Executive.

The question that arises is: what kind of control? Again, the issue is whether the positive enactment of legislation is a precondition for the expenditure of money or whether it is sufficient that the Parliament has the power, should it choose to do so, to legislate so as to prevent spending without prior parliamentary approval, to apply pressure to Ministers or, in an extreme case, to withdraw its confidence in the government. It is not obvious why the terms of the *Constitution* are said to require one form of control rather than the other.

In *New South Wales v Bardolph*,⁸⁰ the issue was whether the executive government of New South Wales had power to enter into a contract for the payment of moneys without prior parliamentary appropriation. It was a different issue, but in that context, Dixon J said:

The principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available.⁸¹

Dixon J’s statement that responsible government does not require *prior approval* from Parliament would seem to apply whether the approval takes the form of appropriation or substantive legislation. It is not obvious why, if responsible government does not require prior approval of contracts in the form of appropriation, it should require prior approval in the form of substantive legislation. The Parliament, if it wished, might act to impose a prior *prohibition* which could be lifted only by the Parliament itself, or, alternatively (but in some respects less satisfactorily), it might subsequently legislate so as to prevent or claw back expenditure of which it did not approve. Why should ‘the principles of responsible government’ be seen as requiring the *prior* approval of Parliament through ‘ordinary’ legislation authorising contracting or spending?

⁷⁹ John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1901 edition, 1995 reprint) 700. See also Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 50–1, 189–90, noting that this is subject to the substantial powers possessed by the Australian Senate, as demonstrated in 1975.

⁸⁰ (1934) 52 CLR 455.

⁸¹ *Ibid* 509.

In *Williams*, Gummow and Bell JJ stated that the proposition that the executive power is co-extensive with Commonwealth legislative power 'would undermine the basal assumption of legislative predominance inherited from the United Kingdom and so would distort the relationship between Ch I and Ch II of the Constitution'.⁸² Yet in the United Kingdom, where responsible government originated, there was no requirement of prior legislative sanction to authorise expenditure of money by the Executive, other than the important requirement of parliamentary appropriation prior to actual expenditure.⁸³

B 'Public Moneys'

A further 'accountability' consideration which was evidently regarded as significant was the fact that the monies at the disposal of the Commonwealth Executive are 'public moneys'.⁸⁴ This final aspect of the argument is encapsulated in the following passage from the judgment of Hayne J:

the expenditures in issue ... are expenditures made by the executive government of a polity — an artificial legal person — and are expenditures of public moneys — not moneys which are in any relevant sense the polity's 'own' moneys.⁸⁵

Similarly, Gummow and Bell JJ said that '[w]here public moneys are involved, questions of contractual capacity are to be regarded "through different spectacles"'.⁸⁶ The point sought to be made is that the Commonwealth Executive, when looking to spend public money, is not in a position analogous to a natural person, so that it cannot simply be assumed that the Commonwealth Executive possesses all the powers or capacities of a natural person.⁸⁷

It is not clear in what sense public moneys, raised through taxation or by other lawful means, are not the polity's 'own' moneys. Such moneys, once lawfully acquired by the polity, can be lawfully spent by the polity (at least acting through the combination of its legislative and executive branches).⁸⁸ Of course, there are certain limits on the ways in which such moneys can be lawfully spent; for example, they may not be spent for improper or corrupt purposes, but that

⁸² *Williams* (2012) 86 ALJR 713, 750 [136]; see also 818 [516] (Crennan J). The observation echoes the opinion of Deakin that 'as a general rule, wherever the executive power of the Commonwealth extends, that of the States is correspondingly reduced': 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, Volume 1: 1901-14* (1981) 129, 132.

⁸³ See explanation of the process in Dicey, above n 2, 202-5.

⁸⁴ *Williams* (2012) 86 ALJR 713, 752 [151] (Gummow and Bell JJ); see also 755 [173] (Hayne J), 818 [519] (Crennan J), 827 [577] (Kiefel J).

⁸⁵ *Ibid* [173]; see also 752-3 [151]-[152] (Gummow and Bell JJ), 765 [216] (Hayne J), 818 [519] (Crennan J).

⁸⁶ *Ibid* 752 [151], citing *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51.

⁸⁷ French CJ also made repeated use of the expression 'public money', perhaps with the intention of making the same point: *Williams* (2012) 86 ALJR 713, 719-20 [1]-[4], 721 [7], 726 [31], 740 [79].

⁸⁸ Gummow and Bell JJ made the point that the executive has no legal personality distinct from the legislative branch: *Williams* (2012) 86 ALJR 713, 753 [154]; see also 723 [21] (French CJ), 765 [217] (Hayne J). In spending money, the appropriations process engages the legislature, while the act of expenditure is undertaken by the Executive.

limitation does not seem significant in ascertaining whether prior parliamentary authorisation should be regarded as constitutionally required. The assumption apparently underlying the rejection of the analogy between a polity and a natural person is doubtful: a natural person can expend moneys which are not that person's 'own' moneys, if they are lucky enough to be lawfully authorised to do so.

X A New Understanding of Commonwealth Executive Power

The reasoning of the majority in *Williams* draws on the twin principles of federalism and responsible government. It substantially alters our understanding of the Commonwealth Executive, and significantly removes it from our British origins and, on one view, from the intentions and expectations of the framers. Rather than an Executive in the mould of a British monarch, being *subject to law*,⁸⁹ *Williams* holds that at least the spending and contracting powers of the Commonwealth Executive are, by and large, dependent on being positively *granted* by law.

This is not congruent with many of the framers' stated intentions during the debates over the clause which ultimately became s 61 of the *Constitution*. Sir Samuel Griffith said, in reference to cl 8 of ch II of the 1891 draft constitution (which would become s 61):⁹⁰

This part of the bill practically embodies what is known to us as the British Constitution as we have it working at the present time[.]⁹¹

The High Court has previously insisted on the unique nature of Australia's system which has combined institutions from the United States with those from Britain.⁹² It can be observed in the following sentiments, expressed by Gleeson CJ, Gummow, Hayne and Heydon JJ, in *Attorney-General (WA) v Marquet*, when considering the theoretical underpinnings of manner and form provisions in the Australian states:

Now, however, it is essential to begin by recognising that constitutional arrangements in this country have changed in fundamental respects from those that applied in 1889. It is not necessary to attempt to give a list of all of those changes. Their consequences find reflection in decisions like *Sue v Hill*. Two

⁸⁹ See, eg, Dicey, above n 2, 282–3.

⁹⁰ Clause 8 of the Bill included a statement that the executive power 'shall extend to all matters with respect to which the legislative powers of the parliament may be exercised'. These words were removed by an amendment proposed by Griffith that was intended to make it shorter but not alter its intention: *Official Record of the Debates of the Australasian Federal Convention* (Sydney) 31 March 1891, 777–8 (Sir Samuel Griffith). Even in this form, the provision would seem open to alternative constructions consistent with either the 'common assumption' or the position of the majority in *Williams*.

⁹¹ *Official Record of the Debates of the Australasian Federal Convention* (Sydney) 31 March 1891, 527. See also *Official Record of the Debates of the Australasian Federal Convention* (Sydney) 6 April 1891, 766 (Mr Wrixon); *Official Record of the Debates of the Australasian Federal Convention* (Sydney) 6 April 1891, 769–73 (debate between Alfred Deakin and Sir Samuel Griffith).

⁹² *R v Kirby; Ex parte Boilermaker' Society of Australia (Boilermakers' case)* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

interrelated considerations are central to a proper understanding of the changes that have happened in constitutional structure. First, constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources. Secondly, unlike Britain in the nineteenth century, the constitutional norms which apply in this country are more complex than an unadorned Diceyan precept of parliamentary sovereignty.⁹³

In *Williams*, the High Court has drawn on the Australian combination of responsible government with the federal system of government, and the role of the Senate as a 'states' house' in Parliament, as providing the foundation of limitations on the Commonwealth Executive not previously appreciated, and, as we have argued, not necessarily required by the constitutional text. Berriedale Keith's predication that 'the executive power of the Commonwealth is little affected by considerations of the federal character of the Commonwealth' has proven untrue.⁹⁴

Gummow and Bell JJ emphasised that 'constitutional coherence' is now key to understanding the Executive's powers under the *Commonwealth Constitution*.⁹⁵ The consequence is the distancing of Australian constitutional arrangements from British traditions, even where the constitutional text is expressed in language which might be thought to have been intended to integrate those traditions. To synthesise the High Court's two broad strands of reasoning, the conclusion is that the *Constitution* implements the tradition of responsible government, but does so in a new form, a form unknown in the unitary British tradition. Responsible government in the Commonwealth of Australia means responsibility both nationally and federally.⁹⁶

The practical working of the integration of responsible government with federalism was not fully anticipated by the framers of the *Constitution*. However, there was an appreciation of the tensions. Richard Baker warned the delegates at the 1891 convention that responsible government would lead to centralisation, in tension with federalism. Federalism, he said, was inconsistent with traditional responsible government.⁹⁷ John Hackett famously pronounced that 'either responsible government will kill federation, or federation in the form in which we shall, I hope, be prepared to accept it, will kill responsible government'.⁹⁸ Sir Samuel Griffith proposed that responsible government be incorporated into the *Constitution* in an 'elastic' way so that it could develop as necessary.⁹⁹ He warned

⁹³ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (citations omitted).

⁹⁴ Berriedale Keith, *Responsible Government in the Dominions* (Stephens, 2nd ed, 1928) vol 2, 623, extracted in *Williams* (2012) 86 ALJR 713, 733 [54] (French CJ).

⁹⁵ *Williams* (2012) 86 ALJR 713, 753 [157].

⁹⁶ Reflecting the national and federal characters of our Parliament: Aroney, above n 79, 49.

⁹⁷ While Baker proposed a Swiss style of executive council comprised of representatives from both House, this was not adopted: *Official Record of the Debates of the Australasian Federal Convention* (Sydney) 16 March 1891, 439–40, 465–6; *Australian Federal Convention Papers* (1897–99) no 2, series 8/13, items 91, 96–7, referred to in Aroney, above n 79, 201–2; *Official Report of the National Australasian Convention Debates* (Adelaide) 23 March 1897, 28–31; see also Richard Baker, *Executive in a Federation* (CE Bristow, Government Printer, 1890), referred to in Aroney, above n 79, 210.

⁹⁸ *Official Record of the Debates of the Australasian Federal Convention* (Sydney) 10 March 1891, 214–15.

⁹⁹ *Official Record of the Debates of the Australasian Federal Convention* (Sydney) 4 March 1891, 35–8, 40–1, referred to in Aroney, above n 79, 202–3.

that responsible government in a federal system, was experimental, and should not be 'prescribed for all time'.¹⁰⁰

The Court has accepted that the *Constitution* embodies aspects of traditional responsible government. For example, in *Pape* the Court drew upon the British tradition of appropriation as an element of responsible government in its consideration of ss 81 and 83 of the *Constitution*.¹⁰¹

The limitations on the Senate's powers with respect to appropriation are comparable to the limitations on the British House of Lords, except that the Senate retains the power to reject money Bills.¹⁰² The framers adoption of this British tradition was a compromise between the nationalists and federalists.¹⁰³ It was also largely driven by what was thought to be practical necessity. H B Higgins famously announced that: 'No man can serve two masters'.¹⁰⁴ Because appropriations are necessary for the day-to-day governing of the state, it was feared that giving the Senate equal powers with the House of Representatives might grind government to a halt. This concern is accommodated by the apparent acceptance of the majority in *Williams* that there is no need for statutory backing for spending and contracting in relation to the exercise of the ordinary and well-recognised functions of government.

In *Williams*, the Court has concluded that accepting all of the tenets of responsible government as practised in Britain would undermine the federal system, just as Baker had warned. Putting to one side the executive nationhood power, spending on subjects or for purposes beyond the ordinary functions of government is not necessary for the day-to-day running of the state. Such expenditure is frequently used to achieve policy goals or to regulate conduct.¹⁰⁵

The majority of the Court has held that Commonwealth expenditure in areas beyond the day-to-day running of government must either be authorised by 'ordinary' legislation passed by the Commonwealth Parliament (including the Senate), or utilise the Parliament's power under s 96 of the *Constitution* to grant money to a state, including on the condition that that money be applied to particular programs. The funnelling of Commonwealth expenditure through these two mechanisms presents the opportunity for the people of each state, either through their elected governments (in the case of s 96 grants) or their elected

¹⁰⁰ *Official Record of the Debates of the Australasian Federal Convention* (Adelaide) 24–30 March 1897, 66, 146–7, 184–5, 193–5, 211, 247, 307, 315, 330, 334; Aroney, above n 79, 211.

¹⁰¹ *Pape* (2009) 238 CLR 1, 36–41 [54]–[67] (French CJ), 75–9 [187]–[200] (Gummow, Crennan and Bell JJ).

¹⁰² See further explanation and history of the compromise of 1891 that resulted in the limited powers of the Senate over money Bills in Gabrielle Appleby and John Williams 'A Tale of Two Clerks: When are Appropriations Appropriate in the Senate' (2009) 20 *Public Law Review* 194, 198–202; Aroney, above n 79, 237–40.

¹⁰³ Aroney, above n 79, 204–5.

¹⁰⁴ H B Higgins, *The Australian Commonwealth Bill: Essays and Addresses* (Atlas Press, 1900) 47–8. Higgins favoured the adoption of British institutions on the basis these were known to work: *Official Report of the National Australasian Convention Debates* (Adelaide) 25 March 1897, 96–7, referred to in Aroney, above n 79, 210.

¹⁰⁵ See further explanation of contracting and spending being used to implement policy in text accompanying above nn 69–4.

representatives in the Senate (in the case of both Commonwealth legislation and s 96 grants), to exercise greater control over expenditure.

The *Williams* decision leaves unanswered further questions about whether other previously assumed non-statutory executive capacities, such as the powers to conduct inquiries, to sue and be sued,¹⁰⁶ or to hold property, can be exercised without prior parliamentary approval. As a matter of theory, these powers are not necessarily analogous to those which involve contracting for the expenditure of funds, or expenditure itself. It is only in relation to the latter that the limited position of the Senate, and the capacity of the Commonwealth Executive to intrude into state spheres of responsibility, would appear relevant.

The new understanding of the executive power heralded by *Williams* may have a significant impact on government contracting. Owen Dixon KC predicted that a requirement for legislative backing for Commonwealth contracting, of the kind imposed by the majority in *Williams*, may 'unduly ... hamper the executive Government if it observes the restrictions, or ... inflict great hardship upon the subject who contracts with the Crown if the executive fails to observe the restrictions.'¹⁰⁷ The apparent principle that contracts made in the ordinary course of government will not require prior statutory approval¹⁰⁸ may allay this concern in some cases; but the difficulty of determining which contracts fall within this class may undermine the exception in practice.

XI The Future: Commonwealth Spending in Practice

Doubts were expressed in the aftermath of the decision as to whether it would mean, in practice, greater oversight of executive expenditure by the Parliament, and less intrusion into areas traditionally regarded as areas of state responsibility (or, at least, intrusion limited to grants under s 96 of the *Constitution*).

In evidence given to the Royal Commission on the *Constitution* in 1927, Owen Dixon KC suggested that the enactment of a 'General Contracts Act' could provide a general and ongoing authority to the Executive to enter any contract having a sufficient connection with a field of Commonwealth legislative competence.¹⁰⁹ If the Parliament were to pass such an Act (and further legislation

¹⁰⁶ The answer in this case may be provided by *Commonwealth Constitution* ss 75(iii), 78; *Judiciary Act 1903* (Cth) ss 56, 57, 61.

¹⁰⁷ Australia, Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence* (Melbourne) 13 December 1927, 781, referred to in *Williams* (2012) 86 ALJR 713, 737 [68] (French CJ); see also *New South Wales v Bardolph* (1934) 52 CLR 455, 471–2, 490 (Evatt J).

¹⁰⁸ *Williams v Commonwealth* (2012) 86 ALJR 713, 738 [74], 740 [79], 741 [83] (French CJ), 751 [139] (Gummow and Bell JJ), 819 [530] (Crennan J).

¹⁰⁹ *Ibid* 737 [68] (French CJ). In supplementary submissions, the Commonwealth had tried to point to s 44(1) of the *Financial Management and Accountability Act 1997* (Cth) as such an Act. Section 44(1) placed on the Chief Executive an obligation to manage the affairs of an agency in a way that promotes proper use of Commonwealth resources, and the drafting note that said the Chief Executive has power to enter into contracts on behalf of the Commonwealth, in relation to the affairs of the Agency. However, the judges quickly rejected that this conferred authority. Rather, it related to prudent conduct of public administration where other substantial sources of power existed: at 738[71] (French CJ), 744 [102]–[103] (Gummow and Bell JJ), 774 [260] (Hayne J), 822 [547] (Crennan J), 831 [596] (Kiefel J).

retrospectively validating previous exercises of executive power) then there would seem to be no reason why the ‘common assumption’ could not, in effect, be restored.

It is hard to see why a ‘General Contracts Act’ of the kind envisaged by Sir Owen Dixon should not be effective. Despite the focus of the High Court in *Williams* on the constitutional requirement of parliamentary oversight of executive spending, we doubt whether the breadth and generality of a ‘General Contracts Act’ would be held to be inconsistent with that requirement. In *Combet v Commonwealth*, the Court held appropriations expressed in broad and non-exhaustive language by the Parliament were a lawful exercise of the supervisory jurisdiction under ss 81 and 83.¹¹⁰ This recognised that unlike the courts, effective exercise of accountability by the Parliament is driven by many institutional interests, only one of which is to fulfil its constitutional duty as an accountability mechanism.¹¹¹

From the Commonwealth’s perspective, one appealing characteristic of a ‘General Contracts Act’ may be that it would avoid the necessity of distinguishing between spending and contracting in the course of administering government departments¹¹² or in the exercise of the ‘nationhood’ power, which would not require legislative sanction, and other spending or contracting, which would. The outer limits of these aspects of the executive power remain shrouded in mystery.

Even if a ‘General Contracts Act’ were enacted, however, it would seem that the Commonwealth must nevertheless distinguish between contracts which bear a sufficient connection with a head of Commonwealth legislative power and those which do not.¹¹³ Those contracts that do not relate to a subject matter or purpose within the Commonwealth’s legislative competence could be made by s 96 grants using the states, although it is difficult to conceive how s 96 could be used to validate retrospectively payments already made in schemes outside the legislative competence. It is unclear whether even state legislation could retrospectively validate payments made pursuant to such schemes.¹¹⁴

The response of the Commonwealth government was not to introduce a Bill for a ‘General Contracts Act’ in quite the sense foreshadowed by Sir Owen Dixon. Rather, it introduced the Financial Framework Legislation Amendment Bill (No 3) 2012 which was passed without any great scrutiny in either House. Politically, the government used the bipartisan support of the chaplaincy program to push through

¹¹⁰ *Combet v Commonwealth* (2005) 224 CLR 494, 529 [27] (Gleeson CJ), 577 [160] (Gummow, Hayne, Callinan and Heydon JJ).

¹¹¹ See further John Uhr, ‘Appropriations and the Legislative Process’ (2006) 17 *Public Law Review* 173, 174.

¹¹² The distinction between contracts in the ‘ordinary course of administering a recognised part of the government of the State’ and other contracts created by *New South Wales v Bardolph* (1934) 52 CLR 455, was heavily criticised by Enid Campbell as difficult to apply creating uncertainty for those contracting with the government: Enid Campbell, ‘Commonwealth Contracts’ (1970) 44 *Australian Law Journal* 14, 14–16; see also Leslie Zines, above n 1, 349–50.

¹¹³ Although see the possible counter-argument to this position in text accompanying below nn 124–6.

¹¹⁴ We consider that this might arguably be achievable by a referral of matters by the states pursuant to s 51(xxxvii) of the *Constitution* so as to enable the Commonwealth Parliament to enact legislation which would retrospectively validate past spending.

the legislation (which supports much more than the chaplaincy funding). The Opposition unsuccessfully proposed a sunset clause, which would have at least allowed for further scrutiny to come at a later time, and the Australian Greens proposed an amendment in the Senate that the legislation only support existing funding agreements. That proposal was also defeated.

The *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) ('*Amendment Act*') amends the *Financial Management and Accountability Act 1997* (Cth) by inserting a new div 3B of pt 4. The new s 32B gives the Commonwealth power to make, vary, or administer arrangements (which include contracts, agreements or deeds) or make grants to the states, territories or individuals, where those arrangements or grants, or the class of arrangements or grants are, or the program, are specified in the regulations. There is a transitional provision that purports to validate retrospectively pre-commencement arrangements by extending the legislative basis in s 32B to them.¹¹⁵

The *Amendment Act* also amends the *Financial Management and Accountability Regulations* by inserting a schedule which lists over 400 specific arrangements and grants, classes of arrangements and grants, and programs. Future amendments to the Regulations can be made by the Executive, although they will be disallowable instruments.¹¹⁶ The Regulations currently list some classes of grants to specific non-state and non-territory parties,¹¹⁷ and numerous programs. Because the specification of arrangements and grants is left to the regulations to be made by the Executive, the *Amendment Act* can be seen as a variation on the idea of a 'General Contracts Act', albeit one which appears to encourage, or at least permit, a greater degree of Parliamentary scrutiny than the model proposed by Sir Owen Dixon.

Many of the programs identified in the regulations plainly bear a sufficient connection with one or more heads of Commonwealth legislative power so that legislation authorising expenditure could be justified as falling within Commonwealth legislative competence. Many others are dubious, including grants to schools,¹¹⁸ higher education and research institutions including universities,¹¹⁹ local government¹²⁰ and, of course, the chaplaincy program itself.¹²¹

¹¹⁵ We have said 'purports' here because there may still be constitutional questions about whether many of the programs fall within a legislative head of power.

¹¹⁶ *Legislative Instruments Act 2003* (Cth).

¹¹⁷ These include grants for specific projects. For example: '317.002 Grant to Federation of Ethnic Communities' Councils of Australia' to advise the Australian Government on the views and needs of ethnic communities in Australia'; '318.003 General Motors Holden — next generation vehicles — *Objective: To provide assistance to General Motors Holden to support capital investment and design and engineering of Holden's next generation vehicles*'; and '318.005 Alcoa Point Henry Assistance — *Objective: to increase the productivity and sustainability of the Point Henry Aluminium Smelter*'.

¹¹⁸ See, eg, '407.036 Empowering Local Schools — *Objective: To support participating schools to make decisions, to better respond to the needs of students and the school community, and to provide services designed to assist their students to achieve their best educational outcomes*'.

¹¹⁹ See, eg, '418.051 Higher Education Special Projects — *Objective: To provide support for Australia's higher education sector, through initiatives that support higher education institutions and students*'.

¹²⁰ See, eg, '421.002 Local Government — *Objective: To build capacity in local government and provide local and community infrastructure*'.

To take only the chaplaincy program as an example, there are serious doubts as to whether the High Court will find the legislative authorisation of this program bears a sufficient connection to a head of Commonwealth legislative competence. In *Williams*, Hayne and Kiefel JJ held that a hypothetical law authorising this program would not be valid. Heydon J found that it would be. However, Heydon J retired from the Court on 1 March 2013. The other judges in *Williams* did not consider the issue.

Many of the programs are identified in such general language that uncertainty may arise as to precisely what payments they are intended to authorise. In some cases, the ‘objectives’ by reference to which the programs are defined are so generally expressed that it may be difficult to give them any clear content at all.¹²²

Further, many of the programs are defined by reference to ‘objectives’ which are expressed in such broad terms that a law authorising expenditure on them could not be characterised as a law with respect to any subject matter of Commonwealth legislative power.¹²³ No attempt appears to have been made to establish such a connection.

The then Commonwealth Attorney-General, Nicola Roxon, publicly stated that she did not accept that the *Williams* decision *necessarily* means that legislation supporting spending programs must be with respect to a head of legislative power. After the decision, she said:¹²⁴

As you’d be aware, of course, the majority judgment was itself split with some judgments suggesting a greater prospect that the Court may in the future find that Commonwealth spending must be tied to a particular head of legislative power. However, despite some commentary signalling this as a definite direction of the future or even a consequence of the decision, this was just a flag by some justices and the case did not decide this matter.’

From these statements, it would appear the Commonwealth may seek to rely in future on an argument that *Williams* simply requires spending to be authorised by a statute, not that that statute must be ‘with respect to’ a head of

¹²¹ The ‘National School Chaplaincy and School Welfare Program’ is listed at 407.013 in the Regulations.

¹²² For example, how is it to be determined whether a particular payment is covered by ‘407.056 Remote Participation and Employment Services — *Objective: To support employer engagement and economic development in communities.*’? Or ‘407.059 Compensation and Debt Relief — *Objective: To provide access for eligible recipients to discretionary payments in special circumstances or financial relief from amounts owing to the Commonwealth.*’? See also those general programs listed in nn 118–20 above.

¹²³ There are many examples of this. Under the responsibility of the Department of Education, Employment and Workplace Relations, for example, two programs are: ‘407.001 Support of the Child Care System — *Objective: To support child care services so that more families can access quality early childhood education and childcare services. This program helps families to participate in the social and economic life of the community*’; and ‘407.005 School Support — *Objective: To support initiatives that aim to improve the quality outcomes for all Australian students*’. See also the general programs listed in nn 118–20 and 122 above.

¹²⁴ Nicola Roxon, ‘A Static Constitution? A Very Australian Standoff’ (Paper presented at the CCCS Conference on Recent Constitutional Developments, University of Melbourne, 19 July 2012) 3.

Commonwealth legislative power.¹²⁵ The argument might be based on the proposition that s 61 does in some way include the common law capacities, unlimited as to subject matter, but that before they can be exercised their exercise must be authorised by legislation, presumably supported by s 51(xxxix); in other words, that they must be 'unlocked' by legislation.¹²⁶ Although an argument along these lines might be consistent with both the accountability considerations, and some of the federal considerations,¹²⁷ discussed above, it is hard to escape the circularity of the proposition that legislation might be characterised as 'incidental' to the very power whose exercise it purports to authorise.

The decision to produce a list of enumerated grants and programs in the *Financial Management and Accountability Regulations*, rather than to enact a 'General Contracts Act', can be viewed as a positive development from the perspective of responsible government. It does represent, at the least, an improvement in the transparency of government funding and contracting, which in the past has often been covered by very broadly expressed appropriations 'outcomes'.¹²⁸ In so doing it enhances the potential of greater scrutiny by the Parliament in the future, particularly through the possibility of parliamentary disallowance of amendments to the Regulations.¹²⁹

As Geoffrey Lindell has pointed out, the emphasis in the judgments on the parliamentary role may raise questions as to whether the legislative function of authorising expenditure by the executive can properly be the subject of delegated legislation.¹³⁰ In light of the role assigned to the Parliament by ss 81 and 83 of the *Constitution* in relation to appropriations, for example, it would seem incongruous if the Parliament were at liberty to delegate to the Executive its function of appropriating money. In light of the reasoning of the majority in *Williams*, a similar argument might perhaps be made in relation to the parliamentary oversight of expenditure by 'ordinary' legislation.¹³¹

¹²⁵ *Contra Williams v Commonwealth* (2012) 86 ALJR 713, [252] (Hayne J).

¹²⁶ A similar argument was advanced in *Colonial Sugar Refining Co Ltd v Attorney-General (Cth)* (1912) 15 CLR 182. See *Williams* (2012) 86 ALJR 713, 735 [63] (French CJ). Note the concern expressed by Hayne J of the disruption to the legislative distribution of powers that would be created if s 51(xxxix) could be used in this way: at 770 [242]; see also 828 [581] (Kiefel J).

¹²⁷ However, it would seem to run contrary to much of the federal reasoning that previously underpinned the common assumption. For example, Mason J said, 'in scope [s 61] is not unlimited and ... its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government': *AAP Case* (1975) 134 CLR 337, 396; see also 362 (Barwick CJ), 379 (Gibbs J).

¹²⁸ See Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart, 2011) 135–6.

¹²⁹ *Legislative Instruments Act*.

¹³⁰ Geoffrey Lindell, 'Williams v Commonwealth — How the School Chaplains and Mr Pape Destroyed the "Common Assumption" Regarding Executive Power' (Paper presented at AACL seminar, Sydney, 13 August 2012) 25.

¹³¹ Leslie Zines has argued that limits on the Parliament's power to delegate should be based on the policies behind the separation of powers or responsible government: Zines, above n 1, 203

XII The Future: Possible Implications for State Executive Power

The High Court in *Williams* did not consider the states' executive power to contract and spend.¹³² French CJ referred to the states' power as being 'analogous to that of a unitary constitution'.¹³³ It may be that the states' executive power is still informed to a greater extent by the British theory of the Crown. If so, that divergence between the Commonwealth and the states would in itself be an interesting development.

We note the focus upon the 'public' nature of the money the subject of executive spending, and the need for parliamentary scrutiny under a system of responsible and representative government. Both of these concerns seem equally applicable to the executive power of the states to contract and spend. They might suggest that the requirement for legislation authorising expenditure should be extended to the states as well as the Commonwealth.

On the other hand, in our view the limitations which have been imposed on the Commonwealth Executive are driven primarily by the continuing problem of reconciling the principles of responsible government with federalism. Therefore, on balance, we consider it unlikely that the conclusions of the *Williams* decision will be extended to the states.

Williams may have a very different implication for the states and their revenue, at least in the short term. If the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) is unconstitutional in relation to many Commonwealth spending programs, then many payments made by the Commonwealth would appear to be unlawful. It is doubtful that persons other than those to whom such payments were made¹³⁴ could compel the Commonwealth to retrieve such payments. However, the states would have an interest in those moneys. Pursuant to s 94 of the *Constitution*, the states have a right to any 'surplus revenue' of the Commonwealth.¹³⁵ While the practical operation of this provision has largely fallen away because of the Commonwealth practice of allocating any potential surplus to trust funds, thus eliminating any surplus revenue,¹³⁶ it is arguable that, if expenditures under the amending legislation were invalid, any funds not lawfully expended would become part of the 'surplus' to which the States, between them, would be entitled.

¹³² State executive power can be traced to Letters Patent, or implications from colonial constitutions, the common law and convention: Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 584. The *Australia Acts 1986* s 7(2) now grants State Governors the power and functions of the Queen in respect of their respective states. In Queensland, *Constitution of Queensland 2001* (Qld) s 51 provides: 'The Executive Government of the State of Queensland has all the powers, and the legal capacity, of an individual.'

¹³³ *Williams* (2012) 86 ALJR 713, 740 [79].

¹³⁴ Cf *Pape* (2009) 238 CLR 1, 34 [45], 36 [52] (French CJ), 68 [153] (Gummow, Crennan and Bell JJ), 98 [271] (Hayne and Kiefel JJ), 137 [399] (Heydon J, dissenting).

¹³⁵ Quick and Garran, above n 79, 865; see also *New South Wales v Commonwealth (Surplus Revenue Case)* (1908) 7 CLR 179, 188–9 (Griffith CJ), 197, 199 (O'Connor J), 205 (Higgins J).

¹³⁶ This practice was upheld as constitutionally permissible in *New South Wales v Commonwealth (Surplus Revenue Case)* (1908) 7 CLR 179.

XIII Conclusion

The approach of the majority of the High Court in *Williams* takes us away not only from the 'common assumption' that the Commonwealth's capacities to spend and contract follow the contours of its legislative powers, but away from a theory of the Crown that we inherited from Britain. While our theory of the Commonwealth Executive is still informed by the British component of our constitutional ancestry (and the inclusion of the prerogative in the executive power is one example of this), it is also modified by the framers' bold experiment: the merging of federalism with responsible government. It may be that the framers did not intend to create a Commonwealth Executive with capacities far more limited than those of the British Crown. However, it was foreseen that a wholesale adoption of responsible government in its British conception had the potential to undermine the federal system. In *Williams*, the Court has recognised an additional *federal* dimension to responsible government with a view to guarding against this result. *Williams* thus represents a counter-attack against traditional responsible government on behalf of federalism.