The watershed for Commonwealth appropriation and spending after Pape and Williams?

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The decisions of Pape v Commissioner of Taxation (2009) 238 CLR 1 and Williams v Commonwealth (2012) 248 CLR 156 marked an important change in relation to the appropriation and spending powers under the Constitution. This article considers the significant uncertainty still surrounding the Constitution’s financial power and discusses the implications of these decisions in the broader context of appropriations and spending. The article concludes that shifting the focus of constitutional compliance from appropriations to spending may have unintended consequences.

INTRODUCTION

Over time, the use of the Commonwealth Constitution’s executive powers to make decisions and implement policies has been based on a broad and undefinable ambit “within the ultimate bounds of law”.1 Section 61 provides, using open language that has not been finally determined, a general power: “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.” In recent times this power has attracted significant attention from the High Court in Pape v Commissioner of Taxation (2009) 238 CLR 1 and Williams v Commonwealth (2012) 248 CLR 156. While the scope of this power is now the source of considerable speculation,2 the purpose of this article is to posit that the new focus is a consequence of the High Court’s failure to properly direct its attention to the appropriations powers in the Constitution. The relevant appropriation provisions in the Constitution provide, in part:

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

While these provisions articulate an appropriation there is no clearly expressed power to spend the amounts appropriated. Over the decades this appropriations authority has been read out by the High Court so that it now has little actual function in limiting appropriations. Starting with New South Wales v Commonwealth (1908) 7 CLR 179 (Surplus Revenue case), the High Court concluded that lawful appropriations had the effect of segregating the revenue and money of the Commonwealth so that it did not enter into the calculation of the surplus revenue due to the States under the Constitution (at 191 (Griffith CJ), 197 (Barton J), 199 (O’Connor J), 203 (Isaacs J), 206 (Higgins J)).3 This surplus revenue provision imposed a measure of accountability on the Commonwealth that together with the other financial provisions limited the new Commonwealth’s un-economic spending of the States’

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3 See also Northern Suburbs General Cemetery Reserve Trust v Commonwealth (1993) 176 CLR 555 at 584 (Brennan J), 592 (Dawson J), 600 (McHugh J).
revenues and moneys.⁴ By liberating the Commonwealth of its surplus revenue obligations through broad appropriations the Commonwealth was empowered to keep the revenues and moneys it collected. The result has been a dramatic expansion in the Commonwealth’s financial resources, a drying up of surplus revenue payments to the States, and an imperative for the Commonwealth to spend these additional resources. And it is with these additional resources that the Commonwealth has challenged the boundaries of appropriations.

This reading of the surplus revenue provisions was then followed by a series of cases mapping the constitutional limits on appropriations for the “purposes of the Commonwealth”. In Attorney-General (Vic) v Commonwealth (1945) 71 CLR 237 (Pharmaceutical Benefits case), Latham CJ (at 256) and McTiernan J (at 274) preferred a wider view of Commonwealth purposes as almost whatever the Parliament determines, while Rich, Starke, Dixon and Williams JJ favoured a narrow reach to purposes properly belonging to the Commonwealth (at 264, 266, 271-272, 282). In Victoria v Commonwealth (1975) 134 CLR 338 (AAP case), Barwick CJ (at 360) and Gibbs J (at 375) accepted some constitutional restraints on Commonwealth purposes, while Mason, McTiernan and Murphy JJ (at 396, 369, 417) favoured the reasoning of Latham CJ in Pharmaceutical Benefits, and Jacobs J (at 413-414) and Stephen J (at 384) adopted unusual approaches, the former favouring an expanded Commonwealth power and the latter a political perspective of legislative control over the Executive. Then in Combet v Commonwealth (2005) 224 CLR 494, Gummow, Hayne, Callinan and Heydon JJ (at 577) preferred the view that it was for Parliament to determine the purposes of the Commonwealth. This was essentially a matter of practicality as the practice of one-line appropriations meant that determining a purpose of the Commonwealth (a constitutional fact) was impossible. Implicit in these decisions was that the power to appropriate also conferred a power to spend, albeit the unresolved question remained of whether a valid appropriation was also sufficient authority to spend the amounts appropriated.⁵

Then the watershed in Pape was twofold. The High Court concluded (at 55-56, 70, 133, 213) that the s 81 “purposes of the Commonwealth” were confined to those within the Commonwealth’s powers according to the Constitution. This, in effect, was favouring the perspectives of Rich, Starke, Dixon and Williams JJ in Pharmaceutical Benefits (at 264, 266, 267, 282) and Barwick CJ and Gibbs J in the AAP case (at 363, 375) that the scope of appropriations was confined to the limits of the Constitution.⁶ Further, the High Court in Pape confirmed (at 55, 75, 113, 211) that an appropriated amount might only be spent either where an authority in the Constitution could be identified other than the appropriation provision (ss 81, 83), or under a valid law of the Commonwealth.⁷ This decision confirmed that the power to appropriate and the power to spend were separate powers and that both were confined to the limits of the Constitution.⁸ The watershed in Williams was to confirm that there really are limits to the Constitution’s power to spend (at [4], [161], [163], [184], [449], [548], [597]).

Thus, the overall result of the High Court’s decisions over the decades has been a massive expansion in the Commonwealth capacity to retain revenues and money and at the same time Pape established a significant restriction of how that money might be appropriated and spent. Both Pape and Williams then demonstrate two different avenues of the shift away from determining the “purposes of the Commonwealth” to finding a suitable head of power to justify spending the appropriated amounts. In Pape the dispute was about whether the Tax Bonus for Working Australians Act (No 2) 2009 (Cth) (Bonus Act) was a valid law of the Commonwealth (at 25, 71, 98, 134). Meanwhile in Williams there was no legislation and it was a bare provision of the Constitution’s executive power that was in question. The purpose of this article is to analyse how the High Court reached this position in these cases and then begin to understand the consequences for the Commonwealth’s existing

⁶ See also Australian Woollen Mills Pty Ltd v Commonwealth (1954) 92 CLR 424 at 454 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).
⁷ See also ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140 at 169 (French CJ, Gummow and Crennan JJ).
⁸ This had been a matter of contention, see, eg Saunders, n 6.
accountability and transparency arrangements. The following parts address the cases to demonstrate the details of the judgments in both Pape and Williams. Then there is a discussion about the merits or otherwise of these approaches in the broader context of the Commonwealth appropriating and spending. The article concludes that the High Court’s earlier decisions liberating the surplus revenue for the Commonwealth and then reading down the s 81 “purposes of the Commonwealth” has shifted determinants of financial power to the spending away from the traditional financial gate keeping role of appropriations. The consequence will be to impose perhaps unintended limits on those powers and a reformulation of the Commonwealth’s existing appropriation and spending arrangements.

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

Pape considered whether the Bonus Act was supported by a valid constitutional head of power and whether the payments were made by a valid appropriation, as required by ss 81 and 83 of the Constitution. In a 4:3 majority, the High Court held that the Bonus Act was validly authorised by the executive power in s 61 of the Constitution, read in conjunction with s 51(xxxix).

The matter began when the plaintiff, Bryan Pape, a person entitled to a $250 payment under the Bonus Act, initiated proceedings against the Commissioner of Taxation. The Commonwealth was also joined as a defendant. The plaintiff contended that the Bonus Act was invalid and that payments made were unlawful and void. The introduction of the Bonus Act was a response by the government to the G20 Summit held in November 2008 to stimulate the economy in a global financial crisis. The Bonus Act aimed to provide taxpayers earning less than $100,000 in the 2007/2008 taxation year with $250-$900 (ss 5-6). The obligation to pay the bonus to taxpayers was imposed on the Commissioner under s 7 of the Bonus Act. The taxpayer submitted two arguments. First, that an appropriation for the purposes of the Commonwealth does not provide a substantive power to enact and spend. The High Court unanimously agreed, stating that s 81 does not authorise a spending power. Thus the decision turned on whether the Bonus Act was supported by another provision of the Constitution, with French CJ (at 63-64) and Gummow, Crennan and Bell JJ (at 89-92) concluding that authority was found under the executive power in s 61, read in conjunction with s 51(xxxix). For French CJ, the importance of checks and balances over the use of the Commonwealth’s funds was imperative (at 37-38):

The right of supreme control over taxation with the correlative right to control expenditure was regarded as the “most ancient, as well as the most valued, prerogative of the House of Commons”. The prohibition upon raising taxes without parliamentary authority would be nugatory if the proceeds, even of legal taxes, could be expended at the will of the sovereign. The principle that the Executive draws money from Consolidated Revenue only upon statutory authority is central to the idea of responsible government [footnotes omitted].

This was previously achieved through appropriations, however, the use of standing appropriations, which now represent more than 80% of appropriation drawings, is “a voluntary surrender by Parliament of what is supposed to be its most important power” (at 40). This means that “Parliament is gradually losing control over the expenditure of public funds. Appropriations are increasingly permanent rather than annual and they are also framed in exceedingly broad terms” (at 40). Consequently French CJ turned to the powers conferred in the Constitution for that authority. Referring to Latham CJ in Pharmaceutical Benefits, French CJ held “that ‘the purposes of the Commonwealth’ are to be found in laws made by the Parliament and in the discharge by the Executive of the powers otherwise conferred upon it by the Constitution and particularly by s 61 … ‘s 81 has little or no bearing upon the matter’” (at 47).

Thus, French CJ examined the history of the Constitution to determine the scope of the Executive’s power, concluding that the executive power includes powers conferred on the Executive.

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9 Citing Alcock v Fergie (1867) 4 WW & A’B (L) 285 at 319 (Stawell CJ).
11 Referring to Attorney-General (Vic) v Commonwealth (1945) 71 CLR 237 at 269 (Dixon J).
by valid laws, prerogative powers, and “capacities” (at 56-60). “Capacities” are powers that may be possessed by persons other than the Commonwealth, such as to enter contracts and agreements, employ staff, deal with property, etc (at 60-61). Repeating what Mason J said in the AAP case at 397, French CJ also extended the power to “engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation” (at 63) provided it does not impinge on the States or other branches of government (at 60-62). Applying this on a case-by-case basis, French CJ concluded that the Bonus Act was within the scope of the executive power, albeit in a limited way (at 63):

The executive power extends, in my opinion, to short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole, where such measures are on their face peculiarly within the capacity and resources of the Commonwealth Government … To say that the executive power extends to the short-term fiscal measures in question in this case does not equate it to a general power to manage the national economy. In this case the Commonwealth had the resources and the capacity to implement within a short time-frame measures which, on the undisputed facts, were rationally adjudged as adapted to avoiding or mitigating the adverse effects of global financial circumstances affecting Australia as a whole, along with other countries.

Gummow, Crennan and Bell JJ reached an analogous conclusion to French CJ, finding that an appropriation was not a source of spending power and on its own does not exercise an executive or legislative power (at 72). Their Honours said (at 78):

as the dispute in Combat v Commonwealth illustrates and as the Court in that case held, it is for the legislature to identify the degree of specificity with which the purpose of an appropriation is identified. One consequence is that, as Jacobs J indicated in the AAP Case, the description given to items of appropriation provides an insufficient textual basis for the determination of issues of constitutional fact and for the treatment of s 81 as a criterion of legislative validity. This underlines the conclusion reached earlier in the present reasons which denies to s 81 the character of a legislative “spending power” [footnotes omitted].

Thus Gummow, Crennan and Bell JJ indirectly determined the scope of “purposes of the Commonwealth” by holding that executive power extends to an undertaking of action appropriate to the Commonwealth (at 83)12 and finding that “the phrase ‘maintenance of this Constitution’ in s 61 imports more than a species of what is identified as ‘the prerogative’ in constitutional theory. It conveys the idea of the protection of the body politic or nation of Australia” (at 83).

In the same way as French CJ had, Gummow, Crennan and Bell JJ recognised that the Executive’s power was limited by the States’ authority to deal with matters, but did not consider it necessary to determine an outer limit of the Executive’s power (at 85-87). Their Honours traced their reasoning to Brennan J in Davis v Commonwealth (1988) 166 CLR 79 at 111, who held that the Executive is not an arbiter of its own power and cannot make decisions on anything it deems to be a national interest or concern, but that it can “engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation”, repeating Mason J’s formulation in the AAP case. However, their Honours agreed (at 87-88) that a global recession was a national crisis and within the ambit of the executive power and s 51(xxxix). A response to a crisis of this scale could not otherwise be resolved by the States, Parliament, or other body alone and clearly falls within the concept of a national emergency, without extending its interpretation (at 91).

Although disagreeing, Hayne and Kiefel JJ also concluded that the meaning “purposes of the Commonwealth” could not import any determinative meaning because the generality of appropriations do not allow for proper examination, requiring the power to be found elsewhere (at 112). Thus Hayne and Kiefel JJ applied the scope of the power to import meaning, but in a different way to the majority judgment, focusing on the means and not the end of the Bonus Act. They rationalised that an argument based on the words “crisis” and “emergency” asked in the context of “there is a crisis; if the Commonwealth cannot do this, who can?” is not within the scope of the court to decide and does not respond to the Executive’s power to spend money (at 122-123).

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12 Citing Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority (1997) 190 CLR 410 at 464.
For Hayne and Kiefel JJ the question was not about why the Bonus Act was enacted, but whether it was within the Commonwealth’s power. In their analysis, their Honours resolved that the limits of the executive power cannot reach beyond the area of responsibilities allocated to the Commonwealth under the Constitution (at 115-116) but that a read down version of the Bonus Act would fall within the taxation power found in s 51(ii), and then within the Executive’s capacity under ss 61 and 51(xxxix). However, the Act in its entirety was not within the taxation power (at 133).

Although in dissent Heydon J agreed that the appropriation power could not confer a power greater than a financial means of distributing funds (at 211):

Having regard to the received meaning of “appropriation”, the greatest power that s 81 could confer on the legislature is a power to earmark funds in the Consolidated Revenue Fund. By its terms, s 81 could go no further than giving Parliament a power to appropriate. It does not confer a power on the Parliament to authorise the Executive to expend the appropriated funds. And it does not confer a power on the Parliament to regulate expenditure made, by imposing a duty on the Executive or imposing a right in a third party, or otherwise.

Consequently, Heydon J turned to s 61 to examine whether the legislation was valid. He rejected (at 169) the majority’s use of the “nationhood test” adopted by Mason J in the AAP case, concluding the majority’s choice to limit Mason J’s test to “enterprises and activities peculiarly adapted to the government of a nation” (at 180-181) was fallacious as it may lead a person to believe that the Executive has a wide power to make decisions under the Constitution, even if they are outside the scope of legislative power. This is something Mason J recognised as part of his original test and must form part of the consideration. Considering the final 13 words of the test: “cannot otherwise be carried on for the benefit of the nation”, Heydon J found that the Commonwealth could have stimulated the economy by means other than the tax bonuses. And these means would have fallen within the Commonwealth’s scope of power (at 177-179).

Similarly to Hayne and Kiefel JJ, Heydon J rejected a national fiscal emergency power, which if read in conjunction with s 51(xxxix), would give the Executive the power to deal with any emergency only capable of being dealt with by the Commonwealth. Heydon J concluded that such a power, using words such as “crisis” and “danger” and “emergency” would widen the Commonwealth’s scope considerably. The practical difficulties associated with this would be complex and difficult to examine (at 192-193).

**WILLIAMS v COMMONWEALTH (2012) 248 CLR 156**

*Williams* considered whether the Executive pursuant to the National School Chaplaincy Program (NSCP) could withdraw funds from the Consolidated Revenue Fund to provide chaplaincy services at a State school in Queensland without any legislation providing the Executive with the power to make NSCP payments. In short, the Commonwealth relied on the executive provisions of the Constitution to empower them to make the payments. By a 6:1 majority, the High Court held that the funding arrangement was invalid because the payments were not supported by s 61 of the Constitution (at [4], [161]-[163], [184], [449], [548], [597]).

In 2006, the NSCP was introduced as a voluntary program, allowing schools to request the provision of chaplaincy services. Following its introduction, guidelines were issued by the Department of Education, Science and Training although they were never backed by statutory force, providing merely administrative guidelines. The Scripture Union Queensland, an independent public company, was then engaged by the Executive from 2007 to provide chaplaincy services to State schools in Queensland, including Darling Heights State School as part of the NSCP. Under this arrangement, the Executive proceeded to draw money from the Consolidated Revenue Fund to fund the program. The matter began, when the plaintiff, Ronald Williams, commenced proceedings on behalf of his four children, who attended the Darling Heights State School. The plaintiff challenged both whether the arrangement was invalid because it was beyond the executive powers and also whether the drawing of money from the Consolidated Revenue Fund was authorised by the relevant Appropriations Act. The latter was not considered by the court because as it was held in *Pape* that “Parliamentary appropriation[s] do not confer a substantive spending power and … the power to expend appropriated moneys must be found elsewhere in the Constitution” (*Williams* at [114] per Gummow and Bell JJ).
(French CJ agreeing at [39])). Similarly, New South Wales v Bardolph (1934) 52 CLR 455 has previously held that the Executive may contract to spend money that is conditional upon a valid appropriation law being passed (see Williams at [115]).

Given the read out vision of the appropriation provisions, the decision turned on whether the agreement was beyond the scope of executive power. The decision was two-fold. First, the High Court considered the Commonwealth’s submission that the Executive’s power to spend and contract was similar to a legal person, and did not require legislative backing, before second, considering whether the Executive’s power to spend money extends to heads of legislative competence.

From the outset, each of the Justices (except Heydon J who did not consider the issue (at [407])), rejected the Commonwealth’s submission that the Executive has the spending power of a legal person. The second proposition was decided on different grounds. French CJ (at [58]-[72]), Gummow and Bell JJ (at [130]-[137]), and Crennan J (at [515]-[516]) held that the arrangement could only be justified if it was supported by legislation, while Hayne J (at [270]-[286]) and Kiefel J (at [569]-[575]) did not consider the argument relevant, finding the arrangement completely outside the scope of the Commonwealth’s jurisdiction. Heydon J in his dissent considered the NSCP arrangement within the Executive’s competence under the Constitution s 51 provision of “benefits to students” (at [408]-[441]).

Rejecting the Commonwealth’s legal person test, French CJ recognised the importance of characterising boundaries to the executive power given the limited controls of the appropriations power (at [35]-[39]) and stated: “There are consequences for the Federation which flow from attributing to the Commonwealth a wide executive power to expend moneys, whether or not referable to a head of Commonwealth legislative power, and subject only to the requirement of a parliamentary appropriation … ‘Governmental action inevitably has a far greater impact on individual liberties, and this affects its character’” (at [37]-[38]). French CJ then rejected the Commonwealth’s submission that the Executive can spend money on any subject of Commonwealth jurisdiction, holding that the appropriation provisions cannot provide these necessary controls, because in its read out form, an appropriation does not satisfy all the necessary legal conditions (at [60], [67]). French CJ also considered the history of the Constitution, holding (at [60]):

There is no clear evidence of a common understanding, held by the framers of the Constitution, that the executive power would support acts of the Executive Government of the Commonwealth done without statutory authority provided they deal with matters within the enumerated legislative powers of the Commonwealth Parliament. A Commonwealth Executive with a general power to deal with matters of Commonwealth legislative competence is in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power. It would undermine parliamentary control of the Executive branch and weaken the role of the Senate.

Thus French CJ concluded that “the submission invites the Court to determine whether there is a hypothetical law which could validly support an impugned executive contract and expenditure under such contract” (at [36]). In its response, the Commonwealth attempted to draw its authority from the Financial Management and Accountability Act 1997 (Cth). This submission was quickly rejected because the Act provides for the proper use and management of public money through its drawing mechanisms, and this cannot amount to constitutional authorisation for the Executive to spend (at [69]-[72]). Crennan J (at [531]) distinguished between statutory authority for executive action and legislation from the appropriation of funds for a particular purpose, finding (at [516], [533]):

Whilst the Executive has the power to initiate new policy and to implement such policy when authorised to do so, either by Parliament or otherwise under the Constitution, Parliament has the power to scrutinise and authorise such policy (if not otherwise authorised in the Constitution), and the exclusive power to grant supply in respect of it and control expenditure.

These considerations highlight the need to characterise any particular act of contracting and spending by the Commonwealth Executive so as to determine whether or not it is authorised by s 61.

Crennan J (at [544]) concluded that a wide view of the executive power “ignores the restrained approach to the prerogative adopted by Brennan J in Davis [Davis v Commonwealth (1988) 166 CLR 79]”, as well as the relationship between the Executive and Parliament, saying: “The statements do not support the proposition that, provided an initiative, policy or activity could be the subject of valid
Commonwealth legislation, the Commonwealth Executive is … authorised to contract and spend in respect of such an initiative, policy or activity without statutory authority” (at [540]). This was also supported by Gummow and Bell JJ’s analysis of the legal person submission, adding that where public moneys are involved, the ordinary laws of contract cannot apply and the contractual capacity of the Commonwealth must be regarded through different spectacles (at [151]-[152]). The significance of Pape for crystallising the relationship between appropriations and spending power mean that “considerations of constitutional coherence point away from the existence of an unqualified executive power to contract and spend” (at [157]).

To reject the Commonwealth’s second submission, Gummow and Bell JJ examined the AAP case to explain the conclusion that the Executive can spend public money for any purpose that is supported by a legislative head of power as misleading (at [130]). Using this as their foundation, their Honours explained how the proposition was too broad, because it is well settled that some powers, such as the taxation power in s 51(ii), cannot be authorised except by statute (at [135]). To accept this submission, would distort the relationship between Chs I and II of the Constitution (at [136]).

Considering the legal person analogy, Hayne J reasoned that the Constitution’s provision for parliamentary control over the raising and spending of public money was a necessary consideration (at [218]).13 Sections 81 and 83 provide merely an abstract description of the purposes of the appropriation and provide limited basis for determining the use of money appropriated; thus the power to spend must be found elsewhere (at [222]). Hayne J stated (at [223]):

It is to be observed, however, that since Federation, parliamentary control over expenditure has not stopped at that point in the process of appropriation at which the legislature authorises drawing from the Consolidated Revenue Fund. As Isaacs J observed in the Wool Tops Case [Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd (1922) 31 CLR 421], as well as “power over appropriation”, “there arises the necessity for control over the actual expenditure of the sums appropriated”. There has always been coupled with the authority to draw from the Consolidated Revenue Fund further legislative provision made in the appropriation legislation, which, if it has not conferred authority to make the relevant expenditures, at least has provided for, and in more recent times in Australia sometimes confined, the application of appropriated sums to expenditures for the designated purposes.

Because the Appropriation Act did not provide any application of the identified spending, there is a conferral of authority to apply the money. Hayne J said that it is “consistent with the proposition that it is Parliament, not the Executive, which controls expenditure of public moneys, not just by ‘power over appropriation’ but also by ‘control over the actual expenditure of the sums appropriated’” (at [233]).

Turning to the Commonwealth’s second submission, although joining the majority to find the NSCP beyond the scope of the executive power, Hayne and Kiefel JJ did so on the basis that the arrangement does not fall within the Commonwealth’s heads of power. Hayne J found that (at [255]):

Posing the question in this way reflects what Barwick CJ said in the AAP case (albeit in order to determine whether the Australian Assistance Plan fell within the “purposes of the Commonwealth” as those words are used in s 81): “In the long run, whether the attempt is made to refer the appropriation and expenditure to legislative or to executive power, it will be the capacity of the Parliament to make a law to govern the activities for which the money is to be spent, which will determine whether or not the appropriation is valid. With exceptions that are not relevant to this matter and which need not be stated, the Executive may only do that which has been or could be the subject of valid legislation.”14

Considering the relevant legislative heads of power, Hayne and Kiefel JJ rejected the submission that the corporation’s power (s 51(xx)) could authorise the NSCP program, because the NSCP guidelines do not require a party to the funding agreement to be a trading or financial corporation; any entity could apply (at [271], [575]). Turning to s 51(xxiiiA) as a possible legislative power, Kiefel J acknowledged that the term “benefit” can include services,15 but this does not extend to services that

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13 See Constitution, ss 53, 54, 55, 56, 81, 83.
15 Citing British Medical Association v Commonwealth (1949) 79 CLR 201 at 279 (McTiernan J).
may only benefit students at a personal level during the course of their education; to do so would extend the meaning of section (at [571]-[572]). Although reaching the same conclusion as Kiefel J, Hayne J concluded that the term “benefit” is not broad enough to encompass services, including chaplaincy services (at [277]-[286]). In his concluding comments, Hayne J referred to a more fundamental reason for finding the NSCP program invalid (at [287]). The necessity of which, stems from the read out version of the appropriations power (at [288]):

Sound governmental and administrative practice may well point to the desirability of regulating programs of the kind in issue in this case by legislation. At the least the difficulties that arise from applying tests that require the consideration of a hypothetical as distinct from an actual law made by the Parliament are avoided and the Parliament’s control over expenditures is plainly asserted in a manner that is capable of review both within and beyond the Parliament. But to conclude that the Constitution requires that the Executive never spend money lawfully available for expenditure without legislative authority to do so is to decide a large and complex issue. It is better that it not be decided until it is necessary to do so. The conclusion that the impugned payments could not have been the subject of a valid law of the Parliament suffices to conclude the issues that have been raised.

In his dissent, Heydon J supported the “Common Assumption” – the idea that the executive power follows the contours of the legislative power to enter into contracts without statutory authority (at [395]). Contrary to the reasoning of the majority, Heydon J rejected the federal considerations, stating that in practice, even without a general legislative Act, the Senate would still play an active role in spending by the Executive (at [396]).

In practice, and by right, the Senate takes a very active role in controlling and monitoring executive expenditure. It is true that the description given to money appropriated in Appropriation Acts and their accompanying documents is often very brief and general. But Senators are able to seek information and criticise proposals to expend money. Senators can do this through the Senate Estimates Committee, through correspondence with responsible Ministers, through debate on Appropriation Bills, and through the questioning of Ministers who are Senators, or their representatives, in the Senate. Nothing in the Constitution prevents the Senate from returning Bills to which s 53 relates which it dislikes to the House of Representatives for amendment, and, in the last resort, from rejecting them … Finally, the Senate, like the House of Representatives, is a platform from which critics of how the executive power has been wielded can build up that corrosive dissatisfaction which eventually leads to a change of government after an election. Consequently, Heydon J concluded that s 51(xxiiiA) “benefits to students” would authorise the payment for chaplaincy services provided by the Commonwealth (at [441]).

**DISCUSSION AND CONCLUSIONS**

The most significant effect of *Pape* and *Williams* has been to confirm that the Commonwealth’s authority to spend amounts appropriated requires either an authority to be identified in the Constitution other than ss 81 and 83, or a valid law made under the Constitution.16 This marks a significant new imposition on the Commonwealth’s financial activities because it imposes a strict limit on the areas in which the Commonwealth can spend its considerable financial resources. The Commonwealth has these considerable financial resources as a direct consequence of the High Court’s decision in the *Surplus Revenue case*17 to find that appropriated amounts were outside the calculation of the surplus. Perhaps unsurprisingly, the Commonwealth has not recorded a surplus since 1908-1909.18 With these considerable financial resources the imperative to spend these financial resources enlivened the potential of the Constitution s 96 through grants to the States. While these grants have proved very successful and faced few constitutional limits (or even limiting decisions by the High Court),19 there

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16 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 23, 36, 55-56, 72-75, 100-101, 210, 213; *Williams v Commonwealth* (2012) 248 CLR 156 at [2], [114], [191], [478], [558].

17 *New South Wales v Commonwealth* (1908) 7 CLR 179.


remains the prospect of the Commonwealth making direct payments to persons and bodies other than States and outside the s 96 arrangements. Both Pape and Williams were attempts to do exactly this.

The analysis of both Pape and Williams here demonstrates that the High Court’s focus was not on the s 81 “purposes of the Commonwealth”. Instead the focus was on finding a power to make the payments other than ss 81 and 83. In Pape this was found in the Bonus Act and the payments were found to be valid. In Williams no power was found and the payments were invalid. For the purposes of this article, however, the judgments reveal the final shift from determining whether there was a valid appropriation to determining whether there was a valid spending power. Hayne J articulated this concern in Williams (at [222]):

Since Federation, the purposes for which the Consolidated Revenue Fund is appropriated have usually been articulated at a very high level of abstraction. And, as the output accounting practices considered in Combat show, there has not been any recent shift to more particular specification of the purposes for which moneys are appropriated. On the contrary, more recent parliamentary practice has been to adopt even more general and abstract descriptions of the purposes for which the Consolidated Revenue Fund is appropriated. As the plurality in Pape noted, one consequence of the manner of drafting appropriations at a high level of abstraction is that appropriations do not provide any sufficient textual basis for determining the constitutional facts that would be relevant to the validity of any particular expenditure made out of the moneys appropriated. But it also follows from the conclusion that the power to spend lies elsewhere than in ss 81 and 83 that whether any particular expenditure was validly made does not depend upon attempting to give content to the phrase, in s 81, “appropriated for the purposes of the Commonwealth” and then seeking to connect the content given to that phrase with either the (often generally expressed) words of appropriation or some more particular expenditure which is found to be authorised by those words [footnotes omitted].

This is perhaps a surprising proposition (albeit it is consistent with the earlier decision in Combat v Commonwealth (2005) 224 CLR 494 at 522, 577) as it essentially means that the s 81 “purposes of the Commonwealth” are no longer words of limitation on what may, or may not, be appropriated. This is, in short, the final reading-out of this provision. This means that disputes about the proper role and place of Commonwealth funding have moved from determining whether there is a valid appropriation for “purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution” to one of determining whether there is either a valid spending power within the Constitution other than ss 81 and 83, or a valid law made under the Constitution. While the effect of limiting appropriations is probably the same as limiting spending, the ambiguity in determining constitutional facts has shifted to a more difficult ambiguity. This is highlighted by the analysis of the executive power in Pape and Williams.

In Pape the majority judgments relied on an as yet ambiguous element of the executive power. For French CJ this was that part of the power that was “capable of serving the proper purposes of a national government”, while for Gummow, Crennan and Bell JJ it was “the undertaking of action appropriate to the position of the Commonwealth as a polity created by the Constitution and having regard to the spheres of responsibility vested in it”. This is often referred to as the “nationhood power” even though this was a phrase notably avoided by the Justices. Unfortunately the Justices did not set out the likely boundaries to this power, albeit the other Justices were critical of such a power. Then Williams confirmed that there were significant areas of executive power outside of validly enacted legislation including the prerogatives and the so-called “nationhood power”. While this did not extend as far as funding the NSCP program in Williams, Pape did accept short term fiscal measures affecting the whole nation and within the capacity of the Commonwealth as a

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20 Pape v Commissioner of Taxation (2009) 238 CLR 1 at 60.
21 Pape v Commissioner of Taxation (2009) 238 CLR 1 at 83.
22 See, eg Pape v Commissioner of Taxation (2009) 238 CLR 1 at 122 (Hayne and Kiefel JJ), 191 (Heydon J).
23 Williams v Commonwealth (2012) 248 CLR 156 at [34], [139], [141], [582].
24 Williams v Commonwealth (2012) 248 CLR 156 at [84], [160]-[166], [548], [598].
“national emergency”. As one of the other Justices pointed out an “emergency” was effectively giving “an unexaminable” power to the Executive.

The effect of these decisions has been to shift the focus in assessing appropriations from the pre-Pape ambiguity of s 81’s “purposes of the Commonwealth” to the increasingly uncertain formulations of statutes, the status of the Crown as a person, prerogatives, and the so-called “nationhood power”. This is likely to be particularly difficult in circumstances where the Executive acts without legislative authority to do so. For example, in *Williams*, Crennan J states that “despite recognised exceptions, spending by the Commonwealth Executive will often require statutory authority beyond Appropriation Acts”. The result of shifting the financial power to spending money away from the appropriations power is that the High Court will eventually have to articulate the true extent of the executive power. The problem is, as *Pape* demonstrated, regulating spending is likely to challenge the scope of these powers in ways that create other novel problems. In *Pape* it was the authority to spend on “an emergency”. In *Williams* a chaplaincy contract was too far.

The Parliament’s response to *Williams* was the legislative listing of over 400 funding schemes in regulations assuming that by legislation the spending (and co-incidentally appropriation) was therefore validly authorised. This suggests there is considerable scope for novel problems in justifying this spending. The consequence from *Williams* is likely to have imposed perhaps unintended limits on those powers as the Commonwealth attempts to spend its vast resources. And, of course, opened a whole new arena of constitutional law focused on articulating the scope and bounds of the spending power. In essence this marks just a shift from the narrow ambiguity of giving meaning to the s 81 “purposes of the Commonwealth” to articulating the broad ambiguity of a spending power dealing with each and every decision that involves spending money. This promises to be fertile ground for constitutional lawyers and very difficult terrain for public sector officials. This also marks a significant challenge for the existing accountability and transparency arrangements set up by the Commonwealth.

The *Financial Management and Accountability Act 1997* (Cth) sets out a management and accountability framework for Commonwealth entities dealing with “public money” – “money in the custody or under the control of the Commonwealth” or “money in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money” (s 5). A complex arrangement is then articulated for any commitments to spend “public money” with the valid appropriation being the thresholds for a valid spending. The *Financial Management and Accountability Regulations 1997* (Cth) requires a two-step process: first an approved “spending proposal”, and secondly a sufficient appropriation (reg 8). An approver can approve a “spending proposal” that is a “proper use of Commonwealth resources” (reg 9) where “proper use” means “efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth” (s 44(3); reg 9). If there is “an insufficient appropriation … under the provisions of an existing [appropriation] law or a proposed [appropriation] law that is before Parliament” then the Finance Minister’s approval is required (reg 10). The approval of the “spending proposal” must then be recorded in writing (reg 12). According to this formula the gatekeeper for a “spending proposal” is the identification of a suitable appropriation.

After the “spending proposal” has been approved the public money can then only be spent (s 26) with a valid “drawing right” (s 27(2)). This is an authority issued by the Finance Minister to “make a payment of public money” (s 27(1)(a)) and has “no effect to the extent to which it purports to

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28 See *Financial Management and Accountability Regulations 1997* (Cth), Sch 1AA.
30 There are some exceptions for “contingent liabilities” (reg 10A).
authorise the making of a payment of public money for which there is no available appropriation” (s 27(5)). Again, the gatekeeper for exercising a “drawing right” is the identification of a suitable and available appropriation.

With the decisions in both Pape and Williams heralding a shift of the gatekeeper for constitutional compliance from appropriations to spending will require a substantial rethinking about the way the Commonwealth regulates its finances. Appropriations and their quantum were relatively easy to identify and quantify, and most importantly, use as a measure to control the purposes of expenditure – even with the uncertainty about the bounds of “purposes of the Commonwealth”, either the intended purposes was or was not a purpose of the Commonwealth. Assessing whether spending is within the bounds of the Constitution is an entirely different matter, vastly compounded by the vagaries of the executive power and its place in the pantheon of governmental activities. The previous assumption that a one-line appropriation passed by Parliament was constitutionally compliant was dramatically simpler that the post-Pape and Williams requirement to assess each spending incident. As the analysis of the Financial Management and Accountability Act demonstrates, this will also require a rethink of the accountability and transparency framework, and consequently procurement, grants, and the other myriad accounting arrangements used across the Commonwealth to justify spending on the basis of appropriations. This promises to be an interesting evolution.