

CASE NOTE: THE CORPORATIONS POWER IN *WILLIAMS* (NO 2)

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This case note analyses the High Court's approach to the corporations power in s 51(xx) of the Constitution in Williams v Commonwealth (No 2) (2014) 88 ALJR 701. The Court held that a law authorising the Commonwealth to pay money to trading or financial corporations was not supported by s 51(xx). This case note argues that, in so holding, the Court failed to engage with the possibility that such a law conferred rights or privileges on corporations and was thus within the scope of the power as explained in New South Wales v Commonwealth (2006) 229 CLR 1 ('Work Choices').

I INTRODUCTION

The High Court's decision in *Williams v Commonwealth (No 2)*¹ has important implications for the spending power of the Commonwealth executive, for the interpretation of s 51(xxiiiA) of the *Constitution*, and for the operation of the Australian federation in general. This case note focuses on a less prominent, but potentially significant aspect of the decision: the treatment of the corporations power in s 51(xx) of the *Constitution*.

II THE CORPORATIONS POWER IN *WILLIAMS* (NO 2)

In *Williams (No 1)*² the High Court held that each expenditure of money by the Commonwealth executive requires specific legislative authorisation. In response to *Williams (No 1)*, the Commonwealth enacted legislation³ in an attempt to authorise approximately 400 spending programs that had no other

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¹ (2014) 88 ALJR 701 ('*Williams (No 2)*').

² *Williams v Commonwealth* (2012) 248 CLR 156 ('*Williams (No 1)*').

³ *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), amending the *Financial Management and Accountability Act 1997* (Cth) and *Financial Management and Accountability Regulations 1997* (Cth). The relevant provisions can now be found in the *Financial Framework (Supplementary Powers) Act 1997* (Cth) and *Financial Framework (Supplementary Powers) Regulations 1997* (Cth).

legislative backing.⁴ These programs included the National School Chaplaincy and Student Welfare Program (NSCSWP), which had been challenged successfully in *Williams (No 1)* and was to be the subject of *Williams (No 2)*. Section 32B of the *Financial Management and Accountability Act 1997* (Cth) provided that the Commonwealth had power to make, vary or administer grants of money or arrangements under which public money was payable by the Commonwealth, if the arrangement or grant ‘is for the purposes of a program specified in the regulations’. Those programs were listed in the new sch 1AA of the *Financial Management and Accountability Regulations 1997* (Cth). The NSCSWP appeared in the schedule, together with the following description:

Objective: To assist school communities to support the wellbeing of their students, including by strengthening values, providing pastoral care and enhancing engagement with the broader community.

In *Williams (No 2)*, Mr Ron Williams renewed his challenge to the NSCSWP. Once the High Court in *Williams (No 2)* had confirmed that Commonwealth spending required legislative authority, the question became whether the legislative provisions authorising the executive to spend money on the NSCSWP were supported by a head of power.⁵ While much of the argument concerned the power to provide ‘benefits to students’ under s 51(xxiiiA), Scripture Union Queensland (a body to which the Commonwealth had made payments under the NSCSWP) submitted that the impugned provisions were supported by s 51(xx).⁶ This argument was based on the fact that the Guidelines

⁴ The Commonwealth also argued that expenditure on the NSCSWP was authorised by s 8 of each year’s *Appropriation Act*, which provided that ‘[t]he amount specified in an administered item for an outcome for an Agency may be applied for expenditure for the purpose of contributing to achieving that outcome’: *Appropriation Act (No 1) 2011-2012* (Cth) s 8; *Appropriation Act (No 1) 2012-2013* (Cth) s 8; *Appropriation Act (No 1) 2013-2014* (Cth) s 8. The NSCSWP was an administered item in each of those years. The High Court found it unnecessary to decide whether the agreement disputed in *Williams (No 2)* (a funding agreement between the Commonwealth and Scripture Union Queensland) was authorised by these provisions, noting that the conclusions about the constitutional validity of the impugned provisions must also apply to the relevant provisions of the *Appropriations Acts: Williams (No 2)* (2014) 88 ALJR 701, 712-13 [52]-[56].

⁵ The relevant provisions were, in their operation with respect to a funding agreement between Scripture Union and the Commonwealth, s 32B of the *Financial Management and Accountability Act 1997* (Cth); pt 5AA and sch 1AA of the *Financial Management and Accountability Regulations 1997* (Cth) and item 9 of sch 1 to the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth). In this case note I refer to those provisions, as the High Court did, as ‘the impugned provisions’.

⁶ Scripture Union Queensland, ‘Third Defendant’s Submissions’, Submission in *Williams v Commonwealth*, No S154 of 2013, 4 April 2014, [101]-[106]. The Commonwealth did not rely on s 51(xx) to support the validity of the legislation, but did make an argument, based on a conception of

under which the NSCSWP was administered required that the body receiving payments be a corporation.⁷

There were two weaknesses in this argument. First, it was arguable whether the corporations receiving the payments – such as Scripture Union Queensland – engaged in sufficient trading or financial activities to characterise them as ‘trading or financial corporations’.⁸ Secondly, the legislation – as opposed to the non-statutory guidelines – contained no indication that the opposite party to a funding agreement had to be a corporation.

The High Court seized on neither of these weaknesses, yet was able to dismiss the argument that the impugned provisions were supported by s 51(xx) in just three paragraphs.⁹ The Court expressly left open the question of the meaning of ‘trading or financial corporations’ in s 51(xx).¹⁰ For the purposes of argument, French CJ, Hayne, Kiefel, Bell and Keane JJ (with whom Crennan J agreed on this point) were prepared to assume that the recipient of any payment made under the NSCSWP must be a trading or financial corporation.¹¹ This meant that the issue could be expressed in the following terms: is a law authorising the Commonwealth to pay money to trading or financial corporations a law with respect to trading or financial corporations?

Based on the reasons in *New South Wales v Commonwealth* (‘*Work Choices*’)¹² – currently the leading authority on s 51(xx) – one might expect the answer to be ‘yes’. In that case, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ adopted, as an authoritative statement of the scope of s 51(xx), the following statement of Gaudron J:

I have no doubt that the power conferred by s 51(xx) of the *Constitution* extends to the regulation of the activities, functions, relationships and business of a corporation described in that sub-

the executive’s spending power contrary to that established in *Williams (No 1)*, that s 51(xx) empowered the executive to make payments (without specific legislative authority) to trading or financial corporations: Commonwealth of Australia and Minister for Education, ‘Annotated Submissions of the First and Second Defendants’, Submission in *Williams v Commonwealth*, No S154 of 2013, 4 April 2014, [155]-[160].

⁷ Scripture Union Queensland, ‘Third Defendant’s Submissions’, Submission in *Williams v Commonwealth*, No S154 of 2013, 4 April 2014, [101].

⁸ See *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282, 304-5.

⁹ *Williams (No 2)* (2014) 88 ALJR 701, 712 [49]-[51].

¹⁰ *Ibid* 712 [51]. The same question was expressly left open in the *Work Choices* case: *New South Wales v Commonwealth* (2006) 229 CLR 1, 75 [58].

¹¹ *Williams (No 2)* (2014) 88 ALJR 701, 712 [49].

¹² *New South Wales v Commonwealth* (‘*Work Choices*’) (2006) 229 CLR 1.

section, *the creation of rights, and privileges belonging to such a corporation*, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships of business.¹³

It is arguable that the impugned provisions conferred rights and privileges on corporations because they authorised the Commonwealth to pay money to corporations.

In *Williams (No 2)*, the High Court's analysis of the corporations power completely ignored the reference, in *Work Choices*, to rights and privileges. Instead, French CJ, Hayne, Kiefel, Bell and Keane JJ said this:

A law which gives the Commonwealth the authority to make an agreement or payment of that kind is not a law with respect to trading and financial corporations. The law makes no provision regulating or permitting any act by or on behalf of any corporation. The corporation's capacity to make the agreement and receive and apply the payments is not provided by the impugned provisions. Unlike the law considered in [*Work Choices*], the law is not one authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation; it is not one regulating the conduct of those through whom a constitutional corporation acts or those whose conduct is capable of affecting its activities, functions, relationships or business.¹⁴

This passage is almost a word-for-word reproduction of a paragraph from the judgment of Hayne J in *Williams (No 1)*.¹⁵ The last sentence in this passage picks up most – but not all – of the matters mentioned in the quote of Gaudron J adopted by the majority in *Work Choices*. Notably, and without explanation, there is no express reference to the conferral of rights and privileges on corporations. Therefore, the Court did not engage with the part of the ratio of *Work Choices* that seemed most relevant to the resolution of this issue.

III IMPLICATIONS OF THIS APPROACH TO THE CORPORATIONS POWER

There are three possible explanations for the failure to refer expressly to rights

¹³ *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 [83], quoted in *Work Choices* (2006) 229 CLR 1, 114 [178] (emphasis added).

¹⁴ *Williams (No 2)* (2014) 88 ALJR 701, 712 [50].

¹⁵ (2012) 248 CLR 156, 276-7 [272].

and privileges in *Williams (No 2)*. The first is that this issue is captured in the reference, in the paragraph quoted above, to the impugned provisions' failure to provide for '[t]he corporation's capacity to make the agreement and receive and apply the payments'. If so, the Commonwealth may be able overcome the obstacle by framing legislation that focuses on the right of corporations to receive money from the Commonwealth, rather than the Commonwealth's right to pay money to corporations. This seems a needlessly formalistic approach.

The second possibility is that the reference to rights and privileges in *Work Choices* was overlooked. Argument on the corporations power in *Williams (No 2)* centred on the two difficulties noted earlier: the legislation did not expressly authorise payments made only to corporations,¹⁶ and there was doubt as to whether the corporations receiving the payments were trading or financial corporations.¹⁷ In these circumstances, the High Court did not receive detailed argument on the hypothetical situation on which it ultimately decided the issue.¹⁸ If the Court did overlook the issue this is of course disappointing, particularly given that the corporations power point could have been decided on narrower grounds (such as on the absence of express reference to corporations in the impugned provisions).

The third possibility has the most far-reaching significance. This possibility is that the treatment of the corporations power in *Williams (No 2)* may signal a move away from the expansive approach to the power that the High Court has

¹⁶ See Ronald Williams, 'Plaintiff's Submissions', Submission in *Williams v Commonwealth*, No S154 of 2013, 28 February 2014, [110]-[115]; Attorney-General (NSW), 'Annotated Submissions of the Attorney General for New South Wales, Intervening', Submission in *Williams v Commonwealth*, No S154 of 2013, 14 March 2014, [41]-[43]; Attorney-General (Qld), 'Annotated Submissions on Behalf of the Attorney-General for the State of Queensland (Intervening)', Submission in *Williams v Commonwealth*, No S154 of 2013, 19 March 2014, [31]; Attorney-General (SA), 'Annotated Submissions of the Attorney-General for South Australia', Submission in *Williams v Commonwealth*, No S154 of 2013, 14 March 2014, [69]; Transcript of Proceedings, *Williams v Commonwealth* [2014] HCATrans 092 (6 May 2014), 1180-95.

¹⁷ See Ronald Williams, 'Plaintiff's Submissions', Submission in *Williams v Commonwealth*, No S154 of 2013, 28 February 2014, [118]; Scripture Union Queensland, 'Third Defendant's Submissions', Submission in *Williams v Commonwealth*, No S154 of 2013, 4 April 2014, [102]-[106]; Attorney-General (Qld), 'Annotated Submissions on Behalf of the Attorney-General for the State of Queensland (Intervening)', Submission in *Williams v Commonwealth*, No S154 of 2013, 19 March 2014, [32]; Attorney-General (Vic), 'Submissions of the Attorney-General for Victoria (Intervening)', Submission in *Williams v Commonwealth*, No S154 of 2013, 14 March 2014, [50]-[57]; Transcript of Proceedings, *Williams v Commonwealth* [2014] HCATrans 092 (8 May 2014), 10565-10650.

¹⁸ That is, the situation in which the legislation authorised payments only to trading and financial corporations.

adopted since the *Concrete Pipes Case*,¹⁹ and that reached its zenith in *Work Choices*. In the aftermath of *Work Choices*, the corporations power appeared to open up vast areas for Commonwealth regulation. Oscar Roos commented that

the mammoth scope of the corporations power, now decisively confirmed by the majority in the *Work Choices* case, provides virtually unlimited opportunities for the Commonwealth Government directly to regulate the activities of most corporations, and by virtue of the corporation's ubiquitous presence in the 21st century economy, to regulate the economy itself.²⁰

It seems anomalous that the Commonwealth has power to regulate virtually all aspects of the activities of corporations and – at least insofar as their conduct relates to the activities of corporations – the conduct of employees, directors, shareholders and those whose conduct is capable of affecting corporations, yet lacks power to pay money to corporations. There is no obvious reason, in principle, to carve out such an exception to an otherwise broad power. Certainly, no reason was explained in *Williams (No 2)*.

It was open to the Court, in *Williams (No 2)*, to consider and reject the possibility that the impugned provisions conferred 'rights' or 'privileges' on corporations. The meaning of 'rights' and 'privileges' in this context is open to more than one construction. The impugned provisions may be said to be laws conferring rights or privileges on corporations because they empower the Commonwealth to pay money to corporations. Against this, it could be argued that the law does not confer *legal* rights or privileges on corporations, but merely creates the prospect that some corporations will be able to enter into agreements under which they receive money at some point in the future. The only entity whose legal rights are directly affected by the law is the Commonwealth, on which the law confers a power to spend money for certain purposes.

This latter interpretation would, in itself, be a relatively narrow reading of the corporations power. Previous statements have indicated that a law will have a sufficient connection to the corporations power if it affects constitutional corporations in a material way²¹ or, 'in its legal or practical operation, it has

¹⁹ *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

²⁰ Oscar Roos, 'From Labour's Pain Comes Labor's Gain? The High Court's Decision in the *Work Choices Case* and the Commonwealth Corporations Power' (2007) 11 *Southern Cross University Law Review* 81, 83-4.

²¹ *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 340 (Brennan J).

significance for corporations.²² In *Re Dingjan; Ex parte Wagner*, Brennan J said that a law would be supported by s 51(xx) if the law

discriminate[s] between constitutional corporations and other persons, either by reference to the persons on whom it confers rights of privileges or imposing duties or liabilities or by reference to the persons whom it affects by its operation. A validating connection between a law and s 51(xx) may consist in the differential operation which the law has on constitutional corporations albeit the law imposes duties or prescribes conduct to be performed or observed by others.²³

A law authorising payments to corporations clearly has significance for, and materially affects, corporations. A law authorising payments *only* to corporations (as the High Court in *Williams (No 2)* was prepared to assume the impugned provisions did) is one that discriminates between corporations and other persons, even though the legal effect of the law falls on another (in this case, the Commonwealth). It is strongly arguable that, on the existing state of the law, the impugned provisions (if read as authorising payments only to constitutional corporations) were within the scope of s 51(xx).

Therefore, even if the High Court in *Williams (No 2)* had expressly engaged with and rejected the submission that the law conferred rights or privileges on corporations, this would have indicated a narrower reading of the corporations power than had been adopted in the past. But the Court in *Williams (No 2)* did not confront these issues. Instead, by ignoring the reference to rights and privileges, they effectively narrowed the scope of the corporations power without explaining the basis on which this decision was made. This is unsatisfactory because the issue has serious consequences for the operation of the federation. Expansive interpretation of Commonwealth powers, following the *Engineers Case*,²⁴ has been a major factor leading to the centralisation of power. The potential for a broad reading of the corporations power to allow the Commonwealth to enter into areas traditionally governed by

²² Ibid 369 (McHugh J).

²³ Ibid 336 (citations omitted). Brennan J formed part of the majority in this case. In *Work Choices*, the majority referred to Brennan J's judgment with apparent approval: (2006) 229 CLR 1, 115-16. The majority in *Work Choices* also referred with approval to the dissenting judgment of Gaudron J in *Dingjan*. Her Honour's view of the scope of the corporations power was *wider* than that of the majority: therefore, *Work Choices* indicates that Brennan J's position in *Dingjan* is, if anything, an understatement of the scope of the power: see *Work Choices* (2006) 229 CLR 1, 114-15.

²⁴ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)* (1920) 28 CLR 129.

States has been noted more than once.²⁵ Any move in the opposite direction will have corresponding consequences for the sharing of power between the States and the Commonwealth.

The *Williams* cases²⁶ have obvious, and important, consequences for the Commonwealth's spending power.²⁷ The High Court's reasoning on this issue has been influenced by federalism considerations,²⁸ and the new conception of the Commonwealth spending power involves a realignment of the relations between the Commonwealth and the States.²⁹ In this case note I have argued that the treatment of the corporations power in *Williams (No 2)* may indicate that the new restrictions on the Commonwealth's executive power may be accompanied by a more confined interpretation of the Commonwealth's legislative power – at least in relation to s 51(xx). Both developments have the potential to effect a decentralisation of power within the federation. The conclusion in *Williams (No 2)* that s 51(xx) does not support a law authorising the Commonwealth to grant money to a trading or financial corporation has implications for situations beyond the NSCSWP. It places in doubt the power of the Commonwealth to grant financial assistance to, for example, embattled manufacturing companies. It remains to be seen, however, whether this potential shift in interpretation will be realised, given the lack of explanation for the apparently narrow interpretation of the corporations power in *Williams (No2)*.

²⁵ See, eg, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 409-10 (Higgins J); *Work Choices* (2006) 229 CLR 1, 224 [539] (Kirby J); Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 132; Nicholas Aroney, 'Constitutional Choices in the *Work Choices* Case, or What Exactly is Wrong with the Reserved Powers Doctrine?' (2008) 32 *Melbourne University Law Review* 1.

²⁶ Together with *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

²⁷ For discussion of these consequences, see, eg, Anne Twomey, 'Post-Williams Expenditure – When Can the Commonwealth and States Spend Public Money Without Parliamentary Authorisation?' (2014) 33 *University of Queensland Law Journal* 9.

²⁸ See *Williams (No 1)* (2012) 248 CLR 156, 178 [1]; *Williams (No 2)* (2014) 88 ALJR 701, 716 [83]; Shipra Chordia and Andrew Lynch, 'Federalism in Australian Constitutional Interpretation: Signs of Reinvigoration?' (2014) 33 *University of Queensland Law Journal* 83; Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power Through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253, 263-70; David Hume, Andrew Lynch and George Williams, 'Heresy in the High Court? Federalism as a Constraint on Commonwealth Power' (2013) 41 *Federal Law Review* 71.

²⁹ See Shipra Chordia, Andrew Lynch and George Williams, '*Williams v Commonwealth* – Commonwealth Executive Power and Australian Federalism' (2013) 37 *Melbourne University Law Review* 189, 215-31; Suri Ratnapala, 'Fiscal Federalism in Australia: Will *Williams v Commonwealth* be a Pyrrhic Victory?' (2014) 33 *University of Queensland Law Journal* 63, 81-2.