Williams v Commonwealth of Australia [2012] HCA 23 (High Court of Australia, Full Court, 20 June 2012)

This case concerned the extent of executive power of the Commonwealth. In particular, the case dealt with the power of the executive to enter into contracts and expend money.

The Constitution of Australia divides power between the executive, the legislature (parliament) and the judicature (the courts). Executive government is dealt with in Chapter II of the Constitution, and vests executive power in the Queen, exercisable by the Governor-General as the Queen’s representative: section 61. The Governor-General is to be advised by the ‘Federal Executive Council’: section 62.

There is no mention in the Constitution of the Prime Minister or the Cabinet. This was because the parliament was always intended to operate on the ‘Westminster’ system (the same as the English parliament). The Westminster system allows for a Prime Minister, ministers in a Cabinet, government departments and ministerial responsibility to the parliament. This was regarded as a given when Australia was constituted as a nation. The Prime Minister and the Cabinet effectively wield the executive power referred to in the Constitution.

The plaintiff, Williams, challenged the Commonwealth’s power to enter into contracts with Scripture Union Queensland (SUQ) for the delivery of ‘chaplaincy’ services into schools operated by the Queensland state government. In particular, he challenged the provision of such services to Darling Heights State School in Toowoomba, where his children attended primary school. Money was expended on chaplaincy services under this contract during 2007 to 2012. Although the expenditure was said by the Commonwealth to have met the necessary condition of a parliamentary appropriation for each year in which it had been made, no Act of Parliament had conferred power on the Commonwealth to contract and expend public money in this way.

Payments for chaplaincy service had first been implemented by the federal government in 2006, and the services were extended in 2009 and have continued since then. Thus, both parties of government had supported the scheme since its inception.

The Full Court held in this case that:

1. Williams had standing to challenge certain payments made by the Commonwealth;
2. Payments made from consolidated revenue to the Darling Heights Funding (DHF) Agreement in Toowoomba, Queensland were beyond the power of the Commonwealth under section 61 of the Constitution;
3. Payments made to Scripture Union Queensland pursuant to the Darling Heights Funding Agreement as above were not supported by the executive power of the Commonwealth under section 61 of the Constitution;
4. None of the issues raised in the case were contrary to section 116 of the Constitution (the section which forbids the Commonwealth from establishing a religion, imposing any religious observance, prohibiting the free exercise of religion, or imposing a religious test on employment).

The main points made by the majority of the High Court were as follows:
On the extent of executive power of the Commonwealth to contract and spend

1. Parliamentary appropriation (via an Appropriation Act) is not a source of spending power, contrary to long-standing assumption.

2. Also contrary to common assumption, the Executive cannot spend money on anything it chooses which is the subject of a commonwealth head of power in the Constitution.

3. There may be some scope, however, for payments to be made in this way in times of national disaster or national economic or other emergency: see Pape v Federal Commissioner of Taxation [2009] HCA 23.

4. The Commonwealth argued that the Executive is a legal person with ordinary powers to contract and spend. However, the Executive is not a separate juristic person. The Executive is a branch of the national polity. The character of the Executive Government as a branch of the national polity is relevant to the relationship between the power of that branch and the powers and functions of the legislative branch and, particularly, the Senate.

5. Unlike a natural person, the Commonwealth’s power to contract and to pay money was constrained by the need for an appropriation and by the requirements of political accountability. The Executive spends public money, not its own money.

6. The exercise of legislative power must yield a law able to be characterised as a law with respect to a subject matter within the constitutional grant of legislative authority to the Parliament. The subject matters of legislative power are specified for that purpose, not to give content to the executive power. Executive action, except in the exercise of delegated legislative authority, is qualitatively different from legislative action.

7. The executive power of the Commonwealth does extend to the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect. That field of action does not require express statutory authority, nor is it necessary to find an implied power deriving from the statute. The necessary power can be found in the words ‘execution and maintenance ... of the laws of the Commonwealth’ appearing in section 61 of the Constitution.

8. Neither the DHF Agreement nor the expenditure made under it was done in the administration of a department of State in the sense used in section 64 of the Constitution. Neither constituted an exercise of the prerogative aspect of the executive power. Neither involved the exercise of a statutory power, nor executive action to give effect to a statute enacted for the purpose of providing chaplaincy or like services to State schools.

9. There was no statute, general or specific, identified by the parties, which could be invoked as a source of executive power to enter into the DHF Agreement and to undertake the challenged expenditure.

10. Whatever the scope of that aspect of the executive power which derives from the character and status of the Commonwealth as a national government, it did not authorise the contract and the expenditure under it in this case.

11. It is possible that there is no such power in the Constitution anyway i.e. it is possible that there could not have been a valid law about the provision of chaplaincy services.
12. Section 61 therefore did not empower the Commonwealth, in the absence of statutory authority, to contract for or undertake the challenged expenditure on chaplaincy services in Darling Heights State School.

**On federal vs state powers**

1. Even if, as the Commonwealth argued, the DHF Agreement and expenditure under it could be referred to either section 51(xxiiiA) (the pensions payment power) or section 51(xx) (the corporations power) of the Constitution, they are fields in which the Commonwealth and the States have concurrent competencies subject to the paramountcy of Commonwealth laws effected by section 109 of the Constitution. *The character of the Commonwealth Government as a national government does not entitle it, as a general proposition, to enter into any such field of activity by executive action alone. Such 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 federal government.*

2. The existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action *involves no real competition with State executive or legislative competence.*

3. The States have the legal and practical capacity to provide for a scheme such as the National School Chaplaincy Program (NSCP). The conduct of the public school system in Queensland, where the Darling Heights State School is situated, is the responsibility of that State. Indeed, Queensland maintains its own programme for school chaplains.

4. If 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 section 109 of the Constitution (which provides for Commonwealth paramountcy in the case of inconsistent legislation) may be impeded.

**On the question of religion**

All the justices agreed that neither the DHF Agreement nor the payments made under it were prohibited by section 116 of the Constitution. The chaplains were not holders of government office, were not employed by the Commonwealth, and had no characteristics to which section 116 might apply.

**Dissenting judgement**

Heydon J in dissent held that:

1. The plaintiff had no standing to challenge payments from the Consolidated Revenue Fund.

2. The common assumption that the Executive could spend money on anything within the legislative powers of the Commonwealth in the Constitution was correct.
3. A capacity to contract is a prime example of a capacity which both the Executive and persons other than the Executive possess.

4. If the NSCP involved the creation of rights and obligations which collided with pre-existing rights and obligations or with state or federal laws, no doubt statute would be necessary. If the conflicting law was a federal enactment, a federal enactment repealing it would be necessary. If the conflicting legal provision was a state enactment, a federal enactment would also be necessary. There would be federal legislative power to support that enactment and it would prevail over the state enactment by reason of section 109 of the Constitution. If the conflicting legal provision was a rule of the common law, a federal enactment would be necessary, and there would be legislative power to enact it. But the NSCP does not create rights and obligations which conflict with pre-existing rights and obligations, or with state or federal laws. Hence no statute is necessary to support it on that account.

Therefore, by a majority of 6 to 1, the High Court held that the NSCP was unable to be paid for by the Commonwealth Executive without supporting legislation.

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/HCA/2012/23.html

Implications of this case

This case raised serious implications for many programs which might be paid for by the Commonwealth government as part of executive power, and thus without supporting federal legislation. The main casualty was the common assumption that executive power extends to all things for which a head of legislative power exists in the Constitution. This was held not to be so. Although the Executive retains many powers, including prerogative powers, it is subject to the control of parliament on issues which involve expenditure from Consolidated Revenue. In addition, it should not exercise executive power in circumstances where state powers may be curtailed on similar issues.

The government passed legislation to overcome this decision on 28 June 2012: see the amended Financial Management and Accountability Act 1997 (Cth) (the FMA Act). The amendments insert a new Division 3B into the FMA to establish a supplementary power for the Commonwealth to make commitments to spend public money where there is no existing legislative authority. This was said not to be a new Commonwealth power, but does not place a limit on what the Executive could do in the absence of legislative authority: new section 32E.

In order to put beyond doubt that public money may continue to be spent where legislative authority (other than Appropriation Acts) does not exist, a new section 32B(1) was inserted into the FMA which provides authority to:

- make, vary or administer arrangements or grants of financial assistance that are prescribed in the Financial Management and Accountability Regulations 1997 (Cth) (the Regulations)
- make, vary or administer arrangements or grants which are for the purpose of a program specified in the Regulations, or
- include classes of arrangement or grants that are specified in the Regulations.
An arrangement is defined to include a contract, agreement or deed. All terms of such arrangements have to be set out in writing: new section 32C. The Minister’s power may be delegated to an official of any agency: new section 32D.

The amendments also provided new sections 44(1A) and (B) in the FMA in order to clarify that Chief Executives of agencies have the power to make, vary or administer arrangements on behalf of the Commonwealth. This latter amendment was to overcome the finding in this case that section 44(1) of the FMA did not empower Chief Executives of agencies of the Commonwealth with the power to spend money. Section 44(1A) provides, via a note, that this power may be delegated to other officials of an agency.

The Regulations were amended to include new Part 5AA, and a new Schedule 1AA. Part 5AA provides that the programs listed in Schedule 1AA are arrangements, classes of arrangements, grants and classes of grants, and programs for the purposes of new section 32B(1)(b) of the FMA. Schedule 1AA lists a large number of existing Commonwealth programs which were placed in doubt by this decision because they have no supporting legislation.