

The Second Williams Case

June 2014

On Thursday 19 June 2014, the High Court handed down its judgment in the case of *Williams v the Commonwealth of Australia* ('Williams No. 2').

In its decision, the Court found both the agreement and the payments made by the Commonwealth to the Scripture Union Queensland under the National School Chaplaincy and Student Welfare Program to be invalid.

This decision may have implications for around 400 Commonwealth programs in a variety of portfolio areas, including industry assistance programs, funding to local councils and money to community organisations for local projects.

The full judgment is available [here](#).

The First Williams Case

In 2012, Ronald Williams successfully challenged the funding agreement between the Commonwealth of Australia and the Scripture Union of Queensland for the provision of chaplaincy services at a State school in Queensland under the National School Chaplaincy Program, on the basis that the agreement was beyond the executive power of the Commonwealth under Section 61 of the *Constitution*.

In its decision, the High Court found that the Commonwealth lacked the power to enter into a funding agreement with a third party without enabling legislation. The judgment clarified the scope of executive power, which had implications far beyond the National School Chaplaincy Program.

Before *Williams No. 1*, governments had generally taken a broad view of the Commonwealth's executive authority to spend Commonwealth funds through the Appropriations Acts and had relied on it to provide funding for a wide variety of Commonwealth programs. However, in *Williams No. 1* a majority of the Court found that Commonwealth expenditure must also be authorised by legislation, and not solely through the Appropriations Acts.

As such, the Court's judgment threw into question the validity of not just the School Chaplaincy Program, but all other programs that are funded by an agreement between the Commonwealth and a third party or an Appropriation Act without legislative backing.

To ensure the validity of these programs, the Parliament was therefore required to either enact legislation to support them, or redirect the funding via other means.

The Hawker Britton Occasional Paper on *Williams No. 1* is available [here](#).

Government Response

Following the Court's decision in *Williams No. 1*, the former Labor Government enacted legislation with bipartisan support intended to ensure the continuation of the School Chaplaincy Program, and around 400 other affected programs in a variety of portfolio areas.

On 27 June 2012, the Federal Parliament passed the *Financial Framework Legislation Amendment Act (No 3)* in an attempt to provide legislative support not only for the making of agreements and payments to the School Chaplaincy Program, but also for all other affected Commonwealth programs.

Some of the major programs provided for under the Government's legislative response to the Court's decision in *Williams No. 1* include:

- funding to local government, including the *Roads to Recovery* program which funds the construction and maintenance of 80 per cent of Australian roads worth \$2.1 billion over the forward estimates;
- industry assistance programs;
- local environment grants;
- housing and homelessness support programs;
- support for volunteer groups; and
- various sports infrastructure and program grants.

The *Financial Framework Legislation Amendment Act (No 3)* (2012) is available [here](#). The full list of programs supported by the legislation is provided in Schedule 1AA.

The Second Williams Case

In 2013, Mr Williams brought a fresh proceeding in the High Court challenging the validity of the relevant provisions of the legislation enacted by the Commonwealth Government to support the School Chaplaincy Program and other Commonwealth programs.

Mr Williams challenged the validity of those provisions both generally, and in their particular operation with respect to the School Chaplaincy Program.

The High Court found that in respect of the School Chaplaincy Program, the legislation and supporting delegated legislation amended and enacted in response to *Williams No. 1* were not valid laws of the Commonwealth, as they were not supported by a legislative head of power under the Constitution.

The Court further held that the Commonwealth's entry into and expenditure of money under the School Chaplaincy Program's funding agreement was not a provision of 'benefits to students' within the meaning of s 51(xxiiiA) of the *Constitution*.

Implications

As the Court's decision specifically related to the School Chaplaincy Program, it does not automatically put at risk all 400 programs covered by the Commonwealth Government's response to *Williams No. 1*.

However, each of these programs may be challenged individually and held invalid if they are unable to be supported by a legislative head of power under the Constitution.

As such, the Commonwealth Government is able to continue to fund each of these programs until such time as it is challenged by an individual or organisation with standing.

If any of these programs are successfully challenged and found invalid by the Court, the Commonwealth Government is likely to be able to fund most of these programs either through direct legislation within power, a referral of power from the states or, via a grant to the States under s 96 of the *Constitution*.

However, it should not be assumed that all programs will be funded by one of these measures. It will be up to the government to respond on a program-by-program basis.

In respect of the School Chaplaincy Program, the government in its response has indicated that it will seek to continue funding the program but is currently examining the Court's judgment to determine the most appropriate mechanism to do this.

Any organisation in receipt of funding under any of the other 400 Commonwealth Programs should seek to clarify whether funding will continue be provided by the Commonwealth Government should the program be successfully challenged.

For more information on how we can assist your organisation, please contact [Simon Banks](#) at Hawker Britton's Canberra Office on +61 2 6111 2191.