HIGH COURT OF AUSTRALIA

20 June 2012

RONALD WILLIAMS v THE COMMONWEALTH OF AUSTRALIA & ORS

[2012] HCA 23

Today the High Court, by majority, held that a funding agreement between the Commonwealth of Australia and Scripture Union Queensland ("SUQ") for the provision of chaplaincy services at a State school in Queensland ("the Funding Agreement") is invalid. A majority of the Court also held that payments made by the Commonwealth to SUQ under the Funding Agreement were not supported by s 61 of the Constitution.

SUQ, a public company, entered into the Funding Agreement with the Commonwealth to provide certain chaplaincy services at the Darling Heights State School in Queensland ("the School") in accordance with certain guidelines ("the NSCP Guidelines"). Those services included assisting the School and community "in supporting the spiritual wellbeing of students" and "being approachable by all students, staff and members of the school community of all religious affiliations". The Funding Agreement was entered into pursuant to the Commonwealth's National School Chaplaincy Program ("the NSCP"). The funding of the NSCP is not provided under legislation, but under a series of funding arrangements administered by the Commonwealth of which the Funding Agreement is one example.

Ronald Williams, the plaintiff, is the father of four children who attended the School. In 2010, Mr Williams commenced proceedings in the original jurisdiction of the High Court challenging the Commonwealth's authority to enter into the Funding Agreement with SUQ, to draw money from the Consolidated Revenue Fund ("the CRF") for each of the financial years from 2007-2008 to 2011-2012 inclusive, and to pay the appropriated moneys to SUQ pursuant to the Funding Agreement.

In addition to the Commonwealth, the Minister for School Education, Early Childhood and Youth, and the Minister for Finance and Deregulation were defendants to the proceeding (collectively, "the Commonwealth parties"). Under the Rules of the Court, the parties agreed to submit a special case to the High Court for determination. Relevantly, the special case asked:

1. Does Mr Williams have standing to challenge the Funding Agreement, the drawing of money from the CRF, and the Commonwealth's payments to SUQ?
2. Is the Funding Agreement invalid because it is:
   (a) beyond the executive power of the Commonwealth under s 61 of the Constitution, or
   (b) prohibited by s 116 of the Constitution?
3. Was the drawing of money from the CRF to make payments under the Funding Agreement authorised by the relevant Appropriation Acts?
4. Were the payments made by the Commonwealth to SUQ pursuant to the Funding Agreement:
   (a) beyond the executive power of the Commonwealth under s 61 of the Constitution, or
   (b) prohibited by s 116 of the Constitution?

Please direct enquiries to Ben Wickham, Senior Executive Deputy Registrar
Telephone: (02) 6270 6893
Email: bwickham@hcourt.gov.au Website: www.hcourt.gov.au

Standing (Question 1): The High Court unanimously held that Mr Williams had standing to challenge the validity of the Funding Agreement. A majority of the Court also held that Mr Williams had standing to challenge the validity of each of the payments made to SUQ, and that it was unnecessary to answer whether Mr Williams had standing to challenge the Commonwealth's appropriations of money from the CRF.

Executive Power (Questions 2(a) and 4(a)): By majority, the High Court held that the Funding Agreement and payments made to SUQ under that agreement were invalid because they were beyond the executive power of the Commonwealth. In the absence of legislation authorising the Commonwealth to enter into the Funding Agreement, the Commonwealth parties relied upon the executive power granted by s 61 of the Constitution. Relevantly, s 61 provides that the executive power of the Commonwealth "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth". A majority of the High Court held that, in the absence of statutory authority, s 61 did not empower the Commonwealth to enter into the Funding Agreement or to make the challenged payments. In particular, a majority of the Court held that the Commonwealth's executive power does not include a power to do what the Commonwealth Parliament could authorise the Executive to do, such as entering into agreements or contracts, whether or not the Parliament had actually enacted the legislation. A majority also held that s 44 of the *Financial Management and Accountability Act* 1997 (Cth) did not provide the Commonwealth with the necessary statutory authorisation to enter into the Funding Agreement or to make payments to SUQ under that agreement.

Freedom of Religion (Questions 2(b) and 4(b)): The High Court unanimously dismissed that part of Mr Williams' challenge based on s 116 of the Constitution. Relevantly, s 116 provides that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth". Mr Williams contended that the definition of "school chaplain" in the NSCP Guidelines imposed a religious test for that office, and that the position of a "school chaplain" was an "office ... under the Commonwealth". The High Court held that the school chaplain engaged by SUQ to provide services at the School did not hold office under the Commonwealth. The chaplain did not enter into any contractual or other arrangement with the Commonwealth.

Appropriations (Question 3): In light of the answer given to Question 1, a majority of the High Court held that it was unnecessary to answer this question.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*