



## *Express law* fast track information for clients

28 June 2012

### **Legislation enacted today in response to High Court's decision in *Williams v Commonwealth***

The *Financial Framework Legislation Amendment Act (No. 3) 2012* was enacted today in response to the High Court's decision in [Williams v Commonwealth \[2012\] HCA 23 \(Williams\)](#), handed down on 20 June 2012.

In *Williams* a majority held that, in the absence of legislative authority (beyond an appropriation), the Commonwealth does not have general executive power to spend money on programs.

The new Act empowers the Commonwealth, from today, to enter into arrangements or make grants where the arrangement or grant, or a program, is specified in regulations. A large number of programs have been immediately specified in regulations for this purpose. The Act also deals with the validity of existing arrangements entered into before the commencement of the Act.

#### **Background – Williams v Commonwealth**

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##### **The High Court's decision**

*Williams* involved a challenge to the constitutional basis for the Commonwealth's activities and expenditure in relation to the National School Chaplaincy Program (NSCP). The NSCP was a program for the funding of chaplaincy services in schools, administered most recently by the Department of Education, Employment and Workplace Relations pursuant to administrative guidelines.

In a 6:1 decision, the High Court invalidated an agreement made by the Commonwealth under the NSCP, and payments made under that agreement, on the ground that they were not supported by the executive power of the Commonwealth. In so concluding, a majority of 4 Justices held that, in the absence of legislative authority, the Commonwealth does not have general executive power to spend money on programs (see [4], [83] per French CJ, [138] per Gummow and Bell JJ,

[544] per Crennan J). Appropriation Acts did not provide sufficient legislative authority.

The two other Justices in the majority – Hayne and Kiefel JJ (writing separately) – decided the case on a different basis. Their Honours found that the Commonwealth’s executive power to spend was confined to subject matters of Commonwealth legislative power, and that there was no such subject matter that would support the NSCP (at [253], [286] per Hayne J, [594] per Kiefel J).

### **Implications of the decision**

The finding of the High Court suggests that many Commonwealth executive government agreements and payments require legislative authority, which has significant implications for the Commonwealth. The *Financial Framework Legislation Amendment Act (No. 3) 2012* provides an urgent response to this requirement.

The *Williams* decision does not have implications for programs and agreements that are already specifically authorised by legislation in addition to an appropriation, agreements with and grants to the States, or agreements and payments for the ordinary services of the government, that is, departmental ‘running costs’.

### ***What the Act does***

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The *Financial Framework Legislation Amendment Act (No. 3) 2012* amends the *Financial Management and Accountability Act 1997* (FMA Act) to establish a supplementary power for the Commonwealth to make, vary or administer arrangements or grants of financial assistance.

More specifically, new s 32B of the FMA Act provides in summary that:

- if the Commonwealth does not otherwise have power to make or administer an arrangement or grant, and
- the arrangement or grant is specified in the regulations, is included in a class of arrangements or grants specified in the regulations, or is for the purposes of a program specified in the regulations, then
- the Commonwealth has power to make and administer the arrangement or grant, subject to compliance with other laws.

The Act amends the *Financial Management and Accountability Regulations 1997* (FMA Regulations) to immediately specify a range of spending programs for the purpose of new s 32B. These are set out in Schedules to the FMA Regulations. These include the National School Chaplaincy and Student Welfare Program (which replaced the NSCP) and a large number of other programs. Further programs can be specified in the future by making regulations.

## **A transitional provision deals with arrangements made before the Act commenced**

The Act also includes a transitional provision to deal with the validity of existing arrangements made before the commencement of the Act (item 9 of Sch 1 to the Act). More specifically, it ensures that an arrangement for programs listed by the Act in Schedules to the FMA Regulations is treated as having been authorised by s 32B if the arrangement was in force at the commencement of the Act.

Arrangements existing at the commencement of the Act for other programs will also be treated as having been authorised under s 32B if these programs are listed in the regulations within 60 days after the commencement of the Act or such further period as is prescribed.

## **Other changes**

The Act amends s 44 of the FMA Act to clarify, in new s 44(1A), that the power of a Chief Executive to manage the affairs of the Agency includes, and is taken to have included, the power (which can be delegated) to make, vary and administer arrangements on behalf of the Commonwealth. The High Court in *Williams* found that s 44(1) did not by itself confer authority on Chief Executives to contract in relation to the affairs of the Agency.

The Act also amends the *Administrative Decisions (Judicial Review) Act 1977* to ensure that decisions made under new Div 3B of Pt 4 of the FMA Act (which includes new s 32B) and s 44 of the FMA Act are not subject to judicial review under that Act.

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