LG Alert

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Williams (No.2) v Commonwealth of Australia

Last week the High Court handed down its much anticipated decision in what is known as the "Williams No. 2" case. Whilst it focussed on the ability of the Commonwealth to fund chaplaincy services at State schools, it has broader relevance to the power of the Commonwealth to fund local government in any manner other than through the State.

As readers will be aware, in 2011, it was the intention of the then federal government to hold a referendum in order to recognise local government in the Australian *Constitution*. This was, however, postponed when the federal election to be held on 7 September 2013 was announced. Since then, the Abbott government has shown no indication as to whether it has any interest in proceeding with the referendum.

The purpose of the referendum was, of course, to amend the *Constitution* to give recognition to local government and not just to the States. If successful, the amendment would allow the Commonwealth to directly fund local government rather than having to provide funding indirectly through the States. Currently, the majority of funding from federal government to local government is channelled to through the States. Minimal direct funding from the federal to local level is used to finance popular programs, such as the Roads to Recovery program and a number of other smaller infrastructure projects.

> "...has imposed a heavy burden on the Commonwealth to negotiate with the States on the allocation of funds for various local government programs."

Over recent years, the Commonwealth's constitutional ability to provide direct funding to local government has been subject to scrutiny and cast into doubt by the High Court of Australia. In *Pape v Commissioner of Taxation*1 and *Williams (No. 1) v Commonwealth of Australia*2, federal issues played a significant part in limiting the scope of the Commonwealth government's executive power. Specifically, in *Williams (No. 1)* it was stated that the federal government does not have a general power to spend in areas where the Commonwealth lacks legislative authority to undertake certain enterprises.3

The case of *Williams (No. 1)* concerned a funding agreement between the Commonwealth and a private service provider, Scripture Union Queensland (SUQ), for the provision of chaplaincy services at a State school. The program was challenged in the High Court by Mr Williams, a parent of four children enrolled at the State school, on the basis that they did not belong to any particular religion. By a majority, the High Court determined that the Executive does not have power under section 61 of the *Constitution* to spend money merely because it is the subject of a Commonwealth legislative power. Further, it was held that the Commonwealth's capacity as a legal person did not enable it to contract and spend as a natural person.

As a result of the outcome to *Williams (No. 1)*, the Commonwealth Parliament quickly passed the *Financial Framework Legislation Amendment Act (No. 3) 2012*, which sought to alter the *Financial Management and Accountability Act 1997* by giving the Executive specified powers to fund a range of programs, including the chaplaincy services program. However, Mr Williams once again challenged the constitutional validity of the program in the High Court and forced the Commonwealth government to justify why the legislation and its regulations fell within the Parliament's powers under the *Constitution*.

On 19 June 2014, the High Court delivered its judgment in relation to *Williams (No. 2) v Commonwealth of Australia*.4 It was held that none of the provisions in the legislation or regulations were supported by a head of legislative power under the *Constitution*. Further, the High Court reinforced its findings from *Williams (No. 1)* in that the Commonwealth's entry into, and expenditure of money under the funding agreement was not supported by the executive power of the Commonwealth. Consequently, the making of the payments under the agreement was unlawful and invalid.

The implication that follows from the High Court judgment is that it yet again puts in doubt direct funding for local government, particularly in respect of the provision of services, such as roads, infrastructure, and educational programs.5 It fails to recognise the importance of local government in providing assistance to the community as a whole and it places any funding that is received at a local level at risk of being challenged. In addition, *Williams (No. 2)* has imposed a heavy burden on the Commonwealth to negotiate with the States on the allocation of funds for various local government programs. Therefore, the debate as to whether local government should be acknowledged in the *Constitution* must continue and, as we see more money channelled through the States, there will need to be a push to bring the referendum back into play.

If you have any questions please contact Claudia Molina at cmolina@kelledyjones.com.au or on 8113 7111 or Michael Kelledy at mkelledy@kelledyjones.com.au on 0417 653 417.

[1] [2009] HCA 23.
[2] [2012] HCA 23.
[3] Erik SDober, *Limitations on Executive Power following Williams v Commonwealth* (2012), QUT Law and Justice Journal, Volume 12, Number 2, p 85.
[4] [2014] HCA 23.
[5] Erik SDober, *Limitations on Executive Power following Williams v Commonwealth* (2012), QUT Law and Justice Journal, Volume 12, Number 2, p 85.