# The Williams case and transport – discarding Captain Jack’s compass

This article expands on previous comments that the Williams (No. 2) case is reason to reconsider Commonwealth engagement in land transport. [1]

## The challenge to Government spending programs

Williams (No. 2) was the third recent challenge in the High Court to Commonwealth Government spending.

Until these cases it was widely assumed the Government could spend as it sees fit. Governments worked on that assumption using the equivalent of Jack Sparrow’s compass to guide them; Conservative administrations set course towards rural roads, Labor steered to cities.

The three High Court cases should consign the assumption, the compass and lack of proper Commonwealth direction to the deep. [2]

## The three cases

The first case, Pape (2009), challenged part of the Government’s response to the Global Financial Crisis; payments to taxpayers. The Court unanimously agreed that Commonwealth spending must be supported by legislation or implied executive power. A 4-3 majority considered the payments lawful under an implied ‘nationhood power’ in times of a national economic emergency. [3]

The decision was seen as raising questions about grants unrelated to national emergencies. In 2012 Mr Williams challenged the school chaplains program on the basis of a lack of supporting legislation. The challenge succeeded and should have sent a shudder through the Government as:

* a private citizen overturned Government spending;
* many Commonwealth programs similarly lacked a legislative basis;
* the High Court decision was a 6-1 majority. [4]

The Commonwealth response, broad legislation seeking to authorise all manner of Government spending, virtually invited another challenge. Mr Williams obliged, claiming Parliament lacked power to legislate for the chaplains program, chaplains not being mentioned in the Constitution.

In 2014 the High Court unanimously agreed and in a judicial slapdown rejected: proposals to reverse Pape and Williams (No.1); Commonwealth arguments. It reasoned:

* Parliament’s ability to legislate does not provide the Government with spending power, actual legislation (or implied executive power) is required;
* in any event, Parliament lacks power to legislate with respect to the chaplains program;
* funding agreements or contracts cannot validate Government spending;
* intergovernmental agreements cannot create Commonwealth powers;
* convenience and merit are not relevant;
* the Government does not have the same powers as other national governments;
* Commonwealth power is not correlated with national significance because of inherent circularity; otherwise the Commonwealth could circumvent Constitutional limits. [5]

The result, Williams (No.2): payments made under the chaplains program were unlawful and became debts to the Commonwealth. The Treasurer subsequently ‘forgave’ these debts.

## Loopholes?

Expert commentary on the cases pointed to a ‘loophole’ by which the Commonwealth can spend on anything; s.96 conditional state grants (specific purpose payments). These grants can only be provided to the states and the power to set conditions (such as: ‘funds must be spent on chaplains or roads’) lies with Parliament. [6]

There are questions about such grants, in particular whether they can allow the Government to do what it wants:

1. Are there limits to what Parliament can delegate regarding s.96 grants? Can legislation allow the Government to set conditions?
2. If delegation of s.96 powers is allowed, how can it be amended or revoked?

The significance of the cases and s.96 extend beyond Commonwealth spending. They are part of a debate about control of executive government; a debate not limited to the Commonwealth or Australia. The debate is familiar to readers of Pearls and Irritants echoing in topics like foreign policy, migration, vested interests, royal commissions, the Solicitor General and willingness to declare war.

The High Court’s modern interpretation of Commonwealth Constitutional spending powers shows a sensible scheme. The Government, formed in the House of Representatives, can spend:

* on matters essential to its character as a Government (implied executive power); and
* on purposes of the Commonwealth, set out in the Constitution, agreed with the Senate (legislation); and
* on any purpose, whether or not identified in the Constitution, agreed with the Senate and relevant states (s.96 grants).

The scheme allows the Commonwealth to enter new fields, even state matters, provided the states’ House (the Senate) and affected states agree. The executive is not to dominate the states.

There may be another loophole if the Government can validly forgive debts arising from its incapacity to spend. In such case, the Government could effectively spend as it likes without the Parliamentary oversight outlined above. This is yet to be tested.

## Implications for transport, infrastructure

The Court’s reasoning in Williams (No. 2) is relevant to transport, infrastructure and cities because, like chaplains, these are not topics mentioned in the Constitution.

After Williams (No. 2) experts noted some Commonwealth programs, including road spending, may lack a proper basis. Subsequent amendments to the National Land Transport Act indicate uncertainty about spending on matters such as suburban roads and ‘blackspots’. The legality of (spending under) the amendments has not been tested, yet. [7]

The Williams (No. 2) reasoning rejected common arguments by advisers and commentators for Government funding of transport and infrastructure. Equally missing the point are arguments about: financial capability; superiority of politicians or bureaucrats; national co-ordination; hypothecation of revenues; ‘deals’ to promote economic growth and Commonwealth revenues.

s.96 concerns what the Commonwealth can do rather than what it should do. The section does not say the Commonwealth, less yet the Government, should do as it likes or what advisers or lobby groups urge.

Basic governance principles such as alignment of power with responsibility, visible accountability and subsidiarity should inform the use of s.96. Greater Parliamentary control of policy is needed when funding relies on the section *because such funding can expand the effective reach of the Commonwealth beyond that set in the Constitution, a matter which is for Parliament.*

Among other things this means that Parliament ie. the Senate not just the Government, should receive proposals for and be given expert advice on such funding. Such advice cannot properly come from a Department which is a part of, represents, the Government. If Captain Jack Sparrow’s compass is still to be used it should be handed to the Senate.

The situation today is different from early 2007 when the then Opposition could plausibly argue for a greater role of the Government, aided by a Department and Infrastructure Australia, in transport and cities on the basis of ‘nation building’.

Governance is a major problem in infrastructure and transport. The right approach is to get the fundamentals right, to closely follow the Constitutional scheme rather than design clever cost-benefit mousetraps that encourage the Government to continue to overstep the real mark.

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**Notes:**

[1] Was Ross right? At thejadebeagle.com

[2] Pirate captain Jack Sparrow was the lead character in the Disney movie series ‘Pirates of the Caribbean’. His compass, which would point at the thing he wanted most, was useless as a navigation device.

[3] Pape v Commissioner of Taxation [2009] HCA 23

[4] Williams v Commonwealth of Australia [2012] HCA 23 (Williams No. 1)

[5] Williams v Commonwealth of Australia [2014] HCA 23 (Williams (No. 2)

[6] Commentary examples include:

Professor Cheryl Saunders <https://blogs.unimelb.edu.au/opinionsonhigh/2014/06/25/saunders-williams/#more-4036>

Glenn Ryall <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop63/c07>

Patrick Hodder <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop64/c08>

[7] The uncertainty about roads is also borne out by the exhaustive listing of potential heads of power in the section ‘Alternative constitutional basis’ see: https://www.legislation.gov.au/Details/C2014C00691 .