

3 July 2014

Ms Christine McDonald
Inquiry Secretary
Senate Standing Committees on Environment and Communications
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By email: ec.sen@aph.gov.au

Dear Ms McDonald

Public hearing 1 July 2014 – responses to questions taken on notice

The Law Council is pleased to provide the attached responses to issues raised during the public hearing of the inquiry into the Carbon Farming Initiative Amendment Bill 2014 (the ERF Bill) on 1 July 2014, and answers to questions taken on notice by the Chair of the Australian Environment and Planning Law Group, Mr Greg McIntyre SC.

Yours sincerely



MARTYN HAGAN
SECRETARY-GENERAL

Q: *Senator Milne raised the following question (paraphrased) during the hearing:* Taking into account the Williams (No 2) decision, where the money that the government intends to allocate to the Emissions Reduction Fund has already been allocated in the Appropriations Bill, in the event that the Carbon Farming Initiative Amendment Bill does not pass, because the Parliament determines that this is not how the money should be spent, is it likely to be legal for the Clean Energy Regulator to still make contracts with proponents? Could the Clean Energy Regulator still contract with proponents to deliver carbon abatement? In other words, can the Emissions Reduction Fund continue without the legislation simply by appropriating money to the Clean Energy Regulator if there is no head of power that enables them to do it?

A: The short answer is that the High Court's recent decision in *Williams v Commonwealth of Australia* [2014] HCA 23 (*Williams (No 2)*) did not definitively rule on that question. There is dicta in *Williams (No 2)* and cases upon which it relied, which leave open a conclusion as to whether a fund such as the Emissions Reduction Fund (ERF) could be expended without specific enabling legislation.

In *Williams (No 2)* the Court was considering the effect of the [Financial Management and Accountability Act 1997](#) (Cth) (FMA Act), [s 32B](#). That section, which deals with supplementary powers to make commitments to spend public money, provides that –

- (1) If:
 - (a) apart from this subsection, the Commonwealth does not have power to make, vary or administer:
 - (i) an arrangement under which public money is, or may become, payable by the Commonwealth; or
 - (ii) a grant of financial assistance to a State or Territory; or
 - (iii) a grant of financial assistance to a person other than a State or Territory; and
 - (b) the arrangement or grant, as the case may be:
 - (i) is specified in the regulations; or
 - (ii) is included in a class of arrangements or grants, as the case may be, specified in the regulations; or
 - (iii) is for the purposes of a program specified in the regulations;
- the Commonwealth has power to make, vary or administer the arrangement or grant, as the case may be, subject to compliance with this Act, the regulations, Finance Minister's Orders, Special Instructions and any other law.

The Court concluded that the provision was valid, that it provided power to make commitments to spend public money,¹ but that it did not have an operation where the Parliament does not have *constitutional* power to authorise the making, varying or administration of arrangements or grants.²

The Court, in relation to the facts in that case, was not able to conclude that the [Financial Management and Accountability Regulations 1997](#) (Cth) (FMA Regulations), which sought to authorise the making of agreements and payments for chaplaincy services to “school communities to support the wellbeing of their students” was within any relevant constitutional power of the Commonwealth.

The Court considered the constitutional power under s 51(xxiiiA) to make laws relating to benefits to students and concluded that it did not authorise the expenditure.³

The Court considered but did not answer the question in relation to whether the constitutional power under s 51(xx) to make laws relating to trading and financial corporations would authorise the expenditure.⁴

The Court also considered but did not answer the question whether Appropriation and Supply Acts provide statutory authority to make a funding agreement or a payment, but noted that the same considerations would apply as would apply to the FMA Act and FMA Regulations,⁵ i.e., did the Parliament have constitutional power to make the provisions authorising expenditure?

Consistently with that, the Court concluded that the power under s 51(xxxix) of the *Constitution* (Cth) to make laws in relation to matters incidental to the execution of a power vested by the Constitution in the executive did not give the executive the power to expend money appropriated in accordance with ss 81 and 83 of the *Constitution* for **any** purpose.⁶

The High Court's decision in *Williams (No 2)* was identified by the Court⁷ as being founded on the decisions in *Pape v Federal Commissioner of Taxation*⁸ and *Williams (No 1)*.⁹

The High Court in *Williams (No 2)*¹⁰ said:

In Pape, all members of the Court concluded that [ss 81](#) and [83](#) of the [Constitution](#) do not confer a substantive spending power. All members of the

¹ [35].

² [36].

³ [38]–[48].

⁴ [49]–[56].

⁵ [55].

⁶ [86].

⁷ [14].

⁸ [2009] HCA 23.

⁹ *Williams v Commonwealth of Australia* [2012] HCA 23.

¹⁰ [20]; See *Pape* [\[2009\] HCA 23](#); [\(2009\) 238 CLR 1](#) [81]–[82], 55 [\[111\]](#), 63–64 [133]–[134], per French CJ, 73 [178], 82–83 [210], 89–92 [232]–[243] per Gummow, Crennan and Bell JJ, 113 [320] per Hayne and Kiefel JJ, 212–213 [606]–[607] per Heydon J.

Court agreed that the power to spend appropriated moneys must be found elsewhere in the [Constitution](#) or in statutes made under it..... It is those conclusions which underpinned the decision in Williams (No 1).

The High Court in *Williams (No 2)*¹¹ notes that both *Pape* and *Williams (No 1)* deny that the executive power of the Commonwealth extends to any and every form of expenditure of public moneys and the making of any agreement providing for the expenditure of those moneys.¹²

In the unusual circumstances of the *Pape* case the majority of the Court held¹³ that the determination of the Executive Government that there was a need for an immediate fiscal stimulus to the national economy enlivened legislative power under [s 51\(xxxix\)](#) to enact the impugned law as a law incidental to that exercise of the executive power.¹⁴

French CJ in *Williams (No 1)*¹⁵ said

There are undoubtedly significant fields of executive action which do not require express statutory authority. the executive power of the Commonwealth extends to the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect. That field of action does not require express statutory authority, nor is it necessary to find an implied power deriving from the statute. The necessary power can be found in the words "execution and maintenance ... of the laws of the Commonwealth" appearing in [s 61](#) of the [Constitution](#). The field of non-statutory executive action also extends to the administration of departments of State under [s 64](#) of the [Constitution](#) and those activities which may properly be characterised as deriving from the character and status of the Commonwealth as a national government.

Gummow and Bell JJ in *Williams (No 1)*¹⁶ noted that

to conclude that the [Constitution](#) requires that the Executive never spend money lawfully available for expenditure without legislative authority to do so is to decide a large and complex issue. It is better that it not be decided until it is necessary to do so.

French CJ in *Williams (No 1)* was very cautious about, if not dismissive of, equating the ambit of executive power with the heads of legislative power set out in the Constitution. He said:

¹¹ [82].

¹² See *Pape* per French CJ [81] and [82]

¹³ [\[2009\] HCA 23](#); [\(2009\) 238 CLR 1](#) 23 [8], 63–64 [133]–[134] per French CJ, 89–92 [232]–[243] per Gummow, Crennan and Bell JJ.

¹⁴ *Williams (No 2)* [20].

¹⁵ [34].

¹⁶ [288]

The subject matters of legislative power are specified for that purpose, not to give content to the executive power..... To say positively and without qualification that the executive power in its various aspects extends, absent statutory support, to the "subject matters" of the legislative powers of the Commonwealth is to make a statement the content of which is not easy to divine. Neither the drafting history of s 61 of the Constitution nor its judicial exegesis since Federation overcomes that difficulty.¹⁷

French CJ in *Williams (No 1)*¹⁸ referred to *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*¹⁹ where Mason J said that the executive power of the Commonwealth was not "limited to heads of power which correspond with enumerated heads of Commonwealth legislative power under the [Constitution](#)",²⁰ adding:²¹

Of necessity the scope of the power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constituent elements in the federation.

French CJ concluded that:

*These remarks are consistent with a concept of executive power in which the character and status of the Commonwealth as a national government is an aspect of the power and a feature informing all of its aspects, including the prerogatives appropriate to the Commonwealth, the common law capacities, powers conferred by statutes, and the powers necessary to give effect to statutes. His Honour's conception of executive power was consistent with that most recently discussed by this Court in *Pape v Federal Commissioner of Taxation*.²² It does not afford support for the broad proposition that the Executive Government of the Commonwealth can do anything about which the Parliament of the Commonwealth could make a law.*

Gummow, Crennan and Bell JJ in *Pape* note that Brennan J in *Davis v The Commonwealth*²³ said:

It does not follow that the Executive Government of the Commonwealth is the arbiter of its own power or that the executive power of the Commonwealth extends to whatever activity or enterprise the Executive Government deems to be in the national interest. But [s 61](#) does confer on the Executive Government power 'to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation', to repeat what Mason J said in the AAP Case²⁴. In my

¹⁷ [27].

¹⁸ [30].

¹⁹ [\[1983\] HCA 29](#); (1983) 158 CLR 535.

²⁰ [\[1983\] HCA 29](#); (1983) 158 CLR 535, 560.

²¹ [\[1983\] HCA 29](#); (1983) 158 CLR 535, 560.

²² [\[2009\] HCA 23](#); (2009) 238 CLR 1, 62–63 [\[131\]–\[132\]](#) per French CJ, 90–91 [239] per Gummow, Crennan and Bell JJ.

²³ [\[1988\] HCA 63](#); (1988) 166 CLR 79, 111.

²⁴ [\[1975\] HCA 52](#); (1975) 134 CLR 338, 397.

respectful opinion, that is an appropriate formulation of a criterion to determine whether an enterprise or activity lies within the executive power of the Commonwealth.

Their honours also refer with approval to the statement in *Davis v The Commonwealth*²⁵ of Mason CJ, Deane and Gaudron JJ that:

[T]he existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence.

In the case of expenditure of the Emissions Reduction Fund, it is to be noted that the primary objective of the Fund is to help Australia meet its international obligations²⁶ under the United Nations Framework Convention on Climate Change ([UNFCCC](#))²⁷ and the Kyoto Protocol, to reduce emissions of greenhouse gases and meet its emissions reduction target of five per cent below 2000 levels by 2020.²⁸

Hayne and Keifel JJ in *Pape*²⁹ note that:

*As was pointed out in Victoria v The Commonwealth (Industrial Relations Act Case)*³⁰ *legislation may be supported under the external affairs power if the legislation gives effect to some international obligation. But as also pointed out in that case, what is said to be the legislative implementation of a treaty may present some further questions for consideration, including whether the treaty in question sufficiently identified the means chosen in legislation as one of the ways in which parties to the treaty are to pursue some commonly held aspiration expressed in the treaty.*

The UNFCCC provides that all parties will –

*Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change*³¹

²⁵ [\[1988\] HCA 63](#); (1988) 166 CLR 79, 93–94.

²⁶ [228].

²⁷ 1771 UNTS 107; S. Treaty Doc No. 102–38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992). The UNFCCC was signed by Australia on 4 June 1992, ratified by Australia on 30 December 1992, entered into force on 24 March 1994. It currently has 196 parties.

²⁸ Explanatory Memorandum, *Carbon Farming Initiative Amendment Bill 2014*, 5.

²⁹ [378].

³⁰ (1996) 187 CLR 416, 486–487; [1996] HCA 56.

³¹ Article 4.1(b).

The Kyoto Protocol provides at Article 3 that –

The Parties included in Annex I³² shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.

2. Each Party included in Annex I shall, by 2005, have made demonstrable progress in achieving its commitments under this Protocol.

3. The net changes in greenhouse gas emissions by sources and removals by sinks resulting from direct human-induced land-use change and forestry activities, limited to afforestation, reforestation and deforestation since 1990, measured as verifiable changes in carbon stocks in each commitment period, shall be used to meet the commitments under this Article of each Party included in Annex I.

Article 6 provides that –

1. For the purpose of meeting its commitments under Article 3, any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy, provided that:

(a) Any such project has the approval of the Parties involved;

(b) Any such project provides a reduction in emissions by sources, or an enhancement of removals by sinks, that is additional to any that would otherwise occur;

...

(d) The acquisition of emission reduction units shall be supplemental to domestic actions for the purposes of meeting commitments under Article 3.

3. A Party included in Annex I may authorize legal entities to participate, under its responsibility, in actions leading to the generation, transfer or acquisition under this Article of emission reduction units.

The treaty provisions do not identify any more specific means for their implementation than is set out above, and so it could be argued that the UNFCCC and Kyoto Protocol do not sufficiently identify an ERF as a means for implementation to support it as an implementation of the treaty.

³² Which includes Australia.

That argument aside, the establishment and expenditure of the ERF could be justified as an exercise of executive power within the Commonwealth's international obligations under the UNFCCC and Kyoto Protocol, and so, comprise an executive implementation of Australia's international obligations, despite a lack of legislation enacted to implement the UNFCCC, pursuant to the external affairs power under the *Constitution* (Cth) s 51(xxix).

The establishment and expenditure of the ERF could be argued to be –

- (a) an executive action not competing with State executive or legislative competence, because of the international or 'external affairs' element of the action; and
- (b) 'peculiarly adapted to the government of a nation';
- (c) the exercise of 'a power appropriate to that of a central executive government in a federation'; or
- (d) an exercise of the prerogatives appropriate to the Commonwealth.

In those circumstances the expenditure of the ERF would be distinguishable from the circumstances in *Williams (No 2)* and may be capable of being the subject of a Regulation promulgated under the FMA Regulations and authorised under the FMA Act s 32B, subject, of course, to the possibility of Parliamentary disallowance.

Q: Senator McEWEN: *Mr McIntyre, did you have any comment about what is currently called the Domestic Offsets Integrity Committee; how effectively the Emissions Reduction Assurance Committee has been working currently; and whether, as part of the amendments to the legislation, you have got any suggestions about how it could work better in terms of maintaining standards, accountability and transparency?*

The Law Council notes that the Emissions Reduction Assurance Committee (ERAC) has not yet commenced. The ERAC will replace the Domestic Offsets Integrity Committee (DOIC) if the ERF Bill is passed, with changes to its functions as outlined in the Law Council's submissions.

The Law Council has not had direct experience in working with the DOIC, but notes that the DOIC has endorsed over 20 methodologies since the CFI commenced at the end of 2012. Given a 40 day consultation period is required as part of this process (s 112(6)), the DOIC appears to function effectively.

However it is noted that the Explanatory Memorandum (EM) for the ERF Bill indicates that the '*...experience of participants in the CFI has been that this process has not enabled the timely development of widely-applicable methodologies.*'

While the Law Council has not experienced this process directly, it appears a significant number of credits have been generated under CFI methodologies since the scheme commenced and that these existing methodologies cover a broad suite of credible emissions reductions or avoidance activities from the land sector. Given these outputs by the DOIC, the Law Council queries the need for reducing the consultation timeframe.

The EM also notes that the membership of ERAC (the replacement committee) will be expanded.

For the ERAC to function effectively it will be essential that scientists of independent outlook with recognised expertise in carbon sequestration are appointed to the panel. This would be better assured if the Bill was amended to include a statutory appointment process similar to that in the *Legislation Act 2001* (ACT). Under that Act, before making an appointment to a statutory position a Minister must consult with the appropriate ACT Parliamentary Committee and not proceed with the appointment until a recommendation has been received or 30 days has passed, and the Minister has had regard to the recommendation (s [228](#)). The instrument of appointment is also a disallowable instrument (s [229](#)).

The Bill (cl 227) replaces a requirement for methodologies to be “supported by relevant scientific results published in peer-reviewed literature” with “clear and convincing evidence”. The Law Council draws attention to this loosening of stringency, and notes that the largest international voluntary carbon greenhouse gas reduction program, [VCS – Verified Carbon Standard](#), requires that methodologies be assessed by two different and independent qualified validation/verification bodies (VVBs) to determine conformance with VCS requirements and sector-specific best practices. The VCS also has a suite of [expert committees](#) and a global consultation and peer review process to “*prevent any one organization or scientific viewpoint from gaining undue influence.*” Global programs such as Certified Emission Reductions (CERs) under the Clean Development Mechanism also require emissions reduction project methodologies to be rigorously assessed and approved.

The Law Council recommends that the legislation affirm the desirability of ERAC engaging with global developments under 123A(5) of the Bill. Alternatively, the Minister may wish to direct the ERAC to take account of international methodologies under s 123B.

ERAC will not be undertaking the same assessment and endorsement functions as the current DOIC. ERAC’s role will involve providing advice to the Minister about methodologies proposed by the Minister. These measures may influence how quickly methodologies are developed, but they also decrease transparency and objective accountability. It could be argued that introducing some of these measures while retaining the existing methodology development and endorsement process could accelerate the methodology determination process without losing important checks and balances (such as the merits review rights proposed to be withdrawn).

Decisions of the DOIC in relation to endorsement are reviewable by the Administrative Appeals Tribunal (s [245A](#) of the current *Carbon Credits (Carbon Farming Initiative) Act 2011* and proposals for methodology determinations are published on the Department’s website. It is intended that ERAC publish advices to the Minister on methodologies. However the Law Council maintains its view that a more appropriate level of formal transparency and accountability are achieved under the current framework.

There is a real question about whether the amended scheme, which could preclude some important projects through changes to additionally requirements, is a better outcome than the current scheme.

Q – related to the above Q

Senator McEWEN: ... Perhaps, similarly, the legislation at the moment lacks anything around the safeguard mechanism, and a number of submitters have made comment about how important it is to get that right. The government intends to introduce that aspect of the legislation by the middle of next year. We would be interested to know whether the Law Council has any comments about the impact on carbon farming if that mechanism is inadequate, or, indeed, does not actually come into legislation because of the peculiarities of the Senate, perhaps.

The Law Council's views on this question mirror aspects its submission on the importance of a viable voluntary or 'secondary' market from which 'make good' requirements that can be met under the ERF amendments.

If implemented well, the safeguard mechanism could be an important driver of behavioural change and a tool to meet Australia's emissions reductions targets. The Law Council notes however that most of the emissions likely to be impacted by the safeguard have other drivers that provide incentives to reduce emissions, such as the cost of fossil fuel consumption in production. But if the mechanism is manifestly inadequate, businesses participation in the scheme could wane. Maintaining the appropriate balance of business and private sector contribution under the ERF is important to avoid a situation where the only demand for the purchase of credit units comes predominantly from public money (via the Government) with potentially some demand from a limited voluntary market.

As noted in submissions from the Carbon Market Institute, corporate participation in the ERF is likely to be influenced by whether and how the safeguard mechanism incentivises businesses to remain below baselines (e.g: requiring the purchase credit units if baselines are exceeded, or avoiding this requirement if improvements are implemented to remain below baselines). In this way, the mechanism has the potential to directly impact the viability of a secondary market (positively or negatively) and therefore, the extent to which the ERF will move away from reliance on Government funding.

The Law Council agrees with other submitters that the safeguard mechanism is an important opportunity to ensure there is viable secondary and complementary market. By incorporating baselines in the mechanism, it also presents an important opportunity for Government to adjust initial emissions levels for businesses over time to meet future national targets.

Additional comment on exchange with Senator Milne

Senator MILNE: *There is another matter I wanted to raise with you. Environmental Justice Australia has released its legal advice saying that the bill would remove the prohibition on clearing native forest and earning carbon credits for that activity. Have you looked at that issue at all?*

The Law Council notes that:

- these changes form part of the suite of amendments intended to ‘streamline project registration’;
- the EM confirms that the requirement to show that a proposed project is consistent with a natural resource management plan will be removed. Further, the restriction on registering projects that involve the harvesting or clearing of a native forest or the use of materials obtained as a result of clearing or harvesting a native forest has also been removed; and
- the EM notes that potential adverse impacts will be considered when methodologies are approved. Given the limited involvement of anyone other than the ERAC in the process of proposing, making and varying methodologies, this requirement is not reassuring for those concerned about impacts on native forests; and
- further, the ERF Bill proposes amendments to enable the Minister to make methodology determinations “that provide high-level guidance rather than rules for estimating emissions reductions.” The ‘requirements for methodologies are noted in Chapter 2 of the EM. As set out in the Law Council’s submission, changes to the methodology development process mean that a person’s ability to challenge the appropriateness of these decisions will be more limited.