AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT

SCHOOLS

Press Release 746

FREEDOM OF RELIGION IS PROTECTED BY SECTION 116

READ MURPHY'S DISSENTING JUDGEMENT DOGS CASE 1981

The Coalition government has given them a sop. Former attorney-general Philip Ruddock is heading a review of religious freedoms Thousands of submissions to the review panel, led by former Liberal attorney-general Philip Ruddock, were released on March 30, after its reporting deadline was deferred until May to accommodate more than 16,000 responses from churches, faith groups, lawyers, individuals and LGBTI bodies.

The Australian Federation of Islamic Councils, a new, minority religious group on the block, used its submission to argue the right to freedom of religion was not adequately protected under Australian law and was "at risk of further erosion in the current political climate". And, of course, religious freedom is something that exercises the mind of a minority group

The AFIC pushed for the introduction of a bill of rights, arguing that religious freedoms were created by a series of legal exemptions. It said this approach "promulgates the view that the right to freedom of religion is a 'secondary' right that is catered for by way of 'exception' in certain matters to the more important rights that it is distinguished from".

"This is fundamentally counter to the intent of the UN Universal Declaration and the International Covenant on Civil and Political Rights," it said.

Other submissions warned that religious institutions were at risk of being driven from public life.

University of NSW Law Dean George Williams warned freedom of religion received "inadequate protection under Australian law" and that, in contrast to other nations, "protection of these rights is weak or even non-existent".

Professor Williams noted Australia was the lone democracy without "some form of national human rights act or bill of rights incorporating protection of freedom of religion".

“The Australian Constitution offers no direct protection in respect of religion or belief at the state level,” he said. “This stands in contrast to the strong and clear protection provided for religious freedom under international law ... and in comparable nations.”

Well, DOGS have some good news for those demanding a Bill of Rights. Australia already has, in Section 116, a Bill of Rights, religious liberty, provision. Here it is :

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth. (Section116)

The problem is not the Australian Constitution, but the interpretation of the Constitution by the Barwick High Court of 1981. You can have freedoms enshrined in a Constitution or a Bill of Rights – we had them – but they can be read down and out.

But there is further good news:

We have a dissenting judgement in the DOGS case. Religious groups should be giving up their lust for power privilege and property and they andRuddock should be looking at what Justice Murphy had to say about religious liberty in the DOGS case:

Murphy was the solitary dissenter in the *State Aid Case.* He was also the only judge, with the partial exception of Mason, to identify the reasons – the difficulties which the Founding Fathers sought to prevent the future Commonwealth running into – which led to the original insertion of Section 116.

Only Murphy closely studied the context; only he identified the purpose and point of its inclusion – the social and religious mischief which it had been intended to prevent.

In the *State Aid Case* Murphy wrote:

The plaintiffs’ principal contention is that the challenged legislation is invalid in so far as it provides for financial aid to non-government schools.

Almost all the non-government schools are what are known as "church" or "denominational" or in the United States, "sectarian" or "parochial" schools. All these have a religious element. The general picture is that as well as secular instruction each of the church schools engages in instruction in its particular religion and engages in religious observances and worship. Most of the buildings are adorned with religious symbols. The churches to which the schools are related exercise varying degrees of supervision over the conduct of the schools. The recipients of the moneys channelled through the challenged Acts are churches associated with the different religions. There was strong contention between the plaintiffs and the defendants over the extent and degree of the religious element, although in the end, much was agreed. My legal conclusions do not depend on any difference between the opposing factual claims.

The plaintiffs rely upon s.116 of the Constitution which states:

> "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office of public trust under the Commonwealth".

The marginal note is "Commonwealth not to legislate in respect of religion".

Chief Justice Latham said in *Adelaide Company of Jehovah's Witnesses Inc. v. the Commonwealth* (1943) 67 C.L.R. 116, 123:

> "Section 116 is a general prohibition applying to all laws, under whatever power those laws may be made. It is an overriding provision. It does not compete with other provisions of the Constitution so that the Court should seek to reconcile it with other provisions. It prevails over and limits all provisions which give power to make laws.
>
> Accordingly no law can escape the application of s. 116 simply because it is a law which can be justified under ss. 51 or 52, or under some other legislative power. All the legislative powers of the Commonwealth are subject to the condition which s. 116 imposes".

Mr Justice McTiernan said (at p.156): "Section 116 imposes a restriction on all the legislative powers of the Parliament".

The United States' establishment clause is also overriding. As Justice Douglas said delivering the opinion of the Court in *Zorach v. Clauson* 343 U.S.306, 312 (1933): "The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute".

Section 116 applies to any law, whether made under s. 51, s.52, s.96, s.122 or any other legislative power.

'for"

In the Australian Constitution, the phrase "for establishing" is used instead of the phrase "respecting an establishment of" used in the United States Constitution. The word "for" in this context embraces the meaning "with respect to". In *The Oxford Dictionary* 1901 one of the definitions of "for" was "As regards, with regard or respect to, concerning". As Chief Justice Dixon said in *Lamshed v. Lake,(1958)* 99 C.L.R. 132, 141 (dealing with s.122): "To my mind s.122 is a power given to the national Parliament of Australia as such to make law"for" that is to say "with respect to", the government of the Territory". He went on to state that the test of whether a law was "for" the government of the Territory is whether it was relevant to that subject matter. The same applies to s.116. If a law is relevant to establishing any religion, it is "for" establishing any religion.

The marginal note to s. 116 confirms this correspondence of "for" and "with respect to". Generally little attention is paid in the interpretation of ordinary Acts to marginal notes,

although in *R. v. Schildkamp* (1971) A.C.I. Lords Reid and Upjohn considered that marginal notes should not be rejected completely as aids. But here we are dealing with a constitution. The marginal notes are part of the Constitution and if they throw only a little light, that light is in favour of a broad construction which would embrace "with respect to". However, whether "for" is read narrowly, meaning "with the purpose *of*" or "with the object *of*" as the defendants contend, or as meaning or including "with respect to" as the plaintiffs contend, is not decisive. Even if the plaintiffs' view of "for" is accepted, the challenge will fail if the defendants' view of "establishing any religion" is accepted. On the other hand, even if the defendants' view of "for" is accepted the plaintiffs will succeed if their view of "establishing any religion" is accepted.

"Establishing any Religion"

Three meanings of "establishing" ins. 116 have been advanced. The first and narrowest means establishing one national church or religion. The second ("preferential") means preferring, by sponsorship or support, any religion over others (and therefore includes the first). The third ("separation") means any sponsorship of support of religion (and therefore embraces the first two). These meanings are therefore not mutually exclusive. The separation interpretation of the clause means that it forbids not only a national church, and any preference to one religion over others, but also sponsorship or support (including financial support) of any religion. The ordinary principle that constitutional provisions should be read not narrowly, but "with all the generality which the words admit", strongly supports the adoption of the more general reading, that is. the separation interpretation. There are other considerations which support the adoption of this interpretation. The guarantees of personal freedom against the imposition of any religious

observance and the prohibition of free exercise of any religion and the requirement of any religious test should be read widely consistently with their brevity and with constitutional usage. As I said in *Attorney-General (Ct/i) Ex rel. McKinlay v. The Commonwealth* (1975) 135 C.L.R. 1, 65 "Great rights are often expressed in simple phrases". It would detract greatly from the freedom of and from religion guaranteed by those clauses if they were to be read narrowly. In the same way the establishment clause should be read widely. To refuse to read the establishment clause with generality because so read it covers some of the ground covered by the other guarantees in s. 116 is to interprets. 116 as if it were a clause in a tenancy agreement rather than a great constitutional guarantee of freedom of and from religion. It would be just as incorrect to narrow the broad meaning of free exercise of any religion because otherwise it would overlap with the clauses prohibiting imposition of religious observances and religious tests. Some laws would breach more than one, even all the clauses – for example a requirement that every candidate for office under the Commonwealth make a particular religious observance. The idea that the establishment clause should be read down so as not to overlap with the free exercise clause has been rejected in the United States (See *En gel v. Vitale* 370 U.S. 421 (1962)).

To read s. 116 as prohibiting only laws for establishing one religion or church, but permitting laws for establishing a number of religions or churches is inconsistent with the comprehensive terms of the prohibition. There is no warrant for reading "any religion" as "anyone religion"; yet this is necessary if "establishing" refers only to the recognition or setting up of one national church of religion. Such a reading trivialises the section. It would allow laws for sponsoring and supporting (financially and otherwise) a number of religions (even in the most discriminatory and preferential way) as long as the laws stopped short of

setting up one national church or religion. The same objection applies to the adoption of the "preferential" interpretation. It requires that the prohibition against laws for the establishing "any" religion be read down so that "any" means "only one or some", instead of "every", or "all". This distorts the meaning of the section. It would forbid preference such as financial assistance to any one religion over others (and presumably to some but not all) but would permit such preference or assistance to all religions over no religion. If a law for financial support for one or more religions but not all (that is, a preferential or discriminatory law) violates the prohibition against "any law for establishing any religion", it follows irresistibly that a law for financial support for all religions also violates the prohibition. There is not the slightest hint in the words used in the establishment clause that it forbids only discriminatory or preferential laws. The preferential interpretation would convert the clause into one permitting laws for establishing all religions. This would make a farce of the section and would deny that s.116 is a guarantee of freedom from religion as well as of religion. This reading is repelled by the emphatic use of "any".

As Chief Judge Latham said in the *Jehovah's Witness* case: "Section 116 applies in express terms to 'any religion', 'any religious observance', the free exercise of 'any religion' and any 'religious test'. Thus the section applied to all religions and not merely in relation to one particular religion". (p.l[23])

"Non-preferential" sponsoring of or aiding religion is still "establishing" religion. In the 19th Century "establishment" was not restricted to sponsorship of or aid to one church or religion, although such sponsorship of or support was of course referred to as establishment. It was also understood to include sponsorship or support of all churches, and was referred to as indiscriminate establishment. In "The State and its Relations with the Church" Gladstone stated that "The Australian colonies have most broadly avowed the principle of indiscriminate establishment". He described endowment of Roman Catholic chaplains and ministers as "state establishment of the Roman Catholic Church" and as part of this indiscriminate establishment (pp.269-273).

The meaning of establishment in the sense of one established church (as referred to in the United Kingdom case of *General Assembly of Free Church of Scotland v Lord Overtoun* (1904) A.C. 515) is not the meaning of "establishing any religion" in s. 116 of our Constitution. In this part of the Constitution, the framers obviously looked for guidance to the United States, not to the United Kingdom.

The purpose of the United States establishment clause was clearly to prevent the recognition of and assistance to religion which plagued European countries over many centuries. The religious wars of ancient times were repeated after the Middle Ages and into modern times. In the United Kingdom the struggle between the contending Catholic and Protestant factions, with the emergence of Presbyterians, Methodists, Quakers, Lollards and many other religious groups, was a bitter illustration of the attempts of religious factions to get the assistance of the state in propagating their views and if possible, suppressing their rivals. The history has a very important economic aspect. One of the dangers of subsidising religious institutions and granting them financial privileges (such as exemption from income tax, land and municipal rates, sales and other taxes) is that such institutions tend to become extremely wealthy, to aggrandize and to become states within a state. The corrective has often been a more or less violent seizure of the assets of the religious institutions, sometimes by the existing sovereign (as did Henry VIII), sometimes by revolutionary movements, which in

many countries have had as one of their main objects the suppression of religious institutions and the seizure of their wealth.

Mr Justice Douglas refers to this in his partial dissent in *Tilton v. Richardson* 403 U.S. 672, 695-696 (1971):

> "Much is made of the need for public aid to church schools in light of their pressing fiscal problems. Dr Eugene C. Blake of the Presbyterian Church, however, wrote in 1959:
>
> > 'When one remembers that churches pay no inheritance tax (churches do not die), that churches may own and operate business and be exempt from the 52 percent corporate income tax, and that real property used for church purposes (which in some states are most generously construed) is tax exempt, it is not unreasonable to prophesy that with reasonably prudent management, the churches ought to be able to control the whole economy of the nation within the predictable future. That the growing wealth and property of the churches was partially responsible for revolutionary expropriations of church property in England in the sixteenth century, in France in the eighteenth century, in Italy in the nineteenth century, and in Mexico, Russia, Czechoslavakia and Hungary (to name a few examples) in the twentieth century, seems self-evident. A government with mounting tax problems cannot be expected to keep its hands off the wealth of a rich church forever. That such a revolution is always accompanied by anticlericalism and atheism should not be surprising'.
>
> The mounting wealth of the churches makes ironic their incessant demands of the public treasury. I said in my dissent in *Walz v. Tax Comm'n,* 397 U.S. 664, 714:
>
> > "The religiously used real estate of the churches today constitutes a vast domain. See M. Larson & C. Lowell, *The Churches: Their Riches, Revenues, and Immunities* (1969). Their assets total over $141 billion and their annual income at least $22 billion. And the extent to which they are feeding from the public trough in a variety of forms is alarming".

In the United States, after deleterious consequences of aid to religion were observed in some of the states, the architects of its Constitution determined to prevent repetition there of the unfortunate experience of other countries by creating a 'wall of separation' between religion and State. (See J. Bryce, *The American Constitution* (1888) Vol. 3 pp.465-6).

The establishment clause was explained by Jefferson in the famous Danbury letter (to a group of Danbury Baptists):

> "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of government reach actions only, and not opinions, – I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof, thus building a wall of separation

> between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties".

The co-author of the establishment clause, James Madison, in explaining his veto to a bill of Congress, stated it was:

> "Because the bill in reserving a certain parcel of land of the United States for the use of the said Baptist Church comprises a principle and a precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment' ".

(J.D.Richardson, *Messages and Papers of the Presidents* (1900). The Annotated U.S. Constitution states "...the theme of the writings of both [Madison and Jefferson] was that it was wrong to offer public support of any religion in particular or of religion in general" (1971) 3rd Edition, p. 912.

This interpretation of the establishment clause was well settled and accepted judicially in the United States prior to the framing of the Australian Constitution.

In 1879, the Supreme Court of the United States in *Reynolds v. United States* 98 U.S. 145 (1879) in a unanimous judgment delivered by Chief Justice Waite, referred to the history of the establishment clause:

> "Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrine and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support ofparticular sects to whose tenets they could not and did not subscribe". (p.162)

The judgment later quoted the above passage from the Danbury letter, and then continued:

> "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured". (p.164)

Thus, an authoritative interpretation of the establishment clause had been given by the supreme tribunal in the United States shortly before the people of Australia were engaged in fashioning their own Constitution. Again in *Davis v. Beason* 133 U.S. 333, 342 (1890) the Court said:

> "The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof,

> was intended...to prohibit legislation for the *support of any religious tenets* or the modes of worship of any sect". (my emphasis)

Another case prior to 1900 to which we were referred was *Bradfield v. Roberts* decided in 1898 by the Court of Appeals (12 App. D. C. 453) and in 1899 by the United States Supreme Court (175 U.S. 291). The Court of Appeals decision was not delivered until after the Constitutional Conventions had ended, so that despite it's being before 1900 it had no influence on the framing of the Australian Constitution. The Court of Appeals held that the Providence Hospital, to which moneys were paid by the United States Government under contract, was a secular corporation (even though operated by Roman Catholics) and that the moneys were "not a subsidy or a gift of money, but compensation for actual services to be rendered" (p.47 1). They stressed that "the sole question for our determination is the power of Congress and the District Commissioners in the matter of the appropriation and contract involved in the case" (p. 477). The Supreme Court also did not decide the scope of the establishment clause. As the Annotated Constitution of the United States (1972 edition) puts it:

> "The Court viewed the hospital as a secular institution so chartered by Congress and not as a religious or sectarian body, thus avoiding the constitutional issue" (p.91'7).

Although some United States' commentators such as Cooley favoured the "preferential" interpretation there is no doubt that the "separation" meaning of the clause as authoritatively declared in *Reynolds v. United States* was well-known to the framers of our Constitution. (See *Unto God and Caesar,* Richard Ely, p. 93, 95-6, 99-100). This separation interpretation has been consistently followed by the United States Supreme Court from *Reynolds'* case until now.

The effect of the United States decisions was properly stated by President Kennedy in 1961:

> "The Constitution clearly prohibits aid to the school, to parochial schools. I don't think there is any doubt of that.
>
> The Everson case, which is probably the most celebrated case, provided only by a 5 to 4 decision was it possible for a local community to provide bus rides to nonpublic school children. But all through the majority and minority statements on that particular question there was a very clear prohibition against aid to the school direct. The Supreme Court made its decision in the Everson case by detet-mining that the aid was to the child,not to the school. Aid to the school is – there isn't any room for debate on that subject. It is prohibited by the Constitution, and the Supreme Court has made that very clear. And therefore there would be no possibility of our recommending it". (See *Tilton v, Richardson)* 403 U.S. 672, 690 (1971))

In *Everson v. Board of Education,* 330 U.S. 1 (1947) the case to which President Kennedy referred, the Supreme Court held that neither the United States nor (because of Amendment 14) any constituent State could provide financial aid to a religion or to all religions. The Court said:

> "The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs of disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the wotds of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State’. *Reynolds v.United States".* (pp.15, 16 my emphasis)

The minority opinions to which President Kennedy referred were even more emphatic. Mr Justice Jackson said~

> "There is no answer to the proposition, more fully expounded by Mr Justice Rutledge, that the effect of the religious freedom
>
> Amendment to our Constitution was to take every form of propagation of religion out of the realms of things which could directly or indirectly be made public business and thereby be supported in whole of in part at taxpayers’ expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers’ minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states’ hands out of religion, but to keep religion’s hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting contol of public policy or the public purse". (pp.26, 27)

Mr Justice Rutledge (with whom Justices Frankfurter, Jackson, and Burton agreed) said:

> "The Amendment’s purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader then separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment’s wording and history unite with this Court’s consistent utterances whenever attention has been fixed directly upon the question.
>
> ‘Religion’ appears only once in the Amendment. But the word governs two prohibitions and govems them alike. It does not have two meanings, one narrow to

forbid ‘an establishment’ and another, much broader, for securing ‘the free exercise thereof. Thereof brings down ‘religion’ with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the States are as broadly restricted concerning the one as they are regarding the other". (pp.31, 32)

" ‘Religion’ has the same broad significance in the twin prohibition concerning ‘an establishment’. The Amendment was

not duplicitous. ‘Religion’ and ‘establishment’ were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes". (p.33)

Chief Justice Warren in delivering the opinion of the Court in *McGowan v. Maryland* 366 U.S. 420, 442 (1961) stated that the Supreme Court:

"has found that the First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church".

In *Walz v. Tax Commission of the City of New York* 397 U.S. 664, 669 (1970) Chief Justice Burger delivering the opinion of the Court wrote:

"The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure no religion be sponsored or favoured, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference".

The Supreme Court has expressly rejected the proposition advanced this case that "historically the First Amendment was intended to bid only government preference of one religion over another, not an)artial governmental assistance of all religions". *(Illinois ex rel. Collum v. Board of Education* 333 U.S. 203, 211 (1948)).

licability of United States Authorities

D'Emden v. Pedder (1904) 1 C.L.R. 91, 112 Chief Justice ~ith, one of the framers of our Constitution said:

> "So far, therefore, as the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.
>
> There is, indeed, another consideration which gives additional weight to the authority of the United States decisions with regard to matters in which the two Constitutions are similar. We have already, in discussing the language of sec. 51 of the Constitution, referred to the inference to be drawn from the fact that a legislature has deliberately adopted in its legislation a form of words which has already received authoritative interpretation. We cannot disregard the fact that the Constitution of the Commonwealth was framed by a Convention of Representatives from the several colonies. We think that sitting here, we are entitled to assume —what, after all, is a fact of public notoriety— that some, if not all, of the framers of that Constitution were familiar, not only with the Constitution of the United States, but with that of the Canadian Dominion and those of the British colonies. When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation".

In *The Amalgamated Society of Engineers v. the Adelaide Steamship Company Ltd.* (1920) 28 C.L.R. 129, 146 the court held that the U.S. decisions were not standards to measure the respective rights of the Commonwealth and the States, because of "the common sovereignty of all parts of the British Empire" and "the principle of responsible government". Those considerations are not present here, and we are not concerned with the respective rights of the Commonwealth and the States.

Chief Justice Latham in *Adelaide Compani' of Jehovah s Witnesses Inc. v. The Commonwealth* (1943) 67 C.L.R. 116, 131 stated:

> "There is' therefore, full legal justification for adopting in Australia an interpretation of s. 116 which had, before the enactment of the Commonwealth Constitution, already been given to similar words in the United States".

The United States' decisions on the establishment clause should be followed. The arguments for departing from them (based on the trifles of differences in wording between the United States and the Australian establishment clauses) are hair-splitting, and not consistent with the broad approach which should be taken to constitutional guarantees of freedom. Even if the United States' decisions were set aside, the considerations to which I have refereed show

that the same interpretation is reached by applying ordinary constitutional principles of interpretation.

The purpose of our establishment clause is the same as that in the United States' Constitution. There does not seem to be any real doubt that if the establishment clause is construed in Australia as it is in the United States, (and if the Commonwealth's argument about the non-applicability of s. 116 to financial appropriations and s. 96 grants is rejected) then the challenged laws are unconstitutional. Section 116 of the Constitution does not assert or deny the value of religion (including religious teaching). It secures its free exercise, but denies that the Commonwealth can support religion in any way whatsoever. The Commonwealth cannot be concerned with religious teaching – that is entirely private. Section 116 recognises that an essential condition of religious liberty is that religion be unaided by the Commonwealth.

The argument that the aid to church schools is only of minor assistance to the religious aspect of the schools and its major impact is to aid the secular aspects is no answer to the plaintiffs' challenge. In his famous *Virginia Memorial and Remonstrance against Religious Assessment,* Madison tellingly explained "That the same authority which can force a citizen to contribute threepence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever". (in *The Mind of the Founders,* edited by Marvin Meyers, 1973, P.10)

The fact is that under the Commonwealth laws vast sums of money are being expended for the support of church schools. The result of the

capital grants Acts is that great and increasing sums are being given to churches to acquire property, which then can lawfully be used for religious purposes apart altogether from schooling. Although the *States Grants (Schools Assistance) Act* 1978 forbids approval of projects (for grants) "if the sole or one of the principal objects" is "to provide facilities for use, wholly or principally, for or in relation to religious worship" (s. 15), this does not prevent a grant for a project as long as religious worship is not the sole or principal object, or one of the principal objects and the Act does not prevent subsequent use of the property for any purpose, even exclusive use for religious worship. The evidence showed that two Catholic parish school buildings, at Churchill and Corio in Victoria although not used wholly or principally for or in relation to religious worship, have been used for religious purposes (apart from schooling). Eighty percent of the cost of the Catholic primary school building at Churchill in the Latrobe Valley, in Victoria was contributed by the payment of Commonwealth grants. The building is also used as the local parish church. A nearby street sign indicates that the building is a Catholic church. $127,000 of the $180,000 cost of construction of the parish primary school in Corio outside Geelong, was provided out of Commonwealth grants. Both these buildings have been used for celebration of Mass for the local parish each Sunday, and for Confessions each

Saturday, and occasionally for other religious services. There is nothing in the challenged Acts to restrict similar use of other property obtained with moneys given to the churches pursuant to these Acts. The effect of the Grants Acts is that the wealth of the churches is increased annually by many millions of dollars oftaxpayers' moneys. They have the effect of extablishing religion. As Justice Douglas observed "In common understanding there is no surer way of 'establishing' an institution than by financing it" *(Wheeler v. Barrera*

417 U.S. 402, 430 (1974)).

Section 80 (trial by jury) and s.l 16 are among the very few guarantees of freedom in the Constitution. In *R. v. Federal Court of Bankruptcy; exparte Lowenstein* (1938) 59 C.L.R. 556, Justices Dixon and Evatt asserted that this Court's reading of s. 80 made a mockery of the Constitution (p.58 1-2). A reading of s.116 that the prohibition against "any law for establishing any religion" does not prohibit a law which sponsors or supports religions, but prohibits only laws for the setting up of a national church or religion or alternatively prohibits only preferential sponsorship or support of one or more religions, makes a

mockery of s.116. Jefferson warned against this tendency. "Our peculiar security is the possession of a written Constitution. Let us not make it a blank paper by construction" (Jefferson writings 506 (Washington ed. 1859)). We should heed his warning. …

The Challenged Acts contravene s.116 of the Constitution. As the majority holds otherwise, there is no point in my deciding whether some provisions are severable and valid, or whether some provisions can be read down so that they do not contravene s. 116. Judgment should be for the plaintiffs.

Attorney-General for Victoria (at the Relation of Black and Others) and Black and Others v. The Commonwealth, and the National Council

Of Independent Schools and Father F. Martin (Sued

as Representing Non-Government Schools) (1981)

is also reproduced in

33 A.L.R. 321 at 358, and

146 C.L.R. 559 at 619

LISTEN TO THE DOGS PROGRAM

855 ON THE AM DIAL: 12.00 NOON SATURDAYS

http://www.3cr.org.au/dogs