# D.O.G.S. AND THE HIGH COURT CASE

## ...Contents:



...

**"ITS (ESTABLISHMENT CLAUSE) FIRST AND MOST**

**IMMEDIATE PURPOSE RESTED ON THE BELIEF THAT A**

**UNION OF GOVERNMENT AND RELIGION TENDS TO**

**DESTROY GOVERNMENT AND TO DEGRADE RELIGION."**

***(From the opinion of the United States Supreme Court in Engel v Vital and Abington v Schempp)***

## ... A Brief History:

**The following brief history tells the story of one of the epics of English speaking Legal History, the struggle (1956 - 1980) to have the question of the constitutional validity of the Commonwealth of Australia's aid to church schools heard before the Australian Full High Court.**

**The story it tells vividly illustrates the foresight of the American Founding Fathers. It underlines the wisdom of the policy of separating Church and State, a policy given constitutional recognition by the American founding fathers in the First Amendment, and by their Australian counterparts in Section H6 of the Australian Constitution. Australia's State Aid to Church school experience offers a lesson - a cautionary tale for the world, both present and future, that church-state entanglement tends to undermine the integrity of the three arms of government: judicial, executive, and legislative; and tends to degrade religion.**

**This booklet tells of the serious corrosion of the judicial process. Two other booklets can and must be written:**

- **one, to tell of the blatant erosion of the legislative and executive process, an erosion which (ends to be both cause and effect of granting aid to church schools.**
- **the other, to tell of the way in which church-state entanglement has degraded religion. This is painfully illustrated by the behaviour of the church school faction in the 1979 Trial of Facts, in their attempt to retain hundreds of millions of dollars of public subsidy.**

**The fight for the retention of the principle of church-state separation, as a living and active principle, is part of a wider battle for human freedom. This has never been just an Australian battle. Nor, in this country, has it been just a battle of the fifties, sixties, seventies and eighties. This is a battle, which spans both distance and time. Freedom is indivisible: If Australians lose. Americans lose; if Americans lose, Australians lose. If we lose now, that loss will be felt by succeeding generations.**

**We have only been able to fight for freedom in this generation as well as we have because others have, with fair success, fought similar battles before us. Jefferson and Madison and their fellows fought and largely won this battle in the United States of America two centuries ago. Because they left an enduring record of their victory in the First Amendment, Henry Bournes Higgins, Andrew Inglis Clark, and other Australian church-state separationists were assisted in their fight in Australia in the 1890s. In the struggle for freedom we build on liberties deposited by those who have gone before us; in bad times to preserve them; in good times to embrace and extend them.**

**The fight for freedom has always been a precarious one. In Australia it is more so. The problems we have faced in this fight for civic and religious liberty have been multiplied by the poor quality of the pastors, journalists, legislators, academics and lawyers. These could have provided an effective check to the kind of scandalous behaviour described in this brief history. That, often, they chose not to, is a national tragedy.**

**Fortunately, freedom does not always depend upon such people as these. Many remain who, collectively when possible, and individually when necessary, hold to fundamentals. They have kept a clear view of the principles of civic polity which Jefferson and Madison, in America, and Inglis Clark and Henry Bournes Higgins in Australia, would have fought for, were they alive in Australia today.**

**My congratulations go to the many citizens, past and present, who did not and would not sell out. They have held the freedom-line and not surrendered. Each in his or her own way has contributed: spiritually, physically and financially. Some have passed on; some have grown tired; some newly enter the ranks. The cost of this booklet is in part underwritten by a gift from one of these battlers Rev. W. J. Salter.**

**It has been my privilege to help hold together and lead the fight against one of the most powerful collection of forces that will ever be arrayed against the citizens in a legal battle in Australia. Our opponents have included the Commonwealth, the six state governments and the government of the Northern Territory, the Roman Catholic Church, and the supporters of rich non-Catholic schools. When, finally, the case got to court, there they stood, a clutch of functionaries of the most powerful institutional dinosaurs in Australia, arrayed against citizens with nothing but a powerful case, courage and a firm commitment to an ideal.**

**In spite of high costs (so far about 350,000 dollars), in spite of physiological and psychological pressures, in spite of a "rule of law" which decidedly favours the bully and the intimidator, we have not, in this tenth year of the present part of the struggle, bent the knee.**

**We have fought in our day and relearnt some time honoured lessons. One of these lessons was stated by Tom Paine, "those who expect to reap the blessings of freedom must, like men, undergo the fatigue of supporting it." Let us trust the succeeding generations will do likewise. Another lesson learnt was that church-state entanglement is neither good for government, religion, citizens, nor the public (government) school system. A third lesson was that all should heed Madison's warning when he stated:**

**"It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealously to be the first duty of citizens, and one of (the) noblest characteristics of the late revolution. The freemen of America did not wait till usurped power had strengthened itself by its exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle."**

**Raymond Norman Nilsen**

**Spokesman and Co-Ordinator,No State Aid High Court Challenge, President,Council for Defence of Government Schools (Victoria)**

## ...THE STRUGGLE THE STORY

**AUSTRALIA DAY, 1981**

**National Library of Australia card number and ISBN**

**ISBN 0959411003**

### Introduction

**"A ... telling consideration for me, . . . is whether a question of constitutionality should be immunised from judicial review by denying standing to anyone to challenge the impugned statute . . . The substantive issue raised by the plaintiff's action is a justifiable one; and prime facie it would be strange and indeed alarming if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."**

***Justice Laskin, Canadian Supreme Court (1974)1***

**There has been no decision to date by the High Court on whether there exist any circumstances in which a taxpayer of the Commonwealth, as such, has the right to challenge the constitutional validity of an appropriation law. Citizens must submit to the screening process of a State or Federal attorney general and obtain his fiat before they will be heard in court. According to Mr. Justice Murphy in 1975 however, it is becoming patently**

obvious that "in many cases ... a proceeding by the attorney general at the relation of others is not appropriate to the operation of our juridical system especially as the attorneys general of Australia and of the States are ministers of State."[2]

Certain problems of standing (of the right to act as plaintiff) have been laid bare by the experiences of the plaintiffs (relators and taxpayers seeking to question the constitutionality of Commonwealth financial grants to church schools. This case has been brought to court in two different but concurrent actions; by a relator action by permission of the attorney general of Victoria; and by a group of taxpayers from three States and the Australian Capital Territory. The second mode of legal action represents a possible threshold in Australian legal history. If access to the court is not made available to the second group of plaintiffs, the taxpayers, then, given the aptitude of the High Court to conform to its own precedents, it is unlikely that its "standing" rules ever will be liberalised in that way. For the sake of simplicity both the relators and taxpayers will be described as plaintiffs. The plaintiffs' case revolves around the establishment clause, the first clause of Section 116 of the Federal Constitution. Section 116 as a whole 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 tests shall be required as a qualification for any office or public trust under the Commonwealth. In many respects this is a peculiar section. It is one of the small number

of sections in the Constitution which embody lack of faith in the routine political process. It expressly withholds power from the Commonwealth in matters dealing with religion. Whereas many other sections in the Constitution indicate confidence in the Parliament's ability to protect the "public" interest, carrying riders such as

"as the Parliament thinks fit," or "until the Parliament otherwise provides." Section 116, like the First Amendment of the United States Constitution embodies a vote of no confidence in the capacity of the political process to protect religious liberties.

The establishment clause of Section 1 16 has lain unlitigated for eighty years. When a trickle of "State Aid" was first given to church schools by the Commonwealth in the 1950's; and again, when the trickle became increasingly flood like in the 1960's and 1970's, some citizens, unwilling to concede the social desirability and legal propriety of this aid, sought to challenge its constitutionality. They maintained that Commonwealth laws which empowered the government to provide such aid constituted the establishing of religion, and hence were prohibited by Section 116.

Some of these complainants considered that, as individual citizens who believed in the desirability of strict Church-State separation, and who therefore conscientiously objected to being taxed for the propagation of any religious beliefs, (even those beliefs they may personally have accepted) they possessed inherent interest and right of access to the High Court. Some complainants considered that each citizen, as a matter of simple citizenly right, possessed a public right to protect all other citizens from any Commonwealth violation of its own Constitution. More generally, the complainants simply assumed that since the constitutionally prohibited action (establishing any religion) necessarily was an action which, in certain fundamental ways, affected each citizen, then, as a natural procedural corollary, each citizen has an inherent right of access for redress to the High Court. They found it hard to believe that the original creators of the Constitution did not, as a matter of course, see the constitutional guarantees of Section 116 as litigable by citizens as such.

In the event, the complainants soon discovered that access to the High Court was astonishingly difficult. Those who, in the end, gained entry to the court, were forced to traverse treacherous quicksands of the political process in both the States and the Commonwealth, to suffer long years of procrastinations and tactical stand-offs, and have to incur ever increasing legal costs.

Before the case could be heard, the would-be litigants were told, a state attorney general needed to give them fiat (permission) in a relator action. According to the rule of law developed in Great Britain and Australia, when the question at issue deals solely with a public right actions for an injunction, as well as for a declaration of invalidity, can only be brought by an attorney general. A complainant's right to be in court is derived from an attorney general's right to be there. In practice, once the attorney general's consent is obtained, the relator instructs counsel and subject to certain reservations, conducts and the proceedings as a private action. Unlike a private action, the relator is generally held to be subject to certain restrictions in the conduct of the case: The attorney general may apply for a discontinuance of proceedings, notwithstanding the opposition of the relator, and may stipulate conditions on the selection of counsel. The giving of fiat is within the absolute discretion of the attorney general and is unimpeachable.[4]

It was not long before the plaintiffs discovered that on politically sensitive issues the attorneys general are often indeed some say typically, Janus faced. The office is political as well as legal in character. In this particular case it was found that in nine approaches out of ten the ministerial, political face won out.

The opponents of state aid to church schools were victims of a not altogether logical arrangement. Their locus standi, which is or ought to be a question of law, was being decided by ministers of the Crown rather than by the court.[5]

This unsatisfactory situation has been questioned in England, Canada, and the United States of America. In the United States of America taxpayers acting as such have been accorded standing in similar cases involving the First Amendment. Accordingly, the Australian plaintiffs decided that, from considerations of general public interest, the state aid case should also become a test case on standing. Even it an attorney general did give fiat - and when one finally did it proved a by no means unmixed blessing - a parallel taxpayers' suit would be initiated if and when the opportunity arose. Late in 1978 the opportunity did arise; and now the taxpayers' action stands, together with the relator action, awaiting judgement.

The case is not completely isolated. The plaintiffs are not the only would-be litigant group in Australia who have found reason to be discontented with the legal process. Sir Keith Hancock has written an analysis of the "Black Mountain Case"[6] in which a group of Canberra citizens sought fiat from the Federal attorney general, Senator Murphy. Hancock remarked on the tension within the attorney general's Department.

On the one hand it is the attorney general's duty to represent the public interest with complete objectivity and detachment . On the other hand it is normally his duty to prepare the case for Ministers of the Crown who are defendants in a legal action.

Senator Murphy's legal advisers reminded him of John Bunyan's Mr. Facing-both-ways

Although Hancock has saluted the state aid plaintiffs as "comrades in arms", he has also wryly noted that the struggle of the Canberra citizens who took the Black Mountain case to court compared to that of the state aid litigants, was a short one.[7]

The following pages offer a documented, itemised account of the problems faced by the plaintiffs in their long, hard pilgrimage to court. Many of the difficulties confronting the plaintiffs stemmed directly from the fact that they were forced into the quicksands of religious influence upon the political and legal process - of de facto church-state entanglement - even before they could enter the court room.

## ...AN OBSTACLE RACE

### 1956 - 1963 In the Beginning

From the very beginning the citizens who wished to test the constitutionality of state aid seemed to be engaged in an obstacle race in which the ambiguous role played by the State and Federal attorneys general appeared an insuperable barrier. From 1956 until 1980 the political and religious affiliations of the attorneys-general have made nonsense of the British view that the attorney general is better fitted to consider "public interest" than the courts.[8] Another major barrier facing the litigants was the extremely high costs of litigation in what appeared to be a never ending case. These two

obstacles were not unrelated.

In July 1956 the Menzies-Fadden federal government introduced a federal programme of state aid to Australian Capital Territory church schools. This took place after a meeting between the acting prime minister, Sir Arthur Fadden and certain church leaders. It sparked off the first attempt to challenge the constitutionality of federal aid to church schools in the High Court. A group of Protestants, some connected with the Congregational Union, secured a legal opinion in the last quarter of the year. They were advised that action could only be taken through the attorney general in any state, or through the attorney general in Canberra.

The attorney general in Canberra is Senator O'Sullivan, who, by the way, had a lot to do with the Federal Cabinet's decision. Obviously this will prove to be costly and we seek the financial help of our friends to enable us to go on with this legal challenge. Our case is now being prepared for submission to the appropriate authorities with a view to immediate action.[9]

At the outset, three major problems became obvious; firstly, the federal attorney general was a member of a government which had sponsored and provided the aid in question; secondly, Senator O'Sullivan was a prominent and dedicated Roman Catholic[10] active in the campaign of that church for state aid;[11] and thirdly (and very much in consequence of these two factors), the cost were likely to be prohibitive.

Thus, the right of Australian citizens to obtain a declaration from the High Court on what was and was not constitutional behaviour on the part of the legislature, a right which many citizens would consider a basic public or even constitutional "right", depended, not upon a legal officer per Se but upon a legal officer whose political, religious and even personal commitments might possibly take priority over purely legal considerations.

Early in 1957 the Victorian Protestant Federation engaged solicitors and briefed counsel. Application for fiat was made to the Federal attorney general, but, not surprisingly, the Victorian Protestant Federation was rebuffed. Litigation was effectively stopped before it could start.[12]

...

### 1963 - 4 The Liberal Party: To Auction?

During the election campaign of November 1963 Sir Robert Menzies promised science grants to church schools. In May 1964, after his government's return to power, legislation empowering these grants was passed. This time a number of groups reacted. Individually, and in combination, they considered the possibility of a legal challenge. On a state level, these groups included the (N.S.W.) Association for the Preservation of Public School Education, the New South Wales Council of Churches, the Loyal Orange Institution of New South Wales, the Secular Education Committee of N.S.W. and the Victorian Protestant Federation. On the federal level the Australian Council of State School Organisations, the Australian Protestant Council, (representing twelve Protestant bodies throughout Australia), and the Loyal Orange Institutions throughout Australia, wanted to take legal action.

In August 1964 a body called the Council for the Defence of Government Schools was initiated chiefly with this legal challenge in mind.

The annual Conference of the Australian Council of State Schools Organisations resolved:Council fully supports the action of the Council for the Defence of Government School system in challenging the Constitutional validity of the States Grants (Science Laboratories and Technical Training Act) 1964 and urges affiliated organisations to seek public, financial and moral support for this cause in their respective States.[13]

In some ways the circumstances seemed auspicious. Not even the Prime Minister in 1960 had been prepared to defend state aid as constitutional. Questioned on the matter in Parliament, in that year, Menzies indicated that he believed federal aid to church schools to be unconstitutional. Menzies 1960 statement was taken up by the Leader of the Opposition, Arthur Calwell, in May 1964.

"The Prime Minister," he said "above all men, has the duty to explain the constitutional position of this measure, for nobody has so often insisted, in this house and elsewhere, that the very sort of grant this Bill now makes is, and must be, unconstitutional."

In answer to a question on this matter from the honourable member for Hunter (Mr. James) on 30 August the Prime Minister said:"the honorable member puts to me a question that is outside the jurisdiction of the Government."

...

### 1966 The Labour Party: To Court or to Auction ...

On February 10 1966 the Australian Labour Party's federal executive decided to set up a committee of legal experts to examine the possibility of a High Court challenge. The following day the Deputy Leader of the party, Gough Whitlam, in a letter to CS. Wyndham, The Secretary of the Australian Labour Party Secretariat, clearly described and considered some of the implications of the political dimension of the attorney - generals' position. He wrote:

The Executive has been told my view . . . That a challenge could be made, if at all, only on the relation of a State attorney general.

The executive has also been told that in my view the Federal Parliamentary Party would not approve my aiding or condoning this move and the Tasmanian and South Australian Parliamentary Parties (the two States where Labour was in power) would not approve their Attorneys General doing [15]

In other words, the State attorneys general in Australia were not impartial legal officers, but members of cabinet. It was unrealistic to expect a cabinet member to take the initiative in challenging legislation his Government supported. The Australian Labour Parties Conference in 1966 decided to abandon the investigation of the constitutionality of state aid proposed by the executive.

...

### July - September 1971 D.O.G.S.: To court, to court, and come what may

The current legal challenge was launched at a public rally on September 21, 1971. The meeting was addressed by Rev. C.Stanley Lowell, a leading proponent of church-state separation and religious freedom in the United States; by the Rev. Dudley Hyde, a former head of the Council for Christian Education; and by the President of the Victorian Council for the Defence of Government Schools, H. Nilsen. Few illusions were held about the difficulties which lay ahead, although no one could have believed at that stage that it would take (at least) nine years to resolve the case. Nilsen offered some not completely uprophetic words;

We must take up the challenge and once having put the hand to the plough not turn back. So here tonight I, on behalf of all those interested, give notice to the politicians, press, pastors and priests that certain members of the public are not going to allow this attack on the State schools and our

religious freedom to go by default. This will not be an easy road: we will require all the physical and financial and moral support we can get .. . The preparation and challenge will be dedicated, disciplined, and determined. It will be careful and concerted. It will not be a hit and miss affair, for the stakes are high and the costs too great. Only the best methods and the best legal men with the most integrity for our cause will be used.

No haphazard methods will be used in the execution of this challenge. What is required is men, women, and money. We need to have people who are modern day Daniels . . . We need people who are not frightened to be smeared and smothered by the bigot blanket so often used nowadays and with so many cowering under it. Not only do we need manpower - We need money. And with this in mind I now launch an appeal fund to be used for the purpose of upholding Section 116. I open this appeal with a promise of one hundred dollars from an aged pensioner . . . [16]

## ...THE PROBLEM OF OBTAINING FIAT

It took one and a half years to solve the problem of obtaining fiat. The Council for the Defence of Government Schools approached citizens from

many social, political, religious and economic backgrounds who were supporters of State Schools and the principle of church-state separation, to become relator plaintiffs in each State. The solicitor for these relator plaintiffs, J. N. Zigouras and Co. approached all the attorneys general, Commonwealth and State. The Federal attorney general and those of Western Australia, New South Wales and South Australia, refused fiat, while Victoria, Queensland and Tasmania asked for further information. The procedures were not uniform and the time lag in replies caused considerable delay. Attorneys general were sometimes engaged in other business. In 1973 the Tasmanian attorney general, Mr. M. Everett, spent time overseas. Since there was some indication that he would give a favourable response, the solicitors waited his reply before approaching Victoria again in 1973 and Queensland with further information. In July Tasmania refused fiat. In September 1973 the three State attorneys general who had refused were once more approached with requests for fiat, but again they declined. The further information requested by Victoria and Queensland was also supplied. So all six states and the federal attorney general were approached in 1972-3. Three States were approached twice. All but one refused. The correspondence is listed in Appendix A.

In 1972 two things became apparent. There was evidence in the response from Western Australia and South Australia td the first approach that their decisions were politically based. It also appeared that the Commonwealth and some of the States, in an effort to preserve the last vestiges of proper legal procedure, were buck passing.

The Western Australian attorney general gave a political and an administrative reasons for his refusal to grant fiat. In his letter of July 11 1972 he advised J. N. Zigouras & Co. that it was the "policy of the Government of Western Australia to grant assistance to independent schools," and that the relevant federal acts were "administered by the Federal Minister." The State "had no responsibility in the matter."[17] This might be construed to mean that, although the grants under the States Grants Acts were allegedly legitimised by Section 96 of the Constitution, the States were ‘acting as a mere post office and passing on the cheques."[18]

South Australia gave no reason for refusal in their reply on August 2 1972. However, the South Australian Association of State School Organisations (SAASSO) wrote to the premier on the matter. The premier’s response was revealing. Dunstan noted that it would be inappropriate for a State attorney general to issue fiat when the State Government did not itself support the challenge. A challenge to Commonwealth law was "more appropriately a matter for the Commonwealth attorney general."[19] Yet in his reply the Federal attorney general, Senator Ivor Greenwood remarked that the granting of fiat would be "without precedent." He added that his decision did not pre’clude a challenge through a State attorney general.[20]

Max Pearson, the President of SAASSO, had been a member of a delegation from the Australian Council of State School Organisations which in 1972 had approached the Federal attorney general. Senator Greenwood had told them that fiat would have to come from a State attorney general and that any South Australian contention to the contrary was "merely a difference of opinion between lawyers." SAASSO’s letter to the South

Australian Premier offered a lay interpretation of what seemed to be a legal run around:

If the State and the Commonwealth believe that the Federal legislation providing grants to non-government schools is valid, we assumed that you would welcome the opportunity to prove this. However, if doubts exist as to its validity, we expected your government to welcome the opportunity to have the matter clarified. To deny assistance merely because the State government itself does not support the challenge, forces us to the conclusion that political expendiency is the overriding factor in your attorney general’s decision.[21]

On November 28 1973 the Victorian attorney general V. Wilcox granted fiat subject to conditions. These conditions were accepted, the documents signed on December 14 and the writ lodged. (See Appendix B).

Why did the Victorian attorney general grant fiat? In an interview, the President of the Council for the Defence of Government Schools (Victoria) cryptically suggested it was a result of particular people being in particular places at a particular time. He would not elaborate except to remark that such particularity was cold comfort to citizens in other States or in the Australian Capital Territory who wished to bring the case to court. He also muttered something about the "law of the jungle where the churchmen nearly reign supreme." Moreover, he added "that the failure to get fiat in 1957, 1964-65 and 1972-73 (except for Victoria) can be directly attributable to the activities of certain churchmen and the politicians fear of an adverse reaction from Roman Catholic voters in particular. Overt and covert church pressure had clearly made a mockery of the process of obtaining fiat from an ‘independent’ attorney general. The rule of law which required the obtaining of an attorney general’s fiat had rewarded and incited the intimidator and the bully "[22]

## ...PROBLEMS WITH RETAINING FIAT

The churchmen were not satisfied with the success rate. Having five out of six State attorneys general and the Commonwealth attorney general refuse to grant fiat was not good enough. They were determined to have no attorney general granting fiat. The activities of the churchmen were to effect the legal challenge throughout the seventies.

However, it is difficult to establish precisely what went on behind the scenes after December 1973, but there is evidence of pressure from the Roman Catholic hierarchy or Hamer, the Victorian premier, and V. Wilcox the attorney general, to withdraw fiat. A report in the Australian Financial Review,[23] states that church attempts were made to influence the political and legal process. The Roman Catholic church faction wrote to the Premier Hamer on March 3 1974, strongly objecting to Wilcox’s action of December 1973 and calling on the State Government to reject the "amendment of the fiat." They were a jump ahead of the plaintiffs. The application to amend the statement of claim to include more recent legislation was not lodged by J. N. Zigouras and Co. until April 22 1974.[24]

According to the Australian Financial Review Hamer replied that the State government had not changed its mind and referred the church

deputations to Wilcox. All Catholic Education and National Council of Independent Schools bureaucracies in each state were then urged to take "co-ordinated action." The Australian Financial Review stated that the respective State governments were to be pressured into rejecting the plaintiffs’ amendments. This co-ordinated action meant that the churchmen were once more, to work to prevent citizens from obtaining fiat anywhere in Australia. Moreover it was also proposed to request all State governments to intervene "if the case reached the High Court."[25] The Age May 11 1974[26] reported that the Victorian premier had given an assurance of its opposition to the High Court challenge to state aid. And when the case finally came

to court on March 24 1980 all States intervened in favour of the defendants.[27]

Attorney general Wilcox received a deputation from some Victorian church leaders in early April and explained the fiat proceedings. On April 18, in referring to the case, he said that his endorsement was a normal action of the attorney general. "Political considerations don't come into it."[28]

A federal election took place in May 1974 and Gough Whitlam, the Labour prime minister campaigning in Bendigo, suggested that Wilcox's decision had a political side. He claimed that Labour attorneys general had successfully resisted "covert attacks on aid to church schools" for ten years. "There was supreme irony," he said, "in the fact that Mr. Wilcox, a liberal attorney general, had cleared the way for an appeal against the education policies of a federal labour government."[29]

Hamer defended Wilcox, claiming that he had acted upon well established principles. A party seeking a High Court action could not take out a writ without the attorney-general's fiat because of legal technicalities.

Wilcox was bound to take this up for the group, and Mr. Whitlam, as a lawyer, should know this. You can't deprive people of the right to go to court if they want to. That is elementary justice.

A barrister, J. D. Merralls[30] joined the fracas, arguing that when deciding whether to grant a fiat or consent to an action involving public rights, the attorney general, as a law officer, exercised a quasi-judicial and not a political function. He quoted from eminent English authorities. But he also referred to recent Australian experience - to the Lake Pedder case in Tasmania and the Black Mountain case in Canberra, where attorneys general had been placed in an impossible legal position because of their political responsibilities.[31]

The legal orthodoxies noted by Merralls had been stated in the plaintiffs' applications for fiat in 1973. Dixon J. had been quoted from the Pharmaceutical Benefits Case. It is the traditional duty of the attorney general to protect public rights and to complain of excesses of a power bestowed by law and in our Federal system the result has been to give the attorney general of a State a locus standi.[32]

It was also suggested by the plaintiffs that "the attorney general decides whether or not to grant his fiat upon principle and not upon grounds of political expendiency."[33] All this had, in the end, fallen upon deaf ears -except in Victoria.

Senior counsel of ability and repute are in limited supply. They are liable to be promoted to the bench, or be busy with other briefs, or to have other priorities.

In July 1972 Mr. K. Aickin 0. C. (now Mr. Justice Aickin) was approached by the plaintiffs. He refused the brief. Mr. John Mc Intosh Young Q.C. was approached and accepted in late July. However in 1974 Mc Intosh Young was appointed Chief Justice of the Sumpreme Court of Victoria. Mr. K. Aickin OC. was again approached and once more refused. It was decided by the plaintiffs that the problems of appointing senior counsel - work load, priorities, and appointment to the bench could best be overcome by engaging a team of younger barristers. Accordingly, in what they considered to be their best interests, the plaintiffs deliberately engaged three young barristers in early May 1974.~~

To their surprise the Victorian attorney general wrote to J. N. Zigouras & Co. on September 23 1974 noting that an important consideration in granting fiat was "signature of senior counsel."[36] The name of the senior counsel responsible for the case was required. No such condition was contained in the November 28 1973 letter, but the plaintiffs had no choice but to search once more for senior counsel. Mr. R. K. Fullager Q.C. was retained on 8 November 1974.36 In January 1975 he was appointed a Justice of the Supreme Court of Victoria.[37] Mr. Neil Mc Phee Q.C. was retainted shortly afterwards and the plaintiffs were fortunate enough to keep him for the rest of the case.[38] Mr. A. R. Castan had been appointed junior to Mc Intosh Young but when he went overseas in 1977 he was replaced by Mr. J. Fajgenbaum.

## ...PROBLEMS WITH AMENDING THE LIST OF PLAINTIFFS

It took over eight months for the attorney general of Victoria to approve amendments incorporating recent Federal legislation. But another problem raised its head when Mrs. J. Kirner, one of the 28 relators, wished to have her name removed from the writ.[39] When she first joined the relators she did so as a representative of Australian Council of State School Organisations. In the meantime she had also been appointed to the Schools Commission. Most of 1975 was taken up with attempts by the plaintiffs, and A.C.S.S.O. to relieve Mrs. Kirner of her association with the action since she now suffered from a conflict of interests. A.C.S.S.O. offered to substitute another signatory,[40] but Wilcox refused on February 5 1975[41] and by May 23 expressed concern at the progress of the action. If normal progress was not made (and this does not appear to have happened)" he wrote, "it may be necessary to reconsider the matter generally".[42]

Both J. N. Zigouras, solicitor for the plaintiffs, and A.C.S.S.O. requested delegations to the attorney general to discuss Mrs. Kirner's position.[43] They were refused.[44] The attorney general insisted that "the action will have to go on in the names in which it stands at present".[45] Mr. Zigouras informed Mrs. Kirner that he had ceased to act as her solicitor for the proceedings. Zigouras informed the attorney general that the case was "proceeding on the basis that Mrs. Kirner could not withdraw her name from the proceedings" and that "the action to include legislation which had been

passed during the delays would proceed".[46] The case was to be heard by the High Court on February 26 1976.

A year was wasted in attempts to solve the "Mrs. Kirner" problem. This waste of time would have never occurred had the plaintiffs not been hamstrung by the conditions of the attorney general's fiat.

Even so, the difficulty was far from solved. Mrs. Kirner's concern at "possible repercussions on A.C.S.S.O.'s representative on the Schools Commission"[47] continued to dog the case.

## ...DELAY BEGETS DELAY

**For the want of a fiat**

The case appeared to be moving, albeit slowly and in spite of earlier problems with counsel, plaintiff and church pressure on the attorney general. But on February 12 1976 the Victorian parliament was prorogued and the legislative assembly dissolved. Two days before the summons was due to be heard on February 24, the Victorian attorney general requested Zigouras, by telephone,[48] to adjourn the summons. Zigouras, complied. Attorney general Wilcox was retiring from Parliament. It was proposed that he be replaced by Haddon Storey, but a special Act of Parliament amending the Victorian Constitution was required to enable Storey, a member of the Legislative Council, to become attorney general. Mr. A. J. Hunt M.L.C. acted in an obviously temporary capacity from March 31 to May 6 1976 until the passing of the Constitution (Responsible Ministers) Act. A new attorney general meant a possibly new approach to continue the fiat.

Had the plaintiffs not been forced to seek fiat, the time spent obtaining it in 1972 and 1973 would not have been lost. Had the attorney general not been, because of the political dimensions inherent in his office, a political figure open to pressure, .the time spent in uncertainty in 1973 would not

have been lost. Had the attorney general in 1974 not demanded the employment of a senior counsel the time spent in 1974 and 1975 seeking to obtain acceptable barristers would not have been lost. Had the attorney general's permission not been required for successive amendments up-dating the statement of claim and to vary the list of relators, the time spent on this in 1974 and 1975 would not have been lost. Had the attorney general's political party not called an election early in 1976, and had the premier not sought to appoint an attorney general from the legislative Council, the first half of 1976 would not have been lost.

The plaintiffs wondered if they might be pushed back to square one.

## ...THE PROBLEM OF RELUCTANT DEFENDANTS

Fortunately forthe plaintiffs Haddon Storey continued the fiat and allowed the amendments.[49] Further federal legislation was passed in 1976 and new amendments were accordingly requested.[50] Haddon Storey complied promptly.[51] On March 1 1977 the High Court allowed incorporation of the latest amendments.

Yet the High Court now was, or at any rate seemed, further away than ever. The opposition was reluctant to come to court. Their major delaying tactic was refusal to 'demur' on the facts. It was always open to the

Commonwealth to demur on the facts, meaning that they would argue that whatever the nature of church schools, and whatever the nature of the administration of the disbursement of Commonwealth moneys, the State Grants Acts were constitutional. But this did not occur, although in fact the Commonwealth often demurs in Constitutional cases. From the first negotiations in March-April 1976[52] it became increasingly evident that the Commonwealth, and close behind it, the church interest, would be reluctant to demur in any form. The alleged religiosity of church schools and the administrative procedures related to Federal State Aid would be a continual bone of contention.

The plaintiffs were ordinary citizens. They were not wealthy, and did not have access to the coffers of any wealthy institution. A "trial of facts" involved a prolonged and expensive court case. This might mean many days in court, and weeks and even years of hard research and preparation. The defendants may be presumed to have been aware of this.

If the plaintiffs could not be prevented from getting to court over the hurdle of obtaining the attorney general's fiat, then the next hurdle could be raised: the prospect of prohibitive costs caused by incalculable delays, by a prolonged trial of facts, and by expenses incurred for witnesses.

There is presently no publicly available evidence as to the nature of discussions between the Commonwealth and church interests in the years 1976-1 980. From the vantage point of the plaintiffs however, it was evident that the defendants were very reluctant to come to the party in 1977 and 1978.

Negotiations between the plaintiffs and the Commonwealth were delayed for five months, from March to July 1977, since the Commonwealth just did not reply in writing. The Commonwealth solicitor general had been overseas from early May until early July, but this was not regarded by the plaintiffs as a sufficient explanation. J. N. Zigouras sent a sharp letter to the deputy crown solicitor in Melbourne criticising Commonwealth delay and pointing out that it was totally impossible to explain to his clients why a five month delay should be tolerated.[54] The Commonwealth replied in kind:

I consider your allegation that the defendants have been guilty of an intolerable delay over the past five months to be ludicrous. In my view the plaintiffs' interest in pursuing the matter over the last three and a half years has been spasmodic at best.[55]

This reaction was understandable. As one of the plaintiffs, in charitable mood, noted in an interview:

Nobody, judiciary, practitioner, or layman could possibly conceive of the difficulties created by the rule of law that requires ordinary people to obtain fiat from the attorney general.[56]

The Commonwealth still refused to draw up pleadings and present a written defence to the High Court until further amendments to pleadings requested in April were granted by the Victorian attorney general and allowed by the court. The confidence of the plaintiffs in the legal profession, and legal process, was not augmented by these delays. During the period from May to November 1977 six telegrams and one letter were sent by the plaintiffs to J. N. Zigouras requesting, in the words of the May 24 telegram, that the barristers to "do everything to force the Commonwealth to a satisfactory resolution of the present impasse."[57] The pace of correspondence between the two parties to the action quickened and some progress was made. Amendments sought by the Commonwealth counsel were speedily approved by Haddon Storey,[58] and on August 19 the High Court allowed their incorporation.[59] In September the Commonwealth put in a defence to the further amended statement of claim.[60]

A feature of the situation which was, so to speak, structural, was that new legislation could always be passed while approval for previous amendments was being sought. States Grants Acts were, of course, renewed annually and consequent ongoing approval of amendments was needed froni the Victorian Attorney General and the High Court. Access to court could never be taken for granted by the relators.

The question of what were the "facts" of the case surfaced as the major element in Commonwealth's delaying tactics. In a letter to J. N. Zigouras the Commonwelath noted that a "trial of this action could be very lengthy." The plaintiffs were requested by the Commonwealth to submit a document setting out each and every fact upon which it was proposed to support their case.[61] The plaintiffs replied, listing the identifying characteristics of various church schools based upon material from official church school sources.[62] The plaintiffs, additionally, sought access to documentation from which they could establish the manner of the administration of the impugned act. The plaintiffs accordingly requested documents without formal discovery regarding the administration of Federal financial aid to church schools.

There was no satisfactory response.[64] The plaintiffs sent a telegram to J. N. Zigouras, and to their senior and junior counsel, expressing grave concern about the legal process and the "fobbing off" by the Commonwealth. "What has happened to us over the five and a half years is a disgrace to the legal profession", they wrote. "We must strenuously attempt to ensure that we are given a high priority by the Commonwealth".[65] They felt powerless, caught up in a game of cat and mouse, unprotected, abused, and subject to bullying.

## ...THE PROBLEM OF DISCOVERY OF DOCUMENTS

November 1977 - May 1978 to court: protection or punishment?

In desperation the plaintiffs sought the protection of the court. On November 29, 1977, a notice of discovery of documents was sent to the Commonwealth.[66] But no reply was given in the time laid down by the High Court rules.[67] Attempts in late January and early February 1978 to obtain a response failed. Consequently a summons was taken out on February 16 in an attempt to get the court to order the Commonwealth to file and serve an affidavit of documents.

In a hearing in chambers on February 23 1978, Chief Justice Barwick arranged for Judge Aickin to take over supervision of the action, since he himself was going overseas. In a chambers hearing before Mr. Justice Aickin on March 3 1978 the possibility of formal hearings in Melbourne in April was discussed. In late April 1978, after two summons had been taken out by the

plaintiffs, a formal hearing took place in the High Court, before Judge Aickin, to consider in detail the attempt by the plaintiffs to obtain facts relating to the Commonwealth's Government's administration of state aid. On May 17 Aickin J. decided against the plaintiffs.. He considered that the administrative details requested were not relevant to any issue arising from the legal documents before him.

## ...

**May 9 1978 - July 20 1978 Who are the defendants?**

There remained disagreement on the question of what characterised a church school. Justice Aickin, on April 26 had suggested that agreement on the profile (the formal definition) should not be difficult. So on May 9 1978, the plaintiffs once more approached the Commonwealth with a draft statement. Ten weeks passed, and once again the plaintiffs were confronted with - nothing.

1The plaintiffs sent another telegram to their legal representatives, expressing exasperation at what they considered Commonwealth stalling and urged their representatives to fix a date for trial.[68]

At this point the church interest surfaced like a submarine into the legal arena. On July 20 in negotiation, the Commonwealth revealed that the plaintiffs' May 9 statement of facts had been sent to Corr and Corr, solicitors for the church school interest, for their comments and view. No indication was given as to how long Corr and Corr would take. It was reported that the partner handling the matter was overseas. It was further revealed that representatives of the church school interest were considering leave to appear in the action.[69]

## ...THE JUDGE

**July20 1978**

And then, in chambers, Mr. Justice Aickin offered a piece of formation which startled the plaintiffs. He told those present that, while a Queen's in Counsel, he had accepted a retainer from Corr and Corr, in regard to the possible intervention of the church interest in the state aid hearings. However, he had never been briefed. Evidently the church interest had contemplated intervention in the case for a considerable time.

Once more the plaintiffs expressed their dissatisfaction with the legal process, passing a motion to this effect in committee, which they conveyed to their legal representatives. In the motion[70] they objected to Mr. Justice Aickin's participation in the immediate proceedings. They pointed to his previous association with the church school interest and the possibility of his having to decide the very question with respect to which he earlier had accepted a retainer.

Mr. Justice Aickin did not continue to act in the role of single justice in the case. The plaintiffs do not know why. Chief Justice Barwick appeared at the next court hearing on October 5.

## ...THE PROBLEM WITH CHURCH INTERVENTION

**September- October 1978**

On September 11 1978 the case was set down for trial at the Court Registry for the next High Court sitting starting in Melbourne on October 3. The required documents were filed with the High Court registry for the service of subpoenas (Ad Test and Duces Tecum) on September 26. Since Roman Catholic schools represented about 80% of church schools in Australia the plaintiffs', counsel decided to call their representatives as the first witnesses, approaching Anglican, Lutheran, Calvinist, Seventh Day Adventist and Jewish representatives later. Subpoenas were subsequently served on school principals and priests in the Roman Catholic diocese of Sandhurst in Victoria.

At last the defendants realised that the plaintiffs meant business. On September 27 the Commonwealth took out a summons in relation to a hearing on October 5 for an order "for such directions as the judge thinks proper." They offered a number of procedural schemes, one of which was a double demurrer with conditions.[71]

At the October 5 High Court hearing a concerted attempt was made by the Commonwealth and plaintiffs' counsel to settle the issues involved with church school characteristics, in order to avoid a trial of facts. The church interest also sou~ht leave to become a party to the action and the plaintiffs opposed their application. Chief Justice Barwick requested submissions from the plaintiffs and from the church school interest, on their entry into the action. He also required from both a statement of facts. It soon emerged that the church interest still had not produced an alternative statement of the characteristics of a church school for either the Commonwealth, the court, or the plaintiffs. The plaintiffs' senior counsel complained:

Your Honour, I think it is fair to say that in late May of this year the solicitor (general) indicated to myself and Mr. Justice Aickin that he anticipated the document to be in existence within a couple of weeks and we have had constant discussions and appearances before his Honour since then without any response. Now, I would be grateful Your Honour if he or Mr. Shaw (the senior counsel representing the church school interest) could indicate that in fact this document will come into existence and when it will.[72]

Arguing for entry into the action, counsel for the church school interest claimed that they would "be able to assist the court to achieve a quicker resolution of the matters of fact than may otherwise be possible." They argued that this was so because they had "direct access to information concerning the conduct of such schools which none of the present parties have."

The plaintiffs had reason to be sceptical. In their submission on the question they summarised their dissatisfaction with the efforts made by the proposed defendants to "facilitate the trial of the action."

They pointed out that after the discussion before Mr. Justice Aickin, they had delivered their draft Statement of Facts on May 9. In late May 1978 the Solicitor General had indicated that a Statement of Facts in reply which was to be prepared by the church school interest would be made available in approximately two weeks. Five months passed and yet it still failed to materialise. When it appeared that an alternative was neither going to be produced, nor the plaintiffs statement demurred to, the plaintiffs requested on September 11 that the action proceed to trial. It was hoped that this would take place in October 1978. The plaintiffs' solicitors had requested the proposed defendants' solicitors, Corr and Corr, simply to identify the names of witnesses who would be most appropriate to give evidence on a number of aspects of the case. Some of these aspects related to statistical information, and other aspects of issues on which it was assumed that there would be spokesmen for the various churches. This request met with a refusal and Corr and Corr declined to enter into further correspondence.

So, from the plaintiffs' corner, it was clear that the church school interest had sought with fair success to cause a stalemate. At considerable expense and inconvenience the plaintiffs were compelled to issue a number of subpoenas. [73]

## ...ENTER THE TAXPAYERS

**High Court Hearing 20 November 1978**

**The "real" defendants and the "real" plaintiffs**

**After the court hearing on October 5 Victoria was approached by J. N. Zigouras & Co. to add a number of taxpayers - who were acting as such and not all of whom were Victorians - as plaintiffs, as well as to take account of the federal legislation passed but not yet included in the Statement of Claim.[74] Haddon Storey replied on 27 October 1978 that he could "see no objection to the ammendments However he was "unable to make a firm decision until the proposed amendments (were) settled and submitted to him". The amendments were submitted to the Attorney General with a letter on November 10. Approval was given on November 14~~**

**Taxpayers were selected to cover all categories. They included six Victorians, four New South Welshmen, two Tasmanians, and two from the Australian Capital Territory. Of these, five had never approached an attorney general for fiat, while four of the Victorians had already been given fiat, but not in their capacity as taxpayers. It should be noted that the two Australian Capital Territory taxpayers would have had to request fiat from the federal attorney general who was a minister of the coalition government. No federal Liberal-Country Party attorney general has ever given fiat to challenge Federal legislation. Hence the two taxpayers from the Australian Capital Territory represented a population with a specially pertinent interest in the locus standi issue.**

**Some interchanges between the Chief Justice, the Solicitor General and Neil Mc Phee at the November 20 hearing were amusing, but to the point.**

**His Honour: Why more plaintiffs?**
**Mr. Mc Phee: The question of the standing of the attorney general of Victoria in this action is put in issue in the Defence,your Honour.**
**His Honour: Can you get anyone with a better standing?**
**(and later),**

**His Honour: He (Mc Phee Q.C.) would only want one taxpayer. You do not need a dozen.**

**Mr. Byers: My friend has gone around the States, Your Honour, I think, and picked out some here and some there .....**

**At the close of the hearing the chief justice ordered the addition to the statement of claim of the amendments agreed to by the attorney general of Victoria.**

**So the Taxpayers had a foot in the door. The chief justice also directed that the church school interest be allowed to join as defendants. He said:**

**They are very rightly interested and as a matter of fact, they are the real defendants, in every sense of the word.[77]**

## ...THE PROBLEM OF THE FACTS

**Facts, cost or price of religious belief?**

**As agreed, the plaintiffs had submitted their Statement of Facts in mid October 1978.[78] This consisted of 122 legal sized pages and references to over 50 documents. The church school interest countered with a document of 41 A4 sized pages with the last 13 devoted to schedules. Most of these schedules were statistical tables.**

**At the court hearing on November 20 Chief Justice Barwick proposed a profile which he said came from considering the submissions. He thought this would be acceptable to the plaintiffs:**

**Some non-government schools do have religious instruction in the curricula on an optional basis and some on a compulsory basis. Some have religious observances on an optional basis and some on a compulsory basis. I am puzzled as to what more you seek to prove.[79] The image of reality here offered was, in fact, one which the church**

**school interest was seeking to promote. It was to their legal advantage to have their schools defined as educational institutions with religious appendages rather than as religious institutions with educational functions. Probably they reasoned that it was less likely that the court would find federal aid to the former offensive to Section 116.**

**The content of the defendants' profile was not unexpected. Similar approaches had been tried in American State Aid cases. There they have been unsuccessful.[80]**

**In the view of the plaintiffs, a profile which presented church schools as educational institutions to which religious instruction and practices were attached, i.e. as glorified state schools, was not usually consistent with the real world. Certainly it ran drastically counter to the idea, and rationale of church schools historically and conventionally advanced by their promotors. The plaintiffs' solicitors understated their position when they wrote to the church school solicitors:**

## ...EROSION OF THE JUDICIAL PROCESS

**The Statement of Facts delivered by your clients would not be acceptable either in its present form or in an amended form. Insofar as it constitutes a reply to the plaintiff's Statement of Facts we consider it generally unresponsive, in part incomplete and in part evasive. In any event, not unnaturally, it approaches the whole subject from a different viewpoint and one not acceptable to our clients.[81]**

**The plaintiffs' senior counsel indicated at the November 20 hearing that on question of facts, the plaintiffs had "no option but to go to trial".[82] Their predicament emerges with some clarity in the following exchange:**

**Mr. Mc Phee:**

**To use the words your Honour that are expressed in some of the documents that have been referred to (documents from church school sources referred to in the plaintiffs' statement of fact) the purpose of a religious school is to conduct an institution which is permeated with religion.**

**His Honour:**

That is in some ways mere words so far as this sort of legal discussion is concerned.

Mr. Mc Phee:

It has this important difference your Honour, that it is apparent the defendants would contend in effect that religious schools and government schools are pretty much the same sort of institution, that is that they achieve a secular education of the same standard as the government, and some private schools may or may not have some religion tacked on. But is central to our case your Honour to prove that the whole approach of those denominations who run religious schools is quite different to that, that the schools are not designed primarily to perform a secular function at all, but are designed as part - if I may use this expression your Honour-they are part of the evangelical mission of the particular religious denomination. It is a necessary step, of course in our case your Honour, barring all other difficulties, to prove in the end that this money reaches a religious institution.[83]

So the plaintiffs had to go to trial to prove the church schools were what their initiators and promotors have claimed them to be for over a hundred years while the church school interests were to go to battle to prove otherwise.

## ...WHERE CAN WE SEND THEM?

The Commonwealth solicitor general Mr. M. H. Byers, questioned the legitimacy of the plaintiffs' entry into the High Court in any capacity for the Trial of Facts. He raised the question of whether what the plaintiffs sought was a proper use of the time of the Court. Chief Justice Barwick indicated that he had thought about it, but had no choice.

I cannot send it away. If I thought I could send it to another court I would send it quite readily. But I do not think I can at this stage.[84] So insult was added to many years of injury.

Notions of elementary justice provoke the question: What does constitute making proper use of the judicial process?

## ...THE PROBLEM OF THE RELUCTANT PLAINTIFF CONTINUED

The trial was due to start on March 6 1979. It was to be heard before a single judge. Mr. Justice Murphy presided. The day before J. N. Zigouras was informed that Mrs. Kirner would seek to be removed as a relator at the court the next day. The Victorian Attorney General did not wish to consent to her application for removal but would leave it to the court to decide.

The "Mrs. Kirner problem" was disposed of with the minimum of fuss by the trial judge. No party opposed her application but the question of costs was left for another day.

Church school representatives in the body of the court offered congratulations when Mrs. Kirner was successful.

## ...CONTINUED PROBLEMS OF DEFINING A CHURCH SCHOOL

It was the task of the plaintiffs to convey to the court what church school interests had proclaimed for over a hundred years - their inherent religiosity. In the nature of the adversary system, it might be anticipated that the defendants would follow American precedent and attempt to minimise this characteristic of their educational institutions. Various approaches could be used by any of the witnesses if they chose to use them. It could be expected that their counsel would attempt to prove that church schools are very much like state schools with maybe a little more religion added. The hierarchical organ isation and chains of authority, particularly of the Roman Catholic system could be lessened or confused. Church schools could be depicted as discrete entities distanced from the priest or central ecclesiastical authority. Any material or statement which might illustrate their basic religious purpose could be categorised as outdated, or narrowed and confined. It could be claimed that teachers did not introduce religious aspects into so-called secular subjects, or that if they did, it was in a balanced, many sided presentation. Selection of teachers on the basis of particular religious commitment could be presented as minimal or non-existent. The plaintiffs were not disappointed.

To make matters well nigh impossible the witnesses called were only the plaintiffs' witnesses in theory. In reality they were committed to the church school defence. Many invitations were extended to them to come to conference. None were accepted.[86]

Nor were the church school defendants prepared to call witnesses from church schools. Given the rules of evidence this would involve cross examination and would give the plaintiffs' counsel a far better opportunity to extract from witnesses a more accurate picture of the real world. Meanwhile the plaintiffs' counsel had to build up evidence to present to the court and were not in a position to squander it by discrediting any of the witnesses which they had called themselves, if the opportunity presented itself.

On the other hand, church school officials and their legal representatives were very successful in arranging and holding conferences with witnesses. Mr. Nilsen, the President of DOGS. Victoria noted with some

amusement that on some days there were suspicions afoot that the Owen Dixon Chambers in William Street, Melbourne, had been taken over for a religious convention. In some lifts medieval habits of the church outnumbered those of the legal profession.[87]

In a civil case a fair percentage of the plaintiffs' witnesses are usually sympathetic to the aims and purposes of the plaintiffs' court action. The plaintiffs called forty nine witnesses and with the exception of perhaps two or three, this was just not the case. So the plaintiffs' barrister entered the court room under a heavy handicap.

Nor did the normal function of cross-examination apply As Mr. N. B. McPhee OC. put it

Now I do not want to derogate in any way from my learned friend's skill as a cross examiner, your Honour, but to put it at its lowest, his cross examination has lacked the excitement and danger that the cross exarniner is normally in when all that Mr. Shaw has to do is to ask a series of leading questions and derive answers that have no doubt been discussed in Conference.[88]

The defendants declined to call their own witnesses from church schools, presumably for tear that they might be subjected to cross examination. Only four witnesses were called by the defendants and these were connected to State Schools system.

The plaintiffs had two advantages. The defendants never knew what evidence or documentation they would produce. Many useful documents were obtained, often from church schools sources. The plaintiffs appeared to have unknown friends. Nor did the defendants know what new questioning tactics would be employed by the plaintiffs' counsel in his examination of witnesses. The evidence obtained in a court of law is not so much the

reflection of the real world as the product of the strength and weaknesses of the contending parties.[89] Much depends upon the ability of the witness to cope with pressure in the box; the ability and knowledge of the respective barristers; conferences with the witnesses; the rules of evidence and whom they favour. Mc Phee OC. was at a disadvantage on most counts. But he was, in part, selected by the plaintiffs for his outstanding skill in finding ways

· through, or around, problems of this kind. They were not disappointed. The trial of facts was heard on 27 sitting days. The hearings before Mr. Justice Murphy were spread over 29 days. Symbolically, the plaintiff's list of documents tabled in the court ends with a document numbered 116.

On June 13 Mr. Justice Murphy set the timetable for the presentation of documents on both the facts and the law.

## ...THE FIAT AGAIN UNDER PRESSURE

The Commonwealth still questioned the efficacy of the attorney general's fiat. The question of amendments was again raised. In late May 1979 two requests for approval of amendments were sent to the Victorian attorney general. Both were approved.[90] The Commonwealth took the opportunity provided by these requests to seek the production in court of the fiat for the

amendments. They indicated that they considered that precedent required amendments to the statement of claim to be approved by Victoria. Moreover, the senior Commonwealth Counsel, Tadgell OC. raised the question of the Commonwealth itself making representation to Victoria regarding the continuance of fiat.

Mr. Tadgell: We would have liked to have made representations ourselves to the attorney general on the question whether any fiat ought to have been granted in respect of these proposed amendments. We were not afforded that opportunity and we do wish to

His Honour: Why has this got anything to do with me, Mr. Tadgell?

Mr. Tadgell: Your Honour, in our submission, according to the authorities, the fiat should be produced to the court before the court allows the amendment.

So the theme of questioning the continuance of the fiat was not let slide. Later that day, however, Mr. Mc Phee announced that there was nothing that had to be done that had not been done - he had the requisite consent of the attorney general.[91] But, if amendments are required to the statement of claim, and had this latest approval had not been obtained, the whole action could have been put in peril.

## ...INTERVENTION OF THE STATES:

October 10· 1979 The Heavies

Early in 1974 the church school interest planned to persuade all States to intervene in their favour "if the plaintiffs got into court."[92] In the South Australian Press a spokesman noted, with satisfaction,[93] that "all State governments had taken the step to intervene in the High Court case." The Director of Catholic Education in that State said he was grateful to the attorney general in the recently elected South Australian Liberal government for acting so quickly. When the October 10, 1979, court hearing arrived, five rather than six states were represented. New South Wales was missing. By the Full Court hearing on March 24, 1980, however, New South Wales had come into line.

## ..."FACTS NOT IMPORTANT"

Years of preparation, and 27 court days, had been spent by the plaintiffs on the "facts". On October 10 1979, senior counsel for the church school interest told the court:

"We (church school interest) say that the Facts do not matter at all"[94]

Why, then, the Trial of Facts?

## ...THE FULL COURT AT LAST: STILL UNDER QUESTION

On January 9 1980 Mr. Justice Murphy made no judgment as to the "facts" or the "law", and informed the plaintiffs and defendants that he would direct the case to be argued before the full court. On February 11 the case was set down for the March hearings. It was heard before the full court on March 24, 25, and 26.

All States supported a State attorney general's right to be heard, but no-one supported the right of the citizen taxpayers to be heard except the taxpayers themselves.

The Commonwealth and the church school interest opposed the right of citizens to be heard under any circumstances whatever, as taxpayers or as relators.

So to the bitter end the pro-State Aid faction which had prevented fiats being granted in various states, which had attempted to have the Victorian fiat withdrawn; which had attempted to intimidate some of the relators, which had caused unprecedented delays and increased the cost to the plaintiffs, just could not accept that the plaintiffs actually were standing legitimately in court.

## ..."A NATION MAY LOSE ITS LIBERTIES IN A DAY, AND NOT MISS THEM FOR A CENTURY."

Montesquieu

On February 10, 1981 the High Court handed down its decision on the State Aid case. The court ruled, by a majority of six to one, that, in the words of Chief Justice Barwick, "The statutes attacked in the action are valid laws of the Commonwealth and not in any wise in breach of Section 116." The six affirmants were, in addition to Chief Justice Barwick,Justices Gibbs, Stephen, Mason, Aickin and Wilson. The dissentient was Mr. Justice Murphy.

This is not the place to comment on the intellectual worth of the majority judgments, other than to note that they are predicated on a demonstrably perverse interpretation of what the founding fathers considered to be prohibited by the establishment ciause. That shall wait as a thesis for the future.

**No decision was made by the court on whether the individual plaintiffs suing in their capacity as taxpayers and parents of children attending government schools, and residents in a state or territory, had legal standing to challenge all or any of the statutes in question. Only Mr. Justice Murphy decided this issue. Fartiy un the basis of the American precedents he ruled that taxpayers as such had standing. But the lone voice of "the Great Dissenter" is cold comfort to ordinary citizens like the plaintiffs caught in the quicksands of the politico - legal process.**

**On the day of judgment the Commonwealth did not seek to recover costs from the plaintiffs, but the church school interest did. The court ordered the plaintiffs to pay the costs of "the defendants, the National Council of Independent Schools and Father Francis Michael Martin (representing the non-government schools in the Commonwealth of Australia)."**

**Some of the plaintiffs at once publicly announced their intention to go to gaol rather than pay these costs a drastic resolve, but not hard to understand in light of the conduct of the church school interest as described in the previous pages. That the court, at the expense of the plaintiffs, should have financially compensated this interest group for its time-wasting, expense-generating conduct, does not accord with everyone's sense of the truly just.**

**So the leading churches in this land, creative in their way, have found a yet further way to misconstrue the words of their Master:**

**FOR UNTO EVERY ONE THAT HATH SHALL BE GIVEN, AND HE SHALL HAVE ABUNDANCE: BUT FROM HIM THAT HATH NOT SHALL BE TAKEN AWAY EVEN THAT WHICH HE HATH. (Matthew, 25:29)**

## ...FOOTNOTES:

1. Laskin J. Thorsen v Attorney General, (1974), 43 D.L.R. 3d 1, pp. 6-7.
2. Murphy J. A.A.P. case (1975) 134 C.L.R. pp 337-8, at 425.
3. The Supreme Court of the United States has found State Aid to be unconstitutional on the basis of the establishment clause in the First Amendment. Thus, Chief Justice Warren noted in Flast v Cohen, 392 US 83, 20 L Ed 2d 947 at 963-4,
"Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favour one religion over another or to support religion in general. James Madison, who is generally recognised as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment may force him to conform to any other establishment in all cases whatsoever" "Writing of James Madison 183, 186 (Hunt ed 1901). The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending power to aid one religion over another or to aid religion in general".
4. L.C.C. v Attorney General (1902) A.C. 165; Attorney General v Parish (1913), 2 Ch. 444; Attorney General v Westminister, C.C. (1924), 2 Ch.416.
5. H.W.R. Wade, Administrative Law, second edition, 1967, p. 11.
6. W. Hancock, The Battle of Black Mountains, (1974), p. 19.
7. W. Hancock to R. Nilsen, June19 1980.
8. Law Reform Commission Paper, Access to Courts, Section 1, Standing: Public Interest Suits, p. 27.
9. Vigilant, November 14 1956, p. 6.
10. This commitment was suspected by the Citizens wishing to obtain fiat at the time, but OSullivan's close involvement in the campaign for obtaining state aid has recently been confirmed by an article in the Catholic Leader of August 3 1980, p. 8. Describing the dedication of a room at St. John Fisher College, University of Tasmania, to the memory of Father Kevin O'Sullivan of the Society of Jesus, the article noted that, Father Kevin O'Sullivan was brother of the late Sir Neil O'Sullivan, who was Government leader in the Senate during the coalition government of Sir Robert Menzies, and at various stages was federal Attorney General, Minister for the Navy and Minister for Trade and Commerce.
The two brothers worked tirelessly in campaigning for State Aid to schools, producing pamphlets and addressing meetings around the country.
Sir Neil's son, Patrick, was provincial of the Society of Jesus from 1972 to 1978.
11. SeenotelO.
12. Minutes of the V.P.F. Executive, August 7 1957.
13. Report of 18th Annual Conference of A.C.S.S.O. October 12 1964, p.15.
14. Hansard, May 14 1964 pp. 1930-1.
15. Gough Whitlam to CS. Wyndham February 11 1966, released to the Press.
16. H. Nilsen, speech delivered at the 1971 launching of the Challenge to State Aid on Section 116 at the Dallas Brooks Hall, September 21 1971.
17. Western Australia to Zigouras, July 111972.
18. A. Calwell in Hansard, May 14 1964, p. 1930.
19. Dunstan to S.A.S.S.O. August 2, 1972.
20. Senator I. Greenwood to Zigouras, July 28 1972.
21. M. Pearson, "The Legal Challenge: Why is S.A.S.S.O. involved?" August 1973.
22. Interview with R. Nilsen, June 20 1980. If there was a political dimension to the Victorian decision, it may relate to endemic state-federal tensions, and a Victorian government hope to establish some limit on the "terms and conditions" which the federal government might attach to the Section 96 grants to the states.
23. Australian Financial Review, May 10 1974.
24. Zigouras to Victoria, April 22 1974.
25. Australian Financial Review, May 10 1974.
26. TheAge,May 11 1974,p. 1;TheSun,May 11 1974,p.7.
27. See later Section on the October 10 1979 Hearing in the High Court," The Intervention of the States."
28. TheSun,May 151974, p. 17.
29. The Australian, May 14 1974, p. 2.
30. J. D. Merralls, Wilcox had Right to Allow Court Test, Letter to The Age, May 211974.
31. In the Tasmanian Lake Pedder case the Cabinet attempted to override the Attorney General's decision. The Attorney General took the view that the decision was entrusted to him alone as law officer and that it was beyond the constitutional competence of cabinet to interfere with it. He resigned his office. In the Black Mountain case, Senator Murphy granted a fiat but, for his own reasons, decided to withdraw from the action not only in fact but also in form. By legislative instrument he amended the title of the action to omit the Attorney General as plaintiff. See Report of the Law Reform Commission, 1977.
32. Attorney General for Victoria v Commonwealth (1945), 71 C.L.R. 237, at 272.
33. Zigouras to Attorneys General, August 15 1973.
34. "Solicitor to Counsel" papers 1972- 1974.
35. Victoria to Zigouras September 23 1974.
36. Zigouras to Victoria November 111974.
37. The Herald, January 29 1975.
38. Zigouras to Victoria February 5 1975.
39. Zigourasto Victoria, December23 1974.
40. Secretary to A.C.S.S.O., Susan Ryan to Zigouras, October 24 1974.
41. Victoria to Zigouras February 51975.
42. Victoria to Zigouras, May 24 1975.
43. Zigourasto Victoria May29 1975; September 191975.
44. Victoria to Zigouras, June 6 1975; Victoria to Una Hodgson. undated, copy to Zigouras. October 7 1975.
45. Victoria to Zigouras October 7 1975.
46. Zigouras to Victoria, November 7 1975.
47. A.C.S.S.O. to Zigouras, October 24 1974.
48. Solicitors' note of telephone conversation February 24 1974.
49. Victoria to Zigouras December 17 1976 approving amendments.
50. Zigouras to Victoria December 22 1976 seeking further amendments for legislation passed while waiting approval of amendments requested on November 3 1976.
51. Victoria to Zigouras December 24 1976.
52. Notes Between Barristers and Solicitor, March - April 1976.
53. Cash costs $350,000 +, but this does not include contributed services.
54. Zigourasto Commonwealth July 71977. "whilst the clients must be expected to live with some delays which are inevitable to the administration of the court system no doubt you would agree that it is totally impossible to explain to the clients why a five month dalay should be tolerated...
We are unable to prevail on our clients to accept further delay. Nor do we consider that it is proper that we should do so in the circumstances.
55. Commonwealth to Zigouras, July 15 1977.
56. R. Nilsen, Interview, June 20 1980.
57. Telegram, May 24 1977.
58. Zigouras to Victoria July 15 1977; Victoria to Zigouras July 19 1977.
59. Court Order, Justice Aickin, August 19 1977.
60. Commonwealth to Zigouras September20 1977.
61. Commonwealth To Zigouras September 27 1977.
62. Zigouras to Commonwealth October 24 1977.
63. Zigouras to Commonwealth October 16 1977.
64. Solicitors' note, November 14 1977.
65. Telegram, November 1977.
66. Notice of Discovery of Documents November 29 1977.

67. High Court Rules Order 32. 10.
urge strongest possible stand in fixing date for trial. Commonwealth performance in past two and a half years a disgrace, with continual delaying, stalling October 24 1977 letter on profile never answered. Failure to make effort to respond to discovery November 29; finally forced into court April 26 1978; May 9 1978 letters and attachments on profile yet to be answered. Sent ten weeks ago. Aickin on April 26 felt agreement on profile should not be hard . . . must fix a date of trial as soon as possible
69. Solicitors' notes for meetings in chambers, July 20 1978.
70. Motion August 311978:
"We wish to convey to J. N. Zigouras and Co. and Mr. N. B. McPhee that an objection should be raised to Mr. Justice Aickin's participation in the matters before the High Court. We do so because when Mr. Justice Aickin was a senior counsel he was approached twice by us for the No-State Aid side to be our senior counsel and on both occasions we were rejected. The approaches to Mr. Aickin Q.C. as he then was - prior to August 1972 before we retained Mr. John Mcintosh Young Q.C. but before we retained other counsel in August 1974. We believe Corr and Corr retained Mr. K. Aickin Q.C. as he then was for the Roman Catholics and others after our two unsuccessful approaches.
ii. Probably Mr. Justice Aickin will have to decide the very question and from the same party he accepted the retainer from.
71. Commonwealth to Plaintiffs' Legal Representatives, September 27 1978.
72. Transcript of October 5 hearings, High Court, Melbourne.
73. Plaintiffs' Submission related to the Intervention of the Church interest, November 10 1978.
74. Zigourasto Victoria, October 9, November 101978.
75. Victoria to Zigouras October 27, November 14 1978.
76. Transcript of High Court Proceedings in Sydney, November 20 1978, pp. 17,23.
77. op. cit. p. 26.
78. Plaintiffs to court, October 16 1978.
79. Transcript of Court Hearing of November 20, pp. 19-20.
80. See Lemon v Kurtzman and Earley v Di Censo and Robinson v Di Censo. 29 L.Ed 2d 745 at 759.
81. Zigouras to Corr and Corr, January 18 1979.
82. Transcript of court hearing November20 1978, p. 20.
83. op.cit. pp. 19-20.
84. Ibid. p. 26.
85. Clarke, Richardson and Grant & Co. to Zigouras, March 5 1979.
86. Letter sent by Zigouras to various church officials called as witnesses, circa February 20 1979.
87. Interview with R. Nilsen, June 20 1980.
88. Transcript court hearing June 5 1979, p. 2128.
89. Tactics in this particular case prevented the plaintiffs' barrister from attempting to have own witnesses declared hostile.
90. Victoria to Zigouras May 24 1979; Victoria to Zigouras May 311979.
91. Transcript of court hearing, May 24 1979, pp. 1984, 1989.
92. The Australian Financial Reviews May 10, 1974.
93. The Advertiser, September 27 1979, p. 12.
94. Court transcript October 10 1979 Mr. Shaw, p. 2468.

...

APPENDIX A: General (1972-3) Summary of Correspondence Between J. N. Zigouras and Co. and Attorneys:

- Tasmania.
- Western Australia.
- South Australia.
- Queensland.
- New South Wales.
- Commonwealth.
- Victoria.

APPENDIX B: Commonwealth of Australia Bill 2 March 1898:Debate on What was to Become Section 116 of the Australian Constitution:

- Introductory Remarks.
- Commonwealth Debates Pages 1769 - 1780.
- Concluding Remarks.