

## THE ESTABLISHMENT CLAUSE OF THE AUSTRALIAN CONSTITUTION: THREE PROPOSITIONS AND A CASE STUDY

### ABSTRACT

This article argues that the reasoning in *Attorney-General (Vic) ex rel Black v Commonwealth*, the sole High Court case on the meaning of the establishment clause of s 116 the *Constitution*, is too narrow and requires reconsideration. It begins that process of reconsideration and argues that the proper meaning of the establishment clause encompasses at least the following three propositions. First, the establishment clause prohibits federal expenditure for religious purposes such as religious activities. Secondly, the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth. Thirdly, the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories. The article concludes by testing the Australian Government's National School Chaplaincy and Student Welfare Program against those three propositions.

### I INTRODUCTION

**T**he High Court of Australia has decided only one case on the 'establishment clause' of s 116 of the *Constitution*. Section 116 provides:

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.

The decision was the 1981 case of *Attorney-General (Vic) ex rel Black v Commonwealth* ('DOGS Case') in which it was held that federal funding of non-government schools that happened to be operated by religious organisations did not contravene the establishment clause when the funding was for ordinary educational purposes.<sup>1</sup> The reasoning in the *DOGS Case* has been described variously as 'restrictive',<sup>2</sup>

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<sup>1</sup> (1981) 146 CLR 559.

<sup>2</sup> *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* (2011) 256 FLR 156, 165 [28].

‘strict’<sup>3</sup> and as setting ‘a very high threshold’.<sup>4</sup> The narrow reasoning in that case — as opposed to its result — is also inconsistent with the reasoning of the High Court in *Williams v Commonwealth (No 1)* (*School Chaplains Case*),<sup>5</sup> which dealt with the religious tests clause of s 116. The narrow reasoning in the *DOGS Case* is also inconsistent with the High Court’s approach to interpreting other prohibitions on power contained in the *Constitution*. The meaning of the establishment clause therefore requires reconsideration.

This article offers a first step in the reconsideration of the meaning of the establishment clause. It uses the facts of the National School Chaplaincy and Student Welfare Program (‘the NSCSWP’) as a useful point of reference. It does so not simply because the High Court refuses to consider abstract questions of legal principle divorced from any application to facts (and mimicking the High Court’s approach is methodologically useful in any attempt to predict the course of legal development), but also because statements of legal principle are more readily understood in their application to factual scenarios. The use of the NSCSWP as the factual scenario is further justified because the reconsideration of the establishment clause arises, in part, from the *School Chaplains Case*.

Part II of this article explains how the reasoning in the *DOGS Case* is too narrow because of its inconsistency with the reasoning in the *School Chaplains Case* and the High Court’s approach to interpreting other prohibitions on power. Part III presents some factual background about the NSCSWP and the work of school chaplains as part of that program. Part IV moves to a consideration of the meaning of the establishment clause and presents three propositions as arguable statements of legal principle concerning its meaning. The first proposition is that the establishment clause prohibits federal expenditure for religious purposes such as religious activities. The second proposition is that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth. The third proposition is that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories. Finally, Part V applies those principles to the facts of the NSCSWP as a demonstration of how reasoning under a reconsidered establishment clause might play out in practice.

## II THE REASONING IN THE *DOGS CASE* IS TOO NARROW

In late 2012, Ron Williams, a Queensland father of school-aged children, achieved a short-lived victory in his High Court challenge to the National School

<sup>3</sup> Joshua Puls, ‘The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees’ (1998) 26 *Federal Law Review* 139, 144.

<sup>4</sup> Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 85.

<sup>5</sup> (2012) 248 CLR 156.

Chaplaincy Program.<sup>6</sup> This program had been established and funded by the Commonwealth in a purported exercise of the executive power of the Commonwealth in the absence of any statutory authorisation beyond a mere appropriation statute. In the *School Chaplains Case*, Mr Williams succeeded in arguing that this was not a lawful basis for the Commonwealth's expenditure.<sup>7</sup> The High Court rejected Mr Williams' additional argument that the program contravened the prohibition in s 116 of the *Constitution* against religious tests for offices under the Commonwealth. The chaplains, the High Court held, did not hold an office under the Commonwealth.<sup>8</sup>

A few days after the High Court handed down its decision, the Commonwealth Parliament enacted legislation to put what had by then become the NSCSWP on a legislative footing.<sup>9</sup> In response to that legislation, Mr Williams indicated his intention to launch a second challenge to the NSCSWP.<sup>10</sup> In August 2013, Mr Williams made good his intention and commenced proceedings in the High Court challenging the legislation.<sup>11</sup> In June 2014, the High Court held that the legislation, to the extent it purported to apply to the NSCSWP, was not supported by any constitutional head of power.<sup>12</sup> Despite the invalidation of the NSCSWP, it remains a useful case study to examine the meaning of the establishment clause. The analysis in this article therefore proceeds on the assumption that the NSCSWP is somehow within Commonwealth power. In this regard, it is noted that following the decision in *Williams (No 2)* the Commonwealth indicated its intention to consider continuing a version of the NSCSWP by means of s 96 grants to the states.

In the *School Chaplains Case*, in the course of holding that the chaplains did not hold an office under the Commonwealth, Gummow and Bell JJ said that 'it may be accepted that, given the significance of the place of s 116 in the *Constitution*,

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<sup>6</sup> Ibid.

<sup>7</sup> For discussions of this aspect of the case, see, eg, Shipra Chordia, Andrew Lynch and George Williams, 'Williams v Commonwealth: Commonwealth Executive Power and Australian Federalism' (2013) 37 *Melbourne University Law Review* 189; Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35(2) *Sydney Law Review* 253; Benjamin B Saunders, 'The Commonwealth and the Chaplains: Executive Power after Williams v Commonwealth' (2012) 23 *Public Law Review* 153.

<sup>8</sup> For a discussion of this part of the case, see Luke Beck, 'Williams v Commonwealth: School Chaplains and the Religious Tests Clause of the Constitution' (2012) 38 *Monash University Law Review* 271.

<sup>9</sup> *Financial Framework Amendment Act (No 3) 2012* (Cth).

<sup>10</sup> Nicola Berkovic, 'Father Flags Second Chaplaincy Challenge', *The Australian* (online), 27 June 2012, <<http://www.theaustralian.com.au/national-affairs/education/father-flags-second-chaplaincy-challenge/story-fn59nlz9-1226409555822>>.

<sup>11</sup> Ronald Williams, 'Statement of Claim', *Williams v Commonwealth*, S154/2013, 8 August 2013.

<sup>12</sup> *Williams v Commonwealth (No 2)* [2014] HCA 23.

the term *should not be given a restricted meaning* when used in that provision.<sup>13</sup> The separate judgments of French CJ,<sup>14</sup> Hayne,<sup>15</sup> Crennan<sup>16</sup> and Kiefel JJ<sup>17</sup> indicated their agreement with Gummow and Bell JJ on s 116 issues. Gummow and Bell JJ's statement should be read carefully. The term in question was 'office' and their Honours held it should not be given a restricted meaning. The reason for that interpretive approach was the significance of the place of s 116 in the *Constitution*. Obviously, the 'significance of the place of s 116 in the *Constitution*'<sup>18</sup> does not change in respect of the different clauses of s 116. It follows that, both being concrete terms, the interpretive approach in respect of the word 'office' is equally applicable to the word 'establishing'.

This rejection of restricted meanings conflicts with the reasoning in the *DOGS Case*.<sup>19</sup> The case concerned a challenge to federal funding of non-government schools that happened to be operated by religious groups. The High Court, by six to one, held that such funding did not breach the establishment clause.<sup>20</sup> The reasoning in the *DOGS Case* is considered in more detail below. What is important for present purposes is the fact that the reasoning in the *DOGS Case* was, as mentioned in the introduction, rather restrictive.

In 2011, in *Hoxton Park Residents Action Group v Liverpool City Council (No 2)* ('*Hoxton Park (No 2)*'), the New South Wales Court of Appeal overturned a decision to strike out a claim that federal funding of an Islamic school contravened the establishment clause.<sup>21</sup> The original striking out had been made on the ground that the issue had been authoritatively decided by the *DOGS Case*. In deciding to overturn this decision, the Court of Appeal said 'it may be accepted that the term "establishing" in s 116 was given a restrictive meaning' in the *DOGS Case*.<sup>22</sup> However, the Court of Appeal also pointed out that approaches to constitutional interpretation have evolved since the *DOGS Case* was decided. References to the record of the Conventions at which the *Constitution* was drafted have, since the *DOGS Case*,

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<sup>13</sup> *School Chaplains Case* (2012) 248 CLR 156, 223 [110] (emphasis added) (footnote omitted).

<sup>14</sup> *Ibid* 182 [9].

<sup>15</sup> *Ibid* 240 [168].

<sup>16</sup> *Ibid* 341 [476].

<sup>17</sup> *Ibid* 374 [597].

<sup>18</sup> *School Chaplains Case* (2012) 248 CLR 156, 223 [110] (Gummow and Bell JJ).

<sup>19</sup> The case is known as the *DOGS Case* because it was brought by an organisation called Defence of Government Schools.

<sup>20</sup> *DOGS Case* (1981) 146 CLR 559 (Barwick CJ, Gibbs, Stephen, Mason, Aickin, Wilson JJ; Murphy J dissenting).

<sup>21</sup> (2011) 256 FLR 156. For a detailed discussion of the case, see Luke Beck, 'Dead *DOGS*? Towards a Less Restrictive Interpretation of the Establishment Clause: *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)*' (2013) 36 *University of Western Australia Law Review* 59.

<sup>22</sup> *Ibid* 165 [28].

become a permitted source of constitutional reasoning and references to American jurisprudence are now more readily entertained by the High Court.<sup>23</sup> These developments might, the Court of Appeal considered, 'allow submissions to be made supporting a more a flexible approach to the constraints on legislative power expressed in s 116.'<sup>24</sup>

Reliance need not be placed on the Court of Appeal's characterisation of the reasoning in the *DOGS Case* as 'restrictive' to show that the reasoning in that case is inconsistent with the *School Chaplains Case*. A number of the majority judges in the *DOGS Case* said themselves that they were being deliberately narrow in their reasoning. Justice Gibbs said '[t]here is no reason to give [s 116] a liberal interpretation.'<sup>25</sup> Justice Wilson, with whom Mason J agreed,<sup>26</sup> stated what while grants of power 'should be construed with all the generality which the words used will admit ... the same is not true of a provision which proscribes power.'<sup>27</sup> It follows that there is an inconsistency between the interpretive approach to s 116 adopted in the *School Chaplains Case* and that adopted in the *DOGS Case*.

The restrictive approach to interpretation in the *DOGS Case* is also inconsistent with the High Court's approach to interpreting other constitutional prohibitions on power. A clear example of this is s 117, which prohibits discrimination based on a citizen's state of residence. As Amelia Simpson has explained, the High Court's early cases on s 117 'gave the provision a very narrow construction'.<sup>28</sup> In 1989, however, the High Court rejected those narrow constructions in *Street v Queensland Bar Association* and gave the provision a broad construction.<sup>29</sup> What is important for present purposes is that, as George Williams and David Hume have commented, the 'judgments in *Street*, in direct contrast to those of Mason J and Wilson J in the *DOGS case* just eight years previously ... were infused with the notion that important constitutional guarantees should be liberally construed.'<sup>30</sup>

There is another reason why the approach to interpreting the establishment clause in the *DOGS Case* is too narrow. Reid Mortensen argues that the interpretation given to the establishment clause in the *DOGS Case* is so narrow that the

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<sup>23</sup> Ibid 166 [32].

<sup>24</sup> Ibid 166 [34].

<sup>25</sup> *DOGS Case* (1981) 146 CLR 559, 603.

<sup>26</sup> Ibid 612.

<sup>27</sup> Ibid 653.

<sup>28</sup> Amelia Simpson, 'The (Limited) Significance of the Individual in Section 117 State Residence Discrimination' (2008) 32 *Melbourne University Law Review* 639, 642.

<sup>29</sup> (1989) 168 CLR 461.

<sup>30</sup> George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 277.

clause ‘means nothing’.<sup>31</sup> The meaning given to the clause in the *DOGS Case* is discussed below. What matters for present purposes is Mortensen’s point that the Commonwealth has no power in the first place to do what the High Court in the *DOGS Case* said establishing a religion involves.<sup>32</sup> It is a rather peculiar approach to constitutional interpretation that has the result of rendering a constitutional provision meaningless and the scope of Commonwealth power the same as if a provision that is expressed to limit Commonwealth power had never been included in the *Constitution* in the first place or had later been repealed. This provides an additional reason for the conclusion that the reasoning in the *DOGS Case* is too narrow or restrictive.

It is clear then that the approach to interpreting the establishment clause taken by the majority in the *DOGS Case* can no longer be viewed as authoritative. That approach is too narrow. That is not to say, however, that the result in the *DOGS Case* — that federal funding of schools that happen to be operated by religious groups is not prohibited by the establishment clause — is incorrect. As it happens, the broader reading of the establishment clause outlined below would not alter the result in that case. Before turning to the task of developing a less-restricted interpretation of the establishment clause, it is necessary to explain the facts of the NSCSWP which will be used to help expound that interpretation.

### III THE FACTUAL SCENARIO

#### *A The National School Chaplaincy and Student Welfare Program*

In September 2011, the Commonwealth announced that the existing National School Chaplaincy Program would become the National School Chaplaincy and Student Welfare Program with effect from January 2012.<sup>33</sup>

Under the former National School Chaplaincy Program, schools could apply to the Commonwealth for funding that would enable the provision of ‘chaplaincy services’ by a ‘school chaplain’ in the school. The NSCSWP was an expanded version of its predecessor.<sup>34</sup> Whilst there were changes relating to administrative matters such as procedures for working with children checks and for handling complaints, the principal difference between the two versions was that in the broader NSCSWP schools had the option of engaging the services of a secular student welfare worker, who was chosen without regard to their religion and religious qualifications, instead

<sup>31</sup> Reid Mortensen, ‘The Establishment Clause: A Search for Meaning’ (2014) 33 *University of Queensland Law Journal* 109, 119–20.

<sup>32</sup> *Ibid.*

<sup>33</sup> Commonwealth Department of Education, Employment and Workplace Relations, *National School Chaplaincy and Student Welfare Program Guidelines*, June 2013 (‘NSCSWP Guidelines’) 9.

<sup>34</sup> Jeremy Patrick, ‘Religion, Secularism and the National School Chaplaincy and Student Welfare Program’ (2014) 33 *University of Queensland Law Journal* 187 provides a thorough overview and analysis of the program and its history.

of a religious chaplain, who must be ordained or accredited by a recognised religious institution.<sup>35</sup> As the *National School Chaplaincy and Student Welfare Program Guidelines* state:

The new National School Chaplaincy and Student Welfare Program (the Program) was announced in September 2011. Commencing in January 2012, the Program builds upon the success of the National School Chaplaincy Program and supports school communities to establish school chaplaincy and student welfare services or to enhance existing services ... From January 2012, schools funded under the Program are able to choose the services of a school chaplain to provide pastoral care services and/or select the services of a non faith-based, or secular, student welfare worker.<sup>36</sup>

Under the NSCSWP, individual schools did not receive Commonwealth funds. Rather, the Commonwealth entered into a contractual arrangement with an organisation described by the Guidelines as a 'Funding Recipient'. The Funding Recipient was responsible for engaging either a 'school chaplain' or a 'student welfare worker' who would provide services at a particular school. Whether a school chaplain or a student welfare worker would be engaged was at the election of individual schools and those schools that elected a chaplain could also elect the chaplain's religious affiliation. The identity of the chaplain or student welfare worker was also a decision for the school.<sup>37</sup>

The operational substance of the NSCSWP was established by the *NSCSWP Guidelines* issued by the relevant Commonwealth department.<sup>38</sup> Those Guidelines were also incorporated into the contracts between the Commonwealth and the various Funding Recipients.<sup>39</sup>

### B School Chaplains and Chaplaincy Services

As noted above, schools could elect to engage either a school chaplain or a student welfare worker. Those terms are defined in the Guidelines:

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<sup>35</sup> In 2008, the original program was modified to allow a 'secular pastoral care worker' to be engaged but only where the school is unable to identify a suitable candidate for a chaplaincy position: Commonwealth Department of Education, Employment and Workplace Relations, *National School Chaplaincy Program 2011: Have Your Say – A Discussion Paper*, February 2011, 20. The primary reason for this modification was 'the inability of some schools to source an individual for the chaplaincy role who was agreeable to the whole school community': at 9. See also, Commonwealth Ombudsman, *The Department of Education, Employment and Workplace Relations' Administration of the National School Chaplaincy Program*, Report, July 2011, 4 [1.9].

<sup>36</sup> *NSCSWP Guidelines*, above n 33, 9.

<sup>37</sup> See *NSCSWP Guidelines*, above n 33

<sup>38</sup> *Ibid* 10.

<sup>39</sup> *Ibid* 10.

For the purposes of this Program, a school chaplain is a person who:

- is recognised by the school community and the appropriate governing authority for the school as having the skills and experience to deliver school chaplaincy (as outlined at Section 1.5) to the school community
- is recognised through formal ordination, commissioning, recognised religious qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service ...<sup>40</sup>

With respect to student welfare workers, the Guidelines state:

For the purposes of this Program, a student welfare worker is a person who:

- is recognised by the local school community and the appropriate governing authority for the school as having the skills and experience to deliver student welfare services (as outlined at Section 1.5) to the school community.<sup>41</sup>

The particular services that school chaplains and student welfare workers provide vary depending on the needs and desires of particular schools. The Guidelines state that these services could include things like running breakfast clubs, delivering peer leadership and support programs and contributing to school newsletters.<sup>42</sup>

The Guidelines also state that a school chaplain may provide services with a far more obvious religious character. Most relevantly for the argument of this article, the Guidelines permit school chaplains, if parental consent is obtained, to ‘deliver activities/services that promote a particular view or religious belief’,<sup>43</sup> ‘provid[e] services with a spiritual content’,<sup>44</sup> and ‘[perform] religious services/rites (such as worship or prayer during school assembly etc).’<sup>45</sup>

The Guidelines are not clear as to whether student welfare workers may also perform these religious activities, although, given the qualifications for the position, they presumably would not do so in practice. The Guidelines state that the expression ‘student welfare service’ means ‘*secular* student welfare service/s’.<sup>46</sup> This would suggest that the work of a student welfare worker should not extend to religious activities. However, Part 3 of the *NSCSWP Guidelines* states that the ‘key tasks of a school/chaplain student welfare worker ... could include’ and then sets out a list of bullet points giving examples of various activities without any suggestion that there are activities that may be performed by one class of position and not the other.

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<sup>40</sup> Ibid 12.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid 11, 17.

<sup>43</sup> Ibid 16.

<sup>44</sup> Ibid 15.

<sup>45</sup> Ibid 16.

<sup>46</sup> Ibid 10 (emphasis added).

For the purposes of this article, it is not necessary to pursue this issue.<sup>47</sup> It suffices that the *NSCSWP Guidelines* clearly authorise school chaplains to perform religious activities.

Almost all school chaplains — more than 99 per cent — belonged to one of the various Christian denominations. In its response to a question on notice about the religious affiliations of school chaplains during Budget Estimates hearings, the Department of Education, Employment and Workplace Relations stated:

As at 1 November 2012, there were 2,607 chaplains (excluding Student Welfare Workers) registered for the National School Chaplaincy and Student Welfare Program. Of these, 2,593 identify as various Christian denominations and 14 from other religions...<sup>48</sup>

The Department provided this breakdown of the religious affiliation of school chaplains:<sup>49</sup>

Religious Denomination	Total
<b>Christian Religions</b>	<b>2593</b>
Anglican	143
Baptist	143
Catholic	182
Churches of Christ	55
Eastern Orthodox	1
Lutheran	20
Pentecostal	168
Presbyterian & Reformed Churches	10
Salvation Army	22
Seventh Day Adventist	28
Uniting Church	45
Unspecified	1776
<b>Other Religions</b>	<b>14</b>
Aboriginal traditional religions	2
Buddhist	1
Baha'i	1
Islam	6
Judaism	4
<b>Total</b>	<b>2607</b>

<sup>47</sup> For a discussion of the NSCSWP in practice see, eg, Marion Maddox, *Taking God to School: The End of Australia's Egalitarian Education?* (Allen & Unwin, 2014) ch 6.

<sup>48</sup> Senate Standing Committee on Education Employment and Workplace Relations, *Supplementary Budget Estimates 2012-2013: Answer to Question on Notice EW0726\_13* (30 January 2013) Parliament of Australia <[www.aph.gov.au/Parliamentary\\_Business/Senate\\_Estimates/eetctte/estimates/supl213/index](http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/eetctte/estimates/supl213/index)>.

<sup>49</sup> Ibid.

By way of contrast, in the 2011 Census, 61.1 per cent of the population reported adherence to a Christian religion, 7.2 per cent reported adherence to a non-Christian religion and 22.3 per cent reported having no religion.<sup>50</sup>

#### IV THE ESTABLISHMENT CLAUSE

The analysis above concerning the *School Chaplains Case* and the High Court's broader interpretive approach to s 117 clearly indicates that the narrow approach of the *DOGS Case* would be subject to reconsideration in an appropriate case. However, the *School Chaplains Case* gives no indication of how non-restrictive any new interpretation might be. A methodological approach does, however, present itself. The High Court has recently re-endorsed a method of constitutional reasoning that understands concepts referred to in the text of the *Constitution* in terms of their centre and circumference. In a 2013 case in which the scope of the Commonwealth's power to make laws with respect to 'marriage' was in issue, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ said:

It may readily be accepted that what Windeyer J described as 'the monogamous marriage of Christianity' would have provided, at Federation, the central type of 'marriage' with respect to which s 51(xxi) conferred legislative power. But, as Higgins J said in relation to the trade marks power, usage of the term in 1900 may give the centre of the power but 'it does not give us the *circumference* of the power' (emphasis added). Hence, as Windeyer J rightly said in the *Marriage Act Case*, '[m]arriage law is not a matter of precise demarcation'. It is, instead, 'a recognized topic of juristic classification'.<sup>51</sup>

The analysis which follows below takes the reasoning of the majority in the *DOGS Case* as sitting somewhere near the centre of the concept 'establishing any religion' and seeks to expand the circumference. There is a sensible reason for adopting this methodological approach for the purposes of this article. The article's starting premise is not that the reasoning in the *DOGS Case* is entirely wrong. The starting premise is that the reasoning in the *DOGS Case* is too narrow or restrictive. This is what the NSW Court of Appeal said in *Hoxton Park (No 2)*. It is also what follows from the High Court's approach to s 117 and from the *School Chaplains Case*. The reasoning in the *DOGS Case* can therefore be seen as being located somewhere near the centre of the prohibition but not constituting its outer limits.

It is, of course, inherent in the centre and circumference approach to interpretation that a judgment must be made as to how far the radius of a concept should extend from the centre. Since the purpose of this article is to offer only a first step in the reconsideration of the meaning of the establishment clause, it does not attempt to move away from the reasoning in the *DOGS Case* in any fundamentally profound

<sup>50</sup> Australian Bureau of Statistics, *Cultural Diversity in Australia* (16 April 2013) <<http://abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>>.

<sup>51</sup> *Commonwealth v Australian Capital Territory* (2013) 304 ALR 204, 209 [20] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (citations omitted).

way. Instead, the approach is to make relatively straight-forward arguments derived from considering the position of the Church of England in the United Kingdom, which is undoubtedly an established church and which was referred to in the *DOGS Case*, and that seem relevant in a consideration of the validity of the NSCSWP in terms of the establishment clause.

Adopting the centre and circumference approach to interpretation approved and adopted by the High Court in 2013 is not problematic in the context of analysing the meaning of ‘establishing any religion’. As Gibbs J recognised in the *DOGS Case* it ‘may be a question of degree whether a law is one for establishing a religion.’<sup>52</sup>

The following three propositions may be readily defended as statements of legal principle concerning the meaning of the establishment clause. First, the establishment clause prohibits federal expenditure for religious purposes such as religious activities. Secondly, the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth. Thirdly, the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories.

None of these principles, it should be noted, would alter the result in the *DOGS Case*. Federal funding in a non-discriminatory manner of non-government schools that are owned or operated by religious organisations would not be invalid by reason of any of these principles. It is the reasoning, and not the result, in the *DOGS Case* which calls for reconsideration.

*A The First Proposition: The Establishment Clause Prohibits Federal Expenditure for Religious Purposes such as Religious Activities*

As mentioned above, the *DOGS Case* is the only High Court decision on the meaning of the establishment clause. All of the majority judges in the *DOGS Case* emphasised that the funding of religiously-affiliated non-government schools was for ordinary educational activities and not for any religious activities. Barwick CJ emphasised that funds were being granted purely for ordinary educational purposes:

Nothing in the laws made by the Parliament expressly authorizes the use of Commonwealth funds for [religious] purposes ... I have been unable to find any statutory authorization by the Commonwealth of any religious activity on the part of the non-government schools in the course of their educational activities.<sup>53</sup>

Similarly, Gibbs J said that, ‘[t]he primary purpose of the challenged legislation is the advancement of education within Australia. That would, no doubt, not be decisive if the legislation had the further purpose of establishing any religion.’<sup>54</sup>

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<sup>52</sup> *DOGS Case* (1981) 146 CLR 559, 604.

<sup>53</sup> *Ibid*, 583.

<sup>54</sup> *Ibid* 604.

Justice Mason said:

It is altogether too much to say that a law which gives financial aid to churches generally, to be expended on education, is a law for establishing religion. The mere provision of financial aid to churches generally, more particularly when that aid is genuinely linked to expenditure on education, falls short of ‘establishing’ a ‘religion’...<sup>55</sup>

Justice Wilson said that the funding scheme in the *DOGS Case* had ‘a secular legislative purpose, that of upgrading the quality and range of education in primary and secondary government and non-government schools throughout Australia.’<sup>56</sup> He continued:

It may be true that in many cases one effect may be to advance religion appreciably, but, even so, such a result is not central to the operation of the legislative scheme. It is an incidental or indirect consequence of the pursuit of the educational purpose. In no case is religion a criterion which attracts a grant.<sup>57</sup>

What is significant for present purposes is that these judges appear to hold the view that no law of the Commonwealth could, consistently with the establishment clause, directly support federal funding for a religious purpose such as funding of religious activities.

This is also the reading of the *DOGS Case* offered in 2011 by the New South Wales Court of Appeal in *Hoxton Park (No 2)*.<sup>58</sup> In that case, the plaintiffs alleged that the Commonwealth was funding the construction of a religious school with associated buildings that included a mosque. The judge at first instance struck out the claim on the ground that it was doomed to fail by reason of the result in the *DOGS Case*.<sup>59</sup> The Court of Appeal, however, considered that it was ‘clear’ that the factual matters raised in the case differed from those raised in the *DOGS Case*.<sup>60</sup> The *DOGS Case* concerned Commonwealth funding of religious schools for educational purposes. The allegation in this case concerned the additional and quite different issue of funding of a religious body for religious purposes, namely the construction of the mosque. The Court of Appeal pointed out that this ‘was not an issue raised in [the *DOGS Case*].’<sup>61</sup> The strike out decision was, therefore, overturned.

There is, therefore, a basis in the case law for the proposition that the establishment clause of s 116 prohibits federal expenditure for religious purposes, such as for religious activities. The Convention Debates also support this proposition. The meaning of the

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<sup>55</sup> Ibid 616.

<sup>56</sup> Ibid 656.

<sup>57</sup> Ibid.

<sup>58</sup> (2011) 256 FLR 156.

<sup>59</sup> *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2010) 246 FLR 207, 218–19.

<sup>60</sup> *Hoxton Park (No 2)* (2011) 256 FLR 156, 165 [28].

<sup>61</sup> Ibid 165 [28], 166 [34].

establishment clause was not subject to very much discussion at all at the Convention Debates, with the bulk of the discussion centred on the necessity of s 116.<sup>62</sup> However, there were some brief comments that are relevant. Edmund Barton thought that a provision such as s 116 was unnecessary, especially a prohibition against establishing any religion. He said: ‘as to establishing any religion, that is so absolutely out of the question, so entirely not to be expected.’<sup>63</sup> George Reid sought clarification about this from Barton on a matter relevant to the present discussion:

Mr REID            I suppose that money could not be paid to any church under this Constitution?

Mr BARTON       No; you have only two powers of spending money, and a church could not receive the funds of the Commonwealth under either of them.<sup>64</sup>

It would seem then that these delegates believed that the granting of public funds to churches could amount to an establishment of religion. This did not need to be expressly prohibited, Barton believed, because the Commonwealth was being granted no power under which it could grant public funds to churches. As it happens, the Commonwealth does give funds to churches, as for example the religious groups who provide employment services to the unemployed under the Commonwealth’s Job Network program. Nevertheless, given that the modern phenomenon of outsourcing of government service delivery was unlikely to be at the forefront of their minds, what Barton and Reid must have been concerned about was the granting of public funds to churches for religious purposes.

In advancing the first proposition there is no real departure from the reasoning in the *DOGS Case* and thus no real expansion of the circumference of the concept ‘establishing any religion’. Indeed, this proposition is simply a corollary of the reasoning in the *DOGS Case*, and one that finds support in the Convention Debates. The next two propositions do move away somewhat from that reasoning.

*B The Second Proposition: The Establishment Clause Prohibits the Commonwealth from Instituting Programs that Result in a Religion or Multiple Religions Becoming Identified with the Commonwealth*

In the *DOGS Case*, the majority judges offered similar explanations of the concept of establishment. Barwick CJ gave this definition:

Establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth.

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<sup>62</sup> See Luke Beck, ‘Higgins’ Argument for Section 116 of the Constitution’ (2013) 41 *Federal Law Review* 393.

<sup>63</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1772 (Edmund Barton).

<sup>64</sup> *Ibid* (George Reid and Edmund Barton).

It involves the identification of the religion with the civil authority *so as to involve the citizen in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronize, protect and promote the established religion*. In other words, establishing a religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth ‘establishment’. *One can perceive these concepts in the decision of the House of Lords in General Assembly of Free Church of Scotland v Lord Overtoun (1904) AC 515. I feel no doubt that this is the sense in which the relevant part of the language of s 116 was used when our Constitution was formed*. As I have indicated, I think the words would mean the same if constitutionally used today. Thus what s 116 forbids is the passage of a law which will erect a religion into such a relationship to the body politic of the Commonwealth as I have attempted to describe.<sup>65</sup>

The italicised words are problematic. The first set of italicised words would seem to throw doubt on the proposition that the Church of England is established in England, since it is not obvious that the Church of England meets that description.<sup>66</sup> It is not clear that any citizens are under a duty to maintain the Church of England. Such an interpretation of the meaning of the establishment clause cannot be accepted.

The citation to authority in the second set of italicised words is rather odd. *Overtoun* did not concern the legal meaning of ‘establishing’, or any variant form of that word. *Overtoun* was recently explained by the Outer House of the Scottish Court of Session:

In 1900, the majority of the Free Church finally unified with the United Presbyterian Church, becoming the ‘United Free Church’. The minority refused to participate. Instead, they commenced an action in the Court of Session seeking to have the property and assets of the Free Church transferred to them as adherents of the true Free Church. In the House of Lords in *Bannatyne v Overtoun* [1904] AC 515 [another name for the same case], the minority were vindicated. Their Lordships identified fundamental tenets of the Free Church from which the majority had departed, including the doctrine of predestination and the Establishment Principle (concerning the right and duty of the state to establish and maintain the Christian Faith). The minority were found to be the true Free Church, and were awarded all the assets.<sup>67</sup>

In other words, *Overtoun* concerned the meaning of ‘the establishment principle’ as a matter of Presbyterian religious doctrine for the purposes of deciding a trusts dispute. It can hardly be accepted that the theological meaning of a Presbyterian

<sup>65</sup> *DOGS Case* (1981) 146 CLR 559, 582 (emphasis added).

<sup>66</sup> See Luke Beck, ‘Clear and Emphatic: The Separation of Church and State under the *Australian Constitution*’ (2008) 27 *University of Tasmania Law Review* 161, 174 n 67.

<sup>67</sup> *The Free Church of Scotland v The General Assembly of the Free Church of Scotland* [2005] CSOH 46, [7].

religious doctrine controls the meaning of s 116.<sup>68</sup> In order to avoid moving too far from the position in the *DOGS Case*, Barwick CJ's definition could be reformulated for present purposes by deleting the italicised words such that it reads:

Establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth. It involves the identification of the religion with the civil authority ... In other words, establishing a religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth 'establishment'.

This reformulation of the passage does not necessarily go against the grain of Barwick CJ's intended meaning. The extracted passage from Barwick CJ's judgment concludes with 'as I have attempted to describe'. In other words, his Honour seems to suggest that there may be some lack of precision in his definition; that his definition is an *attempt* at a definition about which Barwick CJ seems to have some slight hesitation. It is *seeming* hesitation because Barwick CJ also says 'I find no ambiguity in the language of s 116'.<sup>69</sup> In any event, since the purpose of this article is to expand the circumference of the concept 'establishing any religion' taking the reasoning in the *DOGS Case* as somewhere near the centre point, any change in meaning is defensible.

Justice Gibbs gave this definition: 'The natural meaning of the phrase "establish any religion" is, as it was in 1900, to constitute a particular religion or religious body as a state religion or state church.'<sup>70</sup> His Honour also said that the clause means 'that the Commonwealth Parliament shall not make any law for conferring on a particular religion or religious body the position of a state (or national) religion or church.'<sup>71</sup>

Justice Stephen said that establishing a religion is 'to place (a church or a religious body) in the position of a state church.'<sup>72</sup> His Honour went on:

So much may readily enough be accepted: to speak of a religion being established by the laws of a country may well be to include much more than the act of according material recognition and status to a set of beliefs, a system of moral philosophy or particular doctrines of faith; it would certainly include the recognition of a particular religion or sect, with its priestly hierarchy and tenets, as that of the nation.<sup>73</sup>

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<sup>68</sup> Reid Mortensen has also made this point: Reid Mortensen, *The Secular Commonwealth: Constitutional Government, Law and Religion* (PhD Thesis, University of Queensland, 1996) 231; Reid Mortensen, 'Judicial (In)Activism in Australia's Secular Commonwealth' in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (ATF Press, 2005) 52, 63–4; Reid Mortensen, 'The Establishment Clause: A Search for Meaning' (2014) 33 *University of Queensland Law Journal* 109, 117.

<sup>69</sup> *DOGS Case* (1981) 146 CLR 559, 582.

<sup>70</sup> *Ibid* 597.

<sup>71</sup> *Ibid* 604.

<sup>72</sup> *Ibid* 606.

<sup>73</sup> *Ibid*.

Justice Wilson said that he saw in s 116 ‘a narrow notion of establishment, namely, that which requires statutory recognition of a religion as a national institution.’<sup>74</sup> Mason J, stating his agreement with Wilson J, said that the establishment clause ‘forbids the establishment or recognition of a religion (and by this term I would include a branch of a religion or church) as a national institution.’<sup>75</sup>

Justice Aickin did not give separate reasons, instead expressing his agreement with the reasons of Gibbs and Mason JJ.<sup>76</sup>

The terms ‘national institution’ used by Mason and Wilson JJ and ‘state church’ used by Stephen and Gibbs JJ would seem to be short-hand expressions for the concept more fully articulated by the modified form of Barwick CJ’s definition.<sup>77</sup> In other words, Barwick CJ’s notion of ‘identified with’ does the conceptual work. As Gibbs J explained in the *DOGS Case* it ‘may be a question of degree whether a law is one for establishing a religion’.<sup>78</sup> Thus it is a question of degree whether a relationship or association between state and religion — which, among other things, might involve the granting of state imprimatur to a religion or to religious or spiritual activities or beliefs, or state participation or collaboration in or encouragement of religious activities or rites — amounts to an identification of the state with a religion. The relationship between state and religion that exists, for example, when the fire brigade attends a burning church or when an electoral commission hires a church hall for the purposes of using it as a polling place would not amount to an identification of the state with a religion because the religious element to the relationship in question is tenuous and purely incidental.

If the idea that establishment is a question of identification of religion with the state is a defensible reading of the judgments in the *DOGS Case*, then the explanation of the meaning of establishment offered by the majority judges in the *DOGS Case* would seem to make strides towards demonstrating the proposition that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth.

However, the *DOGS Case* does not, by itself, demonstrate that proposition. It would seem only to go so far as indicating that the establishment clause prohibits the Commonwealth from instituting programs that result in a *single* religion becoming identified with the Commonwealth. Justice Stephen, for example, described the establishment clause as prohibiting only ‘the elevation of one church above all others’.<sup>79</sup>

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<sup>74</sup> Ibid 653.

<sup>75</sup> Ibid 612.

<sup>76</sup> Ibid 635.

<sup>77</sup> See Evans, above n 4, 84; Beck, ‘Clear and Emphatic: The Separation of Church and State under the *Australian Constitution*’, above n 66, 174–5; David C Bennett, ‘Case Note: *Attorney-General for Victoria; Ex Rel Black v The Commonwealth*’ (1981) 12 *Federal Law Review* 271, 273.

<sup>78</sup> *DOGS Case* (1981) 146 CLR 559, 604.

<sup>79</sup> Ibid 610.

Mason J also suggested that establishment was a singular concept, stating that '[t]he text of s 116 more obviously reflects a concern with the establishment of one religion as against others than the language of the First Amendment which speaks of the "establishment of religion", not the "establishment of any religion"'.<sup>80</sup> Wilson J made a similar suggestion. His Honour said that 'the point to be made is that establishment involves the deliberate selection of one to be preferred from among others'.<sup>81</sup>

There is every reason to be confident that the High Court would hold that the establishment clause not only prohibits the Commonwealth from instituting programs that result in a single religion becoming identified with the Commonwealth, as seems to be the holding in the *DOGS Case*, but also those that result in more than one religion becoming identified with the Commonwealth.

There is nothing in the text of the establishment clause that suggests that its operation should not extend to prohibiting multiple religious establishments. It would seem almost self-evident that a federal statute that provided, for example, 'Islam and Buddhism shall be the official religions of the Commonwealth of Australia' would be inconsistent with the establishment clause. Moreover, the United Kingdom provides a clear example that multiple religious establishments are possible at the same time.<sup>82</sup> In the United Kingdom, the Anglican Church of England and the Presbyterian Church of Scotland were and are both established at the same time.<sup>83</sup> The *Union with Scotland Act 1706* (Eng) and *Union with England Act 1707* (Scot) resulted in the union of the kingdoms of England and Scotland as the United Kingdom and created a combined Parliament. Those Acts did not, however, affect the respective religious establishments that had existed in the separate kingdoms. Indeed, this was an express condition of the Union provided for in legislation of both the English and Scottish Parliaments.<sup>84</sup> Whilst 'the forms of establishment in Scotland and England are very different'<sup>85</sup> and the establishments are geographically confined, through their established status both churches are identified with the British state.<sup>86</sup>

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<sup>80</sup> Ibid 615.

<sup>81</sup> Ibid 653.

<sup>82</sup> This point is also made in Beck, 'Dead *DOGS*? Towards a Less Restrictive Interpretation of the Establishment Clause', above n 21, 69–70.

<sup>83</sup> In *Macqueen v Frackelton* (1909) 8 CLR 673, 690, Griffith CJ referred to the 'Church of Scotland as by law established'. See further Mark Hill, Norman Doe and Russell Sandberg, *Religion and the Law in the United Kingdom* (Kluwer Law International, 2011) 31; Russell Sandberg, *Law and Religion* (Cambridge University Press, 2011) 70–2; R M Williams, 'Establishment in Scotland' in R M Williams (ed), *Church and State in 21st Century Britain* (Palgrave Macmillan, 2009).

<sup>84</sup> *Protestant Religion and Presbyterian Church Act 1707* (Scot); *An Act for securing the Church of England as by Law Established 1706*, 6 Anne c 8.

<sup>85</sup> R M Williams, 'Introduction: Mapping the Issues' in R M Williams (ed), *Church and State in 21st Century Britain* (Palgrave Macmillan, 2009) 1, 1.

<sup>86</sup> Hilary M Carey, 'An Historical Outline of Religion in Australia' in James Jupp (ed), *The Encyclopedia of Religion in Australia* (Cambridge University Press, 2009) 5, 7: 'in the United Kingdom there were two established churches'.

Elsewhere in Europe, for example, the Swiss Canton of Berne has three cantonal churches<sup>87</sup> and ‘Finland has *two* established churches’.<sup>88</sup>

There appear, therefore, to be strong reasons in favour of the proposition that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth.

*C The Third Proposition: The Establishment Clause Prohibits the Commonwealth from Instituting Programs that Result in a Religion or Multiple Religions becoming Identified with the States and Territories*

The reasoning of the majority judges in the *DOGS Case* appears to suggest that the establishment clause of s 116 prohibits only *national* establishments of religion. Barwick CJ’s definition of establishment, for example, seems premised on this idea. He said ‘[e]stablishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, *in this instance, the Commonwealth*’.<sup>89</sup> Similarly, Wilson and Mason JJ each used the phrase ‘*national institution*’.<sup>90</sup> The idea that the establishment clause only prohibits the Commonwealth from bringing about a national establishment of religion is very restricted and there are reasons to suppose that it would not be accepted by the High Court as an accurate view of the meaning of the establishment clause.<sup>91</sup>

There is nothing in the text of the establishment clause that suggests that its operation should not extend to prohibiting non-national establishments of religion. A federal statute that provided ‘Buddhism shall be the official religion of Norfolk Island’ or ‘Islam shall be the official religion of the Northern Territory’ would plainly contravene the establishment clause of s 116.

There is support in the *DOGS Case* for the idea that the establishment clause prohibits the Commonwealth from creating non-national establishments of religion.<sup>92</sup> Gibbs J, for example, considered that ‘if the conditions of a grant of financial assistance [to a state] require the state to which the grant is made to establish a religion within the meaning of [s 116], the Act by which the grant is authorized [will be]

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<sup>87</sup> Frank Cranmer, ‘Church and State in Western Europe (Excluding Scandinavia)’ in Frank Cranmer, John Lucas and Bob Morris, *Church and State: A Mapping Exercise* (The Constitution Unit, 2006) 97, 115

<sup>88</sup> Frank Cranmer, ‘Church-State Relations in Scandinavia’ in Frank Cranmer, John Lucas and Bob Morris, *Church and State: A Mapping Exercise* (The Constitution Unit, 2006) 78, 85 (emphasis in original).

<sup>89</sup> *DOGS Case* (1981) 146 CLR 559, 582 (emphasis added).

<sup>90</sup> *Ibid* 612, 653 (emphasis added).

<sup>91</sup> This point is also made in Beck, ‘Dead *DOGS*? Towards a Less Restrictive Interpretation of the Establishment Clause’, above n 21, 68–9.

<sup>92</sup> Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 421 cites a majority in the *DOGS Case* as establishing this point.

invalid as contrary to s 116.<sup>93</sup> If this is correct and the Commonwealth cannot use money to induce a state to establish a religion within its jurisdiction by way of state legislation then it must also be the case that the Commonwealth cannot itself directly establish a religion in a state.

There is no need to rely on statements by a single judge or, as with the issue of multiple establishments of religion, resort to hypothetical examples to demonstrate the point about non-national establishments of religion. Actual examples exist: the Church of England and the Church of Scotland.<sup>94</sup> As Jeroen Temperman has explained, in some countries

the issue of state-religion identification is not a national or federal matter but is left at the discretion of the constituent states or provinces. This, when it leads to the situation that some constituent parts have an established religion while others have not, could be referred to as ‘regional establishment’.<sup>95</sup>

It may be taken as uncontroversial that the Church of England, as it exists today, is established.<sup>96</sup> It may also be taken as uncontroversial that any attempt by the Commonwealth to legislate for a church in Australia to occupy an equivalent position would violate the establishment clause of s 116. However, the Church of England is not established throughout the entire country, that country being the United Kingdom of Great Britain and Northern Ireland. With effect from 1871, the *Irish Church Act 1869* dissolved the union between the Irish and English Churches

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<sup>93</sup> *DOGS Case* (1981) 146 CLR 559, 592. His Honour was referring to grants under s 96, which permits the Commonwealth to grant funds to the states on such terms as the Commonwealth Parliament thinks fit.

<sup>94</sup> It is interesting to note the logical inconsistency in Mason J’s judgment in the *DOGS Case* which despite stating that the establishment clause prohibits ‘national’ establishments of religion immediately goes on to recognise that the Church of England was not established throughout the entire United Kingdom:

By it we mean the authoritative establishment or recognition by the State of a religion or a church as a national institution.

This is not only the meaning which is given in the standard English dictionaries, but it is also the meaning which it has in our minds and had in the minds of the citizens of the Australian colonies at the end of the nineteenth century. They were acutely familiar with the relationship between church and state in England and Wales, Scotland and Ireland. They were aware that the Church of England, the Church of Scotland and the Church of Ireland respectively were referred to as ‘the Established Church’: *Ibid* 616–7.

<sup>95</sup> Jeroen Temperman, *State-Religion Relationships and Human Rights Law* (Martinus Nijhoff, 2010) 47.

<sup>96</sup> See *DOGS Case* (1981) 146 CLR 559, 606 (Stephen J):

The plaintiffs point to the undoubted imprecision surrounding the concept of establishment as applied to the Church of England. Again, it may be accepted that there is no single characteristic of that Church which of itself constitutes the touchstone of its establishment ... The status of establishment which the Church of England has long enjoyed in England has no single characteristic ...

and provided that ‘the Church of Ireland, as so separated, should cease to be established by law’.<sup>97</sup> Likewise, the *Welsh Church Act 1914* operated to ‘terminate the establishment of the Church of England in Wales and Monmouthshire’.<sup>98</sup> Moreover, the Church of England was never established in Scotland: the *Protestant Religion and Presbyterian Church Act 1707* (Scot) ensured that on the union of England and Scotland the establishment of the Presbyterian Church of Scotland would not be affected.<sup>99</sup>

In the Canadian context, Margaret Ogilvie has suggested that the Church of England might still be the established church in New Brunswick, Nova Scotia and Prince Edward Island by virtue of old colonial legislation that has never been repealed.<sup>100</sup>

There are also examples of multiple religious establishments existing at the sub-national level. The Swiss Canton of Berne is, as noted above, one example. Another example comes from colonial America. Mortensen has noted that in colonial America, ‘New York (including those parts that became New Jersey and Delaware) had an unusual pattern of “multiple establishments”, by which all Protestant churches in the colony were sponsored, endowed and controlled by government.’<sup>101</sup>

Furthermore, it might even be the case that the establishment clause is not limited only to those non-national establishments of religion that are state or territory establishments. A federal statute that provided, for example, that ‘Hinduism is the official religion of the City of Darwin’ would also be invalid. *Hoxton Park (No 2)* was, in fact, a case in which the plaintiffs were attempting to pursue that notion. One of the plaintiffs’ arguments was that by apparently funding the construction of a mosque in the Sydney suburb of Hoxton Park the Commonwealth had established Islam in that suburb.<sup>102</sup> There are also historical precedents for this notion. Justice Thomas of the United States Supreme Court, for example, has noted that colonial American

<sup>97</sup> 32 & 33 Vict, c 42 preamble. See further J Lucas and R M Morris, ‘Disestablishment in Ireland and Wales’ in R M Williams (ed), *Church and State in 21st Century Britain* (Palgrave Macmillan, 2009).

<sup>98</sup> 4 & 5 Geo 5, c 91 preamble. The *Suspensory Act 1914* 4 & 5 Geo 5, c 88 delayed the coming into effect of the *Welsh Church Act* 4 & 5 Geo 5, c 91. For a discussion see, eg, Roger L Brown, ‘The Disestablishment of the Church in Wales’ (1999) 5 *Ecclesiastical Law Journal* 252.

<sup>99</sup> See also *Union With England Act 1707* (Scot) Anne c 7; *Union With Scotland Act 1706* (Eng) 6 Anne c 11.

<sup>100</sup> M H Ogilvie, ‘What is a Church by Law Established?’ (1990) 28 *Osgoode Hall Law Journal* 179, 183.

<sup>101</sup> Mortensen, *The Secular Commonwealth: Constitutional Government, Law and Religion*, above n 68, 111.

<sup>102</sup> *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2010) 246 FLR 207, 219 [35]; *Hoxton Park (No 2)* (2011) 256 FLR 156, 161 [16]. There was an unexplored question as to whether the statute in question actually authorised funding for the construction of the mosque as the plaintiffs claimed it did.

religious establishments in the South were determined and maintained at the local or municipal level rather than state level.<sup>103</sup>

The discussion presented above appears sufficient to demonstrate that it is a readily defensible statement of legal principle that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories.

## V IS THE NATIONAL SCHOOL CHAPLAINCY AND STUDENT WELFARE PROGRAM INCONSISTENT WITH THE ESTABLISHMENT CLAUSE?

Having demonstrated that it is open to argue that the above three propositions are statements of legal principle flowing from the establishment clause, it is now useful to consider how those principles might play out in relation to the factual scenario presented by the NSCSWP. As mentioned above, the function of this exercise is to gain a better understanding of those principles and see how they might work in practice. The following application of the three propositions shows how an argument of constitutional invalidity might be constructed.

### *A The First Proposition*

The first proposition is that the establishment clause prohibits federal expenditure for religious purposes such as for religious activities. The NSCSWP has, at least in substantial part, a religious purpose in that funding for the program includes funding for religious activities.

In his media release of 29 October 2006 announcing the establishment of the original National School Chaplaincy Program, the then Prime Minister, John Howard, said:

To assist our schools in providing greater pastoral care and supporting the spiritual wellbeing of their students, I am pleased to announce a new initiative today, the Australian Government's National School Chaplaincy Program. ...

Each local school community will decide if they want to participate in this voluntary program. The choice of chaplaincy services, including the religious affiliation and denomination, is entirely a decision for the school community, including teachers and parents. ...

Chaplains will be expected to provide pastoral care, general religious and personal advice and comfort and support to all students and staff, irrespective

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<sup>103</sup> *Town of Greece v Galloway*, 572 US \_\_\_\_ (2014) 2, 6; See also W Cole Durham and Brett G Scharffs, *Law and Religion: National, International and Comparative Perspectives* (Wolters Kluwer, 2010) 25–6; Leonard W Levy, 'Establishment of Religion' in Leonard W Levy and Kenneth L Karst (eds), *Encyclopedia of the American Constitution* (Macmillan, 2nd ed, 2000) 927, 928.

of their religious beliefs. A chaplain might support school students and the wider school community in a range of ways, such as assisting students in exploring their spirituality; providing guidance on religious, values and ethical matters; helping school counsellors and staff in offering welfare services and support in cases of bereavement, family breakdown or other crisis and loss situations.<sup>104</sup>

Consistently with the then Prime Minister's announcements, the guidelines for the original version of the program stated that '[t]he objectives of the National School Chaplaincy Program are to assist schools and their communities to provide greater pastoral care, general religious and personal advice and comfort to all students and staff.'<sup>105</sup>

It follows that the purpose of the original program was, in substantial part, religious. The replacement NSCSWP 'builds upon' the original program.<sup>106</sup> It certainly allows secular student welfare services to be provided; but this add-on does not negate the religious character of some of the activities that may be provided and the religious character of the chaplains providing them. The purposes of the NSCSWP, to that extent, remain the same and are plainly religious in character.

This is made clear in the media release of 7 September 2011 by the then Minister for School Education, Early Childhood and Youth, Peter Garrett, announcing the NSCSWP. The Minister said that the Commonwealth was 'extending this successful scheme' and clearly referenced the religious character of the chaplains and their activities, stating that 'we also want to give schools greater choice. This means schools won't miss out on applying for the program if the school community would prefer to have a secular welfare worker instead of a chaplain.'<sup>107</sup>

The Minister also indicated that, under the expanded program, the purposes of the original program were not being replaced but added to. He said: 'The scheme will be re-named the National School Chaplaincy and Student Welfare Program to reflect its broader scope.'<sup>108</sup> That the current, expanded version of the program maintains its religious purposes is also made clear by the *NSCSWP Guidelines*, which state that '[t]he objectives of the Program are to assist school communities to provide pastoral care and general spiritual, social and emotional comfort to all students'.<sup>109</sup>

<sup>104</sup> John Howard, Prime Minister, 'National School Chaplaincy Program' (Media Release, 29 October 2006) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FF7MV6%22>>.

<sup>105</sup> Commonwealth Department of Education, Employment and Workplace Relations, *National School Chaplaincy Program Guidelines*, 16 February 2010, 4.

<sup>106</sup> *NSCSWP Guidelines*, above n 33, 9.

<sup>107</sup> Peter Garrett, Minister for School Education, Early Childhood and Youth, 'Schools Given Greater Choice Under Expanded Chaplains Program' (Media Release, 7 September 2011) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1065455%22>>.

<sup>108</sup> *Ibid.*

<sup>109</sup> *NSCSWP Guidelines*, above n 33, 10.

To the extent that religious chaplains and religious activities are involved, the NSCSWP has a religious purpose. In addition, there can be no doubt that under the NSCSWP the Commonwealth is funding religious activities. The Guidelines authorise chaplains to ‘deliver activities/services that promote a particular view or religious belief’,<sup>110</sup> ‘provid[e] services with a spiritual content’<sup>111</sup> and ‘[perform] religious services/rites (such as worship or prayer during school assembly etc)’.<sup>112</sup> These are plainly religious activities, which are very much a core part of the NSCSWP; they are not incidental or peripheral in character. In the words of Barwick CJ in the *DOGS Case*, there is ‘authorization by the Commonwealth of ... religious activity’.<sup>113</sup> In the words of Wilson J, the religious activities involved in the NSCSWP are not ‘an incidental or indirect consequence of the pursuit of the [secular] purpose’ and religion is very much ‘a criterion that attracts a grant [of funds by the Commonwealth]’.<sup>114</sup>

### B *The Second Proposition*

The second proposition is that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth. To the extent that the NSCSWP involves the provision of services with a spiritual content, the promotion of particular religious beliefs and the performance of religious rites, it is arguable that the Commonwealth is associating itself with such things or even participating in them through intermediaries. After all, everything a chaplain does must be authorised by, and done in a manner consistent with, the Commonwealth’s Guidelines. Any ‘religious services/rites (such as worship or prayer during school assembly etc)’, for example, are performed by a person chosen in accordance with criteria, including religious criteria, established by the Commonwealth, at the Commonwealth’s expense and as part of a Commonwealth program. This, it might be suggested, results in the identification of the religion of the chaplain with the Commonwealth.

It is unclear whether this is a case of a single religion or multiple religions being established through their becoming identified with the Commonwealth. In the *DOGS Case*, Barwick CJ suggested that the various Christian denominations were but different manifestations of the one religion, Christianity.<sup>115</sup> If this is the correct understanding of the word ‘religion’ in the establishment clause, then it would seem that the NSCSWP has the effect of identifying a single religion, Christianity, with the Commonwealth. As noted above, more than 99 per cent of school chaplains engaged under the NSCSWP are Christian.

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<sup>110</sup> Ibid 16.

<sup>111</sup> Ibid 15.

<sup>112</sup> Ibid 16.

<sup>113</sup> *DOGS Case* (1981) 146 CLR 559, 583.

<sup>114</sup> Ibid 656.

<sup>115</sup> Ibid 580.

Alternatively, the various Christian denominations might be considered separate religions for the purposes of s 116. If this is the case, then the NSCSWP can be seen as establishing multiple religions. This situation is analogous to the situation of multiple religious establishments in the United Kingdom. The establishment of the Churches of England and Scotland do not overlap geographically. They are established in different parts of the United Kingdom. Likewise, the alleged establishments in the case of the NSCSWP do not overlap geographically as the schools in which the NSCSWP operates are located in separate, various parts of Australia. Indeed, in *Hoxton Park (No 2)* the plaintiffs sought to argue that the Commonwealth had established Islam in the suburb of Hoxton Park.<sup>116</sup> Similarly, the argument here would be that the Commonwealth has established the relevant religion in respect of each individual school. In any case, the Swiss and Finnish examples noted above indicate that overlapping, simultaneous establishments are conceptually possible.

The argument that there is a breach of the second proposition might be seen as somewhat weaker because the notion of becoming identified with involves questions of degree. This is not a conceptual problem for the claim that the second proposition is a statement of legal principle. In the *DOGS Case*, Gibbs J indicated that it ‘may be a question of degree whether a law is one for establishing a religion.’<sup>117</sup> In any event, the purpose here is not principally to say that the NSCSWP is invalid but simply to apply the propositions articulated above to a factual scenario.

### *C The Third Proposition*

The third proposition that arguably flows from the establishment clause as a statement of legal principle is that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories. It is arguable that the role of school principals in the NSCSWP has the result that the religions of the chaplains become identified with the states and territories in whose schools they work. This argument would not apply to the NSCSWP to the extent that it operates in non-government schools because it turns on the fact that in a public school a school principal is a state or territory government official.

School principals have an important role in the NSCSWP. According to the Guidelines, they have ‘a lead role in coordinating and managing all aspects of the chaplaincy ... services within the school.’<sup>118</sup> They are responsible for ‘overseeing the delivery of chaplaincy ... services within the school.’<sup>119</sup> It is also the role of the school principal to ‘lead, coordinate and manage all aspects of the chaplaincy ...

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<sup>116</sup> *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2010) 246 FLR 207, 219 [35]; *Hoxton Park (No 2)* (2011) 256 FLR 156, 161 [16].

<sup>117</sup> *DOGS Case* (1981) 146 CLR 559, 604.

<sup>118</sup> *NSCSWP Guidelines*, above n 33, 17.

<sup>119</sup> *Ibid.*

services within the school'.<sup>120</sup> In the *School Chaplains Case*, Gummow and Bell JJ, in rejecting the claim that school chaplains held offices under the Commonwealth, emphasised that chaplains 'provide services under the control and direction of the school principal.'<sup>121</sup>

The result is that a state or territory government official is required by the Commonwealth to lead, coordinate and manage the performance of religious services/rites, the provision of services with a spiritual content and the promotion of particular religious beliefs. (And they do so in the context of a core activity of a state, since the provision of compulsory education is a core activity of a state.) Since a state or territory can only act through its officials or other agents, the effect is that a state or territory is leading, coordinating and managing those religious activities. This, it could be said, results in the religion of the school chaplain becoming identified with the relevant state or territory. This would, depending of the definition of 'religion' adopted, involve multiple establishments of religion since the religious affiliation of the school chaplains varies (albeit really only between Christian denominations) between different schools.

The functions of a school principal in the NSCSWP might even be characterised as loosely comparable in some respects to the functions of a bishop in overseeing the work of subordinate clergy. This analogy is convenient because it leads to High Court dicta in support of the argument that the supervisory function of school principals constitutes religious establishment. In *Wylde v Attorney-General (NSW) ex rel Ashelford*, a case about charitable trusts unrelated to s 116 of the *Constitution*, Dixon J said:

The better opinion appears to be that the Church of England came to New South Wales as the established Church and that it possessed that status in the colony for some decades. The first chaplain and all the early chaplains formed part of the civil establishment. The governor's instructions made it his duty to enforce a due observance of religion and to take steps for the due celebration of public worship as circumstances would permit.<sup>122</sup>

The chaplains to whom Dixon J referred were, of course, Church of England ministers. They were subject to the control of the colonial Governor in some respects, including religious activities, as well as being controlled by their bishop.<sup>123</sup> This is rather similar in character to the way in which school chaplains are supervised and controlled by the school principal but otherwise technically employed by the relevant Funding Recipient with whom the Commonwealth has contractual relations. In essence, this analogy simply serves to reinforce the factual analysis above about the religious function of school principals, and therefore of the states and territories, in the NSCSWP.

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<sup>120</sup> Ibid 12.

<sup>121</sup> *School Chaplains Case* (2012) 248 CLR 156, 223 [109].

<sup>122</sup> *Wylde v A-G (NSW) ex rel Ashelford* (1948) 78 CLR 224, 284.

<sup>123</sup> See ibid 284ff.

## VI CONCLUSION

This article has argued that the meaning given to the establishment clause of s 116 of the *Constitution* in the *DOGS Case* is not authoritative. The reasoning in that case is too narrow and is inconsistent with the *School Chaplains Case* and the High Court's approach to interpreting other prohibitions on power. The article has taken some first steps in considering what meaning should be attributed to the establishment clause. It has argued that the establishment clause prohibits federal expenditure for religious purposes such as for religious activities, the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth, and the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories. These principles have also been given practical demonstration through their application to the issue of the constitutional validity of the NSCSWP with the result that the constitutional validity of that program is in doubt.

That only three statements of principle have been put forward in this article should not be taken to suggest that they exhaust the meaning of the establishment clause. They are, however, statements of principle that are readily defensible and, as such, represent the first steps in a reconsideration of the meaning of the establishment clause. How much further the High Court might be inclined to expand the meaning of the establishment clause is a matter that awaits an appropriate case.