CASE NOTE

# *WILLIAMS v COMMONWEALTH*[*]

# SCHOOL CHAPLAINS AND THE RELIGIOUS TESTS CLAUSE OF THE *CONSTITUTION*

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*This case note examines the High Court's recent decision in* Williams v Commonwealth *as it relates to the religious tests clause of s 116 of the* Constitution. *It was alleged that school chaplains engaged under the National School Chaplaincy Program held offices under the Commonwealth and that the rules governing their appointment constituted a religious test. This case note considers in detail the submissions made by the parties and interveners — something the High Court did not do in its judgment — and critiques the reasoning in the judgments that dealt with the s 116 issues of whether a religious test was involved and whether school chaplains held an office under the Commonwealth. The note also offers a critique of the methodological approach taken to the interpretation of the clause by the Court. It is concluded that the High Court's decision provides only limited and somewhat confusing guidance on the meaning of this important constitutional provision.*

## I INTRODUCTION

In October 2010, the Australian Broadcasting Corporation's *Compass* program aired an episode titled 'Challenging the Chaplains' about the National School Chaplaincy Program ('NSCP') and a challenge being formulated to it by an organisation called the Australian Secular Lobby.[1] Ron Williams, a member of that organisation, appeared in the episode stating that he was 'fiercely and passionately for the separation of church and state' and explaining his objections to the NSCP.[2] *Williams v Commonwealth* ('*Williams*') is the resulting case. The NSCP was ruled invalid as being beyond the executive power of the Commonwealth, it having been established in a purported exercise of that power in the absence of legislation.

This case note considers the High Court's decision in *Williams* as it relates to the religious tests clause of s 116 of the *Constitution*. That clause provides: 'no

* (2012) 86 ALJR 713.

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1 ABC, 'Challenging the Chaplains', *Compass*, 24 October 2010 <www.abc.net.au/compass/s3024993.htm>.

2 Ibid.

religious test shall be required as a qualification for any office or public trust under the Commonwealth.'[3] In *Williams*, the plaintiff alleged that chaplains engaged as part of the NSCP, as it existed at the relevant times, held offices under the Commonwealth and that the NSCP rules governing their appointment constituted a religious test.

During oral argument it was apparent that the High Court was not impressed by the plaintiff's arguments on the s 116 point, indicating that it did not need to hear from any of the other participants.[4] Unsurprisingly then, the Court unanimously rejected the plaintiff's contention that the NSCP was invalid by reason of the religious tests clause of s 116. Only two judgments gave substantive consideration to this issue: the joint judgment of Gummow and Bell JJ, with which in their separate judgements, French CJ,[5] Hayne,[6] Crennan[7] and Kiefel JJ[8] indicated their agreement, and the judgment of Heydon J. Both judgments held that NSCP chaplains did not hold an office under the Commonwealth and that it was therefore unnecessary to decide whether a religious test governed their appointment, although Heydon J offered some comments on the question.

This note proceeds as follows. First, it outlines the factual background to the case. Second, it summarises the existing case law on the religious tests clause. Third, it outlines the submissions made regarding the question of a religious test and considers comments in Heydon J's judgment that appear relevant to that question. Fourth, it outlines the various arguments put as to whether NSCP chaplains held an office under the Commonwealth and considers the reasoning of the judgments on this question. Finally, this case note offers a critique about the way in which the process of interpreting the religious tests clause was approached in the case. Ultimately, it will be seen that *Williams* provides only limited and somewhat confusing guidance on the meaning of the religious tests clause of s 116.

## II THE FACTS

### A *The National School Chaplaincy Program*

In January 2007, the then Department of Education, Science and Training issued *National School Chaplaincy Programme Guidelines*. This followed an announcement some months earlier by the then Prime Minister, John Howard, that such a program would be established and funded by the Commonwealth. As the Guidelines explained:

3 For a discussion of this provision see Luke Beck, 'The Constitutional Prohibition on Religious Tests' (2011) 35 *Melbourne University Law Review* 323.

4 Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 200 (11 August 2011).

5 *Williams v Commonwealth* (2012) 86 ALJR 713, 720 [4].

6 Ibid 754 [168].

7 Ibid 812 [476].

8 Ibid 831 [597].

> It is a voluntary Programme that will assist schools and their communities to support the spiritual wellbeing of their students. This might include support and guidance about ethics, values, relationships, spirituality and religious issues; the provision of pastoral care; and enhancing engagement with the broader community. …
>
> The nature of chaplaincy services to be provided, including the religious affiliation of the school chaplain, is a matter which needs to be decided by the local school and its community, following broad consultation. However, students will not be obliged to participate, and parents and students will be informed about the availability and the voluntary nature of the chaplaincy services.[9]

More specifically, the Guidelines 'set out arrangements for the administration, and the requirements of the delivery of the [NSCP]'.[10]

The Guidelines defined 'school chaplain' as:

> a person who is recognised
>
> - by the local school, its community and the appropriate governing authority as having the skills and experience to deliver school chaplaincy services to the school and its community; and
> - through formal ordination, commissioning, recognised qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service.[11]

NSCP chaplains would provide school chaplaincy services. The glossary to the Guidelines defined 'school chaplaincy services' to be:

> Services which aim to assist schools and their communities through providing greater pastoral care, general religious and personal advice and comfort to all students and staff. Some state and territory governments currently have recognised and approved chaplaincy providers for government schools.[12]

## B *The Funding Agreement*

In April 2007, the Darling Heights State Primary School made an application to the relevant Commonwealth Department for funding under the NSCP. The Darling Heights State Primary School's application described the various chaplaincy services that it sought funding for. These included counselling of students, observing students in the classroom in order to build trust with students,

9 Department of Education, Science and Training (Cth), *National School Chaplaincy Programme Guidelines* (19 January 2007) 3.

10 Ibid.

11 Ibid 4.

12 Ibid 23.

working on self-esteem and responsible behaviour issues and mentoring boys with trouble managing their emotions. The application was set out in some detail by Heydon J in his judgment.[13]

That application was successful and the Commonwealth entered into a 'Funding Agreement' with the fourth defendant, Scripture Union Queensland, which would engage a chaplain (who was identified in the application) to provide chaplaincy services at the school. In the terminology of the NSCP Guidelines, Scripture Union Queensland was the 'project sponsor'. The NSCP operated by means of a series of such funding agreements throughout Australia.[14]

The Guidelines also provided that a potential school chaplain who refused to sign the code of conduct was prohibited from participating in the NSCP.[15] Among other things, the code of conduct prohibited proselytising.[16]

In addition, the project sponsor had various reporting responsibilities to the Commonwealth and the Commonwealth had power to conduct 'a range of monitoring activities to verify that school chaplaincy services are delivered in accordance with the conditions of the funding agreement'.[17]

## C *The Proceedings*

The plaintiff's children attended the Darling Heights State Primary School in Queensland and in December 2010 he filed a writ of summons in the High Court. It named as defendants: the Commonwealth, two of its Ministers and Scripture Union Queensland. The Attorneys-General of each of the states intervened, although not all of them made submissions regarding s 116. In addition, an organisation called the Churches' Commission on Education, which was project sponsor for a large number of NSCP funding agreements for schools in Western Australia, was granted leave to intervene.[18] It also made submissions in respect of s 116.

In July 2011, Gummow J referred an amended special case for the opinion of the Full Court. The second question referred was:

> If [the plaintiff is found to have the necessary standing], is the Darling Heights Funding Agreement invalid, in whole or in part, by reason that the Darling Heights Funding Agreement is:
>
> …

13 *Williams v Commonwealth* (2012) 86 ALJR 713, 779 [297].

14 See ibid 743 [97].

15 Department of Education, Science and Training (Cth), above n 9, 19.

16 See ibid 24–5.

17 Ibid 21.

18 Churches' Commission on Education Incorporated, 'Proposed Submission on behalf of the Churches' Commission on Education Incorporated (Applicant for Leave to Intervene)', Submission in *Williams v Commonwealth*, S307/2010, 29 July 2011, [4]–[6].

> (b) prohibited by s 116 of the Constitution?[19]

The fourth question referred was:

> To the extent that [the plaintiff is found to have the necessary standing], was or is the making of the relevant payments by the Commonwealth to Scripture Union Queensland pursuant to the Darling Heights Funding Agreement unlawful by reason that the making of the payments was or is:
>
> …
>
> (b) prohibited by s 116 of the Constitution?[20]

The Court unanimously answered both questions 'No'.[21]

## III EXISTING CASE LAW ON THE RELIGIOUS TESTS CLAUSE

In oral argument, counsel for the plaintiff advised the Court that '[n]o guidance is to be found on our researches in the case law of this country concerning either religious test or office under the Commonwealth in this [fourth] limb of section 116.'[22] However, the High Court has dealt with two cases invoking the religious tests clause and commented on it in another case concerning the establishment clause of s 116.[23]

The first case was *Crittenden v Anderson*.[24] Anderson, a practising Catholic, had been elected to the House of Representatives. Crittenden challenged Anderson's election under s 44(i) of the *Constitution*, which disqualifies any person who 'is under any acknowledgment of allegiance, obedience, or adherence to a foreign power' from being elected to or sitting in Parliament. Crittenden contended that the mere fact of Anderson's Catholicism meant that Anderson had acknowledged allegiance, obedience or adherence to the 'Papal State'. Fullagar J, sitting alone, rejected Crittenden's contention stating:

> It is in my opinion, s 116, and not s 44(i) of our *Constitution* which is relevant when the right of a member of any religious body … is challenged on the ground of his religion. Effect could not be given to the petitioner's contention without the imposition of a religious test.[25]

19 *Williams v Commonwealth* (2012) 86 ALJR 713, 831.

20 Ibid 831–2.

21 Ibid.

22 Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 198 (9 August 2011) (Bret Walker SC).

23 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.' It is convenient to refer to the four clauses of the provision as the 'establishment clause', the 'religious observances clause', the 'free exercise clause' and the 'religious tests clause' respectively.

24 (Unreported, High Court of Australia, Fullagar J, 23 August 1950), extracted in 'An Unpublished Judgment on s 116 of the *Constitution*' (1977) 51 *Australian Law Journal* 171.

25 Ibid 171.

The second case was *Church of Scientology Inc v Woodward*.[26] Woodward was the Director-General of the Australian Security Intelligence Organisation ('ASIO'). The plaintiff alleged that Woodward had caused or permitted ASIO to communicate security assessments to Commonwealth Ministers about certain current and potential Commonwealth employees. The assessments claimed that those persons were 'security risks' by reason of their membership of the Church of Scientology. The plaintiff claimed that this meant that ASIO had required a religious test as a qualification for a Commonwealth office. Aickin J struck out that claim making the point that '[t]he provision of information to a prospective employer cannot be regarded as the imposition of a religious test by the provider of the information.'[27] His Honour commented that the substance of the plaintiff's allegation 'seems really to be that the Commonwealth itself required a religious test' and added 'but that does not particularise the allegation [as spelt out in the statement of claim]'.[28]

The religious tests clause was also the subject of comment by Stephen J in the *DOGS case*, in which it was alleged that Commonwealth funding of religious schools violated the establishment clause of s 116.[29] His Honour commented that the religious tests clause 'prohibits the imposition, whether by law or otherwise, of religious tests for the holding of Commonwealth office.'[30] That comment draws a distinction between the religious tests clause and the other three clauses of s 116 which prohibit only certain sorts of laws, those clauses being prefaced with the words 'The Commonwealth shall not make any law for'.

None of the parties or interveners in *Williams* acknowledged the existence of *Crittenden v Anderson* or *Church of Scientology Inc v Woodward* and none of the judgments mention or cite them.[31] However, contrary to the assertion by counsel, it will be seen that *Crittenden v Anderson* might have provided some useful guidance.

## IV RELIGIOUS TESTS

Neither of the judgments came to any conclusion as to whether any religious test was involved in the rules governing the appointment of NSCP chaplains. Indeed, both judgments stated that they would not consider the question at all. However, Heydon J appears to have offered some relevant comments. It is therefore useful to summarise the arguments and consider Heydon J's comments.

26 (1982) 154 CLR 25, 79. The case was decided on 9 November 1979 and was reported as an appendix to the later case *Church of Scientology Inc v Woodward* (1982) 154 CLR 25.

27 Ibid 83.

28 Ibid.

29 *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559 ('*DOGS case*'). The establishment clause provides: 'The Commonwealth shall not make any law for establishing any religion'.

30 Ibid 605.

31 However, Heydon J at 784 [327] n 436 cites *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 appended to which is the judgment about religious tests. Presumably, then, his Honour was aware of the decision.

## A *The Submissions*

The plaintiff contended that what he described as the 'eligibility criteria' for appointment as a school chaplain imposed a religious test.[32] Section 1.5 of the *NSCP Guidelines*, revised as at February 2010, provided:

> For the purposes of this Program, a school chaplain is a person who is recognised:
>
> - by the local school, its community and the appropriate governing authority as having the skills and experience to deliver school chaplaincy services to the school and its community; and
> - through formal ordination, commissioning, recognised qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service.
>
> In particular circumstances, secular pastoral care workers may be employed under this program. Contact the DEEWR NSCP Program Office with any queries or if you would like more information regarding this option.[33]

This was incorporated into the Funding Agreement and Scripture Union Queensland was therefore contractually obliged to ensure that the chaplains it deployed to the Darling Heights State Primary School met those criteria.

The plaintiff's written submissions on the question of a religious test were brief. Of particular note is the fact that those submissions did not advance anything like a definition or general description of what a religious test might be. Rather, the plaintiff asserted that one was present in the eligibility criteria and pointed to something thought to make this so.[34] What the plaintiff thought made this so was the 'centrality of religion and religious qualification' to the eligibility criteria.[35] That centrality was highlighted, the plaintiff submitted, by the possibility that, 'in particular circumstances', a 'secular pastoral care worker' could be engaged, something the plaintiff described as an 'exception' to the eligibility criteria.[36] The plaintiff further argued that although it might be the case that 'a person with qualifications from a "state/territory government approved chaplaincy service"' may not have been required to be of any faith in order to become so qualified, the existence of this 'sole alternative' in the eligibility criteria to the other explicitly religion-based criteria did not render the eligibility criteria any less a religious

32 Ronald Williams, 'Plaintiff's Further Amended Submissions', Submission in *Williams v Commonwealth*, S307/2010, 29 July 2011, [79].

33 Department of Education, Employment and Workplace Relations (Cth), *National School Chaplaincy Program Guidelines* (16 February 2010) 4–5 <http://www.deewr.gov.au/Schooling/NSCP/Documents/nscp_guidelines.pdf>.

34 Ronald Williams, 'Plaintiff's Further Amended Submissions', Submission in *Williams v Commonwealth*, S307/2010, 29 July 2011, [79].

35 Ibid.

36 Ibid.

test.[37] The plaintiff added, without explaining, that s 116 'does not prohibit "solely religious tests"'.[38]

The plaintiff also pointed out in the written submissions that although the religious tests clause of s 116 was inspired by a similar clause in the *United States Constitution*,[39] there was no American case law on the question of religious tests since cases involving that question have been dealt with under the First Amendment establishment and free exercise clauses.[40]

In oral argument, counsel for the plaintiff did attempt a definition of religious test:

> one cannot understand religious tests as being confined to the selection of a sole or unique religion or sect within a religion as being either favoured or disfavoured. In our submission, a religious test is a concept which will include the singling out of one for favour, the singling out of one for disfavour, the singling out of more than one for favour, the singling out of more than one for disfavour and, in our submission, a way in which either of those possibilities may come about will include, classically, the qualification or disqualification of certain persons for holding an office under the Commonwealth.[41]

Counsel argued that the religious test arose since the eligibility criteria gave 'imprimatur' to organised religious institutions.[42] What was singled out for favour was organised religion since the 'formal ordination, commissioning, recognised qualifications or endorsement' required by the Guidelines must be from 'a recognised or accepted religious institution'.[43] The primary concern of the eligibility criteria, it was submitted, was religious affiliation.[44] Counsel emphasised that a secular pastoral worker was only an option for schools whose applications in early funding rounds were unsuccessful and which had been unable to locate a non-secular chaplain.[45]

The Commonwealth did not respond in its submissions to the charge that the eligibility criteria involved a religious test.[46] Instead, the Commonwealth rested its argument on the religious tests clause point on the contention that school

37 Ibid.

38 Ibid.

39 *United States Constitution* art VI cl 3: 'no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.'

40 Ronald Williams, 'Plaintiff's Further Amended Submissions', Submission in *Williams v Commonwealth*, S307/2010, 29 July 2011, [78], citing *Torcaso v Watkins*, 367 US 488 (1961) and referring to *United States Constitution* amend I: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'.

41 Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 198 (9 August 2011) (Bret Walker SC).

42 Ibid.

43 Ibid.

44 Ibid.

45 Ibid.

46 See Commonwealth of Australia, 'Amended Submissions of the First, Second and Third Defendants', Submission in *Williams v Commonwealth*, S307/2010, 29 July 2011.

chaplains do not hold an 'office … under the Commonwealth'. This is discussed below.

The fourth defendant, however, did consider in its written submissions the issue of whether a religious test was present, albeit very briefly. Scripture Union Queensland argued that school chaplains were not required to satisfy a religious test since they could be of any religious affiliation at the choice of a school community or could be a secular pastoral care worker.[47] Similarly, the State of Queensland argued that no religious test was imposed as a qualification for a school chaplaincy because engagement of secular pastoral care workers was possible.[48] In their brevity these submissions overlook a significant matter. The religious tests clause is not in terms directed only at the Commonwealth. It simply prohibits religious tests for offices and public trusts under the Commonwealth.[49] Assuming an NSCP chaplain held an office under the Commonwealth, in making the choice of religious affiliation it might be said that a school community is requiring a religious test as a qualification for an office under the Commonwealth. That is something plainly prohibited by the religious tests clause. None of the other interveners commented on the issue of religious tests.

## B *Justice Heydon's Comments*

As noted above, both of the substantive judgments found that NSCP chaplains did not hold an office under the Commonwealth. As such, it was unnecessary for there to be any decision on the question of religious tests. Gummow and Bell JJ simply summarised the plaintiff's submissions and noted that the matter did not get that far.[50] Heydon J described the plaintiff's submissions on the point as 'somewhat controversial' and said that it was unnecessary to deal with them.[51]

However, early in Heydon J's judgment is this sub-heading: 'First preliminary point: the qualifications and work of the "chaplains"'.[52] His Honour noted the claim that the eligibility criteria imposed a religious test and quoted the definition of 'chaplain' provided in the Guidelines and the description of chaplaincy services provided in section 1.5 of the Guidelines, both set out above.[53] Heydon J then said that those outlines when read with Darling Heights State Primary School's description of the chaplaincy services it had sought

> conveys the impression that, at least at this school, neither the NSCP nor the qualification for 'chaplains' had much to do with religion in any specific or sectarian sense. The work described could have been done by persons

47 Scripture Union Queensland, 'Fourth Defendant's Submissions', Submission in *Williams v Commonwealth*, S307/2010, 12 July 2011, [84], [90].

48 Attorney-General (Qld), 'Written Submissions of the Attorney-General for Queensland (Intervening)', Submission in *Williams v Commonwealth*, S307/2010, 20 July 2011, [38].

49 Beck, above n 3, 342.

50 *Williams v Commonwealth* (2012) 86 ALJR 713, 745 [107]–[108].

51 Ibid 809 [448].

52 Ibid 780 [305].

53 Ibid 780–1 [305].

> who met a religious test. It could equally have been done by persons who did not.[54]

This is a very interesting and puzzling passage, especially in a judgment that states that it does not deal with the question of religious tests. There are a number of reasons for this. Firstly, the second sentence seems to suggest that Heydon J has an understanding of what a 'religious test' might be or that he has a definition of 'religious test' in mind. After all, it would be difficult for Heydon J to form an impression about whether the work of an NSCP chaplain could be performed by a person whether or not they satisfied a religious test if he did not have an understanding or definition in mind. Without an explanation of that concept, Heydon J's comment seems really to beg the question.

Secondly, it is not clear if Heydon J is suggesting that it matters for determining if a religious test was present whether the work had much to do with religion or not. His Honour did go on in the very next paragraph to argue that the language of 'chaplain' and 'chaplaincy' as used in relation to the NSCP was 'inaccurate' given the ordinary meanings of those words with their clergy and religious services connotations.[55] As such, his Honour may well not have been making that suggestion. However, there does seem to be an element of ambiguity in the way the passage is expressed: it is not clear whether the final two sentences relate only to the impression that the NSCP had little to do with religion or also to the impression about NSCP chaplains' qualifications.

If Heydon J was indeed suggesting that the nature of the work to be performed is necessarily relevant to deciding whether a religious test exists, the following comments appear relevant. It is difficult to accept that a religious test can only exist where the duties of the position to which it is attached are religious in character.[56] In *Crittenden v Anderson*, the work to be performed was that of a Member of Parliament. It seems improbable that Fullagar J was wrong and that disqualifying Anderson from Parliament on the ground of his Catholicism would not have involved a religious test because the work of a Member of Parliament does not have much to do with religion. Historically, many religious tests had little, if anything, to do with the work to be performed by the occupants of the positions to which the tests were attached. For example, the *Test Act 1672* (Eng)[57] required any person 'that shall bear any office or offices civil or military' or that holds a 'place of trust from or under his Majesty' to take an oath acknowledging the King's supremacy in all religious matters, to receive the sacrament of the Lord's Supper according to usage of the Church of England, and to swear an oath against the catholic belief in transubstantiation. Given that this history was alluded to in *Crittenden v Anderson*, perhaps there was some guidance to be found in Australian case law after all.

54 Ibid 781 [306].

55 Ibid [307].

56 See Beck, above n 3, 346 n 163 arguing that the duties of a position may effect a religious test.

57 25 Car 2, c 2.

Thirdly, Heydon J's comments appear inaccurate or at least very much unexplained. The eligibility criteria, which his Honour quoted, require, with limited exceptions, that a would-be NSCP chaplain be recognised 'through formal ordination, commissioning, recognised qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service'. This would appear to have something to do with religion and, indeed as noted above, the plaintiff put emphasis on this in his argument about the existence of a religious test. Heydon J does not give any explanation for his impression to the contrary. Moreover, whether or not this criterion has something to do with religion in a 'specific or sectarian sense' is difficult to say because it is unclear what those words are about. Sectarianism might, at least at a general level, be a generally understood concept and reasonable minds might accept that the eligibility criteria are not sectarian and thus not about religion in a sectarian sense, although their application by a school community may well be. But what does it mean to say that something is not about religion in a specific sense in a context that expressly refers to religion? Can something be about religion but not about religion specifically? If so, what is the dividing line, why is it relevant to s 116 and what reasons exist for the conclusion that the eligibility criteria do not fall on the specific side of the line? Heydon J gives no clues that might help in answering these questions.

Ultimately, given that Heydon J states that his judgment does not deal with the question of religious tests it is very much unclear what the status of his Honour's comments might be.

## V OFFICE UNDER THE COMMONWEALTH

The substance of the decision in both judgments on the religious tests clause point rests on the conclusion that NSCP chaplains did not hold an office under the Commonwealth. At the outset, two general criticisms may be made of the reasoning in both judgments on this issue. Firstly, the reasoning is unhelpfully brief. Gummow and Bell JJ's substantive reasoning[58] is contained in two paragraphs[59] and Heydon J's in four.[60] The brevity makes it difficult to draw any firm conclusions about their Honours' views. More significantly, both judgments fail to engage fully with the nuances of the submissions put forward by the parties and interveners.

These criticisms are not to suggest that the result is necessarily incorrect. It does, however, suggest that the Court may have gained some assistance from oral submissions.

58 That is, excluding any mere summary of submissions.

59 *Williams v Commonwealth* (2012) 86 ALJR 713, 745 [109]–[110].

60 Ibid 808–9 [444]–[447].

## A *Exercise of Supervision and Control v Legal Relationship*

The plaintiff argued that chaplains engaged under the NSCP held an office under the Commonwealth on the ground that they were under the supervision and control of the Commonwealth.[61] The plaintiff's written submissions developed this point by drawing a distinction with other office-related language in the *Constitution*. The plaintiff first sought to distinguish the phrase 'office of profit under the Crown' appearing in s 44(iv) of the *Constitution* relating to disqualification of parliamentarians. That phrase, the plaintiff pointed out, had been held to denote permanent officers of the executive government.[62] In the plaintiff's submission, the absence of the words 'of profit' in the s 116 phrase suggested that something less than a relationship of employment between the Commonwealth and the officer in question fell within the expression.[63] The plaintiff next sought to distinguish 'officer of the Commonwealth' in s 75(v) of the *Constitution* relating to the High Court's original judicial review jurisdiction. The plaintiff contended that the possessive 'of' in that phrase was 'apt to indicate a person engaged or appointed by the Commonwealth'. The word 'under' in s 116 was more apt, the plaintiff submitted, to suggest 'the exercise of supervision or control by the Commonwealth over the officer concerned'.[64]

The plaintiff argued that this construction was necessary to ensure that the protection of the religious tests clause could not be circumvented.[65] Such circumvention could arise, the plaintiff argued, if a more narrow construction was adopted. This could occur, it was suggested, by the Commonwealth Executive contracting out the provision of public services and the performance of public functions and inserting into each contract a clause requiring that the staff engaged by the contracting party adhere to a particular religious faith.[66]

In the case of the NSCP chaplains, the plaintiff submitted that a number of factors pointed to the Commonwealth's supervision and control of the chaplains. One factor was the fact that a code of conduct set out in the *NSCP Guidelines* had to be signed by every chaplain and that a breach required that a chaplain immediately stop providing chaplaincy services unless the Department said otherwise in writing.[67] The plaintiff contended that this allowed the Department to 'control the commencement and cessation of chaplaincy services'.[68] Another factor was that payments under the NSCP to the project sponsor would only be made once the Department had accepted progress reports about the provision of chaplaincy services from the project sponsor.[69] The final factor pointed to by the plaintiff was

61 Ronald Williams, 'Plaintiff's Further Amended Submissions', Submission in *Williams v Commonwealth*, S307/2010, 29 July 2011, [80]–[84].

62 Ibid [80], citing *Sykes v Cleary* (1992) 177 CLR 77, 96.

63 Ibid.

64 Ibid.

65 Ibid [81].

66 Ibid.

67 Ibid [82].

68 Ibid.

69 Ibid [83].

the right of the Department to conduct 'various monitoring activities' including conducting site visits, examining documents relating to claims for payment, and seeking and responding to feedback from school communities.[70]

The Commonwealth's written submissions rejected the plaintiff's construction of 'office … under the Commonwealth'.[71] The Commonwealth rejected the plaintiff's distinctions with other constitutional language. The use of 'under' in s 116 as opposed to 'of' in s 75(v) was said not to indicate a broader meaning at all, let alone the much broader meaning advanced by the plaintiff.[72] The terminological difference was explained because 'under' is the word appearing in the American religious tests clause from which s 116 borrowed.[73] The only distinction between the s 116 language and the s 44(iv) language, the Commonwealth argued, is that s 116 would capture offices that are not 'of profit' whereas s 44(iv) obviously does not.[74]

Moreover, the Commonwealth submitted, the question of whether the religious tests clause extends to contracts 'between the Commonwealth and individuals for the provision of personal services' did not arise in *Williams* since under the NSCP there is not any contract between school chaplains and the Commonwealth.[75] This submission appears to have overlooked that the plaintiff's submission referred to the religious adherence of the staff of the contracting party and not to that of the contracting party. The Commonwealth further submitted, without elaboration, that there was little to be gained by speculating about what the situation would be if the Commonwealth were to contract out governmental functions and activities.[76]

The Commonwealth submitted that it had no legal relationship, direct or indirect, with school chaplains and that, as such, they could not hold any office under the Commonwealth.[77] It was argued that the Commonwealth did not have any role in selecting or approving school chaplains,[78] seemingly discounting the relevance of the eligibility criteria in the Guidelines that formed part of the contract between the Commonwealth and Scripture Union Queensland. The Commonwealth was said to have no power to direct school chaplains in the performance of their duties or to dismiss them,[79] seemingly discounting that the Guidelines and Funding Agreement described the work to be performed and gave the Commonwealth a monitoring role. Indeed, it was submitted that the particular services to be provided at a particular school was a matter to be decided by the school and that school principals had responsibility for overseeing the delivery of chaplaincy

70 Ibid.

71 Commonwealth of Australia, 'Amended Submissions of the First, Second and Third Defendants', Submission in *Williams v Commonwealth*, S307/2010, 29 July 2011, [49]–[54].

72 Ibid [50].

73 Ibid [51].

74 Ibid.

75 Ibid [52].

76 Ibid.

77 Ibid [53].

78 Ibid.

79 Ibid.

services in their schools.[80] Further, the Commonwealth pointed to the fact that it did not pay chaplains and the fact that chaplains did not report to it.[81]

The plaintiff, therefore, was arguing that a relationship of supervision and control was the key factor as to whether an office was one 'under the Commonwealth' whereas the Commonwealth was arguing that a legal relationship of some sort was necessary.

Gummow and Bell JJ appear to have rejected the idea that there is any single test. Their Honours said:

> The chaplains engaged by SUQ hold no office under the Commonwealth. The chaplain at the Darling Heights State Primary School is engaged by SUQ to provide services under the control and direction of the school principal. The chaplain does not enter into any contractual or other arrangement with the Commonwealth. That the Commonwealth is a source of funding to SUQ is insufficient to render a chaplain engaged by SUQ the holder of an office under the Commonwealth.[82]

This passage is the totality of their Honours' first paragraph of reasoning and it is unclear. It indicates that neither the test proposed by the plaintiff nor that by the Commonwealth was satisfied on the facts. While this passage rejects the existence of a relationship of supervision and control, it does not engage with the plaintiff's reasoning on this question and explain why it is wrong.

In their second paragraph, Gummow and Bell JJ write that 'the force of the term "under" indicates a requirement for a closer connection to the Commonwealth than that presented by the facts of this case'.[83] The passage quoted above read with this comment appears to suggest, although it is not clear, that control and direction by the Commonwealth, the existence of a contractual or other direct arrangement with the Commonwealth and the provision of funding by the Commonwealth are factors pointing in the direction of a conclusion that a sufficiently close connection between an office and the Commonwealth exists such that the office can be said to be under the Commonwealth. It is, however, unclear whether other factors might be relevant and, if so, what those factors are. Gummow and Bell JJ, therefore, appear to be suggesting that there is no single test for when a position is 'under the Commonwealth' and that it is a question of the totality of the circumstances.

Similarly, Heydon J's judgment indicates that neither the test proposed by the plaintiff nor that by the Commonwealth is satisfied on the facts. Heydon J, however, expressly rejects the plaintiff's test and appears to adopt the Commonwealth's test:

> The Commonwealth has no legal relationship with the 'chaplains'. It cannot appoint, select, approve or dismiss them. It cannot direct them. The services they provide in a particular school are determined by those

80 Ibid.

81 Ibid.

82 *Williams v Commonwealth* (2012) 86 ALJR 713, 745 [109].

83 Ibid [110].

> who run that school. The provision of those services is overseen by school principals.
>
> In the result, the plaintiff's construction of s 116 is an unattractive one. Under that construction, whenever the Commonwealth enters a contract under which services are to be provided by a party with whom it is to have no legal relationship, under which particular standards are stipulated, and under which reporting obligations are created to ensure compliance with those standards, that party would hold an office under the Commonwealth.[84]

The Commonwealth's argument and Heydon J's reasoning appear incomplete. There is no explanation provided by the Commonwealth or Heydon J as to why a legal relationship is necessary, nor is there any explanation of what is meant by the concept 'legal relationship'. Moreover, there is no discussion of why the factors that the plaintiff submitted indicated a relationship of supervision and control do not constitute a legal relationship.

## B *'Under' v 'Of': Impact on s 75(v)*

The Commonwealth also had an argument concerning the impact on s 75(v) jurisprudence if the plaintiff's construction of 'office … under the Commonwealth' was adopted. On the plaintiff's approach, it was argued, any situation in which the Commonwealth contracts for the provision of services to a particular standard and imposes reporting requirements 'will have the effect of creating offices under the Commonwealth, occupied by individuals with whom the Commonwealth has no relationship.'[85] This, the Commonwealth argued, would 'radically expand' the scope of s 75(v).[86] Scripture Union Queensland made submissions to the same effect.[87]

Heydon J was obviously attracted by this argument adopting the Commonwealth's language and agreeing that the plaintiff's construction would 'radically expand' the scope of s 75(v).[88] This position seems to have a significant defect: the scope of s 75(v) could only be expanded if 'of' means the same as 'under' and this is something that the plaintiff explicitly rejected. Indeed, the terminological difference was central to the plaintiff's argument. On the meaning of 'under', Heydon J said:

> The word 'under' in s 116 has no significance. It does not suggest the wider meaning which the plaintiff advocated. It simply repeats the relevant part of Art VI of the *United States Constitution*: 'no religious Test shall ever be

84 Ibid 808 [445]–[446].

85 Commonwealth of Australia, 'Amended Submissions of the First, Second and Third Defendants', Submission in *Williams v Commonwealth*, S307/2010, 29 July 2011, [54].

86 Ibid.

87 Scripture Union Queensland, 'Fourth Defendant's Submissions', Submission in *Williams v Commonwealth*, S307/2010, 12 July 2011, [89].

88 *Williams v Commonwealth* (2012) 86 ALJR 713, 808 [446].

> required as a Qualification to any Office or public Trust under the United States.'[89]

The fact that the origins of the word 'under' can be explained by reference to the *United States Constitution* does not provide an explanation of the meaning of that word in the *Australian Constitution*. Moreover, the relevant part of art VI of the *United States Constitution* itself seems to distinguish between 'of' and 'under'. In full, the relevant clause reads:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both *of the United States* and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust *under the United States*.[90]

Whatever the language of the *United States Constitution* might mean, there is an Australian constitutional reason to suppose that 'under' has significance and is wider than 'of'. High Court judges are not officers of the Commonwealth within the meaning of s 75(v).[91] But they do hold an 'office': the *Constitution* expressly refers to High Court judges holding an 'office' in s 72. Heydon J's reasoning would seem to permit the Commonwealth to impose a religious test for appointment to the bench of the High Court. That would be a difficult result to accept.

Gummow and Bell JJ did not directly address the argument concerning s 75(v).

## C *The Meaning of 'Office'*

Victoria advanced an interesting but underdeveloped argument regarding the meaning of 'office'. Victoria pointed to the definition of 'office' given by Isaacs J in *R v Murray and Cormie; Ex parte Commonwealth*: '[a]n officer connotes an "office" of some conceivable tenure, and connotes an appointment, and usually a salary.'[92] Victoria submitted that the reference to the requirement for appointment 'may be taken, in context, to mean appointment by the Commonwealth or by a person exercising power on behalf of the Commonwealth'.[93] It added that 'cognate considerations' obviously bore on the meaning of 'office … under the Commonwealth' and that the Commonwealth did not appoint school chaplains.[94] However, it did not elaborate further. In particular, it did not explain how those cognate considerations might differ and, significantly, did not address the effect

89 Ibid [444].

90 *United States Constitution* art VI cl 3 (emphasis added).

91 *Federated Engine Drivers & Firemen's Association of Australasia v Colonial Sugar Refining Co Ltd* (1916) 22 CLR 103, 109, 117. Judges of other federal courts are, however, officers of the Commonwealth within the meaning of s 75(v): see, eg, *R v Judges of Federal Court of Australia; Ex parte WA National Football League (Inc)* (1979) 143 CLR 190.

92 (1916) 22 CLR 437, 452.

93 Attorney-General (Vic), 'Submissions of the Attorney-General for Victoria (Intervening)', Submission in *Williams v Commonwealth*, S307/2010, 20 July 2011, [52].

94 Ibid [52]–[53].

of the words 'of' and 'under' on the argument. What is clear, though, is that Victoria thought that 'office' had some sort of public nature to it. It further argued that Scripture Union Queensland could not be taken to be acting on behalf of the Commonwealth since the Funding Agreement it entered into with the Commonwealth expressly stated that it was not to be deemed an employee, partner or agent of the Commonwealth and obliged Scripture Union Queensland to ensure that it was not represented as such.[95]

Queensland advanced a similar argument. It submitted that '[a] chaplain employed by scripture union is not an office holder of any kind'.[96] Queensland cited the dictionary definition of 'office' quoted with approval by Isaacs and Rich JJ in *R v Boston* that an office is '[a] position or place to which certain duties are attached, esp one of a more or less public character; a position of trust, authority, or service under constituted authority.'[97] It seems then that, like Victoria, Queensland considers the word 'office' in the *Constitution* to mean something like 'public office'. Queensland argued in support of its submission that chaplains are not appointed by the Commonwealth, are not invested with any powers, and have no legal relationship with the Commonwealth.[98]

Heydon J appears to have agreed with this argument. His Honour held:

> An 'office' is a position under constituted authority to which duties are attached.[99] That suggests that an 'officer' is a person who holds an office which is in direct relationship with the Commonwealth and to which qualifications may attach before particular appointments can be made or continued. The word 'under' has no significance …[100]

It seems, then, that for Heydon J, the words 'under the Commonwealth' serve only to indicate that the reference is not to State offices.

Gummow and Bell JJ did not give any final view on whether NSCP chaplains held an office. In their second paragraph of reasoning, Gummow and Bell JJ state:

> It has been said in this Court that the meaning of 'office' turns largely on the context in which it is found,[101] and it may be accepted that, given the significance of the place of s 116 in the *Constitution*,[102] the term should not be given a restricted meaning when used in that provision. Nevertheless, the phrase 'office ... under the Commonwealth' must be read as a whole. If this be done, the force of the term 'under' indicates a requirement for a

95 Ibid [53].

96 Attorney-General (Qld), 'Written Submissions of the Attorney-General for Queensland (Intervening)', Submission in *Williams v Commonwealth*, S307/2010, 20 July 2011, [33].

97 Ibid, citing *R v Boston* (1923) 33 CLR 386, 402.

98 Ibid.

99 *R v Boston* (1923) 33 CLR 386, 402.

100 *Williams v Commonwealth* (2012) 86 ALJR 713, 808 [444].

101 *Sykes v Cleary* (1992) 176 CLR 77, 96–7; *Kendle v Melsom* (1998) 193 CLR 46, 60–1 [32]–[33]; see also *Edwards v Clinch* [1982] AC 845, 860, 864–7, 870–1.

102 *Kruger v Commonwealth* (1997) 190 CLR 1, 85–7, 121–4, 130–4, 160–1, 166–7.

> closer connection to the Commonwealth than that presented by the facts of this case.[103]

This passage does not reject the notion that there may be some public element to the concept 'office'. It does not express a concluded view on that matter; nor does it express a concluded view on whether NSCP chaplains hold an 'office' of some sort. However, Gummow and Bell JJ clearly indicate that a broader view of the concept 'office' than that expressed by Heydon J should be adopted. How much broader is not entirely clear. Moreover, for Gummow and Bell JJ, the words 'under the Commonwealth' do much more work than they do for Heydon J.

The passage also suggests that, had they turned to consider it, Gummow and Bell JJ would have rejected the Commonwealth's argument about affecting s 75(v) jurisprudence on one or both of two bases: that the word 'under' is broader than 'of', and that the office held by a 75(v) officer may be of a narrower conceptual category than the office referred to in s 116.

### D *The Meaning of 'Office': Reference to the United States*

In further support of the public element to the concept 'office', Queensland pointed to the United States. Queensland argued that there is no American authority 'suggesting that the employee of a party to a contract, a person over whom the United States has no direct control and with whom it has no direct legal relationship, is someone who is the holder of an "office".'[104] To the contrary, Queensland submitted, authorities on the meaning of 'office' in other parts of the *United States Constitution* define 'office' as delegated sovereign authority.[105] The 'relevant part' of the *United States Constitution*, Queensland submitted, was what is known as the 'appointments clause', which provides that the President 'shall appoint [various public officials] and all other officers of the United States.'[106] It is to be noted that Queensland did not actually cite any authorities at all on the meaning of that provision and ignored the existence of other uses of the word 'office' in the *United States Constitution*. It also pointed to a state judicial decision from 1822 holding that 'the term "office" implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office'.[107] Queensland also cited the definition of 'public office' offered by an 1890 American legal treatise to similar effect.[108]

The plaintiff rejected Queensland's *United States Constitution* argument arguing that it was inaccurate and incomplete and did not provide 'a sufficient, let alone

103 *Williams v Commonwealth* (2012) 86 ALJR 713, 745 [110].

104 Attorney-General (Qld), 'Written Submissions of the Attorney-General for Queensland (Intervening)', Submission in *Williams v Commonwealth*, S307/2010, 20 July 2011, [35].

105 Ibid.

106 Ibid n 29.

107 Ibid [35], citing *Opinion of the Justices*, 3 Greenl (Me) (1822) 481, 482 (Supreme Judicial Court of Maine).

108 Ibid [36], citing Floyd R Mechem, *A Treatise on the Law of Public Offices and Officers* (Callaghan and Co, 1890) 1–2.

an irresistible, answer to the plaintiff's case'.[109] As to its incompleteness, the plaintiff pointed to what is known as the 'ineligibility clause' of the *United States Constitution*.[110] That clause provides that '[n]o [serving member of Congress shall] … be appointed to any civil Office under the Authority of the United States … and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office'.[111] The plaintiff suggested that when taken together the appointments clause and the ineligibility clause indicate that members of congress do not hold an office under the United States.[112] The plaintiff further suggested that if that meaning controlled the meaning of the religious tests clause then a religious test could validly be imposed on membership of Congress. Such a result was described by the plaintiff as an 'anomaly'.[113] It is here that *Crittenden v Anderson* may also have provided some guidance, since that decision proceeded on the basis that Members of Parliament hold an 'office or public trust under the Commonwealth'.[114]

As to the inaccuracy of Queensland's *United States Constitution* argument, the plaintiff pointed out that there is authority suggesting that a person may be an 'officer of the United States' if he or she is merely a contractor, rather than a government employee, exercising some power or performing some function that would otherwise render that person an officer.[115] The identity of a chaplains' employer under the NSCP therefore was not conclusive of whether a chaplain held an office under the Commonwealth in the plaintiff's submission.[116]

Also leading to the conclusion that the identity of an officer's employer does not determine whether the religious tests clause has application, the plaintiff submitted, were two American cases with identical facts.[117] The facts were that in order to become a public notary in the relevant state, applicants were required to profess a belief in God. In *Torcaso v Watkins*,[118] the would-be notary, an atheist, alleged that the requirement to profess belief in God violated both the First Amendment and the religious tests clause of the *United States Constitution*.[119] The Supreme Court agreed that the First Amendment was violated by the requirement

109 Ronald Williams, 'Plaintiff's Submissions in Reply to the Submissions of the Interveners', Submission in *Williams v Commonwealth*, S307/2010, 28 July 2011, [26].

110 Ibid [19]–[20].

111 *United States Constitution* art 1 § 6 cl 2.

112 Ronald Williams, 'Plaintiff's Submissions in Reply to the Submissions of the Interveners', Submission in *Williams v Commonwealth*, S307/2010, 28 July 2011, [20].

113 Ibid.

114 (Unreported, High Court of Australia, Fullagar J, 23 August 1950), extracted in 'An Unpublished Judgment on s 116 of the *Constitution*' (1977) 51 *Australian Law Journal* 171.

115 Ronald Williams, 'Plaintiff's Submissions in Reply to the Submissions of the Interveners', Submission in *Williams v Commonwealth*, S307/2010, 28 July 2011, [22], citing *United States v Maurice*, 26 F Cas 1211 (CCD Va, 1823) (Marshall CJ).

116 Ibid.

117 Ibid [23]–[24].

118 367 US 488 (1961).

119 *United States Constitution* amend I: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. The First Amendment has been 'incorporated' to bind the States by reason of the Fourteenth Amendment's 'due process' clause: *Cantwell v Connecticut*, 310 US 296 (1940); *Everson v Board of Education*, 330 US 1 (1947).

and therefore 'found it unnecessary' to consider whether the religious tests clause had been violated.[120] The second case was *Silverman v Campbell*,[121] in which the South Carolina Supreme Court held that the religious tests clause was indeed violated by the requirement to profess a belief in God. However, the Court gave no reasons for its conclusion. For the plaintiff in *Williams*, these cases suggested that the religious tests clause of the *United States Constitution* could not be properly understood by reference only to the appointments clause.[122] This was even more so, the plaintiff submitted, because of the fact that a notary does not exercise any part of the sovereign power of the United States and the uncertainty as to whether a notary exercises any part of the sovereign power of the appointing state.[123]

Neither of the judgments engaged with these submissions. The closest any judgment came is the concluding sentence of Gummow and Bell JJ's reasoning on s 116: 'there is no clear stream of United States authority on [the American religious tests clause] which points to any conclusion contrary to that expressed above.'[124] At most, this comment suggests that those judges would have paused to discuss any such authority and consider what guidance, if any, it might provide on the meaning of the Australian provision.

It is unlikely that too much guidance would be found in such authorities. The meaning of the various 'office'-related language in the *United States Constitution* is ambiguous and the subject of ongoing debate. Various expressions are used in the text of that document, including: 'office of Honor, Trust or Profit under the United States',[125] 'civil Office under the Authority of the United States',[126] 'Office under the United States',[127] 'Officers of the United States'[128] and 'civil Officers of the United States'.[129] The text of the *United States Constitution* appears to contemplate distinctions between these expressions; what those distinctions are, and their precise implications, is a matter of academic controversy.[130] It is most improbable that the resolution of the meanings of these American expressions should, or even could, control the meaning of s 116 of the *Australian Constitution*.

120 *Torasco v Watkins*, 367 US 488, 489 n 1.

121 326 SC 208 (1997).

122 Ronald Williams, 'Plaintiff's Submissions in Reply to the Submissions of the Interveners', Submission in *Williams v Commonwealth*, S307/2010, 28 July 2011, [24].

123 Ibid.

124 *Williams v Commonwealth* (2012) 86 ALJR 713, 745 [110].

125 *United States Constitution* art 1 § 3 cl 7.

126 Ibid art 1 § 6 cl 2.

127 Ibid art 1 § 6 cl 2.

128 Ibid art 2 § 2 cl 2.

129 Ibid art 2 § 4.

130 See, eg, Seth Barrett Tillman, 'Interpreting Precise Constitutional Text: The Argument for a "New" Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, and the Religious Test Clause — A Response to Professor Josh Chafetz's Impeachment & Assassination' (2012) 60 *Cleveland State Law Review* (forthcoming); Zephyr Teachout, 'Gifts, Offices and Corruption' (2012) 107 *Northwestern University Law Review Colloquy* 30; Seth Barrett Tillman, '*Citizens United* and the Scope of Professor Teachout's Anti-Corruption Principle' (2012) 107 *Northwestern University Law Review Colloquy* 1; Zephyr Teachout, 'The Anti-Corruption Principle' (2009) 94 *Cornell Law Review* 341. See also the various cases and literature cited in these articles.

## VI METHODOLOGICAL OVERSIGHT? READING THE PHRASE AS WHOLE

The discussion so far has summarised and critiqued the particular arguments and reasoning put forward by the parties, interveners and judges on the religious tests clause issues. In this section, a more general matter is raised. In their second paragraph of reasoning, Gummow and Bell JJ state: 'the phrase "office … under the Commonwealth" must be read as a whole.'[131] Yet surely the phrase that must be read as a whole is: 'office or public trust under the Commonwealth'. The expression used in the religious tests clause is not 'office under the Commonwealth' and the ellipsis used by all the parties, interveners and judges may have obscured a potentially useful methodological path to determining the meaning of this last part of the religious tests clause.

A number of conclusions can be drawn from the phrase 'office or public trust under the Commonwealth'. It is possible for an office to exist 'under the Commonwealth'. Likewise, it is possible for a public trust to exist 'under the Commonwealth'. Obviously, not all offices and public trusts will necessarily be 'under the Commonwealth'. Importantly, the qualifier 'under the Commonwealth' attaches to both 'office' and 'public trust'. As such, 'under the Commonwealth' must be taken to do the same work, although the work might involve varying means, in respect of both 'office' and 'public trust'. The only way for this not to be true is if the word 'or' in the religious tests clause has a very peculiar and unnatural meaning. What that work is depends not only on the meaning of 'under' but also on the meaning of 'the Commonwealth' since it is one party to the 'under' relationship.

Before turning to consider 'the Commonwealth', it is prudent to recognise that s 116 appears to contemplate a distinction between offices and public trusts. This is not to say that they are mutually exclusive categories but simply to point out that there will be examples where a position may be one but not the other.[132] In *R v Boston*, a criminal case in which a politician was alleged to have accepted a bribe, Higgins J offered an explanation of what a public trust is:

> All the relevant cases rest on the violation of a public trust. 'The nature of the office is immaterial as long as it is for the public good' (*R v Lancaster*[133]). An agreement between a trustee and an estate agent to share commission on a sale is void and the trustee has to account to the beneficiaries for his share. But it is not an indictable matter, as it is not a public trust — a trust 'concerning the public' (*R v Bembridge*[134]). Bribery of electors for Parliament is a crime at common law (*R v Pitt*[135]; *Hughes v Marshall*[136]); so is bribery of one who can vote at an election for alderman

131 *Williams v Commonwealth* (2012) 86 ALJR 713, 745 [110].

132 See Beck, above n 3, 347.

133 (1890) 16 Cox CC 737, 739.

134 (1783) 3 Doug (KB), 332.

135 (1762) 1 W Bl 380.

136 (1831) 2 Cr & J 118, 121.

> (*R v Steward*[137]); so is bribery of a clerk to the agent of French prisoners of war, to procure exchange of some out of their time (*R v Beale*, cited in note to *R v Whitaker*[138]); so is a promise to bribe a municipal councillor as to the election of mayor (*R v Plympton*[139]); bribery of electors for assistant overseer of a parish (*R v Jolliffe*, cited in *R v Waddington*[140]; *R v Lancaster*[141]). So that the application of the principle is not confined to public servants in the narrow sense, under the direct orders of the Crown.[142]

It should be noted that it was Higgins J who at the Convention Debates proposed what became s 116 and was its chief advocate there.[143] If Higgins J is broadly correct then electors for Members of the Commonwealth Parliament hold a public trust and it seems reasonable to suppose that the position is 'under the Commonwealth' and cannot be subject to religious tests.[144] The nature of the relationship an elector has with the 'the Commonwealth' depends on what 'the Commonwealth' is.

The *Constitution* uses the term 'the Commonwealth' in a number of different senses.[145] It is not necessarily the federal government. In some places, the term has clear governmental administrative connotations. Its use in s 75(v) is an example. In other places, the term is being used more broadly in the sense of the Australian nation or body-politic. For example, s 106 speaks of 'State[s] of the Commonwealth', s 24 of 'the people of the Commonwealth', s 51(xxxviii) of the exercise of powers 'within the Commonwealth'. In the religious tests clause, it is not obvious in what sense 'the Commonwealth' is being used. Both judgments in *Williams* reflect on the meaning of 'office' and 'under' but neither reflects on the meaning of 'the Commonwealth' and it might have been useful to do so.[146]

137 (1831) 2 B & Ad 12.

138 (1914) 3 KB, 1300.

139 [1790] EngR 1965; (1724) 2 Ld Raym 1377.

140 [1800] EngR 32; (1800) 1 East 143, 154.

141 (1890) 16 Cox CC 737.

142 (1923) 33 CLR 386, 410–11.

143 See Beck, above n 3, 334–7; Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth, 1891–1906* (Melbourne University Press, 1976).

144 Cf *Constitution* ss 16, 34.

145 See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Melville & Mullen, 1901) 311ff for a discussion of the expression 'the Commonwealth'.

146 Only the Attorney-General for South Australia raised the meaning of 'the Commonwealth' in written submissions:

> Section 116 limits the power of the Commonwealth in four respects, each sometimes referred to as comprising distinct clauses. The first three concern the legislative power of the Commonwealth. The fourth, which is the subject of this case, constitutes a constraint upon both the legislative and executive power. Thus the 'Commonwealth' referred to in the first clause is the Commonwealth Parliament, whilst the 'Commonwealth' referred to in the fourth clause includes both the Commonwealth Parliament and the Executive Government of the Commonwealth.
>
> It is clear from the text of s 116 that where it refers to any office or public trust under the Commonwealth it is not concerned with the 'federal community'. That is, s 116 does not apply in any of its four aspects to the States. This is consistent with the history of the provision in the constitutional conventions.

Attorney-General (SA), 'Written Submissions of the Attorney-General for the State of South Australia (Intervening)', Submission in *Williams v Commonwealth*, S307/2010, 20 July 2011, [51]–[52] (citations omitted).

If it is not possible for either an 'office' or a 'public trust' to have an 'under' relationship with 'the Commonwealth' in a particular sense then there would be good reason to conclude that 'the Commonwealth' is not being used in that sense. On the other hand, if an 'under' relationship is possible with 'the Commonwealth' in multiple senses then reasons will have to be found for preferring one sense over any others. Those reasons might well assist in understanding what it means for a position to be 'under' the Commonwealth.

Ultimately, the point being made is that it is not really possible to conclude that something is or is not 'under the Commonwealth' without first knowing what 'the Commonwealth' is.[147]

To return to the *R v Boston* example, it would seem that the position of elector for members of the Commonwealth Parliament does not have any governmental administrative connotations in the sense that the position of a public servant does. It does, however, seem to have body-politic sense connotations. Another example comes from the Convention Debates. Early in the debate on s 116 Higgins expressed concern, without elaboration, that the religious tests clause might 'void our imposing of the ordinary oaths in the courts and elsewhere.'[148] Without explanation he subsequently overcame those concerns and pursued the clause.[149] It seems unlikely that a witness could be said to hold any sort of governmental administrative position; and if Higgins' concern had some basis this suggests that he conceived 'the Commonwealth' as used in the clause in a broader sense. Higgins' concern is, at least nowadays, unfounded since the availability of affirmations means that oaths are not 'required'.[150]

The meaning of 'the Commonwealth' is not an issue that was engaged with by the judgments in *Williams* but it is an issue that helps determine the meaning of the religious tests clause.

## VII CONCLUSION

In the days following the High Court's decision in *Williams*, the Commonwealth Parliament enacted the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth). The purpose of the Act was to overcome the High Court's conclusion that the executive power of the Commonwealth does not extend to entry into contracts, such as the Funding Agreement in *Williams*, and the spending of money without any legislative authority beyond an appropriation.[151] The Act seeks to do this, in the words of the Attorney-General's Second Reading Speech, by 'empower[ing] the Commonwealth to make, vary or administer arrangements or

147 Cf *Williams v Commonwealth* (2012) 86 ALJR 713, 753 [154].

148 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 February 1898, 657 (Henry Bournes Higgins).

149 See Beck, above n 3, 335–6.

150 See Ibid 344–5.

151 See Explanatory Memorandum, Financial Framework Legislation Amendment Bill (No 3) 2012; Department of Parliamentary Services (Cth), *Bills Digest*, No 175 of 2011–12, 27 June 2012.

grants under which public money is, or may become, payable, if the arrangements or grants or programs are specified in regulations.'[152]

After the *Williams* litigation began the NSCP was expanded and became the National School Chaplaincy and Student Welfare Program, and that program is now specified in the relevant regulations.[153] The *National School Chaplaincy and Student Welfare Program Guidelines* still require that a chaplain be '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'.[154]

It seems unlikely that this new statutory foundation for funding school chaplains has the effect of rendering the position of a school chaplain any closer to the Commonwealth than it previously was. The discussion in *Williams* on the s 116 point proceeded on the assumption that the NSCP was otherwise valid. The new legislation, assuming it is valid, now makes good that assumption. This, without more, is unlikely to alter the conclusion about the religious tests clause.

In the result, Mr Williams failed to achieve his goal and the judgment in *Williams v Commonwealth* provides only limited and somewhat unclear guidance on the meaning of the religious tests clause of s 116 of the *Constitution*.

152 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2012, 8401 (Nicola Roxon).

153 See *Financial Management and Accountability Regulations 1997* (Cth).

154 Department of Education, Employment and Workplace Relations (Cth), *National School Chaplaincy and Student Welfare Program Guidelines* (July 2012) 8 <http://www.deewr.gov.au/Schooling/NSCSWP/Documents/NSCSWP_Guidelines.pdf>.