CASE NOTE

ATTORNEY-GENERAL FOR VICTORIA; EX REL. BLACK v. THE COMMONWEALTH[1]

Constitutional law — Law for establishing any religion — Grant of Financial Assistance to States — Validity of Commonwealth legislation providing financial assistance to non-government schools — Constitution ss. 96, 116

Introduction

In this case the High Court for the first time considered the establishment clause in section 116 of the Constitution.[2] The Attorney-General for Victoria at the relation of twenty-seven persons, together with a number of persons suing individually,[3] sought declarations that a number of Commonwealth Acts[4]—principally, Acts under which the Commonwealth provided financial assistance to schools in the States and internal Territories—were beyond the powers of the Commonwealth and so invalid. The legislation was challenged in so far as it resulted in benefits to "religious" non-government schools (that is, schools conducted by, or on behalf of, or associated with, religious bodies).

The Facts[5]

The Commonwealth has provided financial assistance for both government and non-government schools in the States and Territories, in general since 1964 but, in the case of the Australian Capital Territory, since 1956. In general, under the States Grants Acts challenged in this case the Commonwealth provided financial assistance for such schools in the States on various conditions, for example, obliging a State to apply certain granted sums to capital and recurrent expenses of non-government schools,

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[1] (1981) 55 A.L.J.R. 155; (1981) 33 A.L.R. 321. High Court of Australia; Barwick C.J., Gibbs, Stephen, Mason, Murphy, Aickin and Wilson JJ.

[2] S. 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."

[3] Only Gibbs and Murphy JJ. discussed the standing of the various plaintiffs: (1981) 55 A.L.J.R. 155, 161-162 and 179 respectively. See also 191 *per* Wilson J., who raised certain questions of standing but left them to be resolved at some later time. Gibbs and Wilson JJ. left open the question of whether taxpayers and parents of children at government schools could have a special interest in the subject matter of the action such as would give them standing. Murphy J. thought that such persons would have standing.

[4] The Commonwealth Acts challenged included the States Grants (Schools) Acts passed from 1972 to 1976, the States Grants (Schools Assistance) Acts passed from 1976 to 1979, the Schools Commission Act 1973 (which establishes a Commission, the functions of which include advising the Minister on matters relevant to the granting of financial assistance to schools), the general Appropriation Acts so far as they appropriate moneys to be spent on non-government schools in the Australian Capital Territory and the Northern Territory and the Independent Schools (Loans Guarantee) Act 1969 (which empowers the Treasurer, on behalf of the Commonwealth, to guarantee certain loans to independent schools in those Territories).

[5] The relevant legislation and facts are set out in the judgments of Gibbs and Wilson JJ.: (1981) 55 A.L.J.R. 155, 161 and 180-186 respectively.

and requiring repayment to the Commonwealth if the State did not comply with the conditions of the grant. Most non-government schools in Australia are religious schools and of those most are Roman Catholic schools. The non-government schools provide secular education in accordance with the requirements of State legislation. However, most religious schools also give instruction in the beliefs and values of the religion concerned and Gibbs J. (as he then was) assumed both that:

> in some schools religious and secular teachings are so pervasively intermingled that the giving of aid to the school is an aid to the religion, and . . . that some religions, which conduct more schools than others, will receive more aid than others . . .[6]

The Arguments and Decision

The plaintiffs argued that the States Grants Acts were invalid as (quite apart from section 116) they were not authorised by section 96 of the Constitution (the facultative provision on which they were based) and that all the challenged Acts were invalid as they infringed the establishment clause in section 116 of the Constitution.

The justices unanimously rejected the argument based on section 96 and, by majority (Murphy J. dissenting), held that none of the challenged Acts infringed section 116.[7] The action was, therefore, dismissed as the challenged Acts were valid laws of the Commonwealth.

Section 96

The plaintiffs argued that the States Grants Acts were not authorised by section 96 as the detailed conditions attached to the grants meant that after accepting a grant a State acted as a conduit pipe for the transmission of moneys to schools and school authorities for purposes outside the legislative powers of the Commonwealth—the Acts gave financial assistance not to a State but to schools and school authorities. In so arguing, the plaintiffs were faced with the decision of the High Court in *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W.R. Moran Pty Ltd*,[8] the effect of which was stated by Gibbs J.:

> That case decides that if money is granted by the Commonwealth to a State, there is a grant of financial assistance to the State within s. 96 notwithstanding that the condition of the grant requires the State to pay all the moneys away. The State cannot be compelled to accept the moneys, and the fact that it does accept them may be regarded as an acknowledgement of the fact that the moneys granted are of assistance to the State.[9]

Notwithstanding the arguments of the plaintiffs to the contrary,[10] the Court held that *Moran's* case was not distinguishable and that (subject to

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[6] *Id.* 167.

[7] In respect of both arguments Aickin J. agreed with the reasons for judgment of Gibbs and Mason JJ., *id.* 179.

[8] (1939) 61 C.L.R. 735, affirmed by the Privy Council, (1940) 63 C.L.R. 338. The plaintiffs in the present case sought to distinguish *Moran's* case and did not challenge its correctness.

[9] (1981) 55 A.L.J.R. 155, 163.

[10] *Id.* 163, 170, 190. The plaintiffs argued that *Moran's* case was distinguishable first, because the legislation under challenge in that case was promoted by the States,

the section 116 question) the States Grants Acts were authorised by section 96.[11] A majority also expressed the view that, in any event, the Acts did extend financial assistance to the States.[12]

Section 116

The main issue was whether any of the challenged Acts was a "law for establishing any religion" within the meaning of section 116. The principal argument of the plaintiffs was that the establishment clause prohibits the Commonwealth from making any law which provides any recognition, aid or support (financial or otherwise) to one or more religions or to religion generally.

The reasons for judgment of Gibbs J. are representative of the majority judgments. In determining the meaning of the phrase "establishing any religion" in section 116, Gibbs J. first concluded that, of the four possible meanings[13] of the word "establish" when used in relation to religion:

> 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. . . . On ordinary principles of construction it is the meaning that ought to be given to the words of the section unless sufficient reason is shown for adopting another meaning.[14]

Section 116 is a "fairly blatant piece of transcription"[15] in that it reflects parts of Article VI of, and the First Amendment to, the United States Constitution.[16] It was argued, therefore, that the establishment clause in section 116 should be given the meaning that had by 1900 been given to the establishment clause in the First Amendment. Gibbs J. decided, however, that for various reasons the United States cases did not contain "an exposition which should be treated as authoritative in its application to s. 116".[17] First, there are differences in wording between the two provisions.[18] Secondly, although section 116 appears in Chapter V of the Constitution under the heading "The States" its prohibitions bind only the Commonwealth.[19] The First Amendment applies to the States by virtue of the

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and secondly, because in that case the States were involved in the administration of the wheat stabilisation scheme.

[11] *Id.* 160 *per* Barwick C.J., 162-163 *per* Gibbs J., 170 *per* Stephen J., 173 *per* Mason J., 174 *per* Murphy J., 189-190 *per* Wilson J.

[12] *Id.* 160 *per* Barwick C.J., 163 *per* Gibbs J., 170 *per* Stephen J., 190 *per* Wilson J.

[13] *Id.* 164-165.

[14] *Id.* 165. The relevance of the meaning of the phrase current in 1900 is also referred to at 157-158, 159 *per* Barwick C.J., 172 *per* Mason J.

[15] Pannam, "Travelling Section 116 with a U.S. Road Map" (1963) 4 Melbourne University Law Review 41, 41.

[16] In so far as they are relevant, Art. VI of the United States Constitution provides that ". . . no religious test shall ever be required as a qualification to any office or public trust under the United States" and the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .".

[17] (1981) 55 A.L.J.R. 155, 167; see also 158 *per* Barwick C.J., 169-170 *per* Stephen J., 187 *per* Wilson J. Murphy J. decided that the United States decisions should be followed, *id.* 178.

[18] *Id.* 158 *per* Barwick C.J., 165 *per* Gibbs J., 169-170 *per* Stephen J., 172 *per* Mason J., 187 *per* Wilson J.

[19] *Id.* 157, 158 *per* Barwick C.J., 164 *per* Gibbs J., 187 *per* Wilson J. The history of s. 116 and its precursors is discussed in Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 951-953; Pannam, *op. cit.* 51-55.

Fourteenth Amendment.[20] This suggests that the establishment clause in section 116 has a narrower meaning than the establishment clause in the First Amendment.[21] Thirdly, the First Amendment is the peculiar result of the history of religious oppression in the American Colonies—the background to the insertion of section 116 in the Commonwealth Constitution is very different.[22] Finally, Gibbs J. could find no justification for applying to the establishment clause in section 116 the inconclusive American test which apart from being inconsistent with the natural meaning of that clause was the subject of "continuing controversy".[23]

The emphasis placed by the majority in this case on the differences in wording between the establishment clauses in section 116 and the First Amendment as a reason for not following the United States authorities is, with respect, open to criticism. At the least, those differences are not so great as to govern the meaning of the phrase "establishing any religion" (Murphy J. regarded them as "trifles"[24]) although they are relevant in other respects.[25] The word "establishing" must be given the meaning it had in Australia in 1900 and discovering that meaning is both a legal and an historical inquiry. The United States decisions are not authoritative largely because they are the product of a different legal and social background. The establishment clauses in section 116 and the First Amendment would, surely, bear different meanings even if they were identically worded.[26]

In any case, after reviewing some of the United States authorities[27] Gibbs J. concluded that even if they were applicable to section 116 they would not support the principal argument of the plaintiffs as by 1900 the establishment clause in the First Amendment was not understood as prohibiting the giving of any recognition, aid or support to religion.[28]

The context of section 116 did not, therefore, require that the establishment clause be given other than its natural meaning in 1900. The principal argument of the plaintiffs was rejected and the majority of the Court held that the establishment clause prohibits the Commonwealth from making any law "for conferring on a particular religion or religious body the position of a state (or national) religion or church",[29] that is, for making

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[20] *Murdock* v. *Pennsylvania* (1943) 319 U.S. 105.

[21] (1981) 55 A.L.J.R. 155, 188 *per* Wilson J.

[22] *Id.* 165, 167 *per* Gibbs J., 187 *per* Wilson J.; Pannam, *op. cit.* 43-56, 72-73, 82; Hogan, "Separation of church and State: Section 116 of the Australian Constitution" (1981) 53 The Australian Quarterly 214, 214-216, 218-219. In contrast to s. 116, the First Amendment guarantees a number of fundamental human rights. The United States Supreme Court has been influenced in its interpretation of the First Amendment by statements such as that of Thomas Jefferson that the First Amendment builds "a wall of separation between church and State": cited in *Reynolds* v. *United States* (1878) 98 U.S. 145, 164. In Australia, however, the High Court does not have regard to the Convention Debates in interpreting the Constitution: *Tasmania* v. *Commonwealth* (1904) 1 C.L.R. 329, 333—a rule acknowledged in the present case by Barwick C.J., Gibbs and Wilson JJ. at 157, 167 and 188 respectively.

[23] *Id.* 167. The current American test is stated in *Lemon* v. *Kurtzman* (1971) 403 U.S. 602, 612-613, cited by Gibbs J., *id.* 167.

[24] *Id.* 178.

[25] *Infra* p. 275.

[26] (1981) 55 A.L.J.R. 155, 187 *per* Wilson J., *cf.* 170 *per* Stephen J.; Pannam, *op. cit.* 84.

[27] *Id.* 166-167.

[28] *Id.* 167; see also 170 *per* Stephen J., 171-172 *per* Mason J.

[29] *Id.* 167 *per* Gibbs J.; see also 159 *per* Barwick C.J., 168 *per* Stephen J., 171 *per*

a religion an "institution" of the Commonwealth. That being so, none of the challenged Acts infringed section 116 for, even on the assumptions made by Gibbs J.,[30] the primary purpose of the Acts was the advancement of education and:

> it is impossible to say, on any view of the statutory provisions in question or of the evidence in the case, that the challenged legislation has the purpose or effect of setting up any religion or religious body as a state religion or a state church, even for limited purposes only.[31]

The decision of the Court on the facts depends also on the following propositions. First, the word "for" in section 116 is more limiting than the word "respecting" in the First Amendment as:

> "for" connotes a connexion by way of purpose or result with the subject-matter which is not satisfied by the mere circumstance that the law is one which touches or relates to the subject matter.[32]

In other words, a law does not infringe section 116 merely because it is "with respect to" the establishment of religion. If the primary purpose of a law is secular (for example, as in this case, the upgrading of the quality and range of education in both government and non-government schools) then, even if the necessary effect of the law is to aid religion, it will be difficult, if not impossible, to show that the law has the further object of establishing a religion and does not merely touch or relate to that subject matter.[33] Secondly, the establishment of religion within the meaning of section 116 involves a reciprocal relationship between church and state with a variety of characteristics. In particular, "It identifies a relationship which goes much deeper than financial assistance, whether casual or regular, from time to time, because it is expressive of a duty to maintain and support . . .".[34] A law which creates only one of the elements or characteristics which constitute the prohibited relationship will not, *by itself*, be a law "for establishing" a religion—section 116 prohibits a law which "will erect" a religion into the proscribed relationship.[35] However, the Court will examine the validity of legislative schemes:

> It is necessary to view each law in its context and that context will include the relationship between Church and State as it exists under

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Mason J., 187-188 *per* Wilson J. Murphy J. agreed with the principal argument of the plaintiffs, *id.* 175, and therefore held that the challenged Acts contravened s. 116, *id.* 179. For the views that had been taken by commentators see Pannam, *op. cit.* 81-86; Cumbrae-Stewart, "Section 116 of the Constitution" (1946) 20 A.L.J. 207, 208; Lane, "Commonwealth Reimbursements for Fees at Non State Schools" (1964) 38 A.L.J. 130, 132-133.

[30] *Supra* p. 272.

[31] (1981) 55 A.L.J.R. 155, 168 *per* Gibbs J.; see also 159-160 *per* Barwick C.J., 170 *per* Stephen J., 173 *per* Mason J., 188-189 *per* Wilson J.

[32] *Id.* 172 *per* Mason J.; see also *supra* n. 18. Latham C.J. referred to the relevance under s. 116 of the purpose of a law in *Adelaide Company of Jehovah's Witnesses Incorporated* v. *Commonwealth* (1943) 67 C.L.R. 116, 132.

[33] *Id.* 158 *per* Barwick C.J. who thought that to infringe the establishment clause a law must have the prohibited objective as its express and single purpose and 187 *per* Wilson J. who said that the words "for establishing" convey the sense of "in order to establish"; but see 168 *per* Gibbs J.

[34] *Id.* 188 *per* Wilson J.

[35] *Id.* 159, 160 *per* Barwick C.J., 169 *per* Stephen J., 173 *per* Mason J., 187-188 *per* Wilson J.

> the law generally. When that is done it may appear that a particular law offends s. 116 because its operation, taken in conjunction with that of other laws, is seen to establish a church or religion.[36]

Any law

A majority of the Court held that the prohibitions in section 116 apply to laws enacted pursuant to section 81 or section 96.[37] It will, however, be difficult to show that laws enacted pursuant to sections 81 or 96 are laws "for establishing any religion", though Mason and Wilson JJ. said that the appropriation of moneys and their payment to a church (via the States) under a section 96 grant as an integral element of a scheme to establish that church as a national church would infringe section 116.[38]

The case leaves open the question whether section 116 applies to laws made under section 122 for the government of any Territory.[39]

Some Consequences of the Decision

First, the establishment clause does not build "a wall of separation between church and state"—the relationship (falling short of setting up a state or national religion) that is permitted is determined not by section 116 but through the "democratic processes".[40]

The direct result of this case is that the provision by the Commonwealth of financial assistance to religions for a *secular* purpose will not infringe section 116 even though, in the nature of things, the effects are to benefit a particular religion more than others and to advance religion appreciably as a consequence of the pursuit of the secular purpose.[41] Further, the Commonwealth's involvement with religious authorities for a secular purpose does not infringe section 116.[42] It also seems to follow from the interpretation of the establishment clause in this case that financial aid to a religion for specifically religious purposes will not infringe section 116 if it falls short of setting up a national (official) religion.

As an alternative to their principal submission the plaintiffs argued that the establishment clause prohibits the preferring, by sponsorship or support, of one or more religions over other religions.[43] This argument finds support in the commentary by Quick and Garran on section 116.[44] However, the

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[36] *Id.* 173 *per* Mason J.; see also 157, 159 *per* Barwick C.J., 187 *per* Wilson J. See generally Cumbrae-Stewart, *op. cit.* 211-212; Lane, *op. cit.* 134-136.

[37] *Id.* 157 *per* Barwick C.J., 163 *per* Gibbs J., 173 *per* Mason J., 174 *per* Murphy J., 186-187 *per* Wilson J. Stephen J. did not consider either point and Gibbs J. did not consider the position of laws enacted pursuant to s. 81.

[38] *Id.* 173 *per* Mason J., 187 *per* Wilson J.

[39] *Id.* 157 *per* Barwick C.J., 164 *per* Gibbs J., 173 *per* Mason J., 174 *per* Murphy J., 186 *per* Wilson J. See generally Gibbs, "Section 116 of the Constitution and the Territories of the Commonwealth" (1947) 20 A.L.J. 375; Pannam, "Section 116 and the Federal Territories" (1961) 35 A.L.J. 209; Zines, " 'Laws for the Government of any Territory': Section 122 of the Constitution" (1966) 2 F.L.Rev. 72; Finlay, "The Dual Nature of the Territories Power of the Commonwealth" (1969) 43 A.L.J. 256. If s. 116 does apply to laws made under s. 122 it would have a wider operation in the Territories.

[40] *Id.* 168 *per* Gibbs J.

[41] *Id.* 159-160 *per* Barwick C.J., 167-168 *per* Gibbs J., 173 *per* Mason J., 189 *per* Wilson J.

[42] The plaintiffs had argued, in particular with respect to the Schools Commission Act 1973 (Cth), that the establishment clause prohibits the excessive involvement of the Commonwealth in religion.

[43] (1981) 55 A.L.J.R. 155, 164.

[44] Quick and Garran, *op. cit.* 951; see also the articles referred to *supra*, n. 29.

challenged Acts provided financial assistance "without differentiation between religions or churches"[45]—the Roman Catholic Church received more assistance than other Churches only because it conducted more schools so the question whether discriminatory sponsorship or support as such infringes section 116 did not arise on the facts of this case. Only Mason J. (with whom Aickin J. agreed) explicitly rejected the "preference" argument:

> to constitute "establishment" of a "religion" the concession to one church of favours, titles and advantages must be of so special a kind that it enables us to say that by virtue of the concession the religion has become established as a national institution, as, for example, by becoming the official religion of the State.[46]

Gibbs and Stephen JJ. relied on the meaning attributed in 1900 to the establishment clause in the First Amendment (which was then understood as prohibiting the setting up of a national religion *and* the preferring of one religion over others[47]) as one reason for rejecting the argument that section 116 prohibits the giving of any recognition, aid or support to religion. Indeed, Stephen J. referred to this reason as "the more telling".[48] As a result, the attitude of Gibbs and Stephen JJ. to the "preference" argument is not entirely clear. It may be argued that a reference to the pre-1900 United States authorities is relevant only because they reflect the proper meaning of the establishment clause in section 116—otherwise they would be *wholly* irrelevant to determining that meaning. However, it is considered that the formulations by the majority in this case of the establishment clause as prohibiting the setting up of a state (or national) religion (the narrowest possible interpretation) was exhaustive so that the "preference" argument was, at least implicitly, rejected. The preferring of one religion over other religions does not infringe section 116 unless it amounts, in the relevant sense, to the establishing of a national religion. Discrimination will, however, be highly relevant when determining whether a religion is erected into the proscribed relationship with the state.

Secondly, Hogan concludes that this case reinforces a "strong tradition of narrow interpretation of s. 116".[49] However, the other High Court cases on section 116 concerned the application of the "free exercise" clause to exceptional circumstances. Thus, the decision in the *Jehovah's Witnesses* case was based on the principle that the freedom guaranteed by the "free exercise" clause is not absolute and is consistent with limitations on actions threatening the continued existence of the Australian community in time of war: the case did not require a decision on the general operation of the

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[45] (1981) 55 A.L.J.R. 155, 173 *per* Mason J.
[46] *Id.* 171.
[47] *Id.* 166-167 *per* Gibbs J., 170 *per* Stephen J., 171-172 *per* Mason J.; *supra* p. 274.
[48] *Id.* 170.
[49] Hogan, *op. cit.* 223. The three High Court cases on s. 116 are: *Krygger* v. *Williams* (1912) 15 C.L.R. 366; *Jehovah's Witnesses* case (1943) 67 C.L.R. 116; and the present case. See also *Judd* v. *McKeon* (1926) 38 C.L.R. 380, 387 *per* Higgins J.; *Smith* v. *Handcock* (1944) 46 W.A.L.R. 21; *Kiorgaard* v. *Kiorgaard* [1967] Qd. R 162; *Evers* v. *Evers* (1972) 19 F.L.R. 296; *The Church of the New Faith* v. *Commissioner of Pay-roll Tax (Victoria)* (1980) 80 A.T.C. 4,667.

"free exercise" clause and the principle it establishes is hardly narrow (or contentious).

The possible meanings of the establishment clause put forward in the present case highlighted the importance of the fact that the prohibitions in section 116 bind only the Commonwealth,[50] of the differences in wording between section 116 and the First Amendment and of the scope of the other clauses of section 116[51] in confirming the narrow interpretation of that clause. These factors may not, however, similarly point to a narrow interpretation of, in particular, the "free exercise" clause. For example, an attempt to read down the "free exercise" clause by reference to the scope of the other clauses of section 116 may not lead to any logical formulation of the scope of that clause, whereas the same approach in the case of the establishment clause did point to a particular meaning.[52] Further, in determining the meaning of the "free exercise" clause, the High Court may have greater regard to United States authorities than in the present case.[53] The differences in wording notwithstanding, the approach of those authorities (under which a law is invalid if, when balanced against the interests of society, the court considers that it constitutes an "undue infringement" of religious freedom) appears to be consistent with the natural meaning of the "free exercise" clause in 1900.[54] Latham C.J. has said that there is "full legal justification"[55] for adopting the pre-1900 United States approach in Australia and his Honour's criticisms of some of the American cases[56] may be met by following the more recent formulation of that approach which is less lenient towards legislative restrictions.[57]

In the present case, Gibbs J. implied that the "free exercise" clause should be liberally interpreted as, unlike the establishment clause, it has "the purpose of protecting a fundamental human right".[58] Further, although Wilson J. accepted that a provision of the Constitution denying power

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[50] (1981) 55 A.L.J.R. 155, 188 *per* Wilson J.

[51] *Id.* 159 *per* Barwick C.J., 165 *per* Gibbs J., 172 *per* Mason J., 187, 188 *per* Wilson J.; *contra* 175 *per* Murphy J.

[52] *Contra* 175 *per* Murphy J.

[53] See generally Pannam, (1963) *op. cit.* 62-72.

[54] *Jehovah's Witnesses* case (1943) 67 C.L.R. 116, 126-133 *per* Latham C.J., 149-150 *per* Rich J., 154-155 *per* Starke J., 159-160 *per* Williams J. Latham C.J., Starke and Williams JJ., in particular, appear to accept the "undue infringement" approach. However, the High Court has not considered the validity of a law infringing religious freedom in circumstances where the relevant interest of society was less than the continued existence of the Australian community.

[55] *Id.* 131.

[56] *Id.* 129-131 *per* Latham C.J. In particular, the Chief Justice commented that the decision of the Supreme Court in *Davis* v. *Beason* (1890) 133 U.S. 333 "appears to make room for any kind of law thought proper by the legislature on grounds of peace and prosperity and the morals of the people, that is, in practice, upon any grounds at all, notwithstanding the constitutional protection of religion" and said that a test this lenient towards legislative restrictions was "difficult to justify . . . upon any basis of legal interpretation", *id.* 130. See also Pannam, (1963) *op. cit.* 69-70.

[57] See, for example, *State of Tennessee; ex rel. Swann* v. *Pack* (1975) 527 S.W. (2d) 99, 111 in which the Supreme Court of Tennessee said that although the right to the free exercise of religion is not absolute and unconditional, "the scales are always weighted in favor of free exercise and the state's interest must be compelling; it must be substantial; the danger must be clear and present and so grave as to endanger paramount public interests." Such an approach finds support in some of the judgments in the *Jehovah's Witnessess* case, *supra*, n. 54.

[58] (1981) 55 A.L.J.R. 155, 167. *Cf.* 170 *per* Stephen J., 175 *per* Murphy J.; but *cf.* 168 *per* Stephen J., 186, 187 *per* Wilson J.

should not be read as largely as a provision granting power,[59] the view of the Chief Justice that there is "no reason why the words of the Constitution should not be given their full effect, whether they be expressed in a facultative or prohibitory provision" seems preferable.[60] The three High Court cases on section 116 do not establish a tradition that necessarily points to a narrow interpretation of, in particular, the "free exercise" clause in section 116.

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[59] *Id.* 187. See also 167 *per* Gibbs J., 172 *per* Mason J.

[60] *Id.* 157. See also 175 *per* Murphy J.

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The views in this Case Note are expressed as the personal views of the author, and are not necessarily those of the Department.