

# Religion and the Constitution - an Illusory Freedom

*Michael Eburn*  
*Law, University of New England*

In Australia, there are very few civil freedoms that are enshrined in the Constitution. One 'freedom' that at first glance appears to be protected by the Constitution is a freedom of religious choice. That freedom is protected, if it is protected, by s. 116 of the Constitution. This paper will consider that section and the limited role that it has been given by the High Court of Australia. It will be discovered that any guarantee that the section may appear to give has been seriously limited, with the result that like so many civil liberties in Australia, the freedom of religion is protected by the political process and the 'goodwill' of government, rather than by being enshrined in the foundation documents of the nation.

## The Constitution

Section 116 of the Constitution says:

*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.*

This section of the Constitution is a 'constitutional provision of high impor-

tance' that ensures that 'Parliament will observe that "true distinction between what properly belongs to the Church and what to the State"<sup>1</sup>. However, notwithstanding its apparent broad terms this section is not a guarantee of freedom of religion in Australia.

*It is not, in form, a constitutional guarantee of the rights of individuals ... instead takes the form of express restriction upon the exercise of Commonwealth legislative power.<sup>2</sup>*

Under the Commonwealth structure in Australia, the Constitution sets out those matters upon which the Federal Parliament may make laws. If a law is outside the scope of these listed powers it is beyond the power of the Commonwealth to make the law (the law is *ultra vires*) and any such law is invalid. Section 116 however is unlike other sections of the Constitution in that it does not identify a subject area about which the Commonwealth can make law, rather it identifies an area upon which the Commonwealth cannot make a law. As such it is a limit on Commonwealth power. To put it another way, s. 51 sets out 39 areas upon which the Commonwealth may make law. It is however up to the Parliament to decide what the necessary law should be, for example under the Immigration power (s. 51(xxvii))

the Commonwealth could make a law that either liberalised or restricted Australia's position on immigration. Under the Constitution the power to make the law is given to the Commonwealth but the decision of what law to make is left to the Parliament.

If s. 116 was in similar terms to the other powers in s. 51, for example if it said that the Commonwealth shall have the power to make law regarding religion, then the Parliament of the Commonwealth could either restrict or encourage religious freedom. Section 116 is not, however, like s. 51. Rather than give the Commonwealth freedom and power to make a law, it restricts that power. It says that no matter what the Commonwealth may otherwise be able to do it is not able to make laws about religion that would establish any religion, impose any religious observance, prohibit the free exercise of any religion, or impose a religious test as a qualification for any office or public trust under the Commonwealth.

That limit on Commonwealth power does not however guarantee that the citizens of Australia have the right to exercise religion free from Government interference.

*The fact is that s. 116 is a denial of legislative power to the Commonwealth, and no more. No similar constraint is imposed upon the legislatures of the States. The provision therefore cannot answer the description of a law which guarantees within Australia the separation of church and state.*<sup>3</sup>

The section must have some effect however. It does impose some limits on the Commonwealth if not on the States. The question that needs to be considered is what is the limit that the section imposes? Before attempting to answer that

question, it is helpful to consider what, at law, is a 'religion'?

The task of setting out a definition of religion for the purposes of the law had to be addressed in *The Church of New Faith v The Commissioner of Pay-Roll Tax (Vic)*<sup>4</sup>. The issue was whether the 'Church of New Faith' (Scientology) was a religion within the meaning of the Victorian Pay-Roll Tax Act - if it were then it could claim exemption from pay-roll tax in that State.

Mason ACJ<sup>5</sup> and Brennan J delivered a joint judgement wherein they considered what was meant by a 'religion'. They said that a definition of religion could not be based on a definition acceptable to the 'majority' nor could religion be defined by reference to the majority, mainstream or accepted religions. On the other hand the label 'religion' could not be given to every group that claimed for itself the title of 'religion'. 'A more objective criterion [was] required.'<sup>6</sup> They said:

*We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, the belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.*<sup>7</sup>

Murphy J said that it would be impossible to give a conclusive definition of what is a religion. Rather, it was possible to state what was sufficient, though not necessary, to decide whether or not a group was a religion.

*On this approach, any body which claims to be religious, whose beliefs or practices are a revival of, or resemble, earlier cults, is relig-*

*ious. Any body which claims to be religious and to believe in a supernatural Being or Beings, whether physical and visible, such as the sun or the stars, or a physical invisible God or spirit, or an abstract God or entity, is religious. For example, if a few followers of astrology were to found an institution based on the belief that their destinies were influenced or controlled by the stars, and that astrologers can, by reading the stars, divine these destinies, and if it claimed to be religious, it would be a religious institution. Any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious. The Aboriginal religion of Australia and of other countries must be included. The list is not exhaustive; the categories of religion are not closed.*<sup>8</sup>

Murphy J was prepared to give a very wide view to the meaning of religion and placed a large amount of emphasis on the fact that the group claims to itself the title of religion or of being religious.

The final judgement was a joint judgement of Wilson and Deane JJ<sup>9</sup>. As to religion generally, their honours said that there can be no:

*... definition which will enable the question whether a particular system of beliefs and practices is a religion to be determined by use of the syllogism of formal logic. ... [Rather] the question will ordinarily fall to be determined by reference to a number of indicia of varying importance'.<sup>10</sup>*

Their honours went on to identify their indicia of a religion. They are:

1. belief in the supernatural i.e a reality which extends 'beyond that which is capable of perception by the senses';
2. the ideas relate to man's (sic) nature and place in the universe and his relation to things supernatural;
3. the ideas require or encourage the adherents to observe particular standards

or codes of conduct or to participated in specific practices having supernatural (or 'extra-mundane'<sup>11</sup>) significance;

4. the adherents must constitute an identifiable group or groups (however 'loosely knit'); and

5. the adherents themselves must see the collection of ideas and/or practices as constituting a religion.<sup>12</sup>

The test of whether an organisation or a set of beliefs constituted a religion is determined by reference to the beliefs of the followers of that religion. The fact that, for example, the charismatic leader of a religion is not sincere cannot take from the group the status of religion nor deny the Constitutional protection to the followers of that religion. The protection (whatever its force) is designed to ensure that the Commonwealth does not prohibit the 'free exercise of religion'. That protection would be worthless if a person who held sincere beliefs could be disregarded on the basis that another professed the beliefs but was not genuine in that statement.

*... charlatanism is a necessary price of religious freedom, and if a self-proclaimed teacher persuades others to believe in a religion which he propounds, lack of sincerity or integrity on his part is not incompatible with the religious character of the beliefs, practices and observances accepted by his followers.<sup>13</sup>*

Wilson and Deane JJ, in response to a suggestion that the leaders of the Scientology church had developed 'church' like structures for the sake only of tax advantages, said:

*... the question whether Scientology is a religion ... falls to be answered by reference to the content and nature of those writings and practices and to the part Scientology plays in the lives of its adherents in Victoria rather than by reference to matters such as the gullibility*

*of those adherents or the motives of those responsible for the content of current writings and the form of current practices.*<sup>14</sup>

One of the tests implied in this judgement is that the size of the 'church' and the distance of the members from the founders may be crucial in deciding whether or not there is a 'religion'. For example, two people may decide that there is a benefit to be obtained in describing themselves as a 'religion'. They may see that they will be exempt certain tax obligations and that they will be allowed to profess certain views which they believe to be false, but also believe that many people will accept them and they will be able to make money from the 'church'. Once a number of converts are found, provided those converts genuinely believe in the teaching and follow its teachings, then it may be a 'religion' notwithstanding the lack of good faith by the founders. This is consistent with a constitutional freedom of religion that is designed to allow people to believe what they chose to believe. To rule that there was no religion because the founders were fraudulent, would take the protection found in the Constitution from the genuine believers. As the freedom enshrined in the Constitution is aimed at individuals it would be defeated by a requirement that a religion only exists if all its proponents are genuine.

The relevant criteria is whether the 'general group of adherents'<sup>15</sup> believe in the 'supernatural Being, Thing or Principle' advanced by the 'religion'.

The decision in *The Church of New Faith v The Commissioner of Pay-Roll Tax (Vic)* does not give a definition of what constitutes a religion. The court, in this case and the earlier case of *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth*<sup>16</sup> expressed

the difficulty in providing a complete definition that will be applicable in all circumstances. As such the judges have set out some criteria that may be used to guide subsequent Courts and others to determine if, in particular circumstances, the group in question is in fact a religion. As Murphy J said however, the list is not closed and there will always be the opportunity for new 'religions' to argue that (whether or not they fall within the listed indicia) they are entitled to the status of religion.

Having considered what is a religion, the next issue to consider is what is the extent of the freedom guaranteed by s. 116.

### The Effect of s. 116

*The Commonwealth shall not make any law ... for prohibiting the free exercise of any religion ...*

A law will not contravene the section if it is not a law 'for' the prohibition of the 'free' exercise of religion. The word 'for' implies that the prohibition must be the purpose or intent of the law.

When considering a law that was said to be a law for the establishment of a religion, Barwick CJ said that it must be a law for it, i.e. intended and designed ... for that purpose.<sup>17</sup>

Later he said:

*I have already, though perhaps only incidentally, indicated that the text of s. 116 refers to legislation which is designed to ... [prohibit the free exercise of any religion] ..., which intends and seeks that end, which is in that sense purposive in nature.*<sup>18</sup>

In another case it was asked:

*... whether a particular law can fairly be regarded as a law to protect the existence of the*

community, or whether, on the other hand, it is a law "for prohibiting the free exercise of any religion." The word "for" shows that the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character.<sup>19</sup>

A law that only incidentally, rather than purposefully limits a person's free exercise of religion is not, *prima facie*, prohibited by the section<sup>20</sup>. A law that is a 'law to protect the existence of the community' is not a law *for* the prohibited purpose, even though it has, as a side effect, the consequence of imposing some restriction on the free exercise of religion.

As the Constitutional guarantee exists only while a society governed by the Constitution exists, then the Commonwealth has the right to enact laws designed to protect that society and ensure its continued orderly existence. A law prohibiting teachings that prejudice the conduct of a war<sup>21</sup>; a law requiring a person to submit to compulsory military service<sup>22</sup>; a law that requires an employer to comply with industrial law even though they object on religious grounds to trade unions<sup>23</sup> are not invalid as they do not infringe s. 116—they are not laws *for* the prohibition of the free exercise of religion. They are valid civil laws that all persons may be required to obey.

If a law does, in an ancillary way, impose a restriction that is excessive, that is goes further than is reasonably required to meet the legitimate purpose of the Commonwealth, then it may be implied that the purpose was to impose the restriction and, therefore, that the law is a law *for* the prohibited purpose. In a case dealing with the implied guarantee of free speech found in the Constitution, the High Court said:

*If the restriction imposes a burden on free communication that is disproportionate to the attainment of the competing public interest, then the existence of the disproportionate burden indicates that the purpose and effect of the restriction is in fact to impair freedom of communication.*<sup>24</sup>

By analogy, it can be argued that:

*If the restriction imposes a burden on [the free exercise of religion] that is disproportionate to the attainment of the competing public interest, then the existence of the disproportionate burden indicates that the purpose and effect of the restriction is in fact to impair the [free exercise of religion].*

Therefore a law will be a law *for* the purpose of restricting the free exercise of religion if that is the stated or implied purpose of the law. It will be the stated purpose if that is the intention or design behind the law. It will be implied if, although the law appears to be designed to achieve a legitimate purpose, it imposes an undue restriction, that is it restricts the free exercise of religion and the restriction is greater than is reasonably required to meet the legitimate purpose of the law.

The other requirement in s. 116 is that it prohibit the *free* exercise of religion. Any right or freedom that is enjoyed by members of a community must be tempered by consideration of the rights of others. The rights to freedom of speech and association are not unlimited or unrestricted. Free speech, free love, a free dinner and free trade are never absolutely free<sup>25</sup>:

*Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law ... there is no dictionary meaning of the word "free" which can be applied in all cases.*

So too, the 'freedom of religion' is not unrestricted. A law may impose limits on the free exercise of religion so as to better guarantee the rights of others. Although such a law may be 'for' that purpose, it will not contravene the section if the restriction imposed is not inconsistent with the concept of 'freedom' or the free exercise of a right in a democratic society.

A law that required members of the 'Brethren' to comply with industrial law and negotiate with members of a Trade Union<sup>26</sup> was not a law that restricted the free exercise of their religion even though they objected on religious grounds. To uphold the religious, conscientious objection of the employers, would seriously affect the rights of Union members and the Union itself. As the members of the Brethren could not be allowed to impose such consequences upon members of the Union (or employees who may have wished to join the Union) then the law was valid. The obligation that the law imposed on the Brethren was not a law that imposed an obligation that was inconsistent with the 'free' exercise of their religion even though it did in fact impose some limit upon them. The limit was consistent with freedom.

<sup>27</sup> In *Kiorgarrd v Kiorgarrd and Lange* the Queensland Supreme Court found that it could make an order restricting the rights of the non-custodial father to take his daughter to church and instruct her according to his religion. The Court based its decision on the effect that would have on the child and her relationship with her mother, who objected to the religion. The order was based on 'the best interests of the child' and the court said that such an order would not restrict the father's right to practice the religion of his choice. His obligation to respect the wishes of the custodial parent, and therefore preserve that

relationship, was not a restriction that was inconsistent with the notion of the 'free' exercise of religion. This decision has been affirmed by the Family Court in *In the Marriage of Firth*<sup>28</sup>.

In the cases cited, the argument on 'freedom' was obiter (ie an aside, not essential to the decision) as each case was decided on the basis that the law in question, namely the *Industrial Relations Act* and the *Family Law Act* were not laws for the purpose of restricting the free exercise of religion and any such consequence was incidental to achieving a valid Commonwealth purpose. Notwithstanding the status of the discussion, it appears that the courts recognise that there are two elements to the prohibition in s. 116 so that a law could be passed, even if it was for the express purpose of restricting a religious practice (eg a law prohibiting female circumcision), if the restriction is not inconsistent with the limited notion of 'freedom'.

In summary, notwithstanding s. 116 of the Constitution, the Commonwealth may make laws that restrict a person's right to practice their religion provided that:

- \* the law is a law to meet a valid Commonwealth purpose;
- \* any restriction is ancillary or secondary, that is the purpose of the law is not to restrict religious freedom per se;
- \* any restriction is not 'undue'; or
- \* the law limits the practice of religion only to the extent necessary to protect the rights of others, ie in a way that is not inconsistent with the concept of 'freedom' which is necessarily limited in a co-operative society.

### The Effect of s. 116

*The Commonwealth shall not make any law for establishing any religion ...*

In *The Attorney General for the State of Victoria (at the relation of Black) and Ors v The Commonwealth of Australia*<sup>29</sup> the issue was not whether a law of the Commonwealth was limiting religious freedom but whether the Commonwealth was 'establishing' a religion contrary to s. 116. Here the Commonwealth was providing financial assistance to religious, private schools.

According to Barwick CJ the words of the section impose all the limitations that are binding on the Commonwealth, with the result that the section is to be read narrowly. As s. 116 does not say the Commonwealth cannot give aid or encouragement to any religion then any law of the Commonwealth for the purpose of giving such aid is not prohibited by the section. Accordingly the provision of funds to a non-government school does not represent the establishment of a religion even when it may be assumed that the school will spend some time on religious instruction or use the buildings that may be built with the funds for that purpose.

*A law which in operation may indirectly enable a church to further the practice of religion is a long way away from a law to establish religion as that language properly understood would require it to be if the law were to be in breach of s. 116. ... The law must be a law for it, i.e. intended and designed to set up the religion as an institution of the Commonwealth.*<sup>30</sup>

Gibbs J said that:

*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. If that sense is applied to the word [sic] in s. 116, there is no inconsistency with, or repugnancy to, the other provisions of the section.*<sup>31</sup>

A law is a law for the purpose of establishing a religion if and only if the purpose of the law is to create a 'State' or 'Official' church.

Murphy J dissented. In his view s. 116 should be given the widest possible meaning, that this section was a major guarantee of freedom and that '... the essential condition of religious liberty is that religion be unaided by the Commonwealth'. As the effect of the grants under challenge was to increase the wealth of the churches involved and allowed them to build various church buildings then the effect of the legislation was to support the religion and was, on Murphy's view, contrary to the section.

*A reading of s. 116 that the prohibition against "any law for establishing any religion" does not prohibit a law which sponsors or supports religions, but prohibits only laws for the setting up of a national church or religion, or alternatively prohibits only preferential sponsorship or support of one or more religions, makes a mockery of s. 116.*<sup>32</sup>

Murphy J was however the dissenting judge, and the majority view was clearly that where the section prohibits the 'establishment' of a religion it does not mean that the Commonwealth cannot support a religious organisation or religion generally. It is interpreted narrowly and is limited to a prohibition on the creation of an 'official' or State church. In Australia, under the present Constitution, no church can have the place, status and role that the Church of England has in that country.

## The Effect of s. 116

*The Commonwealth shall not make any law... for imposing any religious observance ... and no religious test shall be required as a qualifi-*

*cation for any office or public trust under the Commonwealth.*

There are no reported cases dealing with the last two prohibitions contained in the section. It follows however that they will be subject to a narrow interpretation and that a law will not be a law 'for imposing any religious observance' unless that is at least its dominant purpose.

Where it is for a legitimate purpose with the incidental effect of 'imposing any religious observance' it is unlikely to infringe the section unless the requirement is 'undue'. Hence a law that allows a person to give evidence on oath, or a juror to be sworn on the bible, or for Christmas day to be a public holiday, is unlikely to infringe the section.

## The States

Although the States came into existence at the time of Federation in 1901, they are not bound by the prohibition contained in s. 116 which is directed solely at the Commonwealth, i.e. the Federal Government.

In *Grace Bible Church v Redman*<sup>33</sup> the court rejected an argument that there was a common law prohibition that was similar to s. 116 and applied to the government of South Australia. They found that there was no fundamental guarantee of an inalienable right of freedom of religion and that there are no constitutional fetters on the parliament of South Australia (or any other State) that would limit the State's power to legislate on matters of religion as it saw fit. A State is not bound by s. 116 and can impose a State Church, or prohibit the exercise of certain religious practices, as it sees fit.

Under s. 51(xxix) of the Constitution, the Commonwealth has the power to

make laws regarding the external affairs of Australia. Australia is a signatory to the International Covenant on Civil and Political Rights. Section 18 of that Covenant says:

*1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in a community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

*2. No-one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*

*3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals of fundamental rights and freedoms of others.*

Giving effect to this obligation represents a valid exercise of the Commonwealth's external affairs power<sup>34</sup> and a Commonwealth law to give effect to the International Covenant would be a valid law of the Commonwealth. Any State law that was inconsistent to the Commonwealth law would then be invalid to the extent of any such inconsistency<sup>35</sup>. This may have the effect of limiting the power of the States to make laws affecting the free exercise of religion, though such a restriction depends upon the will of the Commonwealth to pass such a law and does not represent a fundamental constitutional guarantee.

## Conclusion

Despite its promise of a guaranteed Constitutional freedom, s. 116 represents



no more than a limit on Commonwealth power. It does not guarantee religious freedom for Australian citizens, rather it guarantees that any imposition or restriction of religion by the Commonwealth shall not take any of the four specifically prohibited forms, but a restriction may come in other forms, such as a law that outlaws conduct required by a religion, provided that such prohibition is part of a law that is 'for' the achievement of some valid Commonwealth aim. The States, on the other hand, are free to impose religion or restrict the free exercise of religion, subject only to inconsistent Commonwealth laws, if any.

As far as the present Constitution stands, the concept of a guarantee of religious freedom is just that, more a 'concept' than a reality.

## Notes

1. *The Attorney General for the State of Victoria (at the relation of Black) and Ors v The Commonwealth of Australia* (1981) 146 CLR 559 per Stephen J p.610
2. *ibid* p.605
3. *ibid* per Wilson J p.652
4. *The Church of New Faith v The Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120
5. read as 'Acting Chief Justice Mason'
6. *The Church of New Faith v The Commissioner of Pay-Roll Tax (Vic)* *op.cit.* p.132
7. *ibid* p.136
8. *ibid* p.151
9. read as Justice Wilson and Deane
10. *The Church of New Faith v The Commissioner of Pay-Roll Tax (Vic)* *op.cit.* p.171
11. *ibid* p.176
12. *ibid* p.174
13. *ibid* p.141
14. *ibid* p.171
15. *ibid* p.141
16. *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth* (1943) 67 CLR 116
17. *The Attorney General for the State of Victoria (at the relation of Black) and Ors v The Commonwealth of Australia* *op.cit.* p.583
18. *ibid* p.584
19. *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth* *op.cit.* p.132
20. see also *Krygger v Williams* (1912) 15 CLR 366
21. *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth* *op.cit.*
22. *Krygger v Williams* *op.cit.*
23. *Concept Products v Forest Products, Furnishing and Allied Industries Industrial Union of Workers* (1993) 49 IR 122
24. *Australian Capital Television Pty Ltd v The Commonwealth* (1991-1992) 177 CLR 106 per Mason CJ at pp.143-144
25. *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth* *op.cit.* per Latham CJ p.127
26. *Re CPH Sales and Contracting; Re Furnishing Trades Award*, 1981 (1992) 46 IR 109 and *Concept Products v Forest Products, Furnishing and Allied Industries Industrial Union of Workers* *op.cit.*
27. [1967] QR 162
28. *In the Marriage of Firth* (1988) 12 Fam LR 547
29. (1981) 146 CLR 559
30. *ibid* p.583
31. *ibid* p.597-598
32. *ibid* p.633
33. (1984) 36 SASR 376
34. *The Commonwealth of Australia v Tasmania. The Tasmania Dam Case* (1983) 158 CLR 1
35. s. 109 of the Constitution.