HIGH COURT OF AUSTRALIA

BARWICK C.J. GIBBS, STEPHEN, MASON, MURPHY, AICKIN AND WILSON JJ.

Attorney-General (Vic) (Ex rel Black) v Commonwealth

ORDER

Judgment for the defendants. The plaintiffs to pay the costs of the defendants the National Council of Independent Schools and Reverend Father Francis Michael Martin (representing the non-government schools in the Commonwealth of Australia). No other order.

Cur. adv. vult.

The following written judgments were delivered:—

1981, Feb. 10

BARWICK C.J.

The Attorney-General of the State of Victoria on the relation of a number of Australian citizens interested in various capacities in the education of children in Australian States and in federal Territories sues the Government of the Commonwealth and certain of its Ministers for declarations of constitutional invalidity of several statutes enacted by the Commonwealth Parliament. The defendants assert the validity of the impugned statutes. States of the Commonwealth other than Victoria have intervened to support the legislation.

The claimed ground of invalidity is infraction of s. 116 of the *Constitution* of the Commonwealth, in so far as that section forbids the passage of a law for establishing any religion. It may be as well to set out immediately the full text of the constitutional provision:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The statutes which are said to infringe the terms of the section are Appropriation Acts in so far as they appropriate consolidated revenue to fund the implementation of various statutes granting money to the States of the Commonwealth and the granting statutes themselves. These statutes, so far as they are attacked by the plaintiffs, provide for grants to the States on condition that the money so granted is paid by the States to non-government schools to finance their educational programmes, including the erection of buildings therefor. Some of the intended recipients are schools owned and run by religious bodies, as it happens, in large part by the Roman Catholic church or its agencies.

A great deal of evidence was given as to the extent of the financial support thus provided from Commonwealth funds and as to the manner in which the non-government schools owned and run by religious bodies were conducted. As well, much statistical material, largely in the public domain, was aggregated. Having regard to the opinion I have formed and which I shall shortly express, I have no need to discuss this body of evidentiary material or to attempt to resolve such conflicts as it contains. In my view, it is in truth for the most part irrelevant to the resolution of the question whether the nominated statutes, individually, collectively or in any combination, are or contain a law for establishing a religion.

In the course of the argument of the case, a considerable number of points have been raised. But in the long run, in my view, few of them need to be resolved. Later in the course of expressing myself I shall mention the more substantial of them. But I proceed immediately to the central question for decision.

Section 116 in terms applies to all laws, in my opinion, without exception. The Parliament "shall not make *any* law for establishing any religion". I can find no acceptable reason for excluding from this universality an *Appropriation Act* or an Act granting money to a State pursuant to s. 96. Whilst there may no doubt be difficulty in forming the conclusion that any such Act is a law for such establishment the possibility cannot be denied. Nor is there, in my opinion, anything in the nature of an *Appropriation Act* or an Act granting financial assistance which necessarily precludes the application of the description "a law for establishing any religion".

I should add, perhaps unnecessarily, that each operative provision of a statute is itself a law: and there is no difficulty in applying that concept to the items of an appropriation, or a granting, statute.

When it is necessary to determine what a statute does or what purpose it affects to achieve, its meaning and operation must be considered in the light of the state of the law then existing; that is to say, the concurrence of the existing statutory law may bring an enactment into collision with such a provision as s. 116 whilst that statute if passed in a void might not offend. It is for that reason that it has been necessary in this case to consider the impugned statutes not merely in isolation but in combination; and, as I have said, to do so, if need be, item by item, or section by section. I might mention, however, that no other existing statutory provision, either of the Commonwealth or of the States, appears to be relied upon to convert what would not otherwise infringe into an offending statute.

Further, validity will need to be considered against the background of relevant aspects of the current situation of the community at the date of the passage of the statute. But, for my own part, nothing in that current scene is critical to validity in this case.

It was submitted for the Commonwealth that s. 116, not being a provision granting legislative power but, on the contrary, a provision denying it, ought not to be read as largely as a facultative provision should be read. This submission was based on the view expressed by Sir Owen Dixon in Wragg v. New South Wales [5] . With the greatest respect to an opinion of Sir Owen, I am unable to accept this submission. I can find 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. In particular, in this case, the emphatic universality of the language of s. 116 seems to me to brook no restraint sought to be imposed by any such doctrine as the submission propounds. The control of the legislature by the Constitution is of the essence of its text.

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(1) (1953) 88 C.L.R. 353.

An attempt was also made in argument to develop some restriction on the language of s. 116 from the position it occupies in the Constitution being included as it is in Ch. V which bears the heading "The States". But, in my opinion, the language of the section is not in the slightest affected by the position in which the section is placed in the text of the Constitution: nor can its meaning be determined thereby. To suggest that, because of that placement, it should be read as in any sense a direction to the States is to deny effect to simple and direct English. The section plainly says "The Commonwealth shall not" and its final words deal only with any office or public trust under the Commonwealth.

Before turning to the interpretation of the language of s. 116, having regard to the various submissions made as to its meaning, I wish to say something as to the use in that connexion of material extraneous to the text itself. First, as to the use of the Convention debates: the settled doctrine of the Court is that they are not available in the construction of the Constitution: and, in my opinion, rightly so. An academic exercise to explain historically why the Constitution was cast in a particular form is one thing. To identify the meaning of the words in which the Constitution is expressed by examination of its discursive development is quite another. The former, in my opinion, has no place in the task of construing the text of the Constitution except perhaps in the case of an ambiguity in that text which cannot otherwise be resolved. But, absent the possibility which such ambiguity may present, the task of educing the meaning of the words constitutionally employed derives, in my opinion, no assistance from a consideration of the process by which that text came into being. Indeed, attention to the course of the convention debates might well distract the mind from the proper meaning of unambiguous words in the text.

That is not to say, however, that that meaning must be assigned without regard to the sense in which the words of the text were understood in the day of their expression. As I have said elsewhere, the then current meaning of the words used in the text is the meaning, the connotation, they must thereafter bear, though in application in later times they may achieve results not within the contemplation of those who wrote the text. In other words, the denotation of the words may expand whilst their connotation remains fixed.

Secondly, the use of historical material generally is, in my opinion, subject to the same observations and limitations.

Thirdly, there is the resort to the text of the *American Constitution*, and in this instance to the text of the Bill of Rights, and to the decisions of the American courts, particularly those of the Supreme Court in construing these texts. The plaintiffs have placed considerable emphasis on this material: indeed, it has formed a major element in their submissions.

Again, the text of our own Constitution is always controlling. Even similar or identical language in the American instrument to that in our Constitution can, in my view, rarely, if ever, be controlling. But divergencies in the respective texts must inevitably weaken, if indeed they do not destroy, any support which might be sought to be derived from the American text or its construction. In the case of ambiguous language in our own text, language reasonably capable of bearing more than one meaning, a consideration of the American text and of its judicial interpretation, particularly that which preceded the expression of the Australian text, may assist to determine which of those meanings the language of our text should bear. But, in this case, in my opinion, there is no ambiguity in the relevant text.

Further, in the instant case, not merely is there difference between the Australian text and the language of the relevant provisions of the Bill of Rights, but that language had received an interpretation before the adoption of our Constitution. It later had further and at times different interpretation. The adoption of such diverging language thus has a more than usual significance. It can scarce be said with reason that the use of different, and as I think radically different, language in our Constitution, indicated an

intention thereby to achieve what the American courts had decided to be the result of the American text. I am not called upon here to discuss these judicial pronouncements. It suffices to say that, for myself, I would not necessarily agree with them; indeed, in some respects I could not accept them. But, more importantly, the very divergence in the language of our text from the corresponding terms of the Bill of Rights, assuming those decisions rightly assigned meaning to them as at the time of our federation, makes it in my view more than unsatisfactory to attempt to apply to our text the meaning and operation given to the relevant portion of the Bill of Rights.

I find the language of s. 116 in the relevant part quite unambiguous and have no need to attempt to give it meaning by analogy of, or by derivation from, that of the Bill of Rights or from the interpretations it had received. Consequently, I have no need to dwell on the radical difference in the nature of the Bill of Rights as a whole and that of our Constitution and of s. 116 in particular and the consequences that difference in nature may have on any attempt to use the language and circumstances of the one as an aid to the construction of the other.

The divergence in language to which I have earlier referred is apparent from the use of the word "respecting" in the American text and the word "for" in s. 116. What the former may fairly embrace, quite clearly the latter cannot: and that is so, in my opinion, even without placing critical significance on the purposive nature of the Australian expression and the lack of such an element in the American text.

However, in the interpretation and application of s. 116, the establishment of religion must be found to be the object of the making of the law. Further, because the whole expression is " *for* establishing any religion", the law to satisfy the description must have that objective as its express and, as I think, single purpose. Indeed, a law establishing a religion could scarcely do so as an incident of some other and principal objective. In my opinion, a law which establishes a religion will inevitably do so expressly and directly and not, as it were, constructively.

The inhibition of s. 116 is directed to the making of any laws for establishing any religion. Although, in my opinion, not critical in the instant case, the word "religion" in s. 116 is not really satisfied by a sect or department of the one religion. Hence, the Christian faith, though practised according to particular doctrines by different churches, is in truth one religion. Islam provides another, and so on. I gravely doubt whether it is correct to regard the different Christian churches as separate and distinct religions for the purposes of s. 116.

It may well be possible to conclude from this circumstance that the section is not in any wise directed against discrimination of one church in relation to others. But I find no need in this case to seek support for my own opinion by any such construction of s. 116. Maybe what I am about to say further explains why I do not here pursue the possibility.

The establishment of any one of the Christian churches would, in my opinion, amount relevantly to the establishment of the Christian religion and a law to establish that church would be a law for establishing a religion. Thus, in practical terms, there is really no need finally to decide in this case whether the expression "any religion" in s. 116 is equivalent to any church or section of a religion. Whatever the conclusion in this connexion, the Commonwealth may not make any law for establishing one of the Christian churches because that, in my opinion, would be to establish the Christian religion within the meaning and operation of s. 116.

The operative words of s. 116 are addressed to the Commonwealth and inhibit the making of laws by the Commonwealth. That means they are directed to the Parliament. Included in the laws the making of which the section proscribes are laws which authorize the making of subsidiary laws in the form of proclamations, statutory rules or by-laws. The prohibition will include such subsidiary legislation which is within the authority of an Act of the Parliament but which in itself offends the terms of the section. It may be, of course, that in authorizing subsidiary legislation which could offend the

constitutional provision, the authorizing statute may itself offend. But room must be left for the rare occasion when this result does not necessarily follow. If, of course, the subsidiary legislation is outside or beyond the scope of the statutory authority, it will be invalid for that reason though it might also, if it were valid, in its terms transgress the inhibition of the section.

Here, we are only concerned with the activity of the Parliament itself, with statutes passed by the Parliament, with laws made by it.

The next observation I wish to make as to s. 116 is that it is directed to the *making* of law. It is not dealing with the administration of a law. But, if that administration is within the ambit of the authority conferred by the statute, and does amount to the establishment of a religion, the statute which supports it will most probably be a statute for establishing a religion and therefore void as offending s. 116. That is so, not because of the manner of the administration but because the statute, properly construed, authorizes it. I say most probably, because the purposive content of the expression "for establishing" must, in any case, be satisfied.

The time at which to determine vis à vis s. 116 the validity of a law is therefore the time of its making, of its passage by the Parliament. As I have said, it will be tested against the situation of law and fact current at the time of its enactment. It must then be judged for what in that situation it does and what upon its reasonable construction it authorizes. The manner of its administration can have no independent effect. What may lawfully be done in its administration forms part of the consideration of the validity of its enactment: and what can be lawfully done is determined by the construction of the statute, the determination of its meaning and its operation.

These considerations emphasize the dominant importance of the terms of the statute itself when a question as to the application of s. 116 arises. It is the making of the law which is proscribed. Consequently, the construction of the statute and the determination of its operational effect will be the determinant. Thus, in my opinion, the question in this case could have been decided on demurrer, even if a cautious defendant wished to plead as well as demur.

I have now to deal with the meaning of the operative words of s. 116 before applying them to the statute under challenge in this case.

As I have already indicated, I find no ambiguity in the language of s. 116. The meaning which "establishing" in relation to a religion bore in 1900 may need examination. But that is not because of ambiguity but to ensure that the then current meaning is adopted. However, whilst I have considered what was the current significance of "establishing any religion" in 1900, I am of opinion that there has been no real change in the significance of the words over the years which have intervened. Doubtless, because of our colonial origins and our remoteness from England, the reality of an established religion has not often been borne in upon the public of this country. Further, even in England, the ramifications or consequences of the existence of an established church have become both less and less apparent. But what would be involved in establishing a religion has, in my opinion, remained constant. In my opinion, as used in an instrument brought into existence at the turn of the century, establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth. It involves the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronize, protect and promote the established religion. In other words, establishing a religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth "establishment". One can perceive these concepts in the decision of the House of Lords in General Assembly of Free Church of Scotland v. Lord Overtoun [6] . I feel no doubt that this is the sense in which the relevant part of the language of s. 116 was used when our Constitution was formed. As I have indicated, I think the words would mean the same if constitutionally used today. Thus

what s. 116 forbids is the passage of a law which will erect a religion into such a relationship to the body politic of the Commonwealth as I have attempted to describe.

(2) [1904] A.C. 515.

It is apparent to my mind that, if for no other reason, the inclusion in s. 116 of the prohibition of any law imposing any religious observance or for prohibiting the free exercise of any religion and the proscription of any religious test indicate clearly enough the precise limits of the total inhibition of the section. The absence of any prohibition upon the giving of aid to or encouragement of religion from the entire collocation of s. 116 is eloquent. No imposed obervance: free exercise of religion: no religious test. No established religion. Otherwise the powers with respect to subject matter and in the nomination of the conditions of a grant to States is plenary and without limitation except in so far as the description of the subject matter may import limitation.

Here, the impugned legislation in substance appropriates, and authorizes the disbursement of, part of the consolidated revenue of the Commonwealth for the financial support of the education of Australians by and according to the regimen of non-government schools, including such schools as are owned and conducted by bodies professing and practising the Christian religion, albeit according to the doctrines of a particular church. The financial aid is expressly limited to the educational activities of such schools.

Let it be supposed for the purposes of this discussion, though it must not be thought that by the assumption I am expressing a concluded view in that sense on my own behalf, that opportunity is taken by those in control of such educational activities to utilize some part of the time set aside for such educational activities to foster the practice of the Christian religion, albeit according to the practices or doctrines of a particular church, and let it be supposed that buildings to the cost of the construction of which money derived from the legislation has been applied, are on occasions used for some religious activity of the owner of the premises: I do not think the material proffered on behalf of the Attorney-General of Victoria or the relators on whose behalf he sues takes the matter any further than the assumptions I have just described.

Can it be said that, therefore, the law made by the Parliament is a law for the establishment of a religion in the sense which I am prepared to give to those words, and thus in breach of the inhibition imposed on the Parliament by the Constitution? Nothing in the laws made by the Parliament expressly authorizes the use of Commonwealth funds for those purposes, though it might justly be said that no provision of that law expressly or adequately prohibits the schools or those conducting them from using the occasion or the buildings assisted or built with money provided for support of educational activities to so use the occasion or the buildings. I cannot think that it can rationally be said that by not preventing such a use of the occasion or buildings which I have assumed, the law providing the funds for the forwarding of the education of Australians by non-government schools is a law for establishing a Christian religion. 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. It would not be enough that the law allowed such activity on the part of the owners of the schools. The law must be a law *for* it, i.e. intended and designed to set up the religion as an institution of the Commonwealth.

It might be that the same result might well follow even if it be right and proper to treat the situation I have assumed as authorized by the legislation under attack. But I have

no need to decide the question for I have been unable to find any statutory authorization by the Commonwealth of any religious activity on the part of the non-government schools in the course of their educational activities. That there is no statutory prohibition of such religious activities in the course of authorized educational activities is scarce enough to make the appropriation and granting statutes, laws for establishing a religion in the only sense, in my opinion, those words can have in the Constitution. What the Constitution prohibits is the making of a law *for* establishing a religion. This, it seems to me, does not involve a prohibition of any law which may assist the practice of a religion and, in particular, of the Christian religion. It is the establishment of such a religion which may not be effected by a law of the Commonwealth designed to do so. I have already, though perhaps only incidentally, indicated that the text of s. 116 refers to legislation which is designed to establish a religion, which intends and seeks that end, which is in that sense purposive in nature. I have concluded, therefore, that, even on the assumptions I have made, the challenge to the validity of the Acts here challenged should fail.

A separate attack was made on the granting statutes. It was said that, because of the detailed nature of the conditions attached to the grant, the granted State became a mere conduit pipe to transmit the granted amount of money from the Commonwealth to the designated recipients for purposes in respect of which the Commonwealth has no legislative power. From this, it was said, the conclusion follows that these grants were not grants of financial assistance to the States.

The submission gains no support from the decisions of this Court. In fact, the Court has earlier decided that grants on like detailed conditions relating to matters over which the Commonwealth lacks legislative power are validly made under s. 96 and that the conditions are enforceable according to their terms. Perhaps the extreme case was seen in the Uniform Tax legislation in which the condition of the grant was the abstention by the recipient State from exercise of its own legislative power.

But, in any case, in my opinion, the submission is not acceptable. The conditions of the grant in this case relate to a subject matter of State power. Education is within the State legislative area: and its furtherance is undoubtedly a concern of the State. The operation of the conditions depends on the State's acceptance of the grant. It is no answer to the consequence of this fact that economically speaking a State may have little choice. Again, I should think the Uniform Tax conditions were a dramatic illustration of economic necessity. But the granting legislation had the support of this Court. The State's acceptance must involve the conclusion that the provision of funds to the recipients indicated by the conditions of the grant was, at least in general, in line with State policy. I say "in general", because it may be that whilst the State would favour expenditure, e.g. on non-government schools, if it were sufficiently in funds without Commonwealth assistance, it might choose to distribute its funds in some different manner and perhaps with different safeguards, though broadly with the same objective. In such circumstances, it cannot, in my opinion, be said with reason that the funds granted by the Commonwealth are of no assistance financially to the States. Further, however much a State might prefer to pursue the objective of better educational facilities for the dwellers in that State, it cannot be denied, in my opinion, that the receipt and expenditure of the grant lessens the demands on the Treasury of the State. The submission of the plaintiffs in this respect is, in my opinion, unacceptable.

I have now read the reasons for judgment prepared by my brother Wilson. The detail of the impugned statutes and of the statistical material aggregated in the course of the case is there set out.

I agree with the conclusions to which my brother has come and which he expresses in his reasons for judgment. I agree substantially with the reasons he gives for arriving at those conclusions. Any divergencies can be seen in the reasons I have myself expressed for concluding that the claims of the Attorney-General for the State of Victoria are insupportable and that his action should be dismissed. The statutes

attacked in the action are valid laws of the Commonwealth and not in any wise in breach of s. 116.

GIBBS J.

This action is brought to challenge the validity of a number of Acts of the Commonwealth Parliament under which financial assistance in provided to schools in the States and in the internal Territories of the Commonwealth. The legislation is challenged in so far as it results in benefits being provided to schools which are not conducted by or on behalf of the government of a State or of the Commonwealth ("non-government schools"), particularly such schools as are conducted by or on behalf of, or are associated with, religious bodies ("church schools"), although if one ground on which the attack is made proves successful it will also invalidate the legislation in its application to government schools. The Acts under which financial assistance is or has been provided to schools in the States are the various *States Grants (Schools) Acts* and *States Grants (Schools Assistance) Acts* passed in and between the years 1972 to 1979 (there are eleven such Acts) and the plaintiffs claim that those Acts are beyond the powers of the Commonwealth Parliament and invalid. The plaintiffs also assert the invalidity of the *Schools Commission Act 1973* which constitutes a Commission whose functions include advising the Minister on matters which in fact are relevant to the exercise of his discretion under the Acts. Payments to or for the benefit of schools in the Australian Capital Territory and the Northern Territory have been made under the authority of general *Appropriation Acts*, and certain loans to school authorities in those Territories have been guaranteed by the Treasurer on behalf of the Commonwealth under the *Independent Schools (Loans Guarantee) Act 1969*, and the plaintiffs claim that the *Appropriation Acts* to the extent to which they appropriate moneys to be spent on church schools in the Territories, and the *Independent Schools (Loans Guarantee) Act 1969*, are also invalid.

The first plaintiff, the Attorney-General for the State of Victoria, sues on the relation of a number of persons, some of whom also sue individually. The remaining fourteen plaintiffs are persons who reside either in Victoria, New South Wales, Tasmania or the Australian Capital Territory and who pay taxes to the Commonwealth. Some of those plaintiffs are the parents of children who attend government schools. The defendants are the Commonwealth, three Ministers of State of the Commonwealth, and two representatives of non-government schools.

After evidence had been taken before Murphy J., the case was referred to the Full Court for argument. I intend no disrespect to the very thorough and careful case presented by the plaintiffs when I say that it will be sufficient for the purposes of this judgment if I state only in the barest outline the facts in the light of which the validity of the legislation has to be considered, and the nature of the legislation itself. Throughout Australia primary and secondary education is compulsory for all children below a specified age. Pupils may receive that education either at government schools or at non-government schools. Most of the non-government schools are church schools, and of those most are Roman Catholic schools. The non-government schools, whether or not they are church schools, impart education in ordinary secular subjects, generally speaking in accordance with the same curriculum as that adopted in government schools, and to an academic standard comparable with that in government schools, and under a system of supervision provided by State law. Some of the non-government schools provide a very high standard of education. Of course, most church schools give religious as well as secular instruction and, at least in the case of schools conducted by some religious denominations, are intended to serve the purpose of inculcating in their pupils the religious beliefs and values of the church concerned. It may be accepted that in some cases, if not in most, church schools are seen by the church as fulfilling a religious as well as a purely educational purpose: their functioning is regarded as an integral part of the religion which supports the schools.

Non-government schools derive income from fees and other private sources, and receive financial assistance from the States as well as that which the Commonwealth provides under the statutes whose validity is now in question. The statutes passed from time to time vary in detail, but it is sufficient to take the *States Grants (Schools Assistance) Act 1979* as an example. That Act provides that "financial assistance is granted to a State" in respect of expenditure in relation to government and non-government schools in the State. In the case of non-government schools, the expenditure may be in respect of an approved building project or equipment project (s. 16). Such a project shall not be approved by the Minister if the sole or principal object, or one of the principal objects, of the project is to provide facilities for use, wholly or principally, for or in relation to religious worship: s. 15 (2). The financial assistance provided may also be in respect of recurrent expenditure, whether of an approved school system (s. 18) or of a non-systemic school (s. 19) or in connexion with migrant education (ss. 21 and 22) or disadvantaged schools (ss. 24 and 25) or special schools (s. 27). The amount payable in each case depends on the discretion of the Minister, subject to specified statutory limits. No express restriction on expenditure for religious purposes, similar to that contained in s. 15 (2), appears in these sections. Each of the sections under which these grants may be made imposes conditions on the grant. These conditions oblige the State to pay to the approved authority of the school or school system as the case may be an amount equal to that paid to the State in relation to the project, school or school system. A further condition is that the State shall not make a payment unless the approved authority has agreed with the State to ensure that the money is applied for the purpose for which it was approved, and that if it does not fulfil any condition it will, if the Minister so determines, repay to the State such amount (not greater than that paid) as the Minister determines. By s. 29 further conditions are imposed on the State—(a) to pay to the Commonwealth any amount repaid by or recovered from an approved authority under the conditions of the agreement and (b) to repay to the Commonwealth such amount (not greater than that paid to it) as the Minister determines if the State does not fulfil any of its conditions. The condition requiring an agreement of the kind mentioned above to be made between the approved authority and the State was first introduced by the Act of 1977; before that time, the relevant condition was that the State should make a repayment to the Commonwealth if the school authority did not fulfil the conditions of the grant.

The argument on behalf of the plaintiffs is that this legislation is invalid for two reasons —first, because it is not authorized by s. 96 of the *Constitution*—the section under which the Commonwealth claims that the legislation may be supported—and secondly because the Acts are laws "for establishing any religion" and therefore infringe s. 116 of the *Constitution*. The laws which provide financial assistance for church schools in the Territories are said to be invalid only on the second of these grounds.

At the outset there arises the question whether the plaintiffs or any of them have standing to bring this action. In my opinion it is clear that the Attorney-General for Victoria has a locus standi to sue for declarations of the invalidity of the Acts in question in so far as they apply to schools in Victoria. Indeed in Victoria v. The Commonwealth (the Roads Case) [7] proceedings were brought by two States and their Attorneys-General to challenge the validity of an Act on the ground that it was not a proper exercise of the power conferred by s. 96, and the Court said [8] , that the action was properly constituted. In Attorney-General (Vict.) v. The Commonwealth (the Clothing Factory Case) [9] , Gavan Duffy C.J., Evatt and McTiernan JJ. said:

> In our opinion, it must now be taken as established that the Attorney-General of a State of the Commonwealth has a sufficient title to invoke the provision of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within, the State whose interests he represents.

In Attorney-General (Vict.) v. The Commonwealth (the Pharmaceutical Benefits Case) [10] , Dixon J. said that this statement expressed the settled doctrine of the Court, and

himself restated the principle by saying that the Attorney-General of a State has "a locus standi to sue for a declaration wherever his public is or may be affected by what he says is an ultra vires act on the part of the Commonwealth or of another State". Those statements of principle would I think be applicable in the present case, where the Acts operate on the State of Victoria itself, and on schools within the State. It does not seem to me material that the State of Victoria has accepted the grants of financial assistance made under the Acts. The State is perfectly entitled to say that it will accept the financial assistance if the Acts are valid and the conditions are binding, but that it nevertheless wishes to challenge the validity of the Acts and the conditions. The Commonwealth however says that the *Appropriation Acts* under which moneys are paid for the assistance of schools in the Territories, and the *Independent Schools (Loans Guarantee) Act 1969* under which guarantees are given to enable such schools to borrow money, have no operation in Victoria, and that the Attorney-General for Victoria has no standing to challenge their validity. With all respect I cannot agree. I remain of the opinion which I expressed in Victoria v. The Commonwealth and Hayden (the A.A.P. Case) [11] , which was the case of a challenge to an *Appropriation Act*, that "it is involved in the very nature of the Constitution that either the Commonwealth or a State should have standing to institute legal proceedings when the other has exceeded its constitutional authority." Mason J. expressed a similar view in the same case [12] , but Stephen J. disagreed [13] and Murphy J. was inclined to agree with him, although he said that if it were claimed that the appropriation or expenditure were in breach of any constitutional prohibition then the position might be different [14] . In my opinion even where no question arises as to the limits inter se of the powers of the Commonwealth and the State, the Attorney-General of a State may sue to compel the Commonwealth to observe the fundamental law of the Constitution, which the citizens of any State has an interest to maintain, although it may not be such a special interest as would enable them as individuals to bring the suit. On the other hand, as at present advised, I gravely doubt whether the other plaintiffs have standing to sue; I hardly think that the fact that they are taxpayers, and in some cases parents of children at government schools, gives them a special interest in the subject matter of the action within the principles stated in the cases collected in Australian Conservation Foundation Inc. v. The Commonwealth [15] . However in Canada an exception to the general principle appears to have been recognized in constitutional cases (Thorson v. Attorney-General (Canada) [No. 2] [16]) and since, for reasons which will appear, it is unnecessary to decide whether these individual plaintiffs have standing, I would express no concluded opinion on the question.

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(3) (1926) 38 C.L.R. 399.
(4) (1926) 38 C.L.R., at p. 407.
(5) (1935) 52 C.L.R. 533, at p. 556.
(6) (1945) 71 C.L.R. 237, at p. 272.
(7) (1975) 134 C.L.R. 338, at p. 381.
(8) (1975) 134 C.L.R., at pp. 401-402.
(9) (1975) 134 C.L.R., at pp. 387-390.
(10) (1975) 134 C.L.R., at pp. 424-425.
(11) Ante, pp. 526-528.
(12) (1974) 43 D.L.R. (3d) 1.

I turn then to consider whether the Acts in question were Acts by which the Parliament granted financial assistance to the States within s. 96 of the *Constitution*. That section provides as follows:

> During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant

> financial assistance to any State on such terms and conditions as the Parliament thinks fit.

The argument on behalf of the plaintiffs was that the Acts gave financial assistance not to the States but to the schools, or, in the case of capital grants, to the owners of the property on which the schools were conducted. The moneys granted did not enure for the benefit of the State Treasuries, but were given to the States to be passed on immediately to the schools. The States played no part in deciding what schools got the money, how much was to go to each recipient or how the moneys should be spent, and were, it was said, no more than passive instruments by which the Commonwealth transmitted its moneys to the persons whom it had decided to assist.

The submission that a grant made in these circumstances is not authorized by s. 96 cannot be upheld without overruling the decision of this Court in Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd. [17] , which was affirmed by the Judicial Committee [18] . In that case it had been agreed by the Commonwealth and all the States that it was necessary to take action to stabilize the price of wheat, and for this purpose the Commonwealth Parliament imposed an excise duty on flour, and thus obtained funds out of which moneys could be paid to assist wheat growers. However, since Tasmania alone among the States produced very little wheat, so that only a very small part of the money raised in Tasmania by the excise would be returned to wheat growers in that State, it was decided to make a special provision in relation to Tasmania. It was not possible to except Tasmanian consumers from the excise, for that would have been contrary to s. 51 (ii) of the *Constitution*. Acts were passed which provided that the proceeds of the excise should go into a fund which was to be applied in making payments to the States in proportion to the quantity of wheat produced, and that these grants should be paid to each State upon condition that the money received should be distributed to the wheat growers in that State in proportion to the amount of wheat sold or delivered for sale by each wheat grower in the relative year. Provision was made for an extra grant to Tasmania which it was intended should be distributed among the persons in that State who had paid the excise. It was held that the grants to the States on the conditions stated were validly made under s. 96. The effect of this decision was stated by Dixon C.J. in Victoria v. The Commonwealth (the Second Uniform Tax Case) [19] as follows:

> Now it might have been thought that these provisions were outside s. 96 because they gave no assistance to the State as a body politic but used it only as a conduit or an agency by which the moneys would be distributed among the wheat growers of the State. In fact, however, the provision was considered to amount to financial assistance to the State notwithstanding that the State was bound to distribute the money it received to the wheat grower.
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> The decision, which was affirmed in the Privy Council, without express reference to this use of s. 96, must mean that s. 96 is satisfied if the money is placed in the hands of the State notwithstanding that in the exercise of the power to impose terms and conditions the State is required to pay over the money to a class of persons in or connected with the State in order to fulfil some purpose pursued by the Commonwealth and one outside its power to effect directly. I should myself find it difficult to accept this doctrine in full and carry it into logical effect, but the decision shows that the Court placed no limitation upon the terms or conditions it was competent to the Commonwealth to impose under s. 96 and regarded the conception of assistance to a State as going beyond and outside subventions to or the actual supplementing of the financial resources of the Treasury of a State.

None of the parties in the present case asked us to overrule Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd., but the plaintiffs sought to distinguish that case on the ground that the legislation there in question was promoted by the States, and on the further ground that the conditions of the grants left it to the

States to select the individual persons to whom the moneys were to be distributed and the amount payable to each. The fact that the States combined to give effect to the scheme shows that they were prepared to accept the conditions of the grants, but that fact has no bearing on the question whether, in the circumstances mentioned, it was right to say that there was a grant of financial assistance to a State, or whether the conditions of the grant were valid. Further, the circumstance that a State was called upon to apply the formula laid down in the condition of the grant does not alter the fact that the State received the money only on condition that it be paid out in the manner indicated by the Commonwealth. I find it impossible to distinguish Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd. [20] from the present case. 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.

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(13) (1939) 61 C.L.R. 735.
(14) (1940) 63 C.L.R. 338; [1940] A.C. 838.
(15) (1957) 99 C.L.R. 575, at pp. 606-607.
(16) (1939) 61 C.L.R. 735.

The question that next arises is whether the Commonwealth can, by a condition of a grant made under s. 96, evade the prohibition contained in s. 116 of the *Constitution*. That section is in the following terms:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The question is whether if the conditions of a grant of financial assistance require the State to which the grant is made to establish a religion within the meaning of that section, the Act by which the grant is authorized is invalid as contrary to s. 116. It is plain, as Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd. shows, that a condition may be imposed under s. 96 for the purpose of persuading a State to do something which the Commonwealth itself could not do. Pye v. Renshaw [21] provides another example. The cases show that the Parliament has wide power to fix the terms and conditions of a grant made under s. 96. In Victoria v. The Commonwealth (the Roads Case) [22] , it was said that the *Federal Aid Roads Act 1926* was "plainly warranted by the provisions of s. 96 of the *Constitution*, and not affected by those of s. 99 or any other provision of the Constitution", and the statement that grants made under s. 96 are not affected by any other provision of the Constitution was repeated in Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd. [23] . On the other hand, in Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth [24] , Latham C.J. said that s. 116 "prevails over and limits all provisions" [of the Constitution] "which give power to make laws", and McTiernan J. [25] said that the section "imposes a restriction on all the legislative powers of Parliament". I consider that the ordinary rules of statutory construction should be applied, and that ss. 96 and 116 should be read together, the result being that the Commonwealth has power to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit, provided that a law passed for that purpose does not contravene s. 116. It is one thing to say that the Parliament, by a condition imposed under s. 96, could achieve

a result which it lacks power to bring about by direct legislation, but quite another to say that the Parliament can frame a condition for the purpose of evading an express prohibition contained in the Constitution. As the Judicial Committee pointed out in W.R. Moran Pty. Ltd. v. Deputy Federal Commissioner of Taxation (N.S.W.) [26] , the powers given by s. 51 of the *Constitution* are expressly made "subject to this Constitution" which includes s. 96. On the other hand, s. 116 is not expressed to be subject to the Constitution. Of course the same is true of s. 99, but that section speaks of "any law or regulation of trade, commerce or revenue" and a law under s. 96 cannot properly be regarded as such a law: see Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd. [27] . However, whether or not the provisions of s. 51 can be "completely disregarded" in deciding upon the validity of a law made under s. 96 (as to which see W. R. Moran Pty. Ltd. v. Deputy Federal Commissioner of Taxation (N.S.W.)) [28] , I consider that the Parliament, acting under s. 96, cannot pass a law which conflicts with s. 116. To take an unlikely example, an Act which granted money to a State on condition that the State would prohibit entirely the exercise of a particular religion would, in my opinion, be a law for prohibiting the free exercise of that religion, and would be invalid.

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(17) (1951) 84 C.L.R. 58.
(18) (1926) 38 C.L.R., at p. 406.
(19) (1939) 61 C.L.R., at pp. 763, 771.
(20) (1943) 67 C.L.R. 116, at p. 123.
(21) (1943) 67 C.L.R., at p. 156.
(22) (1940) 63 C.L.R., at pp. 346-347; [1940] A.C., at pp. 855.
(23) (1939) 61 C.L.R., at p. 775.
(24) (1940) 63 C.L.R., at pp. 349-350.

It remains a question whether s. 116 applies to laws made under s. 122 for the government of any Territory. This question is relevant to the validity of the *Independent Schools (Loans Guarantee) Act 1969*. There are strong dicta, in addition to those in the Jehovah's Witnesses Case [29] which I have already cited, which support the view that s. 116 does apply to such laws: Lamshed v. Lake [30] ; Teori Tau v. The Commonwealth [31] , but those dicta are in my opinion very difficult to reconcile with the decision in R. v. Bernasconi [32] , where it was held that the power given by s. 122 is not restricted by s. 80 of the *Constitution*—see also Spratt v. Hermes [33] . If s. 122 is limited by s. 116, the latter section will have a much larger operation in the Territories than in the States, for although s. 116 is contained in Ch. V of the *Constitution* which is headed "The States" it is not expressed to bind the States. However, for the reasons already given, it is in any case necessary to consider the effect of s. 116 in the present case, and in view of the conclusion which I have reached on that question I need not finally decide whether the section is applicable to laws made under s. 122.

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(25) (1943) 67 C.L.R. 116.
(26) (1958) 99 C.L.R. 132, at p. 143.
(27) (1969) 119 C.L.R. 564, at p. 570.
(28) (1915) 19 C.L.R. 629.
(29) (1965) 114 C.L.R. 226, at p. 250.

I then come to what is the most important question in the case, whether any of the laws now challenged is a law "for establishing any religion" within the meaning of s. 116. The primary argument submitted for the plaintiffs is that the relevant words of s. 116—"the establishment clause"—prohibit 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, and that the legislation in question provides financial assistance to the religions which conduct, or are closely associated with, the schools that receive the moneys. Alternatively it was submitted that s. 116 should be construed as prohibiting the giving of recognition, aid or support to one or more religions in preference to other religions, and that the legislation is invalid within that test, because it does not prohibit the Minister from giving preference to some non-government schools over others on account of their religious affiliation, and because in the nature of things some religions must benefit more than others from the assistance provided under the Acts, because more schools are conducted by, or associated with, some denominations than by others. A further alternative submission was that the legislation, and in particular the *Schools Commission Act 1973*, requires the Commonwealth to be excessively involved in religion and that that is a contravention of s. 116.

Whether any of these arguments can succeed depends in the first place on the proper meaning of the expression "establishing any religion" in s. 116. "Establish" has in its ordinary sense a variety of meanings. According to the Oxford English Dictionary those meanings include: "2. To fix, settle, institute or ordain permanently, by enactment or agreement "; "3. To set up on a secure or permanent basis; to found "; "4. To place in a secure or permanent position; to install and secure in a possession, office, dignity, etc; to "set up" in business."; and "5. To set up or bring about permanently (a state of things) Also, to secure for oneself, gain permanently (a reputation, a position)." However the meaning which is most apposite when used in relation to religion is described by the Oxford English Dictionary as follows:

> 7. From 16th c. often used with reference to ecclesiastical ceremonies or organization, and to the recognized national church or its religion; in early use chiefly *pass.* in sense 2 (esp. in phrase *by law established*, i.e. "prescribed or settled by law"), but sometimes with mixture of senses 3-5. Hence in recent use: To place (a church or a religious body) in the position of a national or state church.

The word "established" is defined in *Halsbury* , 4th ed., vol. 14, par. 334 as follows:

> The word "established" in relation to a church is used in various senses. In one sense every religious body recognized by the law, and protected in the ownership of its property and other rights may be said to be by law established. In another sense the words "established church" are used to mean the church as by law established in any country as the public or state-recognized form of religion. The process of establishment means that the state has accepted the church as the religious body which in its opinion truly teaches the Christian faith, and has given to it a certain legal position and to its decrees, if given under certain legal conditions, certain legal sanctions. What is called the "establishment" principle in relation to the church is the principle that there is a duty on the civil power to give support and assistance to the church, though not necessarily by a way of endowment, and where this principle prevails a church is said to be established when it receives such support and assistance. In the fullest sense a church is said to be established when all the provisions constituting the church's system or organization receive the sanction of a law which establishes that system throughout the state and excludes any other system. The Church of England is established by law in England.

It seems to me that the word "establish", when used in relation to religion, has four possible meanings. The widest of these meanings is simply to protect by law. The word was used in that sense by Lord Mansfield in Evans v. The Chamberlain of London [33a] "when, speaking of the Toleration Act, he is reported to have said, that non-conformity is rendered by that act "not only innocent but lawful", and that the protecting clauses of the statute "have put it, not merely under the connivance, but under the protection of the law—*have established it* ".": see Attorney-General v. Pearson [34] . Secondly, and this is the most usual modern sense, the word means to confer on a religion or a religious body the position of a state religion or a state church. In Marshall v. Graham [35] , Phillimore J., speaking of the Church of England, said:

> The process of establishment means that the State has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions.

In Fielding v. Houison [36] , Barton J. also used the word with this meaning when, speaking of course of Australia, he said:

> The Statute book shows amply that the Church of England and Ireland after the constitution of a legislature never was, nor was any other religious body, an established Church.

Thirdly, when used in relation to the establishment principle discussed in General Assembly of Free Church of Scotland v. Lord Overtoun [37] the word means to support a church in the observance of its ordinances and doctrines. In that case Lord Robertson [38] , pointed out that the establishment principle can be held by churches that are unconnected with the state, and are supported by voluntary contributions alone. Like other members of the House of Lords in that case, he thought that the establishment principle was enunciated in Art. III of Ch. XXIII of the Westminster Confession, which read as follows:

> The civil magistrate hath authority, and it is his duty, to take order, that unity and peace be preserved in the church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God settled, administered and observed.

As to this Lord Robertson said [39] :

> On the specific question about the 23rd chapter of the Confession of Faith, I own that I read with some surprise that doubts had been entertained by learned judges as to the effect of the words that it is the duty of the civil magistrate to "take order that" "the ordinances of God" be "duly settled, administered and observed". I must still take leave to think that those words do describe what we call Establishment; and I observe that in the Campbelton Case where these observations were made, the question before the court was State endowment, which is a different thing.

And Lord Alverstone C.J. said [40] :

> It was strongly urged by the respondents that that article does not enunciate the principle of Establishment or Endowment. As regards Endowment the observation is probably well founded, but even taking the article by itself, in my opinion it distinctly embodies the principle of Establishment.

A fourth possible meaning of the word "establish" is simply to found or set up a new church or religion, but that is obviously not the meaning used in s. 116.

(30) (1842) 2 Burn's Eccl. Law. 207.
(31) (1817) 3 Mer. 353, at p. 420 [36 E.R. 135, at p. 157].
(32) [1907] 2 K.B. 112, at p. 126.
(33) (1908) 7 C.L.R. 393, at p. 423.
(34) [1904] A.C. 515.
(35) [1904] A.C., at p. 674.
(36) [1904] A.C., at pp. 680-681.
(37) [1904] A.C., at p. 707.

The first of these meanings—to grant legal statuts, recognition or protection—is obsolete and inappropriate in the context of the Constitution. The word was used in that sense when there was an established church, but legal recognition was nevertheless accorded to other churches. If the Commonwealth were forbidden to make any law for establishing any religion in that sense, it would mean that a Commonwealth statute could not validly recognize the existence of any religion or extend to it the protection of the law. For example, laws which recognized the existence of ministers of religion for any purpose (such as the celebration of marriages) would be invalid. There could have been no possible reason for such a constitutional prohibition, and it would be inconsistent with the spirit of the further provision that no law shall be made prohibiting the free exercise of any religion.

The third possible meaning is also inappropriate in s. 116. When used in that sense the word is contrasted with endowment, and is used to refer to support of a legal or moral rather than a financial kind. However, it is not the usual sense of the word but is used in a special sense in relation to the "establishment principle". If the word were used in that sense in s. 116 the other provisions of that section would be rendered otiose. If the word "establish" in s. 116 simply meant support, a law imposing a religious observance, or the requirement of a religious test as a qualification for office, would amount to the establishment of a religion, and the express provisions of the section forbidding these things would have been unnecessary.

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 in s. 116, there is no inconsistency with, or repugnancy to, the other provisions of the section. 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.

It is strongly argued on behalf of the plaintiffs that since s. 116 was closely modelled on part of the First Amendment to the *Constitution of the United States* it must be taken to have been intended to have the same meaning as that which had been attributed to the First Amendment in the United States before 1900 when the Constitution was enacted, and further that the United States decisions since that date provide a useful guide to the meaning of the section. In deference to this argument I shall turn to some of the American authorities, but it is necessary to notice that there are a number of differences between s. 116 and the First Amendment to the *American Constitution*. The First Amendment is in the following terms:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

It has been held in the United States that these provisions have been extended to the States by the Fourteenth Amendment. The final clause of s. 116 (prohibiting religious tests) is modelled on Art VI, s. 3 of the *United States Constitution*. The establishment

clause in the First Amendment is contained in a provision which guarantees a number of fundamental rights, and that circumstance may have influenced the approach of the courts in the United States to the question. More importantly, the words of s. 116 did not reproduce verbatim those of the First Amendment. The latter speaks of a law "respecting an establishment of religion" and those words appear wider than those of s. 116 which refer to "any law for establishing any religion"—words which look to the purpose of the law rather than to its relationship with a particular subject matter, and which suggest that it is the establishment of one particular religion rather than of religion generally that is proscribed. Moreover s. 116 contains an express prohibition of the imposition of any religious observance—a prohibition which is not included in the First Amendment and which, as I have said, would have been unnecessary if establishing in s. 116 meant "giving assistance or support to". These matters, and the different histories of the two countries, provide reasons why the American decisions as to the meaning of the First Amendment do not necessarily provide any safe guide to the meaning of s. 116 of our *Constitution*.

In any case, with all respect to the argument of the plaintiffs, it had not been established in the United States by the time Federation occurred in Australia that the First Amendment forbad the Congress to give aid, financial or otherwise, to one or more religious bodies. It is true that the Supreme Court had already adopted, as a guide to the meaning of the First Amendment, a statement made by Thomas Jefferson in reply to an address made to him by the Danbury Baptist Association. That statement, which has proved influential in determining the attitude of American Courts to the establishment clause in the First Amendment, is cited in Reynolds v. United States [41] , and was as follows:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship, that the legislative powers of the Government reach actions only, and not opinions, —I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof", thus building a wall of separation between church and state.

In that case the court was dealing with the effect of the free exercise clause, not the establishment clause, and the courts of the United States before 1900 had not had occasion to translate Jefferson's metaphor into terms of specific and practical guidance. The only decision before 1900 in which the Supreme Court considered whether the provision of financial assistance to a body connected with a church violated the establishment clause appears to have been Bradfield v. Roberts [42] . There an appropriation for buildings to be constructed on the grounds of a hospital, a private eleemosynary corporation, was held valid. The facts that the members of the corporation were members of a Roman Catholic sisterhood, and that the title to its property was vested in the sisters, were said to be "wholly immaterial" [43] . It was submitted for the plaintiffs that it was implicit in that decision that if the hospital could have been characterized as a religious corporation, or a corporation that existed for religious purposes, the appropriation would have been invalid. However Peckham J., who delivered the judgment of the Supreme Court, said [44] :

> If we were to assume, for the purpose of this question only, that under this appropriation an agreement with a religious corporation of the tenor of this agreement would be invalid, as resulting indirectly in the passage of an act respecting an establishment of religion, we are unable to see that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not.

It seems to me that the learned justice expressly left open the question what the consequence would have been if the hospital had been a religious corporation, and the

actual decision of the case does not seem to give the least support to the argument of the plaintiffs, according to which the expenditure of public money on lands owned by a religious body would amount to an establishment of religion. Indeed later mention of the case in the American authorities does not support the plaintiffs' argument as to the significance of the decision. In Quick Bear v. Leupp [45] it was held that a statutory limitation on the expenditure of public funds, forbidding contracts for the education of Indians in sectarian schools, did not apply to the expenditure of treaty and trust funds administered by the government for the Indians, and that a contract under which it was intended that the Bureau of Catholic Indian Missions should be paid out of Sioux trust funds, a certain amount for each Sioux in its schools, was not invalid. The question there was primarily one of statutory construction, but in the course of his judgment Fuller C.J. said [46] :

> Some reference is made to the Constitution, in respect to this contract with the Bureau of Catholic Indian Missions. It is not contended that it is unconstitutional, and it could not be. Roberts v. Bradfield [47] ; Bradfield v. Roberts [48] .

More recently in Tilton v. Richardson [49] , Burger C.J. said;

> The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in Bradfield v. Roberts [50] .

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(38) (1878) 98 U.S. 145, at p. 164 [25 Law. Ed. 244, at p. 249].
(39) (1899) 175 U.S. 291 [44 Law. Ed. 168].
(40) (1899) 175 U.S., at p. 298 [44 Law. Ed., at p. 170].
(41) (1899) 175 U.S., at p. 297 [44 Law. Ed., at p. 170].
(42) (1908) 210 U.S. 50 [52 Law. Ed. 954].
(43) (1908) 210 U.S., at p. 81 [52 Law. Ed., at p. 964].
(44) (1898) 12 App. D.C. 475.
(45) (1899) 175 U.S. 291 [44 Law. Ed. 291].
(46) (1971) 403 U.S. 672, at p. 679 [29 Law. Ed. 2d 790, at p. 799].
(47) (1899) 175 U.S. [44 Law. Ed. 168].

Moreover American commentators, before 1900, had not understood the establishment clause to have the effect of forbidding financial aid to church schools. Thus Cooley in his Principles of Constitutional Law, 3rd ed., (1898), said, at pp. 24-25, that by establishment "is meant the recognition or setting up of a state church, or at least the conferring upon one church of special favours and advantages which are denied to others". This passage provides some support for the alternative submission of the plaintiffs but is opposed to their primary contention.

It seems that it was not until 1947 that the Supreme Court first gave extensive consideration to the effect of the establishment clause on the provision of financial aid to church schools. In Everson v. Board of Education [51] . Black J., who delivered the judgment of the majority, said [52] :

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State".

All the judgments appear to favour the view that the establishment clause requires a separation of religious and civil activity and forbids any state aid to religion. Nevertheless, the court, by a majority of 5 to 4, rejected the challenge made in that case to the right of a board of education to reimburse parents for money expended in conveying their children by bus to (amongst other) Catholic parochial schools. The case illustrates the difficulty that one sometimes finds of reconciling a broad statement of principle with the actual decision in cases of this kind. Indeed Jackson J., who dissented in that case, speaking of the majority judgment, said, that "the undertones of the opinion, advocating complete and uncompromising separation of Church from State seem utterly discordant with its conclusion yielding support to their commingling in educational matters." [53]

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(48) (1947) 330 U.S. 1 [91 Law. Ed. 711].
(49) (1947) 330 U.S., at p. 16 [91 Law. Ed., at p. 723].
(50) (1947) 330 U.S., at p. 19 [91 Law. Ed., at p. 725].

Since that time the meaning of the establishment clause in the First Amendment has been the subject of what Blackmun J. in the course of a dissenting judgment in Committee for Public Education and Religious Liberty v. Regan [54] , described as a "continuing and emotional controversy". Although the Supreme Court has evolved a test for the constitutionality of statutes affording aid to church schools, there have been strongly expressed differences of opinion as to the result of the application of that test in particular cases. The test now accepted was stated as follows in Lemon v. Kurtzman [55] :

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion".

This third element is of comparatively recent origin and its inclusion was strongly criticized by White and Rehnquist JJ. in Roemer v. Maryland Public Works Board [56] ; and since it appears to have suggested one of the arguments put by the plaintiffs in the present case, I may say immediately that it finds no support in the words of the establishment clause in s. 116. It would serve no useful purpose for me to discuss the cases on both sides of the borderline, in which the Supreme Court has considered the validity of legislative provisions which authorize the giving of financial aid to church schools, but it is clear that the Supreme Court has not taken the view that the establishment clause entirely forbids the grant of any financial aid to church schools. A few examples will suffice. The Supreme Court has held valid a statute which authorized grants to schools and universities for the construction of buildings and facilities used exclusively for secular educational purposes (Tilton v. Richardson [57]), a statute whose purpose was to provide assistance, primarily through the issue of revenue bonds, for higher education in the construction, financing and re-financing of building projects, not including any facility used for sectarian instruction, religious worship or the study of divinity (Hunt v. McNair [58]), a statute which provided grants to colleges provided that the moneys should not be used for sectarian purposes (Roemer v. Maryland Board of Public Works [59]) and a statute reimbursing schools for performing various testing and reporting services required by state law (Committee for Public Education and Religious Liberty v. Regan [60]), although, in each of these cases, church schools as well as secular schools benefited under the statutes. On the other hand there are many decisions of the Supreme Court which have invalidated legislation giving aid to church

schools, and some of those cases are—at least for someone from another jurisdiction —difficult to reconcile with those to which I have just referred.

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(51) (1980) 444 U.S. 646, at p. 664 [63 Law. Ed. 2d 94, at p. 109].
(52) (1971) 403 U.S. 602, at pp. 612-613 [29 Law. Ed. 2d 745, at p. 755].
(53) (1976) 426 U.S. 736, at pp. 767-768 [49 Law. Ed. 2d 179, at p. 200].
(54) (1971) 403 U.S. 672 [29 Law. Ed. 2d 790].
(55) (1973) 413 U.S. 734 [37 Law. Ed. 2d 923].
(56) (1976) 426 U.S. 736 [49 Law. Ed. 2d 179].
(57) (1980) 444 U.S. 646 [63 Law. Ed. 2d 94].

Even if the United States authorities were treated as applicable to s. 116, they would not give to the argument advanced by the plaintiffs the support which the plaintiffs sought to draw from them. But in any case, for a number of reasons, I cannot regard the United States decisions as containing an exposition which should be treated as authoritative in its application to s. 116. In the first place there are the differences, to which I have already referred, between that section and the First Amendment. Secondly, the history of the United States, which provides the background to the Constitution of that country, has been very different from that of Australia. Thirdly, as I had occasion to point out in Attorney-General (Cth); Ex rel. McKinlay v. The Commonwealth [61] , the courts of the United States, in construing the Constitution, have recourse to material which it is our practice to reject. It would seem paradoxical if we, although forbidden to consider the debates of our own constitutional conventions for the purpose of discovering what the delegates thought was the meaning of a particular provision accepted by the Convention, should nevertheless, in construing s. 116, indirectly give weight to the opinions of Thomas Jefferson as to the meaning of the similar words of the First Amendment. Finally, the course of the decisions in the United States shows that the test which has been adopted in that country, so far from being clear and predictable in its operation, has led, in its application, to continuing controversy. In any case, we should not substitute for the words of s. 116 a test which those words do not appear to warrant, particularly when it does not commend itself by any obvious considerations of justice or convenience.

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(58) (1975) 135 C.L.R. 1, at p. 47.

It was submitted on behalf of the plaintiffs that the words of s. 116 should be given as broad and liberal a construction as possible. That would not justify giving the words of the establishment clause an expanded meaning which they do not naturally bear. In any case, the establishment clause imposes a fetter on legislative power, and unlike the words which forbid the making of any law prohibiting the free exercise of any religion, does not do so for the purpose of protecting a fundamental human right; indeed, the purpose for which it was inserted in the Constitution remains obscure. There is no reason to give such a provision a liberal interpretation. In the end it remains necessary to determine the meaning of the words of s. 116 themselves.

For the reasons I have given, I consider that the words "The Commonwealth shall not make any law for establishing any religion", where they appear in s. 116, mean that the Commonwealth Parliament shall not make any law for conferring on a particular religion or religious body the position of a state (or national) religion or church.

It may be a question of degree whether a law is one for establishing a religion. However, on no view of the evidence in the present case can it be said that any of the laws in question infringes s. 116, if that section is given the meaning which I have attributed to it. If it be assumed 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 if it be further assumed that some religions, which conduct more schools than others, will receive more aid than others, it still does not follow that any religion is established by the legislation. If the administration of the *Schools Commission Act 1973* requires that officers of the Commonwealth be closely involved with religious authorities, that also does not mean that the Act establishes any religion. The primary purpose of the challenged legislation is the advancement of education within Australia. That would, no doubt, not be decisive if the legislation had the further purpose of establishing any religion. However, 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. None of the laws in question is a law for establishing religion within s. 116.

No doubt some members of the public hold strong and sincere views on the question whether any government should provide financial aid to church schools, but the resolution of the differences that exist must be left to the democratic processes which exist under the Constitution; s. 116 does not resolve them.

For the reasons I have given I consider that the plaintiffs cannot succeed in their action and that judgment should accordingly be given for the defendants.

STEPHEN J.

The judgment of Wilson J. relieves me of the need to describe the facts and circumstances of these proceedings. That judgment describes the character of the parties to and intervenors in the proceedings, the plaintiffs' submissions, the legislation of the Commonwealth which is impugned and the factual background against which that legislation operates.

At the heart of this case is the question whether Commonwealth laws offend against s. 116 of the *Constitution* when they grant financial assistance to the States on condition that the States apply the sums granted in paying for capital projects and recurrent expenses of non-government schools. A similar question arises concerning moneys appropriated for spending on such schools in the Territories.

Section 116 is as follows:

> 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.

Some things about the section are self-evident. It is not, in form, a constitutional guarantee of the rights of individuals; with it may be contrasted s. 117 which, like s. 80, at least gives promise of guaranteed rights, however illusory that promise may so far have proved in practical operation: R. v. Archdall and Roskruge; Ex parte Carrigan and Brown [62] and Henry v. Boehm [63] . Section 116, like s. 99, instead takes the form of express restriction upon the exercise of Commonwealth legislative power.

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(59) (1928) 41 C.L.R. 128.
(60) (1973) 128 C.L.R. 482.

The section contains four quite distinct restrictions, each concerned with one aspect of the relationship between church and state and each recalling phases of that relationship as it has evolved through centuries of English history. The first three prohibit the making of laws of particular kinds, laws "for" the doing of certain things. The fourth prohibits the imposition, whether by law or otherwise, of religious tests for the holding of Commonwealth office. It is the first of these four restrictions that is here in question. It differs in substance and form from the second and third restrictions. They are directed against the "imposing" or the "prohibiting" of aspects or religious practice; unlike them, the participle "establishing" used in the first restriction does not describe a prohibited law's impact upon the citizen but its effect upon religion.

What it is which constitutes "establishing any religion" has, of course, been central to the debate in this case. The plaintiffs say that establishing in s. 116 includes the provision by the Commonwealth of funds to schools associated with churches. The predominant view of the various defendants and intervenors is, I think, that "establishing" means the constituting of a religion as an officially recognized State religion.

The context provided by s. 116 is enough to show that what is perhaps the most usual meaning of "establishing", that of setting up or founding, while appropriate where "establish", "established" and "establishment" variously occur in covering clauses of the *Constitution Act* and in ss. 106, 107 and 121 of the *Constitution*, is inappropriate in s. 116. In that section the conjunction of "establishing" with "law" and with "religion" gives it its particular meaning.

It is that meaning which the Shorter Oxford English Dictionary alone gives to it when specifically related to religion, namely "to place (a church or a religious body) in the position of a state church". This I have no doubt is the meaning of the verb "establish" and of its present participle according to common usage when used with reference to a church or religion. Only if convincing reasons can be shown will it bear a different or more particular meaning. The plaintiffs, in seeking to make good the proposition that the provision by law of funds for church schools is an establishing of religion, urge several reasons for so saying, while not conceding in the first place that "establishing" bears the meaning which I would assign to it according to ordinary usage.

The plaintiffs' argument begins by giving to "religion" a meaning which extends beyond a particular religious philosophy so as also to include the religious community which supports that faith and also its organization and practices. So much may readily enough be accepted: to speak of a religion being established by the laws of a country may well be to include much more than the act of according material recognition and status to a set of beliefs, a system of moral philosophy or particular doctrines of faith; it would certainly include the recognition of a particular religion or sect, with its priestly hierarchy and tenets, as that of the nation.

The plaintiffs point to the undoubted imprecision surrounding the concept of establishment as applied to the Church of England. Again, it may be accepted that there is no single characteristic of that Church which of itself constitutes the touchstone of its establishment. Over the centuries the rights enjoyed by the Church of England, as the established church, have greatly changed, as has that subjection to temporal authority which is the concomitant of establishment. Dibdin, in Establishment in England, traces the various phases of the Church's establishment and the disappearance, over time, of many of those characteristics which once went to make up its status as the established Church. The plaintiffs rely both upon his adoption, at p. 113, of Lord Selborne's statement that in different countries the particular forms and conditions of Establishment differ and upon his comment that it might be added that in England those forms and conditions have themselves "differed greatly from time to time". Dibdin concludes, at p. 116: "The Establishment has survived so many modifications that, whatever we may think it would be rash to assert that the irreducible minimum has now been nearly reached."

The status of establishment which the Church of England has long enjoyed in England has no single characteristic but, rather, is the sum total of all the mutual relations for the time being existing according to law between Church and State. No single element of those relations, viewed in isolation, itself creates establishment. Because the status of establishment is, in England, the outcome of a complex of relationships does not make a law which creates one element of that complex a law "for establishing" a religion. Still less does it mean, as the plaintiffs also contend, that any law which may represent a step in the direction of, or may be thought to have a tendency towards, producing the end result of the establishment of a religion is a law which offends against s. 116.

The plaintiffs rely upon matters of colonial history as affecting the meaning of establishing in s. 116. First, they say that in nineteenth century Australia there was for a time a recognition of a variety of representative Christian denominations. This was accompanied by the granting of financial aid by colonial governments to those denominations and to the schools conducted under their respective auspices. By the end of the century however, under the influence of voluntaryist and separationist views of the relationship which should exist between church and state, each of the Australian colonies had by legislation ended this financial support of particular denominations and of church schools. This being the historical setting in which the terms of the federal compact were debated, it is said to colour the meaning to be given to establishing in s. 116 so as to include within its prohibition grants of financial support to schools affiliated with particular churches, grants which each of the federating colonies had abrogated in the three decades preceding federation.

Australia's colonial history does indeed disclose, first, something at least approaching official recognition of the Church of England; followed, however, by a general recognition of a wide variety of denominations, accompanied by impartial financial assistance to all their churches and schools; then, in the latter part of the nineteenth century, there occurred a move towards complete separation of church and state, with the abolition of all financial aid to churches and to church schools. It is with this last development that the plaintiffs would seek to associate s. 116, contending that it represents a continuation of the policy of colonial legislatures of the late nineteenth century.

Perhaps the first thing to be observed in examining this proposition is the marked contrast which exists between the language of the colonial Acts which abolished financial aid to churches and church schools and the words of s. 116. It is in terms of "the abolition of state aid to religion" (Victoria), of the prohibition of "future grants of public money in aid of public worship" (New South Wales), of the discontinuance of "grants from the revenue in aid of religion" (Queensland), of the "termination of the parliamentary ecclesiastical grant" (Western Australia) that colonial legislatures ended their financial support of denominations. Likewise, the termination of state financial aid to church schools was also expressed in precise terms which made no reference to the concept of the establishment or disestablishment of religion.

The language of the first restriction in s. 116 stands in marked contrast to the precise terms in which these colonial measures were expressed. These measures nowhere refer either to "establishing" or "establishment" nor, for that matter, to "disestablishment", a phrase then much in vogue in connexion with the current disestablishment debate in the United Kingdom. The colonial Acts had no need to deal in such concepts because there existed in Australia no established church capable of being disestablished. Section 116, on the other hand, specifically speaks in terms of a prohibition against laws for "establishing any religion". Its language is singularly ill-adapted to ensuring that the spirit of the colonial measures should persist in the new polity which emerged from federation. It is, however, entirely apt if concerned with the quite different subject of the creation of a state church in Australia; something which had come close to occurring in the early colonial period but which s. 116 would prevent for the future. So understood, it is natural that the first restriction in s. 116 should speak in terms quite different from the language of the previous colonial legislation. It is

significant that, writing in 1901, Quick and Garran should say of the opening words of s. 116: "by an establishment of religion is meant the erection and recognition of a State church or the concession of special favours titles and advantages to one Church which is denied to others": Annotated Constitution, p. 951. They clearly did not regard it as continuing the policy of the colonial measures. In saying what they did they were reflecting the view then prevailing in the United States as to the effect of the First Amendment, of which more hereafter.

The very form of s. 116, consisting of four distinct and express restrictions upon legislative power, is also significant. It cannot readily be viewed as the repository of some broad statement of principle concerning the separation of church and state, from which may be distilled the detailed consequences of such separation. On the contrary, by fixing upon four specific restrictions of legislative power, the form of the section gives no encouragement to the undertaking of any such distillation.

The plaintiffs place much reliance upon what is said to have been the influence of the *United States Constitution* in the framing of s. 116. The argument is that words of the First Amendment are similar to those of the first restriction in s. 116; that the First Amendment was, by the time of Federation, understood in a sense which would forbid the grant by the federal government of aid to church schools; and that, by using similar language, the framers of our Constitution must have intended that the first restriction in s. 116 should have a similar operation.

The argument fails on two counts. The more obvious is that the wording of the two measures differs in an important respect; the more telling is that the First Amendment had not, by the 1890s, come to bear the meaning which the plaintiffs would seek to assign to the first restriction in s. 116. As to wording, the First Amendment requires that "Congress shall make no law respecting an establishment of religion", a restriction of wider scope than s. 116's prohibition of laws "for establishing any religion". To illustrate this wider scope one may use another of the restrictions in s. 116, thus avoiding the effect of any preconception about the meaning of "establishing": a law which did no more than require all places of entertainment to be closed on Sundays would not be a law "for" imposing any religious observance whereas it might well be one "respecting" the imposition of some religious observance. The difference of wording, and the effect attributed to "respecting" in the American decisions of this century deprive those modern decisions of value in the interpretation of s. 116.

Then, as to the understanding of the meaning of the First Amendment prevailing in the 1890s; despite its different and wider wording, the First Amendment was understood as requiring only that no national church should be recognized or created and no one persuasion or mode of worship should be given any special privilege or particular recognition. This is made clear in the judgment of the U.S. Court of Appeals for the District of Columbia in Roberts v. Bradfield [64] ; the judgment of the U.S. Supreme Court when the case went on appeal [65] , does not, on analysis, reflect any different view. That this was the then prevailing view of the First Amendment also emerges very clearly from Cooley's Constitutional Limitations, 6th ed. (1890), pp. 575 et seq and his Principles of Constitutional Law, 3rd ed. (1898), p. 224 and from Storey's *Commentaries* , 5th ed. (1891), pp. 631-634. As Von Holst said in his Constitutional Law of the United States of America (1887), p. 227 "Congress is not only prohibited from making any religion whatever a state religion or any church whatever a state church, but it cannot make any laws favouring one religion or church more than any other".

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(61) (1898) 12 App. D.C. 453.
(62) (1899) 175 U.S. 291 [44 Law. Ed. 168].

It follows that even if the framers of our Constitution had seen fit to adopt verbatim the terms of the First Amendment, they would have been doing no more than writing into our Constitution what was then believed to be a prohibition against two things, the setting up of a national church and the favouring of one church over another. They would not have been denying power to grant non-discriminatory financial aid to churches or church schools.

Section 116 is a constitutional provision of high importance. As the plaintiffs say, it does indeed provide important safeguards for religious freedom for Australians, at least so far as that freedom might otherwise be in jeopardy from laws of the Commonwealth. It does so by prohibiting three avenues of possible legislative encroachment upon that freedom—the elevation of one church above all others, the imposing of particular religious observances and the proscribing of any religious worship. It also prohibits one avenue of encroachment open to legislature and executive alike—the imposition of religious tests for office holders. These four prohibitions, the fruit of long experience of past religious intolerance in the United Kingdom, ensure that Parliament will observe that "true distinction between what properly belongs to the Church and what to the State": Reynolds v. United States [66] . They say nothing, however, which would impugn the validity of the legislation which the plaintiffs seek to attack. Because of the meaning which, in my view, "establishing" bears in s. 116, their attack based upon that section fails.

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(63) (1878) 98 U.S. 145, at p. 163 [25 Law. Ed. 244, at p. 249].

Quite distinct from the plaintiffs' general attack on validity founded upon s. 116 is their contention that the legislation here in question, so far as it affects States as distinct from Territories, is not authorized by s. 96 of the *Constitution*. It is said to lack the necessary quality of providing for grants of financial assistance to States on terms and conditions thought fit by Parliament. The argument is that the grants for building and equipment projects and the recurrent expenditure of non-government schools are not grants of financial assistance to the States at all. The States may elect to accept or reject the grant but that is the full extent of their role. If accepted, a State acts as a mere conduit; it derives no benefit as a body politic.

In pursuing this argument the plaintiffs are confronted at the outset with the decision of this Court in Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd. [67] . They do not canvass the correctness of Moran's Case but instead seek to distinguish it; accordingly, the dissatisfaction which Dixon C.J. expressed concerning it in Victoria v. The Commonwealth [68] (the Second Uniform Tax Case) does not now arise for consideration. In the absence of any present challenge to the correctness of Moran's Case and the doctrine which has developed from it, I conclude that the plaintiffs must fail on this issue; I do not regard Moran's Case as distinguishable.

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(64) (1939) 61 C.L.R. 735.
(65) (1957) 99 C.L.R. 575, at p. 607.

It is true that in Moran's Case the initiative for the legislation there under challenge came from the States, which sought the cooperation of the Commonwealth in a

proposed wheat stabilization scheme. The States also played a somewhat more active role in determining the recipients of Commonwealth funds. But, as Dixon C.J. observed in the Second Uniform Tax Case [69] , the non-coercive power conferred by s. 96 "is susceptible of a very wide construction in which few if any restrictions can be implied" and the course of decisions have amplified the power and tend towards "a denial of any restriction upon the purpose of the appropriation or the character of the condition". So long as that course of decisions stands, I am unable to see any ground for distinguishing the present case. In any event, I would regard the present legislation as in substance providing financial assistance to the States. Non-government schools have come to form a significant segment of each State's educational system, as is attested by the financial aid which each State provides for such schools, quite independently of Commonwealth grants. Grants by the Commonwealth of financial aid, directed to those schools through the agency of the States, reduces the burden upon the States and by that means assists them financially.

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(66) (1957) 99 C.L.R., at p. 605.

The plaintiffs' attack based upon s. 96 must in my view fail. It follows that I find it unnecessary to determine the questions of standing of parties which were argued. These are major questions which are better resolved in a case which requires their determination.

I would dismiss the action.

MASON J.

The facts and the relevant statutory provisions have been set out in the reasons for judgment prepared by Wilson J.

Why it was considered necessary to include in the *Constitution* s. 116 or its first clause is not altogether clear. Mr. H. B. Higgins thought that the reference to Almighty God in the preamble might have yielded by implication a power in the Commonwealth Parliament to legislate upon the topics mentioned in the section. Quick and Garran considered that it may have been inserted to forestall any possibility of amending the Constitution by providing for any of the matters prohibited. To others it may have seemed that there was a need to place some restraint upon the exercise of the legislative power with respect to marriage conferred by s. 51 (xxi.). Reflection upon the question is speculative and it does not assist in the resolution of the problems which now arise.

I agree with Wilson J. that the first clause in the section forbids the establishment or recognition of a religion (and by this term I would include a branch of a religion or church) as a national institution. Quick and Garran in Annotated Constitution of the Australian Commonwealth say of s. 116 (p. 951): "by the establishment of religion is meant the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others." With one qualification, I agree with this statement. The qualification is that 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.

Lumb and Ryan in The Constitution of the Commonwealth of Australia Annotated, 2nd ed. (1977), p. 362, rightly observe that it is instructive to compare s. 116 with the First Amendment to the *United States Constitution*. They say (p. 362):

> Section 116 refers to the establishment of *any* religion while the American clause prohibits the establishment of religion. This suggests that what s 116 is aimed at is any type of assistance tending to promote the interests of one Church or religious community as against others. A non-discriminatory law which is directed towards assisting religion generally may fall foul of the American provision but may not be invalid under s 116.

The authors correctly regard the section as aimed at preserving religious equality or equality between religions, but it will be noted that they consider that the prohibition extends to any form of assistance "tending to promote the interests of one Church as against others".

The view expressed by Quick and Garran strongly reflects the interpretation of the "establishment clause" in the First Amendment favoured by Cooley in his Principles of Constitutional Law, 3rd ed. (1898). Cooley said (p. 224):

> By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favours and advantages which are denied to others.

The view of Lumb and Ryan more closely follows the opinion of Story expressed in his Commentaries on the Constitution of the United States, 5th ed. (1891), s. 1877:

> The real object of the amendment was to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

But, unlike Cooley and Quick and Garran who direct their comments to the prohibition against establishment of religion specifically, Story and Lumb and Ryan speak more generally of the effect of the First Amendment and s. 116 viewed as a whole.

The opinions of the two American textwriters reflected the judicial decisions on the "establishment clause" at the turn of the century. The decision of the Supreme Court in Bradfield v. Roberts [70] , does not deal directly with the question. However, the judgment appealed from, that of the United States Court of Appeals for the District of Columbia Circuit [71] , is instructive. The Court said [72] :

> it seems to be the opinion of learned commentators of very high authority, that the declaration was intended to secure nothing more than complete religious liberty to all persons, and the absolute separation of the Church from the State, by the prohibition of any preference, by law, in favor of any one religious persuasion or mode of worship.

The Court then refers to the relevant passages in the works of the commentators, including Cooley and Story. On appeal the Supreme Court did not express any disagreement with what the Court of Appeals had said.

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(67) (1899) 175 U.S. 291 [44 Law Ed. 168].
(68) (1898) 12 App. D.C. 453.
(69) (1898) 12 App. D.C., at p. 467.

Accepting for present purposes that there was a difference, albeit slight, in the interpretation given by Cooley and Story to the prohibition against establishment of

religion and that the Court of Appeals in Bradfield v. Roberts favoured the Story interpretation, this provides no support for the plaintiffs' case. Indeed, it provides a persuasive refutation of that case. Though Story possibly went further than Cooley in perceiving in the prohibition against establishment a prohibition against the giving of *any* preferential assistance to one church or religion over another, and in this he may possibly have been supported by the Court of Appeals, neither Story nor Cooley claimed that the First Amendment proscribed assistance to churches or religions generally, let alone assistance to churches which was limited to education.

Even if the interpretation given to the "establishment clause" in the more recent decisions of the United States Supreme Court more closely accords with the interpretation of s. 116 for which the plaintiffs contend, what is important for our purposes is that the interpretation of the clause in the First Amendment which was accepted at the end of the nineteenth century was that expressed by Cooley and Story. It is that interpretation which the framers of our Constitution would have had in mind when they framed s. 116 and this, no doubt, was one reason why Quick and Garran adopted it as an acceptable construction of the first prohibition contained in the section. I do not accept the plaintiffs' submission that Bryce's interpretation of the First Amendment supports their case and I note that the Court of Appeals in Bradfield v. Roberts [73] did not refer to it.

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(70) (1898) 12 App. D.C. 453.

Although in some circumstances it is permissible to construe a grant of legislative power so as to apply it to things and events coming into existence and unforeseen at the time of the making of the Constitution, so that the operation of the relevant grant of power in the Constitution enlarges or expands, a constitutional prohibition must be applied in accordance with the meaning which it had in 1900. As a prohibition is a restriction on the exercise of power there is no reason for enlarging its scope of operation beyond the mischief to which it was directed ascertained in accordance with the meaning of the prohibition at the time when the Constitution was enacted. Consequently, the content of the prohibition against establishment of religion should not be expanded by reference to a more extensive interpretation given to similar words in the First Amendment by judicial decisions pronounced since 1900, assuming, without deciding, that those decisions have such an effect.

The text of s. 116 more obviously reflects a concern with the establishment of one religion as against others than the language of the First Amendment which speaks of the "establishment of religion", not the "establishment of any religion". And, as we shall see, the history of the relationship between church and state in the United Kingdom and in the Australian colonies in the nineteenth century suggests that the first clause in s. 116 was the expression of a profound sentiment favouring religious equality in the Australian colonies.

The plaintiffs attach much importance to the distinction between establishing in s. 116 and "establishment" in the First Amendment. The former, they say, is wider than the latter which may have a special and limited meaning. Indeed, the suggestion is that "establishing" was selected to ensure that no narrow interpretation would be made to the prohibition. The distinction in meaning, if any, between the words is so slight that it does not supply a sound basis for a difference in interpretation. Both words may be used in a number of senses, but in the context of religion "establishing" should be understood in the same sense as "establishment" in relation to church and state. This is a topic to which I shall return.

There is a second distinction between the language of s. 116 and the First Amendment. We speak of any "law *for* establishing" any religion. The Americans speak of a law "*respecting* an establishment" of religion. In Lamshed v. Lake [74] , Dixon C.J., when referring to s. 122, equated "for" with "with respect to" in its application to the government of the Territory. Here, however, we are dealing, not with a grant of legislative power, but with a prohibition against the exercise of legislative power. In such a context "for" is more limiting than "respecting"; "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. In this respect the first prohibition in s. 116 is narrower than its American counterpart.

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(71) (1958) 99 C.L.R. 132, at p. 141.

Section 116 is directed to the preservation of religious equality, freedom of religion and, as Latham C.J. pointed out in Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth [75] , "the right of a man to have no religion". The inclusion in the section of the prohibitions against laws imposing religious observances and against requiring religious tests as a qualification for any office or public trust indicate that the scope of operation of the first clause of the section is rather more limited than the plaintiffs' argument would admit. The plaintiffs argue that the first clause prohibited the giving of any aid or assistance to religion, financial or otherwise. The imposition of religious observances and the administration of religious tests as a qualification for office would both come within the expanded concept of establishment favoured by the plaintiffs. Yet they are each the subject of separate and explicit constitutional prohibition.

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(72) (1943) 67 C.L.R. 116, at p. 123.

Even so, as I have already indicated, the principal obstacle to an acceptance of the plaintiffs' argument lies in the words "any law for establishing any religion". It is altogether too much to say that a law which gives financial aid to churches generally, to be expended on education, is a law for establishing religion. The mere provision of financial aid to churches generally, more particularly when that aid is genuinely linked to expenditure on education, falls short of "establishing" a "religion" as we understand the expression. By it we mean the authoritative establishment or recognition by the State of a religion or a church as a national institution.

This is not only the meaning which is given in the standard English dictionaries, but it is also the meaning which it has in our minds and had in the minds of the citizens of the Australian colonies at the end of the nineteenth century. They were acutely familiar with the relationship between church and state in England and Wales, Scotland and Ireland. They were aware that the Church of England, the Church of Scotland and the Church of Ireland respectively were referred to as "the Established Church". And they had followed the move to disestablish the Church of England, a move which had generated great political controversy in the first half of the century. To them the issue of establishment was by no means remote. It was a burning question because a large proportion of the Australian population in the second half of the nineteenth century consisted of Non-conformists and Roman Catholics who had suffered from religious

discrimination in their homelands and were devoutly opposed to its resurgence in the colonies, which were, after all, British colonies where the Church of England had the largest following. To the Australian colonists the preservation of religious equality was perhaps more important than the preservation of religious freedom for the simple reason that they had experienced the disadvantages of religious inequality and it posed a more immediate threat than the absence of religious freedom.

It is of great significance that, despite their very comprehensive researches into the history of the relationship between church and state in the Australian colonies, the plaintiffs have been unable to discover any instance in which the provision of financial assistance to churches to be spent on education, was described as "establishing religion" or "establishing a church".

The plaintiffs argue that a law which brings about one of the results or characteristics that go to make up the establishment of religion is itself a law "for establishing" religion. Thus, they submit, a law which gives financial aid to religious schools is a law for establishing religion because the giving of financial aid to religious schools, taken with other support for religion, constitutes the establishment of religion. If it were otherwise, they say, the establishment of religion could be secured by a series of laws no single one of which infringes the constitutional prohibition. This is to assume that each law must be viewed in isolation in deciding whether there is a violation of the prohibition. The assumption is not justified. 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 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.

The position of the establishment provision as the first clause in s. 116 evidences the importance which was attached to it. Nevertheless, to repeat what I said earlier, apart from the second and fourth clauses, the form of religious inequality which has been forbidden by s. 116 is that form of religious inequality which is expressed by the critical words "any law for establishing any religion".

The interpretation which I give to the first clause of s. 116 is fatal to the plaintiffs' case to the extent to which it was based on the section. The statutes whose validity the plaintiffs attack provide financial assistance for church schools without differentiation between religions or churches. True it is that very much more aid is given to Roman Catholic schools. This is because the Roman Catholic Church operates a much larger number of schools than other churches or religions. The provision for church schools forms part of a general scheme for the funding of government and non-government schools. Therefore there is simply no basis for saying that the relevant statutes are laws for establishing the Roman Catholic Church as a national institution. There is just as little basis for saying that they are laws for establishing the Christian religion.

In reaching this conclusion I have assumed that the prohibitions contained in the section apply to appropriation statutes enacted in compliance with s. 83 and to statutes enacted pursuant to s. 96. Laws made pursuant to these provisions are not an exception to the general proposition expressed by Latham C.J. in Jehovah's Witnesses [76] that "Section 116 is a general prohibition applying to all laws, under whatever power those laws may be made". The purpose of appropriation statutes was described by Isaacs J. in The Commonwealth v. Colonial Ammunition Co. Ltd. [77] as "financial, not regulative". Perhaps a similar comment may be made about the purpose of laws made under s. 96. But this is not a ground for saying that appropriation statutes and s. 96 laws stand outside the general prohibition contained in s. 116. Yet it may be a reason for saying that it is much more difficult to show that they infringe the constitutional prohibition, though, like Wilson J., I can conceive that an appropriation of a very large sum to a church as an integral element in a scheme to establish that church as a national church would fall foul of the section. The law would then fall, not because the purpose is not a purpose of the Commonwealth, but because the statute violates a constitutional prohibition.

(73) (1943) 67 C.L.R., at p. 123.
(74) (1924) 34 C.L.R. 198, at p. 224.

The statutes by which moneys are granted to the States for the purpose of assisting religious schools are the subject of an additional challenge. The plaintiffs submit that the statutory provisions travel beyond the authority which s. 96 confers by depriving the States of any choice or freedom of action in relation to the moneys provided, other than the freedom to accept or reject the grant. When States accept the grant on the terms set out in the legislation they are obliged by those terms to pay money to schools and school authorities nominated by the Commonwealth and to enter into agreements the terms of which are fixed by the Commonwealth. As Wilson J. observes, the conditions attached to the grant require the school or school authority to account to the Commonwealth for moneys spent and to provide statistical information to the Commonwealth.

But the course of judicial decision in this Court establishes that the Commonwealth may condition its grant under s. 96 so as to make the State a conduit pipe in channelling the fund to the intended recipient. As early as 1926, in Victoria v. The Commonwealth [78] , the *Federal Aid Roads Act 1926* was upheld, notwithstanding that it bound the State to apply money to an object selected by the Commonwealth, that the object was outside Commonwealth legislative power and that the amount of the payments was to be fixed by a Commonwealth Minister. Subsequently, in South Australia v. The Commonwealth (the first Uniform Tax Case) [79] , the Commonwealth legislation introducing uniform taxation was upheld. A central element in that legislation was a provision in the *States Grants (Income Tax Reimbursement) Act 1942* (s. 4) which provided for the giving of financial assistance to a State on condition that the State did not impose a tax on incomes in the relevant financial year. Latham C.J., Rich, McTiernan and Williams JJ. (Starke J. dissenting) held that the Act was not directed towards destroying or weakening the constitutional functions or capacities of the States and was therefore not invalid on that ground. The Court drew a distinction between a law which offers an inducement to a State not to exercise its powers and a law which creates or attempts to create a legal compulsion to do so [80] .

(75) (1926) 38 C.L.R. 399.
(76) (1942) 65 C.L.R. 373.
(77) (1942) 65 C.L.R., at pp. 417, 464.

Later, in Victoria v. The Commonwealth (the second Uniform Tax Case) [81] , Dixon C.J., who had not participated in the first Uniform Tax Case, though suggesting that there was support for a more limited construction of s. 96, went on to say, "the course of judicial decision has put any such limited interpretation of s. 96 out of consideration" [82] .

(78) (1957) 99 C.L.R. 575.
(79) (1957) 99 C.L.R., at p. 609.

For these reasons the plaintiffs are not entitled to the relief sought in the action.

MURPHY J.

The statutory provisions, details of grants, and an outline of the facts are set out in Wilson J's. judgment.

The plaintiffs contend (apart from their principal contention) that the Acts which purport to be grants under s. 96 of the *Constitution* are not authorized by s. 96. There is no force in the contention, the basis of which has already been rejected in Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd. [83] ; Victoria v. The Commonwealth [84] .

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(80) (1939) 61 C.L.R. 735.
(81) (1957) 99 C.L.R. 575.

The plaintiffs' principal contention is that the challenged legislation is invalid in so far as it provides for financial aid to non-government schools.

Almost all the non-government schools are what are known as "church" or "denominational" or in the United States, "sectarian" or "parochial" schools. All these have a religious element. The general picture is that as well as secular instruction each of the church schools engages in instruction in its particular religion and engages in religious observances and worship. Most of the buildings are adorned with religious symbols. The churches to which the schools are related exercise varying degrees of supervision over the conduct of the schools. The recipients of the moneys channelled through the challenged Acts are churches associated with the different religions. There was strong contention between the plaintiffs and the defendants over the extent and degree of the religious element, although in the end, much was agreed. My legal conclusions do not depend on any difference between the opposing factual claims.

The plaintiffs rely upon s. 116 of the *Constitution* which states:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The marginal note is "Commonwealth not to legislate in respect of religion".

The plaintiffs rely particularly upon that part of s. 116 known as the establishment clause which prohibits the Commonwealth from making "any law for establishing any religion". The plaintiffs and defendants have advanced opposing views on the meaning in s. 116 of the words or phrases "any law", "for", and "establishing any religion". Much of the argument involved reference to the establishment clause of the *United States Constitution* (in the First Amendment) which reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

and also to Art. VI of the *Constitution*: " no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States".

Section 116 is very similar to, and obviously taken from, the provisions of the *United States Constitution*, and the prohibition added against laws "for imposing any religious

observance".

The principles appropriate to construing such constitutional expressions are well recognized, even if sometimes overlooked. "We must remember that it is a constitution we are construing and it should be construed with all the generality which the words used admit." (R. v. Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty. Ltd. [85] , Dixon C.J., Kitto, Taylor, Menzies, Windeyer and Owen JJ.).

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(82) (1964) 113 C.L.R. 207, at p. 225.

"any law"

The Commonwealth Government contended that s. 116 did not apply to grants or conditions on grants under s. 96, nor to appropriation laws under s. 81 of the *Constitution*. It asserted that Parliament could under s. 96 grant say a hundred million dollars to the States on the condition that the money was used "for establishing a religion" and could, under s. 81 of the *Constitution*, appropriate moneys directly for the building of a cathedral, or for the propagation of religious tracts, free of any prohibition in s. 116. I would reject these propositions.

Latham C.J. said in Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth [86] :

> Section 116 is a general prohibition applying to all laws, under whatever power those laws may be made. It is an overriding provision. It does not compete with other provisions of the Constitution so that the Court should seek to reconcile it with other provisions. It prevails over and limits all provisions which give power to make laws.
>
> Accordingly no law can escape the application of s. 116 simply because it is a law which can be justified under ss. 51 or 52, or under some other legislative power. All the legislative powers of the Commonwealth are subject to the condition which s. 116 imposes.

McTiernan J. said [87] : "Section 116 imposes a restriction on all the legislative powers of the Parliament."

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(83) (1943) 67 C.L.R. 116, at p. 123.
(84) (1943) 67 C.L.R., at p. 156.

The United States' establishment clause is also overriding. As Douglas J. said delivering the opinion of the Court in Zorach v. Clauson [88] : "The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute".

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(85) (1952) 343 U.S. 306, at p. 312 [96 Law. Ed. 954, at p. 961]

Section 166 applies to any law, whether made under s. 51, s. 52, s. 96, s. 122 or any other legislative power.

"for"

In the *Australian Constitution*, the phrase "for establishing" is used instead of the phrase "respecting an establishment of" used in the *United States Constitution*. The word "for" in this context embraces the meaning "with respect to". In The Oxford Dictionary (1901) one of the definitions of "for" was "As regards, with regard or respect to, concerning". As Dixon C.J. said in Lamshed v. Lake [89] , (dealing with s. 122): "To my mind s. 122 is a power given to the national Parliament of Australia as such to make laws "for" that is to say "with respect to", the government of the Territory." He went on to state that the test of whether a law was "for" the government of the Territory is whether it was relevant to that subject matter. The same applies to s. 116. If a law is relevant to establishing any religion, it is "for" establishing any religion.

(86) (1958) 99 C.L.R. 132, at p. 141.

The marginal note to s. 116 confirms this correspondence of "for" and "with respect to". Generally little attention is paid in the interpretation of ordinary Acts to marginal notes, although in Reg. v. Schildkamp [90] Lords Reid and Upjohn considered that marginal notes should not be rejected completely as aids. But here we are dealing with a constitution. The marginal notes are part of the Constitution and if they throw only a little light, that light is in favour of a broad construction which would embrace "with respect to". However, whether "for" is read narrowly, meaning "with the purpose of" or "with the object of" as the defendants contend, or as meaning or including "with respect to" as the plaintiffs contend, is not decisive. Even if the plaintiffs' view of "for" is accepted, the challenge will fail if the defendants' view of "establishing any religion" is accepted. On the other hand, even if the defendants' view of "for" is accepted the plaintiffs will succeed if their view of "establishing any religion" is accepted.

(87) [1971] A.C. 1.

"establishing any religion"

Three meanings of establishing in s. 116 have been advanced. The first and narrowest means establishing one national church or religion. The second ("preferential") means preferring, by sponsorship or support, any religion over others (and therefore includes the first). The third ("separation") means any sponsorship or support of religion (and therefore embraces the first two). These meanings are therefore not mutually exclusive. The separation interpretation of the clause means that it forbids not only a national church, and any preference to one religion over others, but also sponsorship or support (including financial support) of any religion. The ordinary principle that constitutional provisions should be read not narrowly, but "with all the generality which the words admit", strongly supports the adoption of the more general reading, that is, the

separation interpretation. There are other considerations which support the adoption of this interpretation. The guarantees of personal freedom against the imposition of any religious observance and the prohibition of free exercise of any religion and the requirement of any religious test should be read widely consistently with their brevity and with constitutional usage. As I said in Attorney-General (Cth); Ex rel. McKinlay v. The Commonwealth [91] "Great rights are often expressed in simple phrases." It would detract greatly from the freedom of and from religion guaranteed by those clauses if they were to be read narrowly. In the same way the establishment clause should be read widely. To refuse to read the establishment clause with generality because so read it covers some of the ground covered by the other guarantees in s. 116 is to interpret s. 116 as if it were a clause in a tenancy agreement rather than a great constitutional guarantee of freedom of and from religion. It would be just as incorrect to narrow the broad meaning of free exercise of any religion because otherwise it would overlap with the clauses prohibiting imposition of religious observances and religious tests. Some laws would breach more than one, even all the clauses—for example a requirement that every candidate for office under the Commonwealth make a particular religious observance. The idea that the establishment clause should be read down so as not to overlap with the free exercise clause has been rejected in the United States (See Engel v. Vitale [92]).

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(88) (1975) 135 C.L.R. 1, at p. 65.
(89) (1962) 370 U.S. 421 [8 Law. Ed. 2d 601].

To read s. 116 as prohibiting only laws for establishing one religion or church, but permitting laws for establishing a number of religions or churches is inconsistent with the comprehensive terms of the prohibition. There is no warrant for reading "any religion" as "any one religion"; yet this is necessary if "establishing" refers only to the recognition or setting up of one national church or religion. Such a reading trivializes the section. It would allow laws for sponsoring and supporting (financially and otherwise) a number of religions (even in the most discriminatory and preferential way) as long as the laws stopped short of setting up one national church or religion. The same objection applies to the adoption of the "preferential" interpretation. It requires that the prohibition against laws for establishing "any" religion be read down so that "any" means "only one or some", instead of "every", or "all". This distorts the meaning of the section. It would forbid preference such as financial assistance to any one religion over others (and presumably to some but not all) but would permit such preference or assistance to all religions over no religion. If a law for financial support for one or more religions but not all (that is, a preferential or discriminatory law) violates the prohibition against "any law for establishing any religion", it follows irresistibly that a law for financial support for all religions also violates the prohibition. There is not the slightest hint in the words used in the establishment clause that it forbids only discriminatory or preferential laws. The preferential interpretation would convert the clause into one permitting laws for establishing all religions. This would make a farce of the section and would deny that s. 116 is a guarantee of freedom from religion as well as of religion. This reading is repelled by the emphatic use of "any".

As Latham C.J. said in the Jehovah's Witnesses Case [93] : "section 116 applies in express terms to "any religion", "any religious observance", the free exercise of "any religion" and any "religious test". Thus the section applied to all religions and not merely in relation to one particular religion."

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(90) (1943) 67 C.L.R., at p. 123.

"Non-preferential" sponsoring of or aiding religion is still "establishing" religion. In the nineteenth century "establishment" was not restricted to sponsorship of or aid to one church or religion, although such sponsorship or support was of course referred to as establishment. It was also understood to include sponsorship or support of all churches, and was referred to as indiscriminate establishment. In The State and its Relations with the Church Gladstone stated that "The Australian colonies have most broadly avowed the principle of indiscriminate establishment". He described endowment of Roman Catholic chaplains and ministers as "state establishment of the Roman Catholic Church" and as part of this indiscriminate establishment (pp. 269-273).

The meaning of establishment in the sense of one established church (as referred to in the United Kingdom case of General Assembly of Free Church of Scotland v. Lord Overtoun [94]) is not the meaning of "establishing any religion" in s. 116 of our *Constitution*. In this part of the Constitution, the framers obviously looked for guidance to the United States, not to the United Kingdom.

(91) [1904] A.C. 515.

The purpose of the United States establishment clause was clearly to prevent the recognition of and assistance to religion which plagued European countries over many centuries. The religious wars of ancient times were repeated after the Middle Ages and into modern times. In the United Kingdom the struggle between the contending Catholic and Protestant factions, with the emergence of Presbyterians, Methodists, Quakers, Lollards and many other religious groups, was a bitter illustration of the attempts of religious factions to get the assistance of the state in propagating their views and if possible, suppressing their rivals. The history has a very important economic aspect. One of the dangers of subsidizing religious institutions and granting them financial privileges (such as exemption from income tax, land and municipal rates, sales and other taxes) is that such institutions tend to become extremely wealthy, to aggrandize and to become states within a state. The corrective has often been a more or less violent seizure of the assets of the religious institutions, sometimes by the existing sovereign (as did Henry VIII), sometimes by revolutionary movements, which in many countries have had as one of their main objects the suppression of religious institutions and the seizure of their wealth.

Douglas J. refers to this in his partial dissent in Tilton v. Richardson [95] :

> Much is made of the need for public aid to church schools in light of their pressing fiscal problems. Dr Eugene C. Blake of the Presbyterian Church, however, wrote in 1959:
>
> > When one remembers that churches pay no inheritance tax (churches do not die), that churches may own and operate business and be exempt from the 52 percent corporate income tax, and that real property used for church purposes (which in some states are most generously construed) is tax exempt, it is not unreasonable to prophesy that with reasonably prudent management, the churches ought to be able to control the whole economy of the nation within the predictable future. That the growing wealth and property of the

> churches was partially responsible for revolutionary expropriations of church property in England in the sixteenth century, in France in the eighteenth century, in Italy in the nineteenth century, and in Mexico, Russia, Czechoslovakia and Hungary (to name a few examples) in the twentieth century, seems self-evident. A government with mounting tax problems cannot be expected to keep its hands off the wealth of a rich church forever. That such a revolution is always accompanied by anticlericalism and atheism should not be surprising.

The mounting wealth of the churches makes ironic their incessant demands on the public treasury. I said in my dissent in Walz v. Tax Commission of New York [96] : "The religiously used real estate of the churches today constitutes a vast domain. See M. Larson & C. Lowell, The Churches: Their Riches, Revenues, and Immunities (1969). Their assets total over $141 billion and their annual income at least $22 billion. And the extent to which they are feeding from the public trough in a variety of forms is alarming."

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(92) (1970) 397 U.S. 664, at p. 714 [25 Law. Ed. 2d 697, at p. 727]

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(93) (1971) 403 U.S. 672, at pp. 695-696 [29 Law. Ed. 790, at pp. 808-809].
(94) (1970) 397 U.S. 664, at p. 714 [25 Law. Ed. 2d 697, at p. 727]

In the United States, after deleterious consequences of aid to religion were observed in some of the states, the architects of its Constitution determined to prevent repetition there of the unfortunate experience of other countries by creating a "wall of separation" between religion and State. (See J. Bryce, The American Constitution (1888), vol. 3, pp. 465-466.)

The establishment clause was explained by Jefferson in the famous Danbury letter (to a group of Danbury Baptists):

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

The co-author of the establishment clause, James Madison, in explaining his veto to a bill of Congress, stated it was:

> Because the bill in reserving a certain parcel of land of the United States for the use of the said Baptist Church comprises a principle and a precedent for the appropriation of funds of the United States for the use and support of

> religious societies, contrary to the article of the Constitution which declares that "Congress shall make no law respecting a religious establishment."

(J.D. Richardson, Messages and Papers of the Presidents (1900)). The *Annotated United States Constitution* states " the theme of the writings of both [Madison and Jefferson] was that it was wrong to offer public support of any religion in particular or of religion in general" 3rd ed. (1971), p. 912.

This interpretation of the establishment clause was well settled and accepted judicially in the United States prior to the framing of the *Australian Constitution*.

In 1879, the Supreme Court of the United States in Reynolds v. United States [97] in a unanimous judgment delivered by Waite C.J., referred to the history of the establishment clause:

> Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe.

The judgment later quoted the above passage from the Danbury letter, and then continued [98] :

> Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured.

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(95) (1878) 98 U.S. 145, at p. 162 [25 Law. Ed. 244, at p. 249].
(96) (1878) 98 U.S., at p. 164 [25 Law. Ed., at p. 249].

Thus, an authoritative interpretation of the establishment clause had been given by the supreme tribunal in the United States shortly before the people of Australia were engaged in fashioning their own Constitution. Again in Davis v. Beason [99] the Court said:

> The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to prohibit legislation for the *support of any religious tenets* or the modes or worship of any sect. [my emphasis]

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(97) (1890) 133 U.S. 333, at p. 342 [33 Law. Ed. 637, at p. 640].

Another case prior to 1900 to which we were referred was Bradfield v. Roberts [1] decided in 1898 by the Court of Appeals and in 1899 by the United States Supreme Court [2] . The Court of Appeals decision was not delivered until after the Constitutional Conventions had ended, so that despite it's being before 1900 it had no influence on the framing of the *Australian Constitution*. The Court of Appeals held that the

Providence Hospital, to which moneys were paid by the United States Government under contract, was a secular corporation (even though operated by Roman Catholics) and that the moneys were "not a subsidy or a gift of money, but compensation for actual services to be rendered" [3] . They stressed that "the sole question for our determination is the power of Congress and the District Commissioners in the matter of the appropriation and contract involved in the case" [4] . The Supreme Court also did not decide the scope of the establishment clause. As the *Annotated Constitution of the United States (1972)* (p. 917) puts it:

> The Court viewed the hospital as a secular institution so chartered by Congress and not as a religious or sectarian body, thus avoiding the constitutional issue.

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(98) (1898) 12 App. D.C. 453.
(99) (1899) 175 U.S. 291 [44 Law. Ed. 168].
(100) (1898) 12 App. D.C., at p. 471.
(101) (1898) 12 App. D.C., at p. 477.

Although some United States' commentators such as Cooley favoured the "preferential" interpretation there is no doubt that the "separation" meaning of the clause as authoritatively declared in Reynolds v. United States [5] was well-known to the framers of our Constitution. (See Unto God and Caesar, Richard Ely, pp. 93, 95-96, 99-100). This separation interpretation has been consistently followed by the United States Supreme Court from Reynolds' Case until now.

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(102) (1878) 98 U.S. 145 [25 Law. Ed. 244].

The effect of the United States decisions was properly stated by President Kennedy in 1961:

> The Constitution clearly prohibits aid to the school, to parochial schools. I don't think there is any doubt of that.
>
> The Everson case, which is probably the most celebrated case, provided only by a 5 to 4 decision was it possible for a local community to provide bus rides to nonpublic school children. But all through the majority and minority statements on that particular question there was a very clear prohibition against aid to the school direct. The Supreme Court made its decision in the Everson case by determining that the aid was to the child, not to the school. Aid to the school is—there isn't any room for debate on that subject. It is prohibited by the Constitution, and the Supreme Court has made that very clear. And therefore there would be no possibility of our recommending it. (See Tilton v. Richardson [6]).

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(103) (1971) 403 U.S. 672, at p. 690 [29 Law. Ed. 2d 790, at p. 805].

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(104) (1971) 403 U.S. 672, at p. 690 [29 Law. Ed. 2d 790, at p. 805].

In Everson v. Board of Education [7] , the case to which President Kennedy referred, the Supreme Court held that neither the United States nor (because of the Fourteenth Amendment any constituent State could provide financial aid to a religion or to all religions. The Court said [8] :

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." Reynolds v. United States [9] . [my emphasis]

(105) (1947) 330 U.S. 1 [91 Law. Ed. 711].
(106) (1947) 330 U.S. 1, at pp. 815-816 [91 Law. Ed. 711, at p. 723].
(107) (1878) 98 U.S. 145 [25 Law. Ed. 244].

The minority opinions to which President Kennedy referred were even more emphatic. Jackson J. said [10] :

> There is no answer to the proposition, more fully expounded by Mr Justice Rutledge, that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse.

(108) (1947) 330 U.S., at pp. 26-27 [91 Law. Ed., at p. 729].

Rutledge J. (with whom Frankfurter, Jackson, and Burton JJ. agreed) said [11] :

> The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question.
>
> "Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof". "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.
>
> "Religion" has the same broad significance in the twin prohibition concerning "an establishment". The Amendment was not duplicitous. "Religion" and "establishment" were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes. [12]

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(109) (1947) 330 U.S., at p. 33 [91 Law. Ed., at p. 732].

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(110) (1947) 330 U.S., at pp. 31-32 [91 Law. Ed., at pp. 731-732].
(111) (1947) 330 U.S., at p. 33 [91 Law. Ed., at p. 732].

Warren C.J. in delivering the opinion of the Court in McGowan v. Maryland [13] stated that the Supreme Court: "has found that the First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church."

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(112) (1961) 366 U.S. 420, at p. 442 [6 Law. Ed. 2d 393, at p. 408].

In Walz v. New York Tax Commission [14] , Burger C.J. delivering the opinion of the Court wrote:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions,

> which is to insure that no religion be sponsored or favoured, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

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(113) (1970) 397 U.S. 664, at p. 669 [25 Law. Ed. 2d 697, at pp. 701-702].

The Supreme Court has expressly rejected the proposition advanced in this case that "historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." (Illinois; Ex rel. McCollum v. Board of Education [15]).

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(114) (1948) 333 U.S. 203, at p. 211 [93 Law. Ed. 649, at p. 659].

Applicability of United States Authorities

In D'Emden v. Pedder [16] Griffith C.J., one of the framers of our Constitution said:

> So far, therefore, as the *United States Constitution* and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.
>
> There is, indeed, another consideration which gives additional weight to the authority of the United States decisions with regard to matters in which the two Constitutions are similar. We have already, in discussing the language of s. 51 of the *Constitution*, referred to the inference to be drawn from the fact that a legislature has deliberately adopted in its legislation a form of words which has already received authoritative interpretation. We cannot disregard the fact that the Constitution of the Commonwealth was framed by a Convention of Representatives from the several colonies. We think that, sitting here, we are entitled to assume—what, after all, is a fact of public notoriety—that some, if not all, of the framers of the Constitution were familiar, not only with the *Constitution of the United States*, but with that of the Canadian Dominion and those of the British colonies. When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, thought varied in form, from provisions of the *Constitution of the United States* which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation.

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(115) (1904) 1 C.L.R. 91, at pp. 112-113.

In Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [17] the Court held that the United States decisions were not standards to measure the respective rights of the Commonwealth and the States, because of "common sovereignty of all parts of the British Empire" and "the principle of responsible government". Those considerations are not present here, and we are not concerned with the respective rights of the Commonwealth and the States.

(116) (1920) 28 C.L.R. 129, at p. 146.

Latham C.J. in Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth [18] stated:

> There is, therefore, full legal justification for adopting in Australia an interpretation of s. 116 which had, before the enactment of the Commonwealth Constitution, already been given to similar words in the United States.

(117) (1943) 67 C.L.R. 116, at p. 131.

The United States' decisions on the establishment clause should be followed. The arguments for departing from them (based on the trifles of differences in wording between the United States and the Australian establishment clauses) are hair-splitting, and not consistent with the broad approach which should be taken to constitutional guarantees of freedom. Even if the United States' decisions were set aside, the considerations to which I have referred show that the same interpretation is reached by applying ordinary constitutional principles of interpretation.

The purpose of our establishment clause is the same as that in the *United States' Constitution*. There does not seem to be any real doubt that if the establishment clause is construed in Australia as it is in the United States, (and if the Commonwealth's argument about the non-applicability of s. 116 to financial appropriations and s. 96 grants is rejected) then the challenged laws are unconstitutional. Section 116 of the *Constitution* does not assert or deny the value of religion (including religious teaching). It secures its free exercise, but denies that the Commonwealth can support religion in any way whatsoever. The Commonwealth cannot be concerned with religious teaching —that is entirely private. Section 116 recognizes that an essential condition of religious liberty is that religion be unaided by the Commonwealth.

The argument that the aid to church schools is only of minor assistance to the religious aspect of the schools and its major impact is to aid the secular aspects is no answer to the plaintiffs' challenge. In his famous Virginia Memorial and Remonstrance against Religious Assessment, Madison tellingly explained "That the same authority which can force a citizen to contribute threepence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." (in The Mind of the Founders, ed. Marvin Meyers (1973), p. 10)

The fact is that under the Commonwealth laws vast sums of money are being expended for the support of church schools. The result of the capital grants Acts is that great and increasing sums are being given to churches to acquire property, which can then lawfully be used for religious purposes apart altogether from schooling. Although the *States Grants (Schools Assistance) Act 1978* forbids approval of projects (for grants) "if the sole or one of the principal objects" is "to provide facilities for use, wholly or principally, for or in relation to religious worship" (s. 15), this does not prevent a grant for a project as long as religious worship is not the sole or principal object, or one of the principal objects and the Act does not prevent subsequent use of the property for any purpose, even exclusive use for religious worship. The evidence showed that two Catholic parish school buildings, at Churchill and Corio in Victoria although not used wholly or principally for or in relation to religious worship, have been used for religious purposes (apart from schooling). Eighty per cent of the Catholic primary school building at Churchill in the Latrobe Valley, in Victoria was contributed by the payment of Commonwealth grants. The building is also used as the local parish church. A nearby street sign indicates that the building is a Catholic church. $127,000 of the $180,000 cost of construction of the parish primary school in Corio outside Geelong, was provided out of Commonwealth grants. Both these buildings have been used for celebration of mass for the local parish each Sunday, and for confessions each Saturday, and occasionally for other religious services. There is nothing in the challenged Acts to restrict similar use of other property obtained with moneys given to the churches pursuant to these Acts. The effect of the Grants Acts is that the wealth of the churches is increased annually by many millions of dollars of taxpayers' moneys. They have the effect of establishing religion. As Douglas J. observed "In common understanding there is no surer way of "establishing" an institution than by financing it" (Wheeler v. Barrera [19]).

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(118) (1974) 417 U.S. 402, at p. 430 [41 Law. Ed. 2d 159, at p. 180].

Section 80 (trial by jury) and s. 116 are among the very few guarantees of freedom in the Constitution. In R. v. Federal Court of Bankruptcy; Ex parte Lowenstein [(19a)] , Dixon and Evatt JJ. asserted that this Court's reading of s. 80 made a mockery of the Constitution. 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. Jefferson warned against this tendency. "Our peculiar security is the possession of a written Constitution. Let us not make it a blank paper by construction" (Jefferson, Writings (Washington ed., 1859), p. 506). We should heed his warning.

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(119) (1938) 59 C.L.R. 556, at pp. 581-582.

Standing.

The defendants challenge the standing of each of the plaintiffs to attack the validity of the legislation. There are three classes of plaintiffs: the Attorney-General of Victoria who sues at the relation of a number of persons, a group of taxpayers of the

Commonwealth who are resident in various States and in the Australian Capital Territory and a group of persons who are taxpayers and parents of children at government schools. I am not satisfied that any of these lack standing.

United Kingdom cases on standing are not in point. That country has a unitary system with no constitutional guarantees like our s. 116.

It is a traditional duty of the Attorney-General of Australia to defend the validity of Acts. It would be incongruous and unrealistic to hold that only the Attorney-General could challenge the validity of an Act. To require a person who is not and will not be affected by the coercive operation of an Act to obtain the fiat of the Attorney-General of Australia or of a State would put enforcement of constitutional guarantees at the mercy of political pressures exercisable through parliaments, although the purpose of the constitutional guarantees was to provide certain protections, even against parliaments. A citizen's right to invoke the judicial power to vindicate constitutional guarantees should not, and, in my opinion, does not, depend upon obtaining an Attorney-General's consent. Any one of the people of the Commonwealth has the standing to proceed in the courts to secure the observance of constitutional guarantees. Objections to wide standing have no merit. Experience in other countries, especially the United States, has shown that the "floodgates" argument is baseless, and that procedures are available to deal with frivolous challenges.

The United States Supreme Court in Baker v. Carr [20] said:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.

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(120) (1962) 369 U.S. 186, at p. 204 [7 Law. Ed. 2d 663, at p. 678].

The conduct of the case by the plaintiffs and their presentation of factual and legal material has taken the question beyond assurance to actual demonstration of that "concrete adverseness which sharpens the presentation of the issues" referred to in Baker v. Carr.

The challenged Acts contravene s. 116 of the *Constitution*. As the majority holds otherwise, there is no point in my deciding whether some provisions are severable and valid, or whether some provisions can be read down so that they do not contravene s. 116. Judgment should be for the plaintiffs.

AICKIN J.

I have had the advantage of reading the reasons for judgment prepared by my brother Gibbs and those prepared by my brother Mason. I am in agreement with those reasons and there is nothing that I can usefully add.

I agree that the action should be dismissed.

WILSON J.

In this case the Attorney-General for the State of Victoria sues upon the relation of twenty-seven persons each of whom is a resident of the State of Victoria and a taxpayer of the Commonwealth of Australia. Twelve of them are each described also as a parent of children who attend schools conducted by the State of Victoria, and three of them are each described as a teacher in a school conducted by the State of Victoria. A

number of other persons sue as plaintiffs in their own right, asserting various capacities which include the following: (a) residents of the State of Victoria and taxpayers of the Commonwealth of Australia, including some who are also the parents of children who attend schools conducted by the State of Victoria; (b) residents of the Australian Capital Territory and taxpayers of the Commonwealth of Australia, including one who is a parent of children attending a school conducted in the Australian Capital Territory by the Commonwealth of Australia; (c) residents of the State of New South Wales and taxpayers of the Commonwealth of Australia, including some who are parents of children attending schools conducted by the State of New South Wales; (d) residents of the State of Tasmania and taxpayers of the Commonwealth of Australia.

The defendants are the Commonwealth and three Ministers of the Crown in right of the Commonwealth, and the National Council of Independent Schools and Reverend Father Martin both of whom are sued as representing the non-government schools in the Commonwealth of Australia.

The plaintiffs assert, and it is admitted by the defendants, that on the dates specified in 1972 and 1973 each of the Attorneys-General of the Commonwealth of Australia, New South Wales, Tasmania, Western Australia, South Australia and Queensland respectively refused to grant a fiat in relation to proceedings similar to the present case.

The defendants have challenged the standing of each of the plaintiffs to invoke the jurisidiction of the Court, and I will examine this aspect of the matter when the central issues in the case have been considered.

The Attorneys-General of New South Wales, Queensland and Tasmania, the State of Victoria, South Australia and Western Australia, and the Northern Territory have intervened in the proceedings in support of the validity of the legislation. They also support the standing of the Attorney-General of Victoria to bring the action.

Broadly speaking, the plaintiffs' claim is that the legislation by which the Commonwealth has provided financial assistance to non-government schools in each of the States, the Australian Capital Territory and the Northern Territory is beyond the power of the Parliament and invalid. The statutes under challenge include the *States Grants (Schools) Acts* that were enacted between 1972 and 1976, the *States Grants (Schools Assistance) Act* and amending Acts passed each year from 1976 to 1979, the *Schools Commission Act 1973*, the *Independent Schools (Loans Guarantee) Act 1969*, and each *Appropriation Act* so far as it provides for the payment of moneys to, for or on behalf of non-government schools in the Australian Capital Territory and the Northern Territory.

The submissions of the plaintiffs may be stated summarily in the form of propositions as follows:

1. Section 116 of the *Constitution* applies so as to limit every law-making power of the Commonwealth. In providing that "the Commonwealth shall not make any law for establishing any religion", the section prevents the Commonwealth Parliament from "making any law which provides any recognition or aid or support to one or more religions or to religion generally".

2. That the States Grants legislation is invalid because it infringes s. 116 in so far as it provides grants for the funding of religious schools.

3. In any event, the States Grants legislation is beyond power in that it is not within the authority conferred on the Parliament by s. 96 of the *Constitution*.

4. Since s. 116 controls laws enacted pursuant to the power conferred by ss. 81, 83 and 122, the general *Appropriation Acts* of the Commonwealth to the extent that they appropriate money for spending on religious schools in the Territories, and the *Independent Schools (Loans Guarantee) Act 1969*, are invalid.

5. The laws referred to together with the *Schools Commission Act 1973*, and the facts surrounding their administration establish an undue involvement of the Commonwealth in the affairs of religion, contrary to s. 116, and the said laws are therefore invalid.

The Legislation.

At this point it is convenient to indicate the relevant features of the impugned legislation. The States Grants legislation will be sufficiently exposed if I examine the *States Grants (Schools Assistance) Act 1978*. Its provisions include the following:

3.(1) In this Act, unless the contrary intention appears—

"approved authority", in relation to an approved school system or in relation to a non-government school, means such person or body as the Minister declares to be the approved authority of that school system or of that school, as the case may be, for the purposes of this Act;

"approved schools system" means a school system in a State, or in a part of a State, that consists of non-government schools and that the Minister declares to be an approved school system for the purposes of this Act;

"approved service and development activities" means—

(a) in-service teacher training;

(b) inquiries into the feasibility of providing support services for government schools and non-government schools in a State, or the planning of such support services; or

(c) activities the purpose of which is to improve communication and undertanding between teachers at government schools and teachers at non-government schools in a State, other persons employed at, or associated with the administration of, those schools, and students, and parents of students, at, and other members of the community interested in education at, those schools;

"disadvantaged school" means—

(a) a government school in a State that the State Education Minister for the State notifies the Commonwealth Education Minister, under sub-section 4 (1), is a school that should, in the opinion of the State Education Minister, be treated as a disadvantaged school for the purposes of this Act; or

(b) a non-government school in a State that the Minister declares, under sub-section 4 (2), to be a disadvantaged school for the purposes of this Act;

"education centre" means a body corporate, or a body of persons that the Minister is satisfied will, during the year to which this Act applies, become a body corporate—

(a) the members, or a majority of the members, of the governing body of which are persons employed as teachers at government schools or non-government schools;

(b) the sole or principal object of which is to improve the professional competence of teachers by methods that include the provision of in-service teacher training; and

(c) which is not conducted for the profit, direct or indirect, of an individual or individuals;

"government school" means a school in a State that is conducted, or proposed to be conducted, by or on behalf of the Government of the State;

"in-service teacher training" means teacher training of persons in employment as teachers at government schools or non-government schools;

"migrant education" means the provision of special educational programs and facilities, and the adaptation of educational programs and facilities, for the purpose of meeting the special educational needs of migrant children and the children of migrants and, in particular, for the purpose of teaching the English language to such children and also providing education for such children and other children that takes account of the various cultures of peoples in countries from which persons have migrated to Australia;

"multicultural education" means the provision of special educational programs and facilities for the purpose of teaching languages (other than the English language) spoken in overseas countries to students receiving primary education or secondary education at government schools or non-government schools and also providing education for such students that takes account of the various cultures of peoples in overseas countries;

"non-government school" means a school in a State that is not conducted, or proposed to be conducted, by or on behalf of the Government of the State, but does not include a school conducted, or proposed to be conducted, for the profit, direct or indirect, of an individual or individuals;

"primary education", in relation to a non-government school in a State, means education of a kind similar to that provided for students at government primary schools in the State;

"residential institution" means an institution or home in a State that (whether or not it is an institution or home at which primary or secondary education is also provided) provides residential care for children and is conducted for welfare, correctional or similar purposes, being an institution or home that the Commonwealth Education Minister, having regard to any advice furnished to him by the State Education Minister for the State in relation to the institution or home, declares to be a residential institution for the purpose of this Act;

"school" includes a proposed school, or an institution or proposed institution similar to a school, but does not include—

(a) a school or institution at which education is provided at a standard (however described) that is pre-school standard only or a proposed school or institution at which it is proposed that education be provided at a standard (however described) that is pre-school standard only; or

(b) where the State Education Minister for a State notifies the Commonwealth Education Minister for a State notifies the Commonwealth Education Minister that a specified school or institution in the State is not recognized by the State Education Minister as a school and the Commonwealth Education Minister does not approve the school or institution as a school for the purposes of this Act—that school or institution;

"secondary education", in relation to a non-government school in a State, means education of a kind similar to that provided for students at government secondary schools in the State;

"special school" means a school, or proposed school, in a State (whether or not it is a school or institution at which primary education or secondary education is provided or proposed to be provided)—

(a) at which special education is provided, or proposed to be provided, for handicapped children; and

(b) that the State Education Minister for the State notifies the Commonwealth Education Minister should, in the opinion of the State Education Minister, be treated as a special school for the purposes of this Act,

or, in the case of such a school at which special education for handicapped children, and also education other than special education for handicapped children, are provided or proposed to be provided, that school in so far as it provides or proposes to provide special education for handicapped children;

"systemic school" means a non-government primary school, or a non-government secondary school, that is included in an approved school system and that the Minister declares to be a systemic school for the purposes of this Act.

Part II (ss. 5-14) deals with financial assistance with respect to various programs affecting government schools, including building and equipment projects, recurrent expenditure, migrant education, disadvantaged and special schools. Part III (ss. 15-29) covers similar areas in relation to non-government schools. Section 15 provides for the approval by the Minister of building projects and equipment projects in connection with both primary and secondary schools in a State. A project will not be approved if the sole or principal object, or one of the principal objects, of the project is to provide facilities for use, wholly or principally, for or in relation to religious worship. Section 16 empowers the Minister to authorise the payment to a State, by way of financial assistance to the State, of such amounts as he determines in respect of expenditure in relation to an approved project, but subject to the limits imposed by s. 17.

Sections 18 and 19 deal respectively with approved school systems and non-systemic schools. In each case, the Minister may determine from time to time the level at which financial assistance is to be provided for the purpose of meeting recurrent expenditure of the system or the school, having regard to the need for such assistance. There are six levels prescribed in Schedule 6, representing different levels of need, indicating an amount referable to each level which when multiplied by the number of students involved yields the sum which the Minister is authorised by s. 18(8) and s. 19(8) respectively to pay to a State by way of financial assistance to that State. Section 20 fixes an additional maximum sum which the Minister may disburse to meet a need in either category of school for short-term emergency assistance. Section 18(9) stipulates the conditions on which the financial assistance is granted, and reads as follows:

Financial assistance is granted to a State under this section in respect of recurrent expenditure of an approved school system in the State on the conditions that—

(a) subject to paragraph (b), the State will, without undue delay, pay to the approved authority of the school system an amount equal to each amount paid to the State under this section in relation to the approved school system, and, in making the payment, will describe the amount paid to the approved authority as a payment made out of moneys provided to the State by the Commonwealth under this section; and

(b) the State will not make a payment to the approved authority under this section unless the approved authority, before or at the time of accepting the first payment under this section, has agreed or agrees with the State to be bound by the following conditions:

(i) the approved authority will ensure that an amount equal to the sum of the amounts paid to the approved authority under this section is applied, according to the respective needs of systemic schools in the school system, for the purpose of meeting recurrent expenditure, in respect of the year to which this Act applies, of those schools, and of the approved authority in respect of those schools, in such proportions as the Minister determines, and, in particular, will ensure that such part of that amount as is not less than the amount determined by the Minister under paragraph (8) (c) in relation to the school system is applied for the purpose of meeting recurrent expenditure, in respect of the year to which this Act applies, in connection with such of those schools as are schools in need of short-term emergency assistance;

(ii) the approved authority will cause to be furnished to the Minister (not later than 30 June 1980 or such later date as the Minister approves)—

(A) a certificate by a qualified accountant to the effect that he has satisfied himself that the condition specified in sub-paragraph (i) has been fulfilled; and

(B) a statement, in writing, that contains such information in respect of recurrent expenditure of the systemic schools in the school system, and of the approved authority in respect of those schools, and such other financial and statistical information in respect of those schools and the approved authority, as is required by the Minister to be so furnished;

(iii) if the approved authority does not fulfil a condition specified in sub-paragraph (i) or (ii), the authority will, if the Minister so determines, repay to the state such amount (not being an amount greater than the sum of the amounts paid to the approved authority under this section) as the Minister determines should be repaid by the approved authority.

Section 19(9) is in similar terms.

The remaining sections in Pt III confer authority on the Minister, subject to conditions and procedures similar to those I have outlined, to grant financial assistance to the States, subject to prescribed maxima, to be applied in connection with migrant education, disadvantaged schools and special schools.

Section 29 provides:

> Financial assistance granted to a State under a section contained in this Part is granted on the additional conditions that—
>
> (a) if an amount that the approved authority of a non-government school or an approved school system is liable to repay to the State, under a condition of an agreement entered into in accordance with the section, is repaid by the authority to the State, or is recovered by the State from the authority, the State will pay to the Commonwealth an amount equal to that amount; and
>
> (b) if the State does not fulfil a condition specified in the section under which the financial assistance is granted, the State will, if the Minister so determines, repay to the Commonwealth such amount (not being an amount greater than the sum of the amounts of financial assistance paid to the State under that section in respect of that non-government school or approved school system) as the Minister specifies in the determination as the amount that should be repaid by the State.

Part IV (ss. 30-46) is headed "Joint Government and Non-Government Schools Programs". It provides for financial assistance in respect of expenditure in connection with multicultural education, primary or secondary education in disadvantaged country areas, education of children residing in residential institutions, approved service and development activities, inter-school transfers to teachers, approved education centres, and approved special projects.

Section 55 authorizes the Minister to delegate to the Schools Commission, or to a full-time member, or to full-time members of the Commission, any of his powers under the Act, subject to specified exceptions.

The *Schools Commission Act 1973* sets up the Commission, with the functions set out in s. 13. That section provides as follows:

> (1) In the performance of its functions, the Commission shall consult and co-operate with representatives of the States, with authorities in the Australian Capital Territory and the Northern Territory responsible for primary or secondary education in either or both of those Territories and with persons, bodies and authorities conducting non-government schools in Australia, and may consult with such other persons, bodies and authorities as the Commission thinks necessary.
>
> (2) The functions of the Commission are to inquire into, and to furnish information and advice to the Minister with respect to, the following matters: —
>
> (a) The establishing of acceptable standards for buildings, equipment, teaching and other staff and other facilities at government and non-government primary and secondary schools in Australia, and means of attaining and maintaining those standards;
>
> (b) The needs of such schools in respect of buildings, equipment, staff and other facilities, and the respective priorities to be given to the satisfying of those various needs;
>
> (c) Matters in connexion with the grant by Australia of financial assistance to the States for and in respect of schools and school systems and to schools in the Australian Capital Territory and the Northern Territory, including matters relevant to the necessity for

financial assistance to be so granted by Australia, the conditions upon which financial assistance should be so granted and the amount and allocation of any financial assistance so granted; and

(d) Any other matter relating to primary or secondary education in Australia, or to Australian schools, that may be referred to the Commission by the Minister or which the Commission considers to be a matter that should be inquired into by the Commission.

(3) In addition to the functions of the Commission under sub-section (2), the Commission shall have such other functions as are conferred on it, either expressly or by implication, by or under any other Act.

(4) In the exercise of its functions, the Commission shall have regard to such matters as are relevant, including the need for improving primary and secondary educational facilities in Australia and of providing increased and equal opportunities for education in government and non-government schools in Australia and the need for ensuring that the facilities provided in all schools in Australia, whether government or non-government, are of the highest standard, and, in particular, shall have regard to—

(a) the primary obligation, in relation to education, for governments to provide and maintain government school systems that are of the highest standard and are open, without fees or religious tests, to all children;

(b) the prior right of parents to choose whether their children are educated at a government school or a non-government school;

(c) the educational needs of handicapped children and handicapped young persons;

(d) the needs of disadvantaged schools and of students at disadvantaged schools, and of other students suffering disadvantages in relation to education for social, economic, ethnic, geographic, cultural, lingual or similar reasons;

(e) the need to encourage diversity and innovation in education in schools and in the curricula and teaching methods of schools;

(f) the need to stimulate and encourage public and private interest in, and support for, improvements in primary and secondary education and in schools and school systems;

(g) the desirability of providing special educational opportunities for students who have demonstrated their ability in a particular field of studies, including scientific, literary, artistic or musical studies; and

(h) the need, in relation to primary and secondary education and in schools and school systems, to promote the economic use of resources.

(5) For the purpose of the performance of its functions, the Commission may undertake, or cause to be undertaken, such research as it thinks necessary into matters that relate to the functions of the Commission.

The *Independent Schools (Loans Guarantee) Act 1969* empowers the Treasurer, on behalf of the Commonwealth, to guarantee the repayment by an independent school of

moneys borrowed by it for the purposes of approved capital expenditure. An independent school is defined to mean—

> a school (in the Australian Capital Territory or the Northern Territory of Australia) at which students are given education at a primary or secondary level or both, not being a school—
>
> (a) conducted by, or on behalf of, the Commonwealth; or
>
> (b) conducted for the profit, direct or indirect, of an individual or individuals.

The Facts.

It is desirable to refer briefly to the facts upon which the plaintiffs rely to demonstrate that the legislation offends s. 116. It is apparent from the statutory provisions to which I have referred that financial assistance is provided, inter alia, to non-government schools. There is no reference to religion or to religious schools. In these circumstances the defendants argue that any reference to the facts is irrelevant because the validity of the statutes is to be determined according to their terms. On the other hand, some understanding of the operation and effect of the legislation is essential to a proper consideration of the submission of the plaintiffs. I propose to confine myself to a description of the relevant aspects of the educational scene in Australia. These are matters largely of public record, not the subject of any dispute between the parties. As at present advised, it will not be necessary for me to enter the labyrinth of contested facts.

From colonial times colonial and State governments in Australia have been responsible for primary and secondary education within their bounds. In every State that education is provided within a system of government and non-government schools. Instruction is provided without charge in the former system, but tuition fees are payable at non-government schools. Attendance at one type of school or the other is compulsory.

Although it varies from State to State, the legislation in each State provides for a degree of supervision by the State of the content and standards of the secular education provided by a non-government school. To be recognised within the educational system a school must be registered or accredited as a school. The plaintiffs do not suggest that the secular education provided by non-government schools is inadequate or in any way inferior to that provided by government schools.

A similar situation obtains in the Territories.

In 1976, approximately 2.9 million children were receiving primary or secondary education in Australia. Of these, approximately 600,000 children, or more than 20 per cent, were attending non-government schools. In the same year, there were a total of 2,002 non-government schools which received financial assistance from the Commonwealth under the legislation in question, of which 1965 were schools which ackowledged some religious character either by way of affiliation with a religious body or simply as Christian schools. Of these, 1,657 schools were conducted by the Roman Catholic Church. If it matters, it is clear that most of the children attending a school belonging to a particular religion or religious denomination come from families which profess that particular form of religious faith.

The plaintiffs place great reliance on the extent to which the "religious" non-government schools use the school as an instrument in the mission of the church to which they belong, that mission being seen essentially in terms of instruction and nurture of the faith. There is no reason to doubt that this is so in the great majority of cases, although it is not suggested that the pattern is wholly uniform and without exception.

Commonwealth aid to non-government schools in the States began in 1964 with capital grants for the construction and equipment of science laboratories. In 1968 attention

was extended to secondary school libraries, and assistance with recurrent expenditure was commenced in 1969. The total amount of assistance has grown each year, and by 1979 the total exceeded $600m. The following schedule records the grants made by the Commonwealth to the States to assist both government and non-government schools in the period from 1964 to 1979.

Commonwealth Grants in Respect of Schools Recurrent Programs Capital Programs ('000) Year Govt Schools Non Govt Schools Joint Total Govt Schools Non Govt Schools Joint Total 1964/65 — — — — 7,238 2,667 — 9,905 65/66 — — — — 6,968 2,667 — 9,635 66/67 — — — — 7,496 2,667 — 10,163 67/68 — — — — 7,250 5,337 — 12,587 68/69 — — — — 8,128 5,337 — 13,465 69/70 — 12,177 — 12,177 12,098 8,340 — 20,438 70/71 — 24,253 — 24,253 18,064 8,255 — 26,319 71/72 — 29,954 — 29,954 20,622 6,642 — 27,264 72/73 — 40,979 — 40,979 6,776 — 33,019 73/74 26,749 55,177 3,735 85,661 60,990 14,986 — 75,976 74/75 117,876 101,711 14,992 234,579 170,016 28,393 959 199,368 75/76 186,663 123,633 21,589 331,885 113,786 28,749 1,096 143,631 76/77 225,767 171,666 24,325 421,758 127,214 19,935 617 147,766 77/78 235,481 191,347 28,739 455,567 151,227 31,960 201 183,388 78/79 231,859 212,325 26,037 470,221 140,533 41,336 17 181,886

Apart from providing a degree of administrative oversight of non-government schools, State governments have themselves contributed financial assistance, by way of interest subsidies on capital expenditure, per capita grants in respect of recurrent expenditure and miscellaneous items. The following table gives an indication of estimated public expenditure on government and non-government schools in Australia for the year 1977-1978: **Estimated Public Expenditure on Schools, Australia** 1977-1978(a) **Recurrent** **Capital** Total Per Student Total Per Student $m. $ $m. $ **schools in the states** State government funds —for government schools 2,440.3 1,060 300.2 130 —for non-government schools (b) 128.5 209 — — Commonwealth funds —for government schools 234.4 102 150.6 65 —for non-government schools 190.4 310 31.8 52 —for joint programs (c) 28.6 10 0.2 — **schools in northern territory and australian capital territory** Commonwealth funds —for government schools 103.3 1,665 33.4 539 —for non-government schools 11.5 673 3.9 231 3,137.0 1,047 520.1 174 per student per student (a) Excludes expenditure on student assistance, school transport, payments of interest on Commonwealth loans and payroll tax. Commonwealth figures include general purpose and special purpose programs for which funds are made available separately to the sectors (e.g. Disadvantaged Schools Program, Migrant and Special Education Programs). (b) Interest subsidies are included in recurrent expenditure figures. (c) Comprises Services and Development, Disadvantaged Country Areas and Special Project programs in which both government and non-government schools may participate.

The defendant schools make the point that notwithstanding the growth in public expenditure on non-government schools, those schools are still required to find substantial moneys by way of tuition fees and donations from private sources, as is shown by the following schedule, which records the sources of income of non-government schools per student for the years 1974 and 1976: 1974 1976 Primary Schools Mixed Schools Secondary Schools Primary Schools Mixed Schools Secondary Schools $ $ $ $ $ $ **catholic systemic** Tuition fees 56 63 132 62 155 176 Value of contributed services (b) 182 234 369 134 157 167 Other private (c) 51 27 70 57 50 51 Total private 289 324 571 253 362 394 Commonwealth recurrent grants 164 188 267 274 347 417 State recurrent grants (d) 104 112 115 131 182 231 Capital grants 30 30 75 32 32 56 Total income 587 654 1,028 690 923 1,098 **catholic non-systemic** Tuition fees 131 271 213 200 320 239 Value of contributed services (b) 158 171 235 149 153 204 Other private (c) 29 72 80 175 64 79 Total private 318 514 528 524 537 522 Commonwealth recurrent grants 135 197 220 237 335 398 State recurrent grants (d) 99 119 144 122 194 222 Capital grants — 28 90 7 43 42 Total income 552 858 982 890 1,109 1,184 1974 1976 Primary Schools Mixed Schools Secondary Schools Primary Schools Mixed Schools Secondary Schools $ $ $ $ $ $ **other schools** Tuition fees 438 1,179 1,070 443 1,204 1,006 Value of contributed services (b) 122 — — 139 — 64

Other private (c) 167 140 234 144 126 224 Total private 727 1,319 1,304 726 1,330 1,294 Commonwealth recurrent grants 102 140 162 176 158 233 State recurrent grants (d) 95 119 134 131 200 229 Capital grants 25 32 53 38 29 41 Total income 949 1,610 1,653 1,071 1,717 1,797 (a) Excludes income relating to boarding facilities. (b) Notional salaries of teachers and other professional staff (based on average salaries paid to teachers in government schools) less actual salaries paid. (c) Comprises all cash income from private sources other than tuition fees, including cash income for capital purposes. (d) Includes interest subsidies.

Another aspect of the facts upon which the plaintiffs rely is the question of ownership of non-government schools. While there is considerable diversity in the syle of proprietorship, ranging from independent statutory corporations to a vesting of beneficial interests in the local parish, it suffices to note that in many cases the sponsoring religious body is both the legal and beneficial owner of the school.

In the Northern Territory (prior to self-government in 1978) and in the Australian Capital Territory Commonwealth funding takes the form of direct grants to schools and school systems by the Department of Education from moneys appropriated for that purpose by the general Appropriation Acts.

It is against the foregoing background of law and fact that I now address myself to the submissions of the plaintiffs.

Section 116.

This section reads as follows:

> 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 will be noticed that the section appears in Ch. V of the *Constitution*, dealing with the States. It is suggested by the Commonwealth that that fact should control its construction as, for example, that it was intended as a guarantee to the States of non-interference rather than the assurance of a personal freedom. However, the explanation for its presence in Ch. V may plausibly be found in the turbulent history of the clause in the discussions leading up to federation, including the fact that at one stage the draft proposal was in form directed to the States. Be that as it may, I do not attach particular significance to its location in the Constitution.

Before I deal with the meaning of the relevant clause in the section, I shall examine the competing submissions concerning the reach of the section. The plaintiffs argue that s. 116 is a singular provision in the Constitution, standing alone as a formal guarantee of a personal freedom, of the type found in the Bill of Rights in the *Constitution of the United States of America*. As such, it controls every law-making power vested in the Parliament of the Commonwealth, whether that power is to be found in ss. 51, 81, 96, or 122. Reliance is placed upon the dictum of Latham C.J. in Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth [21] :

> Section 116 is a general prohibition applying to all laws, under whatever power those laws may be made. It is an overriding provision. It does not compete with other provisions of the Constitution so that the Court should seek to reconcile it with other provisions. It prevails over and limits all provisions which give power to make laws.

(cf. also McTiernan J. [22] .)

(121) (1943) 67 C.L.R. 116, at p. 123.
(122) (1943) 67 C.L.R., at p. 156.

The defendants contest this proposition, particularly so far as concerns laws passed pursuant to ss. 81 and 96, and rely on the fiscal nature of the laws contemplated by both these sections, and the non-coercive character of laws related to the latter section.

In my opinion, the plaintiffs' argument concerning the application of s. 116 carries great weight. The section is clear and emphatic in its command, opening with the words "The Commonwealth shall not make any law ". Quite clearly, it applies to laws enacted pursuant to the powers conferred by s. 51, including pl. (xxiii**a**) which refers, inter alia, to benefits to students. I would expect it also to control the exercise of power pursuant to s. 122 relating to laws for the government of any territory, and this was the view taken by the full bench of this Court in Teori Tau v. The Commonwealth [23] . The real difficulty arises in the case of fiscal laws of the Commonwealth, having their source of power in ss. 81 or 96. With respect to the latter section, the defendants argue that the reliance of the plaintiffs on the statements of Latham C.J. and McTiernan J. in Jehovah's Witnesses is misplaced because those statements were obiter dicta, and in so far as they could support the proposition that s. 96 is subject to s. 116 they are inconsistent with other decisions of the Court upon the effect of s. 96. It is said that in Victoria v. The Commonwealth (the Federal Aid Roads Case) [24] the Court decided that a grant of financial assistance to the States made by virtue of the provisions of s. 96 is "not affected by those of s. 99 or any other provisions of the Constitution", and that this formulation was adopted by Latham C.J. and Starke J. in Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd. [25] . Despite the breadth of the dictum cited, these cases were concerned with the validity of a s. 96 law the terms and conditions of which related to a subject matter which was not within the legislative power of the Commonwealth, and also with the relevance to such a law of the express prohibitions relating to discrimination and preference found in s. 51 (ii) and s. 99 respectively. There is no doubt that they establish the proposition that the power conferred by s. 96 is well exercised although "the object is outside the powers of the Commonwealth" (per Dixon C.J. in Victoria v. The Commonwealth (the Second Uniform Tax Case) [26] . But save as to s. 51 (ii) and s. 99, the focus was upon purposes in respect of which the Commonwealth lacked a positive power, not purposes the pursuit of which by the Commonwealth was expressly forbidden; in the case of the prohibitory character of s. 51 (ii.) and s. 99, the impact of these provisions in avoided by the express words of s. 96, the very terms of which contemplate preference and discrimination as between States.

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(123) (1969) 119 C.L.R. 564, at p. 570.
(124) (1926) 38 C.L.R. 399.
(125) (1939) 61 C.L.R. 735, at pp. 763, 775.
(126) (1957) 99 C.L.R. 575, at p. 606.

In P.J. Magennis Pty. Ltd. v. The Commonwealth [27] this Court held to be invalid a law which approved an agreement between the Commonwealth and the State of New South Wales relating to war service land settlement. The arrangement was that the State would acquire land for the purpose of the scheme at a value to be determined by reference to a date some years earlier. It was acknowledged that the land would have increased substantially in value in the interim period. A majority of the members of the Court held the law to contravene s. 51 (xxxi.) because it failed to provide just terms for

the acquisition of the property. The Chief Justice, Sir John Latham, dismissed summarily an argument based on s. 96, saying [28] : " there is no substance in the objection that the Act is an Act giving financial assistance to States (*Constitution*, s. 96), and is therefore not a law with respect to the acquisition of property." Subsequent to the decision in *Magennis* the New South Wales law was amended to remove any dependence upon an agreement with the Commonwealth, and an acquisition pursuant to the amended Act withstood challenge (Pye v. Renshaw [29] . Notwithstanding the thrust of the dicta appearing in the judgment of the Court in the last-mentioned case [30] , in my respectful opinion *Magennis* remains a persuasive analogy.

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(127) (1949) 80 C.L.R. 382.
(128) (1949) 80 C.L.R., at p. 403.
(129) (1951) 84 C.L.R. 58.
(130) (1951) 84 C.L.R., at p. 83.

The salient feature, for present purposes, of a s. 96 law is that through the exercise of the power to impose conditions to a grant of financial assistance the Commonwealth Parliament may pursue a particular purpose. It is not to the point that a State may refuse to accept the assistance because it is unwilling to comply with the conditions. The fact that the law may fail of its purpose does not deny the characterisation of the law in terms of that purpose.

In the case of s. 81, the defendants say that Appropriation Acts are not affected by s. 116. They are financial, not regulative, laws. Reliance is placed upon passages in the reasons for judgment of Stephen J. and Jacobs J. in Victoria v. The Commonwealth and Hayden (the A.A.P. Case) [31] . So much may readily be conceded, yet just as in the A.A.P. Case the "purpose" of the appropriation was to finance an executive activity of the Commonwealth for which there was no constitutional authority, so here an appropriation may provide the occasion for review: cf. Mason J., A.A.P. Case [32] .

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(131) (1975) 134 C.L.R. 338, at pp. 386, 411.
(132) (1975) 134 C.L.R., at pp. 402-404.

Let me assume, for the purpose of the argument, that the Parliament sought to establish a religion, and proceeded to enact laws pursuant to s. 96 and provide funds pursuant to s. 81 as part of a scheme to achieve that result. As at present advised, and with great respect to those who think differently, I am unable to see why those laws would not offend s. 116. However, for reasons which will appear, this view is not determinative of the answer to the present case.

I come now to the question of the proper construction of the first clause of s. 116. The plaintiffs submit that the purpose of the section is to achieve religious freedom and that the establishment clause contributes to this purpose by prohibiting the Commonwealth from making any law which provides any recognition or aid or support to one or more religions or to religion generally. They draw support for their contention from the historical events in the colonies prior to federation which they say resulted by the end of the nineteenth century in the disestablishment of religion. They draw a close parallel between s. 116 and the First Amendment of the *Constitution of the United States* and draw from the history of the Supreme Court's interpretation of the establishment clause

the concept of a strict separation of church and state. In their submission, the words used in the section bear out their contention. They should be given a broad meaning. The word "for" is to the same effect as "in respect of", words which are of the widest import, and reference is made to Lamshed v. Lake [33] . "Establishing any religion" encompasses any law which has a tendency or takes a step towards establishment, and this includes any form of endowment or support to any one or more religions.

(133) (1958) 99 C.L.R. 132, at p. 141.

All of these submissions have been contested strongly by the defendants and the intervening States. The issues have been fought out at great length, both in writing and by oral submissions. I think it impossible, and therefore I hope unnecessary, if this judgment is to be kept within reasonable dimensions, for me to reflect accurately the time that has been consumed in their consideration. I propose, therefore, to proceed with some circumspection to indicate the conclusions to which I have come.

The First Amendment reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This clause has assumed an honoured place in the American Bill of Rights. The history surrounding its interpretation and its application to the States through the Fourteenth Amendment is a very striking one, so much so that even a close correspondence between its words and those of s. 116 would not of itself justify this Court in adopting the same construction of the provisions as has developed in the United States. I respectfully endorse what Gibbs J. said recently in Australian Conservation Foundation Inc. v. The Commonwealth of Australia [34] :

> Although we naturally regard the decisions of the Supreme Court of the United States with the greatest respect, it must never be forgotten that they are often given against a different constitutional, legal and social background from that which exists in Australia.

In my opinion, these words of caution have direct application to the present case. Cf. also per Barwick C.J. in Attorney-General (Cth); Ex rel. McKinlay v. The Commonwealth [35] .

(134) (1980) 28 A.L.R. 257, at p. 270.
(135) (1975) 135 C.L.R. 1, at p. 24.

In any event, there is here a divergence both in word and context. The context is different in that the provision does not form part of a Bill of Rights. The plaintiffs' claim that it represents a personal guarantee of religious freedom loses much of its emotive and persuasive force when one must add "but only as against the Commonwealth". 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. The plaintiffs' plea for a broad construction overlooks the fact that we are dealing with a clause which does not grant power, but denies it. While it is true that a constitutional grant of plenary legislative power should be construed with all the generality which the words used will admit, carrying with it whatever is incidental to the subject-matter of the power, the same is not true of a provision which proscribes power: cf. Dixon C.J. in Wragg v. New South Wales [36] .

(136) (1953) 88 C.L.R. 353, at p. 386.

Furthermore, it seems to me that the words "for establishing" are not comparable with the words "respecting an establishment". The former words convey the sense of "in order to establish", and speak quite specifically of the purpose of the law in terms of the end to be achieved. "Respecting" conveys the notion of "in respect of" a particular subject-matter, namely, an establishment or religion, thereby providing a broad frame of reference.

I accept that the word "establishment" has no fixed connotation, but having regard to the other clauses which are contained in s. 116, and to the precise manner of their expression, I infer a legislative intent to adopt a narrow notion of establishment, namely, that which requires statutory recognition of a religion as a national institution. The precise status, responsibility and privileges that attend such establishment may vary a good deal, and it is not necessary to consider its features in detail; the point to be made is that establishment involves the deliberate selection of one to be preferred from among others, resulting in a reciprocal relationship between church and state which confers and imposes rights and duties upon both parties. The nature of the responsibility of the state towards an established church is clearly exposed in the judgments of their Lordships in the House of Lords' decision in General Assembly of Free Church of Scotland v. Lord Overtoun [37] where the basic principle of "establishment" is asserted as "the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word" [38] . 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, or, in other words, a duty to "promote religion" as embodied in the doctrine and standards of the Church [39] . Conversely, correlative to the right in the church to the protection and patronage of the state, the church is under a duty to pray for the civil magistrate and faithfully to conform to the church's doctrine and standards.

(137) [1904] A.C. 515.
(138) [1904] A.C., at pp. 646, 656, 677.
(139) [1904] A.C., at p. 694.

If it seems remote from reality to be speaking in terms such as these about a constitutional provision, it must be remembered that the eighty years that have elapsed since federation have witnessed a marked change in the status and role of the church in the Australian community with a corresponding diminution of the sense of authority that formerly attached to the ecclesiastical realm.

Furthermore, it may be thought to be surprising that a prohibition of the kind that I have described was included in the absence of any express legislative power whereby the Parliament could ever have pursued such an objective. It may be that the explanation for any such incongruity is to be found in the chequered history of the clause in the constitutional conventions in the eighteen-nineties, and in an anxiety lest an inference of power was to be drawn from the acknowledgment of Almighty God in the preamble to the *Commonwealth of Australia Constitution Act*. While on present authority it is not permissible to seek the meaning of s. 116 in the convention debates, I may say that I find it interesting that in the course of the conventions the religion clause began as a denial of power to the States, then was re-addressed to both the States and the Commonwealth, and finally took its present form. The separationist view of establishment, for which the plaintiffs contend, does not sit well with the form of s. 116, addressed as it is only to the Commonwealth Parliament. The objective sought to be achieved by a clause construed consistently with the plaintiffs' contention could so easily be subverted by any of the State legislatures, which remain free to give such aid or support to religious bodies as they wished. But no State legislature could establish a national religion, and hence the prohibition was rightly directed to the Commonwealth. It will also be recalled that the 1898 Convention was invited to adopt a form of words for the religion clause which would have placed the present issue beyond doubt, when an amendment from Tasmania to the effect that the clause include the words "nor appropriate any portion of its property for the propagation or support of any religion" was proposed and defeated. Be these things as they may, I believe it would be wrong to attach undue significance to the history of the clause. The actual words of the text supply the only firm ground on which to base a conlusion.

I have already adverted to the other clauses contained in s. 116 as lending support for a narrow construction of the establishment provision, but the observation may deserve further brief explication. If the first clause is to be read, as the plaintiffs contend, as requiring the erection of "a wall of separation" between the church and the state, then it is difficult to see what room is left for the operation of the following clauses. The Commonwealth must not make any law for imposing any religious obervance, but clearly such a law would offend the separationist principle. The same would be true of a law for prohibiting the free exercise of any religion, for one could hardly find a more glaring example of state interference in the religious realm. Again, the imposition of a religious test as a qualification for any office or public trust under the Commonwealth is clearly inconsistent with a prohibition of state involvement with religion. In other words, if the contention of the plaintiffs is correct, the first clause more than covers the entire field to which the section refers, leaving nothing to be contributed by the remaining clauses. If such a result reflected the intended operation of the section, then in my opinion it would have been expressed, as it easily could have been, and was in the Tasmanian amendment which was rejected, in clear and unmistakable terms. On the other hand, if the establishment clause carries the meaning that I have given it, each of the following clauses has a distinct, intelligible and consistent area of operation.

Some argument has proceeded between the parties concerning the word "religion", but I do not find it to be a significant issue in the present case. Whilst I confess to some difficulty in thinking of the different denominations of the Christian faith as separate religions, as distinct from different forms of the one religion, it does not seem to me to do any violence to the wording of the first clause of s. 116 to read it as forbidding any law for establishing any religion or any form of any religion.

It is against this background understanding of s. 116 that I examine the submissions of the plaintiffs. They argue, inter alia, that the legislation in question is necessarily struck down by s. 116 because: (a) in the case of capital grants, the only relevant restraint is that which, for example, in s. 15 of the *States Grants (Schools Assistance) Act 1978*, provides that grants shall not be used in respect of facilities used wholly or principally for or in relation to religious worship; (b) in the case of recurrent grants, there is no restraint at all in respect of religion within the school; and (c) the administration of the Commonwealth scheme requires close consultation with and support of religious

agencies. It follows, in their submission, that buildings and other facilities provided with the help of Commonwealth funds are used for religious instruction, that recurrent grants aid the religious activities of church schools and assist the religious mission of the religion sponsoring the school. In so doing, the laws satisfy the description of laws for establishing any religion.

Given the interpretation of s. 116 that I have expounded, it would seem to follow as a matter of course that these contentions must necessarily fail. Nevertheless, it is appropriate that I should make some observations about the scheme embodied in the legislation. In my opinion, the summary of the provisions of the *States Grants (Schools Assistance) Act 1978* that appears earlier in these reasons clearly reflects a secular legislative purpose, that of upgrading the quality and range of education in primary and secondary government and non-government schools throughout Australia. Even if one accepts the plaintiffs' sub-missions on the facts, it cannot be said that the primary effect of the legislation is to advance religion. It may be true that in many cases one effect may be to advance religion appreciably, but, even so, such a result is not central to the operation of the legislative scheme. It is an incidental or indirect consequence of the pursuit of the educational purpose. In no case is religion a criterion which attracts a grant. Even the most "religious" of the schools which have received assistance are first and foremost educational institutions which are required to strive for a range and quality of education which is at least comparable to government schools. The amount of time devoted to secular instruction in such schools is necessarily substantial, the cost of which obviously forms the major part of the recurrent expenditure of the school. Similarly, the fact that some school buildings may be used for religious instruction for some periods each week cannot obscure the predominantly secular user reflected in the general balance of the secular purpose to the religious goal. The third of the schedules which appear earlier in these reasons makes it clear that, notwithstanding increased contributions from both Commonwealth and State legislatures, non-government schools are still required to fund a substantial part of their expenditure from private sources.

The plaintiffs' submission with respect to the Commonwealth's involvement with religion recalls attention to the *Schools Commission Act 1973*. But here again, I think that the attack is misconceived. It may be that the Commonwealth has chosen to pursue its purpose of aid to education in a manner that reserves to a Commonwealth agency, the Schools Commission, a great deal of detailed administrative work associated with the delivery of that aid to non-government schools. No doubt there were alternative methods of implementing the scheme that could have been chosen, and that would have occasioned less "entanglement" of Commonwealth officers with the representatives of non-government schools. But, in any event, the association between government and school is not based in religion. The fact that many administrators of non-government schools may be church administrators as well does not spell an entanglement of government with religion. The sole purpose of the collaboration is the pursuit of an educational goal.

Section 96.

I have already expressed the opinion that a law which finds its authority in s. 96 is nevertheless subject to s. 116. For the purpose of examining the validity of the States Grants legislation by reference to the latter section I have assumed that the laws were otherwise authorized by the former section. I turn now to consider the plaintiffs' attack based on s. 96. The section reads as follows:

> During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

The plaintiffs focus by way of example on the *States Grants (Schools Assistance) Act 1978*, and cite ss. 15 and 16 with respect to capital grants, and s. 18(9) and s. 19(9) with respect to grants towards recurrent expenditure in relation to systemic and non-systemic schools respectively. These provisions are described or set out earlier in these reasons. The plaintiffs submit that the essential feature of the scheme is that it is the Commonwealth, either the Parliament or the Minister or his delegate, that makes every relevant decision in connection with a grant. The State may elect whether or not to accept the grant, and that is all. The only function of the State is to pay money, in amounts fixed by the Commonwealth, to a school or school system nominated by the Commonwealth, to make an agreement with the school authority in terms which are determined by the Commonwealth, to receive repayment from a school authority of such amounts as the Commonwealth determines ought to be repaid by a school authority in the event of a breach of the agreement with the State, and then to repay that amount to the Commonwealth. In many cases, capital grants paid to a school enable the erection of buildings owned by the religion sponsoring the school. The conditions attached to the grant require the school authority of the school or school system as the case may be to relate directly to the Commonwealth, for example, in accounting for moneys spent, and in the provisions of statistical information.

In these circumstances, the plaintiffs submit that the grants cannot be described as grants of financial assistance to the States within the meaning of s. 96. They give no assistance to a State as a body politic but use it merely as a conduit or an agency by which moneys are distributed to schools and school systems upon conditions fixed by the Commonwealth.

In the Second Uniform Tax Case [40] , Dixon C.J. observed:

> There has been what amounts to a course of decisions upon s. 96 all amplifying the power and tending to a denial of any restriction upon the purpose of the appropriation or the character of the condition.

The Chief Justice then proceeded to review Victoria v. The Commonwealth (the Federal Aid Roads Case) [41] , Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd. [42] , and South Australia v. The Commonwealth (the First Uniform Tax Case) [43] . In speaking of *Moran* , Dixon C.J. said [44] :

> Now it might have been thought that these provisions were outside s. 96 because they gave no assistance to the State as a body politic but used it only as a conduit or an agency by which the moneys would be distributed among the wheat growers of the State. In fact, however, the provision was considered to amount to financial assistance to the State notwithstanding that the State was bound to distribute the money it received to the wheat grower.
>
> The decision, which was affirmed in the Privy Council, without express reference to this use of s. 96, must mean that s. 96 is satisfied if the money is placed in the hands of the State notwithstanding that in the exercise of the power to impose terms and conditions the State is required to pay over the money to a class of persons in or connected with the State in order to fulfil some purpose pursued by the Commonwealth and one outside its power to effect directly. I should myself find it difficult to accept this doctrine in full and carry it into logical effect, but the decision shows that the Court placed no limitation upon the terms or conditions it was competent to the Commonwealth to impose under s. 96 and regarded the conception of assistance to a State as going beyond and outside subventions to or the actual supplementing of the financial resources of the Treasury of a State.

It may be noted that the Second Uniform Tax Case did not confront Sir Owen Dixon with the need to determine for himself the *Moran* doctrine about which he expressed misgiving in the passage which I have just cited. Later in his judgment [45] he accepted

the earlier decisions of the Court, including *Moran* , as establishing "the entire exclusion" of the limited operation that might have been assigned to s. 96 based on the view "that there must be a need for relief or a reason for giving assistance which is not itself created by the Commonwealth legislation connected with the grant".

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(140) (1957) 99 C.L.R., at p. 605.
(141) (1926) 38 C.L.R. 399.
(142) (1939) 61 C.L.R. 735; (1940) 63 C.L.R. 338; [1940] A.C. 838.
(143) (1942) 65 C.L.R. 373.
(144) (1957) 99 C.L.R. 575, at pp. 606-607.
(145) (1957) 99 C.L.R. 575, at pp. 610-611.

The cases to which I have referred give a meaning to s. 96 which, at least for the time being, must be taken as settled. The Court is not asked to reconsider them in any respect. The plaintiffs accept them as authoritative and argue that they do not go so far as to require a determination that the legislation now in question is valid. The defendants rely upon them as conclusive in their favour on this particular question. Several of the States, while intervening in support of the validity of the legislation, indicated a wish at an appropriate time to re-argue the cases, but in the meantime were content to accept them as current authority.

The plaintiffs distinguish *Moran* [46] , notwithstanding an apparent similarity to the present case, as basically different. They observe that the legislation in that case, the *Wheat Industry Assistance Act* was promoted by the States, that the Commonwealth was a partner in the scheme and made the grants at the instigation of the States as bodies politic, albeit that they were eventually to be paid to a class of persons. The machinery of State government was necessarily involved in the administration of the scheme, and it was wrong therefore to describe the States as mere agents of the Commonwealth, with no discretionary responsibility.

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(146) (1939) 61 C.L.R. 735.

I must confess that I have great sympathy with the plaintiffs' argument. The legislation provides a striking contrast in the discretion that is accorded to the States in the administration of the grants for government schools and the virtually total disregard of the States, save only for the barest acknowledgement of the formalities required by s. 96, in the administration of the grants for non-government schools. The contrast is all the more remarkable in the context of a constitution which in the distribution of power within the federation does not confer on the Commonwealth Parliament a specific legislative power with respect to education.

But, unfortunately for the success of their argument, the plaintiffs mistake policy for law. The Court is not concerned with the wisdom or the expediency of the former, and the features of the scheme of which the plaintiffs complain are of this character. In the present state of the authorities, the legislation satisfies the requirements of s. 96 for a valid law. It is a non-coercive law which in terms grants money to each of the States "by way of financial assistance to the State". The freedom of each State to decide whether to accept or reject the grant, however restricted it may be in a political sense, is legally fundamental to the validity of the scheme, and its existence as a matter of law cannot

be denied. The conditions attaching to the grant are those to be determined by the Commonwealth, but this has always been so. It is not necessary that the grant should benefit the State Treasury directly, or that the purpose of the grant should be within the express legislative power of the Commonwealth, or that the State should be the instigator or even a party to the initiation of the scheme.

In addition to the significance of the State's decision to accept the grant, the necessity for it then to enter into an agreement with the eventual recipient of a grant is also significant. The State enters into that agreement, not as an agent for the Commonwealth, but as a principal.

In any event, the plaintiffs have no answer, in my opinion, to the defendants' contention that the legislation does extend financial assistance to the States. It satisfies the most stringent tests that can be applied to that criterion. The States have assumed a governmental responsibility for all primary and secondary education within their bounds. If there were no other contributors, the total financial responsibility would fall on the State, as until recently it always has done in the case of government schools. In such a situation, the initiative and sacrifice assumed by those responsible for the existence of a non-government school system affords relief directly to the State Treasury, without relieving the State of the general responsibility of oversight that it has assumed. The participation of the Commonwealth is a further source of help. In my opinion, there can be no doubt that Commonwealth grants to non-government schools within a State must have the effect of easing the claim that such schools would otherwise make upon State financial resources. It must not be forgotten that these schools are already receiving substantial financial assistance from State governments, and the level of this assistance must be affected by the existence of the Commonwealth scheme.

The Territories.

As I have already indicated, the only question at issue in relation to grants to non-government schools in the Australian Capital Territory and the Northern Territory, apart from standing, is whether the legislation contravenes s. 116. It will be clear from what I have already said as to the proper construction of that section, that in my opinion the legislation is valid.

Standing.

The case raises questions of far reaching importance on the subject of standing, including the following: (a) whether the Attorney-General of a State, suing on the relation of citizens of the State, has standing to challenge the constitutionality of an *Appropriation Act* authorizing the expenditure of moneys in the Territories, and the *Independent Schools (Loans Guarantee) Act 1969* which is a law of the Commonwealth operative only within the Territories; (b) whether the individual plaintiffs, suing in their capacity as taxpayers and parents of children attending government schools, and resident in a State or a Territory, have standing to challenge all or any of the statutes in question; (c) whether the decision of the Supreme Court of Canada in Thorson v. Attorney-General (Canada) [No. 2] [47] , should be followed in Australia in a case in which a citizen seeks to challenge the constitutionality of a statute in circumstances where he has been unable to secure the fiat of an Attorney-General.

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(147) (1974) 43 D.L.R. 3d 1.

However, I have found it convenient to deal with the substantial merits of the case. My conclusion is that the challenged legislation is valid, with the result that the plaintiffs have failed to make out a case for any relief. The question of standing is therefore only of academic interest, and firm decisions on these important issues ought to wait for another case which requires their resolution, and when there might be greater opportunity for more concentrated oral argument than was available in the present case.

I would dismiss the action.
