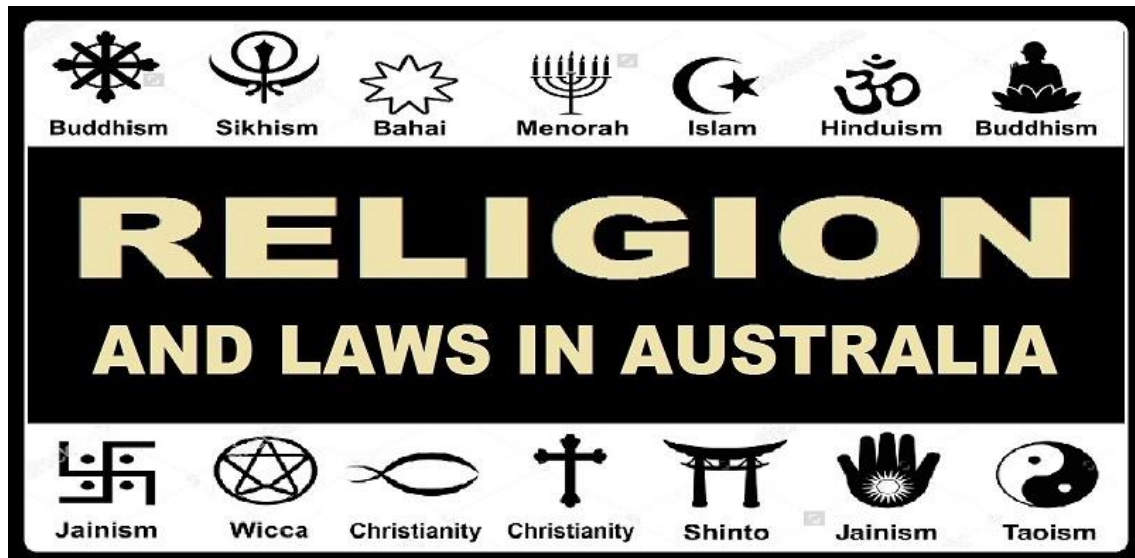


## Section 116 – Religious Freedom



Section 116 provides:

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

The main two limbs of this section of the Constitution prohibit "establishing any religion" and the "free exercise of any religion", which I will cover first, using the relevant case law.

### **(a) Prohibiting the free exercise of any religion:**

[Krygger v Williams \[1912\] HCA 65](#) was the first case to determine the extent that religion would impact government authority and grant certain exemptions. In that case, the protections afforded by section 116 of the Constitution were defined very narrowly. The court held that a person could not object to compulsory military service on the ground of religious belief. It considered that Section 116 would only protect religious observance from government interference; it would not permit a person to be excused from a legal obligation merely because the obligation conflicted with his or her religious beliefs. Griffith CJ (at 369) said:

*"Sec 116 of the Constitution provides that 'the Commonwealth shall not make any law for ... prohibiting the free exercise of any religion' - that is, prohibiting the practice of religion - the doing of acts which are done in the practice of religion. To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec 116 ...."*

<https://freemandelusion.com/wp-content/uploads/2018/07/krygger-v-williams-1912-hca-65.pdf>

[Adelaide Co of Jehovah's Witnesses Inc v Commonwealth \(1943\) HCA 12](#) was another landmark case involving section 116. One of the branch's professed beliefs was that the government was an "organ of Satan". Acting pursuant to the National Security (Subversive Organisations) Regulations 1940, the Government declared Jehovah's Witnesses to be "prejudicial to the defence of the Commonwealth and to the efficient prosecution of the war".

At 127-131 Latham CJ examined a number of then recent decisions of the United States Supreme Court on the First Amendment, and concluded that *"...the general protection given by the Constitution to the freedom in question leaves it to the court to determine whether a particular measure which in fact limits complete freedom involves an 'undue' infringement of that freedom"*. The Chief Justice then referred to American cases that had been decided before the Commonwealth Constitution was drafted which, he said

*"...quite clearly determined that such protection was not absolute and that it did not involve a dispensation from obedience to a general law of the land which was not directed against religion. ... 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. This interpretation leaves it to the court to determine whether a particular law is an undue infringement of religious freedom."*

His Honour was however able to decide the case on a more narrow basis. In the course of so doing he observed that the word *"for"* in the expression *"for prohibiting the free exercise of any religion"* showed that the purpose of the legislation in question may be taken into account in determining whether or not it is a law of the prohibited character.

The court unanimously held that the Act did not infringe against section 116 of the Constitution. The ruling caused the Adelaide branch of the Jehovah's Witnesses to be dissolved and have its property acquired by the Commonwealth government.

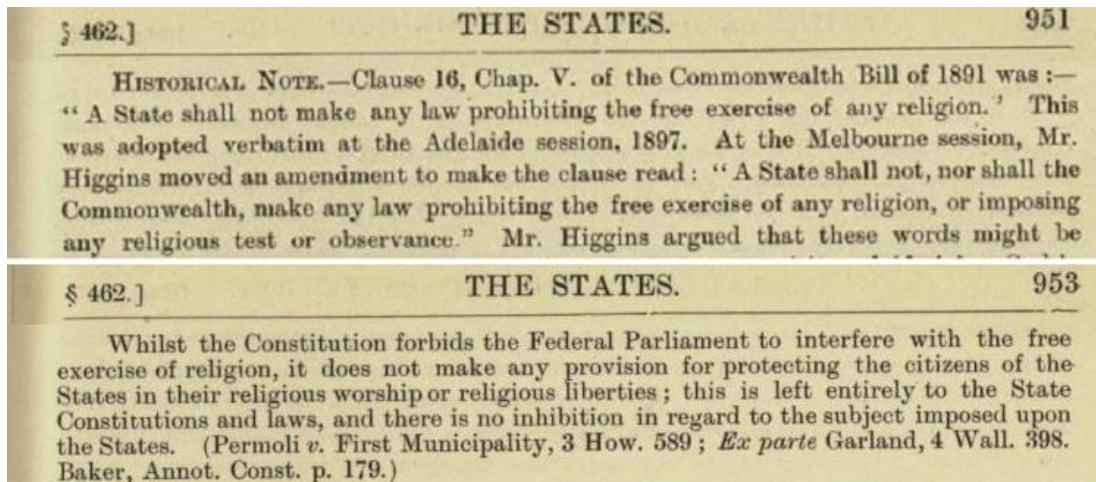
<https://freemandelusion.com/wp-content/uploads/2018/07/adelaide-co-of-jehovahs-witnesses-inc-v-commonwealth-1943-hca-12.pdf>

[Kruger v Commonwealth \[1997\] HCA 27](#) became known as the "Stolen Generations Case", in which it was submitted that the forced removal of aboriginal children, (and consequently from their customary lore) prohibited the free exercise of religion. The court found that section 116 will only prevent legislation that has a prohibited purpose, rather than a prohibited effect, and it:

*"...does no more than effect a restriction or limitation on the legislative power of the Commonwealth. It is not, in form, a constitutional guarantee of the rights of individuals... It makes no sense to speak of a constitutional right to religious freedom in a context in which the Constitution clearly postulates that the States may enact laws in derogation of that right."*

Accordingly, it must be pointed out that the prohibition in section 116 applies only to the Commonwealth government, and does not preclude the states of Australia from making such laws. The first draft, approved by the Melbourne Convention of 1891, would have prohibited the states from passing laws prohibiting the free exercise of religion, but the amendment was defeated. It was feared the

provision would impede the states' legislative powers, so section 116 passed and did not mention the states, as Robert Garran notes on [pages 951 to 953](#):



<https://freemandelusion.com/wp-content/uploads/2018/07/kruger-v-commonwealth-1997-hca-27.pdf>

#### (b) The Commonwealth establishing any religion:

In [Attorney-General \(Vic\) \(Ex rel Black\) v Commonwealth \[1981\] HCA 2](#) the High Court held that Commonwealth funding of religious schools did not contravene Section 116. This case dealt with the interpretation of the prohibition against “*establishing any religion*” as in section 116.

Several members of the Court considered the import of the word “*for*” in the expression “*for establishing any religion*”. Barwick CJ (at 583) thought the word indicated that the law must be intended and designed to set up the religion as an institution of the Commonwealth. Gibbs J (at 598) said the word “*for*” looked to the purpose of the law rather than to its relationship with a particular subject matter, though at 604 his Honour referred to the “*purpose or effect*” of the law. Mason J (at 615-616) was of the view that “*for*” connoted a connection by way of purpose or result with the subject matter which was not satisfied by the mere fact that the law touches or relates to the subject matter. Wilson J (at 653) said that “*for establishing*” conveyed the sense of “*in order to establish*” and spoke quite specifically of the purpose of the law in terms of the end to be achieved.

The court found that its meaning basically is “*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.*”

<https://freemandelusion.com/wp-content/uploads/2018/07/attorney-general-vic-ex-rel-black-v-commonwealth-1981-hca-2.pdf>

#### What constitutes a religion...

[Church of the New Faith v Commissioner of Pay-Roll Tax \(Vic\) \[1983\] HCA 40](#) further refined the definition of “*religion*”. In this case the High Court found that Scientology was a religion, despite its somewhat obscure fundamentals. “...the criteria of religion [are] twofold: first, belief in a supernatural,

Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief."

The court set out five "indicia" of a religion:

- a belief in the supernatural;
- a belief in ideas relating to "man's nature and place in the universe";
- the adherence to particular standards, codes of conduct or practices by those who hold the ideas;
- the existence of an identifiable group of believers, even if not a formal organisation;
- and the opinion of the believers that what they believe in constitutes a religion.

<https://freemandelusion.com/wp-content/uploads/2018/07/church-of-the-new-faith-v-commissioner-for-pay-roll-tax-vic-1983-hca-40.pdf>

### Religious exemptions from various laws

There is a provision available to people in Australia that wish to abstain from voting due to their religious beliefs. In [section 245\(14\) of the Commonwealth Electoral Act 1918 \(Cth\)](#) it states:

*"Without limiting the circumstances that may constitute a valid and sufficient reason for not voting, the fact that an elector believes it to be part of his or her religious duty to abstain from voting constitutes a valid and sufficient reason for the failure of the elector to vote."*

- \* There is a general exemption in [section 61A of the Defence Act 1903 \(Cth\)](#), which exempts certain groups of people such as ministers of religion and others, from military service.
- \* Schedule 2 of the [S.A. Summary Offences Act 1953](#) has a provision in section 7 regarding carrying or possessing a knife for religious purposes, making them exempt from section 21F(1)(b) of that Act:
- \* Under [section 7 of the N.S.W. Charitable Fundraising Act 1991](#), recognised religious organisations are exempt from its provisions.
- \* [Section 57 of the Fringe Benefits Tax Assessment Act 1986 \(Cth\)](#) exempts employees of religious institutions.
- \* Ministers of religion are exempt from jury duty under [section 11 \(sch 7\) of the N.T. Juries Act 1962](#).
- \* [Section 316\(4\) of the Crimes Act 1900 \(NSW\)](#) provides an exemption from prosecution for concealing a serious indictable offence by clergy.
- \* [Section 10\(e\) of the N.S.W. Land Tax Management Act 1956](#) contains exemptions for land taxes, it states: *"land owned by or in trust for a religious society if the society, however formed or constituted, is carried on solely for religious, charitable or educational purposes, including the support of the aged or infirm clergy or ministers of the society, or their wives or widows or children, and not for pecuniary profit."*

\* Similarly in [section 555\(e\) of the N.S.W. Local Government Act 1993](#) it states: "land that belongs to a religious body and is occupied and used in connection with: (i) a church or other building used or occupied for public worship, or (ii) a building used or occupied solely as the residence of a minister of religion in connection with any such church or building, or (iii) a building used or occupied for the purpose of religious teaching or training, or (iv) a building used or occupied solely as the residence of the official head or the assistant official head (or both) of any religious body in the State or in any diocese within the State."

### **Discrimination against religions**

\* [The Fair Work Act 2009](#) (Cth) contains certain provisions which address conduct that may discriminate against people of religious faiths.

\* [section 153](#), which provides that a modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

\* [section 195\(1\)](#), which lists discriminatory terms in enterprise agreements including those terms that discriminate against an employee on the basis of their religion and other personal characteristics;

\* [section 351\(1\)](#), which relates to the General Protections division of the Act and provides that any adverse action taken against an employee on the basis of a protected attribute or characteristic is prohibited;

\* and [section 772\(1\)\(f\)](#), which provides that a person's employment may not be terminated on the basis of a protected attribute, subject to exceptions in s 772(2)(b).

### **Religions exempt from discrimination laws**

\* There are a range of exemptions in the [Sex Discrimination Act 1984 \(Cth\)](#) (SDA), for religious organisations and religious educational institutions where the discriminatory act or conduct conforms to the doctrines, tenets or beliefs of a religion, or is necessary to avoid injury to the religious sensitivities of adherents of that religion. The effect of these exemptions is that a religious school, for instance, may lawfully choose not to employ a pregnant, unmarried teacher, in circumstances where this would be discriminatory conduct for a non-religious organisation.

\* [section 23\(3\)\(b\)](#), which provides that accommodation provided by a religious body is exempt from s 23(1) making it unlawful to discriminate against a person on the basis of a protected attribute in the provision of accommodation;

\* [section 37](#), which exempts the ordination or appointment of priests, Ministers of religion or members of any religious order and accommodation provided by a religious body from the effect of the SDA; and

\* [section 38](#), which exempts educational institutions established for religious purposes from the effect of the SDA in relation to the employment of staff and the provision of education and training, provided that

the discrimination is in "good faith in order to avoid injury to the religious susceptibilities of adherents of that religion".

\* [Section 30\(2\) of the N.T. Anti-Discrimination Act 1992](#) states: "An educational authority that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular religion may exclude applicants who are not of that religion."

\* [Section 35\(2b\) of the S.A. Equal Opportunity Act 1984](#) exempts an association from discrimination on the ground of chosen gender or sexuality "if the association is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion."

\* Likewise [section 85ZN](#): "on the ground of religious appearance or dress if the discrimination arises as a consequence of a person refusing to reveal his or her face in circumstances in which the person has been requested to do so for the purpose of verifying the identity of the person, and the request was reasonable in the circumstances."

### **Laws which may affect freedom of religion**

Freedom of religion is infringed when a law prevents individuals from practising their religion or requires them to engage in conduct which is prohibited by their religion. Alternatively, the freedom will also be infringed when a law mandates a particular religious practice, like the [Marriage Act 1961 \(Cth\)](#) contains certain provisions which affect freedom of religion:

\* [section 101](#), which provides that the solemnisation of marriage by an unauthorised person is a criminal offence. To be authorised under section 29, a religious leader must REGISTER their status as a marriage celebrant, provided that the denomination is recognised by the Australian Government, and the minister is nominated by their denomination.

This may discriminate against smaller, less well-known religious groups, or break-away groups or sects within established religious traditions; and

\* [section 113\(5\)](#), which makes it unlawful to conduct a religious wedding ceremony, unless it occurs after the performance of a legal civil marriage.

\* Some offences in the [Criminal Code 1995 \(Cth\)](#) may be characterised as indirectly interfering with freedom of religion, as they may restrict religious expression. These laws include the following:

\* [section 80.2C](#), which creates the offence of 'advocating terrorism'. This may be seen to limit religious expression by limiting the capacity of individuals to express religious views which might be radical and controversial;

\* [section 102.1\(2\)](#), which provides that an organisation maybe prescribed as a terrorist organisation, making it an offence to be a member of that organisation, to provide resources or support to that organisation, or to train with that organisation. Some argued that this provision risks criminalising individuals for expressing radical, religious beliefs;



\* [section 102.8](#), which makes it an offence to associate with a proscribed 'terrorist organisation'. There may be interference with religious freedom where a person is seen to associate with a member of a terrorist organisation who attends the same place of worship or prayer group. While there is a defence in s 102.8(4)(b) where the association "*is in a place being used for public religious worship and takes place in the course of practising a religion*", this may place a significant burden on defendants to prove that their association arose in the course of practising their religion.

### **Exemptions from religions**

[Section 26 of the N.S.W. Education Act 1990](#) provides for a Certificate of exemption from attending particular classes for parents who have an objection to religious education.



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