ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S307 of 2010

BETWEEN

RONALD WILLIAMS
Plaintiff

AND

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR SCHOOL EDUCATION, EARLY CHILDHOOD AND YOUTH
Second Defendant

MINISTER FOR FINANCE AND DEREGULATION
Third Defendant

SCRIPTURE UNION QUEENSLAND
Fourth Respondent

PLAINTIFF'S SUBMISSIONS IN REPLY TO THE SUBMISSIONS OF THE INTERVENERS

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Part I:

1. These submissions are in a form suitable for publication on the Internet.

Part II:

Standing

2. Unlike the first, second and third defendants, the Attorney-General for Queensland attacks the standing of the plaintiff to seek relief challenging the validity of the Darling Heights Funding Agreement. In so doing, the Attorney-General for Queensland asserts that neither the plaintiff's freedom of action nor that of his children is affected by the NSCP.[1] This is supposedly on the basis that his children have never participated in the NSCP and are under no obligation to do so.

3. However, the application for funding under the NSCP lodged in respect of the Darling Heights State School and dated 4 April 2007 makes clear that the chaplain then engaged at that school, Ms Hawley:

   (a) worked on the Personal Development Programs for both males and females in the Senior School;

   (b) worked on the Reading Programme for Years 2 and 3;

   (c) worked in various capacities in the Prep/1 area of the School [SC, Vol 2, 692].

4. That document also indicates that she was involved in reading groups and in providing classroom assistance [SC, Vol 2, 693].

5. The Court may infer from this material that Ms Hawley – and her replacement, Ms Putland – did not merely provide services additional to those provided in the classroom by teachers, in circumstances where the plaintiff's children were free to avoid any contact or dealings with her. Rather, she was involved in aspects of the life of the School that extended far beyond the forms of individually directed pastoral care that one might ordinarily associate with the title "chaplain". Indeed, she was a presence in the classroom.

6. Accordingly, if it is the proposition of the Attorney-General for Queensland that the plaintiff lacks the requisite standing to seek relief on the basis that there was a *de facto* wall separating him and his children from the activities of first Ms Hawley and then Ms Putland, this proceeds upon an incorrect factual premise.

Section 51(xxiiiA)

7. The plaintiff has already made the submission, in reply to what was put on behalf of the defendants, that neither *British Medical Association v The Commonwealth*[2] nor *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*[3] was a case in which the Commonwealth did no more than provide funding for a welfare program. Rather, in both cases, the relevant benefit involved the assumption by the Commonwealth of at least part of a payment obligation that would otherwise have been owed by the recipient of the benefit. Accordingly, neither case is authority for the proposition that mere provision of funding, in the absence of such assumption, suffices as "provision" within the meaning of s 51(xxiiiA) of the *Constitution*.

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[1] Submissions filed on behalf of the Attorney-General for Queensland at [13].
[2] (1949) 79 CLR 201.
[3] (1987) 162 CLR 271.

8. The Attorney-General for South Australia contends otherwise.[4] However, that contention fails to recognise that even before the insertion of s 51(xxiiiA) into the *Constitution*, the Commonwealth had power to fund private entities with a view to their providing benefits of the sort contemplated by that placitum. After all, pursuant to s 96 of the *Constitution*, the Commonwealth could well have provided grants of financial assistance to the States on the condition that the States pass those monies to private entities which had previously entered into agreements with the Commonwealth as to the purposes for which and the manner in which the funds were to be spent.

9. The *Schools Assistance Act 2008* (Cth) operates to erect precisely such a scheme. Part 4 of that statute authorises the Minister to make determinations authorising the payment of financial assistance to the States for non-government schools in respect of various forms of "recurrent expenditures". Section 30 renders such financial assistance conditional upon the State paying the funds received to the non-government schools in question. Significantly, s 12 prohibits the Minister from making a determination authorising the payment of financial assistance to a State for a non-government school, unless the relevant authority of that school has entered into a funding agreement with the Commonwealth. The contents of such an agreement are prescribed by Div 3 of Pt 2 of the Act, and must, pursuant to s 16, include provisions requiring the relevant authority to ensure that the money provided is spent for purposes that are determined by the Minister or are set out in the agreement itself.

10. The availability of such a facility by recourse to s 96 lends support to the proposition that the power conferred by s 51(xxiiiA) was directed towards something other than the mere funding of welfare programs intended to be administered entities not controlled or managed by the Commonwealth.

11. So much is suggested in the second reading speech of the Hon H V Evatt on the *Constitution Alteration (Social Services) Bill 1946*:[5]

> "It may be said that the Commonwealth should, under the *Constitution* as it stands, make provision for social service benefits by conditional grants of money to the States. But the Government feels strongly that the effective and harmonious administration of such benefits is best ensured by a Commonwealth-wide administrative organization, and that the Commonwealth should have the power to carry out directly, and in its own way, the social services schemes on which Parliament decides."

12. To say this is not to suggest that s 51(xxiiiA) must be "read down" by having regard to s 96. Rather, it is to identify the mischief to which s 51(xxiiiA) was addressed, bearing in mind that the asserted mischief was an apprehended lack of Commonwealth power in some respect, which in turn casts into bold relief the question of what the Commonwealth was empowered to do prior to the insertion of s 51(xxiiiA). Identification of the relevant mischief in this case assists in determining whether the word "provision" in that placitum extends to the mere provision of funding for the forms of benefit thereafter specified, or is confined to their supply or administration.

13. It is also in this light then that the remarks of Dixon J in *British Medical Association*, which are quoted in the submissions filed on behalf of the Attorney-General for South Australia,[6] should be understood. His Honour was making the point that the

[4] Submissions filed on behalf of the Attorney-General for South Australia at [41]-[46].
[5] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946, p 649.
[6] Submissions filed on behalf of the Attorney-General for South Australia at [43].

Commonwealth may, in reliance upon s 51(xxiiiA), establish an entity with a separate legal personality, albeit subject to Commonwealth control, whose assets and revenue do not form part of the Consolidated Revenue Fund, for the purpose of administering and providing the benefits contemplated by that placitum.

14. Indeed, this was precisely what the Commonwealth had sought to do by establishing the Universities Commission in the *Education Act 1945* (Cth), doubts as to the validity of which informed the proposal to insert s 51(xxiiiA) into the *Constitution*.[7] That entity was constituted as a body corporate by s 8(2) of the Act, and then given the function of providing financial assistance to students at universities and approved institutions (s 14).

15. However, it is one thing to establish a body corporate as an instrument for the provision of benefits to students; it is another merely to providing funding to a pre-existing private entity, which then provides services to students. For the reasons already outlined, this latter act was well within Commonwealth power prior to the insertion of s 51(xxiiiA), and given that, it is difficult to see why Dixon J's observations should be read otherwise than as suggested above.

Section 116

16. As was observed in the plaintiff's submissions in chief, the language of s 116 of the *Constitution* has its origins in Article VI, cl 3 of the United States Constitution – the so-called "religious test clause". Given that the Bill of Rights, and in particular the First Amendment, did originally not appear in the United States Constitution, one can only conclude that it was with this provision in mind that James Madison wrote in *Federalist No. 51* that "[i]n a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects".[8]

17. Crucially, the United States authorities relied upon in the submissions filed on behalf of the Attorney-General for Queensland focus largely upon the content of the expression "Officers of the United States" within the meaning of Article II, §2, cl 2 of the United States Constitution ("**the Appointments Clause**"). That provision states:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

18. In *Buckley v Valeo*,[9] the Supreme Court of the United States described as the "fair import" of the Appointments Clause the proposition that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed" by that provision.

19. The notion of an appointee exercising "significant authority pursuant to the laws of the United States" may, moreover, be thought to reflect the suggestion in 1822 by the Supreme Judicial Court of Maine that "[t]he term 'office' implies a delegation of a portion of the

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[7] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946, p 648.

[8] See also *Federalist No. 10*: "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source."

[9] 424 US 1, 125-126 (1976).

sovereign power to, and possession of it by the person filling the office".[10] This statement was made in the context of applying Maine's equivalent to Article I, § 6, cl 2 of the United States Constitution ("**the Ineligibility Clause**"). For reasons that will become apparent below, it is worth at this point reproducing the text of that provision:

> "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

20. Together, the Appointments Clause and the Ineligibility Clause appear to contemplate a distinction between holding an office under the United States and being a member of either House of Congress, in circumstances where these are intended to be mutually exclusive. If therefore the construction given to the term "office" or "officer" in either of those provisions were thought to control the manner in which the expression "office under the United States" in the "religious test clause" is to be understood, one would be confronted with the somewhat anomalous result that a religious test may be set as a qualification for sitting in Congress.[11]

21. It is true that there is no decision of the United States Supreme Court rejecting the possibility of such a result. However, there can be little doubt that that result would sit ill with the position articulated in *Federalist No. 51*, as quoted above. It has also been suggested, on the basis of the discussions that occurred during the various debates concerning ratification of the United States Constitution, that Article VI was "applicable to the entire lawmaking process".[12] For this reason, "[t]he distinctions between officers 'under' the United States and legislators is probably too paltry and picayune to sustain the claimed dispensation from article VI" for members of Congress.[13] And if that is correct, then it would tend to suggest that there must be some limit upon the extent to which the construction given both to the Appointments Clause and to the Ineligibility Clause can inform a proper reading of Article VI, cl 3.

22. There is one further point to be made concerning the construction of the Appointments Clause. It would appear to follow from the decision of Marshall CJ (on circuit) in *United States v Maurice*[14] that a person may be an "officer of the United States" if he or she is merely a contractor, as distinct from an employee of the United States Government, exercising some power or discharging some function that would otherwise render him or her an officer.[15] The identity of a person's employer is thus not determinative of whether he or she is an "officer of the United States".

23. Focusing more closely upon Article VI, cl 3, it should be noted that in *Torcaso v Watkins*,[16] to which reference was made in the plaintiff's submissions in chief, the appellant, a notary public appointed in Maryland, failed to secure a commission as such following his refusal to comply with a provision of the Maryland Constitution requiring that he profess a belief in God, prompting him to assert a departure from the strictures of

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[10] *Opinion of the Justices*, 3 Greenl (Me) 481, 482 (1822).
[11] This anomaly has not escaped academic attention: see L Beck, "The Constitutional Prohibition on Religious Tests" (2011) 35(2) *Melbourne University Law Review* (forthcoming).
[12] G V Bradley, "The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself" (1986-1987) 37 *Case Western Reserve Law Review* 674 at 719.
[13] *Ibid.*
[14] 26 F Cas 1211 (1823).
[15] 26 F Cas 1211, 1214-1215 (1823).
[16] 367 US 488 (1961).

the First Amendment and the "religious test clause". The United States Supreme Court held in his favour on the former basis, and for that reason, found it "unnecessary to consider the appellant's contention that [Article VI, cl 3] applies to state as well as federal offices".[17]

24. Nonetheless, in *Silverman v Campbell*,[18] the Supreme Court of South Carolina appeared to hold that "religious test clause" did so apply, albeit without providing a sufficient statement of its reasons for this conclusion. That case, like *Torcaso v Watkins*, concerned a prospective notary public, whose atheism prevented the realisation of his ambitions. It thus remains possible that a notary public, though appointed by a State, may hold an "office under the United States" for the purposes of Article VI, cl 3 of the United States Constitution. This is notwithstanding:

    (a) the circumstance that such a notary public cannot be said to exercise any part of the sovereign power of the United States; and

    (b) the doubt that attends whether or not he or she exercises any part of the sovereign power of the State which appointed him or her to the position of notary public.

    The mere possibility of such a conclusion serves only to highlight once more the perils of attempting to understand Article VI, cl 3 by reference to concepts which have their origins in the proper construction of the Appointments Clause.

25. It follows then that the position in the United States is neither as clear nor as unequivocal as the submissions filed on behalf of the Attorney-General for Queensland suggest. Ultimately, it must be recognised that the "religious test clause" in the United States Constitution has received little by way of judicial attention and exegesis, given the centrality of the First Amendment to the United States jurisprudence on matters pertaining to the separation of church and State.[19]

26. It would therefore be to proceed upon an incomplete understanding of the position in United States to contend that that position, as recorded in the relevant authorities, affords a sufficient, let alone an irresistible, answer to the plaintiff's case in relation to s 116 of the *Constitution*.

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[17] 367 US 488, 489 n1 (1961).
[18] 326 SC 208 (1997).
[19] D Dreisbach, "The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban" (1996) 38 *Journal of Church and State* 261.