

THE CONSTITUTIONAL PROHIBITION ON IMPOSING RELIGIOUS OBSERVANCES

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This article provides the first thorough analysis of the religious observances clause of the Australian Constitution, which provides: ‘The Commonwealth shall not make any law ... for imposing any religious observance.’ The article explains the origins of the clause and the mischiefs it aimed to prohibit, and presents a doctrinal account of the meaning and operation of the clause informed by the relevant history. The article begins by examining the social and political background to the drafting of the religious observances and its drafting history at the Australasian Federal Convention of 1897–98. The article then presents a doctrinal analysis of the meaning and operation of the religious observances clause by drawing on insights from the legislative histories of compulsory religious observance in the United Kingdom and colonial Australia.

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I INTRODUCTION

The religious observances clause of the *Australian Constitution* stands in marked contrast to what another foundational legal document in Australian history had to say about religious observances. The royal instructions of 25 April 1787 issued to Arthur Phillip as the first Governor of New South Wales commanded that he ‘by all proper methods enforce a due observance of Religion’ in the new colony.¹ To opposite effect, the religious observances clause of s 116 of the *Australian Constitution* prohibits the Commonwealth from legislating to enforce any observance of religion. The clause provides: ‘The Commonwealth shall not make any law ... for imposing any religious observance.’

The New South Wales Court of Appeal has recently commented on the ‘dearth of authority on this limb of s 116.’² This article provides the first thorough analysis of the religious observances clause of the *Australian Constitution*. The article aims to explain the origins of the clause and the mischiefs it aimed to prohibit, and to present a doctrinal account of the meaning and operation of the clause informed by the relevant history. The clause makes sense in light of history.

The article begins in Part II by examining the social and political background to the drafting of the religious observances clause and how a religiously led political campaign agitating that the new Commonwealth should enforce religious observances gave rise to another, ultimately successful, religiously led political campaign agitating that the Commonwealth should be prohibited from interfering in religious freedom. It is in this historical context that the Australasian Federal Convention of 1897–98 came to draft and adopt s 116 and its religious observances clause. Part III of the article explores the drafting history of the religious observances clause at the Federal Convention and how concern about the possibility of federal religious observance laws was the principal mischief s 116 was intended to address. Part IV continues the analysis of the religious observances clause at the Federal Convention and explores what the Convention understood the terms of the clause to mean.

Parts V and VI present a doctrinal analysis of the meaning and operation of the religious observances clause by drawing on insights from the legislative histories of the United Kingdom and colonial Australia. Part V offers a

¹ ‘Governor Phillip’s Instructions 25 April 1787 (UK)’ (Instructions, Historical Records of Australia, 25 April 1787) 15 <www.foundingdocs.gov.au/resources/transcripts/nsw2_doc_1787.pdf>, archived at <<https://perma.cc/Z7NP-M5QB>>.

² *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2016) 310 FLR 193, 221 [132]. This case is discussed in Part VI(B).

doctrinal account of the concept of religious observance. It examines the concept of an observance and argues that an observance will be a religious observance where the observance has some inherent religious element to it or where the observance has a religious purpose or motivation. Part VI offers a doctrinal account of the concept of imposition. Drawing on the legislative histories of compulsory religious observances in the United Kingdom and colonial Australia, the part introduces two broad overlapping taxonomies to understand the concept of imposition: religious observances can be imposed either positively or negatively and religious observances can be imposed either directly or indirectly. Part VII offers some concluding comments.

II THE POLITICAL AND SOCIAL BACKGROUND TO THE RELIGIOUS OBSERVANCES CLAUSE

Unlike the other three clauses of s 116, the religious observances clause has no analogue in the *United States Constitution*.³ Whilst a number of the first American state constitutions prohibited compulsory religious observances,⁴ there is no evidence that these clauses influenced the drafting of s 116 of the *Australian Constitution*.⁵ The religious observances clause appears to be an

³ See *United States Constitution* art VI ('no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States'), amend I ('Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof').

⁴ See, eg, *New Jersey Constitution 1776* art xviii ('That no Person shall ever within this Colony be deprived of the inestimable Privilege of worshipping Almighty God in a Manner agreeable to the Dictates of his own Conscience; nor under any Pretence whatsoever compelled to attend any Place of Worship, contrary to his own Faith and Judgment'); *North Carolina Constitution 1776* art xxxiv ('neither shall any person, on any presence whatsoever, be compelled to attend any place of worship contrary to his own faith or judgment ... but all persons shall be at liberty to exercise their own mode of worship'); *Pennsylvania Constitution 1776* art ii ('That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship ... And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship'); *Vermont Constitution 1786* art iii ('That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings, as In their opinion shall be regulated by the word of God; and that no man ought, or of right can be compelled to attend any religious worship ... Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God').

⁵ There are also historical English constitutional prohibitions on religious observances. The *Instrument of Government*, which was effectively the constitution of the English Commonwealth for a short period under Oliver Cromwell (it was adopted in 1653 and replaced by the

Australian addition to the religion clauses of the *United States Constitution* adopted in order to address a particular mischief. This section provides an overview of the political and social background to the religious observances clause before the article moves to trace its drafting history through the Australasian Federal Convention of 1897–98.

The religious observances clause is a reaction to the successful lobbying by colonial Protestant church leaders to include religious words in the Preamble to the *Commonwealth of Australia Constitution Act 1900* (Imp). The Preamble states:

[Whereas] the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, *humbly relying on the blessing of Almighty God*, have agreed to unite in one indissoluble Federal Commonwealth ...⁶

The lobbying by Protestant church leaders for religious words in the Preamble, which they explained as a ‘recognition’ of God, was one part of a broader campaign by colonial church leaders for political status and influence, which

Humble Petition and Advice in 1657), prohibited compulsory religious observances. The relevant provisions of the Instrument are cls 35 and 36, which provided:

XXXV That the Christian religion, as contained in the Scriptures, be held forth and recommended as the public profession of these nations; and that, as soon as may be, a provision, less subject to scruple and contention, and more certain than the present, be made for the encouragement and maintenance of able and painful teachers, for the instructing the people, and for discovery and confutation of error, hereby, and whatever is contrary to sound doctrine; and until such provision be made, the present maintenance shall not be taken away or impeached.

XXXVI That to the public profession held forth none shall be compelled by penalties or otherwise; but that endeavours be used to win them by sound doctrine and the example of a good conversation.

Those clauses were modelled on cl 12 of the 1647 *Heads of Proposals Offered by the Army*, drawn up by the commanders of the New Model Army and sent to Charles I following his defeat in the first Civil War. The clause proposed:

That there be a repeal of all Acts or clauses in any Act enjoining the use of the Book of Common-Prayer, and imposing any penalties for neglect thereof; as also of all Acts or clauses in of any Act, imposing any penalty for not coming to church, or for meetings elsewhere, for prayer or other religious duties, exercises or ordinances, and some other provision to be made for discovering of Papists and Popish recusants, and for disabling of them, and of all Jesuits or priests from disturbing the State.

These documents are reproduced in Samuel Rawson Gardiner (ed), *The Constitutional Documents of the Puritan Revolution: 1625–1660* (Clarendon Press, 2nd ed, 1899) 321, 416. The book is available online at <<https://archive.org/details/constitutional01parlgoog>>, archived at <<https://perma.cc/G2JS-LL2K>>.

⁶ *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, Preamble (emphasis added).

included a focus on religious observances. In *The Sectarian Strand: Religion in Australian History*, Michael Hogan describes the issue of Sunday observance laws as a particularly ‘symbolic issue’ concerning the political influence of colonial religious leaders.⁷ As Walter Phillips explains, for example, in relation to the situation in Sydney,

the Sunday Laws were widely ignored. Prosecutions for Sunday offences were not unusual, but they were chiefly of Chinese gardeners, newsboys, woodcarters, coalmen, fruit-barrowmen and pedlars; and magistrates sometimes inflicted only nominal penalties or dismissed offenders with a caution. The government itself did business on a large scale on Sunday trains and trams, and compelled ticket licensees to remain open on Sunday afternoons.⁸

The lax enforcement of Sunday laws prompted church leaders, acting across denominational boundaries, to form various lobby groups. Among them were the New South Wales Society for Promoting Due Observance of the Lord’s Day, the Lord’s Day Observation Society,⁹ and the various colonial Council of the Churches.¹⁰ As one commentator has noted,

[t]he successive appearance of these Church-sponsored organisations, having basically identical objectives, points to the strength of their founders’ desire for a more obviously Christian community. Yet their very number suggests either feelings of clerical impotence or fears of community resistance, for if any one of them had been thought likely to be effective, there would have been little incentive for the formation of another.¹¹

As will be discussed below, it was a concern about the potential for federal Sunday laws that prompted agitation for what became s 116 and specifically the religious observances clause of that provision. It was also the churches’ concern for the enforcement of Sunday laws that led to the establishment of the New South Wales Council of the Churches.

⁷ Michael Hogan, *The Sectarian Strand: Religion in Australian History* (Penguin Books, 1987) 97.

⁸ Walter Phillips, ‘The Churches and the Sunday Question in Sydney in the 1880s’ (1970) 6 *Journal of Religious History* 41, 44 (citations omitted).

⁹ Hogan (n 7) 97.

¹⁰ Donald E Hansen, ‘The Seventh-Day Adventist Church and Religious Liberty in Australia: 1885–1900’ in Arthur J Ferch (ed), *Symposium on Adventist History in the South Pacific: 1885–1918* (South Pacific Division of Seventh-Day Adventists, 1986) 30, 31.

¹¹ *Ibid* 32.

The New South Wales Council of the Churches was ultimately responsible for the successful campaign to have God recognised in the *Australian Constitution*. That body was formed in 1889, Phillips explains, ‘chiefly to resist all further attempts to secularize Sunday and, if possible, to have existing infringements of the Sunday laws suppressed.’¹² In the following years, similar councils were established in the other colonies.¹³

In January 1897, the New South Wales Council of the Churches decided to organise a campaign to pursue recognition of God in the *Australian Constitution*.¹⁴ In February, the Council resolved:

That this Council considers it of utmost importance that in the *Constitution* for federated Australia there should be a recognition of God as the Supreme Ruler, and that provision be made for such acts of common worship as should be deemed suitable for a legislative body.¹⁵

At its meeting on 1 March, the Council resolved that it would commence a campaign to obtain signatures for a petition to be sent to the Federal Convention.¹⁶ The petition requested:

- 1 That in the preamble of the *Constitution* of the Australian Commonwealth it be recognised that God is the Supreme Ruler of the world, and the ultimate source of all law and authority in nations.
- 2 That there also be embodied in the said *Constitution*, or in the standing orders of the Federal Parliament, a provision that each daily session of the Upper and Lower Houses of the Federal Parliament be opened with a prayer by the President and Speaker, or by a chaplain.
- 3 That the Governor-General be empowered to appoint days of national thanksgiving and humiliation.¹⁷

¹² Walter Phillips, *Defending ‘a Christian Country’: Churchmen and Society in New South Wales in the 1880s and after* (University of Queensland Press, 1981) 188.

¹³ *Ibid*; Hansen (n 10) 31.

¹⁴ ‘The Council of the Churches’, *The Sydney Morning Herald* (Sydney, 4 March 1897) 6.

¹⁵ Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891–1906* (Melbourne University Press, 1976) 22.

¹⁶ ‘Australian Federation: Meeting of the Council of Churches’, *The Advertiser* (Adelaide, 3 March 1897) 6; ‘The Council of the Churches’ (n 14) 6; ‘Council of Churches: Some Recommendations’, *The Inquirer and Commercial News* (Perth, 5 March 1897) 16.

¹⁷ Ely (n 15) 21.

Some proponents of constitutional recognition of God believed that a religious Preamble would have actual legal effect and authorise laws concerning religion. Richard Ely explains that ‘for some clerics the “recognition” of deity was seen, in one of its aspects, as a device that would enable the Commonwealth constitutionally to legislate for such matters as national Sunday observance.’¹⁸

The chief opponents of constitutional recognition of God, the Seventh-Day Adventists, also believed that constitutional recognition of God would authorise laws concerning religion. The Seventh-Day Adventists observed Saturday as the Sabbath and insisted on working on Sundays. In 1894, an Adventist in Sydney was convicted for breach of Sunday observance laws and sentenced to pay a fine or, in default of payment, be set publicly in stocks for two hours.¹⁹ Reacting to another conviction in May 1894, the Adventists organised two public protest meetings at the Parramatta Town Hall, each with about 500 attendees.²⁰

On learning of the New South Wales Council of the Churches’ petition campaign to recognise God in the constitutional Preamble, the Seventh-Day Adventists responded with their own petition campaign. That campaign was announced on 29 March 1897 in a front-page spread in the Adventist newspaper *The Bible Echo*.²¹ On 6 April 1897, the Federal Convention received this petition organised by the Seventh-Day Adventists:

We, the undersigned, adult residents of Melbourne, Victoria, believing that religion and the State should be kept entirely separate, that religious legislation is subversive of good government, contrary to the principles of sound religion, and can result only in religious persecution, hereby humbly, but most earnestly, petition your honorable body not to insert any religious clause or measure in the *Constitution* of the Australian Commonwealth which might be taken as a basis for such legislation; but that a declaration be made in the *Constitution* stating that neither the Federal Government nor any State Parliament shall make any law respecting religion, or prohibiting the free exercise thereof.²²

¹⁸ Ibid 8.

¹⁹ ‘Sunday Labor Prosecution: “Two Hours in the Stocks”’, *The Evening News* (Sydney, 9 August 1894) 4.

²⁰ Hansen (n 10) 34–5, 35 n 34.

²¹ ‘Religious Legislation or Religious Liberty: Which Shall It Be?’, *The Bible Echo* (Melbourne, 29 March 1897) 97.

²² *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 6 April 1897, 405 (Vaiben Louis Solomon).

What the Adventists feared most was any power on the part of the Commonwealth to enact and enforce Sunday observance laws. They believed that this was the chief motive of the Council of the Churches' recognition campaign. *The Bible Echo* wrote: 'This week we have additional evidence that the Council of Churches is a religio-political organisation whose chief aim is to unite church and state and enforce religious dogmas, chiefly the Sunday institution, on the people by law.'²³

The writer then extracted a report from *The Sydney Morning Herald* which reported that following a meeting between the New South Wales Colonial Secretary and the Council of Churches, the Inspector-General of Police issued instructions to the police that the existing Sunday laws were 'to be rigidly enforced'. *The Bible Echo* writer exclaimed:

Here is proof of what the church leaders are after in their vociferous clamours for what they are pleased to call a 'recognition of God in the *Constitution*'. They simply want a constitutional basis for enforcing religious observances on the people by law.²⁴

It was in this broader political context the Federal Convention came to consider inserting religious words in the Preamble and adopting s 116.

III DRAFTING HISTORY OF THE RELIGIOUS OBSERVANCES CLAUSE

In *Attorney-General (Vic) ex rel Black v Commonwealth* ('DOGS Case'), Stephen J said that s 116 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'.²⁵ This is not correct. Of course, Stephen J could not have been expected to know the true origins of s 116 since at the time the case was decided recourse to the Convention Debates was prohibited.

The Federal Convention ultimately acceded to the demands of both the mainstream Protestant and Seventh-Day Adventist petition campaigns. In summarising the provisions of the Constitution Bill during the Convention's closing session. Edmund Barton, the Leader of the Convention, explained:

²³ 'Enforcing the Sunday Law', *The Bible Echo* (Melbourne, 19 July 1897) 232.

²⁴ *Ibid.*

²⁵ (1981) 146 CLR 559, 605. In this case, the High Court held that federal funding of religious schools for educational purposes does not breach the establishment clause of s 116.

While ... a concession has been made to the popular opinion that some reverential expression should be embodied in the preamble, due care has been taken by the Convention that no reliance upon that provision, and no far-fetched arguments based upon it, shall lead to any infraction of religious liberty under the laws of the Commonwealth which we hope to create.²⁶

A *The Argument Advanced at the Convention for Section 116*

Section 116 was adopted on the initiative of Henry Bournes Higgins, a Victorian delegate to the Convention who later became Attorney-General and a Justice of the High Court. The argument Higgins advanced in favour of s 116 has been examined in detail elsewhere.²⁷ What is relevant for present purposes is that the principal mischief Higgins identified as justifying a provision denying the federal Parliament power to legislate on the subject of religion was the possibility of federal religious observance laws.

On 7 February 1898 at the Melbourne session of the Convention, after explaining the terms of his proposed clause, Higgins made a serious political allegation against those behind the constitutional recognition of God campaign. He told the Convention: ‘This recognition of God was not proposed merely out of reverence; it was proposed for distinct political purposes under the influence of debates which have taken place in the United States of America.’²⁸ Higgins explained:

And now, sir, it will be observed that in the *Constitution* of the United States of America there was not any such recognition in the preamble, and it is proposed that there shall be in our preamble. I am very sorry that those who first propounded this addition to the preamble did not tell the people with what object it was to be put in. They, no doubt, were perfectly fair and honest in their object, but they had read more than most people as to what had happened in the state of America, and I think, in all frankness, the people ought to have been told that there was a direct object and purpose in view.²⁹

²⁶ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 17 March 1898, 2474.

²⁷ Luke Beck, ‘Higgins’ Argument for Section 116 of the *Constitution*’ (2013) 41 *Federal Law Review* 393.

²⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 February 1898, 654.

²⁹ *Ibid* 655.

Higgins then explained an American case, *Church of the Holy Trinity v United States*.³⁰ In summary, Higgins explained that the United States Supreme Court had, on the basis of various colonial documents, described the United States as a 'Christian country'.³¹ Higgins later told the Convention that in reliance on this case the United States Congress had passed a statute requiring the closing of the Chicago Exhibition of 1893 on Sundays.³² In other words, Higgins was alleging that the recognition of God campaign was designed to bring about a judicial ruling that Australia was a Christian country for the purpose of prompting the Commonwealth Parliament to enact Sunday closing laws.

Higgins explained the concerns of the Seventh-Day Adventists to the Convention. The Adventists were, Higgins said, 'exceedingly troubled over the fact that through putting the words in question in the preamble there may be an attempt to enforce the observance of Sunday upon them, whereas they observe Saturday'.³³ In March 1898, Higgins repeated his concerns about the motivations behind the recognition of God campaign and the possibility of the Commonwealth Parliament having power to enact federal Sunday closing laws.³⁴

In concluding the debate that resulted in the Convention agreeing to adopt s 116, Higgins referred directly to the issue of religious observances. Higgins argued that the Convention ought to reassure those people who hold concerns about the effect of recognition of God in the Preamble.³⁵ The possibility of federal laws imposing religious observances was the principal mischief at which s 116 was aimed.

B *The Development of the Language of Section 116 at the Convention*

The drafting history of the language of s 116 makes clear that the reason why s 116 contains four clauses has nothing to do with recalling phases of English history, as Stephen J claimed in the *DOGS Case*. The Federal Convention

³⁰ 143 US 457 (1892).

³¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 February 1898, 655.

³² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 658. See also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1734.

³³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 February 1898, 656.

³⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1734–5.

³⁵ *Ibid* 1773–4, 1779.

began its work with a draft Constitution Bill that included one clause touching religion.³⁶ Clause 109 provided that '[a] State shall not make any law prohibiting the free exercise of any religion.'³⁷ At the Melbourne session of the Convention on 7 February 1898, Higgins introduced an amendment to that clause. He told the Convention: '[The amendment] has been circulated for several days, and is to the effect that neither a state nor the Commonwealth shall make any law prohibiting the free exercise of any religion or imposing any religious test or observance.'³⁸

The next morning — 8 February 1898 — Higgins formally moved that cl 109 be amended. He began his remarks:

I spoke on this clause yesterday evening. I now want to say that, after careful deliberation, I think the wording of my amendment ought to be rectified before it is submitted to the Convention. The existing clause is—

A state shall not make any law prohibiting the free exercise of any religion.

There is no application to the Federal Parliament at all in the clause as it stands. I intend to propose amendments which, if adopted, will make the clause read as follows:—

A state shall not, nor shall the Commonwealth, make any law prohibiting the free exercise of any religion, or for the establishment of any religion, or imposing any religious observance.³⁹

Indicating that the religious observances clause was his invention, Higgins said:

If you look at the first amendment of the [*United States*] *Constitution* you will find that there is no prohibition on a state doing this thing, but there is a prohibition on Congress against either making a law prohibiting the free exercise of

³⁶ Reproduced in John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005).

³⁷ *Ibid* 608.

³⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 February 1898, 654.

³⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 658.

any religion, or for the establishment of a religion. I add, here, 'or imposing any religious observance.'⁴⁰

After some discussion, Higgins's clause was negated on the voices without a vote and the entire cl 109 struck out.⁴¹

The Convention considered the question of including an express denial of power in respect of religion again on 2 March. That morning, during debate on what was ultimately a successful motion to include the words 'humbly relying upon the blessing of Almighty God' in the constitutional Preamble,⁴² Higgins indicated he would again try to insert a religious prohibition into the *Australian Constitution*. He said:

I say frankly that I should have no objection to the insertion of words of this kind in the preamble, if I felt that in the *Constitution* we had a sufficient safeguard against the passing of religious laws by the Commonwealth. I shall, I hope, afterwards have an opportunity, upon the reconsideration of the measure, to bring before the Convention a clause modified to meet some criticisms which have been made on the point, and if I succeed in getting that clause passed it will provide this safeguard.⁴³

Higgins then spoke at length about why a prohibition against laws concerning religion was necessary. That afternoon, Higgins's new clause to replace the deleted cl 109 came on for discussion.⁴⁴ In introducing his motion, Higgins said:

My idea is to make it clear beyond doubt that the powers which the states individually have of making such laws as they like with regard to religion shall remain undisturbed and unbroken, and to make it clear that in framing this *Constitution* there is no intention whatever to give to the Federal Parliament the power to interfere in these matters. ... I beg to move the insertion of the following new clause to replace clause 109 already struck out:—

⁴⁰ Ibid. The religion clauses of the First Amendment later came to be binding on the states by reason of the 'incorporation doctrine' of the Fourteenth Amendment: *Cantwell v Connecticut*, 310 US 296 (1940); *Everson v Board of Education of Ewing TP*, 330 US 1 (1947).

⁴¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 664.

⁴² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1732, 1741.

⁴³ Ibid 1734.

⁴⁴ Ibid 1769.

The Commonwealth shall not make any law prohibiting the free exercise of any religion, or for the establishment of any religion, or imposing any religious observance, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.⁴⁵

Higgins explained to the Convention that ‘most of this clause, with regard to the making of laws, is already in the American *Constitution*, either in the original *Constitution* or by way of an amendment of the Convention.’⁴⁶ He said:

In the *Constitution* of the United States there is a provision that the Federal Parliament is not to make any law prohibiting the free exercise of any religion, and there is also a clause, the very first amendment of the *Constitution*, that the Federal Parliament is not to make any law for the establishment of any religion. In the original *Constitution* you will find also a clause to the effect that there is to be no religious test required as a qualification for any post or office. The only difficulty, therefore, is in respect of these words about imposing religious observances, and that part, as I have already indicated this morning, is rendered necessary by the inclusion in the preamble of our *Constitution* of words which they have not got in the American *Constitution*.⁴⁷

After some debate and a failed attempt to amend Higgins’s clause, the clause was accepted by a vote of 25 to 16.⁴⁸

The clause proposed by Higgins and accepted by the Convention is not the provision that is now s 116 of the *Australian Constitution*. The provision as modified by the Convention’s Drafting Committee and now found as s 116 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 Drafting Committee inserted the word ‘for’ into the religious observances and free exercise clauses, and reordered the four clauses.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid 1779.

IV THE CONVENTION'S DISCUSSION OF THE MEANING OF THE RELIGIOUS OBSERVANCES CLAUSE

Despite the centrality of the religious observances clause to the whole debate on s 116, the Convention did not carefully consider its meaning.

Higgins was clearly of the view that, even if a law did no more than involve, either directly or indirectly, Sunday closing, it necessarily involved or constituted the imposition of an observance. Indeed, it was such a law — the American statutory provision concerning the Sunday closing of the Chicago Exhibition — that excited Higgins and that formed a significant element of his argument to the Convention in favour of a clause prohibiting the Commonwealth from legislating in respect of religion.⁴⁹ Given that Higgins's argument was ultimately successful and that he made the point about Sunday closing laws repeatedly and in strong terms, the Convention as a whole must have understood Sunday closing to involve or constitute an observance. Indeed, there are statements by other delegates expressing such an understanding. For instance, in speaking in support of the clause, New South Wales delegate Bernhard Wise referred to the American statute closing the Chicago Exhibition on Sundays as 'dealing with Sunday observance'.⁵⁰ Similarly, William Lyne, another New South Wales delegate, referred to laws regulating the Sunday trading of 'places of public resort', such as museums and art galleries, as being a matter of 'Sunday observance'.⁵¹

None of the delegates to the Convention, including Higgins, appears to have turned his (and the delegates were all men) mind to whether other things apart from Sunday closing might constitute an observance. There was, for example, no comment on whether the clause would prevent Commonwealth agencies from closing on Christmas Day or Good Friday.

However, Higgins did not understand his religious observances clause as preventing the enactment of Sunday closing laws generally. Rather, he explained that the clause prevented the enactment of religiously motivated Sunday closing laws.⁵² In speaking to the religious observances prohibition, Higgins noted that 'it has been said that this would prevent the imposing of a

⁴⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 658; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1773–4.

⁵⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1773.

⁵¹ *Ibid* 1777.

⁵² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 664.

day of rest.⁵³ He responded to that suggestion, insisting that '[the] amendment] would not'.⁵⁴ He explained the provision 'would simply prevent the imposing of a day of rest for religious reasons'.⁵⁵ It would be necessary, Higgins told the Convention, to look to the purpose underlying a particular law to determine whether the observance it imposed was a religious one or not. He said:

A number of laws have been held to be unconstitutional in America because of their reasons and because of their motives. There was a funny case in San Francisco, where a law was passed by the state that every prisoner, within one hour of his coming into the prison, was to have his hair cut within one inch of his head. That looked very harmless, but a Chinaman brought an action to have it declared unconstitutional, and it turned out that the law was actually passed by the Legislature for the express purpose of persecuting Chinamen.⁵⁶

Acknowledging that the San Francisco case was not a First Amendment religion clauses case,⁵⁷ he went on to say:

I am trying to point out that laws would be valid if they had one motive, while they would be invalid if they had another motive. All I want is, that there should be no imposition of any observance because of its being religious.⁵⁸

In other words, Higgins's view of the effect of the religious observances clause was such that a Sunday closing law motivated by secular reasons would be valid, whereas such a law motivated by religious reasons would be invalid. Purpose has the function of determining whether an observance is a religious or non-religious observance. Higgins did not explain how a court should go

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ The 'funny case' Higgins referred to in his comments concerned a San Francisco Ordinance popularly known as the 'Pigtail Ordinance' or the 'Queue Ordinance' (queue being another word for the pigtail), since it was targeted at Chinese residents of San Francisco who commonly wore that hairstyle. Ho Ah Kow, a Chinese resident of San Francisco, was imprisoned for failing to pay a fine and had his pigtail forcibly removed by prison authorities. Kow sued in tort and the prison authorities pleaded the Ordinance as a justification. In *Ho Ah Kow v Nunan*, 12 F Cas 252 (D Cal, 1879) the Circuit Court of the United States, comprising a judge of the United States Supreme Court and a circuit judge, invalidated the ordinance on the ground that it denied Chinese people the equal protection of the laws contrary to the Fourteenth Amendment. The purpose of the law was a key factor in the finding of invalidity.

⁵⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 664.

about determining the motivation behind a particular law. Nor did Higgins provide any explanation as to what the situation would be if a Sunday closing law was motivated by both religious and secular reasons.

Beyond explaining that the religious observances clause was directed at religiously motivated Sunday closing laws, there was no further discussion of what the clause might mean or to what else it might apply. The Convention's attention simply did not turn to that matter.

V WHAT IS A RELIGIOUS OBSERVANCE?

It is in the context of this history that an exploration of the meaning of the religious observances clause is possible. In a short, early article on s 116, Francis Cumbræe-Stewart described religious observances as including 'acts known to have religious significance either sacramentally, magically or symbolically'.⁵⁹ In light of the history and broader context explored above, this definition is inadequate.

A *What Is an 'Observance'?*

The meaning of the word 'observance' is broad. A Federation-era dictionary, the 1895 edition of *Webster's International Dictionary of the English Language*, offers a broad definition of 'observance': 'An act, ceremony, or rite, as of worship or respect; especially, a customary act or service of attention; a form; a practice; a rite; a custom.'⁶⁰ In similarly broad terms, a contemporary dictionary, the third edition of the *Oxford English Dictionary*, defines 'observance' in this way:

1. An action, esp of a religious or ceremonial nature, performed in accordance with prescribed usage; a customary action, ceremony, or ritual; a custom; an act performed in accordance with social convention. Formerly (also): a necessary or obligatory action, practice, etc. ...
- 4a. More generally: the action or practice of following or respecting a particular law or of fulfilling a duty, etc; adherence or due regard to a particular custom, practice, principle, etc. Usually with *of*. Formerly also (rarely) in *pl*.

⁵⁹ FD Cumbræe-Stewart, 'Section 116 of the Constitution' (1946) 20 *Australian Law Journal* 207, 209.

⁶⁰ *Webster's International Dictionary of the English Language* (rev ed, 1895), 'observance' (def 2).

- 4b. The action or practice of conforming to the requirements of prescribed rituals, ceremonies, etc; *spec* the performance of prescribed rites of worship, or of traditional and customary religious rituals and ceremonies.⁶¹

An observance, including a religious observance, may consist in action or inaction. In an 1845 treatise examining religious observances in English law, Edward Neale wrote of the distinction between religious observances consisting in action and religious observances consisting in inaction:

[P]rohibitions ... against working on holidays, were intended to keep away from the sacred seasons certain actions considered to be inconsistent with the due observance of them; but that observance did not consist in the not doing what by those laws was forbidden to be done, but in doing something else, which, it was thought, would not be done, if the forbidden acts were commonly practised. Whereas, in the seasons of fasting, the not eating flesh is the essential part of the thing to be observed ... that abstinence, therefore, becomes a positive thing to be done, not a thing to be abstained from for the sake of doing something else ...

A similar observation may be made upon some other laws of an apparently negative character, as eg those against fasting on Sundays. They are, substantially, declarations of the manner in which the day ought to be observed, not attempts to remove hindrances to its due observance.⁶²

Sabbath observance⁶³ is another example of religious observance consisting in action. The observance of the Sabbath consists in the act of not undertaking worldly labour.⁶⁴ In Neale's words, the day is 'observed as holy [through its] consecration by cessation from labour, and other secular avocations'.⁶⁵

⁶¹ *Oxford English Dictionary* (3rd ed, 2004), 'observance' (defs 1, 4(a), 4(b)) (citations omitted).

⁶² Edward Vansittart Neale, *Feasts and Fasts: An Essay on the Rise, Progress, and Present State of the Laws Relating to Sundays and Other Holidays, and Days of Fasting; with Notices of the Origin of Those Days, and of the Sittings and Vacations of the Courts* (John Murray, 1845) 274–6.

⁶³ At this point in the analysis, the article uses 'Sabbath observance' instead of 'Sunday observance' because the article discusses the question of Sunday observance laws motivated by non-religious reasons below.

⁶⁴ Referring to the *Sunday Observance Act 1677*, 29 Car 2, c 7, which was in force in New South Wales, the Supreme Court of New South Wales in *Ex parte Rogerson* (1888) 9 NSW 30, 43 (Owen J) also adopted this view: 'The one observance required seems from the rest of the section to refer to the prohibition of trading.'

⁶⁵ Neale (n 62) 176.

B *What Makes an Observance ‘Religious’ in Character?*

The word ‘religious’ in the expression ‘religious observance’ is adjectival. It describes the observance. As Higgins recognised at the Federal Convention, not every observance is a religious observance. Australians observe Australia Day on 26 January each year. Australia Day is an observance but it is not a religious observance. The religious observances clause of s 116 prohibits only the imposition of religious observances.

Conduct (whether action or inaction) is religious in character in either of two circumstances.⁶⁶ First, where the conduct has some inherent religious element to it. Secondly, where the conduct is engaged in for religious purposes. Prayer is an example of the first circumstance.⁶⁷ Prayer, by definition, is communication with a deity or deities⁶⁸ and thus has an inherent religious element. Prayer is always religious in character.⁶⁹ An example of the second circumstance is a man wearing a beard as a tenet of his religion as opposed to a man wearing a beard as a grooming choice. Wearing a beard is not always religious in character.

The second circumstance in which conduct will be seen as religious in character was subject to discussion in the Federal Convention. As Higgins explained to the Federal Convention, the motivation or purpose of the particular observance determines whether it is a religious observance. He said: ‘I am trying to point out that laws would be valid if they had one motive, while they would be invalid if they had another motive. All I want is, that there should be no imposition of any observance because of its being religious.’⁷⁰

Higgins’s immediate example was Sunday closing laws. Such laws may be enacted for entirely non-religious purposes, such as to provide a uniform day of rest and provide an opportunity for people to more easily socialise with

⁶⁶ Luke Beck, ‘The Constitutional Prohibition on Religious Tests’ (2011) 35 *Melbourne University Law Review* 323, 341 n 134.

⁶⁷ *Ibid.*

⁶⁸ William James, *The Varieties of Religious Experience: A Study in Human Nature* (Longmans, Green and Co, 1928) 464: Prayer means ‘every kind of inward communion or conversation with the power recognized as divine ... Prayer in this wide sense is the very soul and essence of religion ... Prayer is religion in act; that is, prayer is real religion.’

⁶⁹ Beck, ‘The Constitutional Prohibition on Religious Tests’ (n 66) 341 n 134.

⁷⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 664.

family and friends who may not be available on ordinary working days.⁷¹ Sunday closing laws may also be enacted for religious purposes, such as to enforce the observance of the Sabbath. It is only religiously motivated Sunday closing laws that can be characterised as involving religious observances. Higgins's broader point was that a legal obligation cannot be characterised as requiring a religious observance simply because the content of that legal obligation happens to coincide with the content of the tenets of some religion.

The religion clauses of the First Amendment of the *United States Constitution*, which provide that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, have been interpreted to prohibit government from imposing religious observances.⁷² Similarly, s 2(a) of the *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'), which guarantees 'freedom of conscience and religion', has been interpreted to prohibit government from imposing religious observances.⁷³ The Supreme Court of the United States and the Supreme Court of Canada have both made the same point as Higgins that a legal obligation cannot be characterised as religious simply because the content of that obligation coincides with the tenets of some religion. Both the United States and Canadian Supreme Courts have given the example of the law prohibiting murder: the fact that some religions prohibit their adherents from engaging in that conduct does not make a legislative prohibition of that same conduct religious in character or involve state-enforced compulsion to conform to religious practices.⁷⁴

The approach of the Supreme Court of Canada and the Supreme Court of the United States in determining whether prescribed conduct is religious in character is, as it is for Higgins, a question of purpose. Both courts hold that it is only if the law in question has a religious purpose that the obligation the law imposes can be characterised as religious. For example, in *Big M Drug*

⁷¹ Of course, these seemingly secular purposes might be prompted by value judgments about the need for recreation and socialisation, which might be informed by religious values. Questions about what is and is not religious can become very complex at a philosophical level.

⁷² *Engel v Vitale*, 370 US 421 (1962) (imposition of religious observances violates Establishment Clause of the *United States Constitution*; obiter that it also violates Free Exercise Clause); *School District of Abington Township v Schempp*, 374 US 203 (1963) (imposition of religious observances violates Establishment Clause; obiter that it also violates Free Exercise Clause). See also *West Virginia State Board of Education v Barnette*, 319 US 624 (1943) (compelled speech, including compelled religious speech, violates First Amendment free speech clause).

⁷³ *R v Big M Drug Mart Ltd* [1985] 1 SCR 295.

⁷⁴ *McGowan v Maryland*, 366 US 420, 442, 462 (1961); *Edwards Books and Art Ltd v The Queen* [1986] 2 SCR 713, 760–1.

*Mart*⁷⁵ and in *Edwards Books*,⁷⁶ the Canadian Supreme Court considered the validity of Sunday closing statutes under s 2(a) of the *Charter*. The statute in *Big M Drug Mart* violated the *Charter* because it was found to have a religious purpose. The statute in *Edwards Books* did not violate the *Charter* because it had a secular purpose and thus did not impose a religious observance. In *McGowan v Maryland*,⁷⁷ the Supreme Court of the United States found that a Maryland Sunday closing statute did not have a religious purpose and therefore did not violate the First Amendment.

The High Court also recognises that it is the motivation or purpose of conduct that determines its character as religious. In *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*, a case about whether the Church of Scientology was a 'religion' and thus exempt from Victorian payroll tax obligations, Mason ACJ and Brennan J said:

Conduct which consists in ... practices or observances may be held to be religious, however, only if the motivation for engaging in the conduct is religious. That is, if the person who engages in the conduct does so in giving effect to his particular faith ...⁷⁸

The former Chief Justice of the High Court, Murray Gleeson, has observed that '[it] has often been pointed out by some judges, and sometimes forgotten by others, that few Acts of Parliament pursue only a single purpose'.⁷⁹ A Sunday closing statute enacted for both religious and non-religious purposes cannot escape characterisation as involving a religious observance simply by the presence of the non-religious purpose. This was the approach in the 1885 case of *M'Hugh v Robertson*.⁸⁰ In that case, the Supreme Court of Victoria described a Sunday closing statute as compelling a religious observance even though the statute had both religious and non-religious purposes. In *M'Hugh v Robertson*, the question for the Court was whether the *Sunday Observance Act 1780* was in force in Victoria,⁸¹ which turned on whether its policy and provisions were reasonably applicable to the condition and circumstances of the colony. In answering that question, Williams J found

⁷⁵ *Big M Drug Mart* (n 73).

⁷⁶ *Edwards Books* (n 74).

⁷⁷ *McGowan* (n 74).

⁷⁸ (1983) 154 CLR 120, 135.

⁷⁹ Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 32.

⁸⁰ (1885) 11 VLR 410.

⁸¹ *Sunday Observance Act 1780*, 21 Geo 3, c 49.

that the statute had two purposes: ‘to support and uphold a State church’ by compelling the religious observance of the Sabbath and to provide for a day of rest.⁸² For Williams J, the existence of the secular purpose meant that the statute was applicable to the circumstances of Victoria. Williams J was clear that if the statute had only a religious purpose it would not have been applicable to the circumstances of Victoria.⁸³

To hold that the existence of an additional non-religious purpose renders a law enacted with a religious purpose incapable of characterisation as a law for imposing a religious observance would enable the easy circumvention of the prohibition s 116 provides.⁸⁴ It would also be to commit the errors of now-abandoned approaches to the characterisation of laws such as the implausible searches in *R v Barger* for the ‘true nature and character’ of a law⁸⁵ and in *Duncan v Queensland* for the ‘pith and substance’ of a law.⁸⁶ As the High Court reiterated in *New South Wales v Commonwealth* (‘Work

⁸² *M’Hugh* (n 80) 419.

⁸³ *Ibid* 419–20. On appeal, the Full Court held that the statute was in force in Victoria by the opposite route of reasoning. The Full Court, consisting of Molesworth ACJ, Higinbotham and Holroyd JJ, found that the religious purpose of the statute was consistent with the religious feelings of British subjects in the Australian colonies, and this was enough to make the policy and provisions of the statute applicable to the circumstances of the colony. The difference in reasoning is due to the fact that Williams J asked the question of whether the policy of the statute was applicable to the circumstances of Victoria as at the time of the case (when the religious purpose could not be seen as applicable to Victoria) whereas the Full Court asked whether the policy of the statute was applicable to the circumstances of New South Wales in 1828: see especially at 428–30. The *Australian Courts Act 1828* (Imp) 9 Geo 4, c 83, s 24 provided that all laws in force in England as at 25 July 1828 were to be applied in New South Wales and Van Diemen’s Land so far as those laws were applicable. The Full Court held that since the Act was applicable to the circumstances of New South Wales in 1828, given prevailing religious sentiments there at that time, Victoria inherited that law on its creation as a separate colony in 1851: at 429. The Full Court did not dispute Williams J’s reasoning that had the question been the applicability of the Act to the circumstances of Victoria at the date of the case then the Act would not have been applicable if it had only a religious purpose but would be applicable given the additional secular purpose. Both the decision at first instance and the decision on appeal are reported together in (1885) 11 VLR 410.

⁸⁴ See *Kruger v Commonwealth* (1997) 190 CLR 1, 161 (Gummow J): ‘It may be that a particular law is disclosed as having a purpose prohibited by s 116 only upon consideration of extraneous matters indicating a concealed means or circuitous device to attain that end, and that it is permissible to apply s 116 in that fashion. But these can only be matters for another day.’ Gummow J cited the following as providing contrary support: *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 349; *Cole v Whitfield* (1988) 165 CLR 360, 401; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 472–4.

⁸⁵ (1908) 6 CLR 41, 65.

⁸⁶ (1916) 22 CLR 556, 623.

Choices Case), '[t]o describe a law as "really", "truly" or "properly" characterised as a law with respect to one subject matter, rather than another, bespeaks fundamental constitutional error'.⁸⁷ Whilst these comments were made in respect of characterising laws as being laws with respect to heads of power, the underlying logic is equally applicable to determining whether a law meets the description in a constitutional provision denying legislative power. As Brennan J explained in *Street v Queensland Bar Association*, '[c]haracterization is a useful and familiar process when the validity of a law depends on the grant of, or restriction on, legislative power'.⁸⁸ Indeed, the High Court has made clear that there is no difference in the correct approach to the interpretation and application of constitutional provisions granting legislative power and constitutional provisions denying legislative power.⁸⁹ The High Court uses the language of characterisation in both types of case. For example, in *Castlemaine Tooheys Ltd v South Australia*, a case concerning the guarantee of freedom of interstate trade and commerce, the High Court spoke of the 'task of characterization of laws challenged for alleged contravention of s 92'.⁹⁰

VI THE MEANING OF 'IMPOSING'

The word 'imposing' in its plain English meaning indicates a need for a degree of compulsion or coercion. Enid Campbell and Harry Whitmore in their book *Freedom in Australia* also take the view that 'imposing' requires an element of compulsion.⁹¹ They give the example that 'it would be incompetent for the Commonwealth Parliament ... to make church attendance compulsory'.⁹² Compulsion or coercion 'admits of varying degrees'.⁹³ It is therefore necessary

⁸⁷ (2006) 229 CLR 1, 72.

⁸⁸ (1989) 168 CLR 461, 508 (emphasis added).

⁸⁹ See, eg, *ibid*; *JT International SA v Commonwealth* (2012) 250 CLR 1, 33. The High Court has made this point in respect of s 116: *Williams v Commonwealth* (2012) 248 CLR 156, 223.

⁹⁰ *Castlemaine Tooheys* (n 84) 470. See also *Cunningham v Commonwealth* (2016) 335 ALR 363, 377 [60] speaking of the 'ultimate question of characterisation' in respect of s 51(xxxi).

⁹¹ Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 2nd ed, 1973) 385.

⁹² *Ibid*.

⁹³ Michael R Rhodes, *Coercion: A Nonevaluative Approach* (Rodopi, 2000) 100. See also J Roland Pennock, 'Coercion: An Overview' in J Roland Pennock and John W Chapman (eds), *Coercion* (AldineTransaction, 2007) 1, 5. See generally Scott Anderson, 'Coercion' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, Summer 2015 ed) <<https://plato.stanford.edu/archives/sum2015/entries/coercion/>>, archived at <<https://perma.cc/Q8AR-PVFN>>.

to develop an understanding of the concept of imposition that goes beyond simply stating that imposition involves compulsion. The history of compulsory religious observances in the United Kingdom and colonial Australia enable a nuanced analysis of what it means to impose a religious observance.

The history of religious observances imposed by law in what is now the United Kingdom extends beyond a millennium. Examples of religious observances imposed by law also predate the kings of England.⁹⁴ The laws of Ine, who reigned as king of the West Saxons from 688 to 726, provided that (translated into modern English): ‘A child is to be baptized within 30 days; if it is not, 30 shillings compensation is to be paid.’⁹⁵ The laws of Wihtred, who reigned as king of Kent from 690 (or 691) to 725, prohibited work on Sundays.⁹⁶

Writing in 1792, Richard Wooddeson explained that the early kings of England enacted many laws concerning compulsory religious observances. He referred, for example, to the laws of Canute (sometimes Cnut)⁹⁷ who ruled as king of England from 1016 to 1035:

King Canute, in his parliament, holden at Winchester upon Christmas-day, [made] sundry laws and orders ... touching the faith, the keeping of holy-days, public prayers, the learning of the lord’s prayer, receiving the communion thrice in the year, the manner and form of baptism, fasting, and other like matters of religion ...⁹⁸

The history of compulsory religious observances imposed by law in Australia may well extend just as far back in time as it does in British history. Various anthropologists describe compulsory religious practices in traditional

⁹⁴ For collections of these laws, see, eg, FL Attenborough (ed), *The Laws of the Earliest English Kings* (Cambridge University Press, 1922); Dorothy Whitelock (ed), *English Historical Documents: c 500–1042* (Eyre & Spottiswoode, 1955) vol 1; *Early English Laws* (Website, 2017) <www.earlyenglishlaws.ac.uk>, archived at <<https://perma.cc/LP3C-CUBA>>.

⁹⁵ Whitelock (n 94) 364. See also Attenborough (n 94) 37.

⁹⁶ Attenborough (n 94) 27; Whitelock (n 94) 363.

⁹⁷ See, eg, Alexander R Rumble (ed), *The Reign of Cnut: King of England, Denmark and Norway* (Leicester University Press, 1994); MK Lawson, *Cnut: England’s Viking King* (Tempus, 2nd ed, 2004); MJ Trow, *Cnut: Emperor of the North* (Sutton, 2005).

⁹⁸ Richard Wooddeson, *Systematical View of the Laws of England; as Treated of in a Course of Vinerian Lectures, Read at Oxford, during a Series of Years, Commencing in Michealmas Term, 1777* (Thomas Payne, 1792) vol 1, lecture 13 [344]. The ‘Oxford code’ of Cnut is available, with modern English translation, online: ‘Cnut’s Oxford Code, 1018 (Cn 1018)’, *Early English Laws* (Web Page, 2017) <www.earlyenglishlaws.ac.uk/laws/texts/cn-1018/view/#edition,1/translation,0_0_c_19>, archived at <<https://perma.cc/Z85U-WKB3>>.

Aboriginal societies.⁹⁹ Compulsory religious observances imposed by law also arrived with the First Fleet. Arthur Phillip's instructions as the first Governor of New South Wales required him to enforce the due observance of religion. The instructions provided:

And it is further Our Royal Will and Pleasure that you do by all proper methods enforce a due observance of Religion and good order among all the inhabitants of the new Settlement and that you so take such steps for the one celebration of publick Worship as circumstances will permit.¹⁰⁰

The first compulsory religious service took place on 3 February 1788.¹⁰¹

The British also brought with them to Australia some of the existing British laws imposing religious observances. Some of those laws were 'received' as part of the law of the Australian colonies.¹⁰² For example, in *M'Hugh v Robertson* in 1885, the Full Court of the Supreme Court of Victoria held that the *Sunday Observance Act 1780*,¹⁰³ which prohibited entertainment venues from opening on Sundays, was in force as part of the law of Victoria.¹⁰⁴ In 1890, the Full Court of the Supreme Court of New South Wales reached the same conclusion in respect of the reception of that statute in *Walker v*

⁹⁹ Ronald M Berndt, *Australian Aboriginal Religion* (EJ Brill, 1974) 5–7; Ronald M Berndt and Catherine H Berndt, *The World of the First Australians: Aboriginal Traditional Life* (Aboriginal Studies Press, 1988) ch 8; WEH Stanner, 'Some Aspects of Aboriginal Religion' in Max Charlesworth (ed), *Religious Business: Essays on Australian Aboriginal Spirituality* (Cambridge University Press, 1998) 1, 1–23.

¹⁰⁰ 'Governor Phillip's Instructions 25 April 1787 (UK)' (n 1) 15–16.

¹⁰¹ Allan M Grocott, *Convicts, Clergymen and Churches: Attitudes of Convicts and Ex-Convicts towards the Churches and Clergy in New South Wales from 1788 to 1851* (Sydney University Press, 1980) 206. The convicts did not generally appreciate compulsory religious observances. In a letter to the Home Secretary, the Duke of Portland, Governor John Hunter described how in October 1798 convicts burnt down Sydney's church 'in consequence of a strict order which I saw it absolutely necessary to issue, for compelling a decent attention upon divine service and a more sober and orderly manner of spending the Sabbath Day': Letter from Governor Hunter to the Duke of Portland, 1 November 1798 in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, 1914) series 1, vol 2, 236.

¹⁰² On the doctrine of reception, see, eg, Alex C Castles, 'The Reception and Status of English Law in Australia' (1963–66) 2 *Adelaide Law Review* 1; Alex C Castles, *An Australian Legal History* (Law Book, 1982) ch 17; BH McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2007).

¹⁰³ *Sunday Observance Act 1780*, 21 Geo 3, c 49.

¹⁰⁴ *M'Hugh* (n 80).

Solomon.¹⁰⁵ A case concerning the operation of that statute reached the High Court in 1907.¹⁰⁶

The United Kingdom and colonial Australian histories of compulsory religious observances allow for the concept of imposition to be understood by reference to two broad overlapping taxonomies. Religious observances can be imposed either positively or negatively. Religious observances can also be imposed either directly or indirectly. These taxonomies overlap such that, for example, a religious observance may be imposed both positively and directly.

A Positive and Negative Impositions

1 Positive Impositions

The United Kingdom and colonial Australian histories of compulsory religious observances show that positive impositions of religious observances come in three types: (i) imposing an obligation to participate in a religious observance; (ii) prescribing the manner or form of a religious observance without imposing an obligation to participate in that religious observance; and (iii) imposing an obligation to participate in a religious observance in a prescribed manner or form.

The first type of positive imposition involves imposing an obligation to attend or participate in a religious observance. For example, the 1650 *Act for the Repeal of Several Clauses in Statutes Imposing Penalties for Not Coming to Church*, among other things, required all individuals to ‘diligently resort to some publique place where the Service and Worship of God is exercised’ on every Sunday and every day appointed as a day of thanksgiving or humiliation.¹⁰⁷ Similarly, one of the effects of the *Toleration Act 1689*,¹⁰⁸ enacted during the reign of William and Mary, was to change the rules governing compulsory attendance at religious services every Sunday. Henceforth individuals could choose whether to attend an Anglican service or a service conducted by a dissenting Protestant denomination allowed by the Act.¹⁰⁹ Australian examples of imposing an obligation to attend or participate in a

¹⁰⁵ (1890) 11 NSW 88.

¹⁰⁶ *Scott v Cawsey* (1907) 5 CLR 132.

¹⁰⁷ *Act for the Repeal of Several Clauses in Statutes Imposing Penalties for Not Coming to Church 1650*, 2 Car 2 in CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642–1660* (His Majesty’s Stationery Office, 1911) vol 2, 423–5.

¹⁰⁸ *Toleration Act 1689*, 1 Wm & M, c 18.

¹⁰⁹ See *ibid* s 13. Catholic worship remained prohibited.

religious observance include the order issued by Governor Phillip in 1790, made after complaints from the colony's chaplain, the Reverend Richard Johnson, about poor attendance at religious services, requiring a reduction in the rations of any overseer or convict who did not attend religious service.¹¹⁰ Another Australian example is legislation enacted in 1849 in Western Australia, requiring 'the attendance of all prisoners at divine service on Sundays'.¹¹¹

The second type of positive imposition of religious observances involves prescribing the manner or form of a particular religious observance without imposing an obligation to participate in that observance. Such laws do not make participation in the religious observance compulsory, but require that the religious observance can only be performed in the prescribed manner. For example, a provision in the *Sacrament Act 1547* required that the Christian sacrament be administered only in 'both [k]inds',¹¹² meaning of bread and wine instead of only wine as in Roman Catholic practice. The *Act of Uniformity 1548* required that religious services be conducted only in accordance with the Book of Common Prayer.¹¹³ In 1643, *An Ordinance for the Utter Demolishing, Removing and Taking Away of All Monuments of Superstition or Idolatry* imposed the form of religious observance or the manner in which religious worship should be performed.¹¹⁴ The Ordinance provided that various items such as communion tables, altars and candlesticks should be removed from all churches and chapels.¹¹⁵ In 1645, an Ordinance was enacted to replace the Book of Common Prayer with a 'Directory for the publique worship of God'. The Ordinance provided that the Directory 'shall be henceforth used, pursued, and observed, according to the true intent and meaning of this Ordinance, in all Exercises of the publique Worship of God, in every Congregation, Church, Chappel, and place of publique Worship'.¹¹⁶

¹¹⁰ Grocott (n 101) 206.

¹¹¹ *An Ordinance for the Regulation of Gaols, Prisons, and Houses of Correction in the Colony of Western Australia, and for Other Purposes Relating Thereto 1849* (WA) s 16.

¹¹² *Sacrament Act 1547*, 1 Edw 6, c 1, s 8.

¹¹³ *Act of Uniformity 1548*, 2 & 3 Edw 6, c 1.

¹¹⁴ *An Ordinance for the Utter Demolishing, Removing and Taking Away of All Monuments of Superstition or Idolatry 1643*, 19 Car 1 in CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642–1660* (His Majesty's Stationery Office, 1911) vol 1, 265–6.

¹¹⁵ *Ibid* 265.

¹¹⁶ *An Ordinance for Taking Away the Book of Common Prayer, and for Establishing and Putting in Execution of the Directory for the Publique Worship of God 1645*, 21 Car 1 in CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642–1660* (His Majesty's Stationery Office, 1911) vol 1, 582–3.

The third type of positive imposition of religious observance is a combination of the first two types: imposing an obligation to participate in an observance in a prescribed manner or form. There are many historical examples of such laws. The *Act of Uniformity 1551* compelled all individuals within England and all of the king's dominions to attend, and to remain for the full duration of, public worship on Sundays and holidays at their local parish church.¹¹⁷ The Act also made it an offence to attend a religious service not conducted in accordance with the Book of Common Prayer. During the reign of Elizabeth I, the *Act of Uniformity 1558* re-enacted the earlier requirement that religious services be conducted only according to the Book of Common Prayer and compelled all individuals to attend public worship on Sundays and holidays, after those laws had been abolished under the Catholic Mary.¹¹⁸ The *Religion Act 1592* authorised the imprisonment of any person above the age of 16 years who failed to attend Anglican church services for more than a month until such time as they conformed to the Protestant religion and agreed to attend Anglican church services.¹¹⁹ The *Popish Recusants Act 1605*, enacted during the reign of James I, sought to put an end to the practice of 'occasional conformity' whereby a Catholic would sometimes attend Anglican religious services to satisfy the demands of the law.¹²⁰ The Act provided that any person convicted of being a 'Popish Recusant' must participate in the Anglican sacrament once a year.¹²¹ The Act also increased the penalty for any person who failed to attend Anglican church services weekly.¹²²

There are also Australian colonial examples of laws imposing an obligation to participate in an observance in a prescribed manner or form. On 12 February 1788, Governor Phillip appointed Lieutenant Philip Gidley King of the Royal Navy as commandant to establish a settlement on Norfolk Island.¹²³ Governor Phillip's instructions to King required King to impose religious

¹¹⁷ *Act of Uniformity 1551*, 5 & 6 Edw 6, c 1, s 2. These specific requirements were imposed because Archbishop Cranmer thought it contemptuous of the local parish church for an individual to attend a different church (see Neale (n 62) 287) and to continue the solution devised under Roman law by the Fourth Council of Carthage in 436 CE to the problem of nominal attendance at church whereby a person would attend but leave before the service ended: at 279–80.

¹¹⁸ *Act of Uniformity 1558*, 1 Eliz 1, c 2.

¹¹⁹ *Religion Act 1592*, 35 Eliz 1, c 1.

¹²⁰ *Popish Recusants Act 1605*, 3 Jac 1, c 4.

¹²¹ *Ibid* s 2.

¹²² *Ibid* s 8.

¹²³ *Historical Records of New South Wales: Phillip 1783–1792* (Lansdown Slattery, 1978) vol 1, pt 2, 136.

observances on those in the settlement: 'You are to cause the prayers of the Church of England to be read with all due solemnity every Sunday, and you are to enforce a due observance of religion and good order.'¹²⁴ King followed those instructions. He issued orders stating that '[n]o person is to absent himself from public worship'¹²⁵ and providing that noncompliance would be punished by forfeiture of a day's rations or additional work for a first offence and 'corporal chastisement' for a second offence.¹²⁶

Other Australian examples include the *St Peter's College Act 1849* (SA), which required a number of religious observances including that the school day always be commenced by the reading of a prayer 'at which all the Pupils shall be expected reverently to assist' and by a reading of scripture 'in the authorised version of the Church of England'.¹²⁷ The school day was to be closed by another reading of a prayer, which 'duty shall be always performed by the Head or Second Master'.¹²⁸ Students were also required to attend religious services on 'the Lord's Day, Good Friday, and Christmas Day'.¹²⁹ In addition, the Act required that there be at least one weekly lecture 'on the peculiar principles and formularies of the Church of England', attendance at which was compulsory for students from Anglican families.¹³⁰ An almost identical provision is found in the *Perth Church of England Collegiate School Ordinance 1865* (WA).¹³¹

2 Negative Impositions

Religious observances may also be imposed negatively. This is done by a law prohibiting activities and actions inconsistent with the desired religious observance. As Neale explained in his 1845 treatise,

prohibitions ... against working on holidays, were intended to keep away from the sacred seasons certain actions considered to be inconsistent with the due observance of them; but that observance did not consist in the not doing what by those laws was forbidden to be done, but in doing something else,

¹²⁴ Ibid 138.

¹²⁵ Grocott (n 101) 207, quoting James Bonwick, *First Twenty Years of Australia: A History Founded on Official Documents* (Sampson Low, Marston, Searle, & Rivington, 1882) 232.

¹²⁶ Grocott (n 101) 207.

¹²⁷ *St Peter's College Act 1849* (SA) sch 1 s 15.

¹²⁸ Ibid.

¹²⁹ Ibid sch 1 s 30.

¹³⁰ Ibid sch 1 s 33.

¹³¹ *Perth Church of England Collegiate School Ordinance 1865* (WA) sch 1 s 33.

which, it was thought, would not be done, if the forbidden acts were commonly practised.¹³²

A law imposing a religious observance negatively ‘attempts to remove hindrances to its due observance’.¹³³

In the *DOGS Case*, Stephen J made some ambiguous obiter remarks, which could be read as contradicting the idea that religious observances may be imposed negatively. He wrote that ‘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’.¹³⁴ If by these remarks Stephen J means that it is necessary to look at the purpose of the law in order to determine whether the observance involved is religious in character or not, then the analysis above about determining whether an observance is a religious observance shows that these remarks are not inaccurate. However, if by these remarks Stephen J means that a law that prohibits activities and actions is inconsistent with the desired religious observance, then these remarks cannot be accepted. They contradict not only the clear purpose the Federal Convention was pursuing in adopting s 116, but also centuries of legislative practice and legal understanding.

During the reign of Charles I, the *Sunday Observance Act 1625* provided for ‘the holy keeping of the Lord’s day, [which] is a principal Part of the true Service of God’.¹³⁵ It prohibited people from attending meetings or assemblies of people for any sport or pastime outside their parish and prohibited ‘Bear-baiting, Bull-baiting, Interludes, [and] Common Plays’ within their own parishes.¹³⁶ The *Sunday Observance Act 1627* prohibited ‘Carters, Wain-men, Butchers, and Drovers of cattell’ from travelling on Sundays.¹³⁷ In 1644, during the Interregnum,¹³⁸ *An Ordinance for the Better Observation of the Lords-Day* was issued, which obliged individuals to ‘apply themselves to the sanctification of the [Lord’s Day] by exercising themselves thereon, in the

¹³² Neale (n 62) 274–5.

¹³³ *Ibid* 276.

¹³⁴ *DOGS Case* (n 25) 609 (federal funding of religious schools for educational purposes does not breach the establishment clause of s 116).

¹³⁵ *Sunday Observance Act 1625*, 1 Car 1, c 1.

¹³⁶ *Ibid*.

¹³⁷ *Sunday Observance Act 1627*, 3 Car 1, c 1(2).

¹³⁸ See, eg, Patrick Little and David L Smith, *Parliaments and Politics during the Cromwellian Protectorate* (Cambridge University Press, 2007).

duties of Piety and true Religion, publickly and privately.¹³⁹ For this purpose, the Ordinance also prohibited worldly labour, travel, the commercial sale of wares and participation in any recreations or pastimes on Sundays.¹⁴⁰ In 1649, *An Act for Setting Apart a Day of Solemn Fasting and Humiliation, and Repealing the Former Monethly Fast* provided that 3 and 17 May 1649 'be set apart and appointed for a publique and solemn day of Fasting and Humiliation'.¹⁴¹ The Act also authorised public officers 'to restrain all persons from the publique doing of any work, or using any exercise of a worldly nature' on those days.¹⁴² *An Act for the Better Observation of the Lords-Day, Days of Thanks-giving and Humiliation* was enacted in 1650 and expanded the list of activities from which people must abstain in order to properly observe the various holy days imposed by other laws.¹⁴³ In 1657, *An Act for the Better Observation of the Lords Day* expanded the list further.¹⁴⁴

There are also Australian colonial examples of laws imposing religious observances negatively. When Philip Gidley King became Governor of New South Wales, he ordered the imprisonment of 'any person seen loitering in Sydney or Parramatta during church hours'.¹⁴⁵ The Preamble to the *Sunday Shooting Prohibition Act 1841* (NSW) described the 'practice of shooting on the Lord's Day at pigeon matches' as prevailing 'to the manifest dishonor of religion'.¹⁴⁶ The Act criminalised the practice.¹⁴⁷ In Victoria, the *Police Offences Statute 1865* (Vic) also prohibited pigeon shooting on Sundays.¹⁴⁸ The *Bakers and Millers Act 1890* (Vic) provided that '[n]o person exercising or

¹³⁹ *An Ordinance for the Better Observation of the Lords-Day 1644*, 20 Car 1 in CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642–1660* (His Majesty's Stationery Office, 1911) vol 1, 420.

¹⁴⁰ *Ibid* 420–2.

¹⁴¹ *An Act for Setting Apart a Day of Solemn Fasting and Humiliation, and Repealing the Former Monethly Fast 1649*, 1 Car 2, in CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642–1660* (His Majesty's Stationery Office, 1911) vol 2, 79, 80.

¹⁴² *Ibid* 81.

¹⁴³ *An Act for the Better Observation of the Lords-Day, Days of Thanks-giving and Humiliation 1650*, 2 Car 2 in CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642–1660* (His Majesty's Stationery Office, 1911) vol 2, 383–7.

¹⁴⁴ *An Act for the Better Observation of the Lords Day 1657*, 9 Car 2 in CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642–1660* (His Majesty's Stationery Office, 1911) vol 2, 1162.

¹⁴⁵ Grocott (n 101) 210.

¹⁴⁶ *Sunday Shooting Prohibition Act 1841* (NSW) Preamble.

¹⁴⁷ *Ibid* s 1.

¹⁴⁸ *Police Offences Statute 1865* (Vic) s 30.

employed in the trade or calling of a baker shall on the Lord's Day commonly called Sunday or any part thereof make or bake any bread rolls or cakes of any sort or kind'.¹⁴⁹ Similarly, the *Pawnbrokers Act 1890* (Vic) prohibited pawnbrokers from trading on Christmas Day, Good Friday and Sundays.¹⁵⁰ An 1844 statute in Western Australia made it a condition of a licence to keep a boarding house that the licensee 'not allow any spirituous or fermented liquors to be drunk in or conveyed out of his or her premises during the usual hours of morning and afternoon Divine Service in the nearest Church or Chapel on Sunday, Christmas Day, or Good Friday'.¹⁵¹

Given the purpose and effect of these laws, there is a sufficient connection between the law and the religious observance to permit such a law to be characterised as a law 'for imposing any religious observance'. Such laws have always been understood as imposing religious observances. In 1890, the Full Court of the Supreme Court of New South Wales described religiously motivated Sunday closing laws as 'passed to enforce the due observance of Sunday'.¹⁵² Similarly, the Sydney newspaper *The Sunday Times* of 7 April 1901 editorialised that had the religious observances clause of s 116 of the *Constitution* been binding on the states,

the Sunday Observance laws [of New South Wales] would be a clear violation of that valuable safeguard, because the entire context of the sections of the Act under which the Sunday trading prosecutions are taken clearly show it is to have a religious and not a secular object.¹⁵³

B *Direct and Indirect Impositions*

The second taxonomy of imposition involves the distinction between direct and indirect impositions. With a direct imposition, the person to conform or participate in the religious observance is the object of the legal command. For example, the *Observance of 5th November Act 1605*, described in its long title as '*An Act for a Publick Thanksgiving to Almighty God Every Year on the Fifth Day of November*', involved a direct imposition of a religious observance. The Act required all individuals within the realm to attend, and remain for the full

¹⁴⁹ *Bakers and Millers Act 1890* (Vic) s 21.

¹⁵⁰ *Pawnbrokers Act 1890* (Vic) s 33.

¹⁵¹ *An Act to Authorise the Keepers of Boarding Houses to Sell Spirituous and Fermented Liquors by Retail under Special Regulations 1844* (WA) sch 1.

¹⁵² Walker (n 105) 101–2 (emphasis added).

¹⁵³ 'The Sunday Observance Laws', *The Sunday Times* (Sydney, 7 April 1901) 6.

duration of, a religious service at their local church on 5 November each year to commemorate James I surviving the failed assassination attempt in the 1605 Gunpowder Plot.¹⁵⁴

There are two types of indirect imposition. The first type of indirect imposition involves a direct imposition on the object of command aimed at the conformity of, or participation in the religious observance by, another person or group of people. The several Acts of Uniformity provide examples of this type of indirect imposition of religious observances. Those Acts imposed a form of religious worship on ordinary congregation members even though ordinary congregation members were not the object of the statutory command. By commanding all ministers of religion to use certain forms of religious ritual, the necessary and inevitable result was that those forms of ritual were imposed on ordinary congregation members. Indeed, the opening recital of the Acts of Uniformity expressly stated this as one of their purposes. The legislation was enacted 'to the Intent that every Person within this Realm may certainly know the Rule to which he is to conform in Publick Worship'.¹⁵⁵ The Acts imposed a religious observance directly on ministers of religion and indirectly on congregation members.

The second way in which a religious observance may be imposed indirectly is by a law authorising or facilitating some person or entity to impose a religious observance on others. The High Court appears to accept that such laws may be characterised as laws for imposing religious observances. Referring to the free exercise clause, but with reasoning equally applicable to the other clauses of s 116, Gaudron J said in *Kruger v Commonwealth*:

And the need to construe guarantees so that they are not circumvented by allowing to be done indirectly what cannot be done directly has the consequence that s 116 extends to provisions which authorise acts which prevent the free exercise of religion, not merely provisions which operate of their own force to prevent that exercise.¹⁵⁶

The legislative histories above provide a number of examples of laws authorising or facilitating the imposition of religious observances. For example, the *Popish Recusants Act 1605* imposed a penalty on any person keeping servants,

¹⁵⁴ *Observance of 5th November Act 1605*, 3 Jac 1, c 1.

¹⁵⁵ See, eg, *Act of Uniformity 1662*, 13 & 14 Car 2, c 4, s 2.

¹⁵⁶ *Kruger* (n 84) 132. Gageler J made a similar point in the context of a different restriction on power in *Cunningham* (n 90) 377 [58], explaining that a law that 'authorise[s] or effect[s] an acquisition of property' otherwise than on just terms is contrary to s 51(xxxi).

where those servants did not attend weekly Anglican church services.¹⁵⁷ The Act did not of its own force compel servants to attend church, but it nevertheless operated such that servants would be compelled to attend church. Similarly, the *Chimney Sweepers Act 1788*, enacted during the reign of George III, required a master chimney sweep to ‘require [his] Apprentice to attend the Publick Worship of God on the Sabbath Day.’¹⁵⁸ During the reign of Victoria, the *Public Schools Act 1868* empowered the governing body of each of the schools to which the Act applied¹⁵⁹ to make regulations ‘[w]ith respect to [a]ttendance at Divine Service’.¹⁶⁰

In Australia, the *Van Diemen’s Land Act for Apprenticing the Children of the Queen’s Orphan Schools in this Island 1838* required the master or mistress of any orphan indentured to them as an apprentice to ‘cause such apprentice to attend divine service when practicable at least once every Sunday’.¹⁶¹ The *University of Sydney Act 1850* (NSW) authorised the making of regulations ‘for securing the due attendance of the students for divine worship at such church or chapel’.¹⁶² In South Australia, the *Adelaide University Act 1874* (SA) similarly authorised the making of rules regulating residential colleges and boarding-houses ‘[p]rovided always, that no such statutes shall affect the religious observances or regulations enforced in such colleges, educational establishments, or boarding-houses’.¹⁶³ The *Sydney Grammar School Act 1854* (NSW) authorised the making of regulations ‘for securing the due attendance of the pupils for divine worship’.¹⁶⁴

Other Australian examples of laws authorising or facilitating the imposition of religious observances include the *Sydney Police Act 1833* (NSW). The Act contained a provision requiring the Justices of Peace appointed as Police Magistrates to ‘cause the Lord’s Day to be duly observed by all persons in [Sydney]’.¹⁶⁵ The *Police Offences Statute 1865* (Vic)¹⁶⁶ and *Police Ordinance*

¹⁵⁷ *Popish Recusants Act 1605* (n 120) s 23.

¹⁵⁸ *Chimney Sweepers Act 1788*, 28 Geo 3, c 48, sch 1.

¹⁵⁹ *Public Schools Act 1868*, 31 & 32 Vict, c 118, s 4. The term ‘public schools’ being used in the English sense of elite non-government schools. The Act applied to Eton, Winchester, Westminster, Charterhouse, Harrow, Rugby and Shrewsbury public schools.

¹⁶⁰ *Ibid* s 12(4).

¹⁶¹ *An Act for Apprenticing the Children of the Queen’s Orphan Schools in this Island 1838* (VDL) sch A.

¹⁶² *University of Sydney Act 1850* (NSW) s 20.

¹⁶³ *Adelaide University Act 1874* (SA) s 9.

¹⁶⁴ *Sydney Grammar School Act 1854* (NSW) s 13.

¹⁶⁵ *Sydney Police Act 1833* (NSW) s 10.

1844 (SA)¹⁶⁷ had similar provisions requiring local authorities to ‘cause Sunday to be duly observed’.

Gaudron J’s comment refers to ‘provisions which *authorise* acts which prevent the free exercise of religion.’¹⁶⁸ Gaudron J’s comment is not limited to provisions which *require* acts prohibiting the free exercise of religion (or, on the same logic, imposing religious observances). A law may authorise a person or entity to impose a religious observance without requiring that person to impose a religious observance. The logic of Gaudron J’s comment, the historical examples given above and the ordinary rules of characterisation which look to ‘the practical as well as the legal operation of the law’¹⁶⁹ require the conclusion that a law that facilitates rather than requires the imposition of religious observances by others may be characterised as a law ‘for imposing any religious observance’.

It was a law facilitating the imposition of a religious observance, rather than directly imposing a religious observance or requiring the imposition of a religious observance, that was the principal example given at the Federal Convention of the type of laws the religious observances clause was intended to prohibit. The American statute Higgins referred to concerning the closing of the Chicago Exhibition on Sundays did not actually prohibit the Exhibition opening on Sundays. The statute granted funds to the corporation organising the Exhibition on condition that the Exhibition not open on Sundays,¹⁷⁰ thereby facilitating an imposition by the organisers on those attending the event. The Exhibition organisers were legally free to refuse the funds. Nevertheless, the Federal Convention obviously understood this statute to be an example of a law ‘for imposing any religious observance’. In the contemporary

¹⁶⁶ *Police Offences Statute 1865* (Vic) s 30.

¹⁶⁷ *Police Ordinance 1844* (SA) s 16.

¹⁶⁸ *Kruger* (n 84) 132 (emphasis added).

¹⁶⁹ *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 [16], citing: *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 368–9; *Leask v Commonwealth* (1996) 187 CLR 579, 601–2, 621, 633–4.

¹⁷⁰ *Act of 5 August 1892*, ch 381, § 4, 27 Stat 389, 390 (1892): ‘That it is hereby declared that all appropriations herein made for, or pertaining to, the World’s Columbian Exposition are made upon the condition that the said Exposition shall not be opened to the public on the first day of the week, commonly called Sunday; and if the said appropriations be accepted by the corporation of the State of Illinois, known as the World’s Columbian Exposition, upon that condition, it shall be, and it is hereby, made the duty of the World’s Columbian Commission, created by the act of Congress of April twenty fifth, eighteen hundred and ninety, to make such rules or modification of the rules of said corporation as shall require the closing of the Exposition on the said first day of the week commonly called Sunday.’

language of characterisation, there was a substantial connection between the law and the imposition of a religious observance.

Where the connection between a law and the imposition of a religious observance is ‘insubstantial, tenuous or distant’¹⁷¹ the law will not be capable of answering the description of a law ‘for imposing any religious observance’. An example recently came before the New South Wales Court of Appeal. In *Hoxton Park Residents Action Group Inc v Liverpool City Council*, a community organisation argued that Commonwealth legislation providing for funding of private schools was, in its application to a particular Islamic school in suburban Sydney, a law for imposing religious observances.¹⁷² The general argument was that since the school imposed religious observances on its students and the Commonwealth funding enabled the school to operate, the Commonwealth law had the effect of facilitating the school’s imposition of religious observances on its students. It followed, so the argument went, that the Commonwealth law answered the description of a law for imposing a religious observance. The Court of Appeal rejected that argument, finding that there was ‘no basis for either Act to be characterised as a law for imposing religious observance’.¹⁷³ The case is an instance of the connection between a law and the imposition of religious observances being insubstantial, tenuous or distant. A similar analysis would apply to any suggestion that Commonwealth welfare payments to parents to assist with the costs of raising a child facilitate the imposition of religious observances simply because, for example, a parent might require their child to say grace before a meal purchased with money sourced from the Commonwealth. The ordinary rules of characterisation limit the scope of the concept of indirect imposition.

VII CONCLUSION

In the *Jehovah’s Witnesses Case*, about the free exercise clause of s 116, Latham CJ commented generally about s 116 of the *Australian Constitution*. He said:

The prohibition in s 116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion. No Federal law can

¹⁷¹ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 79.

¹⁷² (2016) 310 FLR 193 (*Hoxton Park Residents (Appeal)*). An application for special leave to appeal to the High Court was refused: *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2017] HCASL 60.

¹⁷³ *Hoxton Park Residents (Appeal)* (n 172) 222 [135].

impose any religious observance. Defaults in the performance of religious duties are not to be corrected by Federal law — *Deorum injuriae Diis curae* [Injuries to the gods will be remedied by the gods]. Section 116 proclaims not only the principle of toleration of all religions, but also the principle of toleration of absence of religion.¹⁷⁴

The principle to which Latham CJ referred came to have general elite support in Australia well after the arrival of the First Fleet in 1788. Indeed, that principle was not necessarily generally accepted at the time of Federation, as the religious observances laws in force in the Australian colonies demonstrated. Moreover, at the time the *Australian Constitution* was being drafted, serious efforts were underway to ensure that the Commonwealth would be empowered to enforce the due observance of religion. Those efforts failed due partly to the efforts of a minority religious group. The result of that failure is the religious observances clause of s 116.

There has only been one occasion when the High Court has been asked to decide a question concerning the religious observances clause. *R v Winneke; Ex parte Gallagher* concerned an issue of inconsistency between Commonwealth and state legislation governing Royal Commissions which provided inconsistent penalties for failing to answer questions in the context of a joint Commonwealth-state Royal Commission.¹⁷⁵ Only Murphy J reached the religious observances clause issue. With short reasoning, Murphy J considered that provisions of the *Royal Commissions Act 1902* (Cth), which imposed an obligation on witnesses appearing before Royal Commissions to take an oath unless they stated conscientious objections for declining that course of action were contrary to the religious observances and free exercise clauses of s 116. The analysis in this article shows that Murphy J's conclusion that '[n]o law of the Commonwealth may compel a person to take an oath, whether his objections are conscientious or not' is correct.¹⁷⁶ An oath is a religious observance because it has an inherent religious element to it and the compulsion involved in the impugned legislation amounts to a positive and direct imposition. The issue is no longer live given the legislation now provides for a non-religious affirmation.¹⁷⁷

This article has offered a detailed examination of the meaning of the religious observances clause. It is worth concluding by noting that the religious

¹⁷⁴ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 123.

¹⁷⁵ (1982) 152 CLR 211.

¹⁷⁶ *Ibid* 229.

¹⁷⁷ *Royal Commissions Act 1902* (Cth) s 2(3).

observances clause and the principle underlying it may have a broader operation than the doctrinal analysis in this article has outlined. This is because s 116 has been interpreted to give rise to principles of public policy that inform statutory interpretation generally. In *Canterbury Municipal Council v Moslem Alawy Society Ltd*, the question for the New South Wales Court of Appeal was the meaning of the expression ‘place of public worship’ in local planning regulations.¹⁷⁸ McHugh J, with whom Priestley JA agreed,¹⁷⁹ identified a principle of religious equality underlying s 116 generally¹⁸⁰ and held that where a statutory expression was capable of a construction consistent with that principle that construction should be preferred.¹⁸¹ McHugh J interpreted the expression ‘place of public worship’ in this manner. Even though s 116 does not bind the states, its broad underlying principles and the public policy reflected in its terms had an impact on the operation of a state legislative regime. The same mode of reasoning is equally applicable to the principles underlying each individual clause of s 116. The public policy reflected in the terms of the religious observances clause may have a legal effect beyond the doctrinal operation of the clause itself.

¹⁷⁸ (1985) 1 NSWLR 525.

¹⁷⁹ *Ibid* 533.

¹⁸⁰ *Ibid* 544, discussing *DOGS Case* (n 25) 617.

¹⁸¹ *Ibid* 544.