= Section 116 of the Constitution of Australia =

Section 116 of the Constitution of Australia precludes the Commonwealth of Australia (i.e. , the federal parliament) from making laws for establishing any religion , imposing any religious observance , or prohibiting the free exercise of any religion . Section 116 also provides that no religious test shall be required as a qualification for any office or public trust under the Commonwealth . The product of a compromise in the pre @-@ Federation constitutional conventions , Section 116 is based on similar provisions in the United States Constitution . However , Section 116 is more narrowly drafted than its US counterpart , and does not preclude the states of Australia from making such laws .

Section 116 has been interpreted narrowly by the High Court of Australia : while the definition of " religion " adopted by the court is broad and flexible , the scope of the protection of religions is circumscribed . The result of the court 's approach has been that no court has ever ruled a law to be in contravention of Section 116 , and the provision has played only a minor role in Australian constitutional history . Among the laws that the High Court has ruled not to be in contravention of Section 116 are laws that provided government funding to religious schools , that authorised the dissolution of a branch of the Jehovah 's Witnesses , and that enabled the forcible removal of Indigenous Australian children from their families .

Federal Governments have twice proposed the amendment of Section 116 , principally to apply its provisions to laws made by the states . On each occasion ? in 1944 and 1988 ? the proposal failed in a referendum .

= = Text of the provision and location in the Constitution = =

Section 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 .

Section 116 has four limbs . The first three limbs prohibit the Commonwealth from making certain laws : laws " for establishing any religion " ; laws " for imposing any religious observance " ; and laws " for prohibiting the free exercise of any religion " . The fourth limb proscribes the imposition of religious tests to qualify for any Commonwealth office or public trust . Only the " establishing religion " and " prohibiting free exercise " limbs have been the subject of cases before the High Court .

The section sits in Chapter V of the Constitution , which deals with the states of Australia . However , Section 116 does not apply to the states . Each state has its own constitution , and only Tasmania 's has a provision similar to Section 116 . Commentators attribute the erroneous location of Section 116 to a drafting oversight caused by the weariness of the committee charged with finalising the draft Constitution .

= = Origins = =

The Constitution was the product of a series of constitutional conventions in the 1890s . The issues of religious freedom and secularism were not prominent in the convention debates , which focused on the economic and legislative powers of the proposed Commonwealth parliament . The first draft of Section 116 , approved by the Melbourne Convention of 1891 , would have prohibited the states from passing laws prohibiting the free exercise of religion . The Commonwealth was not mentioned because it was assumed that the Commonwealth parliament would have no power to make such laws . At the Melbourne Convention of 1897 , Victorian delegate H. B. Higgins expressed concern about this assumption and moved to expand the provision to cover the Commonwealth as well as the states . The amendment was initially defeated , but Higgins later succeeded in having the eventual version of Section 116 adopted by the convention in a 25 ? 16 vote . Higgins feared opposition to the provision from convention delegates concerned that the provision would impede the states ' legislative powers , so the version passed by the convention did not mention the states .

The proposed inclusion of Section 116 in the Constitution was the subject of some dissent in the 1897 Melbourne Convention and the final convention in 1898 . Protestant churches in New South Wales argued that the Constitution should state that divine providence is the " ultimate source of law " , while convention delegates John Quick and Patrick Glynn moved to have God explicitly recognised in the Constitution . The Seventh @-@ day Adventist Church campaigned for a strict separation of church and state , being concerned that the Commonwealth might prohibit its members from working on Sundays . Both sides to some extent achieved their objectives : Section 116 was approved by the final convention , while Glynn successfully moved for the symbolic mention of " Almighty God " in the preamble to the British statute that was to contain the Constitution . The Constitution was then approved by popular referendums in each of the six colonies and took effect on 1 January 1901 (the colonies thus became the states of Australia) .

Section 116 reflects two provisions of the United States Constitution : the First Amendment , which prohibits the making of laws for the establishment of religion and guarantees the free exercise of religion ; and Article VI , Section 3 , which prohibits the imposition of religious tests for public offices . Academic Clifford L. Pannam , writing in 1963 , called Section 116 a " fairly blatant piece of transcription " of its US counterparts . However , in practice , Section 116 has been interpreted more narrowly than the US provisions .

= = Judicial consideration = =

The High Court 's consideration of Section 116 has generally been limited to three areas : the definition of " religion " ; the meaning of " law for establishing any religion " ; and the meaning of " law for prohibiting the free exercise of any religion " . The two other elements of the provision ? the clauses prohibiting the Commonwealth from imposing of religious observance and from prescribing religious tests for public offices ? have not been the subject of any cases before the court . The court has never ruled a legislative provision to be in contravention of Section 116 . As a result of the court 's narrow and literal interpretation of Section 116 , the provision has played a minor role in Australian constitutional history .

= = = Meaning of " religion " = = =

A threshold test considered by courts applying Section 116 is whether a belief seeking constitutional protection is a " religion " . The leading authority on the question is the 1983 judgment of the High Court in Church of the New Faith v Commissioner for Pay @-@ Roll Tax (Vic) . The court found that Scientology was a religion , despite some justices commenting that its practices were " impenetrably obscure " . In reaching this finding , the court argued that the definition of religion needed to be flexible but should recognise the need to be sceptical of disingenous claims of religious practice . Justices Anthony Mason and Gerard Brennan held :

... the criteria of religion [are] twofold : first , belief in a supernatural , Being , Thing or Principle ; and second , the acceptance of canons of conduct in order to give effect to that belief .

Justices Ronald Wilson and William Deane were less prescriptive , setting out five " indicia " of a religion : a belief in the supernatural ; a belief in ideas relating to " man 's nature and place in the universe " ; the adherence to particular standards , codes of conduct or practices by those who hold the ideas ; the existence of an identifiable group of believers , even if not a formal organisation ; and the opinion of the believers that what they believe in constitutes a religion .

= = = " Establishing any religion " = = =

The courts have taken a narrow approach to the interpretation of the prohibition against " establishing any religion " , deriving from the 1981 case of Attorney @-@ General (Vic) (Ex rel Black) v Commonwealth (the DOGS case) , in which the High Court held that Commonwealth funding of religious schools did not contravene Section 116 . Chief Justice Garfield Barwick held that a law would only contravene the provision if establishing a religion was its " express and single

purpose " , while Justice Harry Gibbs argued that the section only prohibits the establishment of an official state religion . Each justice in the majority contrasted Section 116 with its equivalent in the US Constitution to find that Section 116 is narrower . The court noted that the US Constitution prohibits laws respecting " establishment of religion " generally , whereas the prohibition in Section 116 is against the establishment of " any religion " : this meant that Section 116 did not encompass laws that benefit religions generally ; it only proscribed laws that established a particular religion . The approach of the High Court to the establishment limb of Section 116 thus largely reflects the views expressed by Constitutional scholars John Quick and Robert Garran in 1901 , that establishment means " the erection and recognition of a State Church , or the concession of special favours , titles , and advantages to one church which are denied to others . "

= = = " Prohibiting the free exercise of any religion " = = =

The protection of the free exercise of religion was also interpreted narrowly in early High Court judgments . In 1912 , the court in Krygger v Williams held that a person could not object to compulsory military service on the ground of religious belief . The court considered that Section 116 would only protect religious observance from government interference ; it would not permit a person to be excused from a legal obligation merely because the obligation conflicted with his or her religious beliefs . In a 1929 case , Higgins , then a Justice of the High Court , suggested (as obiter dictum) that a person could lawfully object to compulsory voting on the grounds of religious belief . However , in 1943 , the court continued the narrow approach it took in Krygger v Williams , upholding war @-@ time regulations that caused the Adelaide branch of the Jehovah 's Witnesses to be dissolved and have its property acquired by the Commonwealth government . The government had declared the branch to be an organisation whose activities were " prejudicial to the defence of the Commonwealth " : one of the branch 's professed beliefs was that the government was an " organ of Satan " . Chief Justice John Latham held that the Constitution permitted the court to " reconcile religious freedom with ordered government " .

In a 1997 case known as the Stolen Generations Case , the court upheld an ordinance issued in 1918 that enabled the forcible removal of Indigenous Australian children from their families . The court reasoned that the purpose of the ordinance was not to prohibit the free exercise of religion even though the ordinance may have had that effect . Peter Edge , an academic specialising in religion and the law , thus concludes that Section 116 will only " prevent legislation that has a prohibited purpose , rather than a prohibited effect " . Delivering her judgment , Justice Mary Gaudron denied that the provision confers rights upon individuals , commenting that it :

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

= = Commentary = =

When the Constitution took effect in 1901 , Quick and Garran argued that Section 116 was redundant as the Commonwealth had not been given the legislative power under Section 51 to establish a religion or prohibit its free exercise . In 1963 , Pannam wrote that the provision was regarded " by all as having little practical value " . Pannam considered the provision would only become significant if the High Court held that it applied to laws made by governments of the territories .

Contemporary constitutional scholar George Williams criticises the court 's literal interpretation of the provision and others in the Constitution , saying the court has " transformed the Constitution into a wasteland of civil liberties " . Williams argues that as an " express guarantee of personal freedom " , the provision should be interpreted broadly and promote " individual liberty over the arbitrary exercise of legislative and executive power " . Academics Gonzalo Villalta Puig and Steven Tudor have called for the court to broaden Section 116 by finding in it an implied right to the freedom of

thought and conscience . In their view most Australians correctly " believe that the Constitution protects the right to freedom of thought and conscience just like it protects other civil and political freedoms " , and that the court should give effect to that belief . They argue there is precedent for the court finding implied constitutional rights , such as the 1992 case of Australian Capital Television Pty Ltd v Commonwealth , where the court found that the Constitution guaranteed the freedom of political communication .

In defence of Section 116 and the High Court 's interpretation of it , Joshua Puls argues that the provision is appropriately limited , suggesting that a rigid " wall of separation " between religion and the state is undesirable , and that the stronger Constitutional protection of religion in the United States has become overly politicised . Fellow academics Jennifer Clarke , Patrick Keyzer and James Stellios argue that the court 's narrow interpretation of the provision is consistent with the intention of the Constitution 's drafters , who never intended for it to be a protection of individual rights , while Kevin Booker and Arthur Glass say the provision has " symbolic value " . Booker and Glass defend the court 's interpretation of the provision and other Constitutional rights , saying " the High Court can only work with the constitutional provisions before it " .

= = Referendums = =

Federal governments have twice proposed referendums to expand the scope of Section 116 : in 1944 and in 1988 . In 1944 , John Curtin 's Labor government put a package of measures , known as the " Fourteen Powers referendum " , to the Australian public . The purpose of the package was mainly to widen the Commonwealth 's legislative powers for the purposes of post @-@ war reconstruction . The widening of powers would sunset after five years . One of the measures in the package was to extend Section 116 so that it prohibited the states , not merely the Commonwealth , from making the laws proscribed by the section . The package 's 14 measures ? which included diverse matters such as powers to provide family allowances and legislate for " national health " ? were bound together in a single question . H. V. Evatt , the Labor Attorney @-@ General , argued that freedom of religion was " fundamental to the whole idea of democracy " and that the suppression of civil rights by dictatorships in Europe demonstrated the need for Australia to have a strong Constitutional guarantee of the freedom . The conservative Coalition , then in opposition and led by Robert Menzies , campaigned against the package . Arthur Fadden , leader of the Country Party (the junior member of the Coalition) , claimed a " yes " vote would permit the government to implement a " policy of socialisation " . The package was rejected : the national " yes " vote was less than 46 per cent , and there was majority support for the package only in South Australia and Western Australia . One reason for the rejection was the bundling of multiple controversial proposals into one question : voters could not vote in favour of the measures they supported and against those they opposed , giving them reason to vote against the entire package .

A similar proposal to amend Section 116 was put to the Australian people in a referendum in 1988 . The referendum contained four questions , the last of which sought to amend Section 116 and other constitutional " rights and freedoms " . Again , the proposal was initiated by a Labor government (under Bob Hawke) ; again , the proposal was opposed by the Coalition ; and again , multiple controversial proposals were bound into one question , being " to alter the Constitution to extend the right to trial by jury , to extend freedom of religion , and to ensure fair terms for persons whose property is acquired by any government . " The proposal in respect of Section 116 was to extend its operation to the states , and expand the protection to cover any government act (not just legislation) that established a religion or prohibited its free exercise . Some church officials objected to the proposal , fearing that funding of religious schools by the states could become unlawful . The question failed to pass , being opposed by a majority of voters in each of the states . The 70 to 30 per cent nationwide vote against the proposal was the largest margin by which a proposal to amend the Constitution had ever been defeated at a referendum . Williams attributes the failure of the proposal mainly to the absence of bipartisan support for it , highlighting the " determined and effective " opposition of senior Coalition politician Peter Reith . Williams also points to the " notorious reluctance " of Australians to support Constitutional referendums : of the 44 proposals to amend the

Constitution , only eight have succeeded .

= = = Cited academic texts = = =