The changing relationship between the State and religion in Australia: 1788 to modern Australia. What has changed?, What is the same? And what does that tell us?

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This thesis is presented for the degree of Doctor of Philosophy of The University of Western Australia

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2013
Acknowledgments

In writing any acknowledgments there is always the danger of leaving someone out. In writing this thesis there have been so many people who have assisted in some way, both big and small, acknowledged and unacknowledged. However it is incumbent upon me to publicly thank those who have assisted me the most in this journey I have undertaken.

First and foremost I must thank my husband, Calvin, who has been my rock and support. His unending patience in listening to me pontificate on my research, often at great length, has always been appreciated, even when I wasn’t making much sense.

Second I must thank my supervisor Associate Professor Daniel Stepniak. From the first day I hesitantly knocked on his door to ask if he would consider being my supervisor to the day I wrote my last word, edited my last footnote and printed my last page he has been encouraging and supportive of my research. He has never failed to answer those dumb questions we all ask and to humor my rants and exploration of side tracks, before gently bringing me back to my main research task.

Third I must thank my parents, Ian and Wendy Mabey, both of whom have always encouraged my studies and allowed me to be whatever I wanted. In particular I must thank my mother for her unending patience in assisting me with spelling throughout my education. In a family of dyslexics she is a shining star of good spelling practices. I must also thank my father for being the inspiration for my research. As an Anglican priest it was his engagement with both the world of religion and the secular world beyond which inspired me to first ask the questions which led to this research.

I also extend my thanks to my colleagues at the University of Western Australia (UWA). In particular I extend my thanks to the two Deans during my time at UWA, Winthrop Professor Stuart Kaye and Professor Erika Techera. Along with my colleagues they have never failed to encourage me and give me a little push when I needed it. Special thanks must also go to Winthrop Professor Holly Cullen for her guidance and assistance, especially during the last few frantic months.

Last I must acknowledge the editing support received. My main support was received from Elite Editing and Tessa Burkitt. Editorial intervention was restricted to Standards D and E of the *Australian Standards for Editing Practice*. Editing was organised through UniAccess at UWA. In addition I must thank my friends, family and colleagues who provided last minute spell checks. In particular I would like to thank Wendy Mabey, Ernest Chua, Peta-Jane Hogg, Sarah Murray, Tamara Tulich and Madeleine Hartley.
Abstract

The State and religion interact in a myriad of ways, one of them being their legal relationship. The purpose of this thesis is to both identify and analyse changes in this relationship in Australia over time. In identifying and analysing these changes the thesis demonstrates that changes in the legal relationship are not isolated incidents. Instead they are the result of individual changes, linked together in a continuum stretching back to the arrival of the first fleet in 1788 and forward into modern Australia. Previous work in this area has focused on either individual changes or on specific time periods. This approach misses broader patterns in the legal relationship between the State and religion because it does not link together these individual events and time periods. This thesis begins to remedy this oversight. When the legal relationship is viewed across Australia’s entire 225 years history these patterns emerge.

Three cases studies demonstrate this continuum of change; State restrictions on religion, religion in education and State funding of religion. Each of the three case studies has their own unique pattern of change. First, State restrictions on religion shift from overt restrictions on entire religions towards more covert restrictions which are couched in neutral language and which target particular practices rather than the religion as a whole. Second, the pattern of religion in education is one of two journeys. In the 19th century the picture is one of a gradual reduction in the involvement of religion in education resulting in the establishment of a Sate runs system of secular education and the removal of State funding to religious schools. In the second half of the 20th century this situation is reversed with a gradual increase in religious involvement in education culminating with the creation of the National school Chaplaincy program (NSCP) in modern Australia. Third, the State funding of religion is a tug of war for control of both the quantum of funding and how that funding may be spent.

While these patterns are interesting of themselves the thesis goes further. It also identifies a macro pattern that can be seen across all three case studies. This is a pattern of re-occurrence. In all three case studies there are periods of apparent stability in which there is little or no change in the legal relationship between the State and religion. However these periods of stability do not last forever. With changes in the religious composition of Australia d in the State itself the issues of how the State and religion should interact in the various case studies re-emerges. With this re-emergence comes legal change in the relationship. The question of how the State and religion should interact is so fundamental that it cannot be settled once and for all. Instead it is re-negotiated as both the state and religion themselves change over time.
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Chapter One - Introduction

1.1 Introduction

Modern Australia is a secular nation, with no State church and arguably a very high level of both religious freedom and diversity. The State and religion are two very separate entities, but this does not mean that they do not interact. In recent years there have been a number of instances where the State has interacted in some way with religion. For example, religious based political parties such as the Christian Democrats and Family First have run for and been successful in winning seats at both State and Federal elections. There have been a number of high profile court cases such as Commissioner of Taxation (Cth) v Word Investments Ltd, Williams v The Commonwealth, Monis v The Queen and Attorney General for the State of South Australia v Corporation of the City of Adelaide which have involved some element of interaction between the State and religion. Growing concern over sexual abuse in the Roman Catholic Church has led to three governmental inquires. These examples are just a taste of the myriad ways in which the State and religion interact in modern Australia.

Given this relatively high level of interaction between the State and religion one question that needs to be answered is, are these interactions the product of a one off set of circumstances or are they the product of an on-going pattern of interactions throughout Australia’s history?

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1 See 2.5.
7 [2013] HCA 3.
Interactions between the State and religion in Australia are not just a modern phenomenon. Examples of this interaction can be found across Australia’s history. These interactions have been examined and analysed by a number of authors. However this examination has tended to be fragmented. Rather than examining the interaction across Australia’s history, previous academic work in this area has focused on specific time periods, events or issues. For example Marion Maddox’s God Under Howard focuses on the interaction of the Howard Government with religion. Similarly Richard Ely’s Unto God and Caesar focus is on the period 1891 to 1906, with a particular focus on religion and federation. Even John Strandbroke Gregory’s Church and State, which covers the period 1788 to 1972, is not comprehensive in that the focus is on Victoria since its separation from New South Wales rather than on Australia as a whole. More common are works dealing with specific issues or events such as David Marr’s The High Price of Heaven, Frank Brennan’s Acting on Conscience, Don Smart’s Federal Aid to Australian Schools and Jean Ely’s Contempt of Court. While some of these works deal with the relationship over a significant period of time most do not, and all are limited to the particular issues or event they are dealing with. As a result they cannot, by themselves, answer the question of whether individual interactions are the product of one off circumstances or part of a wider pattern. For that question to be fully answered this work must first be synthesised bringing these fragmented pieces of the picture together to form a coherent whole. It is this task that this thesis has undertaken.

In addition to scholarship which specifically addresses the interaction between the State and religion there are numerous works which look at the history of Australia generally or at issues, events or religion in Australia specifically. While these works do not deal specifically with the issue of the interaction between the State and religion they do touch upon this issue, where it is relevant to their more general discussion. Tom

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13 Frank Brennan, Acting on Conscience How Can We Responsibly Mix Law, Religion and Politics (University of Queensland Press, 2007).
14 Smart, Don, ‘Federal Aid to Australian Schools’ (University of Queensland Press, 1978).
15 Jean Ely, Contempt of Court: Unofficial Voices From the DOGS Australian High Court Case 1981 (Dissenters Press, 2010).
Frame’s *Losing My Religion* is an example of scholarship of this type. His book focuses on the issues of changing levels of religiosity and religious affiliation in Australia. In doing so he touches upon Government policies towards religion and therefore the interaction between the State and religion.\(^{16}\) There are also numerous works analysing the development of Colonial, State and Federal education policies such as Alan Barcan’s *History of Australian Education*,\(^{17}\) John Cleverley’s *The First Generation*,\(^{18}\) Albert Austin’s *Australian Education 1788 – 1900*\(^{19}\) and DA Jeck’s *Influences in Australian Education*.\(^{20}\) In analysing education in Australia more generally these authors touch upon the interaction of the State and religion in relation to education specifically. Works dealing with the history of religion in Australia generally or specific religious denominations also touch upon the interaction between the State and religion as part of their more general discussions. Examples include Ian Breward’s *A History of the Australian Churches*\(^{21}\), John Barrett’s *That Better Country*,\(^{22}\) Timothy Suttor’s *Hierarchy and Democracy in Australia 1788 – 1870*\(^{23}\) and Ross Border’s *Church and State in Australia 1788 – 1872* which, despite its title, deals specifically with the constitutional development of the Church of England rather than the issue of the wider relationship between the State and religion.\(^{24}\) The thesis draws on these works in addition to material which deals specifically with the interaction between the State and religion to fill the gaps left by the fragmented nature of the scholarship in this area.

Even when these two areas of scholarship are synthesised gaps still remain in the overall picture of the interaction of the State and religion across Australia’s history. This is particularly evident in relation to both the earliest and the most recent interactions of the State and religion. In order to fill these remaining gaps the thesis has drawn on a third source, primary material. In particular it has drawn upon cases law,

\(^{19}\) Albert Gordon Austin, *Australian Education 1788 – 1900 Church, State and Public Education in Colonial Australia* (Pitman, 1961).
\(^{20}\) DA Jecks, *Influences in Australian Education* (Carrol’s Pty Ltd, Perth, 1974).
Hansard and parliamentary reports. Extensive use has also been made of the *Historical Records of Australia* (HRA) and the *Historical Records of New South Wales* (HRNSW). The use of primary material has also gone beyond the filling of gaps. In particular it has been used to provide additional context to interactions already dealt with in the existing scholarship and to provide new insights into the interaction between the State and religion across Australia’s history since European colonisation.

When these three sources are brought together a coherent picture of the changing relationship between the State and religion in Australia emerges. In addition synthesising the existing materials in this way enables patterns in that changing relationship to emerge.

### 1.2 Structure and Arguments

The starting point for the research contained in this thesis was the hypothesis that changes in the legal relationship between the State and religion were not just one off changes attributable only to factors in the relevant time and place. Instead I hypothesised that such changes were the result of an ongoing relationship and more importantly changes in that relationship over the course of Australian history. If changes in the relationship between the State and religion are the product of one off circumstances then each change must be dealt with individually and no deeper pattern can be discerned, in effect there would be no value in trying to learn from the past as past changes would have no relation to the present. However, if the converse is true then there is value in studying the past. If patterns can be discerned then these patterns may give guidance as to whether, and if so, how the relationship may change in the future. If this is indeed the case then both religious organisations and the State can examine these patterns and use them to both guide their decision-making and attempt to influence or change the existing relationships between the State and religion.

Before beginning to examine this hypothesis, Chapter Two first examines theories of State-religion relationship and the context of that relationship in Australia. This includes the importance and relevance of federation in 1901 and the interpretation of section 116 of the *Australian Constitution*. Chapter Two also considers the definition of religion and secularism – both of which are fundamental concepts in any study of the relationship between the State and religion.
While the primary focus of this thesis is the case studies presented in Part One and Two and the patterns that emerge from those these need to be set in their wider context. Chapter Two is included to provide this context. In particular any discussion of the relationship between the State and religion in Australia must include an understanding of section 116 of the *Australian Constitution*. While federation and section 116 do not specifically form part of any of the case studies considered in this thesis an understanding of section 116 is crucial to understanding the interaction of the State and religion in Australia post 1901. All of the case studies in this thesis include at least one example which touches upon issues related to section 116. Similarly the relationship between the State and religion in Australia must be understood in the wider context of theory relating to state-religion relationships, secularism and freedom of religion. While Australia’s history is unique it does not operate in a vacuum. An understanding of how these issues have played out around the world helps set the context in which the legal relationship between the State and religion in Australia has changed over time.

### 1.2.1 Part One

#### 1.2.1.1 Chapter Three—Changes to the Relationship in Modern Australia

To test the hypothesis outlined above I identified three changes in the legal relationship between the State and religion that are underway in modern Australia: the debate regarding the wearing of the burqa and niqab in Australia, and subsequent legislation in Victoria; the creation of the National School Chaplaincy Program (NSCP) and subsequent High Court Challenge; and the creation of the Australian Charities and Not-for-profit Commission (ACNP). While other changes in the relationship between the State and religion could have been selected, these three were chosen for a number of reasons. First, all three are evidenced via either legislative change or significant court action. Second all three are issues which have a high resonance in the Australian public consciousness. This is evidenced by the high level of media attention each of the case studies has received. While public interest would not by itself warrant selection, when taken in conjunction with the other two criteria it helps to select case studies, the examination of which will have immediate relevance for the Australian populace. Finally when taken together the three examples cover a broad spectrum of areas in which the State and religion interact. For example, in terms of the Federal structure of Australia, the burqa and niqab debate has largely been carried out at a State level, while the NSCP is a Federal program in a traditional area of State responsibility, and while the
ACNC is a Federal institution it may have some impact on the States and Territories in the long-run. There is also a broad spectrum of interactions represented in terms of the way in which these changes relate to religion. The burqa and niqab debate and subsequent legislation is more likely to impact on individual adherents of the Muslim faith, while the ACNC is likely to impact more upon religious organisations and could go unnoticed by individual adherents. The NSCP on the other hand affects both individual adherents and the religious organisations that run these programs.

A higher level of detail is provided for these changes in the relationship than others discussed in other chapters for three main reasons. First, in the overall structure of the thesis these changes are used as a measuring stick against which to compare historical changes in the relationship. As a result, it is important to describe the more recent changes in Australia fully so that an accurate comparison can be made. Second, these changes are relatively recent. Although most of the information is publically available, it is fragmented. Therefore Chapter Three synthesises the exiting primary material, to provide a coherent picture of the interaction between the State and religion for these three case studies. Finally, myths, misunderstandings, and overgeneralisations are sometimes easy to make when dealing with the interaction between the State and religion. Chapter Three attempts to avoid this trap by providing accurate details of the events leading up to, and surrounding, the changes being considered.

1.2.1.2 Comparison to the first 50 years of Colonisation

While the changes in the legal relationship between the State and religion which will be discussed in Chapter Three are interesting in and of themselves and worthy of study, noting these changes does not answer the central question of this thesis; are these changes the product of one off circumstances or the product of an ongoing pattern of change in the legal relationship between the State and religion? Chapter Four begins to answer this question by looking for similar changes and issues in the first 50 years after European colonisation in 1788.

1.2.1.2.1 Why the First 50 Years?

The first 50 years after colonisation was chosen for initial compassion with modern Australia because of the significant differences in the State, religion, and the interaction between the two. In many ways all three have changed so significantly over Australia’s history since European colonisation that they are almost unrecognisable as the same country. Given these significant differences, it might be expected that any issues in the
relationship between the State and religion would also be significantly different. On the other hand, if similarities could be demonstrated then this would begin to answer the thesis’s central question in the affirmative. If in two such different time-periods there are similarities in the issues and legal changes in the relationship between the State and religion then it is possible that changes in modern Australia are not the product of one off circumstances but may have a history and pattern going back as far as 1788.

1.2.1.2.2 Differences in Religion

Religion in the first 50 years after European colonisation was significantly different from religion in modern Australia. According to the 2011 census,25 only 61.1% of the population recorded their religious affiliation as Christian.26 By contrast, in the 1833 census conducted 50 years after colonisation, 99.3% of the population were listed as Christian.27 While Christianity has maintained its position as the majority religion its percentage share has dropped significantly. Along with the drop in adherents to Christianity, there has been an increase in both religious diversity and those recorded in the census as having no religion.

In the 1833 Census, only three non-Christian options were recorded on the official report: Jews, Pagans, and Uncertain, making up just 0.7% of the population. By contrast, the Australian Standard Classification of Religious Groups 2011 lists seven broad groups (Buddhism, Christianity, Hinduism, Islam, Judaism, other Religion and No Religion), which are then subdivided into dozens of religious groups.28 In the 2011 census, those stating a religion other than Christianity made up 7.2% of the population, while those stating no-religion accounted for 23.3%.29

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25 Census data has some limitations in determining religious affiliation, as it is only capable of recording the religious affiliation that an individual is prepared to list on a government form. It cannot give a representation of religious conviction, practice, or level of belief. See Frame, above n 16, 85 – 104.
26 Australian Bureau of Statistics, Cultural Diversity in Australia: Reflecting a Nation: Stories from the 2011 Census, (21 June 2012) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013> Breakdown by denomination: 25.5% Catholic, 17.1% Anglican, 5.0% Uniting Church, 2.8% Presbyterian and Reformed, 2.6% Eastern Orthodox, 1.6% Baptist, 1.2% Lutheran, 1.1% Pentecostal and 4.5% Other Christian.
The percentage of the population adhering to the various religions is not the only difference. The place of religious officials is also significantly different. In modern Australia there is no State Church, and there are no religious officials who hold office in any of the branches of government in their capacity as a religious official.\textsuperscript{30} By contrast, the first fleet arrived in 1788 with an official colonial Chaplain: Rev Richard Johnson.\textsuperscript{31} Governor Phillip was instructed to ‘…do by all proper methods enforce a due observance of religion and good order among the inhabitants of the new settlement, and that you do take such steps for the due celebration of publick [sic] worship as circumstances will permit.’\textsuperscript{32} Religion was within the ambit of Governor Philips authority, and Rev. Richard Johnson was part of his executive.

1.2.1.3 Chapter Four - Analogies Between the Relationship in Modern Australia and the First 50 years After Colonisation

Given these very significant difference between the State, religion and their legal interaction it could be expected that the issues and changes that occurred in the legal relationship between the State and religion would be significantly different to those in modern Australia. However, as will be detailed in Chapter Four in each of the three case studies discussed in Chapter Three analogous issues or change in the legal relationship during the first 50 years after European colonisation can be identified.

In the case of the debate regarding the burqa and niqab, the analogous issue is the treatment of Roman Catholic convicts in the colony, for the NSCP it is the creation of the Church and Schools Corporation, and for the ACNC the analogous issue is the creation of the \textit{Church Acts}. All three pairings have important similarities which will be identified and analysed in Chapter Four. However, the analogous issues are not identical; there are important differences between the pairings. These differences hint at the pattern of change that has taken place in the intervening 150 years between the case studies from Chapters Three and Four. These patterns will be analysed in Part Two.

\textsuperscript{30} Many religious officials do hold public offices – however they hold these in their private capacity not because of their religious affiliation.


\textsuperscript{32} Historical Record of New South Wales, vol 2, part 2, 90.
1.2.1.3 Part One is Only a Partial Answer to the Central Question.

Together Chapters Three and Four make up Part One of the thesis. When taken together they demonstrate that in at least two time-periods in Australian history analogous issues in the legal relationship between the State and religion can be identified. This partially answers the central question of the thesis: are changes in the legal relationship between the State and religion the product of one off circumstances or the product of an ongoing pattern of change? The answer from Chapters Three and Four is that there appears to be some historical link suggesting that there may be a pattern of change over time.

Part One does not answer the question completely for three reasons. First it may simply be a coincidence that for these three case studies there is an analogous issue in both time periods. Without looking at the intervening years, it is impossible to say that the occurrence of these analogies is anything more than a coincidence. However, if other analogous issues and changes in the legal relationship can be found in the intervening years, then a strong argument can be mounted that the analogous case studies identified in Part One are not simply coincidences, but the two ends of a continuum of change over time. Second, there may be something unique or peculiar about modern Australia and the first 50 years after European colonisation. If both time periods have a unique or peculiar element which has led to these issues and changes then the answer to the central question may in fact be that changes in the relationship are the product of one off circumstances, or at least the product of a rare set of circumstances that are by coincidence present in both time periods. Third, while Chapters Three and Four demonstrate analogous issues and changes, and their similarities and differences, they do not explain how those similarities and differences came about. As discussed above Australia was a very different place during the first 50 years after European colonisation when compared with modern Australia. Similarities should not therefore be expected. However, as Part One demonstrates, they do exist.

As a result of these three factors, Part One can only provide a partial answer to the central question of the thesis and neither confirms nor refutes the hypothesis. Given that analogies have been found in such different time periods, Part One provides justification for further investigation of the question. This is done in Part Two of the thesis which examines the intervening years between the cases studies in Chapter Four and those in Chapter Three in an attempt to identify other changes in the legal relationship between the Sate and religion.
1.2.2 Part Two
As discussed above Part One only partially answers the central question. Part Two will fill in the gaps in this answer, and seeks to achieve three things. First, like Part One, Part Two synthesises the existing scholarship. It does this by bringing the fragmented analysis of the interaction between the State and religion together in a chronological order creating a coherent picture of the legal relationship between the State and religion across Australia’s history. Second, in doing this Part Two demonstrates that the changes in the legal relationship between the State and religion which are analogous to the case studies identified in Part One, can also be identified in the intervening time period. This answers the central question of the thesis in the affirmative. Finally, Part Two demonstrates what, if any, pattern can be seen in these changes over time. If changes in the legal relationship have occurred, is there a pattern to these changes? And if so, what can be learnt from it?

1.2.2.1 The Structure of Part Two
Part One identified three case studies in modern Australia as well as three analogous issues in the first 50 years of colonisation. Each of these three pairings can be described in broad term; the State’s restrictions on religious practice, religion in education and the funding of religion by the State. Part Two is divided into three chapters, one for each of the broad case study categories. This structure allows a more focused examination of each of the case studies than a structure divided by time-periods. It also allows existing scholarship on each of the three categories to be synthesised together rather than being split over several chapters. While a chronological structure would demonstrate macro patterns in changes in the legal relationship between the State and religion such a structure would make the identification of category specific patterns more difficult. The structure chosen allows both macro patterns, and category specific patterns to emerge.

1.2.2.2 The Macro Pattern
Two related macro patterns in changes in the legal relationship between the State and religion in Australia are demonstrated in Part Two of the thesis. First, in all three broad category case studies several instances of change in the legal relationship can be identified. This helps to answer the central question of the thesis by demonstrating that the case studies in Part One are not anomalies or one off events but rather they are either end of a pattern of multiple changes over time. While this in effect answers the central question the second pattern observed provides this answer with details.
The second observable pattern is that issues in the relationship between the State and religion re-emerge repeatedly, leading to a change in the relationship. Even where an issue appears to have been settled for decades it will eventually re-emerge in response to social, political, or other changes. In most cases this eventually leads to legal change, even where initially the issue is dismissed, or legal change seems impossible. This re-emergence can be seen in all three case studies across multiple time periods.

This is arguably one of the most important observable patterns in the changing legal relationship between the State and religion in Australia. If, once a legal change had taken place, the issues leading to that change could be considered solved for all time then it would never need to be re-considered, both the State and religion could effectively ignore the issue in their dealing with one another. However, as the pattern suggests, issues that appear to be solved can re-emerge years and even decades later. As a result, neither the State, nor religious organisations, can rely on the status quo as an indication of how the State and religion will interact into the future. An issue that appears solved today may re-emerge in the future and lead to legal change in the relationship. As a result, both the State and religious organisations need to be alert to this possibility.

Neither of these macro patterns could have emerged without the synthesis of existing material undertaken in this thesis. The fragmented nature of the existing scholarship acted to obscure patterns of this nature. By focusing on individual time periods, issues or events the existing scholarship misses this bigger picture.

1.2.2.3 Patterns in the Individual Case Studies

As discussed above, the chapters in Part Two each deal with one of the three broad case studies. As well as cumulatively demonstrating the macro patterns discussed above, each chapter demonstrates individual patterns in relation to each broad case study. While this thesis can only make observations about the patterns in the case studies under consideration, the fact that all three have different patterns suggests that when considering any issue in relation to the interaction of the State and religion, patterns unique to that issue may be observable.

The macro pattern discussed above suggests that since issues may re-emerge years and even decades after they appear settled, it is difficult for the State and religious
organisations to predict their long term future interaction, as the macro pattern would suggest that change is inevitable. While change might be inevitable, the individual patterns observed in the three case studies may be able to be used as a predictor of the direction or character of that change.

1.2.2.3.1 Chapter 5 – The State’s Restriction of Religious Practice

Chapter Five examines instances of the State’s restriction on religious practices by various religious groups. Two patterns are observable in the restrictions that have been imposed. First, there has been a shift from restricting the practices of an entire religion, towards restricting individual practices. The examples discussed in this chapter show that in the first half of the 20th century the State continued to restrict religious practice via the wholesale restriction of particular religions, as exemplified by the ban on the Jehovah’s Witnesses and the Church of Scientology. In the latter part of the 20th century, this has shifted towards a restriction of particular practices, as exemplified by the blood transfusion laws, which restrict the religious practices of Jehovah’s Witness children and parents.

The second pattern identified in relation to the State’s restriction of religious practice is a shift from overt restriction to covert ones. In the cases where the whole of the religion is restricted, the religion is named specifically. The laws imposing restrictions reveal which religion is being targeted on their face. By contrast, the laws that restrict individual religious practices do not explicitly refer to the religion to which the practice belongs, nor to the religious description of the practice. Instead, the religious practice that is the subject of the restriction is described in neutral language, which is of general application. On their face, the laws imposing the restriction could, in theory, apply to anyone who engaged in the restricted behaviour. Despite this, these laws should be seen as restrictions on religious practice for two reasons. First, the restrictions have a disproportionate impact on the adherents of the religion whose practice is being restricted. Secondly, the history and development of the restrictive laws reveals that they were created in response to particular incidents involving the restricted religious practice.

1.2.2.3.2 Chapter 6 – Religion in Education

Chapters Three and Four demonstrate that during the two time-periods under consideration there has been a very close interaction between the State and religion in relation to religion in education. In both time periods considered in Part One there is a
State sponsored program that places religion in ‘Government’ schools. Chapter Six examines what happened in the intervening time-period.

Given the high level of interaction between the State and religion in the two time periods considered in Chapters Three and Four, it might be expected that in the intervening time-period any changes in the legal relationship would be a change in the character of the relationship, rather than in the level of interaction. However, Chapter Six reveals that the pattern is more complex than this. Far from simply changing from one type of interaction to another, Chapter Six demonstrates that the level of interaction between the State and religion in relation to education changed dramatically. The changes in the legal relationship examined in Chapter Six reveal a pattern of decreased interaction in the latter half of the nineteenth century, followed in the latter half of the twentieth century by an increase in the relationship. The decrease in interaction followed by an increase in interaction can be seen as two halves of a journey. During the nineteenth century, the relationship between the State and religion in relation to religion in education was on a journey of change towards a minimal level of interaction. The move towards greater interaction in the twentieth century can be seen as return steps on that same journey. In some respects, the move back towards a higher-level interaction is a retracing of the journey undertaken in the latter half of the nineteenth century.

1.2.2.3.3 Chapter 7 – The Funding of Religion by the State

The final chapter in Part Two examines the changes in the legal relationship between the State and religion in relation to State funding of religion. Chapters Three and Four demonstrate that there has been a shift from direct State funding of religion provided by the Church Acts, to a system of indirect funding provided by taxation exemptions. Chapter Seven seeks to demonstrate how this shift took place. The pattern that emerges is twofold. First, the intervening period between the Church Acts and the ACNC can be divided into two phases, first a phase of continual change, followed by a phase of apparent stability. Second, across the whole period there was a tug-of-war between the State and religion for control of funding. This control both related to how much funding religion received, and how it should have been spent.
1.3 Sources

There is a general lack of resources dealing with the overall interaction between the State and religion across the entire 225-year history of Australia since European colonisation. What does exist is fragmented. As discussed above, one of the roles of the thesis is to begin to fill this gap. To do so I have drawn on a range of sources that individually tell a small piece of the story. These sources can be roughly divided into four categories: general Australian histories, issue specific sources, religion focused sources, and original material.

1.3.1 General Australian Histories

General Australian histories encompass sources that deal with the history of Australia in a wide-ranging way. These sources do not usually deal with religion, or any of the three case studies specifically, rather they present the unfolding history of Australia in a chronological order. As a result, they do not usually deal with issues in the relationship between the State and religion in great depth, often simply noting that an event or legal change took place, without delving into the details or implications of that event. While they may not provide a great deal of detail, these sources were useful in placing changes in the relationship between the State and religion in their historical context. They are also a useful source of details regarding key events, places, and people, in the overall history of Australia.

An example of this type of source is Manning Clark’s multi volume History of Australia. Biographies and semi-biographical works also fall into this category such as Gough Whitlam’s The Whitlam Government 1972 – 1975, and Sir Kevin Anderson’s Fossil in the Sandstone.

1.3.2 Issue Specific Sources

Issue specific sources cover materials that deal specifically with one of the case studies. These sources cover events and changes in law in much more detail than general Australian histories. As a result, they are a good resource for issue specific factual details such as names and dates, as well as identifying original material. The time-period covered by these issue specific sources varies. Some look at the history of an issue over a long period of time, such as Albert Austin’s Australian Education, 1788-

1900.\textsuperscript{36} Others deal with a specific event, such as Jean Ely \textit{Contempt of Court}.\textsuperscript{37} While these sources do sometimes touch on religion, this is not their main focus; religion is only referred to where it directly intersects with the issue under consideration.

1.3.3 Religion Focused Sources

Religion focused sources take religion as their starting point. They examine events and issues from the perspective of religion more generally, or from the perspective of a particular religion. Like issue specific sources, they provide a higher level of detail than general Australian histories, this time in relation to religious events, people, and places. Some focus on a particular event, person, or religion, such as James Barwick’s \textit{Australia’s First Preacher}.\textsuperscript{38} or Hugh B Urban’s \textit{The Church of Scientology}.\textsuperscript{39} Others focus on an overall picture of religion in Australia, such as Tom Frame’s \textit{Losing My Religion},\textsuperscript{40} or on religion in relation to particular issues, such as Max Wallace’s \textit{The Purple Economy}.\textsuperscript{41}

1.3.4 Original Material

The widest range of source types is original material. It includes all material that could be described as the original sources of the relevant law, or information. Included in this category are cases, legislation, Hansard, Government reports, inquiries and correspondence, law reform reports, media releases, and some news articles. These sources are crucial to the thesis. Wherever possible I have endeavoured to seek out and consult the original material rather than relying on descriptions or analysis provided by other authors. By examining the original source material, additional details not considered relevant or important to other authors, for a variety of reasons, can be identified. Often these details reveal important aspects of the legal change in the relationship between the State and religion. Original sources are also the most accurate source of information, as they have not been interpreted through the lens of another author’s argument. The majority of original material used in this thesis is readily available in Australia. A significant proportion is now available online. Archival

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{36} Albert Gordon Austin, \textit{Australian Education 1788 – 1900 Church, State and Public Education in Colonial Australia} (Sir Isaac pitman & Sons Ltd, Melbourne, 1961).
\item \textsuperscript{37} Jean Ely, \textit{Contempt of Court}, above n 15.
\item \textsuperscript{38} Bonwick, above n 31.
\item \textsuperscript{39} Hugh B Urban, \textit{The Church of Scientology A History of a New Religion} (Princeton University Press, 2011).
\item \textsuperscript{40} Frame, above n 16.
\item \textsuperscript{41} Max Wallace, \textit{The Purple Economy Supernatural Charities, Tax and the State} (Australian National Secular Association, 2007).
\end{itemize}
\end{footnotesize}
1.4 Scope of the Thesis

The terms ‘religion’, ‘State’ and ‘legal relationship’ need some explanation as they can mean different things in different contexts. This section both defines these terms as they are used in the thesis and outlines the overall scope of the thesis. Inevitably, as with all pieces of research, some things have not been included while others have. In outlining the scope of the thesis this section seeks to explain the reasons for the various inclusions and exclusions.

1.4.1 State, Religion and Legal Relationship

Before it is possible to identify changes in the legal relationship between the State and religion the terms ‘religion’, ‘State’ and ‘legal relationship’ need to be defined. The term religion in particular needs to be carefully considered. Religion means different things to different people in different contexts. It could incorporate organised religion, personal spiritual beliefs, religious practices, or theological discussions. The Law has not been immune from the difficulties of defining religion. For this reason an expanded analysis of the legal definition of religion is included in Chapter Two. The expanded analysis is also included because the relevant case, *Church of the New Faith v Commissioner of Pay Roll Tax (Vic)* (the *Scientology Case*), is the seminal High Court case concerning religion. While not directly relevant to this thesis, the case is an important marker in the overall interaction between the State and religion in Australia.

1.4.1.1 Organised Religion vs. Individual Religious Belief

The interaction between the State and religion is often described as being between State and Church. This term has not been used in this thesis. Although most of the changes in the legal relationship between the State and religion considered in this thesis are interactions between the State and organised religion, this is not the only way in which these two bodies can interact. Some actions of the State will have a greater impact on individual adherents than on organised religion. For example, the legislation restricting

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42 For example the Historical Records of Australia Series 1 vol 1 – 36 (Library Committee of the Commonwealth Parliament, 1914–1925) is readily available in libraries in most States and Territories and is available on CD-rom by contrast the Historical Record of New South Wales vol 1 – 7 (Government Printer, 1892-1901) are held in very few public libraries but can be accessed at the National Library of Australia. The National Library of Australia has a significant digital repository of scanned original material including newspapers and original versions of legislation which is available online.

43 (1982/83) 154 CLR 120.
the wearing of full-face coverings in public is an interaction between the State and the individual practice of Muslim women. While a religious organisation may advocate on behalf of these women, the actual legal interaction is not between the State and the religious organisation, but between the State and the individual women. To exclude this type of interaction would be to exclude an important aspect of the interaction between the State and religion, that of the individual adherent. For this reason, the phrase State and Church is inappropriate.

The phrase State and Church is also inappropriate because the term ‘Church’ is usually only associated with the Christian religion. While Christianity has been the dominant religion for much of Australia’s history, this thesis is not just about Christianity and the State. Chapter Five in particular looks at several non-Christian religions. With the increasing diversity of Australia’s religious community it is just as accurate to say that there is an interaction between Mosque and State, Temple and State, or Synagogue and State.

1.4.1.2 Religion and Culture
There is a fine line between religion and culture, particularly in relation to religious practice. It is not uncommon for there to be debate around whether a particular practice is religious or cultural. This has particular relevance in relation to arguments relating to freedom of religion. If a practice is cultural rather than religious then it will not attract the protection of human right’s instruments that guarantee freedom of religion. Nor will arguments for the continuation of that practice necessarily have the same moral force. This is not to say that all manifestations of religion should be permitted just because they are religious rather than cultural. As will be discussed in Chapter Two freedom of religion is not an absolute right. The manifestation of religious beliefs are often subject to limitations in the interests of protecting others or society. Rather, once a practice has been identified as religious the arguments which can and should be had about whether the State can and should restrict or protect the practice are different if they are religious than if they are considered to be ‘purely’ cultural.

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44 See for example, the definition of ‘Church’ in Oxford Dictionaries (online) <http://oxforddictionaries.com/definition/english/church?q=Church>.
45 See 1.2.1.2.2.
46 See 2.5.
47 See 2.5.1.
48 Cultural rights are protected at international law, but tend to be less well recognised than freedom of religion. See Athanasios Yupsanis, ‘The Concept and Categories of Cultural Rights in International Law –
It has occasionally been argued that a belief or practice is only religious if it is held or manifested by all people of that faith. The debate regarding the wearing of full face veils by some Muslim women is an example of the religion vs culture debate.\textsuperscript{49} While some conceptualise the practice as religious others have argued that it is cultural.\textsuperscript{50} Another practice which is often argued to be cultural rather than religious is female genital mutilation (FGM). On its website Human Rights Watch states that FGM ‘is erroneously linked to religion’ and that the link to religion is flawed. However they also state that ‘some adherents of …religions believe the practice is compulsory for followers of the religion.’\textsuperscript{51} The difficulty is that for many religions, practices within the religion vary wildly. Christianity is notorious for the variety that can be found within that faith alone.\textsuperscript{52} Just because orthodox adherents of a particular faith do not engage in a particular practice does not necessarily mean the practice is not a manifestation of a religious belief by another adherent. Nor does the fact that orthodox adherents of a faith manifest their belief in a particular way mean that all people who engage in that behaviour are necessarily doing so for religious reasons.\textsuperscript{53} As a result what is a religious practice for one person may be a cultural practice for another, or even just an expression of personal preference. The Celebration of Christmas in Australia is a prime example. For many it is a Christian religious holiday and the various activities associated with it are undertaken for religious reasons. By contrast for other Australians it is a cultural holiday with the focus on family and friends rather than on religious observance.

1.4.1.3 When is a Law Interacting with Religion?

As has been alluded to above\textsuperscript{54} it is not always clear on the face of a law that it has any effect on religion. For example without knowing that Jehovah’s Witnesses object to blood transfusions laws permitting medical practitioners to administer blood transfusions to children without parental consent do not appear to have anything to do

\textsuperscript{52} R v Secretary of State for Education and Employment and others ex parte Williamson [2005] UKHL 15, [56].
\textsuperscript{53} Ibid [30] – [35].
\textsuperscript{54} See 1.2.2.3.1.
with religion. The High Court has interpreted the word ‘for’ in section 116 of the *Australian Constitution* to require that a law have the purpose of prohibiting the free exercise of religion before it will infringe that provision. However when considering whether a law interacts with religion the consideration needs to go beyond the purpose of the law. The effect of the law must also be considered. The effect of a law can go far beyond its purpose. Sometimes this effect is acknowledged by law makers, as was the case with blood transfusion laws. This may not always be the case. It is plausible that laws whose purpose does not appear to have any relationship with religion can affect religion in some way. This is becoming more and more likely with the increasingly diverse religious community in Australia.

1.4.1.4 Beliefs of Individual Religions

In some cases discussed in this thesis it is necessary to elucidate the beliefs of the religion under consideration. For example, in the cases in Chapter Five this is done to explain how the relevant law restricts the practice or beliefs of a particular religion. In some cases, the religions under consideration are controversial, and their belief systems poorly understood by non-adherents. It is not the purpose of this thesis to explain in detail the historical background, beliefs or practices of any of the religions under consideration. Nor is it the purpose of this thesis to give a detailed theological account of any of the beliefs considered. Where the history, beliefs, or practices of the religion are relevant I have attempted to give a concise explanation of the relevant belief or practice. However, I am not an adherent to any of the religious beliefs under examination. While every effort has been taken to correctly represent the beliefs of the various religions considered by this thesis, some errors may have occurred. Any errors in the description of the various beliefs and practices are inadvertent.

1.4.1.5 State

In Australia the term ‘State’ can be used in two distinct contexts. First, it can be used to refer to the six States, formed from the original six colonies that make up the Federation of Australia. Secondly, the term can be used to refer to the State as a concept made up of the three tiers of government (Federal, State and Local), and the three branches of Government (Executive, Legislative and Judicial). The thesis will use, where relevant,
the term ‘State’ in both contexts. The use of the term in the phrase the ‘State and religion’ refers to the second of these contexts. It is the relationship with religion in this broader context that this thesis seeks to explore.

It must, however, be recognised that what constitutes the ‘State’ in the broad context has changed since European colonisation. In modern Australia it encompasses the executive, the legislature, and the judiciary within a federal structure. The early colonial structure was very different. The State was in effect made up entirely of an executive consisting of the Colonial Governors and their officials, along with the Colonial Secretary in the United Kingdom. Over the course of the nineteenth century this gradually changed to include first a partially then wholly elected legislature and a structured judiciary. In 1901 this changed again to include a federal legislature, executive, and judiciary, along with the existing colonial structures. Due to the long-term historical nature of this thesis, all of these different phases of ‘State’ are included.

1.4.1.6 Legal Change

The thesis focuses on legal changes in the relationship between the State and religion. In the context of this thesis, legal change is taken to be changes in the relationship between the State and religion that is evidenced by either legislative change or case law. As a result, the changes considered throughout the thesis are limited to changes for which there is an associated legislative change or significant case law. This includes clarifications in the law. An example of a clarification in the law which is taken to be a legal change in the relationship for the purpose of this thesis is *William v The Commonwealth*.\(^59\) Although the High Court did not change the law as such the judgment clarified the correct legal position leading to a change in the way the government operated.\(^60\) In effect the legal change in the relationship was from one of uncertainty to one of greater certainty.

In each of the three broad case studies there may have been change in the relationship between the State and religion as a result of social, economic, or other changes. These have not been included in the thesis. For example, in relation to the State’s restriction of religious practice, de-facto restrictions imposed by law enforcement agencies’

\(^{59}\) [2012] HCA 23.
\(^{60}\) See 3.3.2.3.
investigations, or actions, have not been included. Nor have restrictions imposed by Local Government planning decisions. While these kinds of changes are important factors in the overall relationship between the State and religion, the focus of this thesis is legal change.

1.4.1.7 Moral and Ethical judgments
In the study of the relationship between the State and religion, learned minds may differ on the desirability of many of the legal changes being considered by this thesis. It is not the purpose of this thesis to make moral or ethical judgments about the legal changes considered. Rather, the purpose is to set out which changes took place and when, and try to determine whether these changes are part of an overall pattern, or are one off changes.

1.4.2 Secondary Purpose
As well as attempting to answer the central question of the thesis: are changes in the legal relationship between the State and religion the product of one off circumstances, or the product of an ongoing pattern of changes?, the thesis has a secondary purpose.

As referred to above the existing scholarship is fragmented making it difficult, if not impossible, to identify patterns of change across Australia’s history. The thesis therefore synthesises the existing material to create a coherent whole. This is particularly important for two reasons. First, in many cases the sources from which these details have been gathered are varied and not always obviously related to one another or even to the study of the interaction of the State and religion. In bringing these sources together this thesis links previously unlinked events together. This reveals the relationship between these previously unconnected events as well as their place in the overall pattern of change in the legal relationship between the State and religion. Second, some of the existing material, especially original sources, can be difficult to access. In synthesising this material I hope to provide a valuable resource to future researchers in this area. In order to achieve this, details of the legal changes in the

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62 Ibid.
63 See 1.1
64 The *Historical Records of New South Wales* Vol 1 – 7 (Government Printer, 1892-1901) are an example of this. At the time of writing they had not been digitised and were not easily available in Public Libraries in all states of Australia.
relationship are discussed in more depth than is strictly necessary to answer the central question of the thesis.

1.4.3 Indigenous Spirituality

The thesis does not deal with changes in the relationship between the State and religion in relation to Australian Indigenous spirituality. There are several examples across Australian history were the State, religion, and indigenous peoples, or the State and indigenous spirituality interacts. For example, in the early Australian colony Governor Macquarie restricted the involvement of the official colonial chaplain Rev Samuel Marsden in the Indigenous school.\(^{65}\) In more recent times, there has been controversy surrounding the Hindmarsh Island bridge proposal, and subsequent Royal Commission.\(^{66}\) However Indigenous spirituality and its relationship with the State is a complex issue, owing to the unique place of Indigenous Australians as Australia’s first people, the traumas suffered by Indigenous peoples as a result of colonisation,\(^{67}\) and the interconnectedness of Indigenous spirituality with all aspects of indigenous life as a result of their holistic world view.\(^{68}\) Further the issue of Indigenous spirituality cannot be separated from the broader issues of Indigenous recognition in the Australian Constitution and elsewhere and the stolen generation.\(^{69}\) As a result, a complete understanding of the interaction between the State and Indigenous spirituality deserves to be dealt with in its own right, and not conflated with other issues arising from the interaction between the State and religion.

Chapter One has set out the hypothesis, structure, main arguments and scope of the thesis. Before moving to examine the specific case studies in Part One and Two, Chapter Two sets out the relevant theories of potential State-religion relationships and the context in which this has played out in Australia. In particular Chapter Two considers the effect federation had on the relationship between the State and religion.

\(^{65}\) See Cleverley, above n 18, 108.
\(^{67}\) Many Indigenous people refer to Australia Day celebrated on the day the First fleet arrived in Australia (26th January) as Invasion Day.
Chapter Two - Theory and Context

2.1 Introduction

Religion and the State interact in a myriad of ways in a myriad of different circumstances. At the micro level the interaction of the State in relation to education is very different from the State in relation to restrictions on religious belief and from State funding of religion. As identified in Chapter One some of these interactions take place at the institutional level. 1 Others take place at an individual level. At the macro level there are also a number of different ways that the State and religion can and do interact. At the beginning of Chapter One Australia was described as a ‘secular nation’.2 Being secular, however, is just one option. Even if ‘secularism’ is the model adopted by a State, what it means to be secular varies from country to country. Both France and the United States could be described as secular, how that secularism plays out is very different. In France religion is in effect banished from the public sphere to the extent that the wearing of religious symbols in public schools and by public officials was banned in 2004.3 In 2011 France went a step further banning the wearing of face coverings in public, including the Muslim niqab and burqa.4 By contrast in the United States, while there is a formal separation of Church and State,5 it would be almost inconceivable for a publically atheist President to be elected. Australia seems to be somewhere in-between. Australia has in recent years had an atheist Prime Minister in Julia Gillard, a Roman Catholic one in Tony Abbott and Anglicans in Kevin Rudd and John Howard.6 Like France Australia has had to grapple with the issue of face coverings in public, reaching an accommodation granting police increased powers but

1 See 1.4.1.1.
2 The term ‘secular nation’ is imprecise. It can be used to mean secular society or secular State or a combination of the two. See 2.7 and 2.8 for a more detailed discussion.
5 United States Constitution amend I
6 Roy Williams, In God They Trust (Bible Society,2013), 209 – 261.
otherwise allowing people to continue to cover their face in public – regardless of their motivation for doing so.⁷

This chapter sets the context for the case studies considered in this thesis. Australia has a unique interaction between the State and religion. Like its hybrid model of government which adapts both the United Kingdom Westminster System and the United States federalism,⁸ the State and religion relationship is, at the macro level, a hybrid.⁹ However this thesis is concerned primarily with the relationship between the State and religion at the micro level. It is concerned with individual instances of that interaction and the events that surround it. However before examining these micro interactions this chapter sets out the macro context in which these interactions take place. Without an understanding of the wider context much of the significance in these micro interactions may be lost. Similarly without understanding where Australia sits in terms of international comparisons of State-religion relationships the unique character of the relationship in Australia may be missed.

The chapter begins by outlining various models of State-religion relationships from theocracies through to abolitionist states. These models are then applied to the Australian experience. As this chapter will show, Australia has moved through several different models since European settlement in 1788. The chapter then moves to consider the importance and effect of federation in 1901 on the relationship between the State and religion. This includes a consideration of section 116 of the Australian Constitution. An understanding of this so called ‘freedom of religion’ provision is essential to understanding the relationship between the State and religion in modern Australia. Unlike its predecessor, the American First Amendment, section 116 is not contained in a bill of rights, nor has it been interpreted as creating a wall of separation between Church and State. This section leads on to a consideration of freedom of religion in a global context with particular reference to the European Convention on Human Rights as a point of comparison for the Australian experience. Finally the chapter considers two important definitional questions: What is religion?, and; What is secularism?

⁷ See 3.2
⁹ See 2.3.
When combined the apparently disparate issues considered in this chapter form a picture of the macro interactions of the law and religion in Australia. With this picture in place the changes in the relationship between the State and religion can then be examined in their proper context.

2.2 Theories of State and Religion Relationships

This section examines a number of models of State and religion interaction as described by Rex Ahdar and Ian Leigh in *Religious Freedom in the Liberal State*\(^{10}\) with some adaptation based on the model presented by W. Cole Durham and Brett G. Scharffs in *Law and Religion; National, International, and Comparative Perspectives*.\(^{11}\) In the following section this model is applied to Australia, drawing on examples from the case studies presented in this thesis.\(^{12}\) As will be demonstrated, Australia has not always been a ‘secular nation.’

The models of State and religion interaction presented below should be seen as part of a continuum.\(^{13}\) Any particular State at any particular point in time may be in transition from one to another. Many of the models are related to one another. A State may have attributes of two or even more of the models considered.\(^{14}\) This is true for Australia. In modern Australia there are examples that point to the relationship between the State and religion having attributes of structural separation, formal neutrality and pragmatic pluralism.

2.2.1 Theocracy, Erastianism and Religious Establishment

At one end of the spectrum are models in which the State and religion have a very high level of positive interaction. In theocracies and erastianism the State and religion are in effect fused while in States with established religions the State singles out a particular religion or sect for special treatment and support.\(^{15}\) Durham and Scharffs break the notion of established religion down into several categories which are subsumed into the

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\(^{12}\) See 2.3

\(^{13}\) Ahdar and Leigh, above n 10, 68 – 69.

\(^{14}\) Durham and Scharffs, above n 10, 113.

\(^{15}\) Ahdar and Leigh, above n 10, 70 – 71, 75 – 80.
single category in Ahdar and Leigh’s typography. They separate out different models of State and religion interaction at this end of the spectrum into Theocracies, Established Church, Religious Status Systems, Historically favoured and endorsed Church and Preferred set of Religions. However the exact term given is largely irrelevant, what all of these models have in common is a relatively high level of positive interaction between the State and a specific religion or sect.16

In a theocracy religion is supreme and the purpose of the State is to support and further the religion. Often there is no separation between civic and religious rulers and, where there are, the civic leaders are subject to religious rulers. Modern examples include Iran and Afghanistan under the Taliban.17 The erastianism18 model is the flip side of a theocracy. Rather than the State supporting and furthering religion in the erastianism model religion supports and furthers the State. Ahdar and Leigh give the example of modern China where the State defines official religious groups and these religions groups are obliged to carry out policies of the government.19

2.2.2 Pluralism and Neutrality Models
In the middle of the spectrum are models of State–religion interaction which are less than establishment but in which the State and religion are not entirely separate. Some of these models would fit the definition of ‘secular’ depending on how that term is defined. Others would fall far short of this description.20 Ahdar and Leigh identify three types of models which fall into this spectrum of the continuum, pluralist models, neutrality models and the competitive market model.21

In a pluralist model the State ‘attempts an even-handed co-operation with all religions and worldviews held by individuals and groups in society.’22 Therefore unlike separationist models discussed below, religion is not seen as something that must be relegated to the private sphere. Instead the State supports religion, in all its forms, in the public sphere. Pluralism can be split into two forms, principled and pragmatic. The primary difference is the reason the State adopts pluralism. In the case of principled

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16 Durham Scharffs, above n 11, 118 – 119.
17 Ahdar and Leigh, above n 10,70.
18 Also called Caesaropapism.
19 Ahdar Ian Leigh, above n 10, 71.
20 See 2.7.
21 Ahdar and Leigh, above n 10, 84 – 94.
22 Ibid 85.
pluralism the State adopts pluralism as a deliberate choice; as a principle to be upheld and promoted. Monsma and Soper argue that the Netherlands is an example of this kind of pluralism. Pragmatic pluralism on the other hand is adopted as a pragmatic response to a plural society in which a number of religions already exist.

Neutrality models also have elements of State-religion interaction somewhere between establishment and separation. The European Court of Human Rights currently endorses this approach. In *Refah Partisi (The Welfare Party) v Turkey* the Court emphasised that:

> ‘[t]he Court has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs … and that it requires the State to ensure mutual tolerance between opposing groups.’

In neutrality models the State attempts to take a neutral stance towards religion, treating all equally, favouring no one. While pluralism models also support secular worldviews their inclusion is more explicit in neutrality models. As long as secular worldviews are in some way ‘like’ religion, such as atheism and humanism, then the State should be neutral as between these worldviews and religion as much as between different religious worldviews.

There are two different neutrality models; formal and substantive neutrality. Formal neutrality requires the State to be ‘religion blind’. In effect religion is an irrelevant consideration in any decision by the State. As long the purpose of a particular law is not to restrict religion then it is permissible, even if the effect is to restrict religion. Substantive neutrality requires the State to actively engage in a policy of neutral

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23 Ibid 85 – 87.
25 Ahdar and Leigh, above n 10, 87.
26 Ibid.
28 Ahdar and Leigh, above n 10, 87 – 92.
treatment for all religions. The aim is not to make adherence to any one religion more difficult as a result of State action.\textsuperscript{29}

The final model, identified by Ahdar and Leigh, which falls into the middle of the spectrum is the competitive market model. It is similar to both substantive neutrality and the pluralist models but focuses on religion being a matter of private choice. In this model the State encourages a free market place of religions in which individuals can choose which religious belief or non-belief is ‘best.’ Like a more traditional market the absence of monopolies allows a variety of forms of religion to flourish with a consequently high level of religiosity. Ahdar and Leigh identify the United States of America as a State with this model.\textsuperscript{30}

2.2.3 Separation of Church and State
At the other end of the spectrum from theocracies, erastianism and established religion models are separationist models.\textsuperscript{31} In these models religion and the State are separate and inhabit separate spheres, usually conceptualised as private and public respectively. These models are often described as secular.\textsuperscript{32}

Ahdar and Leigh split separationist models into two types, structural and transvaluing. Structural separation requires that the institutions of the State and religion be separate.\textsuperscript{33} Formal separation can be based on a desire to protect the State from undue interference by religion or conversely to protect religion from corruption by the State.\textsuperscript{34} As a result separationist models of this kind can be established on both secular and religious principles. As will be discussed later in this thesis South Australia was founded on the principle of voluntariness, which is in practice a form of religiously founded separation of State and religion.\textsuperscript{35} Ahdar and Leigh identify France’s policy of Laïcité is an example of this kind of separation.\textsuperscript{36}

\textsuperscript{29} Ibid 89 – 90.
\textsuperscript{31} Ahdar and Leigh, above n 10, 72 – 75.
\textsuperscript{32} See 2.7 and 2.8.
\textsuperscript{33} Ahdar and Leigh, above n 10, 72.
\textsuperscript{34} Ibid 73.
\textsuperscript{35} See 6.3.1.2.3.
\textsuperscript{36} Ahdar and Leigh, above n 10, 73.
Transvaluing separation requires the State to actively seek to remove all religious influences from the public sphere. Public life is seen as a religion free zone. While this model is not necessarily hostile to religion it is also not neutral. The State deliberately adopts secularism. There is a danger that removal of religion from the public sphere can evolve into an anti-religious stance.\(^{37}\)

Durham and Scharffs add an additional two models to this end of the spectrum; secular control regimes and abolitionist States. Unlike the separationist regimes described above these models are almost necessarily anti-religious. In a secular control regime the State adopts freedom from religion, as opposed to freedom of religion. In effect secularism becomes the established religion. As a result this model has much in common with the established religion model discussed above.\(^{38}\) Abolitionist States take this a step further. In this model the State actively aims to eliminate religion. Durham and Scharffs identify Albania during the soviet era is an example of this kind of regime.\(^{39}\)

### 2.2.4 The Spectrum

In the forgoing discussion the various models have been presented as a spectrum moving from a very high level of interaction between the State and religion at one end to a relatively low level of interaction at the other. This would seem to imply a linear relationship and suggest that those models at one end have the least in common with models at the other end. In some regards this is correct. If the relationship is viewed purely in terms of how positively the State interacts with religion then theocracies have almost nothing in common with abolitionist States. This is not the only way to view the model. Durham and Scharffs suggest that rather than viewing the various models on a linear spectrum they should be viewed as a loop.\(^{40}\)

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\(^{37}\) Ibid 74 – 75, 95.  
\(^{38}\) Durham and Scharffs, above n 11, 120.  
\(^{39}\) Ibid 120 – 121.  
\(^{40}\) Ibid 114 – 117.
When viewed this way theocracies and abolitionist States are at the same end of the spectrum and arguably have the most in common. In States operating under these models the State has adopted a religious position. As a result religious freedom is low, especially for those who dissent from the sanctioned worldview.

2.3 Australia

In *The Challenge of Pluralism* Stephen V Monsma and J Christopher Soper argue that Australia has been through four different models of State-religion relationship; establishment, plural establishment, liberal separationism and pragmatic pluralism.\(^4\) This section briefly examines the relationship between the State and religion in Australia in light of the various models presented above. While this section agrees with Monsma and Soper that Australia has transitioned between multiple different models of State-religion relationship it also suggests that a more nuanced approach is required, especially in relation to modern Australia.

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\(^4\) Monsma and Soper, above n 24, 93; Monsma and Soper’s analysis focuses primarily on pragmatic pluralism.
2.3.1 Establishment

While Australia has never had a theocracy it is arguable that both the erastianism and establishment models were present in Australia during the first 50 years after European colonisation. The relationship between the early Australian Governors and chaplains plays out as an erastianism model, at least in terms of how some of the early Governors saw this relationship. Many of the early Governors saw the role of the chaplains as moral policemen. They were to support the State in maintaining order and control. Manning Clark characterised the relationship between Rev Johnson, the first chaplain in the colony, and Governor Phillip in the following way. ‘Where he [Johnson] saw religion as the divine medium for eternal salvation, the Governor treasured it as a medium of subordination, and esteemed a chaplain according to the efficacy of his work as a moral policeman.’ Governor Macquarie’s treatment of the chaplains also shows evidence of an erastrian worldview. It was his practice to require that chaplains read government notices during mass. When one of the chaplains refused Macquarie wrote to the Secretary of State for the colonies setting out his view of the matter:

… At present it is my opinion that whatever has a tendency to benefit the community in a material degree (as was the object of the Order in question)
cannot be improper to be made public during the time of religious worship, …

While the early Australian colony may not have formally operated under an erastrian model the Governors at least seem to have operated under an assumption that the role of religion was to support the operations of the State.

The question of whether or not Australia has ever had an established church is debatable. Adding to the debate is the question of what is meant by the term establishment. Ahdar and Leigh identify three different models of establishment, symbolic, de jure and de facto. On the first of these Australia still has an established church courtesy of the reference to God in the preamble of the Constitution. The de jure establishment requires formal establishment such as the position of the Church of

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43 Despatch from Governor Macquarie to Earl Bathurst, 24 May 1814 in *Historical Records of Australia* Series I vol 8 Library Committee of the Commonwealth Parliament, 1914–1925), 255 – 256.
44 Ahdar and Leigh, above n 10, 75 – 84.
England in England while de facto establishment requires only that the State favour one religion or promote religion generally.\(^{46}\)

Justice Gibbs in the *DOGS case* identified four potential meanings for the term; ‘[1] to protect by law … [2] to confer on a religion or a religious body the position of a state religion or a state church … [3] to support a church in the observance of its ordinances and doctrines … [4] to found or set up a new church or religion.’\(^{47}\) He concluded that in the context of section 116 of the *Australian Constitution* it is the second of these, ‘confer[ing] on a religion or a religious body the position of a state religion or a state church’, which is most appropriate.\(^{48}\) This view is consistent with the second of Ahdar and Leigh’s models of establishment. However in the same case Murphy J, in his dissenting judgment concluded that the term ‘establishing’ included providing any sponsorship or support of religion. This is more consistent with Ahdar and Leigh’s third model of establishment and arguably goes even further.\(^{49}\)

The question of whether or not Australia ever had an established church has been considered judicially on a number of occasions. The conclusions reached have been mixed.\(^{50}\) As Dixon J concluded in *Wylde v Attorney General for New South Wales* ‘... the better opinion appears to be that the Church of England came to New South Wales as the established church and that it possessed that status in the colony for some decades’\(^{51}\) and that establishment of the Church of England ended with the ‘...grant of representative government and the separation of the colonies.’\(^{52}\)

Whatever the technical legal case may be the Governors, and later the Legislative Council, treated the Church of England as the established church of the colony.\(^{53}\) Even if formal *de jure* establishment cannot be established less formal *de facto* establishment

\(^{46}\) Ibid 80.
\(^{48}\) Ibid 597.
\(^{49}\) Ibid 622 – 624.
\(^{50}\) See Ex parte Collins [1889] The Weekly Notes 85; Wylde v Attorney General for New South Wales (1948) 78 CLR 224; Scandrett v Dowling (1992) 27 NSWLR 483.
\(^{51}\) Wylde v Attorney General for New South Wales (1948) 78 CLR 224, 284
\(^{52}\) Ibid 285 – 286.
can be. Throughout much of the 19th Century the State supported the Christian churches via direct grants and the funding of religious schools.\(^{54}\)

*De facto* establishment came to an end sometime in the late 1800s. The exact date is difficult to pin down for a number of reasons. First, different colonies moved at different rates. Second, as will be discussed in later chapters, the move away from plural establishment was a gradual process, especially in relation to education. As a result it is difficult to determine exactly where the relationship crossed the line and ceased being most accurately described as establishment and began to be more accurately described by some other model. Third, if Murphy J’s formulation of what constitutes establishment is accepted then Australia has never been in a position without established religion. The character of that establishment may have changed but as later chapters will demonstrate in relation to education and funding there are no periods where the State has not provided at least some support for religion.\(^{55}\)

### 2.3.2 Pluralism and Neutrality

Monsma and Soper argue that modern Australia best fits the pragmatic pluralism model.\(^{56}\) In particular they describe Australia’s education system which provides funding to non-government schools, including religious schools, as an example of pragmatic pluralism.\(^{57}\) As will be discussed in Chapter Six State funding for religious schools was re-introduced in Australia in response to a perceived crisis in Roman Catholic education. The State did not introduce funding in order to positively support a religiously plural society but rather to gain votes from the growing Roman Catholic minority and to stave off the perceived funding crisis faced by Roman Catholic schools.\(^{58}\) This would seem to support an argument that, at least in relation to education, Australia’s pluralism is a matter of practicality, not principle.

Pragmatic pluralism can also be seen in tax exemptions granted to religious organisations. Despite repeated suggestions that these exemptions should be limited in some way they continue to be available to all religions for almost all of their activities.\(^{59}\)

The argument for some limitation has been particularly strong in relation to the

\(^{54}\) See 6.1, 6.2 and 6.3.


\(^{56}\) Monsma and Soper, above n 24, chapter 4.

\(^{57}\) Ibid107 – 115.

\(^{58}\) See 6.4.2.

\(^{59}\) See 7.3.2.
commercial activities of religions however in most circumstances no restrictions have been imposed on the exemptions. The reason however is not a matter of principle. As one parliamentarian has argued ‘any decision to compel religious institutions to pay income tax upon trading profits would react harshly upon an organisation which is doing great service to the poor of Australia.’  

In other words it is more practical to allow pluralism, even to those religions whose activities are of doubtful benefits to continue to receive tax exemptions.

Simply describing Australia as operating under a pragmatic pluralist model does not tell the whole story. As identified above the models presented in this chapter operate on a continuum and a State may have features of more than one model. Modern Australia would seem to fit this description. As well as exhibiting traits associated with pragmatic pluralism the State-religion relationship in Australia also exhibits traits from the two neutrality models.

The Australian High Court adopts formal neutrality in its interpretation of section 116 of the  *Australian Constitution*. As will be discussed in more detail below the High Court has interpreted the use of the word ‘for’ in section 116 to mean purpose. As a result a law will only infringe the ‘freedom of religion clause’ of section 116 if it has the purpose of restricting the free exercise of religion. The State is in effect ‘religion blind’ as a result of focusing on the purpose of the law rather than its effect. Facial neutral laws which have a disproportionate effect on adherents of particular religions are also evidence of formal neutrality. Laws about face coverings and blood transfusions to minors arguably fall into this category.

Substantive neutrality can be seen in exemptions for religious organisations in anti-discrimination legislation. Religious organisations receive exemptions from some provisions of the  *Sex Discrimination Act 1984* (Cth), the  *Age Discrimination Act 2004* (Cth), The  *Australian Human Rights Commission Act 1986* (Cth) along with various State based anti-discrimination Acts. While these exemptions could be seen as

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61 See 2.2.
62 See 2.4.3.4 and 2.4.3.6.
63 See 3.2 and 5.4.1.
64  *Sex Discrimination Act 1984* (Cth) s. 37.
65  *Age Discrimination Act 2004* (Cth) s. 35
66  *Australian Human Rights Commission Act 1986* (Cth) s. 3.
privileging religion they can also be seen as the State attempting to make sure that adherence to any one religion is not more difficult as a result of anti-discrimination laws.67

2.3.3 Separation

In theory section 116 the Australian Constitution could form the foundation of a structural separation model. However, as will be discussed in more detail below, section 116 has not been interpreted as requiring the establishment of a ‘wall of separation.’68 On paper Australia may have a model of structural separation, if the State ever wished to utilise that model, but in effect the level of interaction between the State and religion is too high to fit this model. The one time in Australia’s history when Australia might have been said to have structural separation was during the period between the removal of State aid to religious schools in the late 1800s and its reintroduction in 1964.69 At least in relation to education there was in effect formal separation between the State and religion. Monsma and Soper describe this period of Australia’s State-religion relationship as liberal separation.70 However State funding, via tax exemptions, continued during this period71 as did other practices such as prayers in Federal parliament.72 If the State-religion relationship in Australia does not follow a structural separationist model it is even further removed from transvaluing separation. A secular control or abolitionist model also seems unlikely to accurately reflect the State-religion relationship in Australia. While there is some anti-religious sentiment, this can be seen most acutely in debate surrounding issues such as gay rights and discrimination, the Royal Commission into Institutional Handling of Child Sex Abuse and terrorism. However, these negative sentiments appear to be directed toward a specific religion that is ‘at fault’ rather than at religion in general. As Bouma has pointed out Australians tend to have ‘a notion of fair play, [the] equal worth of human dignity and live and let live’ attitude.73 This is a far cry from a secular control or abolitionist model.

67 Ahdar and Leigh, above n 10, 89 – 90.
68 2.4.3.
69 See 5.3.3.
70 Monsma and Soper, above n 24, chapter 3.
71 See 7.3.
72 See Richard Ely, Unto God and Caesar (Studies in Australian Federation, 1976), 117 – 124;
2.4 Federation and Section 116

On 1 January 1901, Australia transitioned from six separate colonies to a federation with a Federal Government and six State Governments. It can be argued either that this had a profound or a very limited impact on the relationship between the State and religion depending on how you look at it. On the one hand federation and Australia’s new constitution introduced a new formalised relationship between the State and religion as set out in section 116 and added a new tier of government to the concept of State. On the other hand the formal separation set up by section 116 was already effectively in place prior to federation and section 116 has been interpreted narrowly in any event. In addition a significant number of issues of importance to religion remain in the hands of the States; the creation of the new federal tier of government therefore had only a limited impact on the relationship between the State and religion in relation to these matters.

2.4.1 The Profound Effect of Federation

In many ways the Federation of Australia in 1901 had a profound effect on the interaction between the State and religion.

As was discussed above it is not entirely clear when the Church of England ceased to be the established church of the Australian colonies, if it ever was. It is clearer that plural establishment ended with the removal of direct grants to the major Christian churches. However at federation the position of the churches and religion more generally was less clear. The State no longer provided direct funding nor did the State fund religious schools. However; there was no formal separation. The colonial governments could have, at any time, chosen to establish any one of the churches or to prohibit the free exercise of any faith.

The exercise of federation and its potential to formalise the future relationship between the State and religion did not pass the churches by. Many took an active part in the federation debates. The churches actively participated in petitioning the colonial governments and delegates to the Constitutional conventions. There were in essence

74 Commonwealth of Australia Constitution Act 1901 (Imp).
75 See 2.3.1.
76 See 7.2.3
77 See 6.3.2
78 See Ely, above n 72.
two sides to the debate. On the one hand groups like the Council of Churches petitioned to have God recognised in the constitution. On the other side were the Seventh Day Adventists and secularists who petitioned strongly for the separation of church and State. What the outcome would be was far from inevitable.

The very first proposed draft of an Australian Constitution was put together by the Tasmanian Attorney General Andrew Inglis Clark. His draft contained clauses both prohibiting the establishment of a State religion at the Commonwealth level and guaranteeing freedom of religion at both the State and Commonwealth level. The first official draft, from the 1881 Constitutional Convention, retained the guarantee of free exercise of religion at the State level, but said nothing about the Commonwealth or establishment of religion. In the opinion of the drafting committee it was unnecessary. Even this formal reference to religion was initially removed at the 1898 Constitutional Convention in Melbourne before being restored along with the other three ‘limbs’ which make up section 116 today, including that “[t]he Commonwealth shall not make any law for establishing any religion…”

In the end section 116 found its way into the Australian constitution as a formal statement of the relationship between the State and religion. To the extent that this provided certainty and formalised the existing situation it was a significant moment in the relationship between the State and religion.

Federation was also a significant event in the relationship between the State and religion in Australia because it introduced a new tier of government to the State side of the equation. How religion would interact with the State now needed to be negotiated both at a local State and Territory level and at the new national level. Several of the changes in the relationship discussed later in this thesis are between the Federal Government and

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81 Ibid 24 – 30, 43 -44.
82 Ibid 1.
83 Ibid. These provisions were contained in 2 separate clauses of the draft Constitution. Clause 46 which read “The federal Parliament shall not make any law for the establishment or support of any religion, or for the purpose of giving and preferential recognition to any religion, or for prohibiting the free exercise of any religion” and clause 81 which read “No Province shall make any law prohibiting the free exercise of any religion.”
84 Renae Barker, ‘A Question to the Founding Father: why don’t we have a freedom of Religion?’ (A paper presented at RUSSLR Conference Canberra, 14 August 2009); Tony Blackshield, ‘Religion and Australian Constitutional Law’ in Peter Radan, Denis Meyerson and Rosalind F Croucher, Law and Religion: God, the State and the Common Law (Routledge, 2005) 81.
religion, including the creation of the Australian Charities and Not-for-profit Commission (ACNC), the creation of the National School Chaplaincy Program (NSCP), the restriction of Jehovah’s Witness during World War II, the re-introduction of State funding to religious schools and exemptions for religious organisations from income tax.

2.4.2 The Limited Impact of Federation

While in some ways federation had a profound impact on the relationship between the State and religion it can also be argued that in practical terms the impact on the relationship was minimal. While there may have been symbolic importance in formalising the relationship and in the creation of a new tier of government, the day to day relationship between the State and religion changed very little on 1 January 1901. In many ways the formal separation of religion and State established in section 116 was already the de-facto reality of the colonies. All colonies had already removed direct State funding to religion and State funding to religious education. All that section 116 and federation did was to formalise that relationship at the new federal level. At the State level the relationship remained much as it was prior to federation. The States continued to maintain a de-facto separation from religion but were not formally prohibited from either establishing their own State religion or prohibiting the free exercise of religion.

The division of powers under the new Australian constitution also contributed to the limited impact of federation on the relationship between the State and religion. Under Australia’s federal system power to legislate on particular matters are divided between the States and the Commonwealth. Section 52 of the Constitution lists powers which are exclusive to the Commonwealth, while section 51 lists powers which are held by both the States and the Commonwealth concurrently, with the Commonwealth prevailing in the event of an inconsistency. Any areas of responsibility not listed in

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85 See 3.4.
86 See 3.3.
87 See 5.2.1.
88 See 6.4 and 6.5.
89 See 7.3.
90 See 7.2.3 and 6.3.2.
91 Tasmania included a freedom of religion provision in its Constitution in 1934 see Constitution Act 1934 (Tas) s. 46. While this Act was intended to consolidate existing legislation the inclusion of s. 46 is something of a puzzle see Museum of Australian Democracy, Constitution Act 1934 (Tas), Documenting Democracy <http://foundingdocs.gov.au/item-sdid-32.html>.
92 Australian Constitution s. 109.
the Constitution, such as health and education, remained the exclusive province of the States. The power to legislate with respect of religious matters is not listed in the Constitution. It therefore remained the province of the States. During the constitutional conventions Edmund Barton\(^{93}\) expressed the view that section 116 was not necessary because the Commonwealth had no power to legislate with respect to religion.\(^{94}\) An argument can be mounted that section 116 was as much about makings sure that religion remained the exclusive province of the States as it was about religion itself.\(^{95}\) In addition to the fact that religion remained a State concern many of the areas in which religion operated, such as education and welfare also remained State powers. A significant proportion of the examples examined in this these involve the interaction of religion and State at the State and Territory level. Examples include the debate concerning the burqa,\(^{96}\) laws relating to blood transfusions and their impact on Jehovah’s Witnesses,\(^{97}\) the banning of Scientology\(^{98}\) and laws relating to witchcraft.\(^{99}\) The Federal Government has increased its areas of influence in relation to religion since federation. This is most noticeable in the field of education, where the Commonwealth is the primary funding provider to religious schools. This was achieved via the use of State grants under section 96 of the Constitution. Education itself remains the province of the States; the Commonwealth merely provides the funds with significant strings attached.\(^{100}\)

While there is a significant interaction between religion and the Federal Government most of these interactions are in the latter half of the 20\(^{th}\) century into the 21\(^{st}\) century. Federation itself did not precipitate an immediate change in the relationship. There was not an immediate and significant engagement between the federal level of government and religion. Rather it has been how federation has played out in the 100 plus years since 1901 that has brought about the change.

\(^{93}\) Edmund Barton was Australia’s first Prime Minister and later a justice of the High Court of Australia.


\(^{95}\) Barker, above n 84.

\(^{96}\) See 3.2.

\(^{97}\) 5.2.1

\(^{98}\) 5.2.2

\(^{99}\) 5.3

\(^{100}\) See 6.4 and 6.5.
2.4.3 Section 116

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 is one of two places in the *Australian Constitution* that references religion, the other being the reference to Almighty God in the pre-amble. In form and wording it appears on the surface to be an amalgam of the United States of America’s article VI section 3 and the First Amendment.

The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executives and judicial officers, both of the United States, and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.101

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.102

The interpretation of section 116 has been much narrower than its American counterpart. In particular the High Court has held that ‘[t]he provision … cannot answer the description of a law which guarantees within Australia the separation of Church and State.’103

In interpreting section 116 the High Court has divided it into four limbs or clauses; the free exercise clause, the no religious observance clause, the establishment clause and the no religious test clause. In order to make out a breach of section 116 a party must establish a breach of one of these clauses specifically.104 As a result the section has never been interpreted as a ‘repository of some broad statement of principle concerning

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101 *United States Constitution* art VI §3.
102 *United States Constitution* amend I.
the separation of church and state …”105 Instead it has been interpreted as a limit on Commonwealth power in the areas covered by the four limbs.

Despite the relative paucity of case law106 there is extensive academic literature which analyses the meaning of section 116, including several which argue for a different interpretation of the section.107 The purpose of the following provision is not to re-hash old ground. Instead it is intended to provide an overview of the narrow interpretation of section 116 by the High Court.

2.4.3.1 The Commonwealth shall not …

Section 116 only applies to the Commonwealth. It has no application to the States and there is debate as to whether or not it applies to the Territories.108 By contrast the United States equivalent First Amendment provision has been held to apply to both the States and the Federal Government despite the fact that it begins with the phrase ‘Congress shall make no law…’ which appears to be similar to the beginning of s. 116 which states ‘The Commonwealth shall not make any law…’ The reason for the different interpretations is the existence of the fourteenth amendment in the American Constitution.

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105 Ibid 609 (Stephen J).
106 The only reported High Court cases which consider s. 116 as part of the ratio of the case are: Krygger v Williams (1912) 15 CLR 366; Adelaide Company of Jehovah’s Witnesses v Commonwealth (1943) 67 CLR 366; Attorney General (Vic); ex rel Black v The Commonwealth (1981) 146 CLR 559; Kruger v Commonwealth (1997) 190 CLR 1; Williams v The Commonwealth (2012) 248 CLR 156. There are a number of Federal Court, Family Court and State Supreme Court decisions which consider s. 116 to various degrees as well as a small number of High Court cases which are either unreported or where the comments relating to s. 116 are in obiter.
The fourteenth amendment, also known as the equal protection clause, requires States to provide ‘equal protection of the laws’. Its effect has been, inter alia, to extend the protections of the First Amendment to the States as well as the Federal Government. The *Australian Constitution* contains no equivalent clause, as a result section 116 only applies to laws made by the Commonwealth.\(^{109}\) Section 116 therefore acts as a limit on Commonwealth power rather than as a guarantee of freedom of religion or the separation of church and State.

2.4.3.2 … establishing any religion …

The meaning of the ‘establishment clause’ of section 116 was considered by the High Court in *Attorney General (Vic); ex rel Black v The Commonwealth*\(^{110}\) (DOGS Case).\(^{111}\) The Court found, in a 6:1 majority judgment, that the Commonwealth Government’s funding program for religious schools did not violate section 116.\(^{112}\) All of the majority Judges\(^{113}\) came up with their own, slightly different, definition of ‘establishing’. All five of the definitions had two things in common. First the Judges asserted that their definition was the ‘natural’ meaning of the word and that there was no ambiguity to be resolved,\(^{114}\) second all five determined that the word ‘establish’ meant the setting up of a State Church or religion.

Chief Justice Barwick adopted the narrowest interpretation defining establishing a religion as requiring that the religion be adopted as part of the Commonwealth establishment before section 116 would be infringed.\(^{115}\) Justice Gibbs agreed with Barwick CJ approach but was willing to concede that the process from not being an established religion to being one may be a matter of degree.\(^{116}\) Justices Stephen, Mason and Wilson were prepared to go further finding that the granting of favours or privileges in a discriminatory way to one religion over another may amount to establishing that

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\(^{109}\) Pannam, above n 107, 42 – 43. In 1944 and 1988 Australia has held referendums to amend s. 116 in an attempt to extend the operation of s. 116 to the States, both were unsuccessful. See Byrnes, A., Charlesworth, H. and Mckinnon, G. *Bills of Rights in Australia History, Politics and Law*, (University of New South Wales Press, 2009) 26 – 27; Frank Brennan, 'The 1988 Referendum – A Lost Opportunity for an Australian Declaration on Religious Freedom' (1992) 69 *Australasian Catholic Record* 205.

\(^{110}\) (1980 – 1981) 146 CLR 559

\(^{111}\) For a detailed discussion of the background to the case see 6.5.3.

\(^{112}\) For a discussion of these programs see 6.4 and 6.5.

\(^{113}\) With the exception of Aickin J who simply agreed with Gibbs and Mason JJ.

\(^{114}\) *Attorney General (Vic); ex rel Black v The Commonwealth* [1980 – 1981] 146 CLR 559, 579 (Barwick CJ), 597 (per Gibbs J), 606 (per Stephen J), 653 (per Wilson J).

\(^{115}\) Ibid 582.

\(^{116}\) Ibid 603 – 604.
church or religion. While they varied in how special that treatment or favour needed to be, they all set the bar very high.\(^{117}\)

Justice Murphy, in dissent, rejected the majority’s narrow definition of the word ‘establishing’. In his opinion all constitutional provisions should be read widely. He reiterated a statement he had made in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth*;\(^{118}\) ‘[g]reat rights are often expressed in simple phrases.’\(^{119}\) Given this Murphy J determined that the prohibition against ‘establishing any religion’ included a prohibition against providing any sponsorship or support for religion.\(^{120}\)

Recently doubt has been expressed as to the correctness of the narrow interpretation of establishing adopted by the majority in the *DOGS* case.\(^{121}\) Questions have been raised as to whether such a narrow interpretation would be adopted by the present High Court in light of the fact that the High Court has revised its stance on the use of both American precedent and the Constitutional Convention debates in interpreting the Australian Constitution.\(^{122}\) Whether or not these doubts are well founded will need to await a fresh High Court consideration of the issues.\(^{123}\)

2.4.3.3 … imposing any religious observance … …

There have been no cases which have directly considered the meaning of the no religious observance clause. In *R v Winneke; Ex parte Gallagher*\(^{124}\) Murphy J considered the clause in obiter. He found that a law compelling a person to state that they object to taking an oath before being permitted to make an affidavit would infringe section 116 because it imposed a religious observance.\(^{125}\) It is important to note that in the other section116 case in which Murphy J participated he was in dissent.\(^{126}\) Caution

\(^{117}\) Ibid 610 (Stephen J), 612 (Mason J) and 653 (Wilson J).

\(^{118}\) (1975) 135 CLR 1, 65.


\(^{120}\) Ibid 622 – 623

\(^{121}\) *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* (2011) 256 FLR 156, 165; Luke Beck, ‘Dead DOGS? Towards a less Restrictive Interpretation of the Establishment Clause; Hoxton park Residents Action Group Inc v Liverpool City Council (No 2) (2014) 37(2) *University of Western Australia Law Review* 59.

\(^{122}\) Beck, ‘Dead DOGS?’, above n 121, 65.

\(^{123}\) Ibid 73.

\(^{124}\) (1982) 152 CLR 211.

\(^{125}\) *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 229.

\(^{126}\) Murphy J gave a dissenting judgment in *Attorney General (Vic); ex rel Black v The Commonwealth* (1981) 146 CLR 559, 619 – 635.
must therefore be exercised in attributing Murphy J’s opinions on the meaning of section 116 to the High Court in general.

Additional guidance on the meaning of the clause can also be found in the Constitutional Convention debates. During the debate much was made of Sunday observance laws – which could be described as a ‘religious observance’. Henry Higgins, who was one of the greatest advocates for the inclusion of what became section 116, relied heavily on the American experience with Sunday observance and the World Fair. In reliance on *Church of the Holy Trinity v United States*, which purportedly declared America to be a Christian country proponents of Sunday observance laws had been successful in making State funding on the World Fair conditional on the fair closing on Sundays. Higgins was concerned that without a ‘freedom of religion’ style clause a similar result could occur in Australia. Sunday observance laws were also raised by other delegates to the convention as the practice in the colonies varied. For example New South Wales allowed the publication of newspapers on Sundays while Victoria did not. The opinion of the delegates was that issues such as this should be left to the States. The plight of groups like the Seventh-Day Adventists and Jews whose day of rest was Saturday rather than Sunday was also raised. There was concern that without a ‘freedom of religion style’ clause the Commonwealth might impose Sunday observance laws, preventing individuals from these two groups from working on Sunday.

On its face the Constitutional Convention debates would seem to support the view that Commonwealth Sunday observance laws would violate the religious observance clause of section 116. The answer may not be this simple. As Higgins himself pointed out s. 116 would not prohibit Sunday closing laws – as long as the purpose for which they were enacted was not the imposition of a religious observance. As will be discussed

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127 In *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 108 the High Court held that it could not use Constitutional Convention debates in interpreting the Australian constitution. This rule was overturned in *Cole v Whitfield* (1988) 165 CLR 360.

128 143 US 457 (1892).

129 Blackshield, above n 84, 82 – 84.

130 Ibid 84.


132 Blackshield, above n 84, 86
in more detail below the purpose of a law is a vital component that determines whether or not it will violate section 116.133

2.4.3.4 … prohibiting the free exercise of any religion …

The free exercise limb of s. 116 has received the most judicial attention of the four s. 116 clauses. Three of the five reported High Court cases consider this clause,134 along with a number of Federal and Family Court decisions.135 The most extensive analysis of the clause was given by Latham CJ in *Adelaide Company of Jehovah’s Witnesses v Commonwealth*, the following is based primarily on that judgment.136

The free exercise clause prevents the Commonwealth from making any laws prohibiting the free exercise of any religion. The section operates not only to protect the free exercise of religion in the traditional sense but also to protect the right to have no religion.137 The section has particular poignancy for minority religions, as Latham CJ put it ‘[t]he religion of the majority can look after itself.’138 The extent of this protection is not unlimited. As will be discussed in more detail below in part this narrow interpretation is due to the need for the law to have the purpose of prohibiting the free exercise of religion.139 It is also due, in part, to the way in which ‘freedom’ has been interpreted.

As Lathan CJ emphasised in *Adelaide Company of Jehovah’s Witnesses v Commonwealth* free does not mean license. Rather it means free within the confines of a free society.140 ‘It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.’141 A law of the Commonwealth will not infringe section 116 merely because it prohibits the free exercise of religion if it does so in the furtherance of maintenance of the ‘civil

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133 See 2.4.3.5.
136 For a discussion of the background of this case see 5.2.1.
137 The Adelaide Company of Jehovah’s Witnesses Inc v The Commonwealth (1943) 67 CLR 116, 123.
138 Ibid 124.
139 See 2.3.3.6.
141 Ibid 131
government’. Religious practices which are inconsistent with the ordinary civil or criminal law will not be protected from prosecution by operation of section 116. This is not to say that s. 116 only protects the right to believe and not to act on those beliefs. The wording of the section itself denies such an interpretation. Rather the High Court has been prepared to impose limits on free exercise of religion in the interests of protecting a free society. It is left ‘to the court to determine whether a particular law is an undue infringement of religious freedom.’

The interpretation of the ‘free exercise clause’ raises the question of when the Court will determine that there has been an ‘undue infringement’. The three reported High Court decisions determined the question in the negative. Requiring a pacifist to undertake compulsory military training did not infringe freedom of religion, nor did declaring the Jehovah’s Witnesses an unlawful association and seizing their property during World War II, or the removal of Aboriginal children from their parents as part of the Stolen Generation. Federal Court decisions have reached similar conclusions. In Judd v McKeon Higgins J suggested that requiring people to vote, whose religious beliefs and practices provided otherwise, might infringe section 116. However his comments were in obiter and religion was not an issue in the case.

2.4.3.5 … no religious test …

Prior to 2012 there were no cases dealing directly with the ‘no religious test clause’. In Crittenden v Anderson Fullagar J had considered the issue in obiter. He found that prohibiting a Roman Catholic from sitting in parliament would violate section 116. In 2012 the High Court handed down its decision in Williams v the Commonwealth which, inter alia, specifically considered the ‘no religious test clause’ of section 116 for the first time. Despite specifically considering the provision the case’s analysis of the

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143 Ibid, 131.
144 Krygger v Williams (1912) 15 CLR 366.
145 The Adelaide Company of Jehovah’s Witnesses Inc v The Commonwealth (1943) 67 CLR 116; see also 4.2.1.
147 (1926) CLR 380.
148 Judd v McKeon (1926) CLR 380, 387.
149 (1950) 51 ALJ 171.
150 Crittenden v Anderson (150) 51 ALJ 171, 171
151 (2012) 248 CLR 156.
clause is only partial as the judges in that case only considered the first half of the clause.152

The ‘no religious test clause’ has two elements. First there must be ‘no religious test’ and second that these tests are for an ‘office or public trust under the Commonwealth’ The Judgements in Williams v the Commonwealth only considered the second of these two elements. Justice Heydon determined that ‘[a]n office” is a position under constituted authority to which duties are attached’ and that this required a direct relationship with the Commonwealth. 153 In that case a chaplain employed by a service provider who had a contract with the Commonwealth was not in a close enough relationship with the Commonwealth to be an ‘officer under the Commonwealth.’154 No case has specifically considered what constituted a ‘religious test.’155

2.4.3.6 … for …

The establishment, religious observance and free exercise limbs are all prefaced by the word ‘for’. The inclusion of this three letter word has had an profound effect on the interpretation of section 116. The American First Amendment uses the word ‘respecting’ rather than ‘for’ which in the DOGS case was a significant factor in the majorities’ decision not to rely on American precedent in determining the meaning of the term ‘establishing any religion’.156 The version of section 116 which was voted on and passed the Constitutional Conventions did not contain the word ‘for’ in relation to the free exercise clause. As originally passed the clause read:

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 ever be required as a qualification for any office or public trust under the Commonwealth

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152 For a detailed discussion of the background to Williams and a more detailed analysis of the judgements relating to s. 116 see 3.2.2.3.
153 Williams v the Commonwealth (2012) 248 CLR 156, [444]; see also more generally [107] – [110] (Gummow and Bell J), [305]- [307], [442] -[448] ( Heydon J).
154 Ibid [ [110], [447].
156 Attorney General (vic); ex rel Black v The Commonwealth [1980 – 1981] 146 CLR 559, 579 ( Barwick CJ), 698, 602 – 602 (Gibbs J), 613 (Mason J), 652- 654 (Wilson J); the different histories of America and Australia was also an important consideration.
It is interesting to consider how section 116 might have been interpreted had the drafting committee not made this small but significant change.\textsuperscript{157}

The word ‘for’ has consistently been interpreted as requiring that a law must have the purpose of establishing religion, imposing a religious observance or prohibit the free exercise of religion before it will infringe section 116. The issue was first raised in \textit{Adelaide Company of Jehovah’s Witnesses v Commonwealth}. Latham CJ consider that ‘[t]he word ‘for’ shows that the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character.’\textsuperscript{158} In the \textit{DOGS case} the majority came to the same conclusion in relation the establishment clause.\textsuperscript{159} Wilson J characterised this as requiring that a particular law must be in order to establish a religion before it will be unconstitutional as opposed to the American respecting which has a much broader meaning.\textsuperscript{160} The issue was taken up again in \textit{Kruger v Commonwealth}. Chief Justice Brennan, Toohey, Gummow and Gaudron JJ all considered the issue, again concluding that the use of the word ‘for’ meant that it was the purpose of the law which must be taken into account in determining whether or not a law infringed section 116.\textsuperscript{161} While a law may have multiple purposes\textsuperscript{162} untimely ‘[t]he use of the word ‘for’ indicates that the purpose is the criterion and the sole criterion selected by section 116 for validity. Thus, purpose must be taken into account. Further, it is the only matter to be taken into account in determining whether a law infringes section 116.’\textsuperscript{163}

\textbf{2.5 Freedom of Religion}

Freedom of religion is recognised as a fundamental human right in multiple international human rights instruments\textsuperscript{164} along with numerous national constitutions and bills of rights.\textsuperscript{165} Article 18 of the Universal Declaration of Human Rights states:

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{157} Blackshield, above n 84, 85.
\item \textsuperscript{158} \textit{The Adelaide Company of Jehovah’s Witnesses Inc v The Commonwealth} (1943) 67 CLR 116, 132
\item \textsuperscript{159} \textit{Attorney General (vic); ex rel Black v The Commonwealth} (1980 – 1981) 146 CLR 559, 579 (Barwick CJ), 609 (Stephen J) 653 (Wilson J) While not discussing the meaning of ‘for’ in detail Gibbs J also seems to assume that the purpose of the legislation must be to establish a religion see 604.
\item \textsuperscript{160} \textit{Attorney General (vic); ex rel Black v The Commonwealth} (1980 – 1981) 146 CLR 559, 653.
\item \textsuperscript{161} See \textit{Kruger v Commonwealth} (1997) 190 CLR 1, 160 (Brennan CJ, Toohey and Gummow JJ), 132 – 134 (Gaudron J).
\item \textsuperscript{162} \textit{Kruger v Commonwealth} (1997) 190 CLR 1, 133
\item \textsuperscript{163} \textit{Kruger v Commonwealth} (1997) 190 CLR 1, 132
\item \textsuperscript{164} \textit{Universal Declaration of Human Rights}, GA Res 217A (II) UN GAOR. 3\textsuperscript{rd} sess, 183\textsuperscript{rd} plen mtg, UN Doc A/810 (10 December 1948) art 18; \textit{International Covenant on Civil and Political Rights}, opened for signature 19 December 1966, 999 UNTS 4 (entered into force 23 March 1976) art 18; Convention for the
\end{enumerate}
\end{footnotesize}
Everyone has the right to freedom of thought, conscience and religion, this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.\textsuperscript{166}

Australia is infamously the only western liberal democracy without a bill of rights.\textsuperscript{167} Australia is a state party to several international human rights instruments which include freedom of religion including the Covenant on Civil and Political Rights. However, international law instruments are not automatically incorporated into domestic law.\textsuperscript{168} Freedom of religion, as expressed in international law, has so far not been incorporated into Australian domestic law.\textsuperscript{169}

Victoria and the Australian Capital Territory have enacted legislative bills of rights which incorporate freedom of religion.\textsuperscript{170} The Tasmanian Constitution also incorporates freedom of religion.\textsuperscript{171} These are weak protections. They only operate within the territories of Victoria, the ACT and Tasmania and as ordinary acts of parliament which may be displaced by later acts. Freedom of religion in Australia is therefore protected, almost solely, by section 116 of the \textit{Australian Constitution}. This so called ‘freedom of religion provision’ is both much less and much more than a guarantee of freedom of religion. It is much less in that the concept of freedom of religion as protected by section 116 has been interpreted narrowly.\textsuperscript{172} It is much more in that protecting freedom of religion is just one limb of the four so called limbs of section 116.\textsuperscript{173}
While freedom of religion is only weakly protected by domestic law in Australia, Australians still enjoy a relatively high level of religious freedom. This is not to say that there have not been instances where religious freedom of individuals and groups has been restricted. Several instances of restrictions on religious practice are discussed in this thesis. However, the outcomes have not been materially different from States which have express freedom of religion provisions incorporated into domestic law.

2.5.1 Limiting Freedom
Most human rights’ instruments which include freedom of religion protect the freedom of belief absolutely. For example Article 18(1) of the International Covenant on Civil and Political Rights and Article 9(1) of the European Convention on Human Rights contain a freedom of religion provision in a material similar form to Article 18 of the Universal Declaration of Human Rights. This includes the right to change those beliefs.

The right to manifest this belief is also protected. However this right is often subject to limitations, the wording of which varies between conventions. For examples Article 18(3) of the Covenant on Civil and Political Rights states that:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Similar qualifications can be found in other international law instruments. For example Article 9(2) of the European Conventions on Human Rights states:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on

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175 See 3.2, 4.2 and Chapter Five.
176 Lerner, above n 164, 95.
the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Similarly in Australia freedom of religion has never meant license. In order for religious freedom to exist there must be a free society. This means that some restrictions need to be placed on freedom. As Latham CJ observed in the Jehovah’s Witness Case

It is consistent with the maintenance of religious liberty for the state to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.178

This division, between the absolute protection of belief and the limited protection of manifestation of belief is known as the action-belief dichotomy.179 The application of Article 9 of the European Convention on Human Rights is particularly illustrative. The provision has been used to permit laws which ban the wearing of Islamic head scarves by teachers180 and university students181 in the interests of secularism. The laws in question did restrict freedom of religion; however the Strasburg Court felt that these laws were ‘necessary in a democratic society’. France’s laws banning the wearing of face coverings in public are currently being challenged before the Court.182

In determining whether a law restricting religious freedom is ‘necessary in a democratic society’ the Court determines whether the restrictions imposed on freedom to manifest religious belief are proportionate to the aim the law seeks to achieve. A recent example of this process can be seen in Eweida and Others v United Kingdom.183 The case concerned four applicants, all of whom were Christian, who contended that they had been prevented from manifesting their religious beliefs. Two of the applicants (Eweida and Chaplin) claimed that their right to manifest their religion had been infringed when they were prevented from wearing a Christian cross at work.184

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183 App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
In the case of Eweida the Court found that too much weight had been given to her employer’s desire to display a certain image. It therefore concluded that there had been a breach of Article 9.185 By contrast in the case of Chaplin the Court found that there had been no breach of Article 9, even though the manifestation of religion, in this case the wearing of a small Christian cross, was practically identical to Eweida. In Chaplin’s case the competing interest was health and safety in the context of a hospital. Chaplin’s employer was concerned that her cross might be grabbed by patients or touch open wounds.186 The Court determined that the measures taken by Chaplin’s employer were not disproportionate and that in the case of health and safety ‘domestic authorities must be allowed a wide margin of appreciation.’187 In Chaplin’s case, unlike Eweida’s, the Court was in effect satisfied that such restrictions on the manifestation of religion was necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Another example of this balancing process can be seen in the United Kingdom House of Lords decision *R v Secretary of State for Education and Employment and others ex parte Williamson*.188 The case considered the use of corporal punishment at privately funded Christian schools. The teachers and parents considered the use of ‘loving corporal correction’ to be essential.189 While the Court accepted that corporal punishment was a manifestation of religious belief the Court also found that restriction of this manifestation of belief was necessary in a democratic society.190 While all of the judges undertook a balancing exercise, Baroness Hale’s is a particularly good example of the Court weighing the rights and freedoms of others against the freedom of religion. She explicitly weighed the right of children to be free from violence in education as expressed in a number of documents on children’s rights against freedom of religion of the parents and teachers. In light of this she concluded that ‘it is quite impossible to say that Parliament was not entitled to limit the practice of corporal punishment in all schools in order to protect the rights and freedoms of all children.’ She also commented that ‘[i]f a child has a right to be brought up without institutional violence, as he does,

185 Eweida and Others v United Kingdom App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [89] – [95].
186 Ibid [98].
187 Ibid [99] – [100].
188 [2005] UKHL 15; the decision concerned the Human Rights Act 1998 (UK) which incorporates the European Convention of Human Rights into domestic law.
189 R v Secretary of State for Education and Employment and others ex parte Williamson [2005] UKHL 15 [10].
that right should be respected whether or not his parents and teachers believe otherwise.\textsuperscript{191}

In neither \textit{Eweida} nor \textit{Williamson} did the Court deny that the belief in question was religious, nor did the Court deny that the manifestation of that belief had been restricted. Rather the Court accepted that the restrictions on that manifestation were necessary in a democratic society.

Different jurisdictions use different terminology to express this balancing process and at what point it will be acceptable to limit religious freedom in favour of the freedom of others or the interests of society and the State as a whole. In Australia Latham CJ used the term ‘undue infringement’\textsuperscript{192} rather than ‘necessary in a democratic society’ as used in the European Convention. Whatever the term used the effect is the same. Courts must weigh up the infringement to freedom of religion against the harm the law is trying to prevent and determine if such infringement is ‘undue’ or ‘necessary’. As a result freedom to manifest religion is never absolute. Rather it must be balanced against the rights and freedoms of others. While Australia does not have an express right to freedom of religion this process is still undertaken by legislators and judges when considering issues relating to the restriction of manifestations of religion. This process can be seen in the debate surrounding the wearing of the niqab and burqa.\textsuperscript{193} However, without an express freedom of religion contained in a bill of rights there is a danger that this balancing process may be missed in future debates.

\section*{2.6 What is a ‘Religion’?}

The term religion is notoriously difficult to define.\textsuperscript{194} As Latham CJ put it in \textit{Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth}\textsuperscript{195} ‘it would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed in the world.’\textsuperscript{196} However this has not prevented judges,

\begin{footnotes}
\item[	extsuperscript{191}] Ibid [86].
\item[	extsuperscript{192}] The Adelaide Company of Jehovah’s Witnesses Inc v The Commonwealth (1943) 67 CLR 116, 131.
\item[	extsuperscript{193}] See 4.2.
\item[	extsuperscript{195}] (1943) 67 CLR 116.
\item[	extsuperscript{196}] Ibid at 123.
\end{footnotes}
politicians, theologians, philosophers, anthropologists, sociologists, psychologists and a myriad of other disciplines from attempting to do so. Inevitably the definitions arrived at vary from discipline to discipline and from context to context. 197 What is a useful definition in one context will not work for other purposes. 198 Richard Dawkins’ definition of religion as a virus is virtually useless to a judge trying to determine whether a particular set of beliefs are covered by s. 116 of the Australian Constitution. On the other hand it makes Dawkins point very succinctly. 199 This is not to say that interdisciplinary approaches should not be adopted, but that the purpose for which the definition is to be used must be taken into account in constructing it. 200

In attempting to identify changes in the relationship between the State and religion defining religion is vital. Without a working definition there are no outer boundaries which help to delineate when the State is interacting with religion and when it is interacting with some other worldview. If the definition is too wide it may be possible to find ‘great reservoirs of religious sentiment in an apparently secular society’ 201 and therefore overestimate the amount of interaction between the State and religion. On the other hand a definition that is too narrow risks missing many of the interactions that take place between the State and new, novel and unpopular religions. 202

The way in which the State defines religion is itself an important interaction between the State and religion. The State’s definition of religion has the power to exclude and include; to make legitimate or illegitimate religions which falls inside or outside its definition. 203 If the State defines religion narrowly then it may exclude belief systems that are generally accepted as religious. The State may even deliberately seek to define religion narrowly with this very purpose in mind. The treatment of both the Church of Scientology 204 and Witchcraft 205 in Australia are examples of the State attempting to define religion in such a way as to exclude belief systems from the category of religion.

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198 Durham and Scharffs, above n 11, 44.
200 See Sandberg, above n 194, 28 – 52.
201 Steve Bruce, *God is Dead: Secularization in the West* (Blackwell, 2002), 199.
202 Sandberg, above n 194, 29.
204 For a discussion of the interaction of the State and the Church of Scientology see 5.2.2.
205 For a discussion of the interaction of the State and Witchcraft in Australia see 5.3.
In 2000, during the debate to repeal the laws banning the practice of Witchcraft in Queensland the Deputy Leader of the Opposition, Lawrence Spingborg, commented that:

The abolition of the provision also arguably suggests that the occult, witchcraft and so on are acceptable social practices, perhaps on a par with religions. I do not believe that the majority of organised religions, let alone the general community, would accept that they are to be regarded as on par with witchcraft, but that is a consequence of such an approach.\textsuperscript{206}

Earlier, in 1973, Commonwealth Senator Edgar Prowse expressed concern that the recognition of Scientologists under the \textit{Marriage Act 1961} (Cth) may lead to witchcraft also being recognised as a religion.\textsuperscript{207}

The Church of Scientology has also been subject to attempts to define it out of the category of ‘religion.’ As will be discussed in more detail in Chapter Five in the 1960’s the Victorian Government initiated an inquiry into the Church of Scientology, known as the Anderson Report. The report found, inter alia, that Scientology was not a religion.\textsuperscript{208} Based on this Report Victoria, Western Australia and South Australia attempted to ban the practice of Scientology. In Victoria the States continued insistence that Scientology was not a religion eventually led to the famous High Court case \textit{Church of the New Faith v Commissioner of Pay Roll Tax (Vic)}\textsuperscript{209} (the Scientology Case) which is the basis of the legal definition of religion in Australia.

\subsection*{2.6.1 Approaches to Defining Religion}
As identified above context is important in determining the appropriate definition of religion. The purpose of this thesis is to examine legal interactions between the State and religion. Therefore the most appropriate definition in this context is a legal one. However, caution must be exercised in using the State’s own definition. As the Courts form part of the State this must be kept in mind in what follows.\textsuperscript{210} In order to minimise problems associated with using the State’s definition, multiple definitions from multiple jurisdictions are considered.

\textsuperscript{206} Queensland, \textit{Parliamentary Debates}, Legislative Assembly, 10 November 2000, 4323
\textsuperscript{207} Commonwealth of Australia, \textit{Parliamentary Debates}, Senate, 13 March 1973, 351
\textsuperscript{208} See 5.2.2.1.2.
\textsuperscript{209} \textit{Church of the New Faith v Commissioner of Pay Roll Tax (Vic)} (1982/83) 154 CLR 120.
\textsuperscript{210} See 1.4.1.5.
The Courts have adopted three types of definitions of religion; functional, substantive and analogical. Given the fame of the Scientology Case it is tempting to believe that the legal definition of religion has been settled in Australia; however the case has been criticised for failing to deliver a unified definition of religion. An example of each of the three types of definitions can be found in the case. This has not stopped State entities such as the Australian Tax Office (ATO) and Australian Bureau statistics (ABS) from relying on the case.

2.6.1.1 Functional Definitions

Functional definitions define religion from the viewpoint of an individual adherent, focusing on the role religion plays in the adherent’s life. The most well-known legal definitions which adopt a functionalist approach are found in the United States conscientious objector/free exercise cases. In United States v Seeger the United States Supreme Court found that in determining whether a given belief was religious the Court needed to determine:

… whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that fulfilled by the orthodox belief in God of one who clearly qualifies for the exemption.

Justice Murphy’s definition of religion in the Scientology Case is a functional definition. Justice Murphy determined that that:

… any body which claims to be religious, whose beliefs or practices are a revival of, or resemble earlier cults, is religious. Any body which claims to be religious and to believe in a supernatural Being or Beings, whether physical and visible … or a physical invisible God or spirit, or an abstract God or entity is religious. … Any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious.
Functionalist definitions have been criticised as too wide. They have the potential to include a multitude of secular, political and social belief systems which occupy a similar place to religion, but which ultimately most people would not consider to be religious in the ordinary sense of the word.\(^{219}\) In *Welsh v United States*\(^{220}\) the Court found that purely ethical and moral beliefs, which Welsh himself did not consider religious, qualified as a religion.\(^{221}\) The main difficulty with functional definitions is that they include belief systems that are ‘parallel’ to ‘orthodox belief systems’ and as Dillon J pointed out in *Barralet v Attorney General* ‘parallels, by definition, never meet.’\(^{222}\)

### 2.6.1.2 Substantive Definitions

Substantive definitions, also called essentialist definitions, attempt to identify the essence or core concepts of religion.\(^{223}\) Legal definitions which have taken this approach have tended to include a requirement that there be a belief in a Supreme Being or God. This has been the traditional approach in the United Kingdom. In *Barralet v Attorney General* Dillon J concluded that:

> Religion…. is concerned with man’s relations with God, and ethics are concerned with man’s relations with man …It seems to me that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god.’\(^{224}\)

Similarly in *R v Register General; ex parte Segerdal* Lord Denning MR fund that ‘[r]eligious worship means reverence or veneration of God or of a Supreme Being.’\(^{225}\) Courts in the United States have also deployed substantive definitions in the past. For example in *Davis v Beason* the Unites States Supreme Court held that:

> The term religion has reference to one’s views of his relations to his creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will…\(^{226}\)

\(^{219}\) Durham and Scharffs, above n 11,24; Ahdar and Leigh, above n 10, 146 – 147.


\(^{222}\) *Barralet v Attorney General* [1980] 3 All ER 918, 924.

\(^{223}\) Durham and Scharffs, above n 11 ,45; Ahdar and Leigh, above n 10, 148.

\(^{224}\) *Barralet v Attorney General* [1980] 3 All ER 918, 924.

\(^{225}\) *R v Register General; ex parte Segerdal* [1970] 2 QB 697, 707.

\(^{226}\) *Davis v Beason* 133 US 333, 341 – 342 (1890).
In *United States v MacIntosh* Hughes CJ and Holmes J found that ‘[t]he essence of religion is belief in a relation to God involving duties superior to these arising from human relations.’

If functionalist definitions are too wide, then substantive definitions are too narrow. In focusing on the need for belief in God they effectively exclude non theistic religions such as non-theistic Buddhism. Substantive definitions are also criticised for attempting to find a single essence or core idea which is common to all religions. Critics argue that the attempt is misconceived as no such single characteristic exists.

More recently substantive definitions have moved away from an emphasis on belief in God. They focus instead on the supernatural. The definition proposed by Mason ACJ and Brennan J in the *Scientology Case* is a substrative definition which has replaced God with the supernatural. They determined that:

\[\ldots\text{, for the purpose of the law, the criteria of religion are twofold, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, although canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.}\]

In including supernatural things and principles Mason ACJ and Brennan J have expanded the traditional substantive definition beyond theistic religions.

In 2004 the Supreme Court of Canada adopted a similar approach. In *Syndicate Northcrest v Anselem* the Court held that:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

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228 Durham and Scharffs, above n 11,45; Ahdar and Leigh, above n 10, 149.
While employing slightly different language, referring to divine, superhuman and controlling power rather than supernatural, the focus is still on the essence of religion. What it is: in this case non-natural.

More recently the Supreme Court in the United Kingdom explicitly rejected the use of the term supernatural ‘because it is a loaded word which can carry a variety of connotations’. Instead Lord Toulson, with whom the rest of the Court agreed, determined that:

I would describe religion in summary as a spiritual or non-secular belief system held by a group of adherents, which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system.

2.6.2.3 Analogical Definitions
A third option is analytical definitions, sometimes called the family resemblance approach which attempts to define religion by identifying a list of criterion that are common to many religions. Rather than insisting that there is an essential core that all religions share the analytical approach accepts that not all religions will exhibit all of the characteristics but the presence of one or more is a strong indication that the belief system under consideration is in fact a religion.

The most famous example of a legal definition based on analogy is that articulated by Adams J in Malnak v Yogi and Africa v Commonwealth of Pennsylvania. Justice Adams identified 3 indicia that could be used in determining if a particular set of beliefs constitutes a religion:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognised by the presence of certain formal and external signs … that may be analogized to accepted religions. Such signs might include formal

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231 R v Registrar General of births, Deaths and Marriages [2013] UKSC 77, [57].
232 Ibid.
233 Durham and Scharffs, above n 11 ,47; Ahdar and Leigh, above n 10, 149 – 152.
services, ceremonial functions, the existence of clergy, structure and organisation, efforts at propagation, observance of holidays and other similar manifestations associated with traditional religions.  

However he emphasised that ‘[a]lthough these indicia will be helpful, they should not be thought of as a final test for religion.’

In the Scientology Case Wilson and Dean JJ adopted an analytical approach, identifying five indicia ‘derived by empirical observation of accepted religions’

One of the most important indicia of a religion is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. … Another is that the ideas relate to man’s nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium … is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.

They considered that ‘[n]o one of the above indicia is necessarily determinative of the question whether a particular collection of ideas and/or practices should be objectively characterised as “a religion”. They are no more than aids in determining that question and the assistance derived from them will vary according to the context in which the question arises.’ This approach was approved of by Lord Toulson in R v Registrar General of Births, Deaths and Marriages although ultimately the definition he adopted had more in common with substantive approaches than analogical ones.

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236 Ibid, 1035.
237 Malnak v Yogi 592 F.2d 197, 210 (3d Cir 1979).
238 Church of the New Faith v Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120, 173.
239 Ibid 174.
240 Ibid.
241 R v Registrar General of Births, Deaths and Marriages [2013] UKSC 77, [57].
2.6.2 Religion in This Thesis
In order to ensure that interactions between the State and new or unusual religions are not overlooked this thesis needs to adopt a broad definition. However, as noted above, a definition that is too broad is likely to overstate the level of that interaction. Although the thesis is primarily focused on Australia the three Australian definitions from the Scientology Case have not been chosen. As Lord Toulson argued in R v Registrar General of Births, Deaths and Marriages the term supernatural has a number of connotations and its use would import additional layers of meaning into any definition of religion using the term. Lord Toulson’s own definition is, however, too narrow. As a substantive definition it looks for the essence of religion. Give the variety of religious experience across time such a definition risks missing unusual or new religions. Instead this thesis adapts the definition proposed by Wilson and Dean JJ in the Scientology Case with the language used by Lord Toulson.

Religion, for the purpose of this thesis, is defined by reference to a non-exhaustive list of indicia, the presence of which is a strong indication that the belief system under consideration is a religion. While not all indicia need to be present it is unlikely that a belief system is a religion if only one indicia is present. These indicia include:

1. A spiritual or non-secular belief system.
2. Ideas relating to humanity’s nature and place in the universe relating to things spiritual or non-secular
3. These ideas are accepted by adherents as encouraging them to observe particular standards or codes of conduct or participate in practices
4. The adherents constitute an identifiable group or groups; and
5. The adherents see the collection of ideas and/or practices as constituting a religion.

Atheist, agnostic, and secular belief systems are excluded by this definition. These belief systems are about religion but they are not religions themselves. While the State’s interaction, and adoption of these belief systems, is an interaction with religion, they are not the focus of this thesis.
2.7 Secularism

Just as there is considerable debate about the meaning of the term ‘religion’ there is also
debate about the term ‘secularism’. Adding to the confusion is the fact that the terms
secular, secularism and secularisation are often confused and used interchangeably.\(^{242}\)
Russell Sandberg described the difference between the three terms in the following way:

The term ‘secular’ refers to a category that can be distinguished from the
religious. The term ‘secularisation’ describes a ‘process of religious change’,
usually alleging that there has been a decline over time in religious behaviour.
And the worldview of ‘secularism’ refers to an ideology, a theoretical and often
political or philosophical posture, which promotes secularity. Yet, the terms
‘secularisation’ and ‘secularism’ are often treated as if they are synonymous.\(^{243}\)

This section is primarily concerned with secularism, as described by Sandberg.
However, the secularisation thesis will be touched upon briefly.

Charles Taylor identifies three different forms of secularism.\(^{244}\) First, secularism can
mean the removal of God and religion from the public sphere. Taylor argues that under
this model ‘as we function within various spheres of activity … the norms and
principles we follow, the deliberations we engage in, generally don’t refer us to God or
to any religious beliefs; the considerations we act on are internal to the “rationality” of
each sphere.’\(^{245}\) This form of secularism does not necessarily correlate with a decrease
in religious belief by the population, although the two phenomena can coincide.
Taylor’s second form of secularism addresses the issue of the level of religiosity of the
population. It involves ‘the falling off of religious belief and practice, in people turning
away from god, and no longer going to Church’.\(^{246}\) In this form secularism can occur
even where the State still supports religion. Taylor argues this has already taken place in
much of Western Europe.\(^{247}\) The third form of secularism, and the one explored and
promoted by Taylor in his book *A Secular Age*, ‘consists, …, of a move from a society
where belief in God is unchallenged and indeed, unproblematic, to one in which it is

\(^{242}\) Sandberg, above n 194, 56 – 57.
\(^{243}\) Ibid.
\(^{244}\) Charles Taylor, *A Secular Age* (Belknap Press of Harvard University Press, 2007), 2-3; see also Tom
\(^{245}\) Taylor, above n 244, 2.
\(^{246}\) Ibid.
\(^{247}\) Ibid.
understood to be one option among others, and frequently not the easiest to embrace.\textsuperscript{248} In societies which operate under this form of secularism believing is an option. Societies could be highly religious from an individual’s point of view, in terms of Taylor’s second form of secularism while still being secular. In this sense Taylor’s third form is like his first, non-belief of the population is not a precondition. However in the third form religion is not removed from the public sphere, rather it is just one voice amongst many.

Ahdar and Leigh present a different typology of the different forms secularism can take. They suggest that secularism as a political philosophy can be dived into two forms, benevolent or hostile.\textsuperscript{249} In benevolent or soft secularism the State ‘refrains[s] from adopting and imposing any established beliefs – whether they be conventional religious or non-religious (atheistic) beliefs – upon its citizens.’\textsuperscript{250}(emphasis in original) By contrast in hostile secularism ‘the state actively pursue[s] a policy of established unbelief.’\textsuperscript{251} While these two forms have similarities with Taylor’s third and first forms respectively they are also different from them. Taylor’s definitions of secularism focuses on the society while Ahdar and Leigh focus on the policy of the government. The form of secularism that is adopted influences the types of arguments that can be made in support of continued secularisation. For example arguments against the continued wholesale tax exemptions for religious organisations take multiple forms with different underlying assumptions about secularism. An argument that the State should remove all tax exceptions from religious organisations, as to do otherwise is to effectively subsidise believers,\textsuperscript{252} assumes secularism in terms of Taylor’s type one or two. This argument focuses on the removal of religion from the public sphere and on the increase in the number of non-believers in the population who are now subsidising the believers through their taxes. Another option is to instead argue that tax exemptions should be extended to other worldviews, such as atheism and secular humanism.\textsuperscript{253} This argument adopts Taylor’s third form of secularism, that belief is just one option among many.

\textsuperscript{248} Ibid 3.
\textsuperscript{249} Ahdar and Leigh, above n 10, 95.
\textsuperscript{250} Ibid.
\textsuperscript{251} Ibid 96.
\textsuperscript{252} See 7.3.2.2.
It is tempting to see the secular and religion in opposition to one another and to equate secularism with atheism.\textsuperscript{254} However supporters of secularism argue that secularism and atheism are two separate concepts and that one does not necessarily mean the other. Rather secularism is a ‘neutral’ position.\textsuperscript{255} This last point is debatable and will be discussed in more detail below. Regardless of whether or not secularism and atheism should be seen as synonymous, religion and secularism should not be seen as two polar opposites. Instead they should be seen as two sides of the one coin.

Rather than seeing the debate as being between religion and secularism the debate should be seen as being between two worldviews. In many cases these worldviews will be religion and secularism or even atheism. In earlier decades the debate would have been between Protestantism and Catholicism. The debate itself is not different, it is just that the parties have changed and arguably a new party has joined the conversation. The debate remains focused on the place of religion in society. When the debate was between Protestants and Catholics the debate centred on the form that religion should take. The debate between religionists and secularists focuses more on the place of religion but the form is also still important, particular if the various religious positions are viewed as worldviews and secularism as just another worldview.

The traditional secularisation thesis argued that the decline of religious belief and the influence of religions in the public, political and social spheres was an inevitable consequence of modernity. ‘[T]hat changes associated with modernity, including economic growth, urbanisation, greater geographical and social mobility and the rise of technology and science, effectively undermined and marginalised religion and brought on secularism.’\textsuperscript{256} However as Gary Bouma and others have observed ‘secular societies are not irreligious, anti-religious or lacking in spirituality. Whatever theories of secularism predicted, it has become extremely clear at the opening of the twenty-first century that spirituality is not in decline [and] that religion is growing in strength in most parts of the world.’\textsuperscript{257} While some still maintain the inevitability of secularisation others have re-interpreted the thesis suggesting that it is just one option on the path of

\textsuperscript{254} Frame, above n 244, 272.
\textsuperscript{256} Frame, above n 244, 281.
\textsuperscript{257} Gary Bouma, \textit{Australian Soul: Religion and Spirituality in the Twenty-first Century} (Cambridge University Press, 2006), 5; see also Sandberg, above n 194, 57 – 58.
history, and not necessarily an irreversible one. Alternatively, as Taylor has suggested, true secularisation has not taken place at all, rather there has simply be a re-organisation or re-composition of religion and belief into new forms.\textsuperscript{258}

Can secularism be neutral? Is it, as Max Wallace has argued, ‘…neither religious nor anti-religious, but simply neutral.’\textsuperscript{259} Certainly it would be difficult to describe hostile secularism as identified by Leigh and Ahdar as neutral towards religion, but as has been identified above this is not the only form secularism can take. Leigh and Ahdar argue that even benevolent secularism is not neutral in the same way that any other political philosophy is not neutral.\textsuperscript{260} As they put it ‘[n]o philosophy, unless it is content with its own destruction, is indifferent to or accepting of tenants that directly contradict or undermine its own central premises.’\textsuperscript{261} Secularism therefore could not accept a State-religion relationship based on the model of theocracy or erastianism but most of the other models presented above can be ‘secular’ – depending upon how they are implemented and the form of secularism adopted.

Ultimately whether or not a nation is secular will depend on the definition of secularism adopted and the argument an individual, religious organisation or government wishes to advance. If secularism itself is not neutral, then neither is the choice as to which version you adopt as the benchmark.

\section*{2.8 Conclusion}
This brings us back to the question with which this chapter began – what does it mean to be a secular nation? The phrase secular nation is often, particularly in Australia, contrasted with Christian nation – suggesting that a nation must be either one or the other.\textsuperscript{262} As this chapter has argued whether or not a nation is secular in part depends upon the form of secularism that is adopted as the benchmark. But it also depends upon what is meant by ‘nation.’ Nation can mean State, referring to the formal aspects of government and in this sense a nation will be secular if there is at least some separation between the State and religion. This does not necessarily need to be as formal as a

\begin{thebibliography}{99}
\bibitem{259} Wallace, above n 255.
\bibitem{260} Ahdar and Leigh, above n 10, 97 – 98.
\bibitem{261} Ibid 97.
\bibitem{262} Frame, above n 244, 272 – 273.
\end{thebibliography}
declaration in a State’s constitution as in the United States and France, particularly if Taylor’s third form or Ahdar and Leigh’s benevolent secularism is the benchmark. In the model presented by Durham and Scharffs, set out above, a State is secular anywhere on the right hand side of the loop, although secularism is only achieved halfway along the bottom arm of the loop. However, nation can also refer to the people or society. In this sense the formal relationship between the State and religion is irrelevant. The State may be at either extreme a theocracy or an abolitionist State and the people may be secular. This is Taylor’s second form of secularism. While this form is arguably more likely in the bottom half of Durham and Scharffs’ loop, it is not impossible to imagine a situation where the State maintains a formal and close relationship with religion while its people turn their backs on God.

In Australia those advancing the argument that Australia is a secular nation most often point to section 116 of the *Australian Constitution*. While this section does prevent the establishment of a State church in Australia in practice its application has been very narrow. As will be demonstrated in this thesis the existence of section 116 has not prevented a close and sometimes intimate relationship between the State and religion in Australia. Those who argue that Australia is a Christian nation point to census statistics which show a historical dominance of Christianity that has continued into the 21st century.\(^{263}\) If Australia is a secular nation, then it is one where the majority of people have not turned their backs on religion, even if the numbers doing so are increasing with each census. If Australia is a Christian nation then it is one without a State Church and without a formal role for religion and religious leaders in government. Those advancing these two apparently mutually exclusive positions are arguing at cross purposes. They do not have the same definition of secularism let alone nation. Perhaps the best explanation is that Australia is both. It is secular in that there is not state church and it is religious, even arguably Christian, in that religion and faith continue to play an important part in the lives of many of its citizens including its political leaders. It is in this context that Australia has been able to create a county in which individuals are relatively free to exercise their own faith, without freedom of religion being protected in a bill of rights. As this thesis will show, not all Australians have been free


to exercise all elements of their faith. However freedom of religion, even in countries with a bill of rights, does not mean license. Limits have always been placed on the manifestation of religion. The situation in Australia has been no different. In some instances Australia has arguably reached less restrictive accommodations of controversial religious practices than countries with a bill of rights.

The remainder of the thesis moves from looking at these wider macro issues of State-religion relationships to considering the relationship at a micro level. It is at this micro level that individual adherents and religious organisations interact with the State on a daily basis, and therefore the focus of this thesis. However in considering the main question of this thesis: are these changes the product of one off circumstances or the product of an ongoing pattern of change in the legal relationship between the State and religion?, the macro context in which these changes take place needs to be kept in mind. Ultimately the micro changes build together to form macro changes which can in time effect the wider context of the State-religion relationship.

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264 See 3.2, 4.2 and Chapter 5.
265 Compare for example Australia’s laws relating to the burqa with those in Europe and with the European Court of Human Right’s decisions relating to the Islamic head scarf.
Part One

Part One of this thesis is designed as a test of concept for the central question: are changes in the legal relationship between the State and religion the product of unique circumstances, or the product of an ongoing pattern of changes? It does this by first identifying three case studies in modern Australia that represent changes in the legal relationship between the State and religion. These are the State’s restriction on the wearing of full-face coverings in public, the National School Chaplaincy Program, and the Australian Charities and Not-for-profit Commission. Chapter Three sets out the details of each case study and establishes that each is in fact a change in the legal relationship between the State and religion. Chapter Four then identifies three analogous issues in the first 50 years of European colonisation. These are the State’s restriction of Roman Catholics, the Church and Schools Corporation, and the *Church Acts*.

In demonstrating that there are issues in the first 50 years after European colonisation that are analogous to the issues in modern Australia, Part One establishes that there is a basis for further exploring whether there are patterns of change in the legal relationship between the State and religion. This further exploration will be carried out in Part Two.
Chapter Three - Changes in the Legal Relationship Between the State and Religion

3.1 Introduction

As highlighted in Chapter One the State and religion interact in a number of different ways in modern Australia. This includes legal interactions via legislation and case law. The central question of this thesis relates to these interactions between the State and religion, in particular where legal change occurs. Are these legal changes the product of a one off set of circumstances or are they the product of an ongoing series of changes over the course of Australian history? In order to answer this question, Chapter Three examines three changes in the legal relationship between the State and religion in modern Australia. These three case studies will be compared in latter chapters with other legal changes in the relationship to determine whether the changes are analogous, and therefore could be part of a pattern of change. In effect, the case studies discussed in Chapter Three will act as measuring sticks against which changes in earlier time periods can be measured. As such, Chapter Three is a crucial starting point in the investigation of the central question of this thesis.

The three case studies chosen are: the discussion and legislation relating to the wearing of the niqab and burqa; the National School Chaplaincy Program (NSCP) and subsequent High Court case; and the creation of the Australian Charities and Not-for-profit Commission (ACNC). These case studies were chosen for three main reasons. First, they are all evidenced by either legislative change or important cases law,¹ second, all three have had a high level of media attention indicating that they are high in the public consciousness, and third, when taken together the three cases studies cover a

¹ The debate regarding the wearing of the burqa and niqab is evidenced by the Identification Legislation Amendment Act 2011 (NSW). The NSCP is evidenced by the High Court case Williams v Commonwealth [2012] HCA 23. The ACNC is evidenced by the Australian Charities and Not-for-profits Commission Act 2012 (Cth) and Australian Charities and Not-for-profit Commission (Consequential and Transitional) Act 2012 (Cth).
broad range of interactions between the State and religion.² While other case studies could have been chosen, these three give a broad representation and fulfil the requirement that the change under consideration must be legal in nature.³

As well as providing a measuring stick against which other changes in the legal relationship can be compared, Chapter Three fulfils a secondary purpose; the provision of a detailed examination of the history and surrounding circumstances of the three case studies. All of the case studies in Chapter Three are recent changes in the legal relationship between the State and religion. This has two consequences. First, little secondary material is available discussing the three case studies. This chapter seeks to begin to fill this gap by providing a complete examination of the three case studies. To do this Chapter Three relies heavily on primary and original material.⁴

The second consequence of the three case studies being recent changes in the legal relationship between the State and religion is that the changes are not yet complete. In all three cases there is potential for further legal change to take place in the near future. The law and events presented in Chapter Three are correct up to and including the 31 May 2013.⁵ Where future change is likely a brief discussion of that potential future change is provided.

3.2 The Wearing of the Niqab and Burqa⁶

The first case study considered by this thesis is the debate and subsequent legislation regarding the wearing of the niqab and burqa in public.⁷ The niqab and burqa are full-face coverings worn by some Muslim women for religious and/or cultural reasons. In 2011, the New South Wales Government passed the Identification Legislation Amendment Act 2011 (NSW) giving police the power to require a person wearing a full-

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² See 1.2.1.1.
³ See 1.4.1.6.
⁴ See 1.3.4.
⁵ Where change has taken place between this date and the date of submission a footnote to that effect has been provided.
⁶ An earlier version of this section was published in the University of Western Australia Law Review. See Renae Barker, ‘The Full Face Covering Debate: The Australian Perspective’ (2012) 36(1) University of Western Australia Law Review 143.
⁷ A burqa (also burka) is a garment that completely covers the body including the head and face. A niqab also completely covers the body; however a niqab has a slit in the material through which the wearer’s eyes can be seen.
face covering, such as a niqab, burqa, or motorbike helmet, to remove their face covering for the purpose of identification. While the legislation itself does not refer specifically to Islam, Muslims, Muslim women, the niqab or burqa, it does mark a change in the legal relationship between the State and the religious practices of some Muslim women.\(^8\) Both the impact of the legislation and its history suggests that it is an example of the State controlling religious practice. Prior to the introduction of the *Identification Legislation Amendment Act 2011* (NSW) no Australian legislation specifically dealt with full-face coverings such as the burqa and niqab.

This section will first examine the content of the *Identification Legislation Amendment Act 2011* (NSW). As will be seen below, it is neutral in its language and would appear, without further information, not to restrict any particular religious practice. This section will then examine the actual effect of the legislation, which despite the neutral language with which the laws are written, does have a disproportionate impact on Muslim women. Finally, this section will examine the history of the legislation, earlier proposals and interactions between Muslim women wearing full face coverings and the court system.

### 3.2.1 The *Identification Legislation Amendment Act 2011* (NSW)

On 15 September 2011 the New South Wales Parliament passed the *Identification Legislation Amendment Act 2011* (NSW) (the Act) giving Police and other officials the power to require people to remove face coverings for the purposes of identification. The Act is very narrow in its application. It does not ban the wearing of full-face coverings in public, nor does it refer to the burqa, niqab, Muslims, Muslim women, Islam or religion more generally. Instead, designated public officers are given the power to request that face coverings be removed in certain circumstances and impose penalties if this request is not complied with. Instead of referring to the niqab or burqa specifically the term ‘face covering’ is used, which is defined as ‘an item of clothing, helmet, mask or any other thing that is worn by a person and prevents the person’s face from being seen (whether wholly or partially).\(^9\) While this definition would cover the niqab and burqa it also covers a wide range of other types of face coverings.\(^10\) As a

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\(^8\) The practice is observed by a small minority of Muslim women in Australia.

\(^9\) *Identification Legislation Amendment Act 2011* (NSW) schedule 1 [1].

\(^10\) New South Wales, *Parliamentary Debate*, Legislative Assembly, 12 September 2011, 5459 (Kevin Conolly); at 13 September 2011, 5510 (Bryan Doyle).
result the law would appear, on its face, to be a law of general application, and therefore not a change in the legal relationship between the State and religion.

Despite appearing to be of general application both the effect of the law and the reasoning given for the law demonstrate that the Identification Legislation Amendment Act 2011 (NSW) is a change in the legal relationship between the State and religion.

3.2.1.1 The Content of the Identification Legislation Amendment Act 2011 (NSW)


It is divided into two schedules. The first schedule deals specifically with police officers, while the second schedule deals with juvenile justice officers, court security officers, officers authorised by Corrective Services, and people witnessing affidavits and statutory declarations. In the first schedule police offers are given the power to require a person to remove any face covering where that person has been requested to show photographic identification or provide their identity. Failure to comply with such a request results in a $220 fine, or where the request is made of a motor vehicle driver a $5,500 fine (or 12 months imprisonment).

In the second schedule juvenile justice officers, court security officers, and officers authorised by Corrective Services are also given the power to request that a person remove a face covering. If a person fails to comply they can be removed from the relevant premises. In the case of court security officers where a security officer

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13 Identification Legislation Amendment Act 2011 (NSW) schedule 2 (inserting Children (Detention Centres) Regulation 2010 (NSW) s 34A, Court Security Act 2005 No 1 (NSW) s 13A; Crimes (Administration of Sentences) Regulation 2008 (NSW) clause 89 2A – 2D.
14 Identification Legislation Amendment Act 2011 (NSW) schedule 2 s 2.2, 2.3 [3], 2.5 [1].
arrests a person and upon request they refuse to remove it, the maximum penalty is $550.15.

The Act contains some safeguards to ensure that where practical the person who is required to uncover their face is afforded privacy and respect. For example, a police officer must, as far as reasonably practical, provide reasonable privacy and view the person’s face as quickly as possible. Similar requirements are in place for juvenile justice officers, court security officers, and officers authorised by Corrective Services. These requirements imply that once the person’s identity has been confirmed they will be able to re-cover their face if they wish. New South Wales Attorney General, Greg Smith, acknowledged that this might not always be possible.

A witness, who is required to remove a face covering, may request that they be taken back to a police station to afford some privacy. This may or may not be reasonably practicable, depending on the circumstances. The scene may not be contained and police may be required to remain at the scene.

… there may be times when officers at male correctional centres are unable to locate a female to assist with a visitor’s request for a female to conduct the inspection, as there are few female staff working in those facilities. The inability of an officer to meet such a request does not invalidate the requirement to remove the face covering.

The second schedule also amends the *Oaths Act 1990* (NSW). Under the amendment witnesses of statutory declarations or affidavits will be required to see the face of the person making the declaration or affidavit. Failure to do so will result in a maximum fine of $220 for the person who witnesses the statutory declaration or affidavit.

None of these provisions appear to relate specifically to the niqab, burqa, Muslims, Muslim women, or Islam. Religious beliefs and practices are not referred to in any provision of the *Identification Legislation Amendment Act 2011* (NSW). Without knowledge of the surrounding circumstances of the introduction of this legislation, or

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15 Identification Legislation Amendment Act 2011 (NSW) schedule 2 s 2.3 [3]; New South Wales, Parliamentary Debate, Legislative Assembly, 25 August 2011, 4716, (Greg Smith).
17 New South Wales, Parliamentary Debate, Legislative Assembly, 25 August 2011, 4716, (Greg Smith).
18 Identification Legislation Amendment Act 2011 (NSW) schedule 2 s 2.6; New South Wales, Parliamentary Debate, Legislative Assembly, 25 August 2011, 4716, (Greg Smith).
the religious practices of some Muslim women to cover their face in public, the law
appears on its face to be of general application and to have no special impact on any
particular religious practice.

3.2.1.2 The Disproportionate Impact of the *Identification Legislation Amendment Act 2011* (NSW)
In theory, the *Identification Legislation Amendment Act 2011* (NSW) can apply to
several different types of face coverings such as balaclavas, masks, and even large pairs
of sunglasses. However, in practice, in the short period that the legislation has been
operating, it has been Muslim women who have been most affected. Of the eight
recorded occasions when the law has been used, seven have related to a female driver
wearing an Islamic face covering. The one incident that did not involve a female driver
comprised of a person wearing a t-shirt over their head. 19 Given that only 3.17% of the
population of New South Wales is Islamic, 20 the fact that all bar one of the reported
uses of the legislation to date relate to this statistically small group of New South Wales
residents, demonstrates the disproportionate impact of *Identification Legislation
Amendment Act 2011* (NSW) the on Muslim women.

Face coverings are not worn habitually in Australia. As a result, any law targeting face
coverings is going to have a disproportionate effect on any group that does cover their
face in public. For most Australians the *Identification Legislation Amendment Act 2011*
(NSW) will have little impact, as they do not cover their face in public. One, if not the
largest, group in Australia who do habitually cover their face in public are Muslim
women who follow that tradition. This means that the laws have a disproportionate
effect on Muslim women, and as such, the creation of the laws are arguably a change in
the relationship between the State and the religious practice of Muslim women.

Even if the laws had not already had a disproportionate impact on Muslim women, the
status of the laws as a change in the legal relationship between the State and religion

could also be seen in the reasoning for the introduction of the Identification Legislation Amendment Act 2011 (NSW).

3.2.1.3 The Reasoning for the Identification Legislation Amendment Act 2011 (NSW)
As referred to above, the Identification Legislation Amendment Act 2011 (NSW) makes no explicit reference to the niqab, burqa, Islam, or religion. This does not mean that these issues were not in the minds of the parliamentarians when debating the legislation. New South Wales Attorney General, Greg Smith, referred to Islam towards the very end of his speech saying:

The bill is not specific in its application to any particular group in the community and the provisions apply to any person wearing a face covering of any type that falls within the definition. However, the Government recognises that there are members of our community who wear face coverings for religious, cultural or personal reasons, and the Government is committed to working with these groups and the broader community to ensure that people understand not only their obligations but also the extent to which safeguards can reasonably be expected to apply.

In this regard, the Government has consulted with members of the Islamic community on the content of this bill and is committed to ongoing work through the Community Relations Commission on the development of guidelines that will apply to government agencies.21

The New South Wales Shadow Attorney General, Paul Lynch, also specifically linked the Act to Islam and the wearing of the niqab and burqa.22 The recognition of the effect of the legislation on Muslim women by both the Attorney General and the shadow Attorney General of the effect of the legislation on Muslim women demonstrates that despite the neutral language of the legislation, the laws are related to the wearing of the niqab and burqa by Muslim women. Despite all attempts at neutral language, these comments suggest that the laws are not about motorbike helmets and balaclavas – they are about burqas and niqabs.

22 New South Wales, Parliamentary Debate, Legislative Assembly, 12 September 2011, 55 (Paul Lynch.).
On their own these comments would suggest that the *Identification Legislation Amendment Act 2011* (NSW) was, at least partially, recognised to be a change in the legal relationship between the State and the religious practices of some Muslim women; however an even more explicit recognition of the Act’s connection with the wearing of the niqab and burqa can be found. The inclusion of the amendments to the *Oaths Act 1990* (NSW) and comments by the New South Wales Shadow Attorney General, Paul Lynch, explicitly linking the need for the Act to the case of Ms Carnita Matthews demonstrate even more clearly that the *Identification Legislation Amendment Act 2011* (NSW) is a change in the legal relationship between the State and religion.23

3.2.1.3.1 The Catalyst - The Case of Carnita Matthews
Arguably, the catalyst for the *Identification Legislation Amendment Act 2011* (NSW) was the case of Carnita Matthews. Ms Matthews’s case was referred to specifically during the parliamentary debate on the *Identification Legislation Amendment Act 2011* (NSW).24 Further, the important role played by a statutory declaration purportedly signed by Ms Matthews while wearing a niqab was arguably the reason behind the inclusion of amendments to the *Oaths Act 1990* (NSW).

On 7 June 2010, Ms Matthews was stopped by New South Wales police for a random breath test. On 8 June a woman made a statutory declaration in front of a Justice of the Peace relating to the random breath test on the previous day. The statement was signed Carnita Matthews, but the woman did not remove her face veil while making the declaration.25 The statement accused the police officer involved of forcibly trying to remove Ms Matthews’ face covering. The accusations were found to be inconsistent with footage taken by a video camera in the police car. Ms Matthews was charged with making a false statement, and was initially found guilty in the Magistrates Court and sentenced to six months in jail. Ms Matthews appealed that decision, and on 20 July 2011 her appeal was upheld in the New South Wales District Court by Judge Jeffreys.26

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23 ibid.
24 ibid.
25 Janet Fife-Yeomans, ‘Uncovering the writing of this signature case’ *The Daily Telegraph* (Sydney) 1 July 2011.
In giving his decision, Judge Jeffreys stated that he could not be certain that the woman who had made the complaint was Ms Matthews, because the woman who made the statement was wearing a full-face veil.27 There was an attempt to identify the woman as Ms Matthews by comparing the signature on Ms Matthews driver’s license with that on the statutory declaration, however Judge Jefferys said that ‘When I compare the signature on the statutory declaration and the signature (on the license) I am unable to conclude they appear to be the same’.28

Had the changes to the Oaths Act 1990 (NSW) been in force at the time Ms Matthews made her statutory declaration it is possible that she would not have been acquitted, if in fact it was Ms Matthews who made the statutory declaration. The amendments require people witnessing statutory declarations to see the face of the person making the declaration,29 presumably, so that they can later positively identify them. If the amendments had been in place the person who took Ms Matthews’ statutory declaration would have seen her face and would have been able to identify her as the person who made it, thus confirming the false statement to police. Had the witness not done so they would have been subject to a fine.30 This close link between the Identification Legislation Amendment Act 2011 (NSW), along with the specific references to Ms Matthews’ case, confirm that the Act is about the religious practice of wearing the burqa or niqab. As such, it is a change in the legal relationship between the State and religion.

While the history, reasoning, and effect of the Identification Legislation Amendment Act 2011 (NSW) itself all point to it being a change in the legal relationship between the State and religion, the wider history of the debate concerning the wearing of the burqa and niqab further confirms this view.

3.2.2 The Wider History

Interactions between the State and religion in relation to the wearing of the burqa and niqab go back at least as far as 2010. These interactions can be divided into two categories, first calls for and attempts at legislative change, and second interactions with

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27 Anna Patty, ‘Fingerprints Touted as way to Check Identity of Burqa Wearers’ The Sydney Morning Herald (Sydney) 22 June 2011, 3.
28 Janet Fife-Yeomans, above n 25, 2.
30 Identification Legislation Amendment Act 2011 (NSW) schedule 2 s 2.6.
the court system. As will be demonstrated in the discussion below, the overall history of the debate surrounding the wearing of burqa and niqab specifically, and face coverings more generally, has not been neutral. Rather the discussion has focused on Muslim women. When this history is considered alongside the specific history of the Identification Legislation Amendment Act 2011 (NSW) it is clear that the change in law introduced by the Act is about religion generally and the religious practice of face covering by some Muslim women specifically.

The expanded discussion of the overall history of the Australian debate surrounding the wearing of the niqab is also included in fulfilment of the secondary purpose of this thesis. Given the relatively recent nature of the debate there are relatively few sources that discuss the issues from an Australian perspective, and fewer still that give an overall picture of the debate in Australia.

3.2.2.1 Proposed Legislation
Prior to the introduction of the Identification Legislation Amendment Act 2011 (NSW), there had been two attempts to introduce legislation to deal with the issue of people wearing face coverings in public. Each dealt with the issues in a slightly different way, but both would have been heavier handed than the New South Wales Act. The Summary Offences Amendment (Full Face Covering Prohibition) Bill 2010 (NSW) introduced by Senator Fred Nile would have created a total ban, while the Facial Identification Bill 2010 (SA) introduced by South Australian MP Robert Such would have created a situational ban.

3.2.2.1.1 Cori Bernardi
The first politician to actively call for a ban on the burqa and niqab in Australia was South Australian Liberal Senator Cori Bernardi. While he did not introduce a Bill to parliament, the airing of his views was the starting point for the debate that eventually led to the Identification Legislation Amendment Act 2011 (NSW). He first aired his views, that the burqa should be banned, in his blog in response to a robbery in May 2010 in which the robber wore a burqa as a disguise. Senator Bernardi said that ‘the burqa has no place in Australian society. I would go as far as to say it is un-Australian.’

31 See 1.4.2
He also commented that ‘the burqa separates and distances the wearer from the normal interactions with broader society,’ and that ‘Equality of women is one of the key values in our secular society and any culture that believes only women should be covered in such a repressive manner is not consistent with the Australian culture and values.’

Senator Bernardi made reference to specific situations, including banks and petrol stations, where in his opinion the wearing of the burqa is inappropriate. He based this on the fact that, as a motorbike rider, he would be required to remove his helmet in these situations, a garment which also obscures identity. Senator Bernardi’s remarks captured significant media attention and he later participated in the Australian Broadcasting Corporation’s program *Q&A*, and SBS’s program *Insight*, where he repeated his call for a blanket ban on the wearing of the burqa and niqab.

Liberal opposition leader Tony Abbott, then Prime Minister Kevin Rudd, and the Deputy Prime Minister Julia Gillard, all made statements in response to Senator Bernardi. Tony Abbott said that he believed ‘a lot of Australians find the wearing of the burqa quite confronting and I wish it was not widely worn.’ He stopped short of calling for a ban of the burqa, instead focusing on the liberal principles of free speech, saying ‘He (Bernardi) has expressed a view, I respect the view, I don’t absolutely share it, but I can understand the concerns in the community.’ Kevin Rudd and Julia Gillard also ruled out a ban, with Julia Gillard making similar comments to Tony Abbott: ‘I can understand Australians that do find it confronting; it’s a little different on our streets.’

3.2.2.1.2 Fred Nile

While Senator Cory Bernardi called for a ban, he did not introduce any legislation to that effect. In June 2010 the New South Wales MP and leader of the Christian Democratic Party Rev. Fred Nile introduced the *Summary Offences Amendment (Full Face Covering Prohibition) Bill 2010* in the New South Wales Legislative Council. The Bill sought to amend the *Summary Offences Act 1988* (NSW) by inserting two new

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33 Cory Bernardi, ‘Burka Bandits Justify a Burka Ban’ above n 32.
34 Ibid.
35 Q&A: Backlash in Bennelong (Australian Broadcasting Corporation, 31 May 2010).
36 Insight: Banning the Burqa (SBS, 21 September 2010).
38 Ibid.
39 Katharine Murphy, ‘Rudd and Gillard Disagree on Burqa’ The Age (Melbourne) 8 May 2010.
offences in Part 2 of the Act. The first would have made it an offence to wear a face covering while in a public place,\textsuperscript{40} while the second would have made it an offence to compel another to commit an offence under this section of the Act.\textsuperscript{41} An exception to the general prohibition was given where the person covering their face had a ‘reasonable excuse’.\textsuperscript{42} The onus of proving the existence of a ‘reasonable excuse’ was to be on the defendant.\textsuperscript{43} Religious and cultural beliefs were specifically excluded from constituting a ‘reasonable excuse’.\textsuperscript{44}

In his second reading speech, Fred Nile gave three justifications for the ban. First, face coverings are habitually used by criminals, including violent protesters, to hide their identity to avoid capture. Second, face coverings such as the burqa and niqab are being used by terrorists and suicide bombers as a disguise. Third, the burqa and niqab are oppressive towards women.\textsuperscript{45} He also referred to the fact that, at the time, several European countries already had similar bans in place,\textsuperscript{46} were currently in the process of putting bans in place,\textsuperscript{47} or were considering introducing a ban.\textsuperscript{48}

As with Senator Bernardi, Fred Nile’s specific reference to the burqa indicates a deliberate intention to target Muslim women. Fred Nile’s intention is made even clearer by his inclusion of the exception for people who had a ‘reasonable excuse’ and his exclusion of ‘religious and cultural’ reasons from this ‘reasonable excuse’. Had Fred Nile simply wanted to create a neutral law which did not target face covering for religious reasons, then the law would not have needed to exclude ‘religious and cultural’ reasons from the exception. Whether or not religious or cultural reasons were

\textsuperscript{40} Summary Offences Amendment (Full Face Covering Prohibition) Bill 2010 (NSW) schedule 1 s 11(1).
\textsuperscript{41} Ibid schedule 1 s 11(7).
\textsuperscript{42} Ibid schedule 1 s 11(1) & (3).
\textsuperscript{43} Ibid schedule 1 s 11(6).
\textsuperscript{44} Ibid schedule 1 s 11(4).
\textsuperscript{45} New South Wales, Parliamentary Debate, Legislative Council, 22 June 2010, 24404 - 24407 (Fred Nile).
\textsuperscript{46} Belgium, Turkey, Italy.
\textsuperscript{48} Switzerland and Spain.
‘reasonable excuses’ could have been left to the courts to determine. Instead, Fred Nile’s Bill made sure that the laws would cover the burqa and niqab by effectively defining ‘religious and cultural reasons’ as unreasonable.49

3.2.2.1.3 Robert Such
While Fred Nile’s proposed Bill would have created a complete ban on face coverings in public, including the burqa and niqab, the Bill introduced by Robert Such in South Australia would have created a situational ban only.

In July 2010, one month after Fred Nile introduced his Bill, Robert Such introduced the *Facial Identification Bill 2010* (SA). The Bill did not create a blanket ban on face coverings in public; instead it gave prescribed premises the power to display a sign which indicated that a person whose face was obscured could not enter the premises.50

Prescribed premises where defined in the Bill as a premises used for an authorised deposit institution (ADI),51 a State or Federal Government agency, or ‘any other business or activity where, for reasons of security or for the purposes of compliance with any Act or law, it is necessary or desirable to establish the identity of persons in the premises so used.’52

In his second reading speech, Robert Such emphasised that he did not care what people wore, and that this Bill would not ban the burqa; rather it would allow people to be identified. He specifically referred to the need to identify students taking exams,53 people renewing their driver’s licenses, people entering banks, as well as witnesses and accused in courtrooms.54 While Robert Such went to great lengths to emphasise that what he was proposing was not a ban on the burqa, and that in his mind the real issue was facial identification, he did refer to the religious requirements for Muslim women, saying:

49 In *Judd v McKeon* (1926) 38 CLR 380 Higgins J suggested that a refusal to vote on religious grounds would constitute sufficient reasons for failing to vote at 387.
50 *Facial Identification Bill 2010* (SA) s 2(1).
51 For example, in banks.
52 *Facial Identification Bill 2010* (SA) s 2(3).
53 He referred to comments by Professor Peter Schwerdtferger, who said that he had seen situations where he could not identify a student sitting an exam because they had their face obscured.
I think the final point is that not all people of the Muslim faith wear a burqa. It is not ordained in the Koran, from what I can see, that women must cover their face. They must be modest in their dress but there are a lot of people in the Christian faith who would argue the same, in regard to women in particular. I do not know why we pick on women, why women have to be modest in their dress. I think the same rules should apply to men.\textsuperscript{55}

This Bill, had it been passed, would have been a more measured approach than that proposed by Senator Fred Nile. However, it was still heavy handed and would have had a disproportionate impact on Muslim women. In eligible establishments displaying the sign, a person could not re-cover their face once their identity had been verified.\textsuperscript{56} If the reason for this, or similar legislation, is security then once a person’s identity has been verified there is no longer a need to see their face. Continuing to require them to remain un-covered only serves to continue their discomfort. The legislation may also have prevented those who habitually covered their face in public from accessing vital public services. Government agencies, such as Centrelink\textsuperscript{57}, would have been entitled to display a sign refusing entry or service to a person wearing a full-face covering. If you were to accept Senator Fred Nile, or Senator Cori Bernardi’s, argument that women who wear full-face coverings are oppressed, then excluding them from the services offered by a Government agency like Centrelink would exclude them from receiving assistance to escape their oppression. It is conceivable that public hospitals may have been covered by this legislation; it would have been a tragedy if a woman had delayed in taking herself or a sick child to hospital because she was concerned that she would be required to un-veil. It could be argued that she should put her physical wellbeing, or that of her child, ahead of her religious beliefs; however this argument fails to recognise that for the religious the spiritual often trumps the physical.

\subsubsection*{3.2.2.2 Interactions with the Courts}
There have been two incidents where the court system has interacted with the religious practice of covering the face in public. The second was the case of Carnita Matthews

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{55} Ibid.
\item \textsuperscript{56} See \textit{Facial Identification Bill 2010} (SA) s2 (1)(c); this subsection allows a person whose face is covered to be removed from the premise.
\item \textsuperscript{57} Centrelink is the Australian Government’s welfare provision agency.
\end{itemize}
\end{footnotesize}
discussed above.58 The first time an Australian court was asked to deal with the issue was during the fraud trial of Anwar Sayed in 2010.59

3.2.2.2.1 Tasneem

In July 2010, during the preparations for the fraud trial of Anwar Sayed, one of the female witnesses, known as Tasneem, made a request to give her evidence while wearing a niqab.60 The defence objected, expressing concern that if she gave her evidence wearing the niqab the jury would be unable to properly assess her evidence because they could not see her face.61 Judge Shauna Deane of the Western Australian District Court ruled that Tasneem must uncover her face while giving her evidence, but left it for the parties to determine how this could best be achieved.62

In handing down her decision Judge Deane noted that she had not been able to find any other Australian cases where a witness had requested to give evidence while wearing a full-face covering.63 She did however acknowledge that cases had arisen in other common law jurisdictions, including the United States of America, Canada, and New Zealand, referring extensively to the reasoning of Judge LH Moore in the New Zealand case Police v Razamjoo.64

Judge Deane, like Judge Moore, emphasised that that the important consideration was to balance the competing interest of the accused to have a fair trial, and the witness to have

58 See 3.2.1.3.1.
59 Anwar Sayed was accused of fraudulently obtaining State and Federal grants for the Muslim Ladies College of Australia by falsifying the number of students on the roll. Anwar Sayed was found guilty and jailed for four and half years for his part in the fraud.
60 Nicolas Perpitch, ‘Tasneem Must Remove Niqab for Perth Trial, Judge Rules’ The Australian (Online) 19 August 2010 <http://www.theaustralian.com.au/news/nation/tasneem-must-remove-niqab-for-trial-judge-shauna-deane-rules/story-e6frg6nf-1225907292151>. Tasneem is a Muslim woman who follows the Islamic faith. She believes that the wearing of the niqab was not an essential element of Islam. Despite this, she has worn the niqab for 17 or 18 years, all of her adult life. Judge Deane noted that Tasneem is an Australian citizen, moving to Australia from South Africa, and had worn the Niqab at her citizenship ceremony. See Transcript of Proceedings, The Queen v Anwar Shah Wafiq Sayed (District Court of Western Australia, 164 of 2010, Deane DCJ, 19 August 2010) 1043 – 1044.
61 Transcript of Proceedings, The Queen v Anwar Shah Wafiq Sayed (District Court of Western Australia, 164 of 2010, Deane DCJ, 19 August 2010) 1042.
62 Ibid 1060.
63 As the Judge notes, this may reflect the fact that previous cases had not garnered media attention, rather than the complete non-existence of such cases. Transcript of Proceedings, The Queen v Anwar Shah Wafiq Sayed (District Court of Western Australia, 164 of 2010, Deane DCJ, 19 August 2010) 1041.
her deeply held beliefs and long term religious practice accommodated by the Court.\textsuperscript{65} Quoting Judge Moore, Judge Deane identified seven key factors of a fair trial. In her opinion, a fair trial must balance the rights of an accused against the public interest in the effective prosecution of criminal charges and bring alleged offenders to court.\textsuperscript{66}

Two of the identified features directly referred to the need to balance the interests of the accused against that of witnesses. A fair trial is not just one that is fair to the accused, but also one which is fair to witnesses, as well as other stakeholders. Ultimately Judge Deane stated that the real focus of her decision was the jury.

The focus is on the issue of whether the members of the jury as the sole judges of the facts in this case will be impeded in their ability to fully assess the reliability and credibility of the evidence of a particular witness if they are not afforded the opportunity of being able to see that witness’s face when they give evidence at trial.\textsuperscript{67}

Judge Deane acknowledged that the demeanour of a witness and the viewing of their face is not the only way in which credibility is assessed. She also acknowledged that in some cases the demeanour of a witness might be misleading. Ultimately, she considered that in this case the jury should have the assistance of seeing the witness’s face in assessing credibility.\textsuperscript{68}

While Tasneem’s request to wear the niqab was refused, she did give evidence in the trial. Her evidence was given from a separate room via video link. Only 19 men, all of whom were required to be there for the purposes of conducting the trial, were present in the courtroom while her evidence was given. Men who did not need to be in the courtroom were excluded, including journalists.\textsuperscript{69}

When the case of the witness Tasneem, the two attempts to introduce legislation dealing with face coverings in public, and the call by Cori Bernardi to ban the burqa, are all added to the specific history of the \textit{Identification Legislation Amendment Act 2011} (NSW), it is clear that it is an example of a change in the legal relationship between the

\textsuperscript{65} Transcript of Proceedings, \textit{The Queen v Anwar Shah Wafiq Sayed} (District Court of Western Australia, 164 of 2010, Deane DCJ, 19 August 2010) 1051.
\textsuperscript{66} Ibid, 1051 – 1052.
\textsuperscript{67} Ibid, 1058.
\textsuperscript{68} Ibid, 1059 – 106.
\textsuperscript{69} Kate Campbell, ‘Witness Unveils for Fraud Trial’ \textit{The West Australian} (Perth) 18 October 2010, 7.
State and religion. While the *Identification Legislation Amendment Act 2011* (NSW) may be neutral on its face, its specific history, wider history, and effect, all demonstrate that the change in the law is a change in the way the State interacts with the use of full-face coverings by some Muslim women.

### 3.2.3 Other Legislation and Potential Future Change

Since the introduction of the *Identification Legislation Amendment Act 2011* (NSW) only the Australian Capital Territory (ACT) has introduced similar legislation. From April 2012, Section 58B of the *Road Transport (General) Act 1999* (ACT) gives a police officer the authority to direct a driver to remove a face covering for the purposes of identification or administering a drug or alcohol test. While the Australian Capital Territory face covering laws are similar to the New South Wales laws, there are two important differences.

First, unlike the New South Wales legislation, the ACT law only applies to identification in relation to road traffic legislation, and is not a general power to request a person remove a face covering for identification purposes. It also does not give this power to any other officials. In these respect it is much narrower than the New South Wales laws and is targeted to a specific problem, the ability to identify drivers in order to issue road traffic infringements.

Secondly, the ACT law does specifically refer to religion. Section 58B(2) states that Subsection (3) applies if a thing a person is directed to remove is worn by the person for genuine religious or cultural reasons. Section 58B(3) provides:

> The directed person may ask the officer or authorised person to allow the person to remove the thing in either or both of the following ways:

(a) in front of a police officer or an authorised person who is the same sex as the directed person;

(b) at a place or in a way (or both) that gives the directed person reasonable privacy to remove the thing.

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70 See *Road Transport (General) Amendment Act 2012* (ACT).
71 Inserted by *Road Transport (General) Amendment Act 2012* (ACT).
On the surface, this seems to be a reasonable accommodation of the religious beliefs of some Muslim women. On the other hand, the very need to include such a provision indicates that there was an acknowledgment that these new laws would have a disproportionate impact on Muslim women.

The recognition of this disproportionate impact can also be seen in the comments made during the Bill’s passage through parliament. The Attorney General, Simon Corbell, Jeremy Hanson on behalf of the opposition, and Amanda Bresnan on behalf of the Greens, all went to some lengths to point out that they were not targeting Muslims, the burqa or niqab, and that there had been consultation with the Muslim community. Rather than ameliorating the disproportionate impact of the legislation, this emphasis only highlights it. If the laws were not likely to have a disproportionate effect on the Muslim community there would be no need to emphasise that they were not being targeted.

Other states may yet follow suit with calls in Victoria for similar legislation. In Western Australia a Bill containing amendments similar to those introduced by New South Wales has been introduced, but has not passed parliament as at 31 May 2013.

In addition, the Identification Legislation Amendment Act 2011 (NSW) may itself be amended in the future as a result of an ongoing ombudsman’s investigation. The Act includes a requirement for the ombudsman to monitor the operation of the Act for 12 months from its commencement, and to prepare a report for the Minister on its

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72 Australian Capital Territory, Parliamentary Debate, Legislative Assembly, 8 December 2011, 5918 – 5919.
74 Ibid 861.

While the Identification Legislation Amendment Act 2011 (NSW) only impacts a small number within a minority religion, it represents an important change in the legal relationship between the State and religion in modern Australia. Prior to the introduction of the Act there had been significant debate surrounding the wearing of the niqab and burqa in public but no jurisdiction had introduced laws restricting the wearing of any form of face covering. In granting police, and other officials, the power to compel individuals, including Muslim women, to remove their face coverings the Identification Legislation Amendment Act 2011 (NSW) is creating a State restriction on a religious practice. The restriction may be worded in neutral language, may be targeted at a small minority of women, and may be justifiable on security and law enforcement grounds, but this does not make it any less of a restriction on a religious practice.

Chapter Four identifies the State’s constraints on Roman Catholics as an analogous issue of the State restricting religious practice in the first 50 years after European colonisation. Before examining this analogous issue, this chapter will outline two more examples of changes in the legal relationship between the State and religion in modern Australia, the National school Chaplaincy program and the Australian Charities and Not-for-profit Commission.

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77 Identification Legislation Amendment Act 2011 (NSW) schedule 1 [7].
3.3 The National School Chaplaincy Program

The second case study in this thesis is the federally funded National School Chaplaincy Program (NSCP)\(^\text{79}\) and subsequent High Court case. In October 2006 Prime Minister John Howard announced the creation of a chaplaincy program for both Government and Non-Government schools.\(^\text{80}\) Five and a half years later\(^\text{81}\) the High Court of Australia handed down its decision in the case of \textit{Williams v The Commonwealth (Williams)}\(^\text{82}\) holding that the NSCP was unconstitutional. Despite this finding the NSCP has continued. The finding of unconstitutionality did not relate to the religious nature of the program. Rather, the High Court found that the program was unconstitutional because of the way in which the funding had been structured. However, it is the religiosity of the program that has caused the greatest controversy and which has brought it within the ambit of this thesis.

The NSCP represents an important change in the legal relationship between the State and religion in Australia. The NSCP created, for the first time, a federally funded, and therefore endorsed, religious program in Government schools.\(^\text{83}\) This section first examines the content and creation of the NSCP before going on to examine the criticism the program has received. Finally, this section will briefly examine the \textit{Williams} High Court case and Governmental response to that decision.

3.3.1 The Content and Creation of the NSCP

3.3.1.1 The Content of the NSCP

The NSCP commenced in 2007.\(^\text{84}\) Under the program Government and Non-Government schools could apply for grants of up to $20,000\(^\text{85}\) to fund the provision of chaplaincy services.\(^\text{86}\) The purpose of the program was to ‘assist … schools in providing greater pastoral care and supporting the spiritual wellbeing of their students.’\(^\text{87}\) John Howard envisaged that chaplains would:

\(^{79}\) The Program has since been re-named the National School Chaplaincy and Welfare Program (NSCWP).
\(^{80}\) See 3.3.1.3.
\(^{81}\) John Howard, ‘National School Chaplaincy Program’ (Media Release, 29 October 2006).
\(^{82}\) 20 June 2012.
\(^{83}\) [2012] HCA 23.
\(^{84}\) John Howard, ‘National School Chaplaincy Program’ above n 80.
\(^{85}\) Australian Government, ‘National School Chaplaincy Program’ (Discussion Paper February 2011), 3
\(^{86}\) The Government initially committed $30 million per year for three years.
\(^{87}\) John Howard, ‘National School Chaplaincy Program’ above n 80.
\(^{87}\) Ibid.
... provide pastoral care, general religious and personal advice and comfort and support to all students and staff, irrespective of their religious beliefs. A Chaplain might support school students and their wider school community in a range of ways, such as assisting students in exploring their spirituality; providing guidance on religious, values and ethical matters; helping school counsellors and staff in offering welfare services and support in cases of bereavement, family breakdown or other crisis and loss situations.88

In defence of the proposed scheme John Howard did not shy away from the use of the word ‘chaplain’, stating:

Yes I am calling them chaplains because that has a particular connotation in our language … And as you know I’m not overwhelmed by political correctness. To call a chaplain a counsellor is to bow to political correctness. Chaplain has a particular connotation, people understand it, they know exactly what I’m talking about.89

He also acknowledged that the majority of chaplains were likely to be from Christian denominations,90 a prediction which has been realised with 98.52% of chaplains, funded as of February 2011, coming from Christian churches.91

The religious nature of the program, both in its design and implementation, make the NSCP an important change in the legal relationship between the State and religion. The NSCP places religious workers (called chaplains), paid with funds provided by the State, into both Government and Non-Government schools. While the program was later amended to allow for secular pastoral care workers, at its inception it was exclusively religious.92 This is important, as for the first time the Federal Government has effectively endorsed religion in Government schools. As will be highlighted in Chapter Five, religion was deliberately excluded from State run schools by the colonial

88 Ibid.
91 Australian Government, ‘National School Chaplaincy Program’ above n 84, 8.
92 See 3.3.1.3.
governments prior to Federation. While the Federal Government, and to a lesser extent State and Territory Governments, has funded religious Non-Government schools for many decades this is very different from funding religion in Government schools. Parents sending their children to religious Non-Government schools do so knowing of the religious content of the schools. They accept it as part of their children’s education. On the other hand, Australia has had a long history of providing secular education in its Government schools. While the NSCP does not change the secular nature of the educational content provided by Government schools, and enshrined in most States and Territories in legislation, it does place a religious element within the school. As such, it is changing the relationship between the State and religion by giving religion a federally funded and endorsed place in Government schools.

There are two arguments that could be mounted to refute the significance of the change in the legal relationship between the State and religion brought about by the creation of the NSCP. First, the program is voluntary, both in terms of a school and individual student’s participation, and secondly that religious programs were already present in many Government schools prior to the introduction of the NSCP.

3.3.1.1.1. It is a Voluntary Program

The NSCP is entirely voluntary, with school communities applying for funds and choosing the chaplain they wish to have at their school. This includes the ability to choose a chaplain from a religion of their choice. While participation in the program is voluntary it has had a high take up rate, meaning that for many children they will have little option but to attend a Government school which participates in the NSCP.

The program is also voluntary in terms of an individual student’s participation. However, there is not a uniform system of recording parental consent to a child’s participation in the NSCP. Some States operate an opt-in system, while others operate

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93 See 6.3.2.
94 See 3.3.1.1.2.
95 John Howard, ‘National School Chaplaincy Program’ above n 80.
an opt-out system.\textsuperscript{98} In practice, either opting-in or opting-out may not always be practical due to the chaplains’ participation in a broad range of school activities such as sports days and school camps.\textsuperscript{99}

3.3.1.1.2 Religion Was Already a Part of Government School Education
As stated above, the secular nature of education in Government schools is enshrined in State and Territory legislation.\textsuperscript{100} This does not mean that religion has been totally excluded from Government schools. Secular instruction in most States and Territories included general religious education, as distinct from dogmatic or denominational religious education.\textsuperscript{101} Further, all States and Territories provide for denominational religious education to be offered to students, usually at the request of parents, by a visiting religious instructor.\textsuperscript{102} In addition, at the time the NSCP was introduced in 2007 there were chaplains working in States schools in all Australian States and Territories, except New South Wales.\textsuperscript{103} The existing chaplaincy programs were already growing rapidly prior to the announcement of the NSCP.\textsuperscript{104}

It cannot be doubted that religion was present in Government schools prior to the creation of the NSCP. What is different between these programs and the NSCP is the level of endorsement, the scale of the program, and the tier of Government involved. Chaplaincy programs and religious education prior to the NSCP was predominantly funded by donations and/or staffed by volunteers, and as a result the State did not ‘endorse’ the programs. The public nature of the announcement of the NSCP also showed a high level of endorsement by the Federal Government inextricably linking it to the State. As a national program the NSCP is also much larger in scale than those that existed prior to its introduction. Further, as a national program the NSCP is

\textsuperscript{98} Commonwealth Ombudsman, above n 97, 12 – 14.
\textsuperscript{99} Australian Government, ‘National School Chaplaincy Program’ above n 84, 9.
\textsuperscript{100} \textit{Education Act 2004 (ACT)} s 28, \textit{Education Act 1990 (NSW)} s 30 and 33; \textit{Education Act 1994 (Tas)} s 33; \textit{Education and Training Reform Act 2006 (2006)} s 2.2.10; \textit{School Education Act 1999 (WA)} s 68(1)(a).
\textsuperscript{101} \textit{Education Act 2004 (ACT)} s 28(2); \textit{Education Act 1990 (NSW)} s 30; \textit{School Education Act 1999 (WA)} s 68(2).
\textsuperscript{102} \textit{Education Act 2004 (ACT)} s 29; \textit{Education Act 1979 (NT)} s 73; \textit{Education Act 1990 (NSW)} s 32; \textit{Education (General Provisions) Act 2006 (Qld)} s 76; \textit{Education Act 1972 (SA)} s 102; \textit{Education Act 1994 (Tas)} s 34; \textit{Education and Training Reform Act 2006 (2006)} s 2.2.11; \textit{School Education Act 1999 (WA)} s 69.
\textsuperscript{104} Christopher Venning, ‘Chaplaincy in the State Schools of Victoria’ (2005) 48(1) \textit{Journal of Christian Education} 9, 14; Jill Clements, ‘Chaplaincy in the States Schools of Western Australia’ (2005) 48(1) \textit{Journal of Christian Education} 19, 20.
endorsed by the Federal Government while programs in existence prior to the NSCP were State based programs. Even if the arguments for a higher level of endorsement and larger scale are not considered changes in the legal relationship between the States and religion, the change from State based programs to a national Federal Government endorsed program is such a change.

3.3.1.2 The Creation of the NSCP

The NSCP was originally conceived by Peter Rawlings, treasurer of his local chaplaincies committee on the Mornington Peninsula, Victoria. Having seen the positive result of chaplains, funded by voluntary donations, in his local community he saw the potential for chaplains in schools around the nation. He put the idea to the Prime Minister, with the encouragement of his local Member of Parliament, Gregory Hunt, who raised the matter in Federal Parliament on 13 June 2006. In explaining his reasons for the scheme Peter Rawlings said, ‘I have seen the results in young families and families that work – the potential for that to be replicated around this nation.’ Similarly Gregory Hunt said, when referring to the exiting program in his electorate, ‘Experience to date has been of an extraordinary engagement with students. These programs have come at the behest of the schools, the school communities and the parents.’ Other supporters of the program, including Prime Minister John Howard, also referred to the success of existing programs funded via voluntary donations, and to a lesser extent State Government funding. In a speech to parliament on 31 October, Federal Member of Parliament David Fawcett emphasised that the NSCP was created in response to demand for already successful chaplaincy programs in Government schools.

So who has actually been calling for it? Most of the critics are saying that it is the government trying to ram some agenda down people’s throats. But I have to say that this has been in response to a call from the community, who are already seeing the benefits of existing chaplaincy programs around Australia. They exist

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105 Jill Rowbotham, ‘Grassroots idea grows into $90 million Scheme’ The Australian (Canberra) 31 October 2006.
106 Commonwealth of Australia, Parliamentary Debate, House of Representatives, 13 June 2006, 140 (Gregory Hunt, member for Flinders).
107 Rowbotham, above n 105.
109 Ibid; See also Commonwealth of Australia, Parliamentary Debates, House of Representatives, 30 October 2006, 35 (Julie Bishop); 31 October 2006, 126 (Gregory Hunt); 1 November 2006, 155 (Christopher Pearce); John Howard, ‘This is no attempt to force-fee religion to children’ above n 90.
right now in state schools and are benefiting students. In South Australia, this program has been running for well over 20 years, and the South Australian government already gives some $50,000 each year to it. In Victoria, the state government already gives some $25,000 per chaplain to the program and in Queensland the state government gives some $10,000 per group.

What is the program? Let me make it very clear that it is not a program about religious education. As someone who has spent over 22 years in the military, I am very aware of the role of chaplains, and the role is not about religious education. It is for the same reason that we have chaplains in hospitals, in industry, in the military, as I have mentioned, in police services and in correctional services. There are chaplains in schools around Australia, except, I believe, in New South Wales, and they are even in sporting teams. They are there for a range of good reasons but not for religious education.110

The NSCP received bi-partisan support with then opposition leader Kim Beazley, and education spokeswoman Jenny Macklin, supporting the program; although some Labor MPs opposed the scheme.111 Labor Prime Ministers Kevin Rudd and Julia Gillard also supported the NSCP, announcing extended funding of the program during their terms.112

3.3.1.3 Changes to the NSCP
Since the introduction of the NSCP in 2007 it has undergone a series of reviews, including a departmental review, and two ombudsman’s reports.113 These reviews have led to a number of changes in the NSCP, including increased minimum qualifications, ongoing professional development requirements, increased funding and improved

111 Jewel Topsfield, ‘Chaplains Cause Rift in Labor Ranks’ The Age (Melbourne), 1 November 2006.
112 In November 2009 Kevin Rudd announced an additional $42.8 million dollars extending the program until December 2011 see Kevin Rudd, (speech Delivered at Australian Christian Lobby’s national conference, Canberra, 22 November 2009) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FE7MV6%22>. In the 2011/12 Budget an additional $222 million was announced to extend the NSCP to December 2014 see Peter Garret, ‘National School Chaplaincy Program’ (Budget 2011-12 media release, 10 May 2011) <http://www.capmon.com/budget2011/eewr/p110510006b.PDF>.
113 See 3.3.2.
In terms of the legal relationship between the State and religion, the most significant change has been the introduction of secular pastoral care workers. The inclusion of secular pastoral care workers as part of the NSCP, rebranded the National School Chaplaincy and Welfare Program (NSCWP) in 2011, changed the program from being an exclusive interaction between the State and religion, to an interaction that included a non-religious element.

Initially, secular pastoral care workers were introduced to fill a ‘skills shortage’ in chaplaincy. In 2007, the new Labor Minister for Education, Julia Gillard, announced that she would amend the program to allow for ‘secular pastoral care workers.’ However, secular pastoral care workers were only able to be employed under the NSCP if no suitable chaplain could be found. The reason for the change was not to secularise the program. Rather, the change was made to respond to difficulties faced by some schools in finding a suitable chaplain; there was ‘almost a skills shortage in chaplaincy.’ While this change to the NSCP could be seen as a move away from the religious character of the program it is important to note that schools could not simply opt to have a ‘secular pastoral care worker’ instead of a chaplain. The school had to first attempt to find a chaplain and only if they were unable to do so would they be permitted to use the funds to support a secular pastoral care worker.

Secular pastoral care workers were not initially introduced as an alternative to chaplains. However, in 2011 Minister for School Education, Early Childhood and Youth, Peter Garret, announced that the NSCP would be re-branded as the National School Chaplaincy and Welfare Program (NSCWP), and that the re-named program would allow schools to choose to employ either a chaplain or a secular welfare worker. The change was made in response to ‘… strong feedback for the program to be extended to qualified secular welfare workers, which will empower principals and school communities to choose the right person for the needs and circumstances of their

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114 Peter Garret, ‘Schools Given Greater Choice Under Expanded Chaplains Program’, (Media Release, 7 September 2011); Peter Garret, ‘Applications Open for School Chaplaincy and Welfare services’ (Media Release, 30 September 2011).
117 Ibid 52 (Lisa Paul).
schools.119 Unlike the introduction of secular pastoral care workers in 2008, schools would now be able to choose whether to employ a religious chaplain or a secular pastoral care worker. They would no longer be required to attempt to first employ a chaplain before seeking out a suitable secular pastoral care worker. This is an important change in the program, as this change meant that the NSCP was no longer exclusively religious. However, the program still allowed for the employment of chaplains – with the all associated religious connotations of that word.

Since the change from the NSCP to the NSCWP there has been an increase in the number of secular pastoral care workers employed under the program. However, the majority of people employed are still employed as chaplains, indicating that there has not been a rush by schools to abandon the religious element of the program. In May 2012, the Minister for School Education and Early Childhood and Youth, announced that 1,000 new schools had been successful in their application to receive funding under the re-branded NSCWP, bringing the total number of schools participating in the program to 2,555. Of the 1,000 new chaplains and secular pastoral care workers, 65% were chaplains and 35% were secular pastoral care workers.120 This brings the total number of chaplains to 2,265, or 89%, and the number of secular pastoral care workers to 219, or 9%.121 While the incorporation of secular pastoral care workers has introduced a secular element into the program, with just 9% of workers falling into this category, the NSCWP is still predominantly a religious program. Therefore despite this change the NSCWP is still predominantly an example of an interaction between the State and religion.

3.3.2 Criticisms of the NSCP

While the NSCP has received bi-partisan support and initially seems to have been well received by school communities, it has not been free from criticism.122 The NSCP has

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119 Ibid.
122 In 2009 Dr Philip Hughes from Edith Cowan University and Professor Margaret Sims from the University of New England were commissioned by the National School Chaplaincy Association to conduct research on the effectiveness of chaplaincy post the introduction of the NSCP. The National
been the subject of two adverse ombudsman’s reports. The Northern Territory Ombudsman reported on the operation of chaplaincy services in five rural Government schools. She found several deficiencies in the program prompting her to refer this report to the Commonwealth Ombudsman. In response, the Commonwealth Ombudsman also initiated an investigation into the NSCP. Like the Northern Territory Ombudsman, he also found several deficiencies in the program. In addition, the constitutionality of the NSCP was challenged in the High Court case *Williams v The Commonwealth*.

A common complaint regarding the NSCP is that it allows religious people to proselytise to young children. While both Ombudsmen’s reports were critical of the NSCP, and *Williams* found that it was unconstitutional, the main concerns raised in the reports and High Court case did not relate to the religious nature of the NSCP, but to other features of the program and would arguably still have applied had the program only employed ‘secular pastoral care workers’ instead of chaplains.

### 3.3.2.1 The Northern Territory Ombudsman’s Report

In 2010 the Northern Territory Ombudsman initiated an own motion investigation into the operation of chaplaincy programs run by Living Waters Chaplaincy Services at five Northern Territory rural Government schools. While the Report was critical of the chaplaincy services provided, the main criticism did not relate to the religiosity of the program. Instead, the main concern for parents was the relationship between two of the chaplains and a convicted paedophile whose rehabilitation they were facilitating.

The complaints and concerns from parents at the schools included the qualifications of the chaplains, the provision of counselling by the chaplaincy, contact between the

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Northern Territory Ombudsman, above n 97, 15, 149 – 150; Commonwealth Ombudsman, above n 97, 1.


The schools involved were Humpty Doo Primary School, Bees Creek Primary school, Berry Springs primary School, Girraween Primary School and Taminmin High School. Living Waters Chaplaincy Service employed three chaplains: Jason Purugganan, Roslyn McMillan and Stuart McMillan. Most of the complaints related to Roslyn McMillan and Stuart McMillan. See Northern Territory Ombudsman, above n 97, 5 and 112.
chaplains and children identified as opting-out of the program, the chaplains’ access to student records, and the response of the chaplains, school principals, DET\textsuperscript{126} and DEEWR\textsuperscript{127} to complaints. While all of these issues were important, the issue which intensified the parents’ response was the revelation that two of the chaplains, Roslyn and Stuart McMillan, were involved in the rehabilitation of a convicted paedophile.\textsuperscript{128}

This letter captures the concerns of the parents:

As you are aware we have strong concerns regarding the suitability of the Living Waters Uniting Church providing a Chaplaincy Service for our children … These concerns stem from the fact that they are accommodating a re-offended paedophile and his wife at the same residence as Arise After School Care, next to Humpty Doo Child Care Centre, and close to Humpty Doo Primary school, St Francis of Assisi Primary school, Taminmin High school, the Humpty Doo Village Green Park, skate park, scout hall, Humpty Doo Playgroup, Girl Guides and the school bus exchange. They have invited this man onto the property, exposing all our children to him and did not feel that this was inappropriate?

…

Due to the lack of duty of care to all children in the rural sector, we have lost all respect and confidence in this church and strongly advise that we do not invite them into our school. … Surely we could find another service that has only our children’s best interests at heart.\textsuperscript{129}

The convicted paedophile, referred to in the reports as Mr MN, had been convicted on a number of occasions of indecent assault and sexual misconduct with a child, most recently in 2004.\textsuperscript{130} Mr MN, along with his wife, was provided with accommodation at a refuge known as the Meeting Place, where he also worked as a volunteer caretaker.\textsuperscript{131} As stated by the parent in the letter quoted above, the Meeting Place is located in close proximity to several child related services.

Of greater concern to the parents was the fact that one of the chaplains, Stuart McMillan, did not accept that his role as school chaplain was in conflict with his role in

\textsuperscript{126}Department of Education and Training (Northern Territory).
\textsuperscript{127}Department of Education, Employment and Workplace Relations (Commonwealth).
\textsuperscript{128}Northern Territory Ombudsman, above n 97, 5, 51 – 59.
\textsuperscript{129}Ibid 5 – 6.
\textsuperscript{130}Ibid 52.
\textsuperscript{131}Ibid 53.
They were also concerned that if their children became familiar with the chaplains and perceived them as ‘safe people’ then by extension the children may perceive Mr MN as a ‘safe person’ if they saw him in the company of one of the chaplains. The Ombudsman considered that this incident had highlighted a flaw in the NSCP, in that the agreement for the provision of chaplaincy services was between the service provider and the DEEWR. Neither the school nor the DET was a party. This meant that any complaints, and actions on those complaints, had to go through the DEEWR.

The Northern Territory Ombudsman made 13 recommendations relating to chaplaincy services. These included recommending that the provisions of one on one sessions by chaplains and the involvement of chaplains in school wellbeing teams and events such as school sports days be reconsidered and chaplains access to classrooms be restricted. The recommendations also included several procedural changes relating to the provision of chaplaincy services including the standardisation of consent forms, reviewing the guidelines for community consultation, the review of funding arrangements, and the reporting of non-compliance to the DEEWR. Finally, as noted above, the Northern Territory Ombudsman recommended that his report be provided to the Commonwealth Ombudsman.

It is worth noting that a number of the complainants did not object to the provision of chaplaincy services themselves, but how they were being provided, and by whom. It is interesting to note that Witness E stated that, ‘… several parents had removed their children from Humpty Doo Primary school and placed them in St Francis of Assisi as a result of the chaplaincy programme.’ St Francis of Assisi is a Non-Government Catholic primary school. If the parents had objected to a religious element in their child’s education it is unlikely they would have enrolled them in a Catholic school after removing them from a Government primary school.

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132 Ibid 54.
133 Ibid 6. Mr MN was eventually moved from the Meeting Place and the law has since changed making it unlawful to house a convicted paedophile in a location such as the Meeting Place: see page 53.
134 Northern Territory Ombudsman, above n 97, 58.
135 Recommendations 1, 2, 4 and 5.
136 Recommendations 3 and 6-12.
137 Recommendation 13.
138 Northern Territory Ombudsman, above n 97, 39.
It is also important to note that some of the complaints related to activities engaged in by the chaplains prior to the commencement of the NSCP. Two of the chaplains had provided voluntary and incident related chaplaincy services at four of the five schools from as early as 2004. Finally, the Northern Territory Ombudsman’s recommendations related to the entirety of the chaplaincy program conducted in the Northern Territory; however the complaints investigated related to just five schools in the one town serviced by one chaplaincy provider. The report does not state whether the deficiencies identified are systemic or particular to this town, chaplaincy provider or these chaplains.

3.3.2.2 The Commonwealth Ombudsman’s Report

A month after the release of the Northern Territory Ombudsman’s report the Commonwealth Ombudsman initiated an own motion investigation into the DEEWR’s administration of the NSCP. As with the Northern Territory report, the main concerns raised by the Commonwealth report did not relate to the religious nature of the program. Instead, the majority of recommendations related to administrative features and oversight of the chaplains.

Unlike the Northern Territory’s Ombudsman’s report, the Commonwealth Ombudsman’s report did not relate to specific schools or chaplains, although the report did refer to individual experiences. Instead, it looked at the administration of the program as a whole, making eight recommendations. These included recommendations to review chaplaincy guidelines to better define chaplain, pastoral care and minimum qualifications requirements, a review of the code of conduct, and a review of the funding agreements. The Commonwealth Ombudsman also recommended that better guidelines be provided to schools in relation to community consultation, obtaining parental consent and that the Commonwealth work with States and Territories to develop best practice guidelines for the day to day administration and handling of complaints.

139 Stuart McMillan and Roslyn McMillan.
140 Northern Territory Ombudsman, above n 97, 5.
141 Commonwealth Ombudsman, above n 97,1.
142 Ibid 8 and 13.
143 Recommendations 3, 4 and 6.
144 Recommendations 2, 7 and 8.
The report noted that there had been criticism of the NSCP by some individuals and groups. These criticisms particularly related to concerns that chaplains and their role could become confused with that of counsellors and/or therapists, and those regarding the religious nature of the program.\textsuperscript{145} The report also acknowledged that, despite these criticisms, there was a high level of community support for the program.\textsuperscript{146} The Commonwealth Ombudsman made no comments on the merits of the NSCP beyond acknowledging these communities’ responses.\textsuperscript{147}

It is interesting to note that at the time of the Commonwealth Ombudsman’s report the DEEWR had received just 277 complaints about the NSCP. Given that the program was in operation in 2,675 schools, the DEEWR estimated that this represented less than 1\% of students in schools participating in the NSCP.\textsuperscript{148} Of those complaints just 17 related to proselytising,\textsuperscript{149} and less than a third related to the conduct of chaplains themselves.\textsuperscript{150}

\subsubsection*{3.3.2.3 Williams v The Commonwealth}

Arguably the most significant challenge to the NSCP has been the High Court case \textit{Williams v the Commonwealth}.\textsuperscript{151} On the 21 December 2010, Queensland father Ronald Williams issued a Writ of Summons in the High Court challenging the constitutionality of the NSCP.\textsuperscript{152} A year and half later\textsuperscript{153} the High Court handed down its decision declaring in a majority decision that the NSCP was unconstitutional. While the NSCP was declared unconstitutional the Court’s decision was not based on the religious nature of the program. Instead, the Court’s decision rested on the funding method used by the Commonwealth.\textsuperscript{154}

\begin{thebibliography}{9}
\bibitem{145} Commonwealth Ombudsman, above n 97, 5.
\bibitem{146} Ibid 6.
\bibitem{147} Ibid 1.
\bibitem{148} Ibid 19.
\bibitem{149} Ibid 21.
\bibitem{150} Ibid 19.
\bibitem{151} [2012] HCA 23.
\end{thebibliography}
While Williams won the overall case, he was unsuccessful in relation to his two arguments that the NSCP contravened section 116. First, that chaplains held an ‘office … under the Commonwealth’ and secondly that the NSCP imposed a ‘religious test’ for this office. If the High Court had accepted these arguments the NSCP would have been contrary to the fourth limb of section 116 and therefore unconstitutional. The High Court unanimously rejected these arguments.

Only two of the judgements in Williams discussed the section 116 arguments in any detail, the joint judgement of Gummow and Bell JJ, and the dissenting judgment of Heydon J (although he was not in dissent on this point). The remaining four Justices agreed with the reasoning in the joint judgment, making no further comments. Both the joint and dissenting judgements considered the meaning of ‘officer … under the Commonwealth’. In both cases they determined that the relationship between the chaplains and the Commonwealth was not close enough to establish that the chaplains were in fact officers under the Commonwealth.

Heydon J determined that “[a]n office” is a position under constituted authority to which duties are attached’, and that this required a direct relationship with the Commonwealth. Chaplains employed under the NSCP were in no such direct relationship. The chaplains were in a relationship with the chaplaincy provider, who in the case under consideration was Scripture Union Queensland (SUQ), who was in turn in a contractual relationship with the Commonwealth. The Commonwealth could not ‘appoint, select approve or dismiss’ the chaplains employed under the NSCP, meaning that the Commonwealth could not direct them. Williams had argued that the fact that chaplains had to comply with a code of conduct imposed by the Commonwealth meant that the Commonwealth in effect exercised supervision or control over the chaplains. The Court rejected this argument, preferring a narrower reading. The joint judgment also adopted this position, pointing out that the fact that the

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155 For the wording of s 116 see 2.4.3.
160 Ibid [444].
161 The chaplaincy provider varies between States and even between schools.
163 Ibid [445].
164 Ibid [443].
Commonwealth was the source of funding for the chaplains’ employment was not enough to ‘render a chaplain … the holder of an office under the Commonwealth’. Both judgments stopped short of outlining exactly what would be required for a person to hold an ‘office … under the Commonwealth’, simply stating that the relationship between the chaplains employed under the NSCP and the Commonwealth did not meet the required threshold.

After determining that the chaplains employed under the NSCP were not officers ‘...under the Commonwealth’ both Gummow and Bell JJ, in the joint judgment, and Heydon J, in the dissenting judgment, found it unnecessary to discuss the plaintiff’s second section 116 argument, that the qualification for being a chaplain imposed a religious test. This leaves the tantalising possibility that there may in fact have been a ‘religious test’ imposed. However, Heydon J points out that ‘neither the NSCP nor the qualification for “chaplains” had much to do with religion in any specific or sectarian sense. The work described could have been done by persons who met a religious test. It could equally have been done by persons who did not.’ So perhaps even if the Court had considered the issue it would have found that there was no religious test anyway.

Williams was successful in his arguments relating to the way in which the NSCP had been funded. The NSCP was not created via legislation; instead it was created and funded directly by the Executive. The High Court found that this arrangement was unconstitutional because the Federal Executive did not have the power to spend money on programs like the NSCP without legislative support. In response to this decision the Federal Government passed the Financial Framework Legislation Amendment Act (No 2) 2012 (Cth) which has purported to fix this problem for the NSCP and other Government programs.

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165 Ibid [109].
166 Ibid [110] and [447].
167 Ibid [442] and [448]. The joint judgment makes no mention of the Plaintiff’s second argument.
170 The impact of this decision goes far beyond the NSCP and will effect a wide range of Government spending programs. See Orr and Isdale, above n 154; Mirzai, above n 154; Sapienza, above n 154.
171 Orr and Isdale, above n 154, 6. Williams has indicated he may lodge a further Constitutional challenge to the chaplaincy program. See Jane Lee, ‘Father to Take Canberra on Again Over Chaplains, The Age (Online), 7 July 2012.
In the end the *Williams* case has not been a victory for those who have criticised the NSCP. While the NSCP was found to be unconstitutional, the Federal Government has been able to remedy this defect, and the High Court found no constitutional problem with the religious nature of the program.

3.3.2.4 Proselytising

As referred to above a common criticism of the NSCP is that it allows religious workers to proselytise to young children without their parents’ consent. Proselytising is specifically prohibited under the NSCP guidelines. Point nine of the code of conduct for school chaplains under the NSCP states that:

> While recognising that an individual chaplain will in good faith express views and articulate values consistent with his or her denomination or religious beliefs, a chaplain should not take advantage of his or her privileged position to **proselytise** for that denomination or religious belief. [emphasis added]^{172}

Despite this requirement there have been several accusations of proselytising by school chaplains under the program. In December 2008 the book ‘The Chaplaincy Phenomena’ written by former school chaplain Joëlle Kabamba, came to public attention. The book was endorsed and available for sale from Scripture Union, a major provider of school chaplaincy services.^{173} The book contained several statements that, if followed by school chaplains employed under the NSCP, breached the ‘no proselytising’ guideline. Examples include:

> Young people want someone to follow. Who better than a God who loves them. The job of a chaplain is to put God in their terms, to help them understand how God and his teachings are applicable to their lives, and to break it down to give them concrete examples of how God works in their lives.^{174}

> As a chaplain I believe one of my mandates from God was to live among today’s young people and to take them by the hand and positively encourage them through relevant teachings.^{175}

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^{172} Appendix A ‘National School Chaplaincy Program Guidelines’ (16 February 2010), 18. See also Attachment A ‘National School Chaplaincy and Student Welfare Program Guidelines’ (September 2011), 46.


^{175} Ibid 48.
The book also claimed that a number of school chaplains had been responsible for ‘miracles’ such as stopping the rain,\textsuperscript{176} healing the mind of traumatised ADD children,\textsuperscript{177} and healing a child with asthma.\textsuperscript{178} The book also provides numerous case studies detailing the impact that the work of chaplaincy has on the lives of their students. While many of these are positive, and would not breach the NSCP guidelines, some refer to the conversion of students to Christianity, an activity that would breach the NSCP guidelines.\textsuperscript{179} When these breaches were brought to the attention of Tim Mander, Chief Executive of Scripture Union, he withdrew Scripture Union’s support for the book.\textsuperscript{180}

While the practices in the book are in breach of the NSCP guidelines it is unlikely any of them took place under the NSCP. The book was published in 2007, and given the NSCP did not commence until January 2007 it is unlikely that Joëlle Kabamba had the NSCP and its guidelines in mind when either writing the book, or acting as a chaplain herself.

In May 2011 accusations of proselytising emerged in relation to Access Ministries, the main chaplaincy provider in Victoria. Access Ministries’ web page contained a strategy to ‘make students disciples’. It was also revealed that in 2008 the CEO of Access Ministries, Dr Evonne Paddison, had encouraged making disciples of students at a speech to Anglican Evangelicals.\textsuperscript{181}

Around the same time, concerns were raised by the New South Wales Parents and Citizens Association in relation to the chaplaincy service provided by United Christian Education Foundation at Ulladulla High in New South Wales. The school principal reported that at least one instance of proselytising had been investigated.\textsuperscript{182}

The Northern Territory Ombudsman investigated two reported breaches of this provision. The first related to the handing out of bibles at Taminmin High School. The Ombudsman noted that this activity was carried out by the Gideon Society and that the

\begin{footnotes}
\item[176] Ibid 94.
\item[177] Ibid 91.
\item[178] Ibid 93.
\item[179] Ibid 57, 84 – 86, 95 – 97, 99- 101.
\item[180] Overington, above n 173.
\item[181] James Bennett, ‘Chaplains investigated over student ‘disciples’’ \textit{ABC News} (Online) 13 May 2011.
\item[182] ‘Chaplains accused of pushing religion in schools’ \textit{ABC News} (Online) 8 April 2011.
\end{footnotes}
chaplains were not involved, as such there was no breach of the NSCP guidelines or code of conduct. ¹⁸³ The second complaint related to the putting up of religious posters by Roslyn McMillian at Berry Springs Primary School. The Northern Territory Ombudsman noted that this was a breach of the NSCP guidelines and code of conduct but that the principal of the school had responded quickly and appropriately resulting in the posters being removed. ¹⁸⁴

A report commissioned by the National School Chaplaincy Association found that proselytising was not an issue in the schools it reviewed. School principals, staff, and students interviewed or surveyed for the report all commented that the religious affiliation of the chaplain was not relevant and that the chaplain did not ‘push’ their beliefs onto either staff or students. ¹⁸⁵ Some parents surveyed did express concerns about the religious nature of chaplaincy; but the report notes that these concerns seemed to be alleviated when the parent actually met and interacted with the chaplain. ¹⁸⁶

While some proselytising seems to be taking place, the evidence suggests that these incidents are not endemic to the program. In a 2007 article Brian Hill asked ‘Is School Chaplaincy being Secularised?’¹⁸⁷ Despite the accusations of proselytising levelled at the NSCP and the chaplaincy providers, it could be argued that there is less scope for this under the NSCP than before the program’s existence. If this is the case the answer to Brian Hill’s question may well be yes. As already outlined above, in ‘The Chaplaincy Phenomena,’ Joëlle Kabamba outlines a number of practices that would not be permitted under the NSCP. Given that they seemed not to have been a problem prior to the program, it could be argued that the evangelic activities of chaplains has been curtailed under the NSCP. If chaplains had continued to engaged in activities described by Joëlle Kabamba after the introduction of the NSCP they may well have their federal funding withdrawn. Evidence for this may also be found in the fact that neither the Northern Territory Ombudsman’s report nor the report commissioned by the National School Chaplaincy Association found proselytising to be a significant problem.

¹⁸³ Northern Territory Ombudsman, above n 97, 68.
¹⁸⁴ Ibid.
¹⁸⁵ Hughes and Sims, above n 122, 5, 21, 32, 46, 71.
¹⁸⁶ Ibid 37.
Regardless of whether or not proselytising is taking place, this element of the NSCP is an example of the interaction of the State and religion. If proselytising is taking place then it is doing so under the auspices of a State funded and endorsed program, giving the proselytising a certain element of State support and sanction. Given the secular nature of Australia’s Government schools, this is a significant change in the legal relationship between the State and religion.

On the other hand, even if proselytising is not taking place, the prohibition of proselytising by the NSCP and NSCWP guidelines is also an example of interaction between the State and religion. The book by Joëlle Kabamba and article by Brian Hill would suggest that proselytising may have been taking place prior to the introduction of the NSCP. Assuming that all chaplains followed the NSCP guidelines and ceased any proselytising activity when they started to receive federal funds, then the NSCP and its guidelines are an example of the State restricting religious practice by becoming involved in religion. The no proselytising guidelines effectively control religious activities that may have otherwise been permissible without the interaction with the State.

While the religious elements of the NSCP may be constitutionally valid, they still represent a change in the legal relationship between the State and religion. Prior to the introduction of the NSCP religion was a part of many State schools, however the NSCP has introduced religion in a new and different way. The NSCP has created for the first time a widespread, federally funded, and importantly federally endorsed, religious program in secular State schools. While the program has been secularised to a certain extent, it remains predominantly a religious program staffed by chaplains.

In Chapter Four the State’s attempt to create a Church of England monopoly over education via the Church and Schools Corporation is identified as an issue analogous to the creation of the NSCP. As will be discussed in Chapter Three, the Church and Schools Corporation, like the NSCP, is a State program determining the place, and in this case the character, of religion in education. Before looking at this analogous issue, Chapter Two sets out the final case study of change in the legal relationship between the State and religion in modern Australia: the Australian Charities and Not-for-profit Commission.
3.4 The Australian Charities and Not-for-profit Commission

The final case study of a change in the legal relationship between the State and religion in modern Australia is the creation of the Australian Charities and Not-for-profit Commission (ACNC). The ACNC was formally launched on 10 December 2012, over a decade after a national charity regulator was first proposed.188 The creation of the ACNC changes the legal relationship between the State and religion via its interaction with income tax exemptions.

Charities, including religious charities, are exempt from, or receive a rebate on, a wide range of taxes including income tax, capital gains tax, fringe benefits tax, the Goods and Services Tax (GST), Payroll Tax, Land Tax, Stamp Duty and Rates.189 In 2009 it was estimated that this amounted to over $1 billion.190 This significant amount of forgone Government revenue can be seen as indirect funding of charities, including religious organisations. While taxation exemptions do not place new money in the hands of charities, they do leave money in the hands of charities which would otherwise be payable to the Government. The Government therefore, in effect, is funding the charity to the amount of the exemption, or as Senator Xenophon would put it, ‘effectively making donations on our behalf through tax exemptions.’191 Religious organisations receive a significant proportion of this funding. In Australia, religious based charities or those with religious origins dominate the charity sector.192 As a result, any change in the legal relationship between the State and charities will also be a change in the legal relationship between the State and religion.

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189 Gino Evans Dal Pont Law of Charity (LexisNexis Butterworths, Australia, 2010), 144 – 153.


191 Commonwealth, Parliamentary Debate, Senate, 13 May 2010, 2843 – 2844 (Nicholas Xenophon).

The ACNC requires that charities, including religious charities, wishing to take advantage of income tax exemptions register with the ACNC.\textsuperscript{193} While this is only a small change, the requirements that go with this registration are more significant. Registration with the ACNC imposes ongoing reporting requirements and regulatory compliance. Failure to do so can result in de-registration of a charity, and therefore exclusion from income tax exemptions. This high level of oversight by the ACNC is a significant change in the legal relationship between the State and religion. Prior to the creation of the ACNC very little was required in terms of reporting or compliance from the charities sector in return for the indirect funding they received from the Government. The ACNC changed this.

This chapter will examine the changes introduced by the ACNC. While it is argued that these changes do not affect the substantive relationship between the State and religion, in that they do not change who is entitled to taxation exemptions, they do subtly begin to shift control of State funding for religion from religion to the State.

3.4.1 The Three R’s of the ACNC

The creation of the ACNC has had a number of effects on the legal relationship between the State and religion. While individually many of these changes have been small, cumulatively they amount to a significant shift in the legal relationship between the State and religion. Most prominent among the changes introduced by the ACNC are the R’s – registration, reporting and regulation. These three changes, working together, subtly shift control of the indirect funding of religion from religion to the State. While the changes do not affect which organisations are entitled to taxation exemptions they do provide for the first time a level of State oversight and control of charities that receive indirect funding in the form of tax exemptions.

3.4.1.1 Registration

A significant change in the legal relationship between the State and religion brought about by the creation of the ACNC is the requirement that all charities, including religious charities, must register in order to access income tax exemptions. The requirement for registration has involved two changes in the legal relationship between the State and religion, first a definitional change as to which entities are entitled to tax exemptions, and second the creation of a publicly available list of registered charities.

\textsuperscript{193} Income Tax Assessment Act 1997 (Cth) s 50.5 table item 1.1 ‘registered charities’. Note this section was amended, as of 3 December 2012, by Australian Charities and Not-for-profit Commission (Consequential and Transitional) Act 2012 (Cth) as part of the creation of the Australian Charities and Nor-for-profit Commission discussed in more detail below.
The first change brought about by the requirement for registration, the definitional change as to which charities are entitled to income tax exemptions, is small but important for all other changes brought about by the ACNC. Prior to the creation of the ACNC, organisations that were exempt from income tax were listed in section 50.5 of the *Income Tax Assessment Act 1997* (Cth). These included charitable institutions and religious institutions. Charitable institutions included charities for the advancement of religion. Many religious organisations would also have been eligible as other types of charitable institutions. After the introduction of the ACNC charitable institutions and religious institutions have been condensed to be just one item, ‘registered charities’. This means that any charity wishing to access income tax exemptions must be a registered charity with the ACNC. Without this small but important definitional change, many of the other changes brought about by the ACNC may be ineffective, as it is this definitional change that creates the incentive to register with the ACNC. Registration with the ACNC is voluntary, therefore without an incentive many charities may have chosen not to register, particularly given the reporting and regulation requirements that come with registration.

The second change brought about by the requirement for charities to register in order to access income tax exemptions is the creation and publication of the register. Prior to the creation of the ACNC there was no publically available list of all charities receiving tax exemptions. While those organisations receiving tax exemptions were required to be endorsed by the ATO, this list was not necessarily available to the public. It is the intention that the newly created register be made available on the internet. The type of information that is to be made available to the public includes the name, address, and

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194 Item 1.1.
195 Item 1.2.
196 See 2.4.2.
197 Item 1.1 “registered charity” means an entity that is registered under the *Australian Charities and Not-for-profits Commission Act 2012* as the type of entity mentioned in column 1 of item 1 of the table in subsection 25-5(5) of that Act. See *Income Tax Assessment Act 1997* (Cth) s 995-1.
199 See 7.4.4
200 Revised Explanatory memorandum, *Australian Charities and Not-for-profits Commission Bill 2012; Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*, 51 – 54. The list can be accessed at [http://www.acnc.gov.au/ACNC/FindCharity/Search_the_ACNC_Register/ACNC/OnlineProcessors/Online_register/Search_the_register.aspx?hkey=4cfc3e0-00db-4548-91a8-bb2860e8d137](http://www.acnc.gov.au/ACNC/FindCharity/Search_the_ACNC_Register/ACNC/OnlineProcessors/Online_register/Search_the_register.aspx?hkey=4cfc3e0-00db-4548-91a8-bb2860e8d137). At the time of writing the information available on the register is limited, but it is expected that it will expand after the first reporting round due in the second half of 2013.
ABN number of the charity, along with the type and sub type of the entity, the entity’s
governing rules, any financial reports that have been provided by the entity, and details
of any enforcement proceedings undertaken against the entity by the ACNC. While the publication of information about charities is an important change in the legal
relationship between the State and religion, by itself its effect would be of limited
duration as the information became out-dated. It is the creation of the publicly available
register along with ongoing reporting requirements that makes the creation of the
register a significant change.

3.4.1.2 Reporting
As referred to above, there is an extensive list of information that will be included in the
register of charities maintained by the ACNC. In order to keep this information up-to-
date the Australian Charities and Not-for-profits Commission Act 2012 (Cth) provides
for a reporting regime. This ongoing reporting regime has two important effects on the
legal relationship between the State and religion. First, it puts into the public domain, in
many cases for the first time, detailed information about charities. Second, it is
envisioned that the reporting regime will streamline the reporting requirements of
charities.

The first effect on the legal relationship between the State and religion is to make public
a wide range of information about charities, including financial information. This will
have two effects, for the first time it may be possible to quantify the amount of tax
forgone by the State as a result of tax exemptions and it opens up the possibility that
their status as charities may be challenged.

Prior to the creation of the ACNC, the amount of forgone taxation as a result of
exemptions given to charities was unquantifiable; as entities exempt from income tax do
not lodge income tax returns. As a result, there is no publicly available data on the
income of most charities, making estimates of the amount of income and other taxes
forgone impossible to calculate. In 2009 the Federal Treasury estimated that the
forgone revenue from charities was around $1 billion, but officially listed the amount
forgone as unquantifiable. In 2010 the Productivity Commission estimated that the
revenue forgone as a result of these tax exemptions was at least $4 billion, and could be

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202 Senate Economics Legislation Committee, above n 190, 11 – 12.
as much as twice that figure.\textsuperscript{203} While the two figures do measure slightly different things they both demonstrate the uncertainty around the amount of indirect funding given to charities, including religious charities, by the Government and the possibility for that figure to be substantial. The ACNC reporting regime has the potential to bring some certainty in estimates of the amount of revenue forgone by the Government and therefore the amount of indirect funding received by charities.

There are two types of reports that registered charities will be required to provide – annual information statements and financial reports. It is the latter of these that has the potential to clarify the amount of indirect funding received by charities. All large and medium charities registered with the ACNC entities will be required to provide annual financial statements.\textsuperscript{204} While small charities and basic religious charities are not required to provide annual financial statements they may do so voluntarily.\textsuperscript{205} The form of annual financial reports is not proscribed in the \textit{Australian Charities and Not-for-profits Commission Act 2012} (Cth), and is instead intended to be contained in regulations.\textsuperscript{206} Based on the draft regulations the annual financial report is likely to consist of the registered entity’s financial statement for the year, notes on the financial statement, and the responsible entity’s declaration about the statement and notes.\textsuperscript{207} While the exclusion of small and basic religious charities means that a complete picture of the amount of indirect funding received by religious charities will not be able to be gained from these financial statements they will go a long way towards addressing the uncertainty around the amount of revenue forgone by the Government as a result of tax exemptions.

Second, there is potential for the information provided in annual information statements to be used to challenge the charitable status of registered entities. As will be discussed in more detail below, the definition of charity presumes in many cases, including in the cases of charities for the advancement of religion, that the charity is for the ‘public

\textsuperscript{203} Productivity Commission, above n 188, 76.
\textsuperscript{204} \textit{Australian Charities and Not-for-profits Commission Act 2012} (Cth) s 60-10. A large charity is one with an annual revenue of $1 million or more, a medium charity is one with an annual revenue between $250,000 and $1 million. See s 205-25.
\textsuperscript{205} \textit{Australian Charities and Not-for-profits Commission Act 2012} (Cth) s 60-60(2). A small charity is one with revenue of less than $250,000 per year: s 205-25. For basic religious charities see 3.4.1.4.
\textsuperscript{206} Revised Explanatory memorandum, \textit{Australian Charities and Not-for-profits Commission Bill 2012; Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012}, 74 – 75.
\textsuperscript{207} \textit{Australian Charities and Not-for-profit Commission Regulation 2012} (Cth) (draft) reg. 7.
If an entity is not for the ‘public benefit’ then it is not a charity. However, the presumption means that many charities do not need to prove this public benefit. One effect of the reporting regime is that the annual information statements may provide members of the public, the Government, or other organisations the information needed to rebut this presumption.

All registered charities, regardless of size, will be required to provide an annual information statement. The *Australian Charities and Not-for-profits Commission Act 2012* (Cth) does not proscribe the information which is to be contained in annual information statements. Instead, the Charities Commissioner determines this. It is envisaged that the information required by the Commissioner will include information on ‘governance, finances, activities, purposes, objects and beneficiaries’. The 2013 annual information statement contained 19 questions, ranging from basic information, such as the charity’s registered name and address, to more detailed questions such as question 14 ‘Who was helped by your charity’s activities in the last financial year,’ and question 17 ‘Did you have a corporate or financial reporting obligation to a Commonwealth department or agency over the last financial year?’

Even if the information provided in annual information statements is not used to challenge the charitable status of registered entities, it may affect charities’ behaviour. As discussed above, there is an incentive to being a registered charity and subject to these reporting requirements. If a charity is concerned that their activities may be challenged, they may adjust their operations in order to make sure that the information made public about them reveals a public benefit in order to justify their registration as a charity.

The second effect of the reporting requirements on the interaction between the State and religion is the streamlining of contact between the Commonwealth Government and

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208 See 3.4.2.
212 For a more detailed discussion of the potential effect of ‘public benefit’ tests see 6.4.3.
Charities. It is intended that it will be a ‘report once, use often’ system. This means that charities will report only to the ACNC and that other Commonwealth agencies will access any information they need from the register held by the Commission. Prior to the introduction of the reforms many charities were required to report to several different Government agencies and needed to ‘prove their bona-fides’ each time they dealt with a new agency. It is hoped that this kind of duplication will be eliminated by the creation of the register. While this is a relatively small change, it will mean that charities, including religious charities, will now interact with the State via fewer Government agencies. Some duplication may still occur, especially if State and Territory Governments do not adopt registration with the ACNC as the definition of a charity, but overall there will be a streamlining of the interaction between the State and religion in relation to charitable status and tax exemptions.

3.4.1.3 Regulation

Another change in the legal relationship between the State and religion brought about by the creation of the ACNC is the regulation of registered charities. Prior to the creation of the ACNC charities were governed by a variety of different governance standards, depending on the structure of the charity, the industry in which they operated, and their level of interaction with Government. It is possible that some charities, including charities for the advancement of religion, would have had no requirement to comply with any set of governance standards, although they may have done so voluntarily. This means that some of the charities that were receiving indirect Government funding, courtesy of tax exemptions, were not required to comply with any externally imposed governance standards. While the creation of a set of minimum governance standards is arguably a good thing, it does change the relationship between

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215 Australian Charities and Not-for-profits Commission Act 2012 (Cth) Div 45 and 50.

the State and religion. In regulating all charities the State is exercising a level of control over charities which had not previously existed.

Where a charity fails to comply with governance and external conduct standards they can ultimately be removed from the register. The governance standards are contained in Division 45 of the Australian Charities and Not-for-profit Commission Regulation 2013 (Cth). The explanatory memorandum for the Australian Charities and Not-for-profits Commission Act 2012 (Cth) envisaged that the requirements in the regulations may be different for charities of different sizes and different types and that they will be descriptive rather than prescriptive. In other words, registered entities cannot choose whether to meet the standards in the regulations, but they can choose how they meet the standards, taking into account their specific situation.

3.4.1.4 One Exemption for Religion

The registration, reporting, and regulation requirements created by the ACNC will apply to most religious charities. However, the Australian Charities and Not-for-profit Commission Regulation 2013 (Cth) provides some exceptions for ‘basic religious charities’. On one hand, these exceptions are to the advantage of religious charities over the State, as classification as a basic religious charity negates much of the control exercised by the State via the registration, reporting, and regulation requirements. On the other hand, it is an exercise by the State of control over religion. By establishing the category of ‘basic religious charities,’ with the associated structural requirements and incentives, the State can be seen to be subtly influencing the structure and behaviour of religious charities, and in doing so attempting to control religion.

A basic religious charity is defined in the Australian Charities and Not-for-profits Commission Act 2012 (Cth) as registered entity that is entitled to be registered as a charity for the advancement of religion, and is not entitled to be registered as any other

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218 Division 45 was inserted by Australian Charities and Not-for-profit Commission Amendment Regulation 2013 (No 1) Cth which at the time of writing was subject to a motion to disallow.
subtype. However, where an organisation meets these requirements but is incorporated, is a deductible gift recipient, is part of a reporting group, or received a Government grant of more than $100,000 in a financial year, it will not qualify as a basic religious charity.

If a charity for the advancement of religion meets all of the requirements to be defined as a basic religious charity it will be exempt from submitting annual financial statements and complying with the Governance Standards. In addition, the Charities Commissioner cannot suspend the responsible entity of a basic religious charity for non-compliance with the Charities Acts. In effect, this means the Commissioner cannot suspend the leader of a religion.

On the surface the exemption for basic religious charities hands control back from the State to religion, as the subtle control shift described in the previous two sections does not apply. On the other hand, creating this exemption provides an incentive for religious charities to structure themselves and to operate in such a way as to qualify as a basic religious charity.

Where a charity for the advancement of religion is also entitled to be registered as another subtype of charity, they will not qualify as a basic religious charity. In their submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry, Moore Stephens Accountants and Advisers pointed out the many churches and religious institutions engage in pastoral care and ancillary activities that go beyond the advancement of religion. The explanatory memorandum for the Australian Charities and Not-for-profits Commission Act 2012 (Cth) indicated that some ancillary activities would be permitted before a charity for the advancement of

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221 Australian Charities and Not-for-profits Commission Act 2012 (Cth) s 205-35(1).
222 Ibid s 205-35(2) – (5).
223 Charities and Not-for-profits Commission Act 2012 (Cth) ss 45-10(5) and 60-60(1); Revised Explanatory memorandum, Australian Charities and Not-for-profits Commission Bill 2012; Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, 59, 74 – 75.
224 Charities and Not-for-profits Commission Act 2012 (Cth) s 100-5(3). A responsible entity is defined in s 205-30 for more details on responsible entities and the Commissioner's powers of suspension. See Revised Explanatory memorandum, Australian Charities and Not-for-profits Commission Bill 2012; Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, 148 – 161 and 221 – 222.
religion crossed the threshold of being entitled to register as another subtype. However, the example given in the explanatory memorandum appears to set this threshold very low.226

For example, a church … Occasionally provides clothes and food vouchers to families that attend their church services and that are experiencing poverty. This service is not provided frequently, and is merely incidental to the registered entity’s activities to advance religion.227

If a church provided a regular soup kitchen, opportunity shop or food program they may breach the threshold as it is described in the explanatory memorandum. As More Stephens points out:

A strict reading of s205-35(c) would place significant restrictions on these activities, which are ancillary or incidental to the advancement of religion.228

If the Australian Charities and Not-for-profits Commission Act 2012 (Cth) is read as Moore Stephens suggests, charities for the advancement of religion may be influenced to restrict their ancillary activities in order to fall within the definition of a basic religious charity. This exclusion also points to an understanding of religion that implies that it can be separated out from other charitable activities. Given the high number of charities in Australia that have historical affiliation with religious organisations, this is a strange position to take.229

Some of the other exclusionary items have also been criticised;230 however, they may be explainable by reference to the purpose of the ACNC. As discussed above, one of the main aims of the ACNC is to create a ‘one-stop-shop’ for all Government agencies that require information about charities.231 Classification as a basic religious charity exempts a religious organisation from providing some of this information. In the case

227 Revised Explanatory memorandum, Australian Charities and Not-for-profits Commission Bill 2012; Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, 222.
229 O’Halloran, above n 192, 31.
231 See 3.4.1.2.
of the exclusions listed in sections 205-25(2) – (5), the charity would be required to report to a Government agency. For example, those charities that have structured themselves as a corporation would need to report to ASIC, and those who receive large Government grants would need to report to the Government agencies providing those grants. If these exclusions were not included in the qualification for classification as a basic religious charity the ‘one-stop-shop,’ ‘report once, use often’ system would be useless, as the ACNC would not have the information needed by the other Government agencies.

In setting the requirements for a charity for the advancement of religion to qualify as a basic religious charity, the State has subtly controlled the behaviour of religious organisations. In effect, they have forced some religious organisations to choose between structuring themselves to meet the definition of a basic charity or in some other way and be denied the associated advantages. While in some cases the exclusions may be justified, it does shift control away from religion towards the State. The State is now telling religions how they should be structured and what activities they should undertake.

3.4.2 Change but no Change: The Definition of Charity

One important change introduced by the ACNC is a statutory definition of charity. Prior to the creation of the ACNC charity was defined by the common law. At common law, an entity is a charity if it is for the public benefit, and is within the ‘spirit and intendment of the Statute of Elizabeth’. The ‘spirit and intendment of the Statute of Elizabeth’ was interpreted in Commissioner for Special Purposes of Income Tax v Pemsel as consisting of four heads of charity:

1. The relief of poverty, age or impotence;
2. The advancement of education;
3. The advancement of religion; and

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232 Sheppard, Fitzgerald and David, above n 188, 111. The preamble of the Statute of Elizabeth – also known as the Charitable Uses Act 1601 (UK) - stated that charity included: the relief of the aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriages of poor maids; the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes. See Dal Pont, Law of Charity, above n 189,1.

233 [1891] AC 531 at 538.
4. Any other purpose beneficial to the community.\textsuperscript{234}

In the cases of the first three heads, including the advancement of religion, public benefit is presumed.\textsuperscript{235}

3.4.2.1 The ACNC Definition

While the ACNC creates a statutory definition of charity it does not substantially alter the common law definition. While the creation of a statutory definition of charity is a small change in the legal relationship between the State and religion, it is a change in form rather than substance. The \textit{Australian Charities and Not-for-profits Commission Act 2012} (Cth) goes so far as to specifically state that the common law position is not altered.\textsuperscript{236} This is despite the fact that there have been several recommendations to alter the definition of charity in relation to the ‘public benefit’ requirement.\textsuperscript{237}

Section 25-5(5) \textit{Australian Charities and Not-for-profits Commission Act 2012} (Cth) defines charities as:

1. Entity with a purpose that is the relief of poverty, sickness or the needs of the aged;
2. Entity with a purpose that is the advancement of education;
3. Entity with a purpose that is the advancement of religion;
4. Entity with another purpose that is beneficial to the community;
5. Institution whose principal activity is to promote the prevention or the control of diseases in human beings;
6. Public benevolent institution; or
7. Entity with a charitable purpose described in section 4 of the \textit{Extension of Charitable Purpose Act 2004} (provision of child care services).

The first four categories are the four heads of charities set down in \textit{Pemsel}. The final three categories all relate to entities that, prior to the reforms, were listed separately as receiving taxation exemptions or concessions. Including them in the statutory definition of charity simply streamlines taxation legislation and as a result does not significantly alter the definition of charity in any way.\textsuperscript{238}

\textsuperscript{234} Dal Pont, \textit{Law of Charity}, above n 189, 17.
\textsuperscript{235} Sheppard, Fitzgerald and Gonski, above n 188, 111 – 112.
\textsuperscript{236} s 25-5(6) \textit{Australian Charities and Not-for-profits Commission Act 2012} (Cth).
\textsuperscript{237} See most recently Senate Economics Legislation Committee, above n 190.
The link with the four heads of charity laid down in *Pemsel* is explicitly set out in section 25-5(6) of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) which states that,

> The object of column 2 of items 1, 2, 3 and 4 of the table in subsection (5) is to describe entities that are covered by the 4 heads of charity traditionally recognised by the courts.

As a result the creation of a statutory definition of charity should have no practical impact on which religious organisation qualify as a charity, the definition has simply been moved from the common law to a statute. Those organisations that qualify before the creation of the ACNC will still qualify after the creation of the ACNC.

### 3.4.2.2 The Further Future Change

The *Charities Act 2013* (Cth) will commence on 1 January 2014. The Act creates a standalone statutory definition of charity. However, like the ACNC definition it is unlikely to have a significant impact on the legal relationship between the State and religion.

Section 5 of the Bill defines charity:

> Charity means an entity:
> (a) That is not-for-profit;
> (b) All of the purposes of which are:
>   i. Charitable purposes (see part 3) that are for the public benefit (see Division 2 of this Part); or
>   ii. Purposes that are incidental or ancillary to, and in furtherance or in aid of, purposes of the entity covered by subparagraph (i); and
> (c) None of the purposes of which are disqualifying purposes (see division3); and
> (d) That is not an individual, a political party or a government entity.

While the requirement in section 5(b)(i) that the entity be for the ‘public benefit’ would seem to create a positive public benefit test, the effect of this section is negated by section 7 which states that certain charitable purposes are presumed to be for the public benefit, including inter alia ‘the purpose of advancing religion’.

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239 s 2 *Charities Act 2013* (Cth).
240 *Charities Bill 2013* (Cth) s 5.
241 Ibid s 7(e).
Charitable purposes are listed in section 12. This list is much broader than the four heads of charity provided for at common law. However, in relation to the legal relationship between the State and religion there is little change as ‘advancing religion’ is included on the list.242

While the ACNC does not introduce substantive change in the legal relationship between the State and religion, it does introduce important structural changes in the legal relationship. The creation of registration, reporting, and regulation requirements subtly shifts control of State funding for religion from religion to the State. Prior to the creation of the ACNC religion was in effect in complete control of the indirect funding to religion via tax exemptions as there was very little regulatory oversight and no way of determining how much the State indirectly funded religion via tax exemptions. While the ACNC will not directly control the amount of indirect funding religion receives, for the first time it will allow the State to determine how much funding religion is receiving and how those funds are being spent. The requirements of the ACNC may also subtly influence how religious organisations behave and structure themselves in order to meet the requirements for registration with and reporting to the ACNC.

Chapter Four identifies the Church Acts as an analogous issue to the ACNC. As will be discussed in Chapter Three the Church Acts, like the ACNC, created a regulated system for the funding of religious organisations in the early colony and like the taxation exemptions received by religious charities in modern Australia was a system of effectively unlimited funding.

242 Ibid s 12(1)(e).
3.5 Conclusion

Chapter Two has identified three case studies in modern Australia that demonstrate changes in the legal relationship between the State and religion: the restriction of face coverings in public; the NSCP; and the ACNC.

As discussed above, while the restriction on face coverings in public introduced by the Identification Legislation Amendment Act 2011 (NSW) appears on its face to be neutral and of general application, when the history and impact of the laws are examined in more detail they are revealed to be an example of an interaction between the State and religion. The history of the laws reveals that the catalyst for the Identification Legislation Amendment Act 2011 (NSW) was an incident involving a Muslim woman wearing a niqab, and that the overall debate surrounding the wearing of face coverings in public has centred on Muslim women, the niqab, and burqa, rather than face coverings in general. Similarly, the laws have a disproportionate impact on Muslim women, given they are one of very few groups in Australia who habitually cover their face in public. As a result, despite the apparent neutrality of the Identification Legislation Amendment Act 2011 (NSW) the introduction of this law constitutes a change in the legal relationship between the State and religion.

The creation of the NSCP by Prime Minister John Howard was presented as another change in the legal relationship between the State and religion in modern Australia. While prior to the NSCP religion was not entirely excluded from Government schools, the programs that did exist were smaller in scale and based at a State and Territory level. The introduction of the NSCP for the first time created a large scale, federally funded, and therefore endorsed, program that placed religion, via chaplains, in Government schools. This amounts to another change in the legal relationship between the State and religion as the State is, for the first time, giving religion a State endorsed place in secular Government schools.

The final case study examined in this chapter was the creation of the ACNC, and its associated impact on tax exemptions received by religious organisations. The creation of the ACNC does not change the substantive relationship between the State and religion; however, it has had a significant impact on the structural relationship. The ACNC creates for the first time an overarching system of registration, reporting, and regulation that religious organisations will need to comply with in order to access
income tax exemptions. The ACNC therefore represents an important change in the legal relationship between the State and religion as, although the ACNC will not change the amount of the income tax exemptions granted to religious organisations, it significantly changes the requirements that religious organisations and other charities will need to comply with in order to access these exemptions.

While each of these case studies are interesting in and of themselves, and worthy of further study, the purpose of examining these case studies is to identify examples in modern Australia against which changes in the legal relationship between the State and religion in other time periods can be compared. If analogous issues to those identified in Chapter Three can be found in other time periods then this goes some way to answering the central question of the thesis; are changes in the legal relationship between the State and religion the product of one off circumstances, or the product of an ongoing pattern of change over time, in the affirmative. Chapter Four will begin this process by identifying analogous issues in the first 50 years after European colonisation.
Chapter Four – The First 50 Years: Similarities and Differences in the Relationship between the State and Religion

4.1 Introduction

Chapter Three set out three case studies in modern Australia that are examples of changes in the legal relationship between the State and religion. Chapter Four, in order to begin to answer the central question of the thesis, identifies three analogous issues in the first 50 years after European colonisation. As was explained in Chapter One there are significant differences between the State and religion in modern Australia when compared with the early colony.1 In relation to the State, federation in 1901 in particular, has dramatically altered the nature of the State in the intervening years.2 While in relation to religion, there has been a significant shift in religious affiliation with increases in both adherents to non-Christian religions and those professing to have no religious beliefs.3 Given these significant differences, it should not be expected that there would be analogous issues in the first 50 years after European colonisation for the three case studies identified in Chapter Three. Despite this, as Chapter Four will demonstrate, analogous issues can be found for all three case studies.

In looking for analogous issues in any historical time-period, let alone one as different from modern Australia as the very early colony, it cannot be expected that any analogous issues found will be identical to the case studies in Chapter Three. Instead, this chapter identifies issues that are analogous to the broad issues raised by the case studies in Chapter Three.

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1 See 1.2.1.2.
2 See 2.4.1.
3 See 1.2.1.2.2.
In relation to the wearing of full-face coverings and Muslim women, the relevant broad issue is the State’s restriction on religious practice. As was highlighted in Chapter Three, the *Identification Legislation Amendment Act 2011 (NSW)* restricts the religious practice of face covering practised by some Muslim women. In the first 50 years after European colonisation analogous issues can be found in the State’s restriction of Roman Catholics. As will be discussed below, throughout the first 50 years after European colonisation Roman Catholics faced State restriction in the practice of their faith, most notably by the State restricting the arrival and ministry of Roman Catholic priests.

For the NSCP the broad issue is the place of religion in relation to education. The NSCP is a program that places religious workers into otherwise secular Government schools. In the first 50 years after European colonisation, an analogous issue is the creation of the Church and Schools Corporation. The Corporation was created in an attempt by the State to establish a Church of England monopoly over education, and therefore determine the religious character of Government schools. Both programs therefore concern the place and character of religion in Government schools, and in education more broadly.

Finally, the broad issue raised by the ACNC is the funding of religion by the State. As was explained in both Chapters One and Three, the ACNC, and its impact on tax exemptions received by religious organisations, is a program of indirect funding of religion by the State. In the first 50 years after European colonisation analogous issue can be found in the creation of a funding scheme for religion under the *Church Acts*. Both the ACNC and the *Church Acts* create a regulatory system which facilitates the funding of religion by the State.

While the main aim of Chapter Four is to identify analogous issues, and therefore similarities, the Chapter will also identify key differences between the analogous issues and the Chapter Three case studies. As outlined above, these differences are expected. The differences may also indicate other changes that have taken place in the intervening years between modern Australian and the first 50 years after European colonisation. If so, they may indicate patterns of change in the legal relationship for each of the broad issues. While Chapter Four identifies these differences it does not attempt explain them, this is left to Chapters Five to Seven in Part Two.
The analogous issues examined in Chapter Four are set out in the same order as their counterparts in Chapter Three. The first to be examined is the restrictions imposed by the State on Roman Catholics in the early colony.

4.2 Restrictions on Roman Catholic

In Chapter Three the restrictions on the wearing of full face coverings in public was identified as an example of the State interacting with religion to restrict religious practice. In the first 50 years of European colonisation of Australia an analogous interaction can be identified in the State’s restrictions on Roman Catholics. Like Muslim women in modern Australia, Roman Catholics were subject to restrictions on their ability to practise their religion. The State restrictions faced by Roman Catholics took two main forms. First the State prevented Roman Catholic priests from travelling to and ministering in the new colony. Second, when Roman Catholic priests were permitted to officially minister, strict regulations were imposed upon how and when they could practise their religion.

This section will trace the restrictions imposed by the State on the practice of religion by Roman Catholics in the early colony, from prior to the arrival of the first fleet, through to the appointment of the first officially sanctioned and appointed Roman Catholic priests. As will be demonstrated, the State restrictions were consistent throughout the period. Even when Roman Catholic priests were permitted to minster, they did so under strict conditions not imposed on Protestant clergy.

3.2.2 Early Restrictions on Roman Catholics

Roman Catholics faced restriction on their practice of religion from the very beginning of the Australian colonies. This primarily took the form of the State’s failure to arrange for or permit Roman Catholic priests to travel to the new colony. While there is some dispute as to whether requests for Roman Catholic priests to be sent to the colony were actually denied, or simply overlooked or ignored, the failure to provide Roman Catholic priests for the Roman Catholic convicts, emancipists, and later settlers would have acted as a significant restriction on the practice of religion by Roman Catholics in the colony. A number of Roman Catholic religious ceremonies can only be performed by ordained
priests, such as the celebration of the Eucharist and confession. As a result, the denial of a priest to Roman Catholics in the colony acted as a restriction on their ability to practise these aspects of their religion.

The first example of the State denying permission for Roman Catholic priests to travel to and minister to Roman Catholics in the colony may have occurred prior to the first fleet leaving England. In his authoritative work on Australian History _A History of Australia_, Manning Clark asserts that the colonial secretary Lord Sydney refused the request of two Roman Catholic priests to accompany the first fleet in order to minister to the Roman Catholic convicts. Clark refers to an undated letter from the Rev Thomas Walshe to Lord Sydney in which he expresses the ‘desire of two clergymen of the Catholick [sic] persuasion which they have to instruct the convicts who are of their faith who are destined for Botony Bay [sic]’. As the letter is undated, it is impossible to be certain if the letter was written prior to the sailing of the first fleet. Cardinal Moran in his book _The History of the Catholic Church in Australasia_ suggested that the letter was written in 1791. Whether the letter was written before 1788 or in 1791 is immaterial. The reference to Botany Bay rather than Sydney Cove suggests that, at the very least, it was written very early in the Australian colony’s history.

There is also some doubt as to whether or not Lord Sydney in fact refused the request. No response has survived, and it is possible that in the rush to get the Australian colony established the matter was simply forgotten or put to one side. What the letter does show is a desire by at least two English Roman Catholic priests to minister to the convicts. The fact that no Roman Catholic priests arrived at Sydney Cove until the arrival of the convict priests suggests that at the very best the spiritual needs of the Catholic convicts were ignored, and at worst Clark may be right in asserting that they were discriminated against in favour of Protestant ascendency.

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5 Manning Clark, _A History of Australia_ (Melbourne University Press, 1963) vol 1, 78.

6 Historical Records of New South Wales vol 1, Part 2 (Government Printer, 1892-1901) 119.


8 Waldersee, above n 7, 3.

9 See 4.2.3.
Another example of the State restricting the practice of Roman Catholicism is a petition in 1872 by five settlers and emancipists requesting a Roman Catholic priest be sent to the colony to minister to their needs. As with the previous petition by Rev Walshe, no Roman Catholic priest was appointed in response. However, given the struggling nature of the colony, and the fact that the Church of England clergyman Rev Richard Johnson had not been provided with much support, it is perhaps understandable that the request was at best ignored and at worst denied.

There is also evidence of the State restricting the religious practice of Roman Catholic convicts by regulating their religious practice. In the early days of the colony all convicts, regardless of religious persuasion, were required to attend religious services run by the Church of England clergyman Rev Richard Johnson. Failure to attend could result in punishment, including flogging. While attendance at the religious ceremonies of another faith does not prevent a person from carrying out the ceremonies of their own religion, it is an example of the power of the State over religion. By requiring all convicts to attend Church of England services, the State is imposing a particular religious observance on the convicts, and by implication endorsing those religious beliefs and practices over others.

While all three of these examples could be used to support an assertion that the State restricted religious practice of Roman Catholics in the early colony, it is important to note that the same conditions applied to other convicts who were not adherents of the Church of England. No Non-conformists priests accompanied the first fleet, and convicts who adhered to the Non-conformist sects were also required to attend the Church of England services. Rather than the State restricting the practice of Roman Catholics specifically, it may be more accurate to say that the State restricted the religious practices of anyone who was not an adherent of the Church of England.

### 4.2.3 Governor King and Roman Catholics

While the restrictions faced by Roman Catholics in the first few years after the arrival of the first fleet at Sydney Cove were also shared by others whose religious affiliation was not Church of England, specific examples of the State restricting the religious practices

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11 Waldersee, above n 7, 3-4.


13 Waldersee, above n 7, 4-5.
of Roman Catholics began to occur with the arrival of the first Roman Catholic priests. While it might be expected that the arrival of the first Roman Catholic priests would demonstrate a lifting of State restrictions, the surrounding facts and conditions under which they arrived and ministered, instead demonstrates another instance of the State’s power over religion. This time the restrictions were not shared by all who were not adherents of the Church of England, instead the State’s restrictions were specifically aimed at Roman Catholics and their priests.

The first Roman Catholic priests to arrive at Sydney Cove were Rev James Harold, Rev James Dixon and Rev Peter O’Neil. They did not arrive as free men with the intention of ministering to Roman Catholic convicts. Instead, they arrived as convicts themselves, accused of crimes related to the Vinegar Hill uprising in Ireland in 1789. While Rev James Harold and Rev Peter O’Neil had little interaction with the State beyond their status as convicts, Rev James Dixon was eventually permitted to minister under strict conditions before having this permission withdrawn as punishment for Australia’s own ‘Vinegar Hill’ uprising. Rev Dixon’s whole interaction with the State was defined by the State restricting Roman Catholics’ practice of religion, even when it did permit them to worship.

4.2.3.1 Permission is Given - But with Restrictions Attached

Rev James Dixon arrived on the Friendship on 16 February 1800. He had been transported to New South Wales because of his relationship to active United Irishmen including his two cousins and brother. Lord Sydney recommended that Rev Dixon, along with Rev Harold and Rev O’Neil, should be considered for conditional emancipation. Unlike the other two, Governor King felt that Rev Dixon’s behaviour was.

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14 Also O’Neal.
15 Luscombe, above n 12, 7. A number of protestant clergy were also transported for their involvement in the vinegar Hill uprising. See Lynette Ramsay Silver, The Battle of Vinegar Hill, Australia’s Irish Rebellion, 1804 (Doubleday, 1989), 21.
17 Governor King refused to pardon Rev Harold, as in his opinion Rev Harold’s behaviour had been far from exemplary and he had been removed to Norfolk Island. In August 1800, Rev Harold had been implicated in an attempted Irish uprising in the colony. Although he reported the conspiracy, he refused to reveal the names of those involved leading to his exile to Norfolk Island. Rev Harold was eventually allowed to exercise private ministry in Parramatta from 1808, but left the colony just two year later when he was pardoned by Governor Macquarie. See Despatch from Governor King to Lord Hobart, 9 May 1803 in Historical Records of Australia Series 1 Vol 4 (Library Committee of the Commonwealth Parliament, 1914–1925) 82; Silver, above n 15, 28, 30 – 31; Patrick O’Farrell, The Catholic Church and Community An Australian History (New South Wales University Press, 1985), 5; Rev O’Neil had already left the colony when Lord Sydney’s recommendation reached Governor King. Prior to his transportation
since arriving in the colony had been ‘exemplary,’ allowing him not only to pardon him but also to follow Lord Sydney’s other suggestion and permit him to officially minister to the Roman Catholic convicts.  

While Governor King permitted Rev Dixon to minister, it was with some reluctance as can be seen from comments in his despatch to Lord Hobart informing him of his decision.

> Your Lordship's suggestion respecting the exercise of their clerical functions I have most maturely considered, and weighed the certain advantages with the possible disadvantages. I believe it will be admitted that no description of people are so bigoted [sic] to their religion and priests as the lower order of the Irish; grid such their credulous ignorance that an artful priest may lead them to every action that is either good or bad. The number of this description now in the colony is more than a fourth of the inhabitants.

While Governor King’s grudging permission to minister could be seen as the lifting of State restrictions on the religious practices of Roman Catholics, the permission came with a string of conditions. The conditions were published with the Proclamation Respecting the Toleration of the Roman Catholic Religion on 19 April 1803. They included when Roman Catholic services could take place, where they could take place, the requirement of police attendance at the services, and an injunction against seditious talk during worship. While Roman Catholics might have been permitted to practise their religion they could not do so freely at a time and place of their choosing.

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18 Despatch from Governor King to Lord Hobart, 9 May 1803 in Historical Records of Australia Series 1 Vol 4 (Library Committee of the Commonwealth Parliament, 1914–1925) 82; Despatch from Lord Hobart to Governor King, 29 August 1802 in Historical Records of Australia Series 1 Volume 3 (Library Committee of the Commonwealth Parliament, 1914–1925) 564; Waldersee, above n 7, 10.

19 Despatch from Governor King to Lord Hobart, 9 May 1803 in Historical Records of Australia Series 1 Vol 4 (Library Committee of the Commonwealth Parliament, 1914–1925) 83.

20 Luscombe, above n 12 8 – 10; Historical Record of New South Wales vol 5, 97 – 98.

21 Historical Record of New South Wales vol 5, 98.
Rev Dixon was required to sign the regulations and was in effect made personally responsible for the behaviour of the Roman Catholic convicts in the colony.\footnote{Ibid.}

While on the one hand Roman Catholics were finally permitted to practise their religion, it was under strict conditions not imposed on Church of England adherents. The Church of England clergyman, Rev Samuel Marsden, who had replaced Rev Richard Johnsons, had a close relationship with the State at this time and would have been free to minister to his flock.\footnote{For a discussion of the interaction between Rev Samuel Marsden and Governor King in this period see Alexander Turnbull Yarwood, \textit{Samuel Marsden The Great Survivor} (Melbourne University Press, 1977), Chapter 8.} The restrictions placed on Rev Dixon, and the Roman Catholics he ministered to, also demonstrated the absolute power of the State over religion. Without the permission of the Governor they could not practise their religion. The very fact that permission had to be given demonstrates the State’s restriction on the religious practices of Roman Catholics in the early Australian colony. It would be inconceivable in modern Australia for a new religious group or leader to be required to seek State permission before they could practise their religion. The early colony was very different, with the State via the autocratic Governor having ultimate power over almost all aspects of the colony, including religion.

4.2.3.2 The Permission is Removed

Initially Governor King’s fears seemed to be unfounded and his hope of some good coming of his indulging Roman Catholics seemed to be bearing fruit. In a letter to Lord Hobart dated 1 March 1804 he praised the effect Rev Dixon’s ministry was having on the Irish Catholics:

\begin{quotation}
\textit{… the Rev’d Mr Dixon performing the functions of his clerical office as a Roman Catholic, \ldots, has had the most salutary effect on the number of Irish Catholics we have, and since its toleration there has not been the most distant cause for complaint amount that description, who regularly attend divine service;}\footnote{Historical Record of New South Wales Vol 5, 324.}
\end{quotation}

Governor King’s optimism was premature. On 4 March, only days after Governor King wrote his letter, the Irish Catholics, along with their English supporters, began a revolt at the Government farm at Castle Hill. The uprising finished the next day with
Australia’s ‘battle of Vinegar Hill’. 25 The result was 15 convicts killed as part of the uprising, 26 10 hung, 27 7 sentenced to flogging, 28 and 34 exiled to Coal River. 29

Governor King’s response to the uprising is another example of the State restricting the religious practices of Roman Catholics in the early Australian colony. This can be seen in both his response to Rev Dixon and the punishment handed out to the 34 Roman Catholics exiled to Coal River.

While the permission granted to Rev Dixon stands as an example of the State restricting the religious practice of Roman Catholics, from the Roman Catholic convicts it was arguably better than nothing. What few restrictions had been lifted were now re-imposed. Rev Dixon’s authority to perform Mass was revoked and his salary withheld. 30 He was also ordered to watch the flogging of 5 of the convicts and was forced to place his hand upon their back at the conclusion. 31

The restrictions imposed upon Roman Catholics as a result of the uprising did not end with Rev Dixon. As part of the punishment of the 34 convicts exiled to Coal River, Governor King ordered that they have Church of England prayers read to them every Sunday. 32 This punishment is arguably worse than simply being refused permission to practise their own religion. The forced attendance at Church of England prayers went a step further forcing them to participate in the practices of a religion not their own.

4.2.4 Macquarie and Roman Catholics
For the decade following the departure of Rev Harold in 1810 the New South Wales Roman Catholics were left without either an official or unofficial priest. Governor Macquarie’s Governorship saw the arrival of both an unofficial Roman Catholic priest

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25 For a detailed account, see Silver, above n 15.
26 ibid 344, 108.
27 ibid 110 – 112.
28 ibid 113.
29 ibid.
30 Manning Clark, above n 5, 173; Waldersee, above n 7, 8.
31 Silver, above n 15, 113. Following the removal of his official commission Rev Dixon continued to minister privately to the Roman Catholics in the colony. With his departure in 1808 this ministry was taken over by Rev Harold. With Rev Harold’s departure in 1810 the colony was again left with no Roman Catholic priests. Parsons, Vivienne, Dixon, James (1758 – 1840) (accessed 30 September 2013) Australian Dictionary of Biography (Online) <http://adb.anu.edu.au/biography/dixon-james-1980>;
Luscombe, above n 12, 11.
32 Silver, above n 15, 114.
and finally the arrival of two free and officially sanctioned Roman Catholic priests. In both cases, the State restricted the religious practices of Roman Catholics. In the first instance by removing the priest and in the second by imposing restrictions similar to those imposed on Rev Dixon. While permission for Roman Catholic priests to minister was never again removed, these two incidents towards the end of the first 50 years of colonisation demonstrate State restriction on the practice of Roman Catholics in the early Australian colony.

3.2.4.1 Governor Macquarie and the Rev O’Flynn Affair
The Rev O’Flynn affair is a stark example of the State’s powers over religion, in particular its power to restrict the religious practices of Roman Catholics. As referred to above, Roman Catholics had been without a priest for nearly a decade, and as a result would have been unable to practise many of their religious ceremonies. This restriction on their religious practice appeared to have been removed with the arrival of Rev O’Flynn. However, his arrival was unofficial and unsanctioned and he was soon deported, leaving Roman Catholics without a priest and again effectively restricting their religious practice.

Rev O’Flynn arrived in New South Wales on 8 November 1817. Rome had appointed Rev O’Flynn as Prefect Apostolic of New Hold, the same title give to Rev Dixon. However, the Colonial Secretary, Lord Bathurst, refused to sanction him as the official Roman Catholic chaplain for the colony. Assuming the official status would eventually be forthcoming O’Flynn travelled to New South Wales and presented himself to Governor Macquarie. On his arrival in Sydney O ‘Flynn represented to Governor Macquarie that Lord Bathurst had sanctioned his arrival, although he could not produce any paperwork, instead indicating that the paperwork would be on the next ship from England. Although Governor Macquarie was suspicious, he initially allowed O’Flynn to remain in the colony on the condition that he not minister publically while...

33 Also Flinn and Flynn.
34 Dispatch, Governor Macquarie to Lord Bathurst, 12 December 1817 in Historical records of Australia series 1 vol 9 (Library Committee of the Commonwealth Parliament, 1914–1925) 710, Luscombe, above n 12, 13.
35 Dispatch, Governor Macquarie to Lord Bathurst, 12 December 1817 in Historical records of Australia series 1 vol 9 (Library Committee of the Commonwealth Parliament, 1914–1925) 710; Luscombe, above n 12, 13.
36 Luscombe, above n 12, 13.  
38 Luscombe, above n 12, 13.
they waited to see if O’Flynn’s credentials would arrive. When no authorisation arrived and O’Flynn began to minister publically, performing marriages, baptisms and Mass, Governor Macquarie ordered him to leave the colony. Instead of complying O’Flynn disappeared into the country, returning a short time later and apologising to Governor Macquarie. Again, Governor Macquarie ordered him to leave the colony, which Rev O’Flynn agreed to do on the next available ship. Months went by and several ships departed for England without Rev O’Flynn aboard. Governor Macquarie again ordered Rev O’Flynn to leave and suspecting that he would again disappear into the countryside ordered his arrest. Rev O’Flynn was arrested on the 15 May 1818 and deported 5 days later on the *Davis Shaw*.

While it is arguable that O’Flynn was deported, not because he was a Roman Catholic priest, but because he was a “meddling, ignorant; dangerous character,” other comments by Macquarie would suggest that Rev O’Flynn’s deportation was at least in part because of his position as a Roman Catholic priest. In the same despatch in which he described Rev O’Flynn, he also commented that:

> Convinced, from the experience I have had of this Country, that nothing can possibly promote or preserve its internal peace and tranquillity so much as uniformity of religion, I beg leave most earnestly to recommend that no sectarian Preacher or Teacher be permitted to come hither.

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42 Luscombe, above n 12, 16; Clark, above n 5, 320; *Historical Record of Australia* Series I vol VIII page 799 – 801. On receiving Governor Macquarie’s despatched regarding Rev O’Flynn, Lord Bathurst indicated his approval of Governor Macquarie’s handling of the matter. See Lord Bathurst to Governor Macquarie, 24 August 1818 in *Historical Records of Australia* series 1 vol 9 (Library Committee of the Commonwealth Parliament, 1914–1925) 833.

43 Dispatch Governor Macquarie to Lord Bathurst, 18 May 1818 in *Historical Records of Australia* series 1 vol 9 (Library Committee of the Commonwealth Parliament, 1914–1925) 800. See also Waldersee, above n 7, 10 – 15.

44 Dispatch Governor Macquarie to Lord Bathurst, 18 May 1818 in *Historical Records of Australia* series 1 vol 9 (Library Committee of the Commonwealth Parliament, 1914–1925) 801.
This would seem to indicate that Governor Macquarie would have preferred that no Roman Catholic priests be permitted in the colony, preferring instead that the colony have a single Protestant religion. This indicates an intention by the State, embodied in the autocratic Governor, to restrict the religious practices of Roman Catholics in favour of Protestantism. This is further evidenced by the fact that Governor Macquarie, as with his predecessors, also saw no difficulty in Roman Catholic convicts being forced to attend Church of England services.45

While it is perhaps debatable whether Rev O’Flynn was deported because he was a Roman Catholic priest, because of his poor character, or because of a combination of the two, the incident does demonstrate the power of the State over religion. First, Governor Macquarie attempted to ban O’Flynn from ministering to Roman Catholics in the colony. While this exercise of the State’s power was unsuccessful, with O’Flynn ministering to Roman Catholics despite the injunction not to, it demonstrates the power of the State to restrict religious practice. While Roman Catholics in the colony had a priest, he was not permitted to minister to them in effect restricting the practice of their religion. When this restriction failed, the State used a second method of restricting the practices of Roman Catholics by deporting Rev O’Flynn.

4.2.4.2 The First Official Roman Catholic Chaplains are Appointed
With the deportation of Rev O’Flynn Roman Catholics in the colony were again left without a priest as a result of State action, and therefore were again restricted in how they could practise their religion. This time the restriction imposed by the absence of a Roman Catholic priest did no last as long as it had in previous instances. However, as with the arrival and ministry of Rev Dixon, the arrival of the first officially sanctioned Roman Catholic priest is not an example of the State lifting restriction, but an example of the State imposing restrictions via another method. While Roman Catholics could now practice all those aspects of their religion that required a priest, restrictions were imposed on the priests curtailing this freedom.

The first two officially sanctioned Roman Catholic priests, Rev Joseph Therry and Rev Philip Conolly,46 arrived in the colony on the 3 May 1820.47 The newly arrived priests

45 Dispatch Governor Macquarie to Lord Bathurst,12 December 1817 in Historical Records of Australia series 1 vol 9(Library Committee of the Commonwealth Parliament, 1914–1925) 710.
46 Luscombe, above n 12, 28 – 29.
were presented with a list of conditions under which they were to exercise their ministry. They were only permitted to minister to Roman Catholics and could only conduct marriages between two people of the Roman Catholic faith. More importantly, they were both prevented from ministering to children in the Government run Orphan schools.48

Many of the children in the Government run Orphan school were not, as the name suggests, Orphans in the traditional sense. Rather they were the ‘neglected’ children of the poor and of unofficial liaisons.49 The education of children at the Orphan schools was to be the exclusive purview of the Church of England clergy.50 This was a situation Rev Therry could not accept, as he put it:

The lambs are allured abroad, and forcibly prevented from returning to the fold of the only Good Shepherd, Christ Jesus, our Lord and must his humble watchman hold his peace?51

While it is arguable that many of the restrictions placed on the Roman Catholic clergy, especially those relating to marriage were understandable52 this does not make them any less restrictive. In relation to the Orphan school the State restriction didn’t only prevented the Roman Catholic priests from carrying out their ministry as they saw fit it also restricted the religious practice of the Roman Catholic children who, as a result of circumstances outside their control, found themselves at the Orphan school.

While at the end of the first 50 years of European colonisation of Australia, Roman Catholics had access to priests enabling them to practise their religion, this practice was not unfettered. The priests were subject to restrictions imposed by the State as a condition of the practice of their faith.

47 Luscombe, above n 12, 19. Governor Macquarie had been informed of their appointment in a letter from the Colonial Secretary Lord Bathurst on 24 August 1818. See Despatch, Lord Bathurst to Governor Macquarie, 24 August 1818 in Historical Records of Australia series 1 vol 9 (Library Committee of the Commonwealth Parliament, 1914–1925) 833; Acknowledged by Governor Macquarie 24 March 1819 see Historical Records of Australia series 1 vol 9 (Library Committee of the Commonwealth Parliament, 1914–1925) 830 and Vol 10, 84 – 100.

48 Luscombe, above n 12, 27 – 28; O’Farrell, above n 17, 21 – 22.


50 O’Farrell, above n 17, 22 and 25.

51 Ibid, 25.

52 See Waldersee, above n 3, 15 – 20.
4.2.5 Conclusion

In his book *Catholic Society in New South Wales 1788 – 1860*, James Waldersee disputes some of the claims of persecution levelled against the State in relation to Roman Catholics in the early Australian colony. While he may be right that the restrictions faced by Roman Catholics were understandable, and even justifiable, in the circumstances faced by the infant colony, this does not make it any less restrictive. Similarly, the treatment of Muslim women, in relation to facial coverings, may be equally justifiable and understandable, but that does not make it any less restrictive. In both instances, the State is restricting the religious practice of a group of people.

In both modern Australian and in the first 50 years of the Australian colony there is at least one example of the State restricting religious practices. While these are just two examples, at either end of Australia’s history, the fact that an example of the State restricting religious practice can be found in both time periods suggests that there may be some merit in the hypothesis; that changes in the legal relationship between the State and religion in Australia are not the product of one off circumstances but part of a greater pattern.

While both examples demonstrate State restriction of religion there are significant differences. First, the discrimination against Roman Catholics was overt in nature, while the restrictions imposed on Muslim women are arguably covert. Secondly, Roman Catholics themselves and the religion as a whole were restricted during the first 50 years after European colonisation, while the restrictions imposed by the State against Muslim women focus on a particular practice.

As argued in Chapter Three, the State imposed restrictions on Muslim women’s wearing of full face coverings in public in modern Australia is covert rather than overt in nature. The legislation is couched in neutral language, and is, at least in theory, applicable to all members of society. It is the disproportionate impact of the legislation on Muslim women that makes it restrictive rather than the laws themselves. For Roman Catholics in the early colony it was a very different situation. The restrictions placed upon them were, in most instances, aimed directly at Roman Catholics, such as the restrictions placed upon Revs Dixon, Therry and Conolly. While in the very early colony, the

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53 Waldersee, above n 7, 1-41.
restrictions may more accurately be described as being against non-Church of England adherents, by the end of the period the restrictions were targeted at Roman Catholics specifically. In both cases the State is restricting religious practice, but there appears to have been a shift from doing so in an overt way to doing so in a covert way.

Another important difference between the two examples examined in Chapters Three and Four is the proportion of the religion targeted by the State imposed restrictions. The State restrictions imposed on Muslim women in modern Australia are not targeting the whole of their religion, Islam, but rather at a specific practice, the covering of the face in public. The Roman Catholics on the other hand faced restrictions against their religion as a whole. While some of the regulations and restrictions placed on Roman Catholics did target specific practices these practices, such as the saying of Mass, are central to Roman Catholicism. Further, the denial of a priest to minister to the Roman Catholics in the colony can only be seen as restricting the religion as a whole and not just an objectionable practice.

These two important differences will be explored further in Chapter Five. If, as the presence of these two examples in both time periods suggests, changes in the legal relationship between the State and religion are part of a wider pattern and not just the product of one off circumstances, then the differences in these two examples needs to be explored further. Has there been a shift from overt restriction to covert ones and from restricting religion to restricting practices or are they just two examples of how the state restricts religion in Australia with no clear pattern of when each version will occur?

Before doing this Chapter Four will first set out the analogous issues for the remaining two case studies from Chapter Three, the NSCP and the ACNC.
4.3 Attempts at a Church of England Monopoly in Education

In Chapter Three the National School Chaplaincy Program (NSCP) was identified as a change in the legal relationship between the State and religion.\footnote{See 3.3.} An analogous issues in the first 50 years after European colonisation of Australia can be seen in the State’s two attempts to establish a Church of England\footnote{The Church of England changed its name in Australia to the Anglican Church of Australia on 24 August 1981. Anglican Church of Australia, \textit{When did the Church of England become the Anglican Church of Australia?} (accessed 20 June 2013) <http://www.anglican.org.au/content/home/about/students_page/When_did_the_Church_of_England_become_the_Anglican_Church_of_Australia.aspx>. The two names are often used interchangeably. For the purpose of this thesis, the name Church of England is used, as this is the name used during the period under consideration.} monopoly over education. For most of the period, education was of little concern, and was essentially left to the clergy. In the middle of the period this changed, as religious diversity increased it brought with it an increase in religious diversity in education, the State responded by attempting to impose a system of education that was based on Church of England doctrines. When this failed, a final attempt was made at creating a Church of England monopoly over education with the creation of the Church and Schools Corporation. While all attempts to create a Church of England monopoly failed, they demonstrate the States attempts to impose a religious program on education. This is analogous to the creation of the NSCP, which is a State program placing religion in schools. While the NSCP does not favour one religion over another in the way the State attempted to do in the first 50 years after European colonisation, both are examples of the State determining the place and character of religion in schools. In modern Australia this is via the NSCP and chaplains, while in the first 50 years after European colonisation this was via the Church of England, its clergy, and the Church and Schools Corporation.

This section will begin with a brief explanation of the beginning of education in the very early colony before going on to examine in more detail the two attempts by the State to establish a Church of England monopoly over education. This is included for two reasons. First, a brief discussion of the very first schools is included to put the latter attempts at a Church of England monopoly in context. When viewed in this context the attempt at a Church of England monopoly is not the imposition of a monopoly for the first time, but rather an attempt to return to a Church of England monopoly that had existed before leaders of other religious denominations began to
arrive in the colony. Second, the discussion is also included to help fulfil the secondary purpose of this thesis.\textsuperscript{56}

4.3.2 Very Early Schools

In the very early colony the Church of England effectively had a monopoly over education because there was no-one else to provide it. The education of the colony’s children does not appear to have initially been a major concern for those responsible for setting up the colony. The only concessions to education were the inclusion of land for a schoolmaster in the additional instructions to Governor Philip, and the inclusion of Rev Richard Johnson on the first fleet.\textsuperscript{57} Although Governor Philip had been instructed to provide land for a schoolmaster, none was sent out from England with the first fleet or for many years after.\textsuperscript{58} This left Rev Johnson as the only person in the colony available to give any consideration to education.

Rev Johnson set up the very first school in 1789 with a convict woman, Isabella Rosson, as the first schoolmistress.\textsuperscript{59} The fact that the schools were established and run by the Church of England clergy did not make these early schools religious, denominational, or Non-government schools in the same way modern Non-government schools are. Rather, these schools were closer in nature to Government or public schools despite their religious nature and control. This arose from two factors. First, the Chaplains were effectively members of the Government. They were paid and controlled by the Governor, and as such could often be better described as government officials than as religious ones. This can be further demonstrated by the fact that Rev Johnson had to ask for permission from the Governor to set up his school, rather than being able to establish it at his own initiative.\textsuperscript{60} Further, these schools, while organised by the chaplains, were usually at least partially funded by the State.\textsuperscript{61}

\textsuperscript{56} See 1.4.2. Education in early Australia has been covered extensively in John Cleverley, \textit{The First Generation: School and Society in Early Australia} (Sydney University Press, 1971); Barcan, above n 49; Albert Gordon Austin, \textit{Australian Education 1788 – 1900 Church, State and Public Education in Colonial Australia} (Sir Isaac Pitman & Sons Ltd, Melbourne, 1961). See also Albert Gordon Austin, \textit{Select Documents in Australian Education 1788 – 1900} (Sir Isaac Pitman & Sons Ltd, Melbourne, 1963).

\textsuperscript{57} Historical Record of New South Wales Volume 1 Part 2, 90.

\textsuperscript{58} See Bernard Keith Hyams and Bob Bessant, \textit{Schools for the People? An Introduction to the History of State Education in Australia} (Longman, Victoria, 1972), 3 – 4; Cleverley, above n 56, 2.

\textsuperscript{59} Barcan, above n 49, 9; for Isabella Rossen’s background see Cleverley above, n 56, 24 – 25.

\textsuperscript{60} Cleverley, above n 56, 63.

\textsuperscript{61} Hyams and Bessant, above n 58, 6 – 7.
The second factor was the purpose of education in the early Australian colony. The early Australian Governors and clergy saw education as a way to save the children of the poor from the sinful nature of their families. Many of the senior officials in the colony, including but not limited to the clergy, felt that the adult convicts were beyond redemption, but that with education the children could be saved and the future of the colony secured. Johnson expressed this popular belief in a letter to the Society for the Propagation of the Gospel in 1794:

If any hope are [sic] to be formed of any Reformation being effected in this Colony, I believe it must be amongst those of the rising generation.

This salvation was to be Christian, with bible reading seen as the means by which this end could be achieved. There was little distinction between secular subjects and religious ones, with the Bible acting as the main reading material. If the new colony was to survive then it would need honest decent citizens. Given the convict history of most adults, the only hope was seen to be the children, if they could be saved from their parents. This was an aim of the State, not just religion, and a view held by many State officials.

The default monopoly of the Church of England over education continued in place until the arrival of a group of missionaries from Tahiti in 1798. Their arrival heralded the beginning of religious diversity in the colony, as well as boosting the number of people capable and available to provide for the education of the children’s colony.

4.3.3 The First Attempt at a Church of England Monopoly

Until the arrival of the Tahiti missionaries, all schools were assumed to be conducted as Church of England schools under the supervision of the Church of England chaplains Rev Johnson, and later Rev Marsden, in effect a default monopoly. This began to change with the arrival of the missionaries.

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62 Hyams and Bessant, above n 58.
63 Cleverley, above n, 56, 8 – 12.
64 Ibid, 10.
65 Clark, above n 5, 324.
66 Hyams and Bessant, above n 58, 9; Cleverley, above n 56, 45 – 50.
67 The missionaries had originally been sent to Tahiti, but had abandoned it after conflict with the native inhabitants. The missionaries were a driving force behind the founding of schools at Kissing Point, Toongabbie, and Green Hills. See Cleverley, above n 56, 73 – 77 and 86.
4.3.3.1 The Arrival of the Missionaries Brings Religious Pluralism and Conflict

The missionaries who arrived in 1798 were members of the London Missionary Society, a non-denominational organisation. While the London Missionary Society included Church of England members, those who came to New South Wales were predominantly non-conformists and dissenters.68

Initially the missionaries appear to have gotten on well with the Church of England clergy.69 The London Missionary Society instructed the missionaries to ‘pay special regard to the advice of the chaplain of the Church of England’ and warned them against evangelising.70 In the case of education, this instruction appears to have been heeded by at least some of the missionaries. Despite not being members of the Church of England, the schoolmasters at Kissing Point, Toongabbie and Green Hills all taught the Church of England catechisms.71

While some missionaries were happy to obey the Church of England clergy, disputes between the missionaries and the official Church of England chaplains began to arise. Rev Marsden, in particularly, reacted strongly to any challenge to the privileging of Church of England within the colony. He was responsible for the removal of William Crooke from the Hawkesbury Public school after he celebrated communion from an unconsecrated vessel, and in a rare show of unity Rev Marsden and Governor Macquarie shut down Sunday Schools in Parramatta that were run by dissenters when they competed with the Church of England public schools.72

In 1817 the establishment of the Australian Schools Society further challenged the supremacy of the Church of England. The Society was founded to promote the use of the Lancaster Monitorial System of education,73 later known as the British and Foreign Schools Society System.74 This system did not teach the Church of England doctrine,

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68 Cleverley, above n 56, 73 – 79. The terms non-conformists and dissenters refer to those protestant groups and individuals who refused to conform to the doctrines and practices of the Church of England. Groups commonly referred to as non-conformists and dissenters include Presbyterians, Congregationalists, Quakers, Methodists and Baptists. See F.L Cross (ed), *The Oxford Dictionary of the Christian Church* (Oxford University Press, 1957), 963.
69 Cleverley, above n 56, 69.
70 Ibid, 78.
71 Barcan, above n 49, 12.
72 Cleverley, above n 56, 69.
73 Hyams and Bessant, above n 58, 8.
74 Barcan, above n 49, 24.
instead using non-denominational Bible passages.\(^75\) As a result of this non-
denominational focus the system was preferred by non-conformists and dissenters.\(^76\)

### 4.3.3.2 Rev Cowper’s Sydney Schools

The Church of England dominance in education began to be challenged both at an
individual level and at a more organised systematic level. A first attempt to re-establish
the Church of England dominance of education can be seen in the rules imposed by Rev
Cowper over the schools in the Sydney district.

The schools under the Church of England clergyman Rev Cowper’s management were
required to follow the ‘Rules for the management of the Public Schools at Sydney, New
South Wales’.\(^77\) The rules included:

- The object of these schools is to afford useful and religious instruction to the
  children of the poor in general
- The Children, according to their ages and improvements, shall be taught
  Reading, English, Writing, Arithmetic, and the Catechism of the Church of
  England
- The school-business of every day shall commence and conclude with the singing
  of a Psalm or Hymn and a short Prayer (emphasis added)

The children were also required to attend Divine Worship on Sunday,\(^78\) give the
requirement to teach Church of England Catechisms it can be assumed this was the
Church of England service.

While this was just one group of schools the State, via the colonial office, soon also
made an attempt to re-establish a Church of England monopoly over education.

### 4.3.3.3 Rev Reddle and the Bell Monitorial System

The first attempt by the State to re-create the Church of England monopoly over
education was an attempt by the Colonial office to implement the Bell Monitorial
System of education. In 1820 Earl Bathurst instructed Governor Macquarie to

\(^{75}\) Austin, *Australian Education 1788 – 1900*, above n 56, 40.

\(^{76}\) Hyams and Bessant, above n 58, 8.

\(^{77}\) Historical Records of Australia Series 3, Vol 2 (Library Committee of the Commonwealth Parliament,

\(^{78}\) Ibid, 358.
implement the Bell Monitorial System, later known as the National System, in all
government schools.  

Unlike the Lancastrian System, discussed above, the Bell system
taught the Church of England catechisms.  Had the implementation of the Bell system
been successful all schools supported by the Government would have once again been,
in effect, Church of England schools.  Earl Bathurst further instructed Governor
Macquarie that Rev Thomas Reddle was to take up the role of Superintendent in order
to establish the Bell system in the colony.  Rev Reddle arrived in 1820 and began
attempting to implement the Bell system.  He resigned just six years later in February
1826 with the Bell system only partially implemented.

While this first attempt at re-establishing a Church of England monopoly failed, the
State did not give up on the idea.  Instead, it created the Church and Schools
Corporation.

4.3.4 The Church and Schools Corporation
The State’s final attempt to establish a Church of England monopoly over education
was the creation of the Church and Schools Corporation.  The creation of the
Corporation is arguably the greatest change in the legal relationship between the State
and religion in relation to education in this period, and the closest analogy to the NSCP.
While previous attempts at creating a Church of England monopoly are examples of the
State interacting with religion in education, they only mark small changes in the legal
relationship between the State and religion.  Both the attempts by Rev Cowper and Rev
Reddle were small scale, within the existing structure of ad-hoc schools, created by
local demand and supported by the State.  The creation of the Church and Schools
Corporation in 1826 was a radical departure from this model.

79 Historical Records of Australia Series 1, Vol 10 (Library Committee of the Commonwealth Parliament,
1914–1925) 304.
80 Ibid.
81 Barcan, above n 49, 25.
82 Barcan, above n 49, 29.  In 1820, Pater Archer Mulgreave was appointed to implement the Bell system
in van Diemen’s Land.  See Historical Records of Australia Series 1, Vol 10/Library Committee of the
Commonwealth Parliament, 1914–1925) 372 – 373.  At the time John Thomas Bigge conducted his
survey of New South Wales (see 3.3.4.1) the only schools using the National System were the two
schools in Sydney.  See John Thomas Bigge, Report of the Commissioner of Inquiry on the State of
Agriculture and Trade in the Colony of New South Wales (tabled in House of Commons 13 March 1823),
75.
4.3.4.1 The Creation of the Church and Schools Corporation

The Church and Schools Corporation officially came into effect in March 1826. Its creation marked a change in the legal relationship between the State and religion in relation to education in two ways. First, the Church and Schools Corporation marked the first attempt at creating an overarching system of education. Until now, the creation and administration of schools had been ad hoc, relying on local demand and initiative. Secondly, it formalised the monopoly of the Church of England in education. Prior to the creation of the Corporation attempts at enforcing Church of England supremacy and control of education had limited success.

The Church and Schools Corporation had its genesis in the visit by John Thomas Bigge and Thomas Hobbs Scott to Australia between 1819 and 1821. In 1819 the Colonial Office appointed John Thomas Bigge to conduct an inquiry into the state of the colony in New South Wales. Bigge, along with his secretary Thomas Hobbes Scott, arrived in Sydney in September 1819 and remained until 1821. Bigge wrote three reports that were tabled in the British Parliament in 1822 and 1823. While these reports are generally considered to be a detailed source on the state of the colony in 1820 Bigge devoted just 10 pages to education and religion. Instead on Bigge and Scott’s return to England the Secretary of State, Bathurst, requested Scott to draw up a plan for a system of education in New South Wales. Scott’s response was to recommend the creation of what was to become the Church and Schools Corporation.

Scott recommended that one tenth of all colonial land be granted to the Church of England and that the land be used to provide an income to fund both the provision of public schools and pastoral services by Church of England clergy. He further recommended that the system of education to be used in these schools should be the National system. Finally, he recommended that an Archdeacon be appointed for New South Wales and be made Visitor to all public schools. Scott himself was appointed

83 For a copy of the Charter see Austin, Select Documents, above n 56, 10 – 26.
84 Hyams and Bessant, above n 58, 18.
85 Barcan, above n 49, 26; Austin, Australian Education 1788 – 1900, above n 56, 10 – 11.
86 Austin, Australian Education 1788 – 1900, above n 56, 10; Bigge, above n 82, 68 – 78. See Barcan, above n 49, 26.
87 Austin, Australian Education 1788 – 1900, above n 56, 10 - 11.
88 The actual land granted to the Church and Schools Corporation was one seventh.
89 Austin, Australian Education 1788 – 1900, above n 56, 10-12. See also Scott to Bathurst, 30 March 1824 in A.G. Austin, Select Documents in Australian Education 1788 – 1900 (Sir Isaac Pitman & Sons Ltd, Melbourne, 1963), 6 – 8.
Archdeacon for New South Wales and arrived in the colony, with a draft constitution for the new Church and Schools Corporation, in May 1825.\textsuperscript{90}

The Church and Schools Corporation effectively endowed the Church of England as the official State provider of education and religion. In effect, the plan was for the State to grant the Corporation land that would then be used to fully fund the provision of public education, which would be provided by the Church of England. Thus, re-creating an official monopoly for the Church of England over education. In creating this monopoly the State was effectively determining the place of religion in public education in much the same way as the NSCP in modern Australia. While the character of that religion may be different both schemes are examples of the State determining and endorsing a place for religion in education.

4.3.4.2 The Failure of the Church and Schools Corporation

Ultimately the Church and Schools Corporation was short lived. It is arguable that by the time it was created the seeds of its downfall had already been sown. The Corporation was neither religiously viable in an increasingly diverse religious landscape, nor was it financially viable in a depressed land market.

By the time the Church and Schools Corporation was created the Church of England clergy were no longer the only clergy operating in the colony. The Roman Catholics, led by Father Joseph Therry, and the Presbyterians, led by Dr John Dunmore Lang, were the most vocal opponents of the Church and Schools Corporation.\textsuperscript{91} They objected to the Corporation on both religious and economic grounds. In Lang’s estimation, the Corporation was responsible for,

\begin{quote}
... repressing emigration, discouraging improvement, secularizing the Episcopal Clergy, and thereby lowering the standard and morals and religion throughout the Territory.\textsuperscript{92}
\end{quote}

While Lang’s main objections appear to be economic, Rev Therry was concerned that the Church of England monopoly created by the Corporation would exclude poor Catholic children from education:

\textsuperscript{90} Barcan, above n 49, 26; Austin, \textit{Australian Education 1788 – 1900}, above n 56, 13-14.
\textsuperscript{91} Hyams and Bessant, above n 58, 18 – 19; A.G. Austin, \textit{Select Documents}, above n 56, 26 – 28.
\textsuperscript{92} John Dunmore Lang enclosed in Lindesay to Goderich 18 November 1831 in A.G. Austin, \textit{Select Documents in Australian Education 1788 – 1900} (Sir Isaac Pitman & Sons Ltd, Melbourne, 1963) 26 – 27.
... it may be inferred, that public provision is to be made for Protestant parochial schools exclusively; and that the children of the Catholic poor are to be either excluded from the salutary benefits of education, or compelled or enticed to abandon the truly venerable religion of their ancestors...\textsuperscript{93}

While the opposition to the Church and Schools Corporation by the non-Church of England denominations was important, the economic difficulty faced by the Corporation may have been more decisive in its downfall. In 1823, just one month after Scott submitted his first report, Earl Bathurst instructed Governor Brisbane to set aside 'Reserves in every district, which may in the future be granted out for the maintenance of both a Clerical and a School Establishment'.\textsuperscript{94} Despite this, when the Church and Schools Corporation was established the land had not been fully surveyed, as a result no new land was actually transferred to the Corporation until 1829. Until then the Corporation had to survive on income from small parcels of land that had already been granted, such as vacant glebe land, the assets of the Orphan schools, and government loans.\textsuperscript{95} Even after the promised land began to be transferred to the Corporation the income it generated was not enough to defray the costs of providing public education in the colony. The land was of poor quality and an economic recession meant there was little income to be gained from it. As a result, the Corporation continued to rely on funding from the Colonial office.\textsuperscript{96}

The Church and Schools Corporation's continued reliance on the Colonial office for funding defeated the purpose for which the Corporation had been formed. The intention had been for the income from land granted to the Corporation to be sufficient to fund Church of England clergy and public schools. Instead, the Colonial office found itself funding these things while land, that might otherwise, be profitably used by private individuals, was tied up by the Corporation.\textsuperscript{97}

\textsuperscript{93} Therry to Editor of the \textit{Sydney Gazette} 14 June 1825 in A.G. Austin, \textit{Select Documents in Australian Education 1788 – 1900} (Sir Isaac Pitman & Sons Ltd, Melbourne, 1963), 27.\textsuperscript{94} Bathurst to Brisbane, 3 October 1823 in \textit{Historical Records of Australia} Series 1, Vol 11 (Library Committee of the Commonwealth Parliament, 1914–1925) 139 - 140.\textsuperscript{95} Barcan, above n 49, 26; Austin, \textit{Australian Education 1788 – 1900}, above n 56, 19.\textsuperscript{96} Hyams and Bessant, above n 58, 18 – 19; Austin, \textit{Select Documents}, above n 56, 19; Barcan, above n 49, 26; Austin, \textit{Australian Education 1788 – 1900}, above n 56, 19. See also John Dunmore Lang enclosed in Lindesay to Goderich 18 November 1831 in A.G. Austin, \textit{Select Documents in Australian Education 1788 – 1900} (Sir Isaac Pitman & Sons Ltd, Melbourne, 1963) 26 – 27.\textsuperscript{97} Goderich to Darling, 14 February 1831 in A.G. Austin, \textit{Select Documents in Australian Education 1788 – 1900} (Sir Isaac Pitman & Sons Ltd, Melbourne, 1963) 30 – 31; Third Report of the Commissioner for inquiry into the receipt and Expenditure of the Revenues in the Colonies and Foreign Possession, \textit{Great
In May 1829, the Colonial Office informed Governor Darling of their intention to revoke the Church and Schools Corporation’s charter. In June of the following year, the Colonial Office forwarded formal instruction to Governor Darling for the revocation of the Corporation’s Charter and the setting up of a temporary commission. The Church and Schools Corporation was finally dissolved in 1833 leaving the colony of New South Wales and Governor Bourke with the question of what to do about education.

4.3.5 Conclusion

When the first fleet arrived in Australia in 1788 the education of the colony’s children was of little concern. As a result, the education system that initially developed was ad-hoc and dependant on the energies of the Church of England chaplains, and later the missionaries from Tahiti. However, by the end of the period, education had become an important issue for the colony and in particular the religious character of that education. The creation of the Church and Schools Corporation was an attempt by the State to create a Church of England monopoly over education. The Church and Schools Corporation sought to achieve this by endowing the Church of England with land that could be used to fund both education and ministry. Had the Corporation been successful, State sponsored education in the colony would have been exclusively religious and the character of that religion would have been Church of England.

The creation of the Church and Schools Corporation is analogous to the NSCP as both are an example of the State determining the place of religion in education. In the case of the NSCP, the Federal Government is effectively endorsing religion generally by funding the provision of Chaplains in otherwise secular government schools. In the case of the Church and Schools Corporation, the State is endorsing the Church of England as the provider of Government funded education. The existence of analogous

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99 Austin, *Australian Education 1788 – 1900*, above n 56, 23; Murray to Darling 30 June 1830 in *Historical Records of Australia, Series 1 Volume 15* (Library Committee of the Commonwealth Parliament, 1914–1925) 560 – 561. Despite the decision to end the Corporation, it did not come to an end immediately owing to the death of the King, and the subsequent need to conduct elections in England, along with an administrative oversight. See Austin, *Australian Education 1788 – 1900*, above n 56, 23, 25 fn 79.
100 Austin, *Australian Education 1788 – 1900*, above n 56, 31. For their answer to this question, see Chapter 5.
issues in relation to education in both time periods suggest that, at least in relation to education, there is some validity in the hypothesis that changes in the legal relationship between the State and religion are not the product of one off circumstances but are the product of an ongoing pattern of change over time.

As with the State imposed restrictions faced by Roman Catholics and the restrictions on the wearing face coverings discussed above, there are important differences between the NSCP and the Church and Schools Corporation. Most importantly there is a significant difference in the system of Government schools that existed prior to the creation of the two programs. The system of Government schooling in modern Australia is secular in nature. As such, the NSCP is an important change in the legal relationship between the State and religion because it placed religion in secular Government schools. By contrast, the schools that existed prior to the creation of the Church and Schools Corporation were already religious in nature, the Church and Schools Corporation simply aimed to determine which denomination would run Government schools. These differences hint at the existence of other changes in the legal relationship between the State and religion in the intervening years. For example, how did the State move from endorsing and funding schools run by religious denominations as Government schools to a system of secular Government education? Chapter Six will examine the changes that have led to these differences to determine whether, as the existence of analogous issues in education at either end of Australia’s history suggested, there is a pattern of change in the legal relationship between the State and religion in relation to education.

Before doing this the last part of this chapter will set out the final example of an analogous issue in the first 50 years after European colonisation: the Church Acts.
4.4 The *Church Acts*

The most difficult case study from Chapter Three to find an analogy for in the first 50 years after European colonisation is the creation of the Australian Charities and Not-for-profit Commission (ACNC). Direct taxation, including income tax, was not created until the end of the nineteenth century, as a result there can be no analogy to any scheme of exemption for religious organisations from direct taxation, or to a regulatory agency for organisations receiving tax exemptions.\(^\text{101}\) However, if the tax exemptions are viewed as a funding scheme for religious organisations and the ACNC is viewed as a scheme to attempt to control who receives funding from the State, then an analogy in the first 50 years after colonisation can be found. At the very end of the period, the State, under the leadership of Governor Bourke, introduced a direct funding model for religion known as the *Church Acts*.\(^\text{102}\)

The *Church Acts* have three similarities with tax exemptions and the ACNC. First both the tax exemptions and the *Church Acts* are an organised scheme of funding which does not favour any one denomination. As will be discussed below, prior to the creation of the *Church Acts*, funding had been ad-hoc and favoured the Church of England. Second, like the ACNC the *Church Acts* had a regulatory feature. Churches and clergy who received funds under the *Church Acts* had to report to the State, it is perhaps even arguable that the Churches who received funding under the *Church Acts* had a higher reporting obligation than religious organisations do under the ACNC. Finally, both schemes have the same potential flaw. Both the *Church Acts* and the ACNC and tax exemptions for religious organisations provide an unlimited amount of funding. Neither placed any upper limit on the amount of funding religion can receive.

4.4.2 The Content and History of the *Church Acts*

As discussed above,\(^\text{103}\) the Church and Schools Corporation was officially dissolved in 1833.\(^\text{104}\) The Corporation had not only been designed to fund education provided by the

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\(^{102}\) There are two *Church Acts* the New South Wales *Church Act 1836* (NSW) and the Van Diemen’s Land *Church Act 1837* (VDL). Both had similar features, although the details of how much funding was available varied slightly. The term *Church Acts* will be used in this section when referring to the direct funding of religion while the specific Acts will be referred to when describing the details of the relevant Act.

\(^{103}\) See 4.3.4.
Church of England, but also the Church of England itself. With the collapse of the Corporation, a new system for funding of religion was needed. Unlike education, which was to take many years and several Governors, before a new system could be developed and accepted, the problem of funding was solved relatively quickly. The solution was the *Church Acts*, which were to become an integral feature of the legal relationship between the State and religion for decades to come.

In September 1833 Governor Sir Richard Bourke sent a dispatch to the Colonial Secretary Lord Stanley setting out his proposal for the funding of religion in the colonies. Bourke’s plan was to fund the ‘Three Grand Divisions of Christianity’, namely the Church of England, Roman Catholic Church and Presbyterian Church, using a co-contribution scheme. This plan became the *Church Acts* and was a radical departure from the prevailing system of funding. The scheme therefore changed the legal relationship between the State and religion in several ways, including breaking the monopoly relationship between the State and the Church of England, by creating a structured scheme, and by imposing reporting requirements on Churches receiving funds under the *Church Acts*.

4.4.2.1 The Background to the Church Acts

One of the most significant changes in the legal relationship between the State and religion brought about by the *Church Acts* was the break in the exclusive relationship between the State and the Church of England. As will be discussed below, for most of the first 50 years of the colony the State and the Church of England had an exclusive relationship in relation to funding, because, as with education, the Church of England was the only religion to have a significant official presence in the colony. The *Church Acts* officially ended this exclusive relationship. While the *Church Acts* did not provide funding to all religions, being restricted to the ‘Three Grand Divisions of Christianity’, it was a step away from the traditional monopoly of the Church of England, a significant legal change in the relationship between the State and religion.

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105 See Chapter Six.
106 See Chapter Seven.
110 See 3.4.3.
As was discussed above, the colony now had several different religious denominations.\footnote{See 4.3.4.2. See also Historical Records of Australia Series 1, Volume 17 (Library Committee of the Commonwealth Parliament, 1914–1925) 225.} One of Governor Bourke’s concerns, therefore, was that his new system of State funding for religion be equitable. In his opinion, the population of New South Wales would not support the establishment of the Church of England, and that if an attempt were made to establish it the people may turn away from religion completely.\footnote{Historical Records of Australia Series 1, Volume 17 (Library Committee of the Commonwealth Parliament, 1914–1925) 226 – 7.}

Governor Bourke’s view was supported by numerous petitions complaining of the amount of funding received by the Church of England. As will be discussed below,\footnote{See 4.4.3.} even prior to the Church and Schools Corporation, the Church of England had received the majority of State funding. Instead of continuing to solely fund the Church of England, Governor Bourke proposed that the ‘Three Grand Divisions of Christianity’ should all receive State funding, although he expressed the hope that in the future State funding may be able to be removed altogether.\footnote{Historical Records of Australia Series 1, Volume 17 (Library Committee of the Commonwealth Parliament, 1914–1925) 226 – 7.} He is reported to have said that he looked forward to a time when the churches would ‘roll off State support like saturated leeches’.\footnote{Jack Gregory, ‘State Aid to Religion in the Australian Colonies 1788 – 1895’,(1999) 70(2) Victorian Historical Journal, 131, 131.}

A response to Governor Bourke’s plan was delayed due to successive changes of Government in England.\footnote{Historical Records of Australia Series 1, Volume 18 (Library Committee of the Commonwealth Parliament, 1914–1925) 201.} The new Colonial Secretary, Lord Glenelg, finally replied to Governor Bourke’s plan for State funding for religion in New South Wales on 30 November 1835. Lord Glenelg expressed the British Government’s attachment to the Church of England but acknowledged that in New South Wales it was not appropriate for it to be the established Church of Australia.\footnote{Ibid, 202 – 203.}

On receiving Lord Glenelg’s reply, Governor Bourke wasted no time in getting his \textit{Church Act} on the statute Books.\footnote{Gregory, above n 115, 131.} The Bill was placed before the Legislative Council...
on 22 July 1836 and ‘An act to promote the building of Churches and Chapels and to provide for the maintenance of Ministers of Religion in New South Wales’ was passed just 7 days later.\footnote{119}

Van Diemen’s Land followed New South Wales and Governor Bourke’s lead, introducing its own \textit{Church Act; The Support of Certain Christian Ministers and Erection of Places of Divine Worship Act}',\footnote{120} in November 1837.\footnote{121}

4.4.2.2 The Structure and Regulatory Features of the Church Acts

Another change in the legal relationship brought about by the \textit{Church Acts} was the creation of a structured system of funding subject to oversight by the State. Prior to the creation of the Church and Schools Corporation funding, even to the Church of England, had been ad-hoc. Now the Church of England, the Roman Catholic Church and the Presbyterian Church had access to a structured and consistent system of funding.

The \textit{Church Acts 1836} (NSW) had two main limbs, the first for the provision of funds for the building of Churches and Chapels, and the second for the provision of stipends for Ministers of Religion. In relation to the first limb, the \textit{Church Acts} created a co-contribution scheme for the building of Churches, Chapels and ministers’ dwellings. Where the local congregation could raise more than £300 pounds by private subscription the Government would provide an equal amount, up to £1,000.\footnote{122} In relation to the second limb, the \textit{Church Acts 1836} (NSW) set out a scale, based on the number of adherents, for the payment of stipends to Ministers of Religion.\footnote{123} In the case of 100 adherents the minister would be paid £100, for 200 adherents £150, and for 500 adherents £200.\footnote{124}

\footnote{119} John Barrett, ‘\textit{That Better Country, The Religious Aspects of Life in Eastern Australia, 1835 - 1850}’ (Melbourne University Press, 1966), 34. The Act is generally referred to as the \textit{Church Act 1936} (NSW) although it is sometimes referred to as the \textit{Church Building Act 1936} (NSW). Regulations to accompany the Act were gazetted on 4 October 1836. See New South Wales Government Gazette 12 October 1836, 762 – 764.

\footnote{120} 1 Vict. No. 16; In this paper referred to as the \textit{Church Act 1837} (VDL).

\footnote{121} Barrett, above n 119, 37 – 40.

\footnote{122} \textit{Church Act 1836} (NSW) s. 1.

\footnote{123} \textit{Church Act 1836} (NSW) s. 2.

\footnote{124} Ibid. Where there was a Church or Chapel but the requirement for at least 100 adherents could not be met the Governor had the discretion to provide a stipend of £100, if “… under the special circumstances of the case the said Governor and Executive Council shall deem it expedient.” Where there was no Church or Chapel but at least £50 could be raised privately, the Government would pay an
As well as providing the amount of funds available for building works and ministers' salaries, the *Church Acts* also created a system of State oversight as to how the money provided was spent. In relation to church buildings, the *Church Acts* required that trustees be appointed to hold the Church land and that these trustees were required to provide an account to the State that would be reviewed by an architect to determine the quality of the building, and that the claimed amount had actually been spent.\(^\text{125}\) Ministers of Religion who received stipends under the Act where required to provide proof that they were ministering to the community for which they received their stipend.\(^\text{126}\)

These regulatory and reporting requirements are analogous to the regulatory and reporting requirements created in relation to the ACNC.\(^\text{127}\) Under the *Church Acts*, religious organisations were required to report to the State in a similar way to the requirements for religious organisations receiving tax exemptions under the ACNC. It is even arguable that the *Church Acts* reporting requirements were more onerous than those imposed by the ACNC. Under the *Church Acts* the ways in which the money could be spent was regulated. The reporting was designed to confirm this. By contrast, as discussed in Chapter Three, there are no restrictions on how religious organisations spend the indirect funding they receive in modern Australia. The reporting requirements imposed by the ACNC cannot therefore regulate how money is spent. At most the ACNC reporting requirements can monitor how religious organisations spend the indirect funding they receive.

### 4.4.3 The *Church Acts* as a Structures System

As has been referred to above, the *Church Acts* created a structured system of funding which contrasts with the ad-hoc nature of the funding system prior to the *Church Acts*. While the Church and Schools Corporation was arguably meant to be a structured system of funding it was a short lived and failed scheme.\(^\text{128}\) The best way to understand

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\(^{125}\) *Church Act 1836* (NSW) s. 7-10; New South Wales Government Gazette 12 October 1836, 763.

\(^{126}\) *Church Act 1836* (NSW) s. 6. Clause seven of the regulations made under the Act provided that a certificate from the Lord Bishop of Australia in the case of the Church of England (Bishop Broughton), the Moderator in the case of the Presbyterians and the Roman Catholic Bishop (Bishop Polding) would satisfy this clause. See New South Wales Government Gazette, 12 October 1836, 763.

\(^{127}\) See 3.4.1.

\(^{128}\) See 4.3.4.2.
the remarkable difference created by the Church Acts is to briefly examine the funding situation that persisted prior to the Church and Schools Corporation.

4.4.3.1 The Funding of Ministers of Religion

For most of the first 50 years of the Australian colony the funding of religion, at all levels, was on an ad-hoc basis. This included, to a certain extent, the funding of religious ministers. The first chaplain Rev Richard Johnson received a stipend of £182 10s, which would have been at least partially made up of endowments. Subsequent chaplains would have initially received similar amounts. In 1824, the longest serving chaplains were granted an increase in their stipends. Rev Marsden’s stipend was increased to £400, Rev Cowper and Rev Cartwright’s to £300, and Rev Fulton’s £250. What is important to note about these increases is that they were not part of a structured system of funding; rather the increases were determined and granted at the instructions of the Colonial Secretary.

For most of this period, the largest share of funding went to the Church of England. This is not surprising, as the Roman Catholic Church did not have permanent official chaplains until 1820. The first Presbyterian Minister, Rev John Dunmore Lang, did not arrive until 1823, and was not officially appointed as a Chaplain of the colony until 1826. As a result, for at least half of the first 50 years, the only official religion in the colony that could be funded in any way was the Church of England. However, even after religious leaders from other religious denominations began to arrive, the Church of England continued to receive the largest share, this would have been due to the superior number of the Church of England clergy, but it was also due to the inequitable amount of funds granted to the non-Church of England clergy. The Roman Catholic Chaplains were initially given stipends of just £100, compared to the £250 available to the Protestant clergy at the time. Similarly, Rev Lang was initially granted only £100

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131 Barrett, above n 120, 29.
132 See 4.2.4.
134 Despatch Earl Bathurst to Governor Macquarie, 20 October 1819 in Historical Records of Australia, Series 1 Vol 10 (Library Committee of the Commonwealth Parliament, 1914–1925) 204. According to Manning Clark the reason for this discrepancy was “…because Bathurst knew they did not require more,
compared to £150 available for the Church of England clergy at the time. He was also forced to choose between receiving a stipend and funds for the building of a church.  

4.4.3.2 Rev Johnson’s Church

The ad-hoc nature of the funding available for religion can also be seen in the dispute between Rev Richard Johnson and Lieutenant-Governor Grose over the funding of the first Church building in the colony. The details surrounding the building of the Church are usually included in histories of the early colony to demonstrate the difficulties Rev Richard Johnson encountered in trying to carry out his ministry, or to demonstrate the neglected state of religion in the early colony. While the incident does demonstrate these things, it is included here to demonstrate both the power of the State over religion in relation to funding, and the ad-hoc nature of funding available to religion in the early colony when compared to the structured system created under the Church Acts. The details of this dispute are also included in fulfilment of the secondary purpose of this thesis. The dispute regarding the building of the first Church in the colony is not usually linked to the Church Acts. However, when viewed as a dispute about funding, it becomes part of the overall picture of funding in the early Australian colony and needs to be included to see the full picture of the legal relationship between the State and religion.

4.4.3.2.1 The Lack of a Church Building

Despite being instructed to “…take such steps for the due celebration of publick [sic] worship as circumstances will permit”. Australia’s first Governor, Arthur Phillip, did not build a church or chapel during his time in the colony. Rev Johnson complained about this situation to both Governor Philip and his friends back in England to no avail.
In the end the solution was for Rev Richard Johnson to build the first Australian church himself. He began on 10th June 1793 as recorded by David Collins.  

The clergyman, who suffered as much inconvenience as other people from the want of a proper place for the performance of divine service, himself undertook to remove the evil, on finding that, from the pressure of other works it was not easy to foresee when a church would be erected. He accordingly began one under his own inspection, and chose the situation for it at the back of the huts on the east side of the cove. The front was seventy-three feet by fifteen; and at right angles with the centre projected another building forty feet by fifteen. The edifice was constructed of strong posts, wattles, and plaster, and was to be thatched. Much credit was due to the Rev Mr. Johnson for his personal exertions on this occasion.  

After the completion of the building and the first service on the 25 August 1793 Rev Johnson wrote to the Under Secretary of State, Henry Dundas, informing him of the building of the church and enclosing a table setting out the cost of the work.  

As Chaplain to this distant Colony, I humbly beg leave to state to you these following circumstances, …  

That publick works of different kinds have been and still continue to be, so urgent that no place of any kind has yet been erected, for the purpose of performing divine Service.  

…  

That in these and such like considerations, I have at length deemed it advisable, and even expedient, on my own accord, and account, to run up a temporary
shelter, which would serve the above important purpose until a better can be provided.\(^{143}\)

It appears that Rev Johnson both expected the works he had undertaken to be approved of and to be reimbursed for the expenses he had personally incurred. Unfortunately for Rev Johnson, Lieutenant-Governor Grose did not agree. The dispute that followed demonstrated both the power of the State over religion in relation to funding and the ad-hoc nature of funding. The dispute was not settled and Rev Johnson was not reimbursed until 1797, four years after the church was opened.

### 4.4.3.2.2 The Dispute

Rev Johnson gave his letter, and estimate of costs to Lieutenant-Governor Grose to be included in his next dispatch to England. Rather than endorsing the expenditure and reimbursement of Rev Johnson, Lieutenant Governor Grose included his own letter in which he cast dispersions upon Rev Johnson’s character, and made the following comments in relation to Rev Johnson’s request for reimbursement:

> His charge for this Church is infinitely more than it ought to have cost, and his attempt to make a charge of it at all surprises me exceedingly; for on his applications to myself for a variety of little articles with which he has been furnished from the stores, he has invariably stated that as he was building this church at his own expense he hoped to be obliged, and on this account generally was accommodated with whatever he came to ask.\(^{144}\)

Throughout the building of the church Rev Johnson had encountered problems, as aid promised by the Lieutenant Governor was withdrawn or never provided. As a result he was forced to pay for labour, rather than use convict labour, and use his own servants and equipment.\(^{145}\) Perhaps it should not have come as a surprise that Lieutenant Governor Grose then refused to reimburse Rev Johnson.\(^{146}\) What the refusal demonstrates is the absolute power of the State over religion in relation to funding. At this very early stage of the colony Rev Johnson had few others he could turn to in order

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\(^{144}\) Historical Record of New South Wales Vol II, 64.


\(^{146}\) For a discussion of the wider dispute between Lieutenant Governor Gross and Rev Richard Johnson see Macintosh, above n 145, 62 – 82.
to fund the building of the church. The colony was largely made up of convicts, the military, and State officials, so he had little chance of raising funds locally from private subscriptions. What he required in terms of funding had to be provided by the State. There was no one else. In this situation with the State’s refusal of funding, Rev Johnson was powerless, the funding of religion was effectively at the whim of the Governors and the authorities back in England.

The incident also demonstrates the ad-hoc nature of the funding arrangements in the early colony when compared to the systematic scheme created under the Church Acts. Had Rev Johnson sought to build his church under a scheme like the Church Acts he would have had certainty that, as long as he fulfilled the requirements of the Acts, he would have had State funding. Instead he was forced to undertake the work himself, with no guarantee that State funding would be forthcoming. Rev Richard Johnson was eventually reimbursed for the church in 1797. However, it was burnt down on 2 October 1798.147

4.4.4 The Flaw of the Church Acts

The Church Acts in both New South Wales and Van Diemen’s Land were very effective in promoting the growth of religion in the colony. As will be detailed below, both the number of clergy and the number of church buildings grew dramatically in the years following the introduction of the Church Acts. However, this growth highlighted a potential flaw in the scheme - that is that there was no cap on the total amount of funding that the State could be required to provide to religion. While the Church Acts determined the amount any individual church or cleric could receive, there was no limit on the total that could be applied for. In effect, as long as the various religious denominations met the co-contribution and adherent number requirements, State funding of religion was unlimited. This is analogous to the situation in modern Australia. There is no limit on the amount of indirect funding that religious organisations can receive via tax exemptions. The creation of the ACNC does nothing to change this. The more income and wealth a religion has the greater the taxes they would have paid had they not been exempt, and therefore the greater the amount of indirect funding received.

147 Macintosh, above n 145, 70 and 87; Historical Records of New South Wales, vol 2 (Government Printer, 1892-1901) 881.
As well as being an unlimited funding scheme, the *Church Acts* also placed the control of funding in the hands of religion. This is in stark contrast to the situation that persisted prior to the creation of the *Church Acts*. As was discussed above, prior to the creation of the *Church Acts* funding for religion was ad-hoc and at the whim of the State. This created difficulties for the early chaplains and inequality between the various religious denominations. By creating an egalitarian, structured and unlimited system of funding, the State in effect handed control over to religion. It was religion that now determined how much funding the State provided, although the State retained control of how that funding could be spent.

### 4.4.4.1 The Success of the *Church Acts*

Prior to the introduction of the *Church Acts* in New South Wales and Van Diemen’s Land religion was relatively poorly catered for. By contrast, just a few years after the introduction of the *Church Acts*, there was almost an oversupply of religion in the colony. If the success of the *Church Acts* was to be measured in terms of how well it promoted the growth in the number of clergy and church buildings in the colony then it should be judged a remarkable success.

In 1836 New South Wales had 17 active Church of England clergy with 9 more in Van Diemen’s Land. The Roman Catholics did little better with 5 priests in New South Wales and another 2 in Van Diemen’s Land. Other denominations had a similarly small number of clergy. By 1836 the Wesleyan Methodists had 4 clergy. The Presbyterians (Church of Scotland) had 5 ministers in each of the colonies making a total of 10. The Independent (Congregational) Church had 3 ministers in New South Wales and 1 in Van Diemen’s land, while the Baptists had 1 minister in each colony. When all these ministers and clergy were put together, there were 2,200 people per minister in New South Wales, and 1,900 people per minister in Van Diemen’s Land.

In the four years before the *Church Act 1836* (NSW) was passed, the number of clergy in the colony varied from 27 to 32, while in 1841, four years after the introduction of the *Church Act 1836* (NSW), the number had risen to 84, more than a two and a half

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148 See 4.4.3.
149 Barrett, above n 120, 13.
150 Ibid.
151 Ibid, 14.
152 Ibid, 14.
fold increase.\textsuperscript{153} Van Diemen’s Land saw a similar increase in clergy with around 50 ministers in 1841, 35 of whom were supported by the State.\textsuperscript{154}

As well as leading to an increase in the number of clergy, the Church Acts also lead to an increase in the number of church buildings and ministers’ dwellings. The table below, taken from a despatch from Governor Gipps to Lord Russell in 1841, demonstrates the remarkable increase in religious building activities.

<table>
<thead>
<tr>
<th>Religious Group</th>
<th>Churches Completed</th>
<th>Parsonages Completed</th>
<th>Cost of completed buildings £</th>
<th>Churches in progress</th>
<th>Parsonages in Progress</th>
<th>Cost of buildings in progress £</th>
</tr>
</thead>
<tbody>
<tr>
<td>Church of England</td>
<td>15</td>
<td>6</td>
<td>13,155 15 2</td>
<td>24</td>
<td>11</td>
<td>56,467</td>
</tr>
<tr>
<td>Presbyterian</td>
<td>6</td>
<td>1</td>
<td>2,335 17 7</td>
<td>6</td>
<td>1</td>
<td>10,420</td>
</tr>
<tr>
<td>Wesleyan</td>
<td>3</td>
<td>0</td>
<td>1,577 4 9</td>
<td>6</td>
<td>1</td>
<td>14,872</td>
</tr>
<tr>
<td>Congregational</td>
<td>2</td>
<td>0</td>
<td>433 8 3</td>
<td>2</td>
<td>1</td>
<td>2,545</td>
</tr>
<tr>
<td>Roman Catholic</td>
<td>5</td>
<td>0</td>
<td>2,490 8 9</td>
<td>6</td>
<td>0</td>
<td>8,792</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>30</strong></td>
<td><strong>7</strong></td>
<td><strong>19,992 14 6</strong></td>
<td><strong>44</strong></td>
<td><strong>14</strong></td>
<td><strong>93,096</strong></td>
</tr>
</tbody>
</table>

Table 1 Churches & Parsonages built under the Church Act 1836 (NSW) for the years 1836 to 1841\textsuperscript{155}

While the Church Acts were successful in promoting growth in the numbers of clergy and church buildings, all this growth was expensive. As more difficult financial times set in, it soon became apparent that the unlimited nature of the Church Acts was going to cause problems for the colony’s finances.

4.4.4.2 Unlimited Funding Poses a Problem for the State

With the dramatic growth in the number of churches, parsonages, and religious ministers, a flaw in the scheme soon became evident. While the Acts prescribed how much a single congregation could get to build a church, or the amount a single minster could receive per year, no cap was placed on the overall amount that could be granted to fund religion. As the number of churches and religious ministers grew, so too did the cost of funding religion. In effect, the Church Acts had given the Churches control of their own funding. As long as they could meet the co-funding and number of adherents

\textsuperscript{153} Historical Records of Australia Series 1, Volume 21 (Library Committee of the Commonwealth Parliament, 1914–1925) 219.
\textsuperscript{154} Barrett, above n 120, 43.
\textsuperscript{155} Historical Records of Australia Series 1, Volume 21 (Library Committee of the Commonwealth Parliament, 1914–1925) 218 – 219.
requirements the various religious denominations could claim as much funding as they wished, and the State had no way of limiting it. As the colonies entered a depression, this problem became acute and the colonial governments looked for ways to take back control of the funding of religion.

In 1837 the New South Wales government had paid just £19,167 in grants to religion. Under the *Church Act 1836* (NSW), this grew to £35,981 by 1841, an 88% increase in just 4 years.\(^\text{156}\) The *Church Act 1836* (NSW) had been introduced in boom times, however economic depression soon set in. Land sales fell dramatically from £316,626 in 1840, to £90,388 in 1841, and to just £14,575 in 1842.\(^\text{157}\) Even before the depression began, Governor Gipps was concerned about deficit budgets. Wool prices were falling, and a drought began in 1838, this along with an increasing demand for government services meant that the colonies finances were in trouble.\(^\text{158}\)

Like New South Wales, Van Diemen’s Land also began to feel the financial strain of an unlimited *Church Act*. On one side of the equation Van Diemen’s Land faced an economic depression, falling wool prices, small land sales, a shortage of coin, an adverse balance of payments, and an expensive immigration program, while on the other the amount of funds claimed under the *Church Act* rose alarmingly from £12,000 in 1837, to £15,000 in 1842.\(^\text{159}\)

At the close of the first 50 years of European colonisation of Australia the problems of an unlimited funding model for religion were becoming apparent. As yet, the State had not developed a comprehensive solution to the problem – having rejected amending the *Acts* themselves.\(^\text{160}\) Religion was effectively in control of its legal relationship with the State in relation to funding. As long as they continued to meet the requirements laid out in the *Church Acts* they could access as much funding as they desired, placing an increasing strain on the State’s resources. A solution would have to be found. Chapter

\(^{156}\) Gregory, above n 115, 135.
\(^{157}\) Barrett, above n 120, 46.
\(^{158}\) Ibid.
\(^{159}\) Ibid, 45, 47, 53 – 54.
\(^{160}\) The Attorney-General J.H Plunkett had advised that any attempt to amend the Act prior to elections would be unadvisable and that the only real way to limit the operation of the Act would be to repeal it altogether. See Historical Records of Australia Series 1, Volume 23 (Library Committee of the Commonwealth Parliament, 1914–1925) 732 – 733.
Seven will, inter alia, demonstrate how this unlimited funding model was eventually curtailed giving control of funding back to the State.

4.4.5 Conclusion
The creation and implementation of the *Church Acts* in the first 50 years after European colonisation has several similarities with tax exemptions received by religious organisations and the creation of the ACNC when both are viewed as schemes for the funding of religion. These similarities include the structured nature of both schemes, the regulatory nature of the schemes, and the unlimited nature of the funding available to religious organisations. In demonstrating that these two issues are analogous this section, as with the previous two sections, further indicates that there may be some validity to the hypothesis that changes in the legal relationship between the State and religion are the product of a pattern of change across Australia’s history since European colonisation, and are not simply the product of a one off set of circumstances. Given the significant differences in both the State and religion in modern Australia compared with the first 50 years after European colonisation it could not be expected that analogous issues in the legal relationship between the two could be found for all three cases studies identified in Chapter Three. Given that analogous issues can be found for all three, there is a basis for examining any changes that may have occurred in the intervening years to determine if there is a pattern of change in the legal relationship between the State and religion over time.

While the two funding schemes examined in Chapters Three and Four are analogous, and therefore warrant further investigation of the central question of this thesis, they also have important differences. The most striking of these differences is that the funding of religion in the first 50 years after colonisation was direct while in modern Australia it is indirect.

The *Church Acts* provided a given amount for the stipend of clergy and for the building of churches and ministers’ dwellings. This money was given directly to religion by the State. As a result, the amounts involved could be easily measured, if not capped. This meant that the State knew how the funds were being spent and knew how much money it was spending on the funding of religion. By contrast, the funding received by religion in modern Australia is indirect and courtesy of income tax exemptions. Tax exemptions do not directly place State funds in the hands of religion in the same way that the
Church Acts did. Instead tax exemptions leave funds in the hands of religious organisations that would otherwise be payable to the State in taxes if the exemptions did not exist. The consequence of this approach is that both the amount of funding indirectly given to religion and how that funding is spent cannot be controlled by the State. The ACNC is a step towards knowing how this funding is being spent, but does not cap or direct how the money should be spent.

Chapter Seven will examine how the legal relationship between the State and religion changed from a system of direct funding of religion by the State to a system of indirect funding. It will also examine the criticisms and challenges to the system of indirect funding currently in place in modern Australia.
Part Two

Part One of this thesis established that there are analogous issues in the legal relationship between the State and religion in modern Australia and in the first 50 years after European colonisation. While finding analogous issues in both time periods does not answer the central question of the thesis it does suggest that there is some merit in further investigating the question. As was highlighted in Chapter One both the State and religion have changed significantly in the intervening years between the end of the first 50 years of European colonisation and modern Australia. Given these significant differences, it should not be expected that there would be analogous issues in both time periods. However, as identified in Chapter Four, analogous issues do exist for all three case studies identified in Chapter Three. This suggests that there is justification for further investigation of the central question of this thesis. Part Two contains this further investigation.

Part Two is divided into three chapters, one for each of the three broad case studies identified in Part One. Chapter Five examines instances of the State’s restriction of religious practice, building on the analogous case studies of the restrictions on the wearing of face coverings in public and the restrictions on the religious practices of Roman Catholics. Chapter Six looks at the broad case study of religion in education identified in the analogous issues of the NSCP and the Church and Schools Corporation. Finally, Chapter Seven examines State funding of religion building upon the analogous issues of the ACNC and the Church Acts.

Across all three chapters, two broad macro patterns can be identified. First, in all three broad case studies there are numerous instances of changes in the legal relationship between the State and religion. This in effect answers the central question of the thesis in the affirmative. The issues identified in the both modern Australia and in the first 50 years after European colonisation are not isolated incidents, with over 150 years in between. Rather they are either end of a continuum of change in the legal relationship between the State and religion.

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1 See 1.2.1.2.
The second macro issue identified in Part Two is related to the first, but is more specific and gives the first macro pattern more character and detail. In all three broad cases studies there are periods of time where there are very few, if any, changes in the legal relationship between the State and religion. In some cases these ‘gaps’ last for decades. However, in all three cases the issue re-emerges in response to social, political, or other changes, and in most cases eventually leads to legal change, even where initially the issue is dismissed or legal change seems impossible.

Each of the three chapters also identifies patterns in the changes to the legal relationship between the State and religion specific to that case study. The existence of these case study specific patterns further confirms the affirmative answer to the central question of the thesis. Noting that there are re-occurrences, and that these may happen even after several decades, answers the question only in in the broadest sense. The specific patterns identified show not only do legal changes in the relationship between the State and religion in relation to the thesis issues occur across Australian history, but that these legal changes have a recognisable and specific patterns.
Chapter Five – State Restrictions on Religious Practice

5.1 Introduction

Chapters Three and Four demonstrated the existence of State restrictions on religious practice in both modern Australia and during the first 50 years after European colonisation. As was highlighted in Chapter Four the character of these restrictions is very different. While the Roma Catholics in the first 50 years after European colonisation experienced restrictions that were overt and targeted at the whole of their religious practices, Muslim women in modern Australia experience covert restrictions on their religious practice that are hidden behind neutral language laws which appear on their face to be of general application, and target a single practice of the religion rather than the religion as a whole. The purpose of this chapter is twofold. First, it will demonstrate that the restrictions faced by Roman Catholics in the first 50 years after European colonisation, and by Muslim women in modern Australia, are not isolated incidents with over 150 years of tolerance in between. Rather there is a pattern in Australia of the State restricting religious practices. Secondly, this chapter will demonstrate that there has been a shift from overt State restrictions to covert restrictions. Both of these purposes will be achieved via a series of case studies.

The case studies are divided into three sections: those evidencing overt State restrictions; those that are in a transitional phase, having characteristics of both overt and covert State restrictions on religious practices, and finally those evidencing covert State restrictions on religion practices. While the existence of the ‘transitional’ example demonstrates a shift from overt to covert State restrictions, the transition was not straightforward and linear; however time does appears to be a factor in the shift from one to the other. As will be demonstrated, overt State restrictions on whole religions occurred in 1940s and 1960s, while examples of covert State restrictions of a specific religious practice occurred in the 1960s. When the example of the State restriction on face covering in modern Australia is added there appears to be a trend towards covert restrictions of specific religious practices.
All of the case studies chosen occurred during the 20th century, the first of which was in the 1940s. This does not mean that religious practices of various religious groups were not restricted between the end of the first 50 years of European colonisation and the 1940s; Jews in particular were treated less favourably than other religious groups during this time,1 and suspicion surrounding Roman Catholics continued into the middle of the 20th century. As late as the 1950s the High Court of Australia was called upon to decide if Roman Catholics were precluded from serving in Parliament because they were ‘subject to a foreign power’.2 Despite this, there is a paucity of State restrictions of religious practice evidenced by legislation or case law during this period. Part of the explanation for this may be the homogeneity of Australia’s religious beliefs during this time. The vast majority of Australians were either Protestant Christians or Roman Catholics.3 The homogeneity of Australia’s religious community increased after Federation with the creation of the White Australia policy. The policy could just as easily be described as the ‘Christian Australia’ policy as it had the effect of excluding almost all non-Christians, with the exception of Jews, from migrating to Australia.4 As a result, there were very few non-Christian religious groups or beliefs that the State could actively restrict the practices of.

The ‘gap’ in State restrictions on religious practice between the end of the first 50 years of European colonisation and the first example included in this Chapter, is also an example of the macro pattern of re-occurrence. As will be demonstrated in this and the remaining chapters of Part Two, there is a consistent pattern across all three broad case studies, in that issues relating to the legal relationship between the State and religion re-occur repeatedly often leading to legal change. This re-occurrence can happen decades later, often when the issues appears settled and further legal change in the relationship

1 See Israel Getzler, Neither Toleration nor Favour (Melbourne University Press, 1970).
4 Hilary M Carey, ‘Australian Religious Culture from federation to the New Pluralism’ in Laksiri Jayasuriya, David Walker and Jan Gathard (eds) Legacies of White Australia: Race, Culture and Nation (University of Western Australia Press, 2003), 78 – 79, 81. In 1901 the proportion of the population recorded in the census as belonging to a non-Christian faith was 3%. This proportion was not reached again until 1996.
seems impossible. It may well have appeared that in the intervening years between the end of the first 50 years after European colonisation and the 1940s the issues of State restrictions on religious practices were effectively settled. Roman Catholics, along with non-conformists and dissenters, were treated the same as Church of England adherents. Jews and Roman Catholics may have been treated less favourably during this period, but this treatment was not evidenced by State restrictions on their religious practices. This settled state, with the issues appearing to have been solved, may have ended for many reasons, as mooted above; one compelling reason may be the end of the White Australia policy which, inter alia, led to an increase in cultural and religious diversity in Australia. Another explanation for the re-occurrence may be the conflict and suspicion created by World War Two. The first example of covert State restrictions discussed in this chapter occurred during World War Two, and as will be highlighted in Chapter Six, a similar ‘gap’ exists in relation to the issue of the place of religion in education, which also ended as a result of factors which were arguably caused by World War Two.  

5.2 Overt State Restrictions on the Whole of a Religion

Chapter Three highlighted the overt State restrictions on the religious practices of Roman Catholics during the first 50 years after European colonisation of Australia. The restrictions were overt in nature because the religions being restricted, and the restrictive nature of the State interaction with the religion, were apparent on the face of the relevant laws. By contrast, the State restrictions faced by Muslim women in Modern Australia are covert in nature and targeted at a specific religious practice rather than the religion as a whole. As has been highlighted in Chapter Four this is a significant change. However, this change did not happen overnight. Over the course of the twentieth century there has been a gradual shift from one type of State restriction to the other. 

In order to appreciate the shift that has occurred, other examples of overt State restrictions on whole religions need to be examined. This section examines two examples. First, the banning of the Jehovah’s Witnesses during World War Two, and second the banning of the Church of Scientology during the 1960s. Both are examples of government legislation, one at a federal level, the other at a state and territory level, effectively banning a religion by name. As such, they arguably go further than the State

5 See 6. 5.3.
6 See 4.2.5.
restrictions imposed on Roman Catholics in the first 50 years after European colonisation of Australia. While Roman Catholics in the early colony would have had significant difficulty in practicing their religion as a result of the State enforced absences of Roman Catholic priests, they were never subject to a true ban. They did not have their organisation banned and their property seized, as happened to the Jehovah’s Witnesses,7 nor did they have the name of their faith banned and conditions abhorrent to their religion imposed on the practice of fundamental aspects of their religion, as with the case of the Church of Scientology.8

5.2.1 The Jehovah’s Witnesses’ World War Two Ban
The first example of State restriction on religious practice, evidenced by legislation or case law, to occur in the twentieth century was the War time ban imposed on the Jehovah’s Witnesses. During World War Two Jehovah’s Witnesses were the subjects of State restrictions, both as individuals and as a religious group. State restrictions culminated in the group and its associated organisations being declared unlawful in January 1941. As a result of the declaration, the Jehovah’s Witnesses were subject to the most severe form of overt State restrictions, it became unlawful for them to practice their religion. While it was not illegal to be a Jehovah’s Witness, the ban effectively made it unlawful to practice the Jehovah’s Witness faith. The subsequent High Court case Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth9 held that the regulations under which the ban was put in place were unconstitutional. However, this finding was not based on the fact that Jehovah’s Witnesses were a religious organisation. As a result, the ban on the Jehovah’s Witnesses stands as perhaps one of the starkest examples of the State, lawfully, restricting the religious practices of an entire religion.

5.2.1.1 The Laws
While, as will be discussed below, the actual banning of the Jehovah’s Witnesses was overt in nature, the legislation on which it was based appeared, on its face, to be neutral and not aimed specifically at the Jehovah’s Witnesses, or any other religious group. On their face, the laws upon which the ban was based were about national security in wartime.

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7 See 5.2.1.
8 See 5.2.2.
9 (1943) 67 CLR 116.
On 3 September 1939 Prime Minister Robert Menzies announced that Australia was at war with Germany, three days later, on 9 September, parliament passed the *National Security Act 1939* (Cth).\(^\text{10}\) Inter alia, the Act granted the Governor General the power to ‘make regulations to secure public safety and for the defence of the Commonwealth,’\(^\text{11}\) nine months later the Governor General enacted the *National Security (Subversive Associations) Regulations 1940* (Cth) under this provision. Nothing in either the *Regulations* or the *Act* pointed to their application to religious groups such as the Jehovah’s Witnesses. They were, on their face, neutral language laws of general application. The original purpose of the regulations was not to ban the Jehovah’s Witnesses, but to give the Governor General the power to ban the Communist Party.\(^\text{12}\) However, the provisions of the regulations were couched in a way that meant that they could potentially apply to many other organisations that also opposed the War. For example, regulation 3 stated that ‘ANY body corporate or unincorporated the existence of which the Governor General, by order published in the *Gazette*, declares to be in his opinion, prejudicial to the defence of the Commonwealth or the efficient prosecution of the war, is hereby declared to be unlawful’ (emphasis added).\(^\text{13}\) While these words, in and of themselves, appear to be neutral in their effect, and of general application, they are so wide that they could potentially apply to almost any group. Given the Jehovah’s Witnesses beliefs about the War, it could be seen as inevitable that the regulations would be used to ban them.

### 5.2.1.2 Application to the Jehovah’s Witnesses

The Jehovah’s Witnesses were vulnerable to being declared unlawful under the *National Security (Subversive Associations) Regulations 1940* (Cth) because of their particular religious beliefs about the State and the War more generally. They believed that in 1914 Jesus Christ had returned to earth invisibly and established God’s Kingdom on earth, a Kingdom of which all Witnesses were citizens. As a result, they were not able to be citizens of any country and would not vote, salute national flags or serve in the army.\(^\text{14}\) In particular, they believed that all worldly governments were ‘organs of Satan, unrighteously governed and identifiable with the Beast in the 13th chapter of the

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\(^\text{11}\) *National Security Act 1939* (Cth) s. 5.

\(^\text{12}\) Douglas, above n 10, 79.

\(^\text{13}\) *Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth* (1943) 67 CLR 116; 134. For a discussion of the various provision of the Regulations, see Douglas, above n 10, 74 – 79.

These beliefs led both the Allies and Nazi Germany to persecute the Jehovah’s Witnesses during World War Two. Canada, New Zealand, and Australia all banned the Jehovah’s Witnesses, while Nazi Germany interned them in concentration camps.

In Australia, during the early years of World War Two, there were consistent calls for the Jehovah’s Witnesses to be banned by community groups such as the Returned Servicemen’s League (RSL), State and Federal politicians, religious leaders, such as Catholic Archbishop Mannix, the media, and the general community. The Australian Attorney General, Thomas Hughes, initially ruled out a ban on the Jehovah’s Witnesses on the basis that they were doing nothing illegal. Instead, the State focused on individual Witnesses who refused to participate in compulsory military service, and eventually on four radio stations associated with the Jehovah’s Witnesses, radio 5KA in particular.

5.2.1.2.1 Radio Station 5KA

In 1941, prior to the complete banning of the Jehovah’s Witnesses, the State shut down radio station 5KA and three other associated stations controlled by the Witnesses. While the closure of radio station 5KA did not restrict the any religious practices, it is an important aspect of the overall picture of the State’s interaction with the Jehovah’s Witnesses during this period. The closure of these radio stations demonstrates the level of concern in Australia during World War Two about the beliefs and activities of the Jehovah’s Witnesses and is an important aspect of the State’s eventual ban of the group. The description of the closure of radio 5KA is also included in fulfillment of the secondary purpose of this thesis.

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16 Kaplan, above n 14.
17 Bobbie Oliver, Australia: Jehovah’s Witnesses, Censorship During World War II in Derek Jones (ed) Censorship A World Encyclopaedia Vol I A-D (Fitzroy Dearborn Publishers, 2001), 144.
18 Ibid.
20 Oliver, above n 17, 144.
21 Ibid.
22 5AU (Port Augusta), 5KA (Adelaide), 2HD (Newcastle) and 4AT (Atherton Tablelands).
23 For a detailed discussion of the treatment of radio 5KA see Strawhan, above n 19; Oliver, above n 17, 145 – 146.
24 See 1.3.2.
The four radio stations had come under the influence of the Jehovah’s Witness during the 1930s.\(^{25}\) Even before World War Two 5KA came under scrutiny after complaints by the Roman Catholic Church and the general public, in relation to its broadcasts of lectures by the leader of the Jehovah’s Witnesses, Joseph Rutherford. There were also complaints about the station in relation to their refusal to play the national anthem at the close of transmission, which was the custom at the time. By 1939, 5KA was subject to restrictions that required that it submit all religious material for approval prior to broadcast.\(^{26}\)

With the outbreak of World War Two 5KA came under increased scrutiny. This included Naval Intelligence monitoring of all broadcasts by the station. As a result of this surveillance a small number of broadcasts were identified as possibly containing coded messages referring to merchant and troop ship movements.\(^{27}\) On 8 January 1941, in reliance of these reports and on the recommendation of Admiral Sir Raynar Musgrave Colvin Chief of Naval Staff, the Attorney General, Thomas Hughes, approved the closure of all four radio stations under the control of the Jehovah’s Witnesses.\(^{28}\) Nine days later the Jehovah’s Witnesses were declared an unlawful organisation.

5.2.1.2.2 The Declaration

While the closure of radio station 5KA, and its associated stations, demonstrated the level of concern in Australia about the beliefs of the Jehovah’s Witnesses, it did not directly restrict their religious practices. However, the next action by the State against the Witnesses, the declaration that they and their associated organisations were unlawful on 17 January 1941, directly restricted the practice of their faith.\(^{29}\) As Williams J noted, the declaration of unlawfulness and the resulting prohibition on the advocacy of the principles of the Jehovah’s Witnesses was so wide that it, in effect, made ‘every church service held by believers in the birth of Christ an unlawful assembly.’\(^{30}\)

\(^{25}\) Strawhan, above n 19, 550 - 551; Oliver, above n 17, 145.
\(^{26}\) Strawhan, above n 19, 551 – 555.
\(^{27}\) For details of these broadcasts see Strawhan, above n 19, 557 – 559.
\(^{28}\) Strawhan, above n 19, 560.
\(^{29}\) Douglas, above n 10, 79; Commonwealth of Australia Gazette, No8, 17 January 1941, 123. The associations declared unlawful were the Jehovah’s Witness, Watchtower Bible and Tract Society, International Bible Students’ Association, Adelaide Company of Jehovah’s Witnesses, and Consolation Publishing Co.
\(^{30}\) Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth (1943) 67 CLR 116, 164.
In the nine days between the cessation of broadcast and the declaration that the Jehovah’s Witnesses were unlawful, the Attorney General had attempted to negotiate the re-opening of the stations. On 14 January he announced that, subject to a series of conditions, the stations would be permitted to resume their broadcast.\(^{31}\) On 16 January, the Federal Cabinet met in Sydney to discuss, inter alia, the problem of the Jehovah’s Witnesses. Hughes was unable to attend as he was still in Canberra, despite a request from Hughes to move the meeting the Prime Minister Robert Menzies refused to do so.\(^{32}\) The cabinet determined that the Jehovah’s Witnesses should be declared unlawful, despite Hughes decision to re-open the radio stations. As a result the stations remained closed and on 7 February cabinet determined that their licenses should be revoked because they were held by an unlawful organisation.\(^{33}\)

The declaration of unlawfulness made against the Jehovah’s Witnesses specifically named both the Jehovah’s Witnesses and their associated organisations.\(^{34}\) There is no argument that can be made that the bans were neutral or of general application. Nor were the restrictions against specific practices or beliefs of the Jehovah’s Witnesses. Rather, the declaration overtly targeted the Jehovah’s Witnesses as a whole.

As a result of the declaration property of the Jehovah’s Witnesses was seized, including Kingdom Hall in Adelaide, which was to become the subject of the High Court case.\(^{35}\)

5.2.1.3 The High Court Case

On 4 September 1941, in response to the declaration and the seizure of their property, the Adelaide Company of Jehovah’s Witnesses commenced High Court proceedings against the Commonwealth.\(^{36}\) The Court handed down its decision on 14 June 1943.\(^{37}\) Each of the five judges gave their own judgment declaring various parts of the *National Security (Subversive Associations) Regulations 1940* (Cth) unlawful. Latham CJ and McTiernan J determined that only reg 6A, which concerned the seizure of property, was

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31 Persian, above n 19, 8.
32 Jayne Persian has suggested that the banning of the Jehovah’s Witnesses may have been as much about a power play between Hughes and Menzies as about the Jehovah’s Witnesses themselves. See Persian, above n 19.
33 Persian, above n 19, 8 – 13.
34 See ‘Widespread Police Raids on Jehovah’s Witnesses in Australia’, *Examiner* (Launceston) 18 January 1941, 1.
36 *Adelaide Company of Jehovah’s Witnesses Incorporated v The commonwealth* (1943) 67 CLR 116, 118.
37 Oliver, above n 17, 144.
invalid.\textsuperscript{38} Williams and Rich JJ determined that regulations 3 to 6B were invalid.\textsuperscript{39} Stark J went the furthest, declaring the entire National Security (Subversive Associations) Regulations 1940 (Cth) unlawful.\textsuperscript{40} The result was that the Jehovah’s Witnesses were successful in at least having the regulations relating to the seizure of their property declared unconstitutional. However the reasoning behind the Court’s decisions had nothing to do with freedom of religion, instead, the Court focused on the power granted to the Commonwealth under the defence power and the power of the Attorney General to make regulations under the National Security Act 1939 (Cth).\textsuperscript{41}

One of the Jehovah’s Witnesses main arguments was that the National Security (Subversive Associations) Regulations 1940 (Cth) were unlawful as a result of the operation of s.116 of the Australian Constitution.\textsuperscript{42} They argued that the Regulations contravened the free exercise limb of s.116, because the declaration effectively prohibited the free exercise of their religion. Despite the fact that the Jehovah’s Witnesses were unsuccessful in this argument, Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth\textsuperscript{43} has become well known for Latham CJ’s long exegesis on the meaning of freedom of religion.\textsuperscript{44}

Despite finding that section 116 ‘… operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion’\textsuperscript{45} and ‘… that such a provision as s. 116 is not required for the protection of the religion of a majority. The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular unpopular minorities’.\textsuperscript{46} Latham CJ ultimately concluded that the National Security (Subversive Associations) Regulations 1940 (Cth) did not infringe s. 116 despite the effect the regulations had on the Jehovah’s Witnesses, a religious organisation. It cannot be doubted, given the background outlined above,\textsuperscript{47} that the Jehovah’s Witnesses were one of the ‘unpopular

\begin{itemize}
\item \textsuperscript{38} Adelaide Company of Jehovah’s Witnesses Incorporated v The commonwealth (1943) 67 CLR 116, 148 (McTirnan J agreed with Latham CJ at 157).
\item \textsuperscript{39} Ibid, 150 (per Rich J) and 168 (Williams J).
\item \textsuperscript{40} Ibid, 156.
\item \textsuperscript{41} Tony Blackshield, Religion and Australian Constitutional Law in Reder Radan, Denise Meyerson and Rosalind F Croucher Law and Religion God, the State and the Common Law (Routledge, 2005), 93 – 95.
\item \textsuperscript{42} For the wording of s. 116 see 1.2.1.2.3.
\item \textsuperscript{43} (1943) 67 CLR 116.
\item \textsuperscript{44} See Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth (1943) 67 CLR 116, 122 – 134.
\item \textsuperscript{45} Ibid, 123.
\item \textsuperscript{46} Ibid, 124.
\item \textsuperscript{47} See 5.2.1.2.
\end{itemize}
minorities’, referred to by Latham CJ. So why did Latham CJ find that s. 116 did not protect them in this instance?

The answer can be found in the meaning of the word free. Latham CJ devoted several pages to determining how free should be interpreted in the context of s. 116. He ultimately concluded that ‘it is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.’ In his opinion, it was entirely appropriate for the Government to restrain activities that obstructed recruitment of soldiers and encouraged soldiers not to perform their duties. In effect, there was no constitutional problem with the State restricting the religious practices of the Jehovah’s Witnesses in this instance.

While the other Judges did consider s. 116, they did so only briefly, and reached the same conclusion as Latham CJ, s. 116 was of no avail to the Witnesses.

In a time of war advocating that your own country, and those it is aligned with, is an organ of Satan is arguably prejudicial to the war effort. However, these beliefs were also religious beliefs. Unlike the Communist Party, their reasons for advocating what they did were religious not political. Just as the Governors of the early Australian colony had restricted the religious practices of Roman Catholics, now the Commonwealth Government restricted the religious practices of the Jehovah’s Witnesses because their religious beliefs were inconvenient.

The State restrictions on the Jehovah’s witnesses may be explainable as the result of wartime paranoia. However, they are not the only religion in Australia to be subject to overt State restrictions amounting to a ban in the twentieth century.

5.2.2 Victoria, Western Australia, and South Australia Ban Scientology

The severe restriction and effective ban on the Church of Scientology during the 1960s and 1970s is another example of overt State restriction on an entire religion. In the 1960s Victoria, Western Australia and South Australia all passed legislation effectively

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49 Ibid, 132 – 133.
51 Ibid, 146.
banning the practices of Scientology. While these bans were ineffective they
demonstrate another episode where the State attempted to restrict the practices of a
religious organisation, to the extent that the State was in effect trying to eliminate them completely.

This section will examine the bans that were put in place, along with the background and origins of the bans. It will begin by examining the inquiry into Scientology conducted by Kevin Anderson QC, which was used as the justification for the bans. A discussion of the Inquiry is included to provide an overall picture of the State’s interaction with the Church of Scientology during this period. As with the closure of Radio 5KA, the wider debate surrounding the wearing of the burqa and niqab discussed in Chapter Three, the Anderson inquiry is an important part of the overall context of the State’s restriction on the Church of Scientology. While neither the Inquiry into Scientology, the closure of Radio station 5KA, nor the wider discussion of the wearing of the burqa and niqab, actually restricted the religious practices of the relevant religion, they demonstrate that State restrictions are not isolated incidents arising suddenly. Rather, there is a wider context and history of State interaction with the relevant religion leading up to the imposition of the State restriction.

Following the discussion of the Anderson Report, this section will go on to examine the restrictions put in place in Victoria, Western Australia, and South Australia. Finally, the section will briefly examine the removal of the bans on the Church of Scientology.

5.2.2.1 The Anderson Report
The first step towards the State’s restrictions on the Church of Scientology was The Board of Enquiry into Scientology, conducted by Kevin Anderson QC between 1963 and 1965. The finding of The Board of Enquiry into Scientology, also known as the Anderson Report, led the Victorian Government to pass the *Psychological Practices Act 1965* (Vic) which, inter alia, effectively banned the practice of Scientology in Victoria.

The inquiry was precipitated by complaints about the actions of Scientology by representatives of the medical profession and members of the public, prompting Labour

\[52 \text{ See 5.2.1.2.1.} \]
\[53 \text{ See 3.2.2.} \]
Leader John Galbally to raise the issue in parliament on 19 November 1963. In his speech, he described Scientologists as, … a group of charlatans who for monetary gain are exposing children of tender age, youths and adults to intimidation and blackmail, insanity and even suicide, family estrangement and bankruptcy …

In response to the Government’s failure to take any action against Scientology, Galbally introduced the Scientology Restriction Bill 1963 (Vic) on 26 November 1963. In response, the Government set up the Board of Enquiry into Scientology on 27 November 1963.

5.2.2.1.1 Anderson’s Assessment of Scientology

The Anderson Report was devastating in its assessment of Scientology from the first sentence of the report:

There are some features of Scientology that are so ludicrous that there may be a tendency to regard scientology as silly and its practitioners as harmless cranks.

Later in the same paragraph, the Report states that

Scientology is evil; its techniques evil; its practice a serious threat to the community, medically, morally and socially; and its adherents sadly deluded and often mentally ill.

Despite acknowledging that Scientologists had the right to hold whatever beliefs they wished, the Board made it clear that they were not permitted to practices those beliefs if they were harmful, likening the practices of Scientology to human sacrifice.

The report made three recommendations. First that the public be warned ‘of the dangers to mental health of psychological techniques practices by unqualified persons’, second the creation of a Psychologists Registration Board and the prohibition of the

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55 Victoria, Parliamentary Debates, Legislative Council, 19 November 1963, 2127.
57 see Victoria, Parliamentary Debates, Legislative Assembly, 5 October 1965, 481; Victoria, Parliamentary Debates, Legislative Council, 5 October 1965, 436.
58 Kevin Anderson, Report of the Board of Enquiry into Scientology (The state of Victoria, 1965), 1
59 Ibid.
60 Ibid, 147.
61 Ibid, 170.
administration of hypnosis, IQ and personality tests, and the use of E-meters by unregistered persons,\textsuperscript{62} and third the destruction of records held by the Scientology Organisation of auditing sessions.\textsuperscript{63} Interestingly, the report recommended against the banning of the use of the name Scientology as in the Board’s opinion Scientologists would ‘find ways of changing names of processes—even changing the name of scientology— and continuing to practise in much the same way under another guise.’\textsuperscript{64} The report did not recommend the banning of Scientology.

5.2.2.1.2 Religion vs Science

Scientology is one of only two religious belief systems in Australia to have their beliefs subject to a governmental inquiry of this scale.\textsuperscript{65} Had the Enquiry restricted itself to investigating whether or not the practices of Scientology breached existing criminal law, or even into the desirability of the practices themselves, the setting up of the Enquiry may arguably be justifiable on public policy grounds.\textsuperscript{66} The Enquiry did not so confine itself. Instead, it made comment on the veracity of the beliefs claimed by Scientologists, including declaring that it is not a religion.\textsuperscript{67} The report describes adherents of Scientology as ‘sadly deluded and often mentally ill’, a description which can only be justified after concluding that the beliefs cannot possibly be believable by any sane person. If similar comments were made about the adherents to more mainstream religions they would be considered unacceptable. However, belief in the tenants of these religions rests as much on faith as does belief in the tenants of Scientology, and not on the scientific veracity of the beliefs. As Murphy J put it in the Scientology Case:

If each purported religion had to show that its doctrines were true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the numbers of adherents small, the leaders hypocrites, or because they seek to

\textsuperscript{62} Ibid, 170 – 172.
\textsuperscript{63} Ibid, 172.
\textsuperscript{64} Ibid, 169.
\textsuperscript{65} The spiritual beliefs of Australia’s Indigenous people were subject to scrutiny in the Hind Marsh Island Royal commission. See Neil Andrews, ‘Dissenting in Paradise? The Hindmarsh Island Bridge Royal Commission’ (1998) 5 (1 -2) \textit{Canberra Law Review} 5. See also 1.3.3
\textsuperscript{66} The Inquiry found that the activities of Scientology in Victoria did not breach any existing criminal laws. Adam Possamai and Alphia Possamai – Inesdey, ‘Scientology Down Under’ in James Lewis (ed) \textit{Scientology} (Oxford University Press, 2009), 351.
\textsuperscript{67} Anderson, above n 58, 147.
obtain the financial and other privileges which come with religious status. In the eyes of the law, religions are equal.  

Throughout the report the Board emphasised the ‘false’ ‘scientific’ claims of Scientology, and the use of auditing via e-meters as being harmful to mental health. Chapter seven of the Report is devoted to outlining ‘Hubbard’s Scientific Deficiencies’. It would be unthinkable to include a similar chapter on the Pope’s scientific deficiencies in a similar Government enquiry on the beliefs and practices of the Roman Catholic Church, or Mohammad’s scientific deficiencies in an enquiry into Islam. Both Roman Catholicism and Islam make claims that cannot be backed up scientifically.

The focus of Anderson on the ‘scientific’ claims of Hubbard and Scientology also obscures the fact that just because something claims to be a science rather than religion does not necessarily make it so. For example, the fact that the Church of Christ, Scientist has the word ‘science’ in its name does not convert it from a religion to a science. Neither does the claims of the proponents of intelligent design to be a science or that creationism should be taught in science classrooms make it a science rather than a religious belief.

As well as pointing out the scientific deficiencies of L Ron Hubbard and Scientology, the Board of Enquiry also rejected the religiosity of Scientology. While it may be understandable to reject scientific evidence for religious beliefs that are based on faith, to also reject the religiosity of the beliefs is a step further.

On the same page of the Report, the Board of Enquiry stated that theirs was not a theological enquiry into the veracity of Scientology beliefs, nor did their conclusions hang on whether or not Scientology was a religion, yet also stating that Scientology was not a religion. If it was not a theological enquiry into the veracity of beliefs, the Board should not have been able to conclude that Scientology was not a religion. In addition, if the Board’s findings did not rely on a determination of whether or not

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68 Church of the New Faith v The Commissioner for Payroll Tax (Victoria) [1982- 1983] 154 CLR 120, 150.
69 Anderson, above n 58, 12 – 15.
70 For example the virgin birth of Jesus in Roman Catholicism.
71 Anderson, above n 58, 147.
Scientology was a religion, then there should have been no need to determine Scientology’s religiosity.  

5.2.2.2 Victoria’s Psychological Practices Act

While the Anderson Report did not itself restrict the religious practices of the Church of Scientology and its adherents, the legislation passed in Victoria and later in Western Australia and South Australia in response to the report did attempt to do so. While the laws passed did not ban Scientology in the way the World War Two declaration against the Jehovah’s Witnesses had, the restrictions imposed were constructed in such a way as to effectively ban Scientology.

In a direct response to the Anderson Report, the Victorian Government passed the Psychological Practices Act 1965 (Vic). At first glance the Psychological Practices Act 1965 (Vic) does not appear to be targeted at Scientology. Both its name and the majority of its provisions focus instead on the practice of psychology. As such, the majority of the provisions of the Act are couched in neutral language and appear to be of general application. However, the reasoning given by the Government for these apparently general provisions relate back to the Government’s desire to restrict Scientology. The majority of the provisions in the Act focus on the perceived similarities between Scientology, psychology, and hypnosis. The government believed that ‘by establishing controls over these aspects, in addition to banning Scientology itself and the organizations practising it, much more effective restrictions will be imposed, and there will be less likelihood of its resurrection in some different form.’ Importantly, section 39 of the Act made the practice of psychology by an unregistered person for fee or reward an offence; the term psychology was defined widely with the intention of catching the practices of Scientology.

The provisions relating to the Victorian Psychological Council and the registration of psychologists are consistent with the second recommendation of the Anderson Report.

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72 Scientology was found to be a religion in Church of the New Faith v The Commissioner for Payroll Tax (Victoria) [1982-1983] 154 CLR 120. The lower courts had found that Scientology was not a religion. See Church of the New Faith v Commissioner for Payroll Tax [1983] VR 97. While denying a particular belief’s religiosity is discriminatory it does not directly restrict religious practices. As such a detailed examination of the denial of Scientology’s religiosity, separate from the bans in Victoria, Western Australia and South Australia, is beyond the scope of this thesis.

73 Victoria, Parliamentary Debates, Legislative Assembly, 10 November 1965, 1342 – 1345.

74 Ibid.

75 Psychological Practices Act 1965 (Vic) s. 16.

76 Victoria, Parliamentary Debates, Legislative Assembly, 10 November 1965, 1345.
While the provisions were specifically designed to restrict Scientology, they were couched in neutral terms. They were similar in nature to the face covering legislation discussed in Chapter Three in their use of neutral language to catch the practices of a particular religious group. These provisions may even be seen as less restrictive, given the much wider application of the provisions than the face covering legislation. The non-discriminatory nature of these provisions is further strengthened by an exemption for ‘any priest or minister of a recognised religion in accordance with the usual practices of that religion.’ The term ‘recognised religion’ was defined as a religion whose priests or ministers are recognised under Commonwealth laws relating to marriage. Scientology was recognised under the *Marriage Act 1961*(Cth) on 15 February 1973, effectively nullifying the operation of section 39. Perhaps as a result of this, there has never been a successful prosecution of Scientologists under the *Psychological Practices Act 1965* (Vic).

Had these been the only provisions of the *Psychological Practices Act 1965* (Vic) it would at least be arguable that the *Act* did not specifically restrict the practices of Scientology, and that any restrictions that did exist were only incidental. However, the *Act* went further with sections 30 to 32 directly dealing with the practices of Scientology. Section 30 is perhaps the most offensive of these provisions. Section 30 prohibited the use of the E-meter by any person unless they were a registered psychologist. Given the importance of the E-meter to Scientologist’s auditing this provision could have potentially been very restrictive. The restrictive nature of this provision was heightened by the fact that Scientologists and their founder L Ron Hubbard do not believe in the use of traditional psychology or psychiatry. As a result Scientologists could not ‘get around’ this provision by simply ‘getting in’ sympathetic psychologist to help conduct auditing sessions using the E-meter.

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77 See 3.2.
78 *Psychological Practices Act 1965* (Vic) s2(3).
79 Ibid, s2(4).
Section 31 banned the teaching, practice, and application of Scientology for fee or reward. The provision was no doubt aimed at the perception that the teaching and practice of Scientology was a money making scheme, and that Scientologists would not be prepared to teach or practice Scientology without receiving a fee. For the purposes of this section, Scientology was defined very widely as:

… the system or purported system of study of knowledge and human behaviour advocated in the writings of Lafayette Ronald Hubbard and disseminated by the Hubbard Association of Scientologists International, a company incorporated in the State of Arizona in the United States of America, and includes and system or purported system associated with or derived from the same and the system or purported system known as dianetics.

The final section dealing specifically with Scientology, section 32, required that all ‘scientological records be delivered to the Attorney General and destroyed. As with the term Scientology itself, ‘scientological records’ was widely defined as any document ‘which relates to the practice of scientology on by or with respect to any particular person.’ This provision related to the third of the Anderson Report’s recommendations, that records of Auditing sessions kept by Scientology should be destroyed. On the 21 December 1965, the police raided the Scientology centre in Melbourne, seizing around 4,000 personal files.

While Scientology itself was not banned as such, these three provisions were designed to make it extremely difficult, if not impossible, for Scientology to continue operating in Victoria. Unlike the other provisions of the Psychological Practices Act 1965 (Vic), sections 30 to 32 could not be argued to be of general application or couched in neutral language. They were designed to specifically restrict the practices of the Church of Scientology.

5.2.2.3 Western Australia and South Australia

While the majority of the Victorian Psychological Practices Act 1965 (Vic) was couched in neutral language, and was of general application, the laws restricting

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85 Anderson, above n 58, 2 and 22 – 39.
86 Psychological Practices Act 1965 (Vic) s. 31(2).
87 Ibid, s32(1)
88 ‘Scientology Files Seized in Raid’, Sydney Morning Herald (Sydney), 22 December 1965, 1.
Scientology in Western Australia and South Australia were aimed entirely at Scientology. 89

In Western Australia the relevant Act was the Scientology Act 1968 (WA), while in South Australia it was the Scientology (Prohibition) Act 1968 (SA). These two Acts replicated the Victorian provisions dealing exclusively with Scientology. No argument can be made that the Western Australian or South Australian legislation was neutral in language or general in application. The entirety of the Acts passed in these States dealt only with one religion and its practices, the Church of Scientology.

5.2.2.4 The Ineffectiveness and Eventual Removal of the Ban on Scientology

Despite the legislation in Victoria, Western Australia and South Australia there were no successful prosecutions under any of the anti-Scientology legislation during its existence. 90 As referred to above, this may be because of the exemptions relating to ministers of religion. Another possibility is definitional problems revealed during the unsuccessful prosecution of the Hubbard Association of Scientologists International Ltd (HASI) in Western Australia. 91

HASI was initially found guilty of a breaching s3(1) Scientology Act 1969 (WA) in the Court of Petty Sessions. Section 3(1) prohibited the ‘practice’ of Scientology. HASI appealed to the Full Court of the Supreme Court of Western Australia where their appeal was upheld. The Court found that the prosecution had not provided evidence that HASI had in fact ‘practiced’ Scientology during the specified period. 92 The prosecution had relied heavily on a large number of documents found at a raid of a premises formally leased by HASI. These documents were provided to the Court but the prosecution did not specify how these documents were supposed to show the ‘practice’ of Scientology contrary to the Act. 93 The prosecution also ran into difficulty, as they did not attempt to demonstrate a single, or even multiple, acts of ‘practicing’ Scientology. Instead they attempted to show a course of business carried on by HASI

90 New South Wales Anti-Discrimination Board, above n 82, 212.
91 See Hubbard Association of Scientologists International Ltd v Parker (Unreported, Supreme Court of Western Australia, Virtue SPJ, Nevile J and Burt J, 18 November 1969).
92 Ibid, 8.
93 Ibid, 6 – 8.
that amounted to the ‘practice’ of Scientology. As Burt J pointed out, this method of trying to establish the ‘practice’ of scientology would be extremely difficult.94

Following the successful appeal by HASI, the Western Australian Crown Law Department reviewed the Scientology Act 1969 (WA) and determined that it was so poorly drafted that it was essentially unenforceable.95 As a result, they recommended that 15 charges before the Police Court be withdrawn, and that the documents seized under the Act be returned.96 The documents were returned on 5 May 1970 and the charges were dropped on 10 March 1972.97

Following the advice of the Crown Law Department, and consideration of the Scientology issue over some 20 months, the Minister for Health, Ronald Davies, introduced the Scientology Act Repeal Bill 1972 (WA) on 14 November 1972.98 Along with the unenforceability of the Act, Davies was persuaded to repeal the Scientology Act 1972 (WA) by the fact that since 1968 no other Government had banned Scientology, despite inquiries in England, New Zealand and South Africa.99 The English inquiry was heavily critical of the Australian legislation as being ‘discriminatory and contrary to all the best traditions of the Anglo-Saxon legal system.’100

South Australia repealed its Scientology (Prohibition) Act 1969 (SA) the following year with the passage of the Scientology (Prohibition) Act 1968, Repeal Act 1973 – 1974 (SA). Victoria did not repeal its anti-Scientology provisions until 1982.101

Despite the ineffectiveness of the anti-Scientology legislation the existences of these Acts stands as one of the most overt instances the State attempting to restrict the religious practices of a specific religion in Australia. Not only is Scientology singled out by name, as happened with both Roman Catholics in the early colony and the Jehovah’s Witnesses during World War Two, but the State also banned the practice of

94 Ibid, 3.
95 Western Australia, Parliamentary Debate, Legislative Assembly, 14 November 1972, 5104 – 5105.
96 Ibid.
97 Ibid, 5105.
98 Ibid, 5103.
99 Ibid, 5106
100 Ibid, 5107; John G Foster, Enquiry into the Practice and Effects of Scientology (Her Majesty’s Stationery Office, 21 December 1971), 181
101 Psychological Practices (Scientology) Act 1982 (Vic); Possamai and Possamai – Inesdey, above n 66, 351.
Scientology ‘for fee or reward’, effectively banned the religious practice of auditing, and seized the records of the Church of Scientology. Individually each of these State actions would arguably amount to a restriction on the religious practices of Scientology, when taken together they effectively banned Scientology in Victoria, Western Australia and South Australia.

Both the Jehovah’s Witnesses and the Church of Scientology, like the Roman Catholics, have been subject to overt State restrictions on the whole of their religious practice. However, as was demonstrated in Chapter Three, State restrictions against religious practice do not take this form in modern Australia. Instead, State restrictions are couched in neutral language, and appear to be of general application. It is only when the effect and history of the relevant laws are considered, that the restrictive nature of the laws becomes apparent. Before examining an example of this kind of State restriction, this chapter will first consider an example of State restrictions on religious practice that has elements of both overt and covert State restrictions.

5.3 Witchcraft and Pagans102 – A Transitional Example

It could be argued that Australia has moved on significantly from the 1960s and 1970s, and that overt State restrictions of the form experienced by the Church of Scientology would not be possible in modern Australia. However, as was discussed in Chapter Three, and will be discussed in more detail below, State restrictions against certain religious practices continue to occur in modern Australia. However, it is mostly covert in nature, couched in neutral language that on the surface appears to be of general application and aimed only at a specific practice of a religion, rather than a religion as a whole. When legislation imposing the restrictions is examined more closely, the restrictive nature of the laws becomes evident in both the history of the laws and in the disproportionate impact on the target religion or belief. However, the relationship between the State and religion in Australia did not simply jump from overt State restrictions to covert ones. A halfway point between the two forms of State restrictions can be seen in the laws restricting the practices of Witches and Pagans in Australia. It is important to note how recently these laws were repealed. As will be discussed below, Queensland did not repeal their anti-Witchcraft laws until 2000, and South Australia

continues to have anti-fortune-telling provisions. This means that as late as 2000, Witches and Pagans in Queensland were effectively banned from practicing their religion, and in South Australia they continue to be banned from practicing one aspect of their religion.

The laws under consideration in this section can be divided into two broad categories, anti-Witchcraft laws, and anti-fortune telling laws. Anti-Witchcraft laws are broader in nature than anti-fortune telling laws purporting to ban the exercise of Witchcraft as a whole rather than focusing on particular practices. As a result, they are similar in nature to the laws banning the Jehovah’s Witnesses and the Church of Scientology. Anti-fortune telling provisions, on the other hand, deal only with fortune telling and related practices. In this regard, they are closer in nature to the full face covering laws discussed in Chapter Three, and the Blood Laws discussed below.

5.3.1 Anti-witchcraft provisions
Anti-witchcraft laws, like the laws targeting the Jehovah’s Witnesses and the Church of Scientology, restrict the practices of Witchcraft as a whole by naming Witchcraft specifically and effectively purporting to ban its practice. As late as the 1990s both South Australia and Queensland had provisions of this nature in their criminal codes. The provisions were based on the much older United Kingdom law contained in the Witchcraft Act 1735. While most states repealed this Act with the passage of their Imperial Act Application Acts, South Australia and Queensland created witchcraft offences in their own Criminal Codes, which were not repealed until 1992 and 2000 respectively. This section will focus on Queensland, as the last to remove its anti-witchcraft provision.

Until their repeal, both States’ Criminal Codes contained the following provision:

103 The Northern Territory is currently in the process of repealing its anti-fortune-telling laws see Smail, Stephanie, ‘Northern Territory government to repeal centuries-old witchcraft, tarot card law’, ABC News (online), 18 August 2013 <http://www.abc.net.au/news/2013-08-17/northern-territory-to-ditch-their-witchcraft-law/4894086>.
104 See 5.4.1.
106 See for example Imperial Acts Repeal Act 1988 (ACT); Imperial Acts Application Act 1969 (NSW) s. 8; Imperial Acts Application Act 1980 (Vic) s. 5.
107 See Criminal Law Consolidation Act 1935 (SA) s. 259 as passed, later amended by Statutes Amendment and Repeal (Public Offences Act 1992) s. 7 (SA); Criminal Code 1899 (Qld) s. 432 as passed, later amended by Justice and other legislation (Miscellaneous Provisions) act 2000 (Qld) s. 3 Sch.
Pretending to Exercise Witchcraft or tell Fortunes

Any person who pretends to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult science to discover where or in what manner anything supposed to have been stolen or lost may be found, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for one year.108

The provisions cover both the practices of ‘witchcraft or sorcery’ as whole as well as the individual practices of enchantment, conjuration and telling fortunes. The reference to ‘Witchcraft and Sorcery’ could be construed as a reference to the religion of Witchcraft or Paganism, which is an entire religion rather than a particular practice, or set of practices. The provision amounted to an overt State restriction on the practices of a whole religion that can be seen on the face of the law. The understanding of the law expressed at the time of its repeal in Queensland, supports the view that the law was targeted not at an individual practice of Witchcraft or Paganism but at Witchcraft as a whole.

The move to repeal the anti-witchcraft provision from Queensland’s criminal law was criticised by both the Deputy Leader of the opposition, Lawrence Spingborg, and the Anglican Archbishop, Peter Hollingworth. Both were concerned that the occult could be used to dominate or harm vulnerable people.109 The concerns expressed by both the Archbishop and Lawrence Springborg do not appear to relate to an individual practice in the way concerns regarding face coverings relate to an individual practice of Islam. Rather their concerns appear to be directed at the wider practice of the occult, or Witchcraft, and a belief that the existence of a criminal sanction would prevent the practice of these belief systems as a whole and therefore protect ‘vulnerable people’.

Both Lawrence Spingborg and the Archbishop also expressed concern that the provision had been included as a machinery amendment and that there had been little consultation.110 However, neither Spingborg nor Hollingworth should have been surprised by the move to repeal s. 432 Criminal Code 1899 (Qld). Recommendations to

108 In South Australia the provision was found in s. 259 Criminal Code Consolidation Act 1935 (SA) (as passed). In Queensland it could be found in s. 432 Criminal Code 1899 (Qld) (as passed).
110 Ibid.
do so go back at least as far as 1992.\textsuperscript{111} In 1996 Matthew Foley attempted to amend the \textit{Criminal Law Amendment Bill 1997} (Qld) to insert a section repealing s. 432.\textsuperscript{112} In his speech, Foley rehearsed the arguments he would make again in 2000, that the provision was antiquated and irrelevant.\textsuperscript{113} He, and his supporters, observed that many Queenslanders used fortune telling and other psychic services that would all be technically illegal under s. 432.\textsuperscript{114} Denver Beanland, on behalf of the Government, rejected Foley’s amendment. In support of the Government’s position, Beanland referred to the murder of Mr Baldock in Brisbane and the sexual assault of boys in Western Australia, both of which were supposedly carried out for occult reasons.\textsuperscript{115} Finally, in 1998 the Human Rights and Equal Opportunities Commission recommended in its report \textit{Article 18 Freedom of Religion and Belief} that s. 432 should be repealed.\textsuperscript{116} Given the number of times in the preceding decade that the issue of the anti-Witchcraft provision had been raised, suggestion that its repeal was a ‘surprise’ and done without consultation is naïve.

The objections raised in relation to the supposed activities of those practicing the craft can be dismissed just as easily. While the existence of cases such as the murder of Mr Baldock are very distressing, they are not sufficient reason for banning a religion even if the murder was supposedly carried out by an adherent of a particular religion as part of their religious beliefs. As was pointed out by Terence Sullivan, Christians throughout the ages have been responsible for many atrocities, including murder. This has not led to Christianity being banned. In modern Australia the Roman Catholic Church is accused of the systematic cover up of sexual abuse of children by its priests.\textsuperscript{117} This

\textsuperscript{112} Queensland, \textit{Parliamentary Debates}, Legislative Assembly, 25 March 1997, 816 – 817
\textsuperscript{113} Queensland, \textit{Parliamentary Debates}, Legislative Assembly, 25 March 1997, 817. See also 817 – 818 (Robert Gibbs); 818 – 819 (Judy Spence); 819 (Terence Sullivan); 820 – 821 (Dean Wells); Queensland, \textit{Parliamentary Debates}, Legislative Assembly, 22 June 2000, 1818, 1882.
\textsuperscript{116} Human Rights and Equal Opportunities Commission, \textit{Article 18 Freedom of Religion and Belief} (Commonwealth of Australia, 1998), 60 – 64.
does not justify a ban on Christianity or even Roman Catholicism. The majority of believers should not be punished for the criminal behaviour of a few individuals, even if those individuals are the leaders of the religious organisation. So why should a murder and sexual abuse of boys by a few adherents of Paganism/Witchcraft justify the banning of all Pagan practices? This position is supported by the fact that research into the practice of Paganism in Australia suggests that the abuses are usually carried out by adherents who would not be recognised as such by other adherents. Instead, these abuses are more like carried out by people who simply claim to be occult practitioners, with little relation to the bulk of adherents in Australia.

5.3.2 Anti-Fortune Telling Provisions

The other category of State restrictions on the religious practices of Witchcraft and Paganism are anti-fortune-telling laws. Unlike anti-Witchcraft laws, the anti-fortune-telling laws do not restrict Witchcraft as a whole, but instead restrict a particular practice of Witchcraft, namely fortune telling. In this regard, they are different to the other case studies discussed above, and closer to the State restrictions on face coverings discussed in Chapter Three. However, unlike the State restrictions on face coverings, the particular religious practice being restricted has been named. As discussed in Chapter Three the legislation restricting the wearing of face coverings in public does not refer to either a specific religion, such as Islam, or a specific religious practice, such as wearing of the burqa or niqab, by name. Instead, the practice is referred to as face covering, a neutral phrase that could in theory apply to a large number of situations. By contrast, the anti-fortune telling laws do name a specific religious practice, fortune telling. As such, they are not neutral on their face. This difference is an important feature of the changes in the legal relationship between the State and religion. The anti-fortune telling laws are a ‘transitional example’, between overt State restrictions on the whole religion and covert State restrictions on specific religious practices. It is ‘transitional’, in that it has features of both types of State restrictions on religious practice. The existence of a ‘transitional’ example helps to demonstrate that the change from one type of State restriction to the other is not a straight forward shift with a clean line demarcating the division between the two. Rather it appears to be a more gradual process. The time when the anti-fortune telling laws existed is also important. As will

Diocese of Maitland-Newcastle, Home (accessed 30 September 2013)
120 See 3.2.1.
be seen below, while most States have repealed their anti-fortune telling laws South Australia has created a new anti-fortune telling provision that continues to exist, and therefore is co-existent with covert State restrictions on Muslim women discussed in Chapter Three.

South Australia removed its anti-witchcraft provision from its criminal code eight years prior to the removal of Queensland’s anti-witchcraft provision. However, unlike Queensland the South Australian Government introduced a new anti-fortune telling provision to replace its anti-Witchcraft one. Section 21 of the Amendment and Repeal (Public Offences) Act 1992 (SA) created a new s. 40 in the Summary Offences Act 1953 (SA):

**Acting as a spiritualist, medium etc with intent to defraud**

A person who, with intent to defraud, purports to act as a spiritualist or medium, or to exercise powers of telepathy or clairvoyance or other similar powers, is guilty of an offence.

In 1992, when South Australia enacted s.40 Summary Offences Act 1953 (SA), several other States and Territories also had anti-fortune telling legislation. However, the form taken by these provisions was significantly different from the South Australian provision. They were based on medieval vagrancy laws and the language used in them reflected this origin appearing more archaic than the more modern expression ‘spiritualist and medium’ used in the South Australian provision. It is arguable that their existence in 1992 was as a remnant of older laws and, unlike the South Australian provision, not necessarily a deliberate decision to continue to criminalise these practices. Whether this argument can be sustained or not they were an example of a State restriction on the religious practice of Witches and Pagans, which effectively banned them from engaging in the practice of fortune telling as part of their spiritual beliefs. This applies equally to the modern anti-spiritualist/medium provision and the more archaic anti-fortune telling provisions. In this regard, they are similar in nature to the full face covering legislation discussed in Chapter Three. Like the face covering legislation, the anti-fortune telling provisions restrict one practice rather than banning the whole religion. However, unlike the face covering legislation they are not couched

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121 Summary Offences Act (NT) s. 57(1)(d); Vagrants, Gaming and Other Offences Act 1931 (Qld) s 4(1)(o); Police Offences Act 1935 (Tas) s. 8(1)(g); Vagrancy Act 1966 (Vic) s. 13; Police Act 1892 (WA) s. 66(3).

122 See Human Rights and Equal Opportunities Commission, above n 116, 60 – 64.
in neutral language and do not appear to be of general application. The practices of
fortune telling/acting as a spiritualist/medium are named specifically, and can be
directly linked to being practices of certain Witchcraft and Pagan beliefs. In this regard,
they represent a transitional point between the overt discrimination that can be seen on
the face of the law, and the covert neutral language discrimination where the legislation
appears on its face to be of general application.

While South Australia retains its anti-fortune telling provisions, Tasmania, Western
Australia, Victoria and Queensland have repealed the anti-fortune telling provisions
from their criminal laws.

The State restrictions on Witchcraft and Paganism have features of both overt State
restrictions on whole religions and covert State restrictions on particular religious
practices. As a result they are a transitional example between the two types of State
restrictions identified in Chapter Three and Four. The final case study in this chapter,
the blood transfusion laws, are closer to the State restriction on face covering discussed
in Chapter Three. Like the face covering restrictions, the blood transfusion laws appear
on their face to be neutral and of general application, but a closer inspection of their
history and application reveals that they are in fact an example of a State restriction on
religious practice.

5.4 Covert State Restrictions on Specific Religious Practices

State restrictions on religious practice do not need to be overt in nature, nor targeted at
the whole of the religion. As the example of the State restriction on face coverings
discussed in Chapter Three demonstrates, the State can also restrict religious practice in
a covert way. In the cases of covert State restriction on religious practice, the restrictive
nature of the relevant law is not apparent on the face of the law. This means that unlike
in the examples discussed so far in this chapter the restricted religion, or religious
practice, is not named or specifically referred to. Instead, the laws are couched in terms
that make them appear to be of general application. However, these laws do still restrict
the religious practices. They do so via their differential impact on the targeted religion
or religious practice. As was discussed in Chapter Three, the face covering laws have a

123 See Police Offences Amendment Act 2001 (Tas) s5; Criminal Law Amendment (Simple Offences) Act
2004 (WA) s. 57; Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005 (Vic) s. 3; Summary
Offences Act 2005 (Qld) s. 29.
different impact on Muslim women because they are one of very few groups in Australia who habitually cover their faces in public. The background and history of these laws also reveals their restrictive nature.

As has been referred to above, there has been a shift from the State restricting the whole of a religion in an overt way, to the State restricting specific religious practices in a covert way. This shift has not been straightforward. There is no bright line at which the State shifted from one to the other. The example discussed in this section, the blood transfusion laws and their application to Jehovah’s Witnesses, were introduced in the 1960s around the same time as the ban on the Church of Scientology discussed above. Until the repeal of the ban on the Church of Scientology there was an example of overt State restriction running side by side with an example of covert State restriction on religious practice. However, a shift does appear to be underway. The overt ban on the Church of Scientology was repealed while the blood transfusion laws continue to exist.

The remaining section of this chapter will analyse the blood transfusion laws and their application to the Jehovah’s Witnesses, in particular their children. It will demonstrate that like the face covering laws discussed in Chapter Three they are an example of covert State restriction of a specific religious practice.

5.4.1 Child Blood Transfusion Laws and Jehovah’s Witnesses’ Beliefs

All Australian States and Territories have laws that permit medical practitioners to administer blood transfusions to minors without the consent of the minor’s parents or guardians (blood transfusion laws). In all cases, the laws are couched in neutral terms, with no reference to religion, a particular religious group, religious belief, or practice. They appear on their face to be of general application. However, both the practical effect of the laws, and the background to their introduction, reveal that the laws are a covert State restriction on religious practice. This section will first set out the content of the laws before examining their effect on the religious practices and beliefs of

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124 See 3.2.1.2.
125 See 5.2.2.
126 See Transplantation and Anatomy Act 1978 (ACT) s. 23; Transplantation and Anatomy Act 1979 (Qld) s. 20; Human Tissue Act 1985 (Tas); Human Tissue Act 1982 (Vic) s. 24; Human Tissue and Transplant Act 1982 (WA) s. 21; Emergency Medical Operations act 1973 (NT) s. 2 – 3; Children and Young Persons (Care and Protection) Act 1998 (NSW) s. 174; Consent to Medical Treatment and Palliative Care Act 1995 (SA) s. 15(5).
Jehovah’s Witness children and their parents, and then examine the background to the introduction of the blood transfusion laws.

5.4.1.1 Content of the Laws
As referred to above, all States and Territories have laws that permit medical practitioners to give blood transfusions to minors without or against their parent’s consent. These laws can be divided into two categories. First, those that specifically deal with blood transfusions to minors and second those that are more general in application, dealing with all lifesaving medical procedures carried out on a minor. The Australian Capital Territory, Queensland, Tasmania, Victoria, and Western Australia fall into this first category. The Northern Territory, New South Wales, and South Australia fall into the second category.

Both categories operate by providing immunity from civil and criminal sanctions for medical practitioners who administer blood transfusions, or other medical procedures in the case of the second category, to a minor without or against parental consent. Without this legislation, a medical practitioner who carried out any medical procedure on a minor without their parent or guardian’s consent may be charged with the criminal offence of assault, and be liable to civil action for battery. While the exact wording of the various Acts differ, they are broadly similar in that they all permit a medical practitioner to give a child a blood transfusion or lifesaving medical treatment without or against the consent of child’s parent when the medical practitioner is satisfied that without it the child is likely to die. The Acts provide various safeguards such as the need for the medical practitioner to gain a second opinion, or have previous experience in administering blood transfusions.

The blood transfusion laws do not provide any exceptions for minors whose religious beliefs do not permit blood transfusions or other medical procedures, nor do the laws refer to any religion or religious practice. As such, they appear on their face to be of general application as there is nothing in the laws themselves that suggests that they may have a restrictive effect on any religious belief or practice. However, when the specific religious beliefs of the Jehovah’s Witnesses concerning blood transfusions are

When the blood transfusion laws were first introduced in 1960, New South Wales also fell into this category, but amended its laws in 1983. See New South Wales Anti-Discrimination Board, above n 82, 117.

128 See for example Human Tissue and Transplant Act 1982 (WA) s. 21 (1)(a)-(b); Human Tissue Act 1982 (Vic) s. 24 (1)(b); Consent to Medical Treatment and Palliative Care Act 1995 (SA) s. 13(1)(b).
examined alongside the neutral wording of the blood laws, it becomes clear that the laws do restrict the practice of that belief by Jehovah’s Witness children and their parents.

5.4.1.2 Jehovah’s Witnesses’ Beliefs
The Jehovah’s Witnesses do not believe in the use of blood transfusions. This is based on their interpretation of various biblical passages.\(^{129}\) Passages such as Genesis 9: 3–4, Leviticus 17: 13 – 14, and Acts 15: 28 – 29 prohibit the consumption of blood. The Jehovah’s Witnesses interpret this to include consumption via medical procedures, including blood transfusions.\(^{130}\) As a result, the administration of a blood transfusion to a minor of the Jehovah’s Witness faith by a medical practitioner under the blood transfusion laws would conflict with this belief. Given that the laws can be used by medical practitioners against the parent and the child’s wishes, the laws have the potential to restrict the religious practices of a Jehovah’s Witness child by forcing them to take part in procedure which conflicts with their religious beliefs.

Like the face covering laws discussed in Chapter Three, the blood laws are couched in neutral language and on their face are of general application. In theory, they could be applied to any minor of any faith, or none. A parent or older child may refuse a blood transfusion for reasons other than religious belief. However, given the specific beliefs of the Jehovah’s Witnesses the laws are likely to have a disproportionate impact on them, as they are the group most likely to object to a blood transfusion for a minor.

In determining the differential impacts of the laws, the two categories of blood transfusion laws should be distinguished. The laws that only deal with blood transfusions have a greater disproportionate effect on Jehovah’s Witnesses than the second category, which permits any form of life saving medical treatment. In the case of the laws that only cover blood transfusions; the laws have a specific differential impact on Jehovah’s Witnesses. There is a wide range of potentially lifesaving medical treatments that a parent may refuse to consent to for their child. However, the first category of blood transfusion laws do not allow for the administration of any lifesaving treatment a medical practitioner may wish to administer to save the life of a child.


\(^{130}\) Ibid, 4.
Instead, they deal specifically with blood transfusions. The creation of a law overriding parental consent for one specific medical treatment, to the exclusion of all others, that is rejected by one religious sect, specifically, suggests that the law may be targeted at that particular religious sect and their beliefs, rather than at a wider public policy of saving the life of children. The targeted nature of these laws becomes even clearer when considering that Jehovah’s Witnesses will consent to almost any other medical treatment.\textsuperscript{131} The only medical treatment objected to by Jehovah’s Witnesses is blood transfusions, and the only medical procedure that can be administered without parental consent in the first category of laws is blood transfusions.

The second category of blood transfusion laws does not have as much of a disproportionate impact on the Jehovah’s Witnesses. The second category permits medical practitioners to administer any lifesaving treatment; as such, it does not appear to target Jehovah’s Witnesses and their beliefs regarding blood transfusions. While Jehovah’s Witnesses’ beliefs will still be captured by this category, theirs are not the only beliefs that will be affected by the more general laws in the Northern Territory, New South Wales, and South Australia.\textsuperscript{132} Another group identified when the laws were introduced in 1960 are Christian Scientists, who reject all forms of modern medical intervention.\textsuperscript{133} It is arguable that these laws are so neutral in their language, and so general in their application, that any differential effect is minimal. This is particularly the case when compared to blood transfusion specific legislation. This is not to say that these laws do not restrict the religious practices of Jehovah’s Witnesses. Their children can still be forced to undergo a blood transfusion, without or against parental consent. Rather, the differential impact is lessened because there are more groups that will be affected. From a public policy point of view, this type of law may be more defensible as the practical effect of the legislation is not a specifically targeted at a particular religious belief.

5.4.1.3 The History of the Laws
Given the neutral language and apparent general application of the various blood laws, it could be argued that any State restriction on Jehovah’s Witnesses religious beliefs were unintentional and merely incidental to other public policy concerns. The history
of the blood laws does not support this interpretation. Like the face covering laws discussed in Chapter Three, the background to the blood transfusion laws, along with the parliamentary debate when the laws were first introduced, reinforces the argument that the blood transfusion laws were designed to restrict the religious beliefs of Jehovah’s Witnesses.

The potential need for laws regarding blood transfusions and minors was sparked by the death of two-day-old baby Stephen Jehu, who died in January 1959 after his father, Alvin Leonard Jehu, refused to consent to a blood transfusion.134 After a coronial inquest, Mr Jehu was charged with manslaughter.135 He was found guilty by a jury on 30 March 1960, after a very public trial.136 He was released on a £100 bond to be of ‘good behaviour’ for five years.137 Mr Jehu’s reason for refusing to allow a blood transfusion for his child was his religious beliefs as a Jehovah’s Witness. He was prepared to try any other treatment to save his child’s life, but in accordance with his faith, he could not permit Stephen to have a blood transfusion.138 In the wake of baby Stephen’s death, the coronial inquest, and the trial of Mr Jehu, all states and territories introduced laws permitting blood transfusions to be administered to minors without or against parental consent.139

An examination of the parliamentary debate shows that the beliefs of Jehovah’s Witnesses concerning blood transfusions, and the Jehu case in particular, were a motivating factor behind the passage of the blood laws. While baby Stephen and his

134 ‘Transfusion for baby Refused; Father For trial’, *Sydney Morning Herald* (Sydney), 19 May 1959, 4
135 Ibid.
136 ‘Guilty Verdict at Jehovah’s Witness Transfusion Trial’ *Sydney Morning Herald* (Sydney) 30 May 1960, 4. See also ‘Father let Baby Die, Court Told’ *Sydney Morning Herald* (Sydney), 24 March 1960, 18; ‘Blood Kept From Baby, Court Told’ *Sydney Morning Herald* (Sydney) 25 March 1960, 5; ‘Wanted His Baby to Live, Says Jehovah’s Witness’ *Sydney Morning Herald* (Sydney) 29 March 1960, 11.
137 ‘Guilty Verdict at Jehovah’s Witness Transfusion Trial’ above n 136, 4.
138 ‘Transfusion for baby Refused, above n 134, 4; ‘Guilty Verdict at Jehovah’s Witness Transfusion Trial’ above n 136, 4.
139 The first state to introduce blood transfusion laws was Queensland in December 1959. See *Health Act Amendment Act 1960* (Qld). See also Queensland, *Parliamentary Debates, Legislative Assembly*, 9 December 1959, 1981.

father were never referred to by name, the case was referred to several times. The case was in the minds of the New South Wales parliamentarians as the trial of Mr Jehu was being conducted at the time of the debate on the New South Wales Bill. Further evidence can be found in the speech of Victorian MP Rupert Hamer. He made extensive reference to a medical condition suffered by infants where their blood and that of their mother is incompatible. This condition was, at the time, treated by a blood transfusion to the infant after birth, and is the condition from which baby Stephen died. There were also several references to the Jehovah’s Witnesses either by name, or by reference to their beliefs concerning blood transfusions. The targeted nature of these laws was made clear by a statement from the New South Wales Minister for Health, William Sheahan:

… when the Medical Practitioners Act was amended in 1956 to prohibit unregistered persons from treating cancer, tuberculosis, poliomyelitis, epilepsy and diabetes, the treatment of such diseases by a person in the bona fides practice of the religious tenants of any church was specially exempted. This action was taken at the request of one sect that is opposed to blood transfusions. It and another group have made representations that they should be given similar exemption in connection with the proposals for giving blood transfusions to minors, without parental consent. I do not consider, however, that the circumstances are parallel, because these two sects are the main objectors to blood transfusions and if they are exempt from the provisions of the bill, its whole purpose would be defeated. [emphasis added]

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The parliamentarians debating the blood laws in 1959 and 1960 seem to have been well aware that the creation of these laws could impact upon religious beliefs. Almost all speakers mentioned the religious element of the proposed laws and expressed sympathy with people who hold strong religious beliefs. Ultimately, all concluded that the laws were not discriminatory, or that in any event the parent’s religious views should be overridden in order to save the life of the child.\textsuperscript{146}

When this history is combined with the effect of the blood transfusion laws, their restrictive nature becomes evident. Not only is the effect of the blood laws to restrict the religious practices of Jehovah’s Witnesses children and their parents, the history also reveals that this was the original intention of the laws. Therefore, the blood transfusion laws are an example of covert State restriction on religious practice. Unlike the State restrictions on Roman Catholics, the banning of the Jehovah’s Witnesses in World War Two, and the banning of the Church of Scientology the State’s restriction is not evident on the face of the laws. However this does not mean the blood transfusion laws are not an example of State restriction. Rather the blood transfusions laws, like the face covering laws, are an example of covert State restriction.

\textbf{5.5 Conclusion}

This Chapter ended where it began with an example of the State imposing restrictions on the religious practices of the Jehovah’s Witnesses. These two examples involving the Jehovah’s Witnesses neatly encapsulate the pattern of change that has occurred in the legal relationship between the State and religion in relation to State restrictions on religious practices that have occurred across Australia’s history since European colonisation. The first, the ban during World War Two, is an example of the State overtly restricting the religious practices while the second, the blood transfusion laws, are an example of the State covertly restricting religious practice. They are either ends of the pattern of change that has taken place in the legal relationship between the State and religion in relation to State restrictions on religion across the 20\textsuperscript{th} century. When the examples from Part One, the restriction of Roman Catholics and the face covering

legislation, are added to the examples presented in this chapter, a clear pattern of change in the legal relationship can be seen. There has been a gradual shift from the State restricting religious practice by overtly targeting a named religion, to covert restriction of religion by targeting a specific religious practice via laws that appear on their face to be of general application. While there is no bright line at which it is possible to declare that the shift from one mode of State restriction to the other took place there is a clear pattern of the State moving from one form of State restriction on religious practice to another.

It is not the purpose of this Chapter, or the thesis more generally, to determine the desirability of these State restrictions on religious practice. There were and continue to be in many cases good public policy reasons for the restrictions discussed in this thesis. However, the pattern of change in the legal relationship that has been outlined in this chapter needs to be recognised and taken into account in the ongoing legal relationship between the State and religion in Australia. The move towards more covert forms of State restriction means that there is a risk that these restrictions may not be recognised as such and their disproportionate effect on religious practices dismissed. By couching State restrictions in neutral terms, the State does not need to admit overtly to a restriction on religious practice. While in the covert examples discussed in this thesis the implications for religious practice have been recognised and consciously restricted, there is a risk in the use of neutral language that the disproportionate effect of such laws on specific religious practices would be overlooked or even deliberately obscured.

As well as demonstrating this broad category specific pattern this chapter has demonstrated that in relation to the issue of State restrictions on religious practice there has been continued re-occurrence of the issue across Australia’s history since European colonisation. As will be seen in the remaining chapters of Part Two, this macro pattern of re-emergence can be observed in all three of the broad cases studies considered in this thesis. The examples identified in Part One are not isolated examples with over 150 years of tolerance in between. Rather, they are either ends of a pattern of change over time with the issue of State restriction of religious practice re-occurring time and time again. As this chapter has shown, the State has restricted religious practice in the 1940s, the 1960s, and the 1990s. In the cases of the blood transfusion laws, and the restrictions on the practices of spiritualists and mediums in South Australia, these State restrictions on religious practice continue into modern Australia. Not only are the face
covering laws discussed in Chapter Three not an isolated example, with over 150 years of tolerance preceding it, they are also not isolated in modern Australia. Like Muslim women, Jehovah’s Witnesses children and their parents, Witches, and Pagans also continue to face State restrictions on their religious practices.

An important aspect of the pattern observed in this chapter in relation to the broad case study of State restriction on religious practices is that while there is a pattern of change in the legal relationship, the actual instances of State restrictions on religious practices are not necessarily inter-related. The pattern relates to the mode of State restriction rather than the specific instances of legal change. The fact that the creation of the ban on the Jehovah’s Witnesses preceded the creation of the ban on the Church of Scientology does not mean one caused the other or was a necessary precursor to the other. In fact, it is possible that the two had little to do with each other. The pattern observed in this chapter does not depend on the various legal changes being related to each other, other than that they are all examples of State restrictions on religious practice. This is not the cases for the other two broad cases studied in Part Two. As will be demonstrated in Chapters Six and Seven, the issue specific patterns observed in relation to religion in education and State funding of religion are to a certain extent the product of a series of interdependent and incremental changes in the legal relationship between the State and religion.
Chapter Six - The State, Religion and Education

6.1 Introduction
The school systems in which the National School Chaplaincy Program (NSCP) and the Church and Schools Corporation operated are very different from one another. For example, in modern Australia, there are both Government schools, which are wholly supported by State funding, and non-Government schools, which also receive State funding. In effect, there is a dual system of education. It is a formal, organised system regulated by both State and Territory and Federal legislation.¹ In contrast, in the first 50 years after European colonisation, the education system was, for most of the period, de facto rather than systematic. As discussed in Chapter Four, during the first 50 years after European colonisation, schools were generally established as a result of local demand and run by local clergy rather than being established and run as part of an organised Government system.² As a result, although all schools were ‘Government’ in that they received Government support and were often run by Government-paid clergy, they were not Government in the modern sense.

Despite these important differences between the school system that exists in modern Australia and that which existed in the first 50 years after European colonisation, Part One identified two analogous issues in the legal relationship between the State and religion: the NSCP and the Church and Schools Corporation. Not only are these two programs analogous in that they both concern the place of religion in education, but they also both have important similarities.³ In particular, both programs are examples of the State effectively endorsing religion as a part of education. In modern Australia, this is via the funding of chaplains in both Government and non-Government schools. In the first 50 years after European colonisation, this was via the funding of religious schools.

² See 4.3.
³ See 4.3.5.
With just these two points in time as examples, it could be argued that the State has always supported religion in education; however, this is not the case. In the middle of the period between these two examples, there was a ‘gap’ of over 70 years where the State and religion effectively had no relationship. During this period, neither the States and Territories nor the Federal Government provided any funding to schools run by religious organisations, and education in all State-run and funded schools was secular.4

Like Chapter Five, the purpose of this chapter is twofold. First, it will demonstrate that in the 150 years between the creation of the Church and Schools Corporation and the creation of the NSCP, there was a series of changes in the legal relationship between the State and religion in relation to the place of religion in education. This will establish that the two case studies identified in Part One are not isolated incidents; nor is it coincidental that these two analogous issues can be found in the two periods considered in Part One. Rather, they are two ends of a pattern of change over time. In demonstrating this series of changes, Chapter Six will demonstrate the macro-pattern observable in all three broad cases studies: that issues in the legal relationship between the State and religion re-occur time and again, even after the issue appears to have been settled.5

Second, Chapter Six will demonstrate that, as in the case of State restrictions on religious practice, an issue-specific pattern can be observed in the changes in the legal relationship between the State and religion in relation to the place of religion in education. In this case, this pattern of change can be envisaged as two halves of a journey. In the first half of the journey, which took place in the second half of the nineteenth century, the legal relationship between the State and religion decreased via a series of incremental steps until, by the turn of the century, the relationship was effectively severed with the creation of a wholly secular system of education in every colony. In the second half of the journey, which took place in the second half of the twentieth century, the relationship between the State and religion gradually increased. The second half of the journey can be seen as a return journey. While the journey has not been completely reversed (which would require the collapse of Government secular schools), the relationship has reversed a long way down the path it took towards secular

4 Segregated special religious education was permitted throughout this period. However, unlike earlier education programs, the general instruction was to be secular rather than based on the bible or religious catechisms.
5 See 1.2.2.2.
While it is not argued that this final step will be taken, the creation of the NSCP is yet another step back towards religious education by introducing a State-supported religious program into otherwise secular schools.

The first step in the first half of the journey towards secular education, and the first change in the legal relationship between the State and religion after the collapse of the Church and Schools Corporation, was to create a dual system of education with schools run by both the State and churches, both of which were supported by the State.

### 6.2 Creation of a Dual System of Education

With the official dissolution of the Church and Schools Corporation on 28 August 1833, the Australian colony and its governors were faced with the problem of what to do about education. The creation of a State-sponsored monopoly by the Church of England had failed, and a new system had to be found. In the following decade, Governors Bourke, Gipps and Fitzroy all attempted to set up systems of State-sponsored education that would be able to provide education for all children, regardless of their religion. It was not until the late 1840s that Governor Fitzroy was finally able to establish a system of education. Even then, it was not a single system for all children but a system divided on the basis of religion.

### 6.2.1 Creation of the Dual System by Governor Fitzroy

The first step on the journey towards secular State-run education was the creation of a dual system of education. Until the creation of this dual system, all schools receiving Government support were run by the Churches. Following the collapse of the Church and Schools Corporation, a de-facto system of education had emerged, with the four dominant Christian denominations each running their own schools. The dual system of education established by Governor Fitzroy added a fifth type of school. Rather than being run by one of the Christian denominations, these schools were run by the State. While the dual system that was established did not itself withdraw State support for Church-run schools, it laid the foundation for the eventual removal of State funding to religious schools and the establishment of a State-run system of secular education. The creation of any form of State-run schools was an important first step in the journey;

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7 The funding of Church-run (denominational) schools by the State is often referred to as 'State aid'. This term is also used to refer to more general funding of religion by the State. To avoid confusion, as this thesis deals with both issues, the term ‘State aid’ is not used.
without State-run and therefore State-controlled schools for the colony’s children to
attend, it would have been very difficult to both withdraw State support from Church-
run schools and establish a secular system of education.

6.2.1.1 Prior to Fitzroy

Governor Fitzroy established his Dual Board system of education in 1848, 15 years
after the collapse of the Church and Schools Corporation. However, in the intervening
years, the issue of education more generally and the place and type of religion in
education specifically had not been dormant. Fitzroy’s two predecessors—Governors
Bourke and Gipps—had both unsuccessfully attempted to establish their preferred
systems of education. Governor Bourke had preferred the Irish National System and
Governor Gipps had preferred the British and Foreign Schools System with separate
schools for Catholic children. However, both proposals had faced significant
opposition from the religious leaders in the colony.

Instead the colony developed a system of education where the four major Christian
denominations ran their own State-funded schools. In 1836, the Church Act was
introduced, which provided funding to the four major Christian denominations. This
was interpreted to include the funding of schools. However, this system was
inefficient and did not adequately provide for the educational needs of all children.

One of the main reasons for the failure of the unified system proposed by Bourke and
Gipps was opposition by religious leaders who could not agree on a system that would

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8 Bourke to Stanley, 30 September 1833 in Historical Records of Australia, Series 1 Volume 27 (Library
Committee of the Commonwealth Parliament, 1914–1925) 224–233. The Irish National System was
designed to bring children of all religious denominations together, with the education being Christian
but non-denominational. The use of the Bible was not permitted. See Albert Gordon Austin, Australian
Education 1788–1900: Church, State and Public Education in Colonial Australia (Sir Isaac Pitman & Sons
Ltd, 1961) 35.
9 Barcan above n 6, 47. Gipps recommended a separate system for Catholics on the grounds that they
had particular religious objections to the British and Foreign Schools System of education, which was
non-denominational but allowed for the free use of the Bible in schools. See Austin, Australian
Education 1788–1900, above n 8, 42.
10 Austin, Australian Education 1788–1900, above n 8, 36–39, 42–45.
11 Church of England, Roman Catholic, Presbyterian and Methodist.
12 See 4.4.
13 Barcan, above n 6, 44.
14 John Strandbroke Gregory, Church and State: Changing Government Policies Towards Religion in
Australia, with Particular Reference to Victoria Since Separation (Cassell Australia, 1973) 37; Barcan,
above n 6, 51–52; Russell Fletcher Doust, New South Wales Legislative Council 1824–1856: The Select
Committees (Parliament of New South Wales Parliamentary Library, 2011) 118–119; New South Wales,
Parliamentary Debate, Legislative Council, 4 October 1844.
be acceptable to all of the major denominations in the colony. The Church of England
wanted its monopoly back and the Catholics demanded their own schools, while the
Presbyterians and Methodists were at best lukewarm to the various proposals and at
worst opposed them. The failure of religious leaders to reach consensus and work
together to create an efficient education system that catered for the needs of all children
created the need for a State-run secular system of education. If the Churches could not
do it, then the State would have to create its own system, and if no form of religious
education could be found that was acceptable to all religious denominations, then the
solution was to take religion out altogether.

6.2.1.2 Fitzroy’s System

Governor Fitzroy needed to devise a system of education that was different to that
proposed by his predecessors. Both Bourke and Gipps had attempted to create a single
system that was acceptable to all. This had failed because it had been impossible to
design a system that was acceptable to the religious leaders of all of the major Christian
denominations. Instead of trying to combine all schools into a single system, Governor
Fitzroy proposed a system based around two boards of education: one for the existing
church-run schools and one for new State-run schools. In 1848, the National Board of
Education was created to oversee the creation and running of Government-owned
schools based on the Irish National System, along with a Denominational School Board
to oversee the distribution of funds to the churches for their various schools.

Fitzroy’s solution did not solve all of the problems faced by the education system in the
colony. It could be argued that the creation of the Dual Board system was both a
significant step along the journey to secular State-run education and no real step at all.
Nothing really changed for the four major denominations; their schools continued to
receive Government funding and continued to compete with one another for students.
The multiple systems of education were still inefficient; the creation of State schools
merely created a fifth system of education. Unlike later schemes, there was nothing in
Fitzroy’s scheme to discourage inefficient competition and the creation of new
denominational schools.

15 Austin, Australian Education 1788–1900, above n 8, 36–39, 42–45.
16 Governor Fitzroy arrived in the colony in 1848.
17 Barcan, above n 6, 53.
19 See 6.3
Fitzroy’s system was an important first step in the journey; for the first time, it created schools run not by religious denominations but by the State. Education was no longer the sole province of the churches and was no longer solely denominational in character. While general religion was not banned from the classroom in these new Government schools, and the Irish National System was far from secular, denominational education in National schools was restricted. Visiting clergy were only permitted to attend the National schools one day per week for the purpose of instructing children in their denomination.20

While Fitzroy’s system preserved the inefficiencies of the de-facto system that emerged after the collapse of the Church and Schools Corporation, it laid the groundwork for later changes in the legal relationship between the State and religion in relation to education, and in the journey towards a State-run secular education system. In this regard, the most important change introduced by Fitzroy’s Dual Board system was the creation of National schools, which changed the legal relationship between the State and religion in relation to education by breaking religion’s monopoly over education. The State now competed with the churches in providing education to the colony’s children.

6.3 From Five Systems to One State System of Secular Education

Governor Fitzroy’s Dual Board system had effectively established five separate systems of education, which were all funded by the State. However, the Dual Board system had not solved the problem of inefficiency. The eventual solution was to create a single State-run secular system of education. Once this system was established, it remained in place for over 70 years.

The next stage of the journey towards the creation of a State-run secular system of education involved two steps. First, the Dual Board system was consolidated to a Single Board system, which controlled and oversaw the funding of both State-run schools and schools run by religious denominations. The colonies took two different paths to create their Single Board systems. In Queensland, Victoria and New South Wales, there was a relatively straightforward shift from one board system to another. However, in Tasmania and Western Australia, the path to a Single Board system was more convoluted, with funding being both withdrawn and re-instated to church-run schools.

20 Barcan, above n 6, 53.
Regardless of how the various colonies reached the Single Board system, the resulting change in the legal relationship between the State and religion was effectively the same.

The second and final step in the journey towards a State-run secular education system was the removal of funding from religious schools. With this step, the State effectively severed the legal relationship between the State and religion in relation to education. By Federation, all colonies had abolished State funding to religious schools and entered a period of around 70 years in which State and religion had no relationship in relation to education.

6.3.1 Step One—The Single Board System

The next important change in the legal relationship between the State and religion in relation to education was the creation of a Single Board system of education. Like Governor Fitzroy’s Dual Board system, religion preserved a place in education. Under the Single Board system, Church-run schools continued to receive State funding, and in Government-run schools, education continued to contain a religious element. However, the ability of the Churches to control education was greatly diminished.

Governor Fitzroy’s Dual Board system had severed the monopoly of religion over education by giving the State a new role. The State now not only funded education provided by the churches, but it also directly provided education. The Single Board system established in the various colonies took this a step further. Under the Single Board system, the State now took control not only of the educational content and creation of its own National schools, but it also regulated the educational content and creation of church-run schools. This gave an advantage to the State schools.

Two different paths were taken by the colonies to reach this Single Board system. In New South Wales, Victoria and Queensland, the new Single Board system directly replaced the Dual Board system discussed above. Tasmania, Western Australia and South Australia took a different path; none of these colonies had a Dual Board system of education. In Tasmania and Western Australia, the Single Board system was created to replace State-run education systems, while in South Australia, the Single Board system was temporarily created to try to rescue the ailing system of denominational education. In the cases of these colonies, rather than decreasing the involvement of
religion in education, the creation of a Single Board system actually increased the relationship between the State and religion.

This section is divided into two parts. The first part analyses the effect of the creation of a Single Board system on the relationship between the State and religion. As will be demonstrated, the changes in the legal relationship between the State and religion that resulted from the creation of the Single Board system were an important incremental step on the journey towards a State-run secular system of education. The second part sets out the different routes taken by the various colonies in the creation of their Single Board systems. This part is included for three reasons. First, the background to the creation of the Single Board system provides an important context to explain how and why this legal change in the relationship took place. Second, the different routes imply slightly different changes in the legal relationship between the State and religion. Finally, the explanation of the different routes undertaken by the various colonies is included to fulfill the secondary purpose of the thesis.21

6.3.1.1 The Changes
The creation of the Single Board system of education brought about two significant changes in the legal relationship between the State and religion. First, the State imposed restrictions on the creation of new church-run schools, and second, the State imposed restrictions on the content of education in church-run schools. While the Single Board systems in all colonies had similar features, the changes discussed in this sub-section are most applicable in the colonies that moved from the Dual Board system to a Single Board system of education. Therefore, this sub-section will focus on Queensland, Victoria and New South Wales.

6.3.1.1.1 Restrictions on New Church Schools
Under the Dual Board system, the churches could set up new schools wherever they wanted, and there was little restriction on what they could teach. The Education Act 1860 (Qld), Commons Schools Act 1862 (Vic) and Public Schools Act 1866 (NSW) (‘Education Acts’) changed this significantly. All three Acts significantly curtailed the ability of churches to set up new denominational schools. In Queensland, no provision was made to fund new denominational schools. In Victoria, a new denominational school could not be established within two miles of an existing Government school with

21 See 1.4.2.
less than 200 students.\footnote{Common Schools Act 1862 (Vic) s. 10.} In New South Wales, the distance was five miles and 70 students.\footnote{Public Schools Act 1866 (NSW) s. 9.} The Victorian Act went a step further by empowering the Board to shut down small denominational schools.\footnote{Common Schools Act 1862 (Vic) s. 20.} For the first time, control of the multiple education systems had truly passed to the States. Under the Dual Board system, the State had control of the establishment of its own National schools, and now it took control of the establishment of church-run schools as well. With restrictions on the funding and creation of new denominational schools, the inefficiencies observed under earlier systems could be curtailed.

6.3.1.1.2 Restrictions on the Content of Education

Not only did the Single Board system restrict the growth of denominational schools, but it also restricted what could be taught in church-run schools. The Education Acts all required a minimum number of hours of consecutive secular instruction.\footnote{Education Act 1860 (Qld) s. 6; Common Schools Act 1862 (Vic) s. 11; Public Schools Act 1866 (NSW) s. 19.} This was another significant step towards secular education. Previous attempts to control the religious content of education, such as the attempts by Bourke and Gipps to establish single State-run systems of education\footnote{See 6.2.1.1.} and the attempts to establish a Church of England monopoly over education,\footnote{See 4.3.3 and 4.3.4.} had focused on the type of religion rather than the amount. For the first time, the State now ensured that where it funded education, there was a minimum amount of content that was non-religious.

The effect of both of these changes on the legal relationship between the State and religion was to tip the balance from the churches to the State and from religious education to secular. Like Fitzroy’s Dual Board system, these changes were an important incremental step in the overall journey to a State-run system of secular education. The Single Board system and the restrictions imposed on Church-run schools effectively set a precedent that Government-run National schools were to be given priority and that education should contain a minimum amount of secular content. The restrictions on denominational schools gave the Government schools an advantage. The number of Government schools increased while the overall number of denominational schools decreased.\footnote{Austin, Australian Education 1788–1900 above n 8, 118-119, 126.}
6.3.1.2 The Routes

As discussed above, different colonies took different routes to establish their Single Board systems of education. Queensland, Victoria and New South Wales took a direct route when shifting from the Dual Board system to the Single Board system. Tasmania and Western Australia took a more circular route, with both colonies first attempting to create a single system of State education before re-introducing State funding to church-run schools under a Single Board system. South Australia took a very different route and became the first colony to completely remove State funding for church-run schools.

6.3.1.2.1 The Direct Route

Upon separation from New South Wales, Queensland and Victoria both inherited New South Wales’s Dual Board system. All three colonies took a direct path from the Dual Board system to a Single Board education system. While the route from one system to the other was relatively direct, it was not immediate. In the cases of Victoria and New South Wales, the change from the Dual Board system took time. In Victoria, this was due to social conditions created by the gold rush, and in New South Wales, the delay was caused by political instability. In contrast, Queensland moved much more quickly.

The first Dual Board colony to establish a Single Board system was Queensland, which separated from New South Wales on 6 June 1859. Just six months later, in February 1860, Governor Bowen established a temporary National Board to oversee the Government schools, but he did not establish a Denominational Board to oversee the church-run schools. In September 1860, Queensland passed the Primary Education Act 1860 (Qld), which formally abolished the Dual Board system and set the scene for the eventual abolition of funding to denominational schools. While Queensland’s change from a Dual Board system to a Single Board system was relatively simple and painless, this was not the case for Victoria and New South Wales. In Victoria, it took until 1862—11 years after separation from New South Wales, and in New South Wales, the Single Board system was not established until 1866.

In Victoria, the 11-year delay between separation from New South Wales and the establishment of a Single Board system of education was primarily due to the social turmoil created by the gold rush. In particular, the irreligious attitude of the new

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29 Alan above n 6, 102, 106.
30 Barcan, above n 6, 103.
migrants spurred the State and the churches to work more closely together to overcome the perceived evils that this entailed.31

In education, this manifested in increased State support for denominational schools and decreased support for National schools. Upon separation from New South Wales, Superintendent La Trobe did not establish a National Board to oversee the Government schools. Instead, he handed control of these schools to the Denominational School Board.32 While this arrangement did not last long, it set the tone of the relationship between the Government schools, the denominational schools and the State. Even after a National Board was established, the Board and the Government schools it supervised remained the poor cousins to the Denominational Board and its schools.33 The lack of support for Government schools led to three attempts to abolish them altogether. Despite this, they survived.34

The eventual creation of the Single Board system in Victoria was largely due to a change in public sentiment, which shifted over time to support State-run secular education.35 As the population spread out as a result of the gold rush, the need to unify the two school systems to prevent inefficiencies became more apparent.36 This was achieved via the Common School Act 1862 (Vic).37

The last of the Dual Board colonies to move to the Single Board system was New South Wales. In New South Wales, the delay was the result of political instability. As early as 1855, a Select Committee recommended the institution of a Single Board system. The Committee condemned the Dual Board system as inefficient and the conditions of the denominational schools in particular as inadequate. However, no action was taken to reform the school system.38

32 Austin, *Australian Education 1788–1900*, above n 8, 120.
33 Ibid, 121–124.
35 Austin, *Australian Education 1788–1900*, above n 8, 126.
37 Clause 5 *Common School Act 1862* (Vic).
38 Barcan, above n 6, 82–85.
Over the next 11 years, there were at least 10 further attempts to reform education in New South Wales. Much of the failure of these attempts can be attributed to the political instability of the colony. In this climate, few politicians were willing to seriously tackle a divisive issue such as education reform, despite the fact that the need for reform was growing more evident. On 1 January 1866, political opponents James Marks and Henry Parks formed a coalition, which finally created the political stability needed to tackle educational reform. In September 1866, the New South Wales Parliament finally passed the Public Schools Bill 1866 (NSW), which abolished the Dual Board system and replaced it with a Single Board system.

6.3.1.2.2 The Circular Route

Tasmania and Western Australia took a very different path from the eastern mainland colonies in their journey to a Single Board system of education. Neither colony had to deal with the creation and collapse of the Church and Schools Corporation; nor did they inherit the Dual Board system created in New South Wales. Despite this, Tasmania and Western Australia both eventually developed a single system with features similar to that in place in the eastern mainland colonies. However, the journey and the resulting change in the legal relationship between the State and religion in relation to education were very different.

In the eastern mainland colonies, the creation of the Single Board system increased State control over religion in education by controlling both creation and the content of education provided in church-run schools. In contrast, in Tasmania and Western Australia, the creation of Single Board-style education systems was the result of the re-introduction of State funding to denominational schools. They were also both created as a compromise to appease the competing interests of the Church of England and the Roman Catholic Church. As a result, the effect of the creation of the Single Board-style system of education in Tasmania and Western Australia increased the legal relationship between the State and religion rather than decreased it.

Tasmania reached the solution of a Single-Board-style system of education before the eastern mainland colonies. The first step in Tasmania’s journey towards the Single

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40 Ibid, 11; Austin, Australian Education 1788–1900, above n 8, 109–112.
41 Austin, Australian Education 1788–1900, above n 8, 117; Barcan, above n 6, 111–112.
42 Public Schools Act 1866 (NSW) s. 1–6; Austin, Australian Education 1788–1900, above n 8, 118–119.
43 See 6.3.1.1.
Board-style system came in 1839 under Governor Franklin, with the establishment of Tasmania’s first formal system of education. Unlike Governors Bourke and Gipps in New South Wales,44 Governor Franklin was successful in establishing a single State-run system of education based on the British and Foreign Schools System. In addition to establishing a single system of education, this effectively removed State funding to denominational schools.45 All schools receiving State funding were now Government-run. Had this innovation lasted, Tasmania would have been the first colony to remove funding to denominational schools.

Almost immediately, this new State-run system of education came under attack first from competition from the new Roman Catholic schools and more influentially from the Church of England hierarchy, who objected to the British and Foreign Schools System’s non-denominational nature.46 The conflict continued to increase until in May 1845, the Colonial Secretary ordered an inquiry into the state of education in Tasmania.47 Despite the fact that the inquiry concluded that the state of Government schools was not as bad as had been reported by the Church of England hierarchy, the Colonial Secretary ordered the Governor to allocate funding to denominational schools.48 This both ended Tasmania’s experiment with a single State-run education system and created its Single Board-style system of education. However, it is important to note that this step in the journey towards the eventual creation of a secular State education system was happening in the opposite direction to that in the eastern mainland colonies. While New South Wales, Queensland and Victoria decreased the role of the Churches in education, Tasmania had reached the Single Board-style system by increasing the Churches’ involvement. Tasmania was not unique in this experience; Western Australia established its Single Board-style system via a similar process.

Like Tasmania, Western Australia eventually created a Single Board-style system of education. As with Tasmania, the creation of the Single Board-style system followed the removal of State funding to church-run schools and was introduced as a compromise with the Church of England and the Roman Catholic Church. However, Western

44 See 6.2.1.1.
45 Barcan, above n 6, 62–63.
46 Ibid, 63–65; Austin, *Australian Education 1788–1900*, above n 8, 73–78.
48 Ibid, 79; Barcan, above n 6, 65–66.
Australia’s journey to the Single Board-style system was much longer and more convoluted than in Tasmania due to the very different starting position.

For the first 20 years of the Western Australian colony, the Government did very little for education.\textsuperscript{49} It was not until 1848 that the first Government-funded schools were established. Like Tasmania, the system that was initially established was based on State-run non-denominational schools. The aim of creating these schools was to provide an alternative to the existing Roman Catholic schools, which dominated education in the colony despite the fact that they received no Government funding.\textsuperscript{50}

Western Australia’s first attempt at a Dual Board system occurred when Governor Fitzroy provided funding to Roman Catholic schools as well as continuing funding to the existing State schools.\textsuperscript{51} This system was different to the dual systems in all other colonies in that it created a dual system of State schools and one other type of religious school. In all other colonies, multiple denominations received funding for their schools under the dual model.\textsuperscript{52}

This dual Government–Catholic system lasted until 1855, when Governor Kennedy abolished funding to Catholic schools. The main reason given for this decision was that the colony was in a dire financial situation.\textsuperscript{53} In the following years, Roman Catholics continuously lobbied for a return of funding to their schools. These pleas were ignored until the arrival of the Roman Catholic Governor Weld in 1869.\textsuperscript{54}

Upon his arrival in the colony, Governor Weld began to explore options for returning funding to Roman Catholic schools. His initial proposals were met with hostility, especially from Protestants who supported the existing Government schools. Weld’s plans were also frustrated by the first Legislative Council elections, at which most successful candidates opposed making any changes to the existing system.\textsuperscript{55} The Anglican Bishop Hale finally broke the deadlock between the Roman Catholics and the

\textsuperscript{49} Barcan, above n 6, 69–70.
\textsuperscript{50} Ibid, 70; Austin, \textit{Australian Education 1788–1900}, above n 8, 84–88.
\textsuperscript{51} Austin, \textit{Australian Education 1788–1900}, above n 8, 90–93.
\textsuperscript{52} This system was similar to that proposed by Governor Gipps. See 5.2.1.1; See also Barcan, above n 6, 71.
\textsuperscript{53} Austin, \textit{Australian Education 1788–1900}, above n 8, 144–150.
\textsuperscript{54} Ibid, 151.
\textsuperscript{55} Ibid, 151–154.
Protestants by proposing that rather than giving funding to just Roman Catholic and Government schools, the funding was given to all denominational schools. Governor Weld accepted this suggestion and the Legislative Council passed the *Elementary Education Act 1871* (WA).  

Like Tasmania, the compromise in Western Australia, which created its Single Board-style system of education, saw an increase in the legal relationship between the State and religion in relation to education. Church-run schools, which had either previously had their funding removed, such as the Roman Catholic schools, or had never received any funding at all, now received State funding alongside the State-run schools. Despite the different changes in the legal relationship brought about by the creation of the Single Board system in the various colonies, in all cases it was the penultimate step before the creation of a State-run secular system of education.

Before turning to consider the creation of secular education in these colonies, the experience in South Australia needs to be considered. South Australia was the first colony to finally abolish aid to denominational schools.

6.3.1.2.3 Another Path

South Australia took a very different path to all other colonies. It was neither a Dual Board colony, nor did it have a tug-of-war between the denominational schools and Government schools. Further, unlike the other colonies, the form that education was going to take was planned from the start. In 1836, the same year that the colony was settled, the South Australian School Society was founded in order to provide funding to schools in South Australia. This funding was to come from private subscriptions rather than the Government, and the schools were to be non-denominational. The society opened its first school on 28 May 1838. From the start, South Australia showed a preference for a limited relationship between the State and religion in the field of education; the plan was that both should be excluded.

One reason that South Australia was so different from the other colonies was the character of the early colonists. The majority of those who initially settled in South Australia believed in civil liberty, equality for all religions and voluntarism. Many were

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56 Ibid, 154–156.
57 Barcan, above n 6, 71–72.
religious dissenters and non-conformists. Thus, they believed that education should be non-denominational, voluntary and supported by voluntary subscriptions. However, the reality of colonial life did not live up to the ideal. In August 1843, the Society’s first school became private, and as the years progressed, it became increasingly apparent that Government funding would be needed to support both churches and schools.

In 1846, the newly appointed Governor of South Australia, Governor Robe, announced a plan to fund both churches and their schools. The new plan created controversy within the colony, with many churches debating internally whether they should accept the funding on offer. The controversy and confusion lasted only a few years. The election in 1851 was dominated by the issue of whether the State should fund religion, including religious education. Those in support of abolishing State funding to religion won the election, and at the end of the first week of sittings, the newly elected Legislative Council refused to renew State grants to the churches. Later in the same year, a Select Committee on education recommended the abolition of funding to denominational schools and suggested funding only those schools that provided ‘good secular instruction based on the Christian religion, apart from all theological and controversial differences on discipline and doctrine and no denominational catechisms shall be used’. With the adoption of the Select Committee’s recommendations, South Australia became the first colony to abolish all funding to church-run schools.

As with the other colonies, the Government-run schools funded by the State in South Australia were not yet secular in nature. The funding was to go to schools that provided ‘good secular instruction based on the Christian religion’. The real difference from the other Colonies was that denominational schools were excluded from State funding. With the establishment of their Single Board systems of education, the other colonies had taken another important step in the journey towards a State-run system of secular education; however, their systems still funded not only Christian education, but also denominational education.

58 Austin, *Australian Education 1788–1900*, above n 8, 93–96.
59 Barcan, above n 6, 72; Austin, *Australian Education 1788–1900*, above n 8, 93–98.
60 Austin, *Australian Education 1788–1900*, above n 8, 98–100.
65 Ibid, 102, 156–160.
6.3.2 The Last Step on the Journey

The final step on the journey to State-run secular education systems for all colonies was the creation of a truly secular education system and, with the exception of South Australia, the final removal of all funding to denominational schools. After funding had been removed in each colony, it was not re-introduced for over 70 years.

The first colony with a Single Board system to remove funding from denominational schools was Victoria, which removed all Government funding to church-run schools on 1 January 1872. The other colonies followed and, by 1895, all colonies had abolished State funding to denominational Schools. The relationship between the State and religion in relation to education had been on a journey towards secular education since the collapse of the Church and Schools Corporation in the 1830s.

A number of factors contributed to the eventual removal of State funding to church-run schools. While no single factor can be said to have caused this important change in the legal relationship between the State and religion in relation to education, three of the most important factors include the public’s changed attitude towards the role of religion in society, changed views regarding who was responsible for education, and increased sectarian tension between Protestants and Roman Catholics. When taken together, these factors produced the necessary catalyst for the State to take the final step towards a State-run secular education system and to remove State funding from all church-run schools.

6.3.2.1 Change in Public’s Attitude Towards Religion

The significant change that had taken place in the public’s attitude towards religion cannot be underestimated as a factor that led to the creation of secular education systems in the Australian colonies. In the early colony, education was seen as a way to save children from the degradation of their parents. The method of attaining this salvation was through Christian religious education. By the 1870s and 1880s, attitudes regarding the place of religion had changed significantly. The changed attitude of the public in relation to religion can be seen in how Victoria responded to a situation that

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66 Barcan, above n 6, 133.
67 Ibid, 151, 175, 197; Michael Cathcart (ed), Manning Clark’s History of History of Australia (Melbourne University Press, 1993) 333; see Public Instruction Act 1880 (NSW) s. 7, 17 and 18; Education Act 1972 (Vic) s. 10 and 12; Education Act 1875 (SA); Education Act 1885 (Tas); Education Act 1875 (Qld) s. 12, 13 and 22; Elementary Education Act 1871 (WA) s. 24; Assisted Schools Abolition Act 1885 (WA).
68 See 4.3.2.
had led to the increased involvement of religion in education in the early New South Wales colony.

In Victoria, a dramatic increase in the number of school-aged children was one of the factors that led to education reform. ‘Hordes’ of idle children were seen on the streets of Melbourne and other colonial cities. To policy-makers, this was a deplorable situation that would lead to an increase in crime and a disruption to society. As in the early colony, it was the parents who were to blame for this deplorable state of affairs. Unlike the early colony, the solution was not religious education but compulsory education.  

The religious education of children was now seen as the responsibility of the churches and the parents.

In previous decades, the solution may have been to increase funding to the denominational schools and churches. Instead, at the very time that there was a dramatic increase in the child population, Victoria removed funding to denominational education and began the process of making education in State schools free and compulsory.

6.3.2.2 Who Should be Responsible for Education?

Despite these changed notions of the place of religion in education, religion was not excluded from Government schools. All of the colonial Education Acts of the 1870s–1890s provided for at least some form of religious instruction. The change in beliefs about the place of religion in education was more than that religious instruction should be undertaken by someone other than the school master. The change also involved a change in understanding about the institutions that should be responsible for education. In the early colony, the Church of England, and later the other Christian denominations, saw one of their major roles as being the education of children. The State was happy for them to occupy this role to such an extent that no real provision was made for education with the arrival of the First Fleet. By the 1870s and 1880s, this attitude had changed dramatically. There was now a belief that the State was responsible for the education of children, and the experience of the past few decades had shown colonial politicians that the denominational system was inefficient. Politicians and the community more

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70 Victoria, Parliamentary Debates, 12 September 1872, 1344, quoted in Barcan, above n 6, 132.

71 Bessant, above n 69.

72 Austin, Australian Education 1788–1900, above n 8, 168.

73 See 4.3.2.
generally now believed that only the State was capable of providing an effective
education system for the colonies’ children.74 The relationship between the State and
religion was as much about who provided education as it was about whether education
should be secular or religious.

6.3.2.3 Sectarian Tensions
Increased sectarian conflict also influenced the removal of Government funding to
denominational schools. As discussed above,75 the inability of the various religious
denominations to agree had led to the creation of public schools in the first place. The
continuing sectarian conflict made the next step of removing support from
denominational schools almost inevitable.

In 1864, Pope Pius IX published his Syllabus of Errors.76 Among many other perceived
evils of the modern world, the Pope condemned Roman Catholic support of mixed
Christian schools run by the State.77 In the decades following the publication of the
Syllabus of Errors, the Roman Catholic hierarchy in Australia became increasingly
militant in their opposition to the creation of any single mixed school system and
increasingly vocal in their calls for the support of their own schools. The difficulty
faced by the Roman Catholic hierarchy was that it had supported mixed schools in the
past and many lay people sent their children to Government schools.78 To try and
counter these issues, the Australian Roman Catholic bishops cajoled and encouraged
their followers to send their children to Catholic schools. Some bishops went so far as to
threaten to ex-communicate any parents who did not send their children to a Roman
Catholic school.79 As Roman Catholic militancy on the issue of education grew, so too
did Protestant resistance to Roman Catholic calls for their own Government-funded
school system.

The sectarian conflict over education was made worse by the fact that the Syllabus of
Errors had also condemned liberal values held by many Protestant leaders, including
political leaders in Australia. In theory, these liberal values would not allow politicians

74 Austin, *Australian Education 1788–1900*, above n 8, 177.
75 See 6.2.1.1.
77 Pope Pius IX, *Syllabus of Errors* (Vatican, 1864) error 45
78 Austin, *Australian Education 1788–1900*, above n 8, 193–204.
79 ibid, 203.
who held them to discriminate against a religious group because of their beliefs. These beliefs would in theory have supported the continued funding of Roman Catholic schools because of their belief that they could not attend mixed schools. Austin argues that as Roman Catholic militancy on the issue of education grew, Protestants, including those who held liberal beliefs, began to feel under attack. They also saw the threats of the bishops towards their own followers as little more than tyranny. In response to this attack, the Protestant political leaders removed funding from denominational schools, including Roman Catholic schools. It could be argued that the Education Acts of the 1870s–1890s were partially motivated by a desire to prevent the Roman Catholic assault on liberal values from being funded with the Government’s own money.80

By the turn of the century, all of the colonies had taken the final step on the journey towards a State-run secular education system by removing State funding to denominational schools. All education funded by the State was now run by the State along secular lines;81 the State and religion effectively now had no legal relationship in relation to religion in education. The journey towards this position had been one of incremental steps. While each individual change may not have been revolutionary, together they combined to transform both the education system and the legal relationship between the State and religion. In the 100 or so years since the arrival of the First Fleet, the education system in the Australian colonies had transformed from a system of effectively religious education run by the Church of England clergy with some support from the State82 to a system of secular education run and funded by the State.

While the preceding 100 years had been a period of great change, over the next 70 years, the legal relationship between the State and religion remained relatively stable. For 70 years, the State ran and funded only its own schools, and the Churches were left to their own devices.

80 Ibid, 196–197.
81 However, all of the colonial Education Acts permitted a small number of hours each week for segregated voluntary religious instruction.
82 See 4.3.2.
6.3.3 A Period of Stability

In 1895, Western Australia became the last colony to remove State funding to Church-run schools. As discussed above, this effectively severed the legal relationship between the State and religion in relation to education, which led to a period of stability in that relationship.

The preceding 100 years had been a period of constant change in the legal relationship between the State and religion in relation to education. While there had been some lengthy periods between actual legal change, such as the 15 years between the collapse of the Church and Schools Corporation and the creation of Fitzroy’s Dual Board system, and 18 years between the creation of Fitzroy’s Dual Board system and the creation of a Single Board system in New South Wales, these were not periods of stability in terms of the issues of the place of religion in education. In the case of the 15-year gap between the collapse of the Church and Schools Corporation and the creation of the Dual Board system, Governors Bourke and Gipps attempted and failed to establish their own systems of education.83 Further, in the case of the gap between the change from the Dual Board system to the Single Board system in New South Wales, there were 11 failed attempts at reform.84

In contrast, the next 70 years85 were a period of stability both in terms of actual legal change and the issue of the legal relationship between the State and religion in relation to education. Throughout this period, the State continued to run and fund only its own schools. Church-run schools—especially Roman Catholic schools—continued to exist, but they received no support from the State.86 As noted in Chapter Five87 and Chapter Seven, a similar period of stability occurred in both of the other broad case studies considered in Part Two. One potential reason for the period of stability in relation to religion in education may be that, as discussed in Chapter Five, the population was relatively homogeneous in terms of religious belief.88 The period of stability may also

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83 See 6.2.1.1.
84 See 6.3.1.2.1.
85 The 70 years is calculated from the removal of State funding in Western Australia in 1895 to the introduction of the School Science Laboratories scheme in 1964. For colonies that removed State funding to Church schools earlier, the gap is even larger: 92 years for Victoria and 113 years for South Australia.
86 For a discussion of Church schools, including Roman Catholic schools, during this period, see Austin, Australian Education 1788–1900, above n 8, 200–202; Barcan, above n 6, 141–143.
87 See 5.1.
88 See 5.1.
have come to an end for similar reasons. As will be discussed below, the outbreak of World War Two and the resulting population changes contributed to the re-introduction of State funding for church-run schools.\textsuperscript{89} However, this thesis focuses on legal change; thus, a detailed examination of the reasons for this period of stability is beyond its scope. Regardless of the reasons, the issue of the place of religion in education must have appeared settled. However, as is apparent from the existence of the NSCP, as discussed in Chapter Three,\textsuperscript{90} and the existence in modern Australia of a dual system of education,\textsuperscript{91} this stability did not last forever. As will be discussed below, in 1964 the Federal Government re-introduced State funding for church-run schools. While the initial funding was small in scale, its introduction was the first step in a journey back towards a significant relationship between the State and religion in relation to education.

The existence of the 70-year gap, the re-emergence of the issue of the place of religion in education and the legal change in the relationship between the State and religion that resulted from the creation of the School Science Laboratories Scheme in 1964 is a stark example of the macro-pattern of re-emergence seen across all three broad case studies.\textsuperscript{92} As indicated in Chapter One, in all three case studies there is a pattern of re-emergence. That is, the issue of the relationship between the State and religion in relation to that particular case study will re-occur time and again, leading to multiple legal changes in the relationship between the State and religion over time. Thus, there is a pattern of change, and any single change is not just the product of one circumstance, but should be seen as just one example in a pattern of change over time. While this may be obvious in hindsight, at the time of a period of great stability in the legal relationship, such a pattern may be obscured. It is likely that during the 70 years of stability, both the State and religion believed that the issue of the legal relationship between the State and religion in relation to education was settled and that there would be no further changes in the legal relationship. However, as will be demonstrated below, the issue of religion in education did re-occur, resulting in legal change in 1964.

\textsuperscript{89} See 6.4.2.1 and 6.4.2.2.
\textsuperscript{90} See 3.3.
\textsuperscript{91} See 6.1.
\textsuperscript{92} See 1.2.2.2.
6.4 First Step: Capital Grants

For over 70 years, the legal relationship between the State and religion in relation to education remained unchanged. This period of stability came to an end in the 1960s, when the issue of State funding for church-run schools re-emerged, leading to the creation of the School Science Laboratories Scheme. This Federally funded scheme became the first step in the return journey towards an increased relationship between the State and religion in relation to education. While this thesis does not argue that a complete return to a church-run system of education is either likely or possible, it does argue that the incremental changes in the legal relationship between the State and religion that have occurred since the re-introduction of State funding for religion reversed many of the legal changes that led to the State-run secular education system that existed at Federation. This reversal has had three steps: first, the re-introduction of State funding via capital grants schemes; second, the creation of per-capita grants schemes; and third, the introduction of a State-sponsored religious program into otherwise secular State schools. The remainder of this chapter will examine the first two steps. The third step is the creation of the NSCP, which was examined in Chapter Three.93 When the NSCP is analysed alongside the programs discussed in this chapter, it can be seen as just the next step in a journey back towards an increased relationship between the State and religion in relation to education that began in the 1960s with a small-scale Federal funding scheme for School Science Laboratories.

As with the journey towards a State-run secular education system, the reasons for the return journey are complex. Perhaps most importantly, in the second half of the twentieth century Australia was a very different place compared to when the colonies had established the secular education system. Also important was the political situation in the 1960s, with the newly formed Democratic Labor Party (DLP) effectively holding the balance of power.94 Given the DLP’s Roman Catholic supporter base, as well as the changed attitudes towards Roman Catholicism and the crisis facing the Roman Catholic education system, the time was ripe to re-introduce funding to religious schools.

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93 See 2.3.
6.4.1 School Science Laboratories Scheme (SSLS)

In the lead-up to the 1963 Federal election, Prime Minister Robert Menzies announced the creation of a new funding scheme for both Government and non-Government schools. Menzies announced:

… there is a special need for the improved science teaching in the secondary schools, if we are to keep in step with the march of science.

As some recognition of this need, we will make available £5M. per annum for the provision of building and equipment facilities for science teaching in secondary schools. The amount will be distributed on a school population basis, and will be available to all secondary schools, Government or independent, without discrimination.95

In just a few short sentences, Menzies swept away 70 years of opposition to the direct funding of non-Government schools. While the amount of funding was targeted and relatively small, it was an important first step in the Federal Government’s funding of education for two reasons. First, it was the Federal Government’s first foray into the direct funding of either Government or non-Government schools. The Federal Government had previously maintained that it had no role in the direct funding of schools.96 Secondly, and more importantly for this thesis, it was the first time since the establishment of the principle of ‘free, compulsory and secular’ education that a Government of any level had created a scheme to provide direct funding to non-Government schools.

On 21 May 1964, the States Grants (Science Laboratories and Technical Training) Act 1964 (Cth) was passed by the Commonwealth Parliament in fulfillment of Menzies’ election promise.97 The SSLS allocated £5 million per year of Commonwealth funds to the building and equipping of science laboratories in Government and non-Government, including religious, secondary schools.98

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96 See 6.4.2.
98 The provisions relating to the SSLS can be found in section 2 of the Act. The Act also set up a scheme that provided £5 million per year for the funding of technical training (section 3).
6.4.2 Reasons for the School Science Laboratories Scheme

As referred to above, the creation of the SSLS is remarkable because it broke with several longstanding conventions regarding the relationship between the State and religion; that is, that the States fund education rather than the Federal Government, and that only Government secular schools would receive funding. As late as November 1962, Prime Minister Menzies maintained that the Commonwealth could not and would not provide funding to schools, including non-Government schools.99 In 1960, in answer to the question:

… whether his Government favours the provision of financial assistance for denominational schools throughout the Commonwealth?100

Menzies replied simply:

The honourable [sic] member puts to me a question that is outside the jurisdiction of this Government.101

Given this, the question that has to be answered is why did the Menzies Government change its mind? As alluded to above, the answer is complex and involves a number of factors, including a crisis in the education system, political capital that could be gained by the creation of the scheme and the changed nature of Australia’s attitude towards religion.

6.4.2.1 A Crisis in (Catholic) Education

One important factor that contributed to the timing of the introduction of the SSLS was a crisis in funding facing both the Roman Catholic school system and the Government school system in the 1950s and 1960s. The 1950s saw a boom in the number of school-aged children as a result of the post-War baby boom, post-War migration, higher school retention and higher school-leaving ages.102 This created immense pressure on the education systems.103

100 Commonwealth of Australia, Parliamentary Debates, House of Representatives, 30 August 1960, 514 (Mr James).
101 Ibid (Robert Menzies, Prime Minister). Arthur Calwell (Leader of the Opposition) reminded Menzies of this answer during the debate on the States Grants (Science Laboratories and Technical Training) Act 1964 (Cth); see Commonwealth of Australia, Parliamentary Debates, House of Representatives, 14 May 1964, 1930.
102 Wilkinson et al, above n 97, 22.
The Roman Catholic education system was under particular pressure. In the period 1948–1960, the Catholic school system across Australia saw a 98 per cent increase in enrolments.\(^\text{104}\) The Catholic School system was also facing increased wages, as teachers in their schools now demanded to be paid the same wages as teachers at Government schools. This was exacerbated by a shift away from teachers who were members of religious orders towards the use of lay teachers.\(^\text{105}\)

The crisis facing the Roman Catholic education system was brought to the public’s attention when the Auxiliary Bishop of Canberra-Goulburn, John Cullinane, closed all Roman Catholic schools in his diocese on 16 July 1962. The dramatic closures were in response to demands by the New South Wales Health Authorities that the toilet facilities at Our Lady of Mercy Preparatory School be improved and expanded. The school did not have the funds and resented being told how to spend its limited resources. As a result of meetings with parents at other Roman Catholic schools in the diocese, a decision was made to close all schools in solidarity with Our Lady of Mercy Preparatory School and to attempt to enrol the children in the local Government primary schools.\(^\text{106}\) While the protest was short-lived, it garnered significant attention from the press and the public more generally.\(^\text{107}\) The Goulburn closure, along with the more general crisis facing education, meant that more funding was needed; however, changes to the tax system in 1942 meant that the States and Territories simply did not have the funds.

Prior to 1942, both the States and the Commonwealth collected income tax. In 1942, the Commonwealth wanted to increase the tax it collected to help fund the World War Two effort. Simply increasing the percentage collected by the Commonwealth would have placed an unequal burden on citizens in different States and had drastic political implications because of the large increase needed to adequately fund the War effort. To try and avoid these difficulties, the Commonwealth used a number of heads of power in the Constitution and effectively excluded the States from this area of revenue.\(^\text{108}\)

\(^{104}\) Barcan, above n 6, 316–317.

\(^{105}\) Wilkinson et al, above n 97, 40; Barcan, above n 6, 368–371.

\(^{106}\) Of the 2,070 Catholic school children in Goulburn, 640 were enrolled at the State primary and secondary schools.

\(^{107}\) Wilkinson et al, above n 97, 26–29.

As a result, the States now had less revenue but needed more funds to cater for the increasing number of students in their education systems. In the end, the Federal Government responded to the crisis by introducing the SSLS. As with Governor Fitzroy’s Dual Board system of education, the SSLS did not solve the crisis in the existing system of education because it funded just one small area of education. However, as with Fitzroy’s Dual Board system, it was an important first step because it set the precedent that the Federal Government could fund education and religious schools, just as Fitzroy’s system had set the precedent that there could be State-run schools.

6.4.2.2 Changed Attitudes Towards Religion and Education

At the end of the nineteenth century, one of the factors that contributed to the removal of State funding of church-run schools and the creation of a State-run secular system of education was a change in the community’s attitude towards religion in education.109 Public attitudes had changed again by the 1960s, and now a reduction in sectarian conflict contributed to the re-introduction of State funding for church-run schools.

Demographic change was an important contributor to this change in public sentiment. In the 70 years since the removal of funding to religious schools, the religious demographics of Australia had shifted. Importantly, Roman Catholics no longer made up a small lower class.110 At the time of the 1961 census, there were 2,620,011 Catholics111 in Australia compared to 3,668,931 Church of England adherents.112 While they were not yet a majority—a feat that Roman Catholics achieved in the 1986 census113—they were well on their way and at the very least made up a sizable, growing and important minority.114

The sentiments of non-Roman Catholics towards the State funding of non-Government schools had also shifted in the 70 years since the removal of State funding to church-run schools. Polls conducted around the time that the SSLS was introduced show that there

109 See 6.3.2.
110 Barcan, above n 6, 319.
111 This figure is obtained by combining those who described themselves as ‘Catholic’ and those who described themselves as ‘Roman Catholic’ on the census form.
112 Gill, above n 94, 276.
114 Barcan, above n 6, 319; Gill, above n 94, 275–276.
was support for the introduction of State funding for non-Government schools. In all bar one Gallop polls conducted in this period, there was an absolute majority in favour of the re-introduction of such funding. Given that Roman Catholics were still a minority, this indicates that Protestants were now prepared to support the funding of religious schools even though the majority of any such funding would go to Roman Catholic schools.\textsuperscript{115}

Further support for the changed attitude of Australians towards the issue of religion can be found in the ecumenical movement that was underway at the time.\textsuperscript{116} A movement such as the ecumenical movement, which required cooperation between the various denominations of Christianity, would have been unthinkable in earlier decades. As discussed, sectarian rivalry was a very real problem in Australia during the nineteenth century. The very existence of the ecumenical movement showed just how far Christian Australians had come in terms of their ability to accept the beliefs of other Christians.

\textbf{6.4.2.3 Political Capital}

Another important factor in the timing of the creation of the SSLS was the political capital to be gained by the Menzies Liberal Government as a result of creating the scheme. At the time the scheme was introduced, the Menzies Government was able to exploit two political factors to its own advantage. First, the creation of the SSLS enabled the Menzies Government to highlight significant internal conflict within the Australian Labor Party (ALP). Secondly, the Scheme enabled the Menzies Government to garner the support of the Democratic Labor Party (DLP) and its predominantly Roman Catholic supporter base.

\textbf{6.4.2.3.1 The ALP}

Not long before the announcement of the 1963 election and therefore the announcement of the SSLS, the State Labor Government in New South Wales had been engaged in a very public argument with the Federal branch of the Labor Party on the issue of funding schemes for students at non-Government schools. There was great political capital to be gained by the Federal Liberal Party in offering a funding scheme that the Labor Party could not.

\textsuperscript{115} Gill, above n 94. In 1961, 82 per cent of non-Government schools in Australia were Roman Catholic; see ABS, \textit{Year Book of the Commonwealth of Australia 1963} (Commonwealth Bureau of Census and Statistics, 1963) 729.

In 1963, the New South Wales State Labor Conference recommended that the NSW State Labor Government fund science laboratories in all schools and provide bursaries for secondary school students. However, these policies conflicted with the national ALP policy adopted in 1957.117 With the next national conference just two months away, the New South Wales branch of the ALP decided to wait and see how the ALP National Conference and the National Executive would respond to its proposed funding program. At the 1963 National Conference, direct funding of non-Government schools was ruled out.118 However, the Conference supported a system of scholarships for students of both Government and non-Government schools, provided that the payment was made directly to the student.119 This meant that the planned NSW proposed science classroom scheme was no longer permissible. However, the NSW Labor Government interpreted the second policy on education as permitting its new bursary scheme. The Federal ALP Executive took a different view.120 The problem was that the National Labor policy permitted the payment of bursaries directly to students, while the NSW scheme paid the bursary to parents, which in effect reimbursed them for fees already paid to non-Government schools.121

The NSW State Labor Party and the Federal Labor Executive were at an impasse. After two hurried negotiations, a settlement was finally reached that allowed the New South Wales Government to keep its proposed bursary scheme.122 While the bursary scheme remained, it did so only after very public and fraught negotiations between the NSW State Labor Party and the National Executive.123 As The Sydney Morning Herald editorial noted, the Federal Executive was made to look ‘remarkably foolish’.124

119 Albinski, above n 117, 18.
120 Whitlam, above n 99, 298.
123 Albinski, above n 117, 20–22.
Not long after this very public dispute between Federal and State Labor, the then Liberal/Country Prime Minister Menzies announced an early election for 30 November 1963. The Liberal/Country Party won the election. While education was not the only factor in the election, the issue served to highlight internal divisions within the ALP as well as the so-called ‘36 Faceless Men’ of the Labor Executive.

6.4.2.3.2 The DLP

As well as highlighting internal division within the ALP, the announcement of the SSLS enabled the Liberal Party to garner support from the DLP. The very existence of the DLP and its particular position in the political landscape of the 1960s played an important role in the timing of the re-introduction of State funding to church-run schools.

The DLP split from the ALP in 1954–1955. While the DLP had little parliamentary representation, it effectively held the balance of power via its flow of preferences to the Liberal Party. Prior to the 1963 election, the Liberal Government held the lower house of Federal Parliament by a majority of just one vote. Perhaps more importantly, the Liberal Party had attained many of the seats it held courtesy of the DLP’s second preference flows. In order to retain Government, the Liberal Party needed to retain the flow of the DLP’s second preferences. One of the DLP’s key policy issues was education. It was particularly concerned by the low level of funding. At the 1963 election, the DLP’s policy on education was to immediately increase Commonwealth assistance to all forms of education. By announcing the SSLS and extending it to cover both Government and non-Government schools, including Roman Catholic schools, the Liberal Party was able to offer the DLP a way to achieve one of its policy objectives. The Scheme would also have appealed to the DLP voters, who were predominantly Roman Catholic.

125 Whitlam, above n 99, 299.
127 Wilkinson et al, above n 97, 31. This split also led the ALP to change its policy regarding education from one that supported the funding of non-Government schools to one that did not; see Whitlam, above n 99, 297.
128 Jupp, above n 94, 83.
129 ‘DLP Puts Foreign Policy and Defence in Forefront’, The Age, 8 November 1963, 6–7.
130 P Gill, above n 94, 274; ‘DLP Puts Foreign Policy and Defence in Forefront’, above n 130, 6–7.
131 Gill, above n 94, 282.
During the debate surrounding the SSLS, there was no suggestion from the Federal Liberal Government or Prime Minister Menzies that the Scheme heralded the beginning of a wider funding program for either Government or non-Government schools. They did not see it as the first step in a return journey back towards a close relationship between the State and religion in relation to education. As far as the architects of the Scheme were concerned, it was a one-off program and the Federal Government had no intention to further interfere in the arena of education. Despite this, the SSLS holds the historical position as the first step in the journey towards greater Commonwealth involvement in education generally and funding of non-Government schools specifically.

6.4.3 The School Libraries Scheme
The next incremental step in the journey towards an increased relationship between the State and religion in relation to education occurred in 1968 with the creation of the Federal School Libraries Scheme. The Scheme provided $27 million over three years, which was distributed along the same lines as the SSLS.

Unlike the SSLS, the introduction of the School Libraries Scheme for secondary schools was not a surprise. The Scheme was preceded by extensive lobbying from interest groups and public support for such a program. It also made further funding seem more likely. The Federal Government had now taken two tentative steps along the return journey towards the re-introduction of ongoing funding for religious schools. The SSLS, which had been a point, had now become a line that could turn into a pattern of Federal funding to schools.

6.4.4 Ongoing Capital Grants
So far, direct funding to non-Government schools had been via non-recurring grants. The School Libraries Scheme was specified to run for just three years; in theory, the

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133 See Commonwealth of Australia, Parliamentary Debates, House of Representatives, 14 May 1964, 1971 (Kim Beazley) and 1950 (Malcolm Mackay).
134 Don Smart, Federal Aid to Australian Schools (University of Queensland Press, 1978) 78.
135 States Grants (Secondary school Libraries) Act 1968 (Cth).
136 Commonwealth of Australia, Parliamentary Debates, House of Representatives, 14 August 1968, 142 (Malcolm Fraser, Minister for Education and Science).
137 Smart, Federal Aid to Australian Schools, above n 134, 73.
SSLS could have been phased out at any time. The return journey to an increased relationship between the State and religion in relation to education was very much in its infancy; the journey had barely begun and could turn back at any time. These schemes were far from being a permanent legal relationship that non-Government schools could rely on.

Another important step in the journey—the creation of ongoing capital funding for non-Government schools—occurred in 1973. In 1972, the Federal Government had created a capital grants scheme for Government schools. The following year, the Federal Government extended it to apply to non-Government schools as well. Non-Government schools now had a more reliable and flexible source of capital funding—even if they already had a suitable science block and library, they could now apply for funding for other urgent capital works.

This step on the return journey to a relationship between the State and religion in relation to education is arguably overshadowed by an even more significant step—the creation of per-capita grants for non-Government schools.

### 6.5 The Second Step: Per-Capita Grants

The second step in the journey towards an increased relationship between the State and religion in relation to education, and the next important legal change in that relationship, was the creation of a system of per-capita grants for non-Government schools. This step created three important legal changes in the relationship between the State and religion. First, for the first time, it created per-capita rather than capital grants. Second, the per-capita grants scheme created an ongoing legal relationship between the State and religion that non-Government schools could rely upon as a source of funding. Finally, the legal relationship that was created was exclusively between the State and non-Government schools.

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139 According to the Karmel report, these schemes were due to finish on 31 December 1974 and 30 June 1975 respectively; see Interim Committee for the Australian Schools Commission, *Schools in Australia: Report of the Interim Committee for the Australian Schools Commission* (Australian Government Publishing Service, 1973) 6.

140 *States Grants (Capital Assistance) Act 1971–72* (Cth).

141 Commonwealth of Australia, *Parliamentary Debate*, House of Representatives, 11 May 1972, 2456 (William McMahon); Interim Committee for the Australian Schools Commission, above n 139, 40.

The amount of recurrent funding and the way in which the amount received by each school was determined changed several times in the decades following the initial introduction of per-capita grants. Initially, the funding was a set dollar amount per student, which was changed to a percentage per student before being completely re-invented as a system of funding based on ‘need’. While each of these funding modes have different implications for the relationship between the State and religion in relation to education and are separate and important steps in the journey, the most important step was the initial creation of recurrent per-capita-based funding. While important, the changes and amendments are simply different ways of achieving the same aim of ongoing funding of religious schools by the State. This ongoing funding of non-Government schools has continued into modern Australia and is arguably the basis of modern Australia’s dual system of education.\textsuperscript{143} The most recent examination of the way in which funds are allocated to schools, including non-Government schools, is the Gonski Review.\textsuperscript{144} At the time of writing, the recommendations from the Gonski Review are still being considered and negotiated; as such, they do not form part of this thesis.\textsuperscript{145}

6.5.1 Creation of Per-Capita Funding

The crisis in Roman Catholic education, as discussed above,\textsuperscript{146} had not abated as a result of the introduction of the various capital works schemes. As Prime Minister Malcolm Fraser pointed out, there was a very real danger of the Government school system being flooded with students if the non-Government schools collapsed.\textsuperscript{147} The solution, and thus the next step in the incremental journey back towards an increased relationship between the State and religion in relation to education, was the introduction of per-capita grants to non-Government schools.

An important aspect of this step in the journey was that it only applied to non-Government schools. The SSLS, School Libraries Scheme and the Capital Funding Scheme had all provided funding to both Government and non-Government schools. The new per-capita grants program only provided funding to non-Government schools.

\textsuperscript{143} See 6.1.
\textsuperscript{145} Ibid.
\textsuperscript{146} See 6.4.2.1.
\textsuperscript{147} Commonwealth of Australia, \textit{Parliamentary Debate}, House of Representatives, 13 August 1969, 186 (Malcolm Fraser).
which were predominantly religious and predominantly Roman Catholic. Prime Minister Fraser specifically rejected any argument that similar grants should be made to Government schools as well. In the Government’s opinion, it already provided over 50 per cent of the States’ recurrent expenditure, and as such, it had already supplied 50 per cent of the funding of Government schools.\textsuperscript{148}

6.5.1.1 Fixed Rate Grants

The first version of the per-capita grants to be introduced was based on a fixed dollar amount per student. In the 1969/70 budget, the Commonwealth Government announced that it would provide per-capita grants to non-Government schools of $35 per primary school student and $50 per secondary school student.\textsuperscript{149} The initial grants were not enough to alleviate the crisis; in 1972, the amount of the per-capita grants was increased to $50 per primary school student and $68 per secondary school student.\textsuperscript{150}

As with previous incremental steps—both in the return journey to an increased relationship between the State and religion in relation to education and in the original journey towards a State-run secular education system—the creation of fixed-sum per-capita grants did not entirely solve the crisis that precipitated the legal change. The small amount and fixed nature of the grants left the schools vulnerable to increased costs if the fixed amounts were not increased each year. At the time, the cost of educating a child in a Government primary school was over $300 per year, and the cost of educating a child in a secondary Government school was over $500.\textsuperscript{151} The per-capita grants to the non-Government schools represented just 17 per cent and 14 per cent respectively of the cost of educating a child.\textsuperscript{152} However, the creation of the fixed-sum grants was an important step that set the precedent of an ongoing legal relationship between the State and religion in relation to education.

6.5.1.2 Percentage-Based Grants

While the creation of fixed-sum per-capita grants had set the precedent of an ongoing legal relationship between the State and religion, without a procedure to increase the

\textsuperscript{148} Ibid, 187 (Malcolm Fraser).
\textsuperscript{150} Commonwealth of Australia, \textit{Parliamentary Debate}, House of Representatives, 9 December 1971, 4435 (William McMahon). At the same time, the Government announced a general capital grants program worth $20 million for Government schools.
\textsuperscript{151} Ibid, 4434 (William McMahon).
\textsuperscript{152} Ibid, 4437 (Kim Beazley Snr).
funding as the costs of providing education grew, the step may have become pointless, as Roman Catholic schools may have still collapsed under the ever-increasing funding costs.

In late 1972, the Federal Government changed the per-capita grants scheme from a fixed dollar amount per student to a percentage. Under the new scheme, grants were calculated at 20 per cent of the average cost of educating a student in a Government primary or secondary school.

The reason given for this change was, as Prime Minister McMahon explained, to provide non-Government schools with ‘assurances for the future’. By tying the per-capita grants to the costs of educating a child in a Government school, non-Government schools were provided with certainty that the current level of funding would be maintained even if the costs of providing education increased significantly. The creation of fixed per-capita grants had created the precedent of an ongoing legal relationship between the State and religion in relation to education—the creation of a percentage-based funding model cemented this relationship as a source of funding that non-Government schools could rely on.

The legal changes in the relationship between the State and religion that had occurred so far from the creation of the SSLS to the creation of percentage-based per-capita funding had reversed the journey undertaken in the nineteenth century back to the equivalent of the Single Board system. There were now effectively two systems of education—one Government and one non-Government—which both received funding from the State.

While the principle of ongoing per-capita funding had been established, the method of determining the amount of funding received by various schools underwent one final change. In the 1970s, the newly elected Whitlam Labor Government changed the system of funding for non-Government schools from a uniform per-capita rate to a system based on ‘need’.

153 See States Grants (Schools) Act 1972 (Cth). The Act also authorised a five-year capital grants scheme that provided grants to both Government and non-Government schools.
156 See Commonwealth of Australia, Parliamentary Debate, House of Representatives, 14 September 1972, 1399–1400 (Malcolm Fraser, Minister for Education and Science).
6.5.2 A ‘Needs’-Based Approach

While the per-capita grants program for non-Government schools introduced by the Fraser Liberal Government is arguably one of the most important steps on the return journey towards an increased relationship between the State and religion in relation to education, it did not last long. In 1972, the ALP, led by Gough Whitlam, defeated the Federal Liberal Government. While the ALP no longer actively opposed State funding to non-Government schools, it did have a significantly different approach to the issue. Rather than favouring uniform per-capita grants to all non-Government schools, the ALP favoured a ‘needs-based’ approach. While in opposition, it had continually championed this position; now that it was in Government, it had the opportunity to put its views into action.\footnote{See Commonwealth of Australia, *Parliamentary Debate*, House of Representatives, 23 September 1969, 1743–1749 (Lance Barnard); Commonwealth of Australia, *Parliamentary Debate*, House of Representatives, 9 December 1971, 4436–4437 (Kim Beazley); Commonwealth of Australia, *Parliamentary Debate*, House of Representatives, 26 September 1972, 1936–1940 (Kim Beazley). The Liberal Government had specifically rejected a needs-based approach to the allocation of funding on the basis that it would penalise schools whose parents and supporters worked hard to improve their schools; see Commonwealth of Australia, *Parliamentary Debate*, House of Representatives, 14 September 1972, 1399 (Malcolm Fraser). For other funding models considered by the Liberal Government, see O’Brien, above n 99, 48–49.}

The creation of a needs-based funding model was a long-lasting and significant step in the journey. As discussed above, per-capita funding for non-Government schools has continued through to modern Australia.\footnote{See 6.5.} The recent Gonski Review of school funding, inter alia, recommended the continuation of a funding model for non-Government schools based on relative needs.\footnote{See Gonski et al., above n 144, xxi (recommendation 4).}

As with all previous steps, the change to a needs-based funding model was an incremental step that built upon the previous steps in the journey. As the last step in the second stage of the journey back towards an increased legal relationship between the State and religion, it built upon the previous steps, such as the implementation of ongoing per-capita grants, the creation of ongoing capital grants and the re-introduction of State funding to non-Government schools. The important change brought about by the change to the needs-based funding model was the shift in emphasis from religion to needs. As will be discussed in more detail below, by determining the amount of funding on the basis of needs, the State shifted the focus from whether Church-run schools
should receive State funding to whether wealthy schools should receive State funding. Before analysing this important change in the legal relationship between the State and religion, this final sub-section will first briefly outline the background to the introduction of the needs-based funding model. This background is included for two reasons. First, as with other legal changes discussed in this thesis, the background is an important element of the pattern of legal change over time. Secondly, the background is included in fulfillment of the secondary purpose of the thesis.

6.5.2.1 The Karmel Report

On 12 December 1972, just 11 days after taking office, Whitlam announced the 11 members of the Interim Committee for the Australian Schools Commission, along with its terms of reference. The terms of reference for the Interim Committee required, inter alia, for the Committee to:

Make recommendations to the Minister for Education and Science as to the immediate financial needs of schools, priorities within those needs, and appropriate measures to assist in meeting those needs...[emphasis added].

The Interim Committee determined ‘need’ on the basis of the amount of resources used by a particular school in conjunction with any special disadvantages suffered by pupils at that school. It used this measure of need to create an index of resources used in a school with a base of 100 as the average resources used in a Government school in Australia. All Catholic parochial school systems scored below 100; however, the scores of non-Catholic non-Government schools varied significantly. While some had resources below the level of Government schools, others had resources significantly above that of Government schools. The Interim Committee split these schools into eight categories based on their score and recommended that each category receive a different level of

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160 See 6.5.2.3.
161 See 1.4.2.
162 Professor Peter Karmel was the Chair of the committee.
163 Interim Committee for the Australian Schools Commission, above n 139, 3.
164 Ibid, 49–50.
165 Ibid, 57.
166 Ibid, Tables 6.1 and 6.3.
funding. It also recommended that grants to schools with the highest level of resources be phased out by 1976.

Following the release of the Karmel Report, the Whitlam Government moved quickly to implement the Interim Committee’s recommendations. However, instead of phasing out funding to the non-Government schools with the highest level of resources, the Cabinet decided to end funding to these schools immediately.

6.5.2.2 The Acts

The Interim Committee’s recommendations, including those relating to the funding of non-Government schools, were put into effect via two Acts: the *Schools Commission Act 1973* (Cth) and the *States Grants (Schools) Act 1973* (Cth). Both Acts had a stormy passage through Parliament. While the Liberal opposition did not reject the principles contained in the Acts, they objected to certain provisions, including the immediate withdrawal of all funds to the wealthiest schools and the method of appointing Commissioners.

The deadlock was broken via a compromise between the Labor Government and the Country Party. The Country Party agreed to cross the floor and support both Bills if the Government was prepared to continue a minimum level of per-capita funding to the wealthiest non-Government schools.

With the successful passage of the *Schools Commission Act 1973* (Cth) and the *States Grants (Schools) Act 1973* (Cth), another important step in the journey towards increased relationship between the State and religion had been taken. The needs-based funding model also signified a side step in the journey, as the debate moved from being about State funding and religious schools to needs and wealthy schools.

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168 Ibid, 71.
169 Ibid.
171 Ibid. 57.
173 Smart, *Federal Aid to Australian Schools*, above n 134, 112.
6.5.2.3 A Change of Focus

In the debate around earlier funding schemes, such as the SSLS, there had been a focus on the crisis faced by Roman Catholic schools. The funding allocated was divided between Government, Roman Catholic and other non-Government schools. As a result, there was a focus on the religious aspect of the problem. Susan Pascoe argued that the transition to needs-based funding shifted the debate from one about State funding to religious schools to one about Government funding to wealthy schools.\textsuperscript{174} The Karmel report repeated the practice of dividing schools into Government, Catholic and other non-Government schools. However, the focus was not so much on funding Government as opposed to non-Government—predominantly Roman Catholic—schools. Instead, the focus was on how much to fund the wealthiest schools compared to the poorest schools.

The change in emphasis is demonstrated by the Hawke Labor Government’s attempt to remove funding from the 50 wealthiest non-Government schools. Over the years of the Liberal Fraser Government, the amount of Federal funding to non-Government schools had increased by 87.2 per cent in real terms, while Federal funding to Government schools had decreased by 24.3 per cent in real terms. There had also been a rationalisation of the categories of ‘need’ from eight to just three.\textsuperscript{175} This, inter alia, had led to a resurgence of the debate about the State funding of non-Government schools.

Just a few months after taking office in 1983, the new Labor Education Minister Senator Ryan announced that funding to the wealthiest non-Government schools would be reduced by 25 per cent.\textsuperscript{176} Prior to the election, the ALP had announced that if it won the election, it would reduce the amount received by the 50 wealthiest non-Government schools over 1984 and 1985, with the implication that funding to these schools would eventually be phased out entirely.\textsuperscript{177} The proposed reduction and potential phasing out of funding to these schools met immediate opposition and was eventually dropped.\textsuperscript{178} The importance of this temporary renewal of the debate about State funding to non-Government schools is that at no time did the Hawke Labor Government suggest that


\textsuperscript{176} Ibid, 131.

\textsuperscript{177} Ibid, 130.

\textsuperscript{178} Ibid, 131–136.
State funding be removed from all non-Government schools. Instead, the focus was only on those schools that could be considered ‘wealthy’. In an attempt to calm the waters after announcing the phasing out of funding to these wealthy schools, Hawke assured the public that there was no intention to remove funding from all non-Government schools.\(^\text{179}\)

The needs-based funding model had effectively cemented the relationship between the State and religion in relation to education by taking the public focus off religion and putting it instead on need. The opposition to the Hawke Government’s plan also demonstrated how far the journey had come. One hundred years earlier, the proposal to remove State funding to all denominational schools had been successful and had resulted in a period of 70 years during which the State and religion had almost no relationship in relation to education.\(^\text{180}\) Now, the Hawke Government’s proposal to simply reduce funding to the wealthiest schools was met with so much opposition that it was dropped.

Despite how far the journey had come, there was still one very significant roadblock that needed to be overcome. Questions had been raised regarding the constitutionality of the Federal Government providing funding to religious schools.\(^\text{181}\) While the focus had shifted to the needs of non-Government schools rather than their religiosity, most were still, and continue to be in modern Australia, religious. Section 116 of Australia’s Constitution, inter alia, prohibits the Commonwealth from making ‘…any law for establishing any religion…’.\(^\text{182}\) If funding religious schools amounted to ‘establishing any religion’, then all of the funding programs for non-Government schools—from the SSLS to Whitlam’s needs-based funding model—were unconstitutional.

### 6.5.3 The DOGS High Court Challenge

As discussed above, one of the significant legal changes in the creation of the SSLS was that it was a federally funded program.\(^\text{183}\) State funding for church-run schools had been removed prior to Federation; therefore, all funding for these schools had come from the

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\(^{179}\) Ibid, 131.

\(^{180}\) See 6.3.3.


\(^{182}\) For the full wording of s. 116, see 1.2.1.2.3.

\(^{183}\) See 6.4.1.
Questions regarding the constitutionality of the re-introduction of State funding to religious schools were raised almost as soon as the funding was re-introduced. In 1964, the Defence of Government Schools (DOGS) organisation was formed with the intention of bringing a court action to challenge the constitutionality of the Federal funding of religious schools. The DOGS argued that such funding was in breach of the establishment clause of s. 116 of the *Australian Constitution* and therefore unconstitutional. The DOGS was not alone in this view. During the debate of the legislation introducing the Menzies’ Government’s SSLS in 1964, the ALP leader Arthur Calwell mooted the possibility of challenging the constitutionality of the program. In 1966, the ALP Executive set up a committee to investigate the possibility of challenging the constitutionality of the SSLS, but the investigation was abandoned a few months later. Others held a different view. In articles published in 1963 and 1964 Clifford Pannam and Patrick Lane respectively, both questioned the success of any such challenge. With two competing views, the only way an answer could be reached would be via a High Court decision on the issue. The DOGS decided to go ahead and launched its intended High Court challenge at a public rally in Melbourne on 21 September 1971.

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185 The Victorian Protestant Federation also explored the option of challenging an earlier program that assisted non-Government, mostly Catholic, schools in the ACT. This challenge was abandoned, as the Victorian Protestant Federation and its members did not have standing before the High Court and could not convince a relevant Attorney General to grant them fiat; see M J Ely, *Erosion of the Judicial Process: An Aspect of Church–State Entanglement in Australia* (Defence of Government Schools Victoria, 1981) 9.


189 M.J. Ely, above n 208; Jean Ely, *Contempt of Court: Unofficial Voices From the DOGS Australian High Court Case 1981* (Dissenters Press, 2010) 171–172. Between 1964 and 1971, the DOGS ran candidates in...
schemes was eventually answered a decade later, on 10 February 1981, when the High Court handed down its decision in *Attorney General (Vic); ex rel Black v. The Commonwealth*.  

The High Court of Australia held in a 6:1 decision that the various Federal school funding schemes that provided funding to religious schools did not infringe the establishment clause of s. 116 of the *Australian Constitution*. The majority judges (Barwick CJ, Gibbs, Stephen, Mason and Wilson JJ) all held that ‘establishing’ should be defined using the ‘natural’ meaning of the word and that there was no ambiguity to be resolved. All five concluded that ‘establishing’ required to a greater or lesser extent the setting up of a State Church or religion. While each judge came to a slightly different conclusion as to what would constitute ‘establishing’ in the Australian context, all five concluded that the non-discriminatory funding of religious schools was not enough. The Court also considered the meaning of the word ‘for’ in the phase ‘for establishing any religion’. The majority held that ‘for’ meant that the relevant law must have the purpose of ‘establishing’ religion. Since the various school funding schemes did not have the establishment of religion as their purpose, they were not unconstitutional. Justice Murphy was the only judge in dissent, holding the contrary view that the Federal school funding schemes were unconstitutional. Murphy gave a wider interpretation to the term ‘establishment’ than the majority, interpreting the word to include State sponsorship and support of religion, which therefore precluded the State from funding religious schools.  

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190 (1980–1981) 146 CLR 559. The case is often referred to as the DOGS case because of the involvement of the Defence of Government Schools organisation. The DOGS had been forced to bring its case to the High Court as a relator action because it was believed at the time that it did not have standing to bring the case itself. However, the DOGS drove the case and should be considered the real plaintiffs. See for example, Jean Ely, *Contempt of Court*, above n 189, 8 and chapter 10.  

191 The cases considered the constitutionality of the following Acts: *State Grants (Schools) Act 1972–1974 (Cth), State Grants (Schools) Act 1976 (Cth), State Grants (Schools Assistance) Act 1976 (Cth), State Grants (Schools Assistance) Amendment Act 1977 (Cth), States Grants (School Assistance) Amendment Act 1978 (Cth), States Grants (School Assistance) Act 1978 (Cth) and Schools Commission Act 1973 (Cth).*  


193 Ibid, 582 (Barwick CJ), 603–604 (Gibbs J), 610 (Stephen J), 612 (Mason J) and 653 (Wilson J).  

194 Ibid, 579 (per Barwick CJ), 609 (Stephen J) and 653 (Wilson J). While not discussing the meaning of ‘for’ in detail, Gibbs J (604) also seems to assume that the purpose of the legislation must be to establish a religion.  

The handing down of Attorney General (Vic); ex rel Black v. The Commonwealth was not a new step in the journey. Rather, it removed a potential stumbling block which, if the decision had gone the other way, would have reversed much of the journey in a single step. Had the High Court found the Federal funding schemes to be unconstitutional, most of the relationship that had been established would have been wiped out overnight. All of the schemes discussed in 6.4 and 6.5 were between the Federal Government and schools; the States and Territories were little more than intermediaries that channeled Federal funds to the schools. Had these funds been removed, the journey may have reversed all the way back to the 1960s, with a funding crisis facing the Roman Catholic school system. This did not happen; instead, the journey continued on to the eventual creation of the NSCP, which placed a State-sponsored religious program in Government schools.

6.6 Conclusion

Part One demonstrated that in both the first 50 years after European colonisation and in modern Australia, there has been a State-endorsed religious program in education. In the first 50 years, this was a system of education that was effectively run by the Church of England via the Church and Schools Corporation, and in modern Australia, it is the NSCP. With just these two points on which to base an analysis of the legal relationship between the State and religion, it would be understandable to conclude that the change in the intervening years has simply been one of type. However, as this chapter has shown, the legal relationship has not simply involved a shift from one type of State-endorsed religious involvement to another. Rather, a more complex pattern of change has occurred—one of incremental steps. First, there were incremental steps away from a close relationship between the State and religion towards a State-run secular education system. This was followed by incidental steps back towards the increased involvement of religion in education. While individual changes did not make revolutionary changes, when the changes are added together, they have resulted in a dramatic shift in the legal relationship between the State and religion.

197 The various funding schemes discussed in this chapter were all carried out under section 96 of the Australian Constitution. For a discussion of the meaning and operation of s. 96, see Jennifer Clarke, Patrick Keyzer and James Stellios, Hanks Australian Constitutional Law Materials and Commentary (LexisNexis Butterworths, 9th ed, 2013) 651–670.
As well as establishing that the examples of legal change in the relationship between the State and religion in relation to education, which were identified in Part One, are not isolated incidents with 150 years with no other legal change, this chapter has also illustrated the macro-pattern found in all three case studies and a broad case-study-specific pattern. It has demonstrated the macro-pattern or re-occurrence by detailing numerous instances where the issue of the place of religion in education has been raised, from the creation of Governor Fitzroy’s Dual Board system of education and the various Single Board-style systems to the eventual removal of all State funding for church-run schools and the re-creation of the dual system of education via the re-introduction of State funding of church-run schools in the twentieth century. While there is a gap in which no legal change in the relationship occurred, this only seeks to highlight the pattern of re-occurrence. Even after a period of 70 years of stability, the issue of religion and education re-occurred, leading to a legal change in the relationship between the State and religion.

The chapter also demonstrated that in relation to the issue of religion in education, there is a pattern of incremental steps—first towards a wholly State-run secular education system and then back towards the increasing involvement of religion. While no individual step was revolutionary, together they have contributed to one of the most drastic shifts in the legal relationship between the State and religion throughout Australia’s history. Moving forward into modern Australia, the pattern suggests that there is an increasing relationship between the State and religion in terms of the place of religion in education, with the NSCP being the most recent example of this increasing relationship. While the religiosity of the NSCP has been reduced, it is still fundamentally a religious program. The increasing involvement of religion in education—including in Government schools—is a pattern that the State and religion should be salient of in their dealings with one another into the future.
Chapter Seven – Funding of Religion by the State

7.1 Introduction
Chapter Six analysed the legal changes in the relationship between the State and religion in relation to education. A significant part of that relationship is the provision of State funding for schools run by religious organisations. State funding of religion more generally is another example of a relationship between the State and religion that has undergone significant legal change over the course of Australia’s history.¹ Part One identified the creation of the Australian Charities and Not-for-profit Commission (ACNC) in modern Australia as an example of a change in the legal relationship between the State and religion in relation to funding.² Part One also identified an analogous issue in the first 50 years after European colonisation—the Church Acts.³ Like the ACNC, the Church Acts were an attempt to regulate the provision of State funding to religion—in this case, via direct grants to the various Christian denominations. In identifying these two examples, Part One established that, as with the other two broad cases studies, there is a prima facie case for considering whether other legal changes in the relationship between the State and religion in relation to State funding of religion can be identified in the intervening 150 years. Chapter Seven does this by tracing the legal changes that have taken place from the end of the first 50 years of European colonisation through to the lead-up to the creation of the ACNC in modern Australia.

As with the preceding two chapters in Part Two, Chapter Seven has two purposes. First, it demonstrates the macro-pattern of re-emergence that has been demonstrated across all three broad case studies considered in this thesis. Second, it demonstrates the case study’s specific pattern. There are two identifiable patterns in the case of State funding for religion. First, the legal changes that have taken place in the relationship between the

¹ In this thesis, the phrase ‘State funding of religion’ is used rather than the more common phrase ‘State aid’, ‘State Funding’ is also used to refer to the funding of Church-run (denominational) schools by the State. As this thesis deal with both issues, the term ‘State aid’ is not used in order to avoid confusion.
² See 1.2.1.3, 3.4 and 4.4.
³ See 4.4.
State and religion in relation to State funding of religion can be divided into two phases. The first phase is a dynamic phase in which there is a progressive reduction in both the quantum of funding available and the amount of control that religion has over that funding. This phase ended with the removal of all direct State funding for religion in all colonies prior to Federation. The second phase is of relative stability during which the State indirectly funded religion via tax exemptions.

The second pattern that emerges in the legal change in the relationship between the State and religion in relation to State funding of religion is a tug-of-war for control of both the quantum of funding and how that funding is spent. As demonstrated in Part One, in both modern Australia and at the end of the first 50 years of colonisation, the State has faced a situation in which State funding to religion has effectively been unlimited. While the funding schemes are significantly different, both gave religion control of the quantum of State funding for religion. As this chapter will demonstrate, the relationship between the State and religion has not simply shifted from one scheme of unlimited funding to another. Rather, there has been a tug-of-war for control of both the quantum of funding and how that funding is spent. In the period covered by phase one, the State gradually took control back from religion until it exercised its ultimate control over the quantum and removed all funding. In contrast, in phase two, religion has again taken control of both the quantum of funding and how that funding is spent. It is arguable that the creation of the ACNC is a new phase and an attempt by the State to begin to take back control of State funding for religion.

### 7.2 Phase One—The State Takes Back Control

As highlighted in Chapter Four, at the end of the first 50 years of European colonisation, the *Church Acts’* unlimited nature had begun to cause financial strain for the colonial government. An attempt had been made to restrict the amount of funding provided to religion by attempting to limit the number of clergy arriving in the colony. However, this could not solve the real problem of religion having control of the quantum of funding; the stipends paid to clergy were only part of the overall funding provided to religion by the State.

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4 See 4.4.4.2.
6 See 4.4.2.2.
While the State—via the co-contribution requirements in the *Church Acts*—had control of how State funding for religion was spent, the *Church Acts* placed no upper limit on the quantum of funding that could be claimed. With a wholesale repeal of the *Church Acts* unlikely, other solutions needed to be found. The initial solution was a limit on the quantum of funding that could be provided to religion by the State via a constitutional cap. The institution of a constitutional cap on the amount of funding gave the State control of the quantum of funding and maintained an ongoing legal relationship with religion. While the constitutionally enshrined nature of State funding for religion made it difficult to remove, eventually the State exercised its ultimate control over the funding relationship by removing all direct grants to religion. Therefore, phase one contains two legal changes: the State taking back control of the quantum of funding and the State removing all direct funding to religion.

The discussion of the *Church Acts* in Chapter Four only dealt with New South Wales and Tasmania. By the end of the first 50 years of European colonisation, Australia only consisted of these two colonies. However, as the other colonies were created, they too had to deal with the issue of State funding for religion. Therefore, this section will also briefly outline the creation of State funding and the amount of control exercised by the State over that funding in the remaining Australian colonies.

### 7.2.1 Controlling the Quantum

The first legal change to take place in the relationship between the State and religion in relation to State funding of religion was the restriction on the amount of funding that was available. In both New South Wales and Tasmania, this was achieved via the creation of a constitutional provision of a set amount for the funding of ‘public worship’. While this cap enabled the State to take back control of State funding for religion, simply putting a cap in place did not solve all of the issues that had been created via the unlimited system of funding established under the *Church Acts*. Two further issues needed to be resolved: first, how that cap could be reconciled with the apparently unlimited funding available under the *Church Acts*, and second, how the now limited funding should be distributed between the various Christian denominations.

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7 See 4.4.2.2 and 4.4.4.2.
8 In Chapter Four, Tasmania is referred to as Van Diemen’s Land; however, in this chapter, it will be referred to as Tasmania. The change of name occurred with the adoption of the *Australian Constitution Act 1850* (Imp), which also introduced the constitutional cap on State funding for religion.
7.2.1.1 The Constitutional Cap

In 1842, the British government passed the *Australian Constitution Act 1842* (Imp) 5 & 6 Vict. c 7, and in 1950, it passed the *Australian Constitution Act 1950* (Imp), creating the foundation for democratic and responsible government in New South Wales and Tasmania respectively. Additionally, the Acts set out the amount that was to be made available for ‘public worship’. In New South Wales, a sum of £30,000 was stipulated; in Tasmania, the amount was £15,000.⁹

The amount that could be spent on religion now had an upper limit. This meant that the most problematic element of the *Church Acts*—the unlimited nature of the available funding—had been resolved. It also handed the control of funding back to the State. While funding had been unlimited, religion had effectively been in control. Now that a cap had been set, the State had control of both the quantum and how the money was spent. As discussed in Chapter Four,¹⁰ the *Church Acts* provided funding for specific activities. It also required co-contributions. These two factors combined would have had the effect of directing where the various denominations expended their efforts. If they wanted more funding, they needed to employ more clergy and build more churches.

With the introduction of a constitutional cap, the tug-of-war for control of funding of religion was beginning to be won by the State. However, the battle was not yet won, and the creation of the cap created two new problems that needed to be solved. First, how was the constitutional cap to be reconciled with the unlimited nature of the *Church Acts*? Second, how would the limited amount set aside for ‘public worship’ be distributed?

7.2.1.2 Reconciling the Cap with the *Church Acts*

For New South Wales, the answer to the question of how to reconcile the new constitutional cap on State funding for religion was to be found in the *Church Act 1836 (NSW)*. On re-examining the *Church Act*, the Attorney-General JH Plunkett rediscovered apparently overlooked wording in clauses 1 and 2. In the case of funding of church buildings, the grant could only be made ‘with the advice of the Executive Council’, and in clause 2, large grants could only be made ‘with the consent of the

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¹⁰ See 4.4.2.2.
Legislative Council’. This meant that the unlimited nature of the Church Act could be circumvented by the Executive or the Legislative Council, disapproving applications in excess of the £30,000 cap.11

In the end, it was not this rediscovered control mechanism that gave the State back control of the quantum of religious funding. Instead, the depression, combined with the original control mechanism of co-contributions, was enough to bring the amount of funding claimed under the Church Act under the £30,000 cap. As a result of the depression, local congregations were unable to raise the co-contribution amounts required to make claims. In 1844, the amount actually claimed was just £26,000, making the Legislative Council’s assertion of control a moot point.12

Tasmania’s Church Act 1837 (VDL) did not originally contain a provision analogous to clauses 1 and 2 in New South Wales, making its Church Act truly unlimited. In 1840, the Tasmanian Government remedied this by passing the Support of Certain Christian Ministers and Erection of Places of Divine Worship Amendment 1840 4 Vict., No. 16. The amendment permitted the Governor and Executive Council to refuse funding where it was sought for a church or house that was not necessary.13 By itself, this amendment proved to be insufficient and estimates of expenditure for religious funding in Tasmania continued to climb.14

Unlike New South Wales, Tasmania was unable to bring the actual amount of State funding for religion below the constitutional cap. As will be discussed below, a further attempt to bring the amount of funding below the constitutional cap was made in 1862, and while this gave the State in Tasmania a little more control of the quantum of funding, it was not until all direct funding to religion was actually removed that the State was able to truly win the tug-of-war in the relationship between the State and religion in relation to State funding of religion.15

12 Barrett, above n 9, 48. When Victoria separated from New South Wales in 1851, the amount available to fund religion in New South Wales was reduced to £28,000. See Walker, above n 11.
13 Barrett, above n 9, 53.
14 Ibid, 55.
15 See 7.2.3.2.
7.2.1.3 The Distribution

The second issue that needed to be settled before the State could fully take back control of funding of religion in New South Wales was how the £30,000 was to be distributed. Under the unlimited *Church Act*, the quantum that each denomination received was determined by their ability to meet the co-contribution requirements. In effect, religion had control not only of the quantum, but also of which religious denomination received the largest share. In an unlimited funding environment, this second element was of less concern; however, with a cap now in place, the division of the fixed sum of money available became very important.

Two different distribution models were proposed, one by the Roman Catholic Church and the other by the Church of England. On behalf of the Roman Catholic Church, Bishop Polding recommended that the money be distributed in accordance with the number of adherents of the various churches. On behalf of the Church of England, Bishop Broughton rejected this as a departure from the principle of the *Church Acts*, instead recommending that the money be distributed in proportion to the amount received prior to the cap. Rather than making a decision himself, Governor Gipps referred the matter to the Colonial Secretary.

The Colonial Secretary, Lord Stanley, eventually approved the *uti possiditis* method of distribution. The amounts each denomination received would be determined by reference to the number of adherents in a selected census year rather than in the year of distribution. While this method was introduced in 1844, it was not until 1853 that a census year was finally selected for this purpose. The reason for the delay was the rapid increase in the population and the significant changes in the proportion of the population claimed by each church. Finally, in 1853, the census of 1851 was selected, thus settling the question after nine years of debate.

The State in New South Wales now had control of the quantum of funding, which religious denominations received that funding and how that funding could be spent. In

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18 Ibid, 348–349.
19 Ibid, 734; Walker, above n 11.
20 Walker, above n 11, 166–167.
one view, the State had won the tug-of-war for control of State funding of religion; however, State provision of funding for religion was constitutionally enshrined. This appeared to guarantee that the relationship would continue into the future. Religion still had a little control in that it could expect to continue to be funded by the State under the Constitution. As will be discussed below, this relationship did not last forever, and changing attitudes towards religion eventually led to the removal of the constitutionally enshrined funding for religion not just in New South Wales but also in all other Australian colonies.

Before analysing the removal of all direct funding to religion, the creation and level of State control of State funding to religion in the other colonies needs to be considered. As discussed in Chapter Four, the Church Acts only covered New South Wales and Tasmania as the other colonies were not created until after the end of the first 50 years of European colonisation. The experiences of the other colonies prior to the actual removal of direct State funding of religion needs to be included in order to develop a complete picture of the legal changes in the relationship between the State and religion in relation to State funding of religion across Australia. Subtly different local circumstances produced subtly different legal changes in each colony. While all colonies, except Queensland, developed a Church Act-like scheme of funding, the actual implementation of that scheme was subtly different.

7.2.2 The Other Colonies

Like New South Wales and Tasmania, all of the other Australian colonies faced the issue of how best to fund religion. While all colonies eventually developed a Church Act-like funding scheme, the legal changes that took place in the development and implementation of the scheme differed in every colony. This was primarily due to different local circumstances and different starting points in the legal relationship. While each is subtly different, they can be divided into two broad categories based on the starting point of the relationship: first, those that directly inherited the principle of State funding for religion upon separation from New South Wales, and second, those that had little or no initial provision for State funding of religion.

In the cases of the first category, the creation of State funding for religion was simply a function of the colonies’ separation from New South Wales. In effect, it only changed which State authority religion had a relationship with in relation to funding, rather than
the character or nature of that relationship. Victoria and Queensland both fall into this first category. Upon separation from New South Wales,21 both colonies had a sum for religious worship set out in their founding constitution. Schedule B of the *Australian Constitution Act 1850* (Imp) initially provided £6,000 per year for ‘Public worship in Victoria’,22 while the amount in Queensland was £1,000 per year.23 Like New South Wales and Tasmania, the legal relationship between the State and religion in relation to State funding of religion was constitutionally based.

In contrast, the colonies that fall into the second category did not inherit the principle of State funding of religion from New South Wales. Instead, they developed this principle on their own in response to local conditions after initially having little or no provision for State funding of religion. Given this important difference in the legal change in the relationship between the State and religion brought about by the creation of State funding for religion, the creation of State funding in these colonies will be considered in more detail.

7.2.2.1 Western Australia and South Australia

Western Australia and South Australia did not separate from New South Wales and therefore did not inherit the principle of State funding for religion. As a result, the principle developed independently in these two colonies. While they have this feature in common and both eventually developed a *Church Act*-like scheme of funding, they also have some important differences in the legal relationship between the State and religion in relation to funding. Three of the most important are the initial intention of the founders of the colonies in terms of State funding for religion, the principle upon which State funding of religion was distributed once it was provided, and the operation of the schemes in practice and the controls placed on the schemes by the State.

7.2.2.1.1 Initial Intentions

The initial intentions of the founders of Western Australia and South Australia in relation to State funding of religion were very different. In Western Australia, it was

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22 Ibid, 44. In Victoria, the Constitutional cap on State funding for religion was increased to £30,000 on 18 January 1853. See *An Act more effectually to promote the erection of Buildings for Public Worship and to provide for the Maintenance of Ministers of Religion in the colony of Victoria 1853* (Vict.); ‘Legislative Council’, *The Argus* (Melbourne), 1 December 1852, 4–5; John Strandbroke Gregory, above n 21, 51.
23 Jack Gregory, above n 9, 139.
intended that religion be provided for in a similar way to New South Wales, while in South Australia, the intention was that no State funding would be provided to religion. While the eventual creation of a system of State funding in both colonies was the same, the implications of that change were very different. In Western Australia, the creation of a system of State funding for religion effectively conformed to what the colony founders intended, while in South Australia, the creation of State funding was an abandonment of the principles upon which the colony was founded.

The instructions to Governor Stirling, founding Governor of Western Australia, were that religion was to be provided for in a similar way to New South Wales upon its establishment over 40 years earlier:

You will bear in mind, that in all locations of Territory, a due proportion must be … , as well as for the maintenance of the Clergy, Support for the Establishments for the purposes of Religion, and the education of youth, …

However, as with education, the actual provision of religion in the Swan River colony was initially very slight. Initially, grants were made on an ad hoc basis, and it was not until 1840 that a scheme of State funding for religion was established under the Church Act 1840 4 Vict., No. 6. The Act was nearly identical to Governor Bourke’s New South Wales Church Act, but the grants available were much smaller.

In contrast, in South Australia, the initial intention of the founders was that there be no provision for State funding of religion. As discussed in Chapter Six, this included State funding of schools. Unlike the other colonies, many of the original settlers in South Australia were from dissenting Christian denominations who believed in voluntarism. However, the principle of voluntarism left many churches in a desperate situation, with

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25 Ibid.
26 See 6.3.1.2.2.
27 Jack Gregory, above n 9, 133.
28 Strong, above n 24, 525–526.
29 See 6.3.1.2.3.
30 Jack Gregory, above n 9, 134; Douglas Pike, Paradise of Dissent South Australia 1829–1857 (Melbourne University Press, 1967) 3. Voluntarism is the principle that religion should not be funded by the State and instead should be funded by voluntary contributions from adherents.
religion and education poorly catered for in many areas.\textsuperscript{31} The solution was State funding for religion.

State funding for religion was eventually introduced in 1845 by the newly appointed Lieutenant-Governor Frederick Robe.\textsuperscript{32} Two days later, the new Legislative Council passed a resolution that a grant from special revenue be made for religion for all Christian denominations that would accept it.\textsuperscript{33}

7.2.2.1.2 Distribution of the Funds

Even after a scheme of State funding for religion was created in South Australia and Western Australia, they continued to have a subtly different relationship between the State and religion in relation to State funding of religion from both each other and the other Australian colonies. One way in which the subtle difference manifested itself was the way in which the funds were distributed. In Western Australia, an almost exclusive relationship between the State and the Church of England developed, while in South Australia, the founding principles of the colony manifested itself in being the only colony to provide State funding for non-Christian religions.

On paper, the legal relationship between the State and religion in relation to State funding of religion was the same as in the eastern mainland colonies. Like the New South Wales Church Act, Western Australia’s funding scheme provided funding to all of the dominant Christian denominations.\textsuperscript{34} In practice, the Church of England received the bulk of the funding under the Act. By 1843, the Wesleyans had received just £200, while the Roman Catholics had to wait until 1852 for a stipend to be paid to any of their ministers.\textsuperscript{35} In theory, there was a relationship between the State and all three Christian denominations; however, in practice, the legal relationship that developed was a nearly exclusive one between the State and the Church of England. This relationship became even stronger with the arrival of the first convicts in 1850.\textsuperscript{36} Convicts were initially brought to Western Australia to help alleviate the desperate financial circumstances of the colony and this continued until 1868. During this period, the Church of England clergy developed an even closer relationship with the State. They spent so much of their

\textsuperscript{31} Pike, above n 30, 351–357, 359. For a discussion of funding for education, see 6.3.1.3.
\textsuperscript{32} Ibid, 359–360.
\textsuperscript{33} Ibid, 361.
\textsuperscript{34} Church of England, the Roman Catholic Church and the Wesleyans.
\textsuperscript{35} Strong, above n 24, 526–528.
\textsuperscript{36} Marian Verley, ‘Western Australian Society: The Religious Aspect 1929–1895’ in C T Strannage (ed), A New History of Western Australia (University of Western Australia Press, 1891) 589.
time ministering to and supervising the convicts that they became indistinguishable from prison chaplains, with many receiving a large proportion of their income from this work.\footnote{Ibid, 590–592.}

While all Christian denominations had in theory been on an equal footing since the passage of the \textit{Church Act 1840} (WA), in reality, the convict era served to strengthen the dominance of the Church of England. It was not until 1871 that State funding of religion in Western Australia was finally distributed equally to all denominations.\footnote{Ibid, 592.}

In contrast, in South Australia, not only were all Christian denominations treated equally in terms of the available funding, but so too were non-Christian denominations. While this thesis uses the term ‘religion’, in effect, the relationship in relation to State funding to religion had been a relationship between the State and Christianity only. South Australia was the only colony to truly have a relationship between the State and all religions in the colony.

On the same day that funding was granted to Christian denominations in South Australia, the motion to grant religious funding was amended to include Jews. Those in support of the amendment insisted that despite the fact that there were only 58 Jews in the colony, there might be more in the future and they wanted to establish the principle of equity from the start. When challenged that this principle would also allow Mohomedans\footnote{Muslims.} and Pagans to receive government funding, the supporters of Jewish funding agreed that all could potentially be included.\footnote{Jack Gregory, above n 9, 138. For a comprehensive discussion of the treatment of Jews in the Australian colonies, see Getzler, above n 1.}

\textit{7.2.2.1.3 The Operation of the Scheme and State Control}

As highlighted above and in Chapter Four, in relation to both the \textit{Church Acts} in Tasmania and New South Wales, the funding schemes under the \textit{Church Acts} were potentially unlimited, giving religion control of the quantum of funding available.\footnote{See 7.2 and 4.4.4.2.} In the eastern colonies, the State took back control by placing a constitutional cap on the amount of funding available for religion. While this created a new constitutional relationship, it gave the State control of the quantum of funding, at least on paper.
Western Australia and South Australia also faced the issues of a scheme of funding that was unlimited, at least in theory. In each colony, the State took back control using different methods.

While it is arguable that South Australia was the most reluctant colony to introduce State funding for religion due to its founding principles of voluntarism, it in fact introduced the most unlimited funding scheme of all colonies. An amount of 2 shillings per head was granted to each denomination that would accept it. Therefore, the more people in each denomination, the more funding they were entitled to. Like the original Bourke Church Acts, religion was in control of the quantum of funding - the more adherents a religion could claim, the greater the amount of funding it could claim from the State. With no cap in place, the only limiting factor in the amount that each denomination could receive would have been the population of the colony.

The initial funding scheme in South Australia was also unlimited in another way. There were no controls placed on how the granted funds could be spent. The denominations were simply given their allotted funds and it was left to them to determine how this money was to be spent. This gave the religious denominations even more control than they had in New South Wales and Tasmania. In South Australia, the Churches would have been free to set their own priorities regarding how best to spend their Government-allocated funds.

While the South Australian funding scheme was initially different from the original Church Acts the State in South Australia quickly developed a Church Act-like scheme of funding. In doing so, the State took back control of funding of religion by determining how that funding should be spent. From 1848, funds were awarded on a co-contribution basis in a similar way to the Church Acts in other colonies.

While the State in South Australia eventually exercised control in the same way as under the Church Acts—by creating a co-contribution purpose-based scheme of funding for religion—religion exercised control over funding in South Australia in a different

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42 Pike, above n 30, 363; the Jews, with only 58 adherents, were entitled to £2 18s.
43 Ibid.
44 See 4.4.2.2.
45 Pike, above n 30, 371–372; £150 was available for a Church building where there was a private subscription of £50, and £50 was available for any clergy who had 50 pew holders.
way to all other colonies by refusing to accept the funding on offer. Four Christian denominations claimed their entitlement under the 1846 ordinances. The remaining non-conformist denominations refused to accept the funding allotted to them, meaning that in the first 18 months of the scheme, only £2,629 of the available £3,336 was used. In refusing the funding, the non-conformist denominations exercised control in refusing to establish any relationship with the State, thereby obeying their own principles of voluntariness and separation of Church and State.

In theory, the Western Australia Church Act was also unlimited. Like South Australia, Western Australia did not have a constitutional cap on funding. The solution in Western Australia to the apparently unlimited nature of the Church Act funding scheme was administrative rather than legal. From the very beginning of the scheme, the State exercised control over religion in relation to funding in the way in which the funding scheme was administered. For example, the Government would not pay a stipend or church building grants to an itinerant preacher, where there were no fixed service times, where the signatures gathered came from non-adherents of that denomination, or where the minister received funds from a source external to the colony. These restrictions were not part of the Act itself, but were applied as an administrative restriction. The reason for the restrictions and small funding amounts may have been the desperate financial situation in the colony. In December 1843, the financial situation was so bad that the colonial Government was forced to suspend the Church Act 1840 (WA). The administrative measures and the suspension of the Church Act in Western Australia suggest that despite the theoretically unlimited funding scheme created by Western Australia’s Church Act, religion was never in control because the State in Western Australia could never afford to let it be.

7.2.3 Removal of Funding to Religion
All of the colonies eventually reached a situation where the State had taken back most of the control in the relationship between the State and religion in relation to funding. In all colonies, a system had been established where the State controlled how much funding the various denominations received and how that funding could be spent. It could be argued that the State therefore had all of the control; however, a relationship

46 Church of England, Church of Scotland, Roman Catholic Church and Wesleyans.
47 Pike, above n 30, 369.
48 Strong, above n 24, 526–528.
49 Strong, above n 24, 528–529.
still existed in that the States were obliged—via their legislation and constitutions—to fund religion, giving religion at least a nominal level of control in the relationship.

The next important legal change in this relationship was the removal of the direct funding of religion by the State. The eventual removal of direct State funding of religion can be seen in two ways. First, it could be argued that the removal of funding was the ultimate act of control by the State. While the various schemes existed, religion could exercise some control, but the very existence of the schemes was in the hands of the State rather than religion. Any control that religion may have had in the past was arguably illusory in that the State could have exercised ultimate control at any time by changing or abolishing any of the colonial funding schemes. Second, the removal of State funding of religion could be seen as religion taking back control. All of the various funding schemes eventually reached a position where the State directed how funds were to be spent. This would have had the effect—via the co-contribution requirements—of influencing how the various denominations operated. By providing funding only for clergy and churches built on a co-contribution basis, the various denominations had an incentive to concentrate their activities in these areas. As highlighted in Chapter Four, the Church Acts were very effective in promoting both the arrival of new clergy in the colonies and constructing church buildings. In removing direct State funding, State control via incentives to concentrate activity in certain areas was removed. In effect, the Churches could now set their own priorities unencumbered by State incentives to behave in particular ways.

The final abolition of direct State funding for religion in the Australian colonies was drawn out over four decades. In 1851, South Australia became the first colony to abolish State funding for religion, and 44 years later, in 1895, Western Australia became the last. The details of the removal of State funding in each colony vary depending on local conditions, but they can be divided into three broad categories. First, in South Australia and Queensland, the abolition of State funding occurred relatively quickly and painlessly. Second, in New South Wales, Tasmania and Victoria, the process was protracted mainly as a result of political factors. Finally, in Western Australia, the abolition appears to be predominantly a case of catching up with the eastern mainland colonies. The details of the abolition of State funding are less

[^50]: See 4.4.2.2.
important than the fact that it was eventually abolished. With its abolition, the State effectively severed a legal relationship that had existed since the very early days of the colony. However, a brief overview of the abolition of State funding to religion is included in the following section in fulfilment of the secondary purpose of this thesis.\(^{51}\)

7.2.3.1 A Brief Experiment with State Funding

In Queensland and South Australia, State funding for religion was removed relatively quickly and painlessly. In both cases, direct State funding for religion did not last long enough to become an entrenched feature of the colony. In Queensland, it lasted just one year. On 1 August 1860, after a failed attempt to increase State funding for religion,\(^{52}\) the *State Aid Abolition Bill 1860 (Qld)*\(^{53}\) was passed by the Legislative Council, ending State funding to religion in Queensland just over one year after the colony separated from New South Wales.\(^{54}\)

South Australia’s direct funding scheme lasted a little longer—just under a decade. While Lieutenant Governor Robe had been successful at initiating State religious funding in South Australia, his scheme faced significant opposition from the beginning. Voluntarists organised petitions and public meetings in opposition to religious funding. While these were met by similar moves from those in support of religious funding, the underlying opposition did not go away.\(^{55}\) The end of religious funding in South Australia seemed inevitable when, prior to the 1851 election, the old Legislative Council turned down applications for funding based on the 1847 Ordinance on the basis that new legislation was needed to authorise any new funding.\(^{56}\) The refusal to grant new funding by the Legislative Council effectively ended religious funding in South Australia. This effective end became a formal end when the newly elected Legislative

\(^{51}\) See 1.4.2.

\(^{52}\) See P C Gawne, State Aid to religion and Primary Education in Queensland, 1860 (2007) 9(1) *Journal of Religious History* 50, 55.

\(^{53}\) Some sources refer to it as the *State Aid Discontinuance Bill 1860*.

\(^{54}\) Queensland separated from New South Wales in June 1859; for the debate on the Bill, see ‘Queensland Parliament’, *The Moreton Bay Courier* (Brisbane), 2 August 1860, 2. The Bill passed its third reading in the Legislative Council with seven votes to four. It had passed its third reading in the Legislative Assembly on 24 July 1860 with 16 votes to six; see ‘Queensland Parliament’, *The Moreton Bay Courier* (Brisbane), 26 July 1860, 2. For the debate on the Bill, see ‘Queensland Parliament’, *The Moreton Bay Courier* (Brisbane), 12 July 1860, 2–4; 19 July 1860, 3; 28 July 1860, 2; 26 July 1860, 2; 2 August 1860, 2–3.

\(^{55}\) For a detailed discussion of the debate surrounding religious funding in South Australia, see Pike, above n 30, 361–362.

\(^{56}\) Ibid, 423.
Council formally rejected a Bill to continue State funding of religion on its first reading, 13 votes to 10.\footnote{Ibid, 436–437.}

7.2.3.2 A More Turbulent Removal

While the removal of State funding to religion was relatively straightforward in South Australia and Queensland, the issue took much longer to resolve in the other colonies. In New South Wales, Victoria and Tasmania, State funding had become an entrenched feature of the colony and was enshrined in their constitutions. As a result of this and political turmoil, the eventual removal of direct State funding to religion took longer in these colonies.

In Tasmania, the actual removal of State funding to religion was relatively straightforward. In 1868, with no actual campaign underway for the removal of State funding to religion, Tasmania passed the \textit{State Aid Commutation Act 1868 (Tas)}, commuting the constitutionally enshrined yearly funding of £15,000 to a single lump sum payment of £100,000.\footnote{\textit{State Aid Commutation Act 1868 (Tas)} ss. 2–5.} As the Governor General explained, the issue had been raised several times in recent years, and until the issue was finally addressed, this would continue to happen.\footnote{'Parliament of Tasmania', \textit{The Mercury} (Hobart), 14 August 1968, 2–3; see also Richard Davies, \textit{State Aid and Tasmanian Politics 1868–1920} (University of Tasmania, Hobart, 1969) 29–31; see also 'Parliament of Tasmania', \textit{The Mercury} (Hobart), 21 August 1868, 2–3; 5 September 1868, 3; for debate on the Bill, see 'Parliament of Tasmania', \textit{The Mercury} (Hobart), 14 August 1868, 2–3; 19 August 1868, 2–3; 21 August 1868, 2.} However, to reach this point, Tasmania first had to confront the continuing control that religion had over State funding of religion. As discussed above, unlike the other colonies, the State in Tasmania had never been truly successful in taking control of the quantum of funding provided.\footnote{See 7.2.1.2.} In a final attempt to exert control, Tasmania passed the \textit{State Aid Distribution Act 1862 (Tas)}. That Act attempted to take back control by re-asserting the constitutional cap and it provided a mechanism by which the amount of funding actually provided would reduce over time until it fell below that constitutional cap.\footnote{'State Aid Redistribution', \textit{The Mercury} (Hobart), 26 September 1862, 4. The Act attempted to do this by listing the clergy who could receive stipends under the Act and disallowing further stipends. As a result, it was thought that the amount of funding would drop as clergy receiving stipends died or retired.} However, this was only a compromise and the eventual abolition of all State
funding for religion six years later arguably finally gave the State in Tasmania control over State funding of religion by abolishing it.

In New South Wales and Victoria, the process was more politically difficult. In New South Wales, the main problem was political instability. As with the creation of the Single Board system of education discussed in Chapter Six,\(^\text{62}\) continuing political instability meant that multiple attempts to abolish State funding for religion failed.\(^\text{63}\) Finally in 1862, the Government was successful in passing the *Publish Worship Prohibition Act 1862* (NSW), effectively abolishing State funding for religion.\(^\text{64}\)

In Victoria, the delay in removing State funding for religion was also caused by political turmoil—in this case, the constitutionally enshrined nature of State funding for religion. In order to repeal the provision relating to State funding for religion, the constitution required an absolute majority in both houses of parliament.\(^\text{65}\) Over 15 years, several attempts were made to abolish State funding for religion; however, on most occasions, the Bill passed the Legislative Assembly only to be blocked by the Legislative Council or to pass by such a slim majority as to not constitute the absolute majority required.\(^\text{66}\) Finally, in 1871, in a resigned decision, the now deeply unpopular Legislative Council passed the *State Aid to Religion Abolition Act 1871* (Vic), 18 votes to seven.\(^\text{67}\) As Thomas A’Beckett stated:

> I do not think it will be contended that when, by the people, a most emphatic and repeated approval of the principle of a Bill has been pronounced, it is proper that we should, year after year and season after season, refuse our assent to it.\(^\text{68}\)

7.2.3.3 Playing Catch-up

Western Australia was the last colony to abolish direct State funding to religion. It finally did so in 1895, 44 years after South Australia and 24 years after the last of the

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\(^{62}\) See 6.3.1.2.1.

\(^{63}\) Walker, above n 11, 168.

\(^{64}\) Ibid, 169. The Act did not abolish clergy stipends immediately. As a result, New South Wales continued to pay the stipends of Ministers of Religion into the twentieth century. The last minister to be paid a stipend under this provision, the Rev. Septimus Hungerford, died in 1927, although he had given up his stipend a few years earlier when he retired; see ‘Last Recipient of State Stipend’, *The Sydney Morning Herald*, 7 July 1927, 10.

\(^{65}\) *Victorian Constitution ACT 1855* (Imp) clause 60.

\(^{66}\) John Strandbroke Gregory, above n 21, 76–123.

\(^{67}\) John Strandbroke Gregory, above n 21, 122–123.

\(^{68}\) John Strandbroke Gregory, above n 21, 123.
eastern Colonies, Victoria. In many respects, Western Australia was playing catch-up. The last Governor, Sir John Forrest, had maintained that the special character of Western Australia warranted the continuation of direct State funding of religion. However, with growing public and political sentiment against this continuing and with the arrival in the colony of migrants from colonies in which State funding for religion had long been abolished, Forrest was forced to concede that the time had come to remove State funding for religion in Western Australia.

The Ecclesiastical Grant Abolition Act 1895 (WA) gave a payout of £35,420 to the four predominant Christian denominations in lieu of ongoing grants. With the passage of the Ecclesiastical Grant Abolition Act 1895 (WA), the last vestiges of direct State funding of religion were abolished in Australia.

With the final removal of direct State funding to religion, the relationship between the State and religion in relation to funding was severed. Neither had the power to assert control over the other via funding schemes. It would appear that the issue of State and religion relationships in relation to funding had received its final answer; the relationship was over. However, as Chapter Three demonstrated, this was not the end of the relationship in reality. In Chapters Three and Four, it was highlighted that the State had again lost control of funding to religion, much as it had in the early days of the Church Acts. While this funding is indirect (via tax exemptions) rather than direct (via grants), control is still arguably in the hands of religion rather than the State.

7.3 Phase Two—Religion Again Takes Control

The legal changes in the relationship between the State and religion discussed so far in this chapter have all been examples of the State taking back control of funding. As demonstrated above, the issue of State funding of religion re-occurred several times across the second half of the nineteenth century, resulting in a progressive increase in State control of the quantum and allocation of State funding provided to religion. With the abolition of all direct grants to religion by the State, the legal relationship in relation to State funding of religion—and therefore control of that relationship by either the

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69 Although Victoria abolished State funding in 1871, it did not take effect until 1875, reducing the gap to 20 years.
70 Jack Gregory, above n 9, 142.
71 Verley, above n 36, 596.
72 See Ecclesiastical Grant Abolition Act 1895 (WA) s. 2.
State or religion—was severed. However, as demonstrated in Chapter Three, in modern Australia, there is a significant legal relationship between the State and religion in relation to State funding of religion. Religious organisations in Australia are entitled to a range of tax exemptions. In effect, they are indirectly funded by the State courtesy of these exemptions. Tax exemptions do not directly place additional funds in the hands of religious organisations in the way that direct grants did in the nineteenth century. However, being exempt from taxation means that funds that would otherwise leave the hands of religious organisations instead remain with the organisations to spend as they wish. In effect, the State funds religious organisations for the amount of the exemptions. The legal changes that led to this indirect funding model, as well as the debate that has taken place regarding the continuation of the indirect funding model that took place between the removal of direct funding for religion and the creation of the ACNC, make up phase two of the broad case study’s specific pattern identified in this chapter.

In terms of actual legal change, phase two is a phase of stability. In this phase, there is only one major legal change—the creation of tax exemptions at the beginning of the phase—and two minor changes, with decades of stability in between. While there has been very little actual legal change in phase two, the issue of State funding for religion via tax exemptions has been raised several times in several different contexts. As a result, unlike the 70-year ‘gap’ in education, this period of apparent stability in the legal relationship is in fact a period of debate, which arguably ultimately led to the legal change that is the creation of the ACNC.

As the focus of this thesis is legal change, a detailed discussion of the various occasions when the issues of State funding for religion via tax exemptions has been raises is beyond its scope. Instead, a brief summary is included in the interests of completeness and in fulfilment of the thesis’ secondary purpose.

7.3.1 The Legal Changes

There have been three legal changes in the relationship between the State and religion in relation to State funding of religion during phase two. The first, and the most important, was the creation of the indirect funding model, whereby the State funds religion via tax
exemptions. Without this legal change, the removal of direct grants discussed above may have been the end of the legal relationship between the State and religion in relation to funding. Only two relatively minor changes have been made in this legal relationship since its inception: the transfer of the relationship from being between the states and territories and religion to being between the Federal Government and religion, and the expansion of the definition of charity to include closed and contemplative religious orders. As will be highlighted below, despite these three changes, phase two is predominantly a period of stability in terms of actual legal change. Rather than being dominated by a series of incremental changes, as occurred in phase one, phase two is dominated by a series of ‘gaps’ in which no legal change occurred. However, these ‘gaps’ only highlight the macro pattern of re-occurrence. While the issue of State funding to religion appears to be settled for most of phase two, the fact that a few small legal changes occur highlights the fact that despite appearing settled, the issue does reoccur and legal change does take place even after decades of apparent stability.

7.3.1.1 The Creation of Indirect Funding
As with the broad case study of education discussed in Chapter Six, the removal of State funding was followed by a ‘gap’ before the issues re-emerged and a new system of funding was created. However, in the cases of State funding of religion, the actual length depends on how that ‘gap’ is measured.

Exemptions for religious organisations from direct taxation in Australia, including income tax, can be traced back to the very first Australian income tax introduced in South Australia in 1884. Direct funding for religion had been removed in South Australia in 1851, 33 years earlier. Therefore, there was not a direct transition from direct funding of religion to indirect funding of religion. There was a ‘gap’, although it was much shorter than the 70-year interregnum observed in Chapter Six. However, the ‘gap’ between the two events was smaller in other colonies. In Western Australia, direct aid was abolished in 1895, and income tax, including exemptions, was introduced in 1907, after just 12 years. Further, when South Australia introduced its income tax in 1884, Western Australia was still providing direct funding to religion. When viewed

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79 Land and Income Tax Assessment Act 1907 (WA) ss. 11(c) and 19(6).
Australia-wide, the move from direct to indirect funding therefore occurred at roughly the same time. As the State was taking back control of the relationship in relation to direct funding, it was setting the stage for religion to again take back control via an unlimited supply of indirect funding.

The foundations of the indirect funding model for religion were being laid at the same time that direct funding was being removed, suggesting that there was in fact no gap. However, the creation of exemptions does not appear to have become an issue until much later. The first serious discussion of exemptions as something akin to funding did not occur until 1936. During the parliamentary debate on the *Income Tax Assessment Act 1936* (Cth), several speakers expressed concern about the advantage that religious organisations were receiving as a result of tax exemptions. Given this, the gap between the end of direct funding of religion and when indirect funding became an issue worthy of consideration and debate is between 41 and 85 years, depending on which colony/state is taken as the start of the ‘gap’ period. Unlike the other two case studies considered in this thesis, the re-emergence of this issue occurred prior to World War Two. In Chapters Five and Six, it was noted that the ‘gap’ in which few, if any, changes occurred in the relationship appears to have come to an end as a result of catalysts associated with World War Two. In the case of State restrictions on religion, it was the war-time attempt to ban the Jehovah’s Witnesses; in the case of education, it was in part the post-war baby boom and post-war immigration which led to the re-emergence of those issues after a significant ‘gap’. However, as discussed below, both the introduction and takeover of federal income tax by the Federal Government occurred during war time.

7.3.1.2 The Transfer of the Relationship

Another ‘gap’ in which arguably very little has changed in the relationship between the State and religion in relation to funding has occurred between the introduction of tax exemptions and the creation of the ACNC. Given that exemptions first created in South Australia in 1884 have continued as part of all subsequent Australian income tax laws, it is arguable that the relationship between the State and religion has not changed at all during this period. If so, the relationship has been stable for over 120 years—one of the longest periods of stability observed in the three case studies considered in this thesis.

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81 See 7.2.1.2; A detailed examination of the possible factors leading to such a long period of stability is beyond the scope of this thesis.
While this is true to a certain extent, there have been two small but very significant legal changes. The first was the transfer of the relationship in 1942 from being between the states and territories and religion to being between the Federal Government and religion.

As seen above, in each colony, the relationship between State and religion changed at different times and often for slightly different reasons. As a result, while broad trends and patterns can be observed, the relationship between State and religion in each colony needs to be considered separately because they each have features that are unique to that colony. With a shift to a system of indirect funding that was predominantly provided by federal income tax exemptions, there is just one relationship to consider instead of six.

As discussed in Chapter Six,82 in 1942, the Federal Government took over the levying of income tax in an attempt to increase federal funds to support the war effort during World War Two.83 While this is the point at which the change became permanent, it was not the first time the Federal Government had levied income tax. It had first levied income tax in 1915 as a way to raise revenue to fund World War One. Between 1915 and 1942, both the states and territories and the Federal Government levied income tax. This ceased in 1942 in a move that was challenged and eventually found to be constitutional in the first and second *Uniform Tax Cases*.84 All subsequent federal income tax Acts have included exemptions for religious organisations.85

7.3.1.3 The Expansion
The second legal change to take place in phase two was the expansion of the legal definition of ‘charity’ to include closed or contemplative orders. While this legal change appears to be relatively minor on the surface, it is important because it arose out of an attempt by the State to take back control of the legal relationship between the State and religion by re-defining charity to remove the legal presumption of public benefit.

82 See 6.4.2.1.
85 See *Income Tax Assessment Act 1997* (Cth) s50.5 table item 1.1 (this provision must be read in conjunction with *Income Tax Assessment Act 1997* (Cth) s. 995-1 and *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s. 25-5(5)).
Instead of achieving this, the legal change that actually took place granted State funding to a group of religious organisations that had previously been excluded.

In 2003, the Federal Government proposed to amend the definition of charity via the Charities Bill 2003 (Cth). The Bill was a response to the Report of Inquiry into the Definition of Charities and Related Organisations. If it had passed, it would have achieved a number of changes in the legal relationship between the State and religion. Most importantly, it would have created a legislative definition of charity that included a positive public benefit test for all charities. The Bill also created a definition of religion based on a series of indicia. Arguably, like the more general definition of charity, had this change gone ahead, religions may have been subtly influenced to amend their practices and beliefs in order to meet this definition. However, the Government abandoned the Bill on the advice of the Board of Taxation.

While the Government had abandoned the major recommendation from the Report of Inquiry into the Definition of Charities and Related Organisations, it did not abandon the Report altogether, opting instead to implement a more limited reform. This amounted to two relatively small changes: first, it extended tax exemptions to closed contemplative orders, and secondly, it created a requirement for charities to be endorsed by the Commissioner of Taxation.

Extending the definition of charity to closed or contemplative religious orders was necessary if they were to receive tax exemptions as a result of the common law definition of charity. Under common law, a charity needed to be able to show a public benefit. While this was presumed for charities for the advancement of religion, there were instances where this presumption had been rebutted. One example of this was in relation to closed or contemplative religious orders. Such orders did not meet the ‘public’ requirement of the public benefit test. The Report of Inquiry into the Definition of Charities and Related Organisations recommended that the law be

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86 See also 7.2.2.2.4.
87 Charities Bill 2003 (Cth) ss. 4 and 7.
88 Ibid, s. 12.
89 Board of Taxation, Consultation on the Definition of a Charity (Canprint Communications, 2003)
amended to remove this exclusion. The recommendation was acted upon with the passage of the *Extension of Charitable Purposes Act 2004* (Cth).

The consistent concerns regarding the existence of tax exemptions for religious organisations highlighted below suggest that the extension of the exemption to closed religious orders whose public benefit is questionable would have been objected to. However, the parliamentary debate on the *Act* only refers to this aspect of the *Act* very briefly and in neutral or even positive terms.

No politicians criticised the extension of the definition of charity to cover closed or contemplative religious orders in any way. Instead, the debate focused on the extension of the definition of charity to include self-help groups and child care as well as criticisms of the Government for not carrying through with more of the recommendations from the *Report of Inquiry into the Definition of Charities and Related Organisations*.

Another small change in the relationship between the State and religion recommended in the *Report of Inquiry into the Definition of Charities and Related Organisations* also came in 2004. The *Tax Laws Amendment (2004 Measures No. 1) Act* (Cth), inter alia, enacted the second part of Recommendation 26 by requiring that ‘charities … be endorsed by the Commissioner of Taxation in order to access all relevant taxation concessions’.

While this change, like the creation of the ACNC, did not change the actual tax concessions available to charities (including charities for the advancement of religion), it can be seen as a subtle shift in the relationship between the State and charities, including religious charities. The State was in effect taking back some control by requiring charities to be endorsed by the Commissioner of Taxation. In this way, there was effectively a check to see whether charities were ‘real’, which has been an ongoing concern for the State when dealing with tax exemptions for charities and

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94 Sheppard, Fitzgerald and Gonski, above n 91, 294.

religious organisations.96 It can also be seen as the first step towards the creation of a national register of charities.

Even when these small but significant changes are taken out of the 120-year ‘gap’ identified above, there remains a period of over 60 years97 where, arguably, very little changed in the relationship between the State and religion in relation to funding. While the existence of the exemption has remained throughout this period, it has not been free from criticism. The issue of what exemptions religious organisations should receive, if any, has been raised numerous times. While the debates and discussions have led to very little change in practice, the continual raising of the issue again demonstrates the re-emergence of an issue that at times appeared to be settled.

7.3.2 Criticisms of Tax Exemptions for Religious Organisations

Throughout phase two, the issue of whether and to what extent the State should provide tax exemptions for religious organisations has re-emerged in the form of criticism of the existing exemptions. While these criticisms have rarely led to actual legal change, they demonstrate the re-emergence of the issue of State funding for religion and further, that even where there is apparent stability in the legal relationship between the State and religion, the issues inherent in that relationship can be far from dormant. The reoccurrence of criticism of wholesale tax exemptions for religious organisations throughout the twentieth century is also an import backdrop to the eventual creation of the ACNC.

The criticisms can be classified into three main areas. First, religious organisations that derive income from ‘commercial activities’ have a competitive advantage over organisations that do not receive a tax exemption and therefore exemptions should be restricted to ‘core activities’. Second, religion should not be treated differently to other organisation; in treating them differently, non-believers are effectively being asked to subsidise believers. Third, all charities, including religious charities, should be subject to a positive public benefit test before being eligible for tax exemptions.

The proceeding section of this chapter focused on exemptions from income tax. While this is arguably the largest source of indirect State funding for religious organisations, it is not the only source. Religious organisations and other charities also receive

exemptions from a range of other federal, state and local government taxes. The exemptions provided for religious organisations in relation to these taxes have been criticised on the same grounds as income tax exemptions. When these criticisms are included in the history of the relationship between the State and religion in relation to funding, the issue appears to emerge even more.

7.3.2.1 Tax Exemptions for ‘Commercial Activities’

The first criticism to emerge relates to the ‘commercial activities’ of religious organisations. In many cases, tax exemptions do not discriminate between activities of religious organisations that directly relate to the core activities of the organisation and other activities undertaken, including commercial activities. As a result, religious organisations receive tax exemptions on what would otherwise be considered a commercial enterprise. It has been argued on several occasions throughout the twentieth century that this gives religious organisations an ‘unfair’ advantage over commercial enterprises.

It is important to note that the criticism is not of exemptions for religious organisations in general, but in relation to their commercial activities specifically. Those criticising exemptions for the commercial activities of religious organisations often express the desirability of exemptions for religious organisations generally.

The first criticism of tax exemptions for the commercial activities of religious organisations emerged during the debate on the Income Tax Assessment Act 1936 (Cth). During the debate several members of parliament raised concerns that some organisations might commit fraud by claiming to be religious when in fact their main activity was commercial. However the Government declined to attempt to restrict access to tax exemptions as they believed that any attempt to catch some organisations would inevitably catch all, including those that made significant contributions to the welfare of the community.

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99 Recent data suggest that charities, including religious charities, are increasingly relying on income derived from commercial sources. However, as noted by Ian Murray, ‘commercial activities’ have not been definitively defined in the context of charities. See Ian Murray, ‘Charitable Fundraising Through Commercial Activities: The Final Word or a Pyrrhic Victory’ (2008) 11(2) *Journal of Australian Taxation* 138, 140–141, 144–148.
101 Ibid.
The issue was raised again in 1941, this time in relation to the *Local Government Bill 1941* (Vic). On this occasion, the main issue of contention was the interpretation of a provision granting exemption from rates to land on which there was a church, hall or other buildings connected with public worship.\(^{102}\) While there was significant dispute as to the breadth of the clause, both sides of parliament agreed that land owned by religious organisations but used for commercial activities should not be exempt from rates.\(^{103}\) In the end, the Government agreed to amend the clauses to put the issue beyond doubt.\(^{104}\)

The issues re-emerged again in the 1980s in the wake of the *Scientology*\(^{105}\) and *DOGS*\(^{106}\) cases. In its 1984 Report, *Discrimination and Religious Conviction*, the New South Wales Anti-Discrimination Board noted the significant community concern about the issues of tax exemptions for the commercial activities of religious organisations. The report noted that commercialism was ‘endemic in organised religion’ and quoting Murphy J’s comments in his dissenting judgment in the *Scientology Case*:\(^{107}\)

The organised religions are big business. They engage in large scale real estate investment, money dealing and other commercial ventures.\(^{108}\)

However, the Board made no specific recommendations on the issue.

The most recent re-emergence of concern regarding tax exemptions for the commercial activities of religious organisations occurred over a series of reports and inquiries in the 1990s and 2000s.\(^{109}\) Prior to these reports, there appears to have been an assumption

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\(^{103}\) For example, Victoria, *Parliamentary Debates*, Legislative Assembly, 15 October 1941, 1284 (Ian MacFarlane).

\(^{104}\) Victoria, *Parliamentary Debates*, Legislative Assembly, 18 November 1941, 1826–1831.

\(^{105}\) *Church of the New Faith v Commissioner of Pay Roll Tax (Vic)* (1982/83) 154 CLR 120.


\(^{108}\) Ibid.

that tax exemptions on the commercial activities of religious organisations gave them an advantage over their commercial competitors. In 1995, the Industry Commission Report into Charitable Organisations attempted to analyse this presumed advantage. It concluded that for both unrelated fundraising activities and core activities, income tax exemptions did not provide charitable organisations with a competitive advantage. Later inquiries such as the Productivity Commission’s 2000 report ‘Contribution of the Not-for-profit Sector: Research Report’ and Ken Henry’s 2010 report ‘Australia’s Future Tax System’ concurred with this finding.

However, the Industry Commission Report determined that exemptions from input taxes, such as fringe benefit tax, can provide charities with an advantage over their for-profit competitors. Again the Productivity Commission and Henry Reports reached similar conclusions. However, at the time of writing, these findings and the recommendations in these Reports have not led to any legal change.

7.3.2.2 Non-Believers Should Not Subsidise Believers

While the argument that income tax exemptions provide a competitive advantage to the commercial activities of religious organisations is arguably dead, this is not the only criticism that has been made of tax exemptions for religious organisations. The exemptions have also been subject to a much more fundamental objection. By providing indirect funding via tax exemptions, non-believers and their organisations that have to pay tax are subsidising believers and their organisations, which do not.

Tax exemptions are effectively indirect funding of religion. While exemptions do not directly put extra funds into the hands of religion, the exemptions mean that they get to keep funds that they would otherwise have to pay to the Government in tax. From the Government’s point of view, this means that they forgo revenue to the amount of the tax that would be payable if the exemptions did not exist. The State therefore has less revenue than it might otherwise have to carry out the functions of Government—a
greater proportion of which arguably comes from non-believers whose equivalent organisations do not enjoy the same tax exemptions. Many have argued that this arrangement is unfair and discriminatory.\textsuperscript{115}

As with the debate about tax exemptions for the commercial activities of religious organisation, the argument that non-believers should not subsidise believers has re-emerged several times throughout the twentieth century. It has also been framed in many different ways, from exemptions causing antagonism towards the churches through to arguments about discrimination.

The first time the argument against exemptions for religious organisation was raised, it was not about the effect of these exemptions on non-believers, but about the resentment that exemptions may create towards the churches. During the 1941 debate on the Victorian \textit{Local Government Bill 1941} (Vic), two members of parliament expressed concern that providing an exemption for religious organisations would further antagonise the section of the community that is opposed to the churches and that this would be bad for the churches.\textsuperscript{116}

The next time the issues was raised it had evolved to be about equality, but not between believers and non-believers. This time, the focus was on equality between organisations of a ‘similar’ type. In 1967, the New South Wales \textit{Report of the Royal Commission of Inquiry into Rating, Valuation and Local Government Finance}\textsuperscript{117} was asked to consider which land owned by religious organisations should be exempt from rates. The Commission concluded that exemptions should be confined to:

\begin{quote}
Land on which is erected a church or building use solely for public worship or a hall used for religious teaching or training in connection with such church or building, together in each case with a reasonable curtilage of land surrounding such church, building or hall.\textsuperscript{118}
\end{quote}

\begin{footnotes}
\item[115] See for example David Marr, \textit{The High Price of Heaven} (Allen and Unwin, 1999).
\item[116] Victoria, \textit{Parliamentary Debates}, Legislative Assembly, 15 October 1941, 1294–1295; Legislative Council, 3 December 1941, 2267–2268. They also argued that State support is bad for religion generally.
\item[118] Ibid,133.
\end{footnotes}
This excluded land used as the residence of religious ministers, which was further than submissions to the Commission had recommended.\(^\text{119}\) However, as the Commission pointed out, Crown land used for residential proposes was not exempt; as such, they could see no reason why land owned by a religious organisation should be treated differently.\(^\text{120}\)

It was not until 1980s that the argument finally evolved to a being a comparison between believers and non-believers. In 1984 the New South Wales Anti-Discrimination Board Report *Discrimination and Religious Conviction*\(^\text{121}\) noted that there was an argument in favour of removing all ratings exemptions for religious organisations. Other organisations were capable of, and did in fact provide, welfare services. Instead, the local council should collect all rates and then provide welfare services as needed, rather than granting exemptions. As the Board put it:

> This approach has the advantage that non-believers would not subsidise the religious activities of other members of the community, whom they may not want to support and, indeed, may actively oppose.\(^\text{122}\)

While the Board stopped short of recommending that this approach be adopted, it recognised that the provision of tax exemptions to religious organisations and not to other organisations was arguably discriminatory.\(^\text{123}\) The Board proposed two possible solutions. First, it recommended that the available exemptions be widened to include ‘purposes that are anti-religious or can very broadly termed religious, on the grounds that together [with religious purposes] promote mental or moral improvement’.\(^\text{124}\) In effect, this recommendation was that organisations run for or by non-believers, which filled the same place as religion in the lives of believers, should be treated in the same way as believers. Under this approach, no one subsidises anyone because everyone has the exemption. Second, the Board suggested that exemptions could be restricted so that they were only available for ‘identifiable social purposes, such as the promotion of health, education or some other charitable form of social welfare’.\(^\text{125}\) Under this

\(^{119}\) Ibid, 132  
\(^{120}\) Ibid, 132–133.  
\(^{121}\) New South Wales Anti-Discrimination Board, above n 107.  
\(^{122}\) Ibid, 141.  
\(^{123}\) Ibid, 170, 172.  
\(^{124}\) Ibid, 172.  
\(^{125}\) Ibid, 172.
approach, non-believers are not subsidising believers because they are believers, although they may do so if religious organisations are providing welfare services. While the issue of non-believers effectively subsiding believers has been raised several times since 1984, no official Government report or inquiry has gone as far as the New South Wales Report in suggesting that tax exemptions could be removed from religious organisations. Most reports simply notes the concerns raised by atheist and humanist groups without making any specific recommendations. The 2001 Report of the Inquiry into the Definition of Charities and Related Organisations even went so far as to assert that tax exemptions should be retained as ‘it is clear that a large proportion of the population have a need for spiritual sustenance’. The assertion that there was a need for ‘spiritual sustenance’ was not supported in the Report by any evidence nor did it explain why tax exemptions necessary to provide for this need, if it existed.

7.3.2.3 There Should be a ‘Public Benefit’ Test

The most recent argument against the contention of wholesale tax exemptions for religious organisations is that a positive ‘public benefit test’ should be imposed on any organisation claiming tax exemptions. This would require charities, including religious charities, to prove that they provided a benefit to the public. Under existing law, charities for the advancement of religion are presumed to be for the public benefit. The argument that charities, and especially religious charities, should prove they are for the public benefit is premised on the presumption that some religions do not in fact benefit the public and may in fact be harmful.

126 See Australian Parliament Joint Standing Committee on Foreign Affairs, Defence and Trade, above n 109, 185-186, 192-193; Sheppard, Fitzgerald and Gonski, above n 91, 175-179; Senate Standing Committee on Economics, above n 109, 83–84; Senate Economics Legislation Committee, above n 109, 20–21; Australian Human Rights Commission, above n 109,25, 39, 47, 55.
127 See for example Australian Parliament Joint Standing Committee on Foreign Affairs, Defence and Trade, above n 109, 185-186
128 Sheppard, Fitzgerald and Gonski, above n 91, 179.
129 Dal Pont, ‘Law of Charity’ above n 74, 234 - 245
The suggestion for a positive public benefit test was first raised in 2001 in the Report of the Inquiry into the Definition of Charities and Related Organisations.131 In response to the Report’s recommendations, the Government proposed to create a statutory definition of Charity which would have included a public benefit test.132 However, the Government abandoned its attempt to legislatively define charity, opting instead to continue with the common law definition.133

The issue was raised again in 2010 when Senator Xenophon introduced the Tax Laws Amendment (Public Benefit Test) Bill 2010 (Cth).134 The Bill was referred to the Economics Legislation Committee,135 which recommended, inter alia, that the Government develop a public benefit test for charities.136 In the Committee’s view, there was a need for a higher level of accountability in the sector, and that a public benefit test would be an appropriate way of achieving this.137

At the time, the Government supported this recommendation, stating that as part of the 2010 election campaign, it had committed to reform of the sector and that the Treasurer had been tasked with a scoping study for the establishment of a National Commission.138 However, as discussed in Chapter Three,139 the legislative definition of charity created at the time of the creation of the ACNC and the subsequent legislative definition created in the Charities Act 2013 (Cth) do not create a positive public benefit test. Instead, both specifically preserve the presumption of public benefit for charities.

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131 Sheppard, Fitzgerald and Gonski, above n 91, 111–129.
132 see Charities Bill 2003 (Cth).
133 See also 7.2.1.3; Gary Johns, ‘Charity Reform in Australia’ (2004) 11(4) Agenda 293, 297–298; Peter Costello, ‘Final Response to the Charities Definition Inquiry’ (Media Release, No. 31, 11 May 2004); in common law, charity was defined by reference to the Statute of Charitable Uses 1601 43 Eliz I c. 4 and the four heads of charity laid down in the Commissioner for Special Purposes of the Income Tax v. Pemsel [1891] AC 531 (’Pemsel’). These are the relief of poverty, age or impotence, the advancement of education, the advancement of religion and any other purpose beneficial to the community. See Pauline Ridge, ‘Religious Charitable Status and Public Benefit in Australia’ (2011) 35 Melbourne University Law Review 1071, 1074; G E Dal Pont, ‘Charity Law and Religion’ in Peter Radan, Denise Megerson and Rosalind F Croucher (eds), Law and Religion, God, the State and the Common Law (Routledge, 2005) 220; Dal Pont, Law of Charity, above n 74, 17, 213–214..
134 Commonwealth of Australia, Parliamentary Debates, Senate, 13 May 2010, 2843.
135 Ibid, 2844, 2971.
137 Ibid, 29.
139 See 2.4.2.1.
for the relief of poverty, age or impotence, the advancement of education and the advancement of religion.\textsuperscript{140}

Currently, this issue appears to be dead; however, as this thesis has demonstrated, once an issue has been raised, it will continue to be raised time and again. Only time will tell if the arguments for a public benefit test will eventually lead to a change in the legal relationship between the State and religion.

7.4 Conclusion
Throughout Australia’s history since European colonisation, there has been a tug-of-war between the State and religion for control of State funding for religion. This chapter demonstrated that in the 150 years between the first 50 years of European colonisation and modern Australia, this tug-of-war has had two main phases. In the first phase, the State gradually took back control of funding to religion by first restricting it and then by removing it altogether. In the second phase, religion took control again via the effectively unlimited funding available via tax exemptions. When the examples of State funding of religion examined in Part One are added, three more phases can be added to this tug-of-war. In the early colony there were two phases. First, there was a period of ad hoc funding, where the State effectively had control of the funding relationship. This was followed by the phases covered by the \textit{Church Acts}, where the uncapped nature of the \textit{Acts} gave religion control. Finally, it is arguable that a new phase is beginning in modern Australia. With the creation of the ACNC, the State may again be attempting to take back control of the legal relationship between the State and religion in relation to State funding of religion. When these additional three phases are added to the two phases outlined in this chapter, a clear tug-of-war throughout Australia’s history is revealed. First, the State was in control (ad hoc funding), followed by religion (\textit{Church Acts}), the State again (restrictions on \textit{Church Acts} and removal) and religion (tax exemptions), and now it appears that the State may be attempting to assert control again (ACNC).

If the legal relationship between the State and religion in relation to State funding of religion is entering a new phases in which the State is again attempting to take back control of the relationship, then this is a pattern that both the State and religion need to

\textsuperscript{140} \textit{Australian Charities and Not-for-profits Commission Act} 2012 (Cth) s. 25-5(5); \textit{Charities Act} 2013 (Cth) s. 7.
be aware of in their dealings with one another on this issue. The question of whether a positive public benefit test should be imposed on charities receiving tax exemptions has already been asked, and as the macro-pattern of reoccurrence demonstrated in both this chapter and across the thesis has shown, it is likely to reoccur time and again until there is legal change. The form of that legal change may be different than that envisaged by the proponents of a positive public benefit test; however, as the argument may evolve over time, the macro-pattern suggests that legal change of some type is inevitable. If the pattern observed so far in Australia’s history since European colonisation holds, then that change will be in the direction of greater State control over the legal relationship of State funding of religion.
Chapter Eight – Conclusion

8.1 Introduction
Since the arrival of the first fleet in 1788 the State and religion have interacted with each other in a variety of ways and in a variety of spheres. This thesis has explored that interaction via legal changes in the relationship between the State and religion for three cases studies: State restrictions on religious practice,1 religion in education2 and State funding of religion.3 For all three case studies the thesis has traced a pattern of change from the very earliest days of the colony through to the most recent changes in the relationship. In doing so, it sets out the complete story of the legal relationship for each case study, allowing the series of legal changes to be seen as a whole.

Existing scholarship in this area is fragmented. It has tended to focus on individual events,4 people,5 places,6 concepts7 or on defined time periods.8 While this approach reveals details of the interaction between the State and religion it obscures wider patterns in that relationship. This approach also fails to recognise links and analogies between legal changes which are separated by time. By contrast this thesis views the relationship between the State and religion across all 225 years of Australia’s history since European colonisation. In doing so it is able to identify a continuum of change linking together individual events to form a series of identifiable patterns. It has done this by martiaillng the existing scholarship, alongside a detailed examination of original source material, to form a single coherent picture of the legal relationship between the State and religion across Australia’s history.

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1 See 3.2, 4.2 and Chapter 5.
2 See 3.3, 4.3 and Chapter 6.
3 See 3.4, 4.4 and Chapter 7.
4 See for example Jean Ely, Contempt of Court: Unofficial Voices From the DOGS Australian High Court Case 1981 (Dissenters Press, 2010).
The purpose behind this approach was to test the hypothesis that individual changes in the legal relationship between the State and religion are not simply the product of one off circumstances but part of a pattern of change in that relationship over time. The fragmented nature of the existing scholarship meant that this hypothesis could not be tested without first bringing that material, along with original source material, together in one location. The thesis confirms this hypothesis for the three cases studies under consideration. While the thesis can only make statements for the case studies actually considered the existence of recognisable patterns in all three suggest that patterns of change may also be present in other spheres of interaction between the State and religion.

The legal relationship between the Sate and religion explored in this thesis can be viewed in two ways. First, the thesis can be viewed as three discrete examples of areas in which the State and religion interact and the legal changes that have taken place in relation to each of these. Second, the thesis can be viewed as three examples of a broader overarching legal relationship between the State and religion in Australia. This final chapter will consider each of these views.

8.2 Discrete Examples
While the thesis is divided into two parts, when viewing the thesis as three discrete examples the observable patterns are not confined to either Part One or Part Two. Instead the events in the first 50 years after European colonisation and in modern Australia, which are discussed in Part One, should be seen as either end of the related chapter from Part Two. For example the treatment of Roman Catholics in the early colony and the creation of the face covering laws should be analysed in conjunction with the events and patterns identified in Chapter Five on the State restriction on religious practice.

Even when viewed as a series of discrete examples the existing scholarship has tended to be fragmented. Scholars have focused on individual events or time periods. This has meant that the links between these events and time periods have been obscured. This thesis has brought together these separate events for each of the three case studies demonstrating in each case that there is a continuum of change which, when viewed as a

9 See 1.1. and 1.2.
whole rather than as individual fragments, reveal a pattern in the changes that have taken place.

8.2.1 State Restrictions on Religious Practice

The first discrete example of the interaction between the State and religion in Australia examined by this thesis was State restrictions on religious practices. The thesis has demonstrated that throughout Australia’s history there have been a series of examples of the State restricting religious practices. Previous scholarship has tended to look at these events individually or as examples of the State’s interaction with ‘new religious movements’ (NRMs) or minority religions. James Richardson has previously commented upon the State’s tendency to restrict the religious practices of NRMs. The 1984 report of the New South Wales Anti-Discrimination Board identified a significant number of instances of State discrimination against minority religions. Over a decade later the Human Rights and Equal Opportunity Commission identified ‘new religious movements’ as an area of concern. The Report also identified State restrictions in relation to a number of other religious practices, most of which are usually associated with either NRMs or minority religions. However, focusing on either NRMs or even ‘minority religions’ does not give the full picture of State restrictions on religious practice in Australia.

This thesis has examined six examples of State restrictions on religious practice against five different religions. Of those only two of the religions would classify as NRMs; the Church of Scientology and the Jehovah’s Witnesses. While minority religions is a wider concept than NRMs, as it would incorporate ancient religions with very small followings in Australia, only two of the remaining three religions covered in this thesis

10 See 3.2, 4.2 and Chapter 5.
14 Ibid, 29 – 64.
16 Jehovah’s Witness are repeated.
17 Some definitions of NRMs would include modern Witchcraft/Paganism.
could fulfil this requirement; Islam and Paganism. The remaining religion against which the State has restricted religious practices is Roman Catholicism. While at the time of the restrictions Roman Catholics were in the minority, being less than 50% of the population, it was a substantial minority.\textsuperscript{18} The thesis has gone beyond the usual narrow view of State restrictions on either NRMs or minority religions and examined the overall picture from the refusal of the State to allow a Roman Catholic priest to accompany the first fleet\textsuperscript{19} through to the implementation of the \textit{Identification Legislation Amendment Act 2011}(NSW).\textsuperscript{20} As a result it provides a more complete picture than previous academic work in this area.

In bringing all of the individual examples together to form a coherent picture of State restrictions on religious practices the thesis has revealed two identifiable patterns. First, there has been a shift from overt State restrictions towards covert State restrictions. Second, there has been a shift from restricting the whole of a religion to restricting individual practices. With the move towards multiculturalism in the second half of the twentieth century it might have been expected that State restrictions on religious practices would have dissipated. However, these patterns reveal that that this has not been the case; instead State restrictions on religious practice have simply changed form. In modern Australia the covert nature of State restrictions, which tend to be couched in neutral language that appears on its face to be of general application, means that it is possible to overlook, or even deliberately obscure, the restrictive nature of the relevant laws. This could give the impression that the State is not restricting religious practice. However, as this thesis has revealed, this is not the case when the effect and history of laws of this kind are examined in detail. Therefore both religious organisations and the State need to be vigilant in their dealings with one another to ensure that restrictions on religious practices do not slip through the cracks of neutral language legislation.

\subsection*{8.2.2 Religion in Education}

The second discrete example examined in this thesis is the interaction of the State and religion in relation to education.\textsuperscript{21} The thesis reveals that this relationship has undergone dramatic changes across Australia’s history. The legal relationship has run the full gambit of possible levels of interaction. Religion has run all State education,

\begin{itemize}
\item \textsuperscript{18} Roman Catholics made up 28.4\% of the population in 1833 ADA Historical, \textit{HCCDA Document 'NSW-1833-census'} (3 April 2012) \texttt{<http://hccda.anu.edu.au/pages/NSW-1833-census-01_26>}. \textsuperscript{19} See 4.2.2.
\item \textsuperscript{20} See 3.2.
\item \textsuperscript{21} See 3.3, 3.3 and Chapter 6.
\end{itemize}
been entirely excluded from State funding for education and has run schools partially, or wholly funded by the State alongside secular State run schools.

The history of Australian education generally and religion in education specifically has been extensively examined by previous scholars. However, the existing work is split. First, there is scholarship dealing with the various education schemes and the removal of State funding for religious education in the nineteenth century such as Alan Barcan’s *History of Australian Education*, John Cleverley’s *The First Generation* and Albert Austin’s *Australian Education 1788 – 1900*. Second, there is scholarship dealing with the re-introduction of State funding for religious schools and the various funding models that have existed since the 1960s such as DA Jeck’s *Influences in Australian Education*, Ian Birch and Don Smart’s *The Commonwealth Government and Education 1964 – 1976* and various chapters in William Boyd and James Cibulka’s *Private Schools and Public Policy*. This thesis has brought these two areas of scholarship together revealing a pattern of change stretching across both the nineteenth and twentieth centuries and forward into the twenty-first century.

The pattern that is revealed is a journey of two halves. While the legal relationship between the State and religion in each of the halves is interesting in and of themselves, it is when the two are brought together that the dramatic changes in the relationship are revealed. In the twentieth century there has been a gradual increase in the legal relationship between the State and religion in relation to education. This began in the 1960s with the re-introduction of limited State funding to church run schools and has increased via a series of funding models which have effectively entrenched State funding for religious schools into the education landscape of modern Australia. By contrast in the nineteenth century the legal relationship between the State and religion in relation to education gradually decreased via a series of incremental steps. The relationship shifted from a position where the Church of England was effectively given

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28 See 6.4 and 6.5.
a monopoly over State education to one where State funding was removed from all church-run schools in favour of secular State-run schools.²⁹

The changes that have occurred in the legal relationship in these two separate time periods are significant when viewed alone. However, when viewed together the changes become even more dramatic and the reversal becomes clear. The changes in the relationship that have taken place across the twentieth century are a reversal of the changes that took place in the nineteenth. The journey has reversed so far that in modern Australia there is a State funded, and therefore endorsed, scheme placing religious workers in otherwise secular schools; the NSCP. While not going as far as the Church and Schools Corporation, in that the NSCP does not hand control of education over to religion, the two programs are both examples of the State endorsing a place for religion in education. The legal change brought about by the creation of the NSCP may just be an incremental step from that which existed before its creation but when viewed as just the last step in a reverse journey it demonstrates just how far that journey has been reversed.

8.2.3 State Funding of Religion

The third and final discrete example is State funding of religion.³⁰ This relationship has been both the most dynamic of the three case studies and the most stable. It has been dynamic in that the State and religion have traded control of the relationship multiple times, especially during the nineteenth century. It has also been the most stable with some form of State funding for religion being provided from 1788 right through to modern Australia. In addition, despite the State and religion trading control of the relationship multiple times the relationship in relation to funding also contains the longest period of stability of the three cases studies.

Since European colonisation in 1788 the State in Australia has always provided some form of State funding to religion. This has taken three main forms: ad-hoc arrangements, direct grants schemes and indirect funding via tax exemptions. Previous work in this area has focused on either indirect funding via the tax exemptions received by religious organisations in the twentieth century or on the ‘state aid’ debate in the

²⁹ See 4.3, 6.2 and 6.3.
³⁰ See 3.4, 3.4 and Chapter 7.
nineteenth century. This is because they have usually been treated as two separate issues in the relationship between the State and religion rather than as two instances of the same issue. By focusing on these two types of State funding as separate issues patterns in the changes that have taken place across all types of State funding for religion have been overlooked. This thesis addresses this oversight by examined both direct funding and indirect funding via taxation exemptions as one issue: State funding for religion. Not only has this thesis examined these two examples of State funding of religion, it has also examined the ad-hoc funding in the first 50 years of European colonisation and the creation of the Australian Charities and Not-for-profit Commission (ACNC). When all of these changes in the legal relationship between the State and religion are examined together a pattern in the legal changes that have taken place emerges.

When State funding of religion is examined as a continuum of change rather than as a series of discreet events the pattern that emerges is of a tug-of-war for control of both the quantum of funding and how that funding should be spent. Control of both has been traded several times across Australia’s 225 years history. The latest event in this ongoing battle for control is the creation of the ACNC. While it is yet to be seen how effective the ACNC will be in giving the State greater control of the relationship it has the potential to give the State a significant amount of information it has not previously had and with that information the means by which the State may be able to take even greater control of the funding relationship. Whether the ACNC achieves this or not it is unlikely to be the last shot in the tug-of-war. This thesis has revealed the persistence of the battle for control of both the quantum and for control of how funding should be spent. It is therefore likely that further change in the legal relationship will occur in the future as either the State or religion again attempt to assert control of the relationship.

8.3 The Broad Relationship

While the thesis can be seen as three discrete examples of the legal relationship between the State and religion it can also been seen as three examples of a broader relationship.

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The State and religion interact in numerous ways. The three cases studies examined in this thesis are just three examples of the many areas in which the State interacts with religion.\footnote{For other examples of the interaction of the State and religion see 1.1.} As such they provide a snapshot of the broader interaction.

All three case studies revealed a pattern of re-emergence. At various times there are periods of stability between individual changes in the legal relationship between the State and religion. However; these periods of stability do not last. As the thesis has demonstrated, as the State, religion or society has changed, issues that appeared settled have re-emerged leading to legal change. The ongoing relationship between the State and religion is so fundamental that it cannot be settled once and for all. Instead it must be re-negotiated time and time again as conditions change.

The tables on the following pages demonstrate this re-emergence. In all three examples there are periods, sometimes lasting for decades, where little or no change occurs in the legal relationship between the State and religion. The fragmented and targeted nature of the pre-existing scholarship obscured these periods of apparent stability and therefore the pattern of re-emergence. It is only when all of the individual changes are brought together and viewed as a complete picture that this pattern of re-emergence can be observed.

The tables are not intended to include every single incident in the legal relationship between the State and religion discussed in this thesis. It is intended to provide a snapshot of the legal relationship that has been identified across this thesis. What it demonstrates is both the persistence of issues in the relationship between the State and religion generally and the re-emergence of specific issues, even after decades of apparent stability.

In every decade there is at least one identifiable event. Some of these events are relatively minor while others are important turning points in the relationship. When taken together and viewed as a continuum of events across all three case studies these events highlight the persistence of the legal relationship between the State and religion. There is always something going on. The sphere in which the interaction takes place changes over time. For example from the 1830s to the 1930s there are no interactions
between the State and religion in relation to State restrictions on religious practice. However, the legal relationship in relation to education and State funding of religion are active in this period.

The table also demonstrates in a visual form the pattern of re-emergence for all three cases studies. In all three cases there are identifiable events in both modern Australia and the first 50 years after European colonisation with multiple emergences of these events in the intervening decades. While years and even decades sometimes separate these re-emergences the legal relationship is never truly settled for any of the case studies. The issue inherent in the relationship re-emerges time and time again as the State, religion and society more generally changes. If this pattern holds into the future it is inevitable that the ‘solutions’ arrived at in modern Australia will not be the final chapter in the legal relationship between the State and religion.

33 For an explanation of this ‘gap’ see 5.1.
34 The decades covered by these periods are indicated in grey on the table.
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<td><strong>Religion in Education</strong></td>
<td>First schools (4.3.2)</td>
<td>Arrival of the Tahiti missionaries (4.3.3.1)</td>
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<td>Bigge Report (4.3.4.1)</td>
<td>Creation of the Church and School’s Corporation (4.3.4.1)</td>
<td>Church and School’s Corporation dissolved (4.3.4.2)</td>
<td>Governor Fitzroy’s dual system of education (6.2)</td>
<td>SA introduced State funding for religious schools (6.3.1.2.3)</td>
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<td><strong>State funding of Religion</strong></td>
<td>Rev Johnson builds his church (4.4.3.2)</td>
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<td>Creation of the Church Acts (4.4.2)</td>
<td>Constitutional cap placed on Funding in NSW (7.2.1)</td>
<td>Constitutiona cap placed on Funding in Tas (7.2.1)</td>
<td>SA first colony to remove all funding to religion (7.2.3.1)</td>
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(The numbers in brackets refer to the relevant section of the thesis.)
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<td>Religion in Education</td>
<td>Qld, Vic and NSW move to a Single Board system of education (6.3.1.2)</td>
<td>Beginning of removal of State funding for religious schools (6.3.2)</td>
<td>All State funding to religious schools removed (6.3.2)</td>
<td>Federation 1 January 1901 (2.4)</td>
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<td>State funding of Religion</td>
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<td>First direct tax (and exemptions) created in SA (7.3.1.1)</td>
<td>WA the last colony to remove funding to religion (7.2.3.3)</td>
<td>Cth first levies income tax (7.3.1.2)</td>
<td>Last clergyman to receive State funding died (7.2.3.2 fn 64)</td>
<td>Income Tax Act 1936 (Cth) (7.3.2.1)</td>
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<td>State Restrictions on Religion</td>
<td>Jehovah’s Witnesses banned and Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth (5.2.1)</td>
<td>Crittenden v Anderson (5.1) DLP split from the ALP (6.4.2.3.2)</td>
<td>Scientology banned (5.2.2) Blood Transfusion laws introduced (5.4.1)</td>
<td>Church of the New Faith v Commissioner of Pay Roll Tax (Vic) (2.6)</td>
<td>SA creates modern anti-fortune telling laws (5.3.2)</td>
<td>Anti-witchcraft laws repealed in Qld (5.3.1) Face covering first raised as an issue (3.2.2.1.1)</td>
<td>Face covering laws introduced (3.2.1)</td>
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<td>State funding of Religion</td>
<td>Cth takes over levying of income tax (7.3.1.2)</td>
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Cth = Commonwealth

SSLS = School Student Loans Scheme

ACNC = Australian Charities and Not-For-Profit Commission
8.4 Final Thoughts

It is tempting to think of the relationship between the State and religion in modern Australia as very different from the first 50 years of European colonisation, or from the turn of the twentieth century and Federation, or even from the 1960s or 1980s. In many ways this is correct. The religious demographic of Australia has changed significantly across its 225 year history, and while Christianity remains the majority religion it is beginning to be challenged by a host of minority religions and by those professing no religious beliefs. The nature of the State has also changed dramatically from an infant penal colony ruled over by autocratic governors and a distant colonial administration to an independent Federation with a well-established democratic system.

Despite these apparent differences this thesis has demonstrated that the issues of State control of religious practice, religion in education and State funding of religion are not confined to one time period. Instead examples of these issues, evidenced by legal change, can be seen across Australia’s history. The old saying ‘the more things change the more they stay the same’ is appropriate. The State and religion may have changed dramatically but the areas in which they interact have not. The State continues to restrict religious practice, the debate about the place of religion in education and the issue of if and how the State should fund religion continue. While the thesis can only make specific observations about these three it is likely that in other areas of the legal relationship between the State and religion similar observations could be made.

Whether the thesis is viewed as three discrete examples of the interaction of the State and religion or as three examples of a broader interaction the lesson to be learned is the same. When examining or considering a new change in the legal relationship between the State and religion that change should not be viewed in isolation. Instead the State, policy makers, academics and religious leaders should view the change in the context of a continuum of change over time. As this thesis has demonstrated the relationship between the State and religion is constantly being re-negotiated as both the nature of the State and religion changes; however these re-negotiations are not isolated incidents relevant only to the circumstances in which they occur; they are just the latest re-

35 See 1.2.1.2.2.
incarnation of a relationship which stretches back to the beginning of Australia’s European history.
Bibliography

A Articles/Books/Reports

A.1 Article/Books

‘A Challenge for the High Court – and the Nation- to come to grips With Religious Education’ (2011) 87 Australian Rationalist 1


Albinski, Henry, The Australian Labor Party and the Aid to Parochial Schools Controversy (Pennsylvania State University, 1966)

Anderson, Kevin, Fossil in the Sandstone: The Recollecting Judge (Spectrum, 1986)


Austin, Albert Gordon, Australian Education 1788 – 1900 Church, State and Public Education in Colonial Australia (Pitman, 1961)

Austin, Albert Gordon, Select Documents in Australian Education 1788 – 1900 (Pitman, 1963)


Bakht, Natasha, ‘What’s in a Face? Demeanour Evidence in the Sexual Assault Context’ in Elizabeth Sheehy (ed) *Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era* (University of Ottawa Press, 2010)


Barker, Renae, ‘A Question to the Founding Father: why don’t we have a freedom of Religion?’ (A paper presented at RUSSLR Conference Canberra, 14 August 2009)

*Barker, Renae ‘The Full Face Covering Debate: The Australian Perspective’* (2012) 36 (1) *University of Western Australia Law Review* 143


Beazley, Kim, ‘The Labor Party in Opposition and Government in Ian Birch and Don


Beck, Luke, ‘Dead DOGS? Towards a less Restrictive Interpretation of the Establishment Clause; Hoxton park Residents Action Group Inc v Liverpool City Council (No 2) (2014) 37(2) University of Western Australia Law Review 59

Beckford, James, Social Theory and Religion (Cambridge University Press, 2003)


Bessant, Bob and Andrew Spaull, Politics of Schooling (Pitman Publishing, 1976)


Blackshield, Tony ‘Religion and Australian Constitutional Law’ in Peter Radan, Denis Meyerson and Rosalind F Croucher, Law and Religion: God, the State and the Common Law (Routledge, 2005) 81

Blaike, George, ‘The Reverend Richard Johnson: A Tough Path to Purgatory’ (1983) 1 Historic Australia 28

Blake, Meredith, ‘Religious Beliefs and medical Treatment: The Challenge to Patient Consent’ (2007) 19 (1) Bond Law Review 1


Bonwick, James, Australia’s First Preacher the Rev. Richard Johnson, First Chaplain of New South Wales (Sampson Low, Marston & Co, 1898)


Boyle, Kevin and Juliet Sheen (eds), Freedom of Religion and Belief: A World Report (Routledge, 1997)

Braybrooke, EK, ‘Notes on Statues: The Scientology Act 1968’ (1967 – 1968) 8 University of Western Australia Law Review 545

Brennan, Frank, Acting on Conscience How Can We Responsibly Mix Law, Religion and Politics (University of Queensland Press, 2007)

Breward, Ian, A History of the Australian Churches (Allen and Unwin, 1993)

Bridges, Barry, ‘Sir Henry Parkes and the New South Wales Public Instruction Act, 1880’ (1975) 17(1) Melbourne Studies in Education 177


Bruce, Steve, God is Dead: Secularization in the West (Blackwell, 2002)


Carey, Hilary, ‘Australian Religious Culture From Federation to the New Pluralism’ in Laksiri Jayasuriya, David Walker and Jan Gathard (eds) Legacies of
White Australia: Race, Culture and Nation (University of Western Australia Press, 2003) 70

Carey, Hillary, ‘Religion and Society in Deryck M Schreuder and Stuart Ward Australia’s Empire (Oxford University Press, 2008) 186


Cathcart, Michael (ed) Manning Clark’s History of History of Australia (Melbourne University Press, 1993)


Clarke, Jennifer, Patrick Keyzer and James Stellios, Hanks Australian Constitutional Law Materials and Commentary (LexisNexis Butterworths, 9th ed, 2013)


Crawford, Robert, What is Religion? (Routledge, 2003)

Clements, Jill, ‘Chaplaincy in the States Schools of Western Australia’ (2005) 48(1) Journal of Christian Education 19

Cleverley, John, The First Generation School and Society in Earl Australia (Sydney University Press, 1971)


Collins, David, An Account of the English Colony in New South Wales From its First Settlement in January 1788 to August 1801 (A Strahan for T Cadell and W Davies, 2nd ed, 1804)

Coper, Michael, Encounters with the Australian Constitution (CCH Australia Limited, 1987)


Cumbrae-Stewart, FD, ‘Section 116 of the Constitution’ (1946) 20 Australian Law Journal 207

Dal Pont, Gino Evan, Law of Charity (LexisNexis Butterworths, 2010)

Dal Pont, Gino Evan, ‘Charity Law and Religion’ in Peter Radan, Denise Megerson and Rosalind F Croucher, ‘Law and Religion, God, the State and the Common Law’ (Reoutledge, 2005) 220

Davies, Richard, ‘State Aid and Tasmanian Politics 1868 – 1920’ (University of Tasmania, 1969)

Dawkins, Richard, ‘Viruses of the Mind’ in Bo Dahlbom (ed) Dennett and his Critics (Blackwell, 1993) 13

Doust, Russell Fletcher, New South Wales Legislative Council 1824 – 1856 The Select Committees (Parliament of New South Wales Parliamentary library, 2011)


Edge, Peter, Religion and Law An Introduction (Ashgate, 2006)

Edwards, Toney, John Fitz and Geoff Whitty, ‘Private Schools and Public Funding: A Comparison of Recent Policies in England and Australia’ (1985) 21(1) Comparative Education 29

Eldershaw, M Barnardo, Phillip of Australia (Discovery Press, 1972)

Elder, JR,(ed) The letters and journals of Samuel Marsden, 1765-1838 : senior chaplain in the colony of New South Wales and superintendent of the mission of the Church Missionary Society in New Zealand (Dunedin ; Coulls ; Somerville : Wilkie, ltd. and A. H. Reed, for the Otago university council, 1932)


Ely, Jean, The Establishment Clause in Section 116 of the Australian Constitution An Interpretation (Self Published, 1979)

Ely, Jean, Contempt of Court: Unofficial Voices From the DOGS Australian High Court Case 1981 (Dissenters Press, 2010)


Kennett, Geoffrey, ‘Individual Rights, The High Court and the Constitution’ (1994) 19
Melbourne University Law Review 581


Flannery, Tim (ed), Watkin Tench’s 1788 (Text Publishing, 2009)

Frame, Tom, Losing My Religion: Unbelief in Australia (University of New South Wales Press, 2009)

Frost, Alan and Mollie Gillen, ‘Botany Bay: An Imperial Venture of the 1780s’ (1985) 100(395) English Historical Review 309


Gaze, Beth and Melinda Jones, Law Liberty and Australian Democracy (The Law Book Company, 1990)

Getzler, Israel, Neither Toleration nor Favour (Melbourne University Press, 1970)


Greenwood, Gordon, Australia A Social and Political History, (Angus and Robertson, 1955)


Gregory, John Strandbroke, Church and State: Changing Government Policies Towards Religion in Australia, with Particular Reference to Victoria Since Separation (Cassell Australia, 1973)


Grose, Kelvin, ‘William Grant Broughton and National Education in New South Wales, 1829 – 1836’ (1965) 8(1) Melbourne Studies in Education 135


Hogan, Michael, ‘Separation of Church and State: Section 116 of the Australian Constitution’ (1981) 53(2) *Australian Quarterly* 214


Hubbard College of Scientology, *Kangaroo Court: An investigation into the Conduct of the Board on Inquiry into Scientology Melbourne, Australia* (Hubbard College of Scientology, Church of Scientology of California, 1967)


Hyams, Bernard Keith and Bob Bessant, Schools for the People? An Introduction to the History of State Education in Australia (Longman, 1972)


Joseph, Sarah and Melissa Castan, Federal Constitutional Law; A Contemporary View (Thomson Reuters, 3rd Ed, 2010)


Karkar, John, ‘The DOGS Case’ (1983) 7(1) Independence 13
Kaye, Bruce, ‘Case Note and Commentary: An Australian Definition of Religion’ (1991) 14(2) University of New South Wales Law Journal 332


Lahey, John, Faces of Federation An Illustrated History (Royal Historical Society of Victoria, 2000)

Lane, Patrick, ‘Commonwealth Reimbursement for Fees at Non State Schools’ (1964) 38 Australian Law Journal 130

Lawlor, Kevin, ‘Catholic Schools in the High Court: DOGS and Funding’ (2002) 50(4) Journal of Religious Education 57


Livingston, KT, The Emergence of an Australian Catholic priesthood 1835 – 1915 (Catholic Theology Faculty, 1977)

Luscombe, Tom, Builders and Crusaders (Lansdowne Press, 1967)


Macintosh, Neil, Richard Johnson Chaplain to the Colony of New South Wales His Life and Times 1755 – 1827 (Library of Australian History, 1978)

Mackaness, George, Some Private Correspondence of the Rev. Samuel Marsden and Family 1794 – 1824 (D.S Ford, 1942)


MacLean, Donald, ‘Jehovah’s Witnesses’ (1986) 15(6) Australian Family Physician 772

Maddox, Marion, God Under Howard The Rise of the Religious Right in Australian Politics (Allen and Unwin, 2005)


Marr, David, The High price of Heaven (Allen and Unwin, 1999)


Moran, Patrick Francis Cardinal, *History of the Catholic Church in Australasia From Authentic Sources* (The Oceanic Publishing Company, 1897)


Oliver, Bobbie, ‘Australia: Jehovah’s Witnesses, Censorship During World War II’ in Derek Jones (ed) *Censorship A World Encyclopaedia* (Fitzroy Dearborn Publishers, 2001) *Vol I A-D*

Orr, Graeme and William Isdale, Responsible Government, Federalism and the School Chaplaincy Case: God’s Okay, it’s Mammon that’s Troublesome (2013) 38(1) *Alternative Law Journal* 3


Richardson, James, ‘Minority Religions (Cults) and the Laws: Comparisons of the United States, Europe and Australia’ (1994 – 1995) 18 University of Queensland Law Journal 183


Richardson, James, ‘Scientology in Court: A Look at Some Major Cases from various Nations’ in James R Lewis (ed) Scientology (Oxford University Press, 2009) 183


Ritchie, John (ed), ‘The Evidence to the Bigge Reports: The Written Evidence’ (William Heinemann Australia, 1971)


Rowland, Edward Carr, A Century of the English Church in New South Wales (Angus and Robertson, 1948)


Smart, Don, ‘Federal Aid to Australian Schools’ (University of Queensland Press, 1978)


Stoljar, Jeremy *The Australian Book of Great Trails: The Cases That Shaped a Nation* (Pier 9, 2011)


Thompson, Elaine ‘The Washminster Mutation’ (1980) 15(2) *Politics* 32


Venning, Christopher, ‘Chaplaincy in the State Schools of Victoria’ (2005) 48(1) *Journal of Christian Education* 9

Verley, Marian, ‘Western Australian Society: The Religious Aspect 1929 – 1895’ in C.T. Strannage (ed) *A New History of Western Australia* (University of Western Australia Press, 1891) 575

Vincent, Alison, ‘Clergymen and Convicts Revisited’ (1999) 1(1) *Journal of Australian Colonial History* 95

Waldersee, James, *Catholic Society in New South Wales 1788 – 1860* (Sydney University Press, 1974)


Watch Tower Bible and Tract Society of Australia Hospital Information Service, ‘*Family Care and Medical Management for Jehovah's Witnesses*’ (Watchtower Bible and Tract Society of Australia, 1995)


Williams, Roy, *In God They Trust* (Bible Society, 2013)

Whitaker, Anne-Maree, ‘Swords to Ploughshares? The 1798 Irish Rebels in New South Wales’ (1998) 75 *Labour History* 9


Woolmington, Jean (ed), *Religion in Early Australia The Problem of Church and State* (Cassell Australia, 1976)


A.2 Thesis


A.3 Reports and Inquiries

Anderson, Kevin, Report of the Board of Enquiry into Scientology (The State of Victoria, 1965)

Australian Government, National School Chaplaincy Program (Discussion Paper February 2011)

Australian Government, Consultation Process and Outcomes for the National School Chaplaincy Program (September 2011)


Bigge, John Thomas, *Report of the Commissioner of Inquiry on the State of Agriculture and Trade in the Colony of New South Wales* (Tabled in House of Commons 13 March 1823)

Board of Taxation, *Consultation on the Definition of a Charity* (Canprint Communications, 2003)

Cahill, Desmond, Gary Bouma, Hass Dellal and Michael Leahy, *Religion Cultural Diversity and Safeguarding Australia: A Partnership under the Australian Government's Living In Harmony Initiative* (Department of Immigration and Multicultural and Indigenous Affairs and Multicultural Foundation, 2004)


Commission of Inquiry into Receipt and Expenditure of Colonial Revenue, *Third Report of the Commissioner for inquiry into the receipt and Expenditure of the Revenues in the Colonies and Foreign Possession Great Britain and Ireland Parliamentary Documents Vo 15 1826 – 1838* (1 November 1830)

Commonwealth Ombudsman, *Administration of the National School Chaplaincy Program* (Report No 06/2011, July 2011)


Foster, John G, *Enquiry into the Practice and Effects of Scientology* (Her Majesty’s Stationery Office, 1971)

Henry, Ken *Australia’s Future tax System* (Commonwealth of Australia Department of Treasury, 2010)


Hughes, Philip and Margaret Sims, *The Effectiveness of Chaplaincy: As Provided by the National School Chaplaincy Association to Government Schools in Australia* (Social Justice Centre, 2009)


Joint Standing Committee on Foreign Affairs, Defence and Trade, Australian Parliament *Conviction with Compassion A Report into Freedom of Religion and Belief* (2000)

Legislative Council Select Committee, South Australia, *Report on The Church of Scientology Incorporated* (1985)

Menzies, Robert, *The Commonwealth and Education* (Tabled in the House of Representatives 5 November 1962)


Northern Territory Ombudsman, *Investigation on the Operation of the Chaplaincy Services within Five Government Rural Schools of the Northern Territory* (Northern territory Ombudsman, 2010)


Senate Community Affairs Legislation Committee, Parliament of Australia, *Australian Charities and Not-for-profits Commission Bill 2012; Australian
Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012; Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (2012)


Senate Standing Committee on Economics, Parliament of Australia, Disclosure Regimes for Charities and Not-for-profit Organisations (2008)

A.4 Newspaper Report and Press Releases

A.4.1 Newspaper Reports
‘Askin Attacks Aid Decisions’ Sydney Morning Herald (Sydney) 9 October 1963, 5


‘Blood Kept From Baby, Court Told’ Sydney Morning Herald (Sydney), 25 March 1960, 5

Campbell, Kate, ‘Witness Unveils for Fraud Trial’ *The West Australian* (Perth) 18 October 2010, 7


‘Compromise Proposal to Avert Rift Over School Aid’ *Sydney Morning Herald* 4 October 1963, 1

‘DLP Puts Foreign Policy and Defence in Forefront’, *The Age* (Melbourne) 8 November 1963, 6 – 7

‘Father Let Baby Die, Court Told’ *Sydney Morning Herald* (Sydney), 24 March 1960, 18


Fife-Yeomans, Janet, ‘Uncovering the Writing of this Signature Case’ *The Daily Telegraph* (Sydney) 1 July 2011, 2


‘Guilty Verdict at Jehovah’s Witness Transfusion Trial’ *Sydney Morning Herald* (Sydney) 30 May 1960, 4


‘Labour Party Clarifies Policy on Aid to Schools’, *Sydney Morning Herald* (Sydney) 2 August 1963, 1

‘Labor Party Disunity on Two Major Issues’ *Sydney morning Herald* (Sydney) 4 October 1963, 2

‘Last Recipient of State Stipend’ *The Sydney Morning Herald* (7 July 1927), 10


Murphy, Katharine, ‘Rudd and Gillard Disagree on Burqa’ *The Age* (Melbourne) 8 May 2010, 13

‘NSW Labour Victory on State Aid’ *Sydney Morning Herald* (Sydney) 9 October 1963, 2


Patty, Anna, ‘Fingerprints Touted as Way to Check Identity of Burqa Wearers’ The Sydney Morning Herald (Sydney) 22 June 2011, 3


Rowbotham, Jill, ‘Grassroots Idea Grows into $90 Million Scheme’ The Australian (Canberra) 31 October 2006

‘Scientology Files Seized in Raid’, Sydney Morning Herald (Sydney), 22 December 1965, 1

Smail, Stephanie, ‘Northern Territory Government to Repeal Centuries-old Witchcraft,

‘State Aid Plan Under Attack: Contrary to ALP Federal Policy’, The Age (Melbourne) 4 October 1963, 3

‘State Aid Redistribution’, The Mercury (Hobart) 26 September 1862, 4

‘State Govt Wins on School Aid; Federal Envoy Drop Attack’ Sydney Morning Herald (Sydney) 9 October 1963, 1


Topsfield, Jewel, ‘Chaplains Cause Rift in Labor Ranks’ The Age (Melbourne), 1 November 2006

‘Transfusion for Baby Refused; Father For Trial’, Sydney Morning Herald (Sydney), 19 May 1959, 4

‘Wanted His Baby to Live, Says Jehovah’s Witness’ Sydney Morning Herald (Sydney) 29 March 1960, 11

‘Widespread Police Raids on Jehovah’s Witnesses in Australia’, Examiner (Launceston) 18 January 1941, 1
A.4.2 Press Releases


Howard, John, ‘National School Chaplaincy Program’ (Media Release, 29 October 2006)

**B Cases**

*Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth*(1943) 67 CLR 116

*Africa v Commonwealth*, 662 F.2d 1025 (3d Cir. 1981)

*Attorney General (Vic); ex rel Black v The Commonwealth* (1980 – 1981) 146 CLR 559

*Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1

*Attorney General for the State of South Australia v Corporation of the City of Adelaide* [2013] HCA 3

*Barralet v Attorney General* [1980] 3 All ER 918

*Commissioner for Special Purposes of the Income Tax v Pemsel* [1891] AC 531

*Commissioner of Taxation (Cth) v Word Investments Ltd* (2008) 236 CLR 204

*Church of the Holy Trinity v United States* 143 US 457 (1892)

*Church of the New Faith v Commissioner for Payroll Tax* [1983] VR 97

*Church of the New Faith v Commissioner of Pay Roll Tax (Vic)* (1982/83) 154 CLR 120
Cole v Whitfield (1988) 165 CLR 360

Crittenden v Anderson (1950) 51 ALJ 171


Davis v Beason 133 US 333, 341 – 342 (1890)

Eweida and Others v United Kingdom App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013)

Ex parte Collins [1889] The Weekly Notes 85

Halliday v Commonwealth (2000) 45 ATR 458

Hartridge v Samuels [1976] 14 SASR 209

Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2) (2011) 256 FLR 156

Hubbard Association of Scientologists International Ltd v Parker (Unreported, Supreme Court of Western Australia, Virtue SPJ, Nevile and Burt JJ, 18 November 1969)

In the Marriage of Abbott (1995) 123 FLR 424

In the Marriage of Paiso (1978) 36 FLR 1

Judd v McKeon (1926) 38 CLR 380

Kruger v Commonwealth (1997) 190 CLR 1

Krygger v Williams (1912) 15 CLR 366
Leyla Şahin v Turkey (2007) 44 EHRR 99

Malnak v Yogi, 592 F 2d 197 (3rd Cir. 1979)

Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association (1987) 17 FCR 373

Monis v The Queen [2013] HCA 4

Municipal Council of Sydney v The Commonwealth (1904) 1 CLR 108

Nelson v Fish (1990) 21 FCR 430

Nulyarimma v Thompson [1999] FCA 119

Nunawading Shire v Adult Deaf and Dumb Society of Victoria (1921) 29 CLR 98

Police v Razamjoo [2005] DCR 408

R v Registrar General of Births, Deaths and Marriages [2013] UKSC 77

R v Registrar- General; Ex parte Segerdal [1970] 2 QB 697; [1970] 3 ALL ER 886

R v Secretary of State for Education and Employment and others ex parte Williamson [2005] UKHL 15

R v Secretary of State for Education and Employment and others ex parte Williamson [2005] UKHL 15

R v Winneke; Ex parte Gallagher (1982) 152 CLR 211

Refah Partisi (The Welfare Party) v Turkey (2003) 37 EHRR [91]

Scandrett v Dowling (1992) 27 NSWLR 483
South Australia v Commonwealth (1942) 65 CLR 373

Syndicate Northcrest v Anselem [2004] 2 SCR 551

Transcript of Proceedings, The Queen v Anwar Shah Wafiq Sayed (District Court of Western Australia, 164 of 2010, Deane DCJ, 19 August 2010)

United States v MacIntosh, 283 US 605, 633-644(1931)

United States v Seeger 330 US 163 (1965)

Victoria v Commonwealth (1957) 99 CLR 575


Williams v The Commonwealth [2012] HCA 23

Wylde v Attorney General for New South Wales (1948) 78 CLR 224

C Statutes and Regulations

C.1 Australia

C.1.1 Commonwealth

Age Discrimination Act 2004 (Cth)

Australian Charities and Not-for-profits Commission Act 2012 (Cth)

Australian Charities and Not-for-profit Commission (Consequential and Transitional) Act 2012 (Cth)

Australian Charities and Not-for-profit Commission Regulation 2012 (Cth) (draft)

Australian Human Rights Commission Act 1986 (Cth)

Charities Bill 2013 (Cth)
Income tax Assessment Act 1997 (Cth)

Marriage Act 1961 (Cth)

National Security Act 1939 (Cth)

National Security (Subversive Associations) Regulations 1940 (Cth)

Sex Discrimination Act 1984 (Cth)

School Assistance Act 2008 (Cth)

States Grants (Science Laboratories and Technical Training) Act 1964 (Cth)

States Grants (Secondary school Libraries) Act 1968 (Cth)

States Grants (Capital Assistance) Act 1971-72 (Cth)

States Grants (Independent Schools) Act 1969 (Cth)

States Grants (Schools) Act 1972 (Cth)

State Grants (Schools) Act 1972 – 1974 (Cth)

State Grants (schools) Act 1976 (Cth)

State Grants (Schools Assistance) Act 1976 (Cth)

State Grants (Schools Assistance) Amendment Act 1977 (Cth)

States Grants (School Assistance) Amendment Act 1978 (Cth)

States Grants (School Assistance) Act 1978 (Cth)
Schools Commission Act 1973 (Cth)

Tax Laws Amendment (Public Benefit Test) Bill 2010 (Cth)

C.1.2 Australian Capital Territory

Education Act 2004 (ACT)

Human Rights Act 2004 (ACT)

Imperial Acts Repeal Act 1988 (ACT)

Road Transport (General) Act 1999 (ACT)

Road Transport (General) Amendment Act 2012 (ACT)

Transplantation and Anatomy Act 1978 (ACT)

C.1.3 New South Wales

Amendment of Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

Children and Young Persons (Care and Protection) Act 1998 (NSW)

Children (Detention Centre) Act 1987 (NSW)

Children (Detention Centres) Regulation 2010 (NSW)

Church Acts 1836 (NSW)

Court Security Act 200 (NSW)

Crimes (Administration of Sentences) Act 1999 (NSW)

Crimes (Administration of sentences) Regulation 2008 (NSW)

Education Act 1990 (NSW)
Full Face Covering Prohibition Bill 2006 (NSW)

Identification Legislation Amendment Act 2011 (NSW)

Imperial Acts Application Act 1969 (NSW)

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

Local Government Act 1919 (NSW)

Oaths Act 1990 (NSW)

Public Health (Amendment) Act 1960 (NSW)

Public Instruction Act 1880 (NSW)

Public Schools Act 1866 (NSW)

Summary Offences Amendment (Full Face Covering Prohibition) Bill 2010 (NSW)

C.1.4 Northern Territory

Education Act 1979 (NT)

Emergency Medical Operations act 1973 (NT)

Summary Offences Act (NT)

C.1.5 Queensland

Criminal Code 1899 (Qld)

Criminal Law Amendment Bill 1997 (Qld)

Education Act 1860 (Qld)

Education Act 1875 (Qld)
Education (General Provisions) Act 2006 (Qld)

Health Act Amendment Act 1960 (Qld)

Justice and other legislation (Miscellaneous Provisions) Act 2000 (Qld)

Summary Offences Act 2005 (Qld)

Transplantation and Anatomy Act 1979 (Qld)

Vagrants, Gaming and Other Offences Act 1931 (Qld)

C.1.6 South Australia

Amendment and Repeal (Public Offences) Act 1992 (SA)

Consent to Medical Treatment and Palliative Care Act 1995 (SA)

Criminal Code Consolidation Act 1935 (SA)

Criminal Law Consolidation Act 1935 (SA)

Education Act 1972 (SA)

Education Act 1875 (SA)

Emergency medical Treatment of Children Act 1960 (SA)

Facial Identification Bill 2010 (SA)

Scientology (Prohibition) Act 1968 (SA)

Statutes Amendment and Repeal (Public Offences Act 1992) (SA)

Summary Offences Act 1953 (SA)
Taxation Act 1884, no. 323 (SA)

C.1.7 Tasmania

Church Act 1837 (VDL)

Constitution Act 1934 (Tas)

Education Act 1994 (Tas)

Education Act 1885 (Tas),

Human Tissue Act 1985 (Tas)

Police Offences Act 1935 (Tas)

Police Offences Amendment Act 2001 (Tas)

State Aid Commutation Act 1868 (Tas)

State Aid Distribution Act 1862 (Tas)

C.1.8 Victoria

An Act more effectually to promote the erection of Buildings for Public Worship and to provide for the Maintenance of Ministers of Religion in the colony of Victoria 1853 (Vict)

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Common Schools Act 1862 (Vic)

Education Act 1972 (Vic)

Education and Training Reform Act 2006 (Vic)

Human Tissue Act 1982 (Vic)
Imperial Acts Application Act 1980 (Vic)

Local Government Bill 1941 (Vic)

Medical (Blood Transfusion) Act 1960 (Vic)

Pay Roll Tax Act 1971 (Vic)

Psychological Practices Act 1965 (Vic)

Psychological Practices (Scientology) Act 1982 (Vic)

Vagrancy Act 1966 (Vic)

Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005 (Vic)

C.1.9 Western Australia

Assisted schools Abolition Act 1885 (WA)

Criminal Investigation (Identifying People) Amendment Bill 2012 (WA)

Criminal Law Amendment (Simple Offences) Act 2004 (WA)

Ecclesiastical Grant Abolition Act 1895 (WA)

Elementary Education Act 1871 (WA)

Human Tissue and Transplant Act 1982 (WA)

Land and Income Tax Assessment Act 1907 (WA)

Police Act 1892 (WA)

School Education Act 1999 (WA)
C.2 United Kingdom and Imperial

_Australian Constitution Act 1850_ (Imp)

_Australian Constitution Act 1842_ (Imp)

_Commonwealth of Australia Constitution Act 1901_ (Imp)

_Human Rights Act 1998_ (UK)

_Statute of Charitable Uses 1601 43 Eliz I c. 4_

_Victorian Constitution Act 1855_ (Imp)

_Witchcraft Act 1735_ (UK)

C.3 Other National Statutes and Regulations

_Canada Act 1982_ (UK) c 11, sch B Pt I (‘Canadian Charter of Rights and Freedoms’)

_New Zealand Bill of Rights Act 1990_ (NZ)

_United States Constitution_ amend I

_United States Constitution_ art VI §3

C.4 International Law


**D Parliamentary Debates**

**D.1 Commonwealth**

**D.1.1 House of Representatives**


Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 1 November 2006, 155

D.1.2 Senate


Commonwealth, Parliamentary Debate, Senate, 16 June 2004, 23975 – 23976

Commonwealth, Parliamentary Debate, Senate, 22 June 2004, 24606 – 24607


Commonwealth, Parliamentary Debate, Senate, 13 May 2010, 2843 – 2844, 2971

D.2 Australian Capital Territory

D2.1 Legislative Assembly
Australian Capital Territory, *Parliamentary Debate*, Legislative Assembly, 8 December 2011, 5918 – 5919


D.3 New South Wales

D.3.1 Legislative Assembly
New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 March 1960, 2901- 2904

New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 March 1960, 3137 - 3139

New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 March 1960, 3208 2312 - 3215
New South Wales, *Parliamentary Debate*, Legislative Assembly, 25 August 2011, 4716

New South Wales, *Parliamentary Debate*, Legislative Assembly, 12 September 2011, 55, 5459

New South Wales, *Parliamentary Debate*, Legislative Assembly, 13 September 2011, 5510

**D.3.2 Legislative Council**

New South Wales, *Parliamentary Debate*, Legislative Council, 4 October 1844


New South Wales, *Parliamentary Debates*, Legislative Council, 16 November 2006, 4132


**D.4 Queensland**

**D.4.1 Legislative Assembly**

‘Queensland Parliament’, *The Moreton Bay Courier* (Brisbane), 12 July 1860, 2 – 4

‘Queensland Parliament’, *The Moreton Bay Courier* (Brisbane), 19 July 1860, 3


‘Queensland Parliament’, *The Moreton Bay Courier* (Brisbane), 28 July 1860, 2

‘Queensland Parliament’, *The Moreton Bay Courier* (Brisbane), 2 August 1860, 2

Queensland, *Parliamentary Debates*, Legislative Assembly, 14 November 1996, 4237


Queensland, *Parliamentary Debates*, Legislative Assembly, 22 June 2000, 1818 and 1882

Queensland, *Parliamentary Debates*, Legislative Assembly, 10 November 2000, 4322 - 432

**D.5 South Australia**

*D.5.1 Legislative Assembly/House of Assembly*

South Australia, *Parliamentary Debates*, Legislative Assembly, 3 November 1960, 1663 - 1669

South Australia, *Parliamentary Debate*, House of Assembly, 22 July 2010, 1023 - 1024

*D.5.2 Legislative Council*


South Australia, *Parliamentary Debates*, Legislative Council, 3 November 1960, 1669
D.6 Tasmania
Parliament of Tasmania’ *The Mercury* (Hobart) 14 August 1968, 2 – 3
Parliament of Tasmania’ *The Mercury* (Hobart) 19 August 1868, 2 – 3
Parliament of Tasmania’ *The Mercury* (Hobart) 21 August 1868, 2 – 3
Parliament of Tasmania’ *The Mercury* (Hobart) 5 September 1868, 3

D.7 Victoria
D.7.1 Legislative Assembly
Victoria, *Parliamentary Debates*, Legislative Assembly, 12 September 1872, 1344
Victoria, *Parliamentary Debates*, Legislative Assembly, 15 October 1941, 1262 – 1298
Victoria, Parliamentary Debates, Legislative Assembly, 5 November 1941, 1592, 1601 – 1603
Victoria, *Parliamentary Debates*, Legislative Assembly, 18 November 1941, 1826 – 1831
Victoria, *Parliamentary Debates*, Legislative Assembly, 9 November 1960, 1068, 1825, 1826
Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 1960, 1824,
Victoria, *Parliamentary Debates*, Legislative Assembly, 5 October 1965, 481
Victoria, *Parliamentary Debates*, Legislative Assembly, 10 November 1965, 1342 – 1345
D.7.2 Legislative Council

‘Legislative Council’, *The Argus* (Melbourne), 1 December 1852, 4 – 5

Victoria, *Parliamentary Debates*, Legislative Council, 3 December 1941, 2252 – 2278


Victoria, *Parliamentary Debates*, Legislative Council, 5 October 1965, 436

D.8 Western Australia

D.8.1 Legislative Assembly

Western Australia, *Parliamentary Debate*, Legislative Assembly, 14 November 1972, 5103 – 5107

E Web Sources

ADA Historical, *HCCDA Document 'NSW-1833-census'* (3 April 2012)

Anglican Church of Australia, *When did the Church of England become the Anglican Church of Australia?* (accessed 20 June 2013)
<http://www.anglican.org.au/content/home/about/students_page/When_did_the_Church_of_England_become_the_Anglican_Church_of_Australia.aspx>


Australian Government, *Find a Charity on ACNC Register: Quick Search* (accessed at 30 September 2013) Australian Charities and Not-for-profit Commission 
<http://www.acnc.gov.au/ACNC/FindCharity/Search_the_ACNC_Register/ACNC/OnlineProcessors/Online_register/Search_the_register.aspx?hkey=4cffc3e0-00db-4548-91a8-bb2860e8d137>


partnerships/Charities-consultative-committee-resolved-issues-document/?page=32

Australian Dictionary of Biography (Online),


<http://www.vatican.va/archive/ENG1104/__P38.HTM>

<http://www.vatican.va/archive/ENG1104/__P3G.HTM>

Human Rights Watch, *Q&A on Female Genital Mutilation* (16 June 2010)


Oxford Dictionaries, *Definition of Church in English* (2013)
<http://oxforddictionaries.com/definition/english/church?q=Church>

Australian Dictionary of Biography (Online) < http://adb.anu.edu.au/biography/harold-james-2156>


**F Other**

**F.1 Speeches**


French, Robert, ‘Oil and water? – International Law and Domestic Law in Australia’ (Speech delivered at the Brennan Lecture, Bond University, 26 June 2009)

Menzies, Robert, ‘Federal Election, 1963 Policy Speech’ (Speech delivered in Melbourne, 12 November 1963)

Rudd, Kevin, (speech Delivered at Australian Christian Lobby's National Conference, Canberra, 22 November 2009) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FE7MV6%22>

**F.2 Other**


Evidence to Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia Senate, Canberra, 20 February 2008, 50 - 56 (Chris Sheedy)

Evidence to Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia Senate, Canberra, 20 February 2008, 52 (Lisa Paul)

Explanatory Memorandum, *Tax Laws Amendment (Public benefit Test) Bill 2010* (Cth)

Historical Records of Australia Series 1 vol 1 – 36 (Library Committee of the Commonwealth Parliament, 1914–1925)

Historical Record of New South Wales vol 1 – 7 (Government Printer, 1892-1901)

*Insight: Banning the Burqa* (SBS, 21 September 2010)


Pope Pius IX, *Syllabus of Errors*, (Vatican, 1864) error 45

*Q&A: Backlash in Benalong* (Australian Broadcasting Corporation, 31 May 2010)


Revised Explanatory Memorandum, *Australian Charities and Not-for-profits Commission Bill 2012; Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*

Stephens, Moore, Submission No 30 to Parliamentary Joint Committee on Corporations and Financial Services, *Australian Charities and Not-for-profits Commission Bill 2012; Australian*
