

ESTABLISHMENT CLAUSES, LEGISLATION AND PRIVATE SCHOOL FUNDING IN THE UNITED STATES AND AUSTRALIA: RECENT TRENDS

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Public funding of private schools with religious affiliation in the United States (US) has long been rejected under the US Constitutional Establishment Clause. In Australia, a similarly-worded Establishment Clause in the Constitution has been interpreted quite differently for funding of such schools. This article discusses the bases of these interpretations, and considers recent trends in both nations. The article explores possible practical convergence in law of funding to religious-affiliated schools in the two nations, in the US through provision of funding to parents to pay private school fees in certain circumstances, in Australia, through possible overriding of federal interpretations by very localised council planning decisions.

Religion and schooling are always topics of interest in education law. The contrasting interpretations of federal funding arrangements in Australia and the US of religious-affiliated schools provide the opportunity to examine issues that arise in both nations.

I INTRODUCTION

At one level, the government and legal systems of the United States of America (US) and Australia are very similar, when contrasted with those of other nations. However, on closer examination, differences in US and Australian government policy and judicial interpretation may reflect strong cultural roots — differences that can have substantial impact in the field of education. A major example of this is the ‘establishment clauses’ of the two constitutions.

The First Amendment of the Bill of Rights of the *Constitution* of the US (Establishment Clause), enacted in 1791, states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...¹

When the Australian *Constitution* was being drafted, existing constitutions of many nations, including the US, were considered. The Australian *Constitution*, enacted more than a century after the US First Amendment, has, on surface, a similar establishment clause:

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 ...²

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Post-indigenous settlement in the US included many emigrants fleeing religious persecution in their home countries. The principle of a nation free from religious persecution was and remains very important to the American population. While the first post-indigenous settlers in Australia did not have such a history, freedom of religion was still clearly seen as an important part of the new democratic nation. Whatever the bases for the inclusion of the establishment clauses in the two constitutions, despite their apparent similarity, substantially different judicial interpretations have been made in their application, with consequences for education.

The US Establishment Clause forms a frequent basis for US education law challenges, particularly on matters of demonstration of religion in public education settings. However, the issue of direct funding for student tuition or teacher salaries to private³ schools with religious affiliation has long been settled, in principle it does not occur due to the US interpretation of the establishment clause. In practice, indirect funding can occur — through specific initiatives where public services or resources are provided to private schools, and through recent legislation such as the *Individuals with Disabilities Education Act* (IDEA),⁴ where funding can be directed to parents of children with disabilities for payment of private school fees when a public school cannot provide a free, appropriate public education (FAPE).⁵ At issue is whether, by default, these applications can be seen as rejecting interpretations of the US Establishment Clause that public funding for religious schools cannot occur, and convergence closer to the Australian interpretation.

In Australia, the issue of funding to private schools with a religious affiliation has also long been settled at the judicial level — it does occur and is seen to be outside the purpose of the Establishment Clause.⁶ Federal and state funding are made available to private schools, with and without religious affiliation. Indeed, over the last two decades, such funding has enabled the Australian federal government to exert control over the educational activities and educational accountability of such schools, beyond initial requirements for financial accountability.

The issue of federal versus state (or local) control of policy and practice is another common educational development in the US and Australia. In both nations, the federal governments exert control through the ‘power of the purse’, the distribution of federal funds to states for state programs. In the US, the *No Child Left Behind Act*⁷ places accountability requirements on states; in Australia, such requirements occur through the funding provisions Act, the *Schools Assistance (Learning Together — Achievement Through Choice and Opportunity) Act 2004* (Cth), and the more recent *Schools Assistance Act 2008* (Cth) for funding to private school systems⁸ and individual schools.⁹

However, a further difference in US and Australian constitutional interpretation affects the degree to which federal action can affect state policy — the concept of reserve powers for states in a federated system. The Australian interpretation provides the Australian federal government with more direct control of education provision by the states,¹⁰ in comparison with the powers of the US federal government. The Australian federal government control extends to the private school sector if government funds are accepted. While tensions could arise between the federal government and states over such control, to date, the state ministers of education, and independent schools, have acquiesced to all demands, with barely a whimper.

This article discusses recent developments in the public funding of religious-affiliated private schools in Australia and the US and ways they may be converging in practice. A further major issue discussed in the article is whether a new level of government in Australia may be exerting control that, while on principle is not contrary to current interpretation of the establishment clause

and religious-affiliated private school funding, provides a more ‘popular’ response to the funding of some religious-affiliated schools.

These developments and issues are discussed in the following sections. To provide an understanding of fundamental differences between Australia and the US and the funding of private, religious-affiliated schools, the next section outlines in brief the history of the interpretation of the US Establishment Clause, and recent trends that may indicate accommodation of a changing interpretation by the US courts.

II THE US ESTABLISHMENT CLAUSE AND SCHOOL FUNDING GOVERNMENT ASSISTANCE TO RELIGIOUS SCHOOLS IN THE US

In the United States in 2008 (the most recent year for which enrolment data are available), 5,072,451 students were enrolled in 33,740 private schools. While nonsectarian schools constituted 32 per cent of the total number of these private schools, religious schools enrolled 80 per cent of the students.¹¹ In effect, over 4 million students are enrolled in religious schools whose interaction with federal and state governments’ efforts to provide financial assistance brings them within the purview of the First Amendment’s Establishment Clause. While the number of students in religious schools, when compared with the 49,825,000 students enrolled in public schools,¹² is small, the impact on Supreme Court litigation over the past 60 years has been significant with at least 20 decisions addressing the appropriate boundaries for government aid to religious schools.¹³

The earliest Establishment Clause government aid cases upheld such aid under the broad rubric of child benefit. In the seminal case of *Everson v Board of Education of Ewing Township* (*Everson*),¹⁴ the US Supreme Court held that the Establishment Clause did not prohibit the State of New Jersey from enacting a statute permitting the use of tax revenues to pay bus fares for both public and parochial students. Declaring that ‘the State [had] contribute[d] no money to the [religious] schools’,¹⁵ the Court found the tax-supported bus transportation to be a ‘neutral’ method of ‘help[ing] parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools’.¹⁶ Twenty-one years after *Everson*, the Supreme Court, in *Board of Central School District v Allen* (*Allen*),¹⁷ upheld a New York statute permitting the loaning of secular textbooks free of charge to religious schools, reasoning that, since the books were owned by the public school districts and since the books were considered to have been requested by the students, they financially benefitted the children and the parents, not the school.¹⁸

Allen was followed three years later by the benchmark decision, *Lemon v Kurtzman* (*Lemon*),¹⁹ where, in striking down a Rhode Island state statute providing salary supplements for teachers in religious and nonreligious private schools and a Pennsylvania state statute reimbursing religious schools for teachers’ salaries, textbooks, and instructional materials used in the teaching of specified secular courses, the Supreme Court framed its tripartite test that was to become a permanent fixture in Establishment Clause litigation. In order to determine if a government act providing assistance to religious schools passed constitutional muster under the Establishment Clause, that act would have to be examined as to whether it: (1) had a secular purpose, (2) advanced or inhibited religion, or (3) would result in excessive entanglement between government and religion.²⁰ A violation of any one of the three parts of the *Lemon* test would render a government act unconstitutional. Despite its detractors over the years, efforts to eradicate the *Lemon* test have been unsuccessful.²¹

In a series of government assistance cases in the 1970s, the Supreme Court invoked the *Lemon* test repeatedly to invalidate a broad range of state efforts to assist religious schools. On one day in

June, 1973, the Court rendered two government aid cases. In *Sloan v Lemon*,²² the Court struck down a Pennsylvania statute reimbursing parents for tuition paid to religious schools, reasoning that the statute had the impermissible effect of advancing religion. On the same day, the Court, in *Committee for Public Education & Religious Liberty v Nyquist*,²³ also invalidated a New York statute providing tuition reimbursement to parents, ruling that an act encouraging parents to enrol children in religious schools had the effect of advancing religion ‘whether or not the actual dollars given eventually find their way into the sectarian institutions’.²⁴ In addition, the *Nyquist* Court found unconstitutional maintenance and repair grants to religious schools limited to a maximum number of dollars per student, determining that the grants had the effect of ‘subsidiz[ing] and advanc[ing] the religious mission of sectarian school’.²⁵ In *Meek v Pittenger*,²⁶ the Supreme Court invalidated a State of Pennsylvania instructional equipment loan program to the extent that it sanctioned the loan of equipment which could be diverted to religious purposes, but upheld a statute loaning secular textbooks to religious schools, adopting the reasoning of *Everson* that textbooks were being lent directly to students, not to the private school, and that the financial benefit of the program redounded to parents and children, not to the private schools.

In 1977, a severely divided Supreme Court in *Wolman v Walter*²⁷ upheld an Ohio statute that expended state funds for purchases of secular textbooks for loan to the students, for standardised test and scoring services which were the same as those used by the public schools, and for the provision of diagnostic and therapeutic services to students. The Court reasoned that the state had ‘a substantial and legitimate interest in insuring that its youth receive an adequate secular education’.²⁸ While the *Wolman* Court invalidated the loaning of instructional materials and the funding of field trips on the ground that the monitoring of the equipment to assure no diversion to religious uses and the supervisory monitoring of field trips to assure that they were only to secular sites constituted an excessive entanglement under *Lemon*, members of the Court were clearly becoming dissatisfied with the *Lemon* test and its application to government aid for religious schools.

Arguably, the corner was turned in the Supreme Court’s *Committee for Public Education and Religious Liberty v Regan*²⁹ decision where the Court upheld a New York statute that reimbursed public and private (including religious) schools that administered and graded state mandated tests. For the first time, the Court upheld direct cash payments to religious schools as payment for grading the state-prescribed exams. Refusing to forego ‘common sense’,³⁰ the Court recognised that the sameness of function — grading of state tests by persons in either public or religious schools — is not an Establishment Clause violation, especially where the teachers had no responsibility in drafting the questions on the test. However, five years later in *Aguilar v Felton*,³¹ the Court invalidated a part of Title I of the federal *Elementary and Secondary Education Act* (ESEA)³² that required that publicly paid remedial math and reading instructors be available to provide on-site services in parochial schools on the same basis as they were provided in public schools. Ruling, in effect, that publicly paid teachers could not be trusted to limit their teaching in religious schools only to math and reading, a bare majority of the Court held that to permit the Title I program to be used in religious schools would require a permanent and pervasive state presence in sectarian schools receiving aid by requiring the city to adopt a system for monitoring religious content of publicly funded Title I classes.³³ In effect, Title I, as applied to religious schools, violated the excessive entanglement part of the *Lemon* test.

Twelve years later, though, the Supreme Court, in *Agostini v Felton*,³⁴ reversed *Aguilar*, reflecting in its decision the dramatic change that had occurred in the Court’s view of government aid to religious schools. The *Agostini* Court expressly dispensed with judicial assumptions,

invoked in past cases and undergirded by the *Lemon* test, which had resulted in the denial of government aid to religious schools. In essence, the *Agostini* Court ruled that lower courts should no longer assume that government assistance to religious schools would finance or advance religious indoctrination or that publicly paid teachers providing services at religious schools would disregard instruction not to indoctrinate students.

Two earlier post-*Aguilar* and pre-*Agostini* Supreme Court decisions had formed the basis for the Court's *Agostini* reasoning. In a 1983 decision, *Mueller v Allen*,³⁵ the Court had upheld on a neutrality theory a Minnesota statute that provided, both to parents of public and private students, tax deductions for tuition, textbooks, or transportation. The fact that only parents in private schools (96% of which were religious) were likely to be able to use the deductions was of no Establishment Clause consequence since the statute applied in a neutral manner to students in both public and private schools. Ten years after *Mueller*, the Supreme Court, in *Zobrest v Catalina Foothills School District*,³⁶ held that a public school's providing a sign language interpreter on-site at a religious school for a hearing impaired student did not violate the Establishment Clause. Citing to *Mueller*, the *Zobrest* Court held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.³⁷ In effect, the Court reasoned that the student would have received the same interpreter if he had enrolled at a public school. However, just to demonstrate how far the Court had come by the time of *Zobrest* in its view of neutrality, the Court refused to give significance to the fact that the sign language interpreter in the religious school would be interpreting both religious as well as secular instruction, something that would not have occurred in a public school.

Two recent late-Twentieth Century Supreme Court decisions have completed the redefinition of the constitutionality of government assistance to religious schools. In *Mitchell v Helms*,³⁸ the Court upheld another part of Title I of the ESEA that awards federal grants to state departments of education which then, in turn, are distributed to public and private (including religious) schools.³⁹ Funds are not distributed directly to private schools, but this part of the ESEA requires that public school districts purchase for distribution to private schools 'instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials'.⁴⁰ In fact, allocations of funds for private schools must generally be 'equal (consistent with the number of children to be served) to expenditures for programs ... for children enrolled in the public schools'.⁴¹ Among the materials and equipment provided under this program for private schools have been 'library books, computers, and computer software, and also slide and movie projectors, overhead projectors, television sets, tape recorders, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings'.⁴² Relying on the neutrality principle from *Agostini*, the *Mitchell* Court upheld the constitutionality of 'aid that is offered to a broad range of groups or persons without regard to their religion'.⁴³ As a result the Court also expressly overruled *Meek* and *Wolman*, holding that they were 'no longer good law'.⁴⁴

In the final government aid case, the Supreme Court, in *Zelman v Simmons-Harris*,⁴⁵ upheld the awarding of state vouchers to disadvantaged students in the Cleveland (Ohio) Municipal School District. The state statute authorising the vouchers also provided public school options for children, including money to hire tutors in the Cleveland public school and the possibility of enrolment in one of the fifteen school districts contiguous to the Cleveland district (subject, however, to the approval of those districts). However, by the time the case reached the Supreme Court, the evidence was clear that, while some children were being helped with their Cleveland

public school academic programs through the hiring of tutors, none of the contiguous school districts had elected to participate in the enrolment option. In effect, by far the largest amount of state funds was being expended for tuition for students to attend private schools in Cleveland, almost all of which had religious-affiliation. In upholding the voucher provisions, the majority of Justices in a divided Court referenced the litany of reasons that had been formulated to replace the tripartite *Lemon* test: the state aid program is neutral in the sense that students have both public and private options; the vouchers provide assistance to children who are disadvantaged; for children who are awarded vouchers, their presence in religious schools is the result of the choice of parents, not the public school district or the state; and, while the parents are only a conduit for voucher money ending up in the coffers of the private schools, they are, nonetheless, considered to be the immediate recipients of the funds.

Mitchell and *Zelman* have rewritten the law of government assistance to religious schools in terms of the *US Constitution's* Establishment Clause. While these two cases, as well as their judicial progeny, continue to refer to the *Lemon* tests, it is clear that the definition of impermissible government aid under the Establishment Clause has been changed significantly. However, the broadening of permissible government aid under the federal constitution has only served to shift the emphasis to state constitutions. A dramatic example of what can happen under state establishment clause provisions when they are interpreted more broadly than the federal constitution can be seen in *Witters v Washington Dept. of Services for the Blind*.⁴⁶ In *Witters*, the US Supreme Court held that a Washington State visually impaired student, who was pursuing bible studies degree at a Christian college in the state, could use financial vocational assistance awarded by the Washington State Commission for the Blind without violating the federal Constitution's Establishment Clause. However, on remand, the Supreme Court of Washington held that, while the assistance may be constitutional under the US Constitution, it was not under the state constitution.⁴⁷ The State of Washington Constitution provided that '[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment'⁴⁸ and the Supreme Court of Washington held that the state constitutional prohibition against applying public monies to any religious instruction prohibited granting aid to be used by a student in a program in preparation for the ministry. Thus, while the Supreme Court of Washington did not rely on the *Lemon* test in finding a state establishment clause violation, it produced a result similar to that of *Lemon*. The effect of the state supreme court decision in *Witters* is that the battle for government aid to religious schools has shifted from the federal to the state courts and from the interpretation of the US Constitution's Establishment Clause to interpretation of the fifty state constitutions' comparable provisions. Worth noting is that state constitutional limitations on aid for religious purposes would apply only to funds provided by state governments or by local governments, considered in all states to be administrative units of the states.

III THE AUSTRALIAN ESTABLISHMENT CLAUSE AND SCHOOL FUNDING

A *The Context of Australian Education and Funding to Schools*

Current contexts for funding to education, and particularly to religious-affiliated private schools in Australia, have emerged from distinctive aspects of Australian federal and state relations including revenue raising, appropriations for state expenditures, and allocation of powers.

1 *The Source of Education Funding in Australia*

Funding for education in Australia derives from three sources: the Australian federal government, state governments, and parents (through fees to private schools and ‘contributions’ to public schools’ activities and resources). For public schools, the predominant source is federal government funds. This is due to the sole role of the federal government in collecting income tax within Australia, both from individuals and corporations. Australia has three levels of government: local government, which collects property taxes;⁴⁹ state government, which can collect payroll tax, land tax, stamp duty and special provision levies; and the federal government, which collects income tax, the general services tax (GST), special levies, all taxes associated with customs and excise and so on.

Federal power in income tax collection arose during World War II, following a particularly critical battle close to Australian shores. A suite of acts⁵⁰ imposing a high tax rate on all high-income earners, cooption of state resources for tax collection, requirement for priority in payment of federal over state taxes, and subsequent appropriations to states for their activities, was introduced ‘with a view to the public safety and defence of the Commonwealth and for the more effective prosecution of the war in which His Majesty is engaged’,⁵¹ perhaps one of the first uses of a national crisis to enable federal legislation and power.

The states at that time had different income tax rates and held the resources, including staff and offices for the collection of income tax for their own purposes and also on behalf of the federal government.⁵² Several states challenged the constitutionality of the federal acts on the basis that they removed the states’ constitutional right to raise income tax and interfered with constitutionally-derived roles. By majority, the High Court held all acts to be constitutionally valid and not affecting the right of a state to raise income tax.⁵³ While aspects of the legislation were to be temporary, the federal government advised in 1946 that the scheme would be continued indefinitely.⁵⁴

Since World War II, states have not imposed income tax, due to possible effects on any federal appropriations to the state, and on state populations, who would most likely move to a state without additional income tax. The Australian federal government therefore has the major source of income for expenditure on public activities, and the power through appropriation clauses of the Australian Constitution to direct the expenditure of funds it provides to the states as long as the expenditure is within constitutional power. The federal government may not use such appropriation bills to extinguish constitutional powers of a state.⁵⁵ However, the balance of powers between the federal government and states in a range of areas has been, as a result of the Australian interpretation of reserve powers, broadly interpreted in favour of the federal government.

The issue that has arisen in the US whereby a state constitution Establishment Clause can be more restrictive than the federal clause would not arise in Australia. The various state and territory constitutions in Australia deal with the establishment of parliament and the judiciary, but not matters such as the establishment of religion. Decisions on public funding and the Australian establishment clause are intended to be resolved at federal level.

2 *Australian Government and Reserve Powers to the States*

The *Australian Constitution* nominates specific federal (Commonwealth) powers, specific areas of responsibility to states, and areas where the federal government cannot intrude on states. However, on many areas the *Constitution* is silent. While a reserve powers interpretation of the

Constitution, following the US and Canadian models, existed for some time after federation, that is, that matters on which the *Constitution* was silent were ‘reserved’ to the states, that interpretation was reversed in 1920 in the seminal *Engineers’ case*⁵⁶. While the federal government cannot enact laws that, for example, interfere with constitutional roles of the states or discriminate against or disadvantage one state over another, an absence of specific powers in the *Constitution* to the federal government does not render a reserve power to the state.

Australian states do challenge the constitutionality of new federal legislation on occasion. Quite recently, the extent of federal power was tested in the *WorkChoices* case,⁵⁷ when the federal government introduced legislation involving employment and industrial relations matters using its corporations power.⁵⁸ The states challenged the constitutionality of the legislation, arguing that the proper head for the matter was, not corporations, and that federal government constitutional authority in industrial relations was restricted to conciliation and arbitration of industrial disputes beyond state boundaries, not matters within states.⁵⁹ The states were unsuccessful, with the High Court ruling the use of the corporations power was valid for the federal government purposes. Given the extent to which corporations are the basis of modern capitalistic societies such as Australia, this ruling gives the Australian federal government widespread possibilities for future legislation.

Unlimited federal authority may have since taken a step back when an individual challenged the authority of, and the constitutional validity of the appropriations by, the Federal government to legislate payments to individual Australians as a remedy to the global financial crisis, nominally called a ‘tax bonus’.⁶⁰ The High Court of Australia by a narrow majority (4-3) held that the expenditure could be authorised under various sections of the Constitution, held together by the Executive Power of the government under s 61. However, the High Court cautioned:

Future questions about the application of the executive power to the control or regulation of conduct or activities under coercive laws, absent authority supplied by a statute made under some head of power other than s 51(xxxix)⁶¹ alone, are likely to be answered conservatively ... They are likely to be answered bearing in mind the cautionary words of Dixon J in the *Communist Party Case* ...:

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.

In essence, the High Court warned the Australian federal government against using perceptions of national crises as a basis for making legislation affecting either state or individual powers — Australian federal government powers are still bound by the *Constitution*, although the boundaries in recent times are yet to be identified.

B *Australian Government Funding of Religious-Affiliated Schools*

For the first half of the 20th century, and nearly the first century of schooling in Australia, government funding was provided only to public schools. Private schools historically drew from churches and charitable purposes, with fees paid by parents when possible. Parental choice of the type of school children attend has been noted as a parental right.⁶²

However, the introduction of public funding to private schools in Australia occurred almost by happenstance following a crisis in 1962. New South Wales Government health inspectors ordered that three additional toilets needed to be installed at a Catholic Primary School in a

small country town. The school had no funds available to do this. A 'strike' by the parents was organised — children from all the Catholic schools in the town were withdrawn, and more than 1000 children sought to enrol at the 'already overcrowded' public schools.⁶³

The strike ended after a week but a national lobby group ensured state aid for private schools became a 'political hot potato'. In 1963, the New South Wales Labor government, linked strongly to the Catholic population of the state, wanted to provide state funding for science laboratories in all private schools, but could not, due to internal party politics. However, the Prime Minister of Australia saw an opportunity, endorsed a similar policy and called a successful snap election,⁶⁴ with 'State Aid for science blocks and Commonwealth scholarships for students at both Government and non-Government schools as part of his Party's platform'.⁶⁵ Following this election, Minister John Gorton, in conjunction with other responsibilities, became the first federal minister for education, as the 'Minister assisting the Prime Minister in Commonwealth activities relating to research and education which fall within the Prime Minister's Department'. After the next federal election in 1966, Gorton was appointed the Minister for Education and Science. In five years in this role, Gorton presided over a major controversial foray of the Commonwealth into 'education areas which had been the business of the States and promoted State aid to non-government schools'.⁶⁶

While federal government funding for private schools, with or without religious affiliation, was for restricted purposes originally, federal cabinet papers throughout the 1960s show increasing funding for capital works and recurrent costs for private schools, although the expectation was that these would be accommodated within current financial provisions for education.⁶⁷

1 *Challenges to Federal Government Funding of Religious-Affiliated Private Schools*

In the seminal constitutional challenge to these directions in funding private schools, in 1981 the Victorian state government (the '*DOGS*' case⁶⁸) challenged on the basis that the use of federal funds for schools with a religious basis contravened the Australian Establishment Clause. The state was unsuccessful. In the leading decision for the High Court, Barwick CJ stated, in what could be seen as a clear rejection of the *Lemon* test approach in the US,

I have been unable to find any statutory authorization by the Commonwealth of any religious activity on the part of the non-government schools in the course of their educational activities. That there is no statutory prohibition of such religious activities in the course of authorized educational activities is scarce enough to make the appropriation and granting statutes, laws for establishing a religion in the only sense, in my opinion, those words can have in the Constitution. What the Constitution prohibits is the making of a law for establishing a religion. This, it seems to me, does not involve prohibition of any law which may assist the practice of a religion and, in particular, of the Christian religion.⁶⁹

Justice Wilson stated further that in Australian private schools with religious affiliation, religion was

... an incidental or indirect consequence of the pursuit of the educational purpose. In no case is religion a criterion which attracts a grant. Even the most 'religious' of the schools which have received assistance are first and foremost educational institutions which are required to strive for a range and quality of education which is at least comparable to government schools.⁷⁰

In 2004, the teachers union in New South Wales indicated that it would again challenge the constitutional validity of public funding for non-government schools as it was argued that evidence was available that public funding was being used to promote religious education.⁷¹ However, the challenge did not eventuate, possibly due to lack of public support for the position.

Avenues of government funding of private schools have increased since the early times, including over the last decade. Available funding includes capital works funding programs, per capita student funding that directly supports teacher salaries and administrative costs, and special purpose grants in areas such as literacy and numeracy, students with special needs or English as a second language background, or technology.

Limits that reflect the Establishment Clause, and would support the US *Lemon* test, do exist. For example, in the 1976 provisions bill,⁷² a building project would not be approved 'to provide facilities for use, wholly or principally, for or in relation to religious worship'.⁷³ In 1981, when 'ethnic education' policy was in vogue, funding was available to both public and private schools for a

'program of ethnic education' ... a program of instruction, on a part-time basis, the sole or principal purpose of which is to teach students undertaking the program a language (not being the English language), either alone or in conjunction with ethnic cultural instruction (*other than instruction that is wholly or predominantly of a political or religious nature*) related to people speaking that language as their native language.⁷⁴

IV ESTABLISHING A PRIVATE SCHOOL IN AUSTRALIA: WHO CONTROLS THE AGENDA

The nature of any 'school' in Australia is highly-controlled. Establishment of a private school in Australia requires state-level accreditation. A new school proposal must meet guidelines that include facilities, qualified staff and policies (eg, student safety). The school must indicate the curriculum model that it will teach, and curriculum must be accredited by the state.⁷⁵

Using Queensland as an example, the most important starting point is that the proposed school must be non-profit.⁷⁶ The potential impact of a new school on enrolments at any existing school, particularly existing public schools, is also considered.⁷⁷ A further consideration is 'the extent of religious, philosophical, or educational delivery, choice in education that students residing in the school's catchment area have with the existence of the school',⁷⁸ a clear policy endorsement of government funding of diversity of choice and religious-affiliated schools.⁷⁹

In general, state level funding to private schools is limited compared with federal government funding. A state-accredited private school, with or without religious affiliation, seeking federal government funding must meet further conditions and another round of approval through the federal government education department. The school, or representative of a school system, signs an individual agreement with the federal minister for education.⁸⁰ Funding allocations for the private school sector are paid by the federal government to state governments, with the requirement that the state must pay amounts of assistance to the relevant authority of the school or body 'as soon as practicable'.⁸¹ The private school sector explains this mechanism of payment by the Australian federal government to the states for such private school funding:

[t]he Australian Government has not constitutional authority to make direct payments to non-government schools but uses its power under various sections of the Australian Constitution to make payments to States for schools.⁸²

Thus, for private schools, both with and without religious affiliation, federal government funding is available if the school meets state and federal requirements. What has been occurring in the last fifteen years has been a growth in the number of private schools, especially schools affiliated with minority religions. Pre-1996, federal requirements on size and affiliation for government funding of private schools had affected schools affiliated with minority religions. When these restrictions were removed from legislation in 1996, a number of schools previously ineligible for public funding became eligible, and an increase occurred in the number of small schools with a minority religious affiliation receiving government funds.⁸³ For example, among the 507 accredited private schools in Queensland, religious affiliations include Catholic, Anglican and Presbyterian, Ananda Marga, Islamic, Brethren, Jewish, and Assemblies of God. In New South Wales, a small accredited independent school flourishes in a Hare Krishna community.

While state governments control the establishment of schools through legislation at the state level, they have no constitutional role that affects public funding for religious-affiliated private schools. Conversely, states are also bound by their own, and federal, anti-discrimination acts and cannot discriminate against a specific religious affiliation when accrediting a proposed school.⁸⁴ However, state governments do have a role in monitoring schools. In contrast to the 'excessive entanglement' of the US *Lemon* test, the Australian federal and state governments are happy to monitor the content of teaching in religious-affiliated private schools to ensure the religious content does not interfere with non-religious curriculum requirements.⁸⁵ Recently, an Islamic school in Western Australia was closed for failure to teach the accredited curriculum, and focusing 'too heavily' on religious instruction.⁸⁶ The Education Minister stated that:

The school was not meeting the curriculum framework, with some of the students there undertaking religious instruction on a daily basis for 43 per cent of their time at school.

The school closure deepened from an issue of religious content. The acting principal was also charged with defrauding the government of some \$356 000 funding, with the school a part of a larger group subsequently charged with more substantial fraud.⁸⁷

Thus, the federal constitution in Australia and the *DOGS* case govern the use of public funds for religious-affiliated private schools. Unlike the US, Australian state governments have no constitutional role in establishment clauses and cannot discriminate against specific religions when accrediting private schools. The question is whether there may be a new player in school establishment, local governments. What may be happening in Australia is a public reaction to Muslim schooling and presence, following the September 11 attack in the USA and attacks involving Australians in Indonesia. Muslims have long been apart of Australian community and, like all religions, are tainted by extremist positions.

A Local Government and Religious-Affiliated Private Schools

In 2008, in Camden, New South Wales, the local council voted unanimously to reject a proposal to build a 1200-student Islamic school following substantial objection by residents in the area. Reasons for the rejection included: a school was not in the original planning development for the area (although a permissible use); traffic concerns; and loss of valuable primary industry land. The Islamic group wishing to build the school had paid \$1.5m for the land, and \$250,000 for the development application.⁸⁸ The school proposers appealed unsuccessfully in the Land and Environment Court in New South Wales, rejected again on the grounds that the proposed school did not comply with the site's zoning restrictions,⁸⁹ although '[a]n "educational establishment" is a permissible use within this [rural] zone, with consent'.⁹⁰

The issues considered by the Land and Environment Court were the rural locality, the planning regulations to keep agricultural enterprise to the fore, including matters such as air and water quality. A major issue appeared to be the planned size of the school, and the number of two-storey buildings proposed. Commissioner Brown stated

I do not accept that because a school is a permissible use within the zone that this suggests that the proposed development should be given some greater entitlement to an approval. ... It may be that a school is suitable for the site but it does not follow that all schools are suitable. For example, Mr Dowd accepted that a school that contained only a very small number of classrooms may be acceptable on the site.⁹¹

The reasoning of the decision appears to have a sound rural and environmental basis. The argument may be weakened, however, by the fact that a government high school had been recently constructed some 800 metres to the south, in a presumably previously rural site. 'Only part of the buildings associated with the school can be observed from the locality and only from the higher parts around The Old Oaks Road ... [and] have little impact on the character of the locality because of the distance from the site and screening by the natural topography'.⁹² While the proposed Islamic school less than a kilometre away was rejected on environmental grounds, the children in the new public high school

set on six and a half hectares ... [enjoy the] beautiful views of the Razorback Range as a backdrop. The school community — students, parents and teachers are now busily engaged in using the exciting new facilities that we have to their maximum advantage.⁹³

The Land and Environment Court for the Camden appeal stated that issues of taste and morality of the public were not a concern and matters raised as being in the public interest were not considered.⁹⁴

Since this rejection, another Sydney council has approved an Islamic school development, stating that most concerns by the community had been about traffic concerns.⁹⁵ Nine per cent of the community around the school was Islamic and the area was fast-growing.

Similar issues have arisen elsewhere. A Muslim school has been approved on land purchased by the proposers on the Gold Coast, in south-east of Queensland, one of the fastest growing areas in Australia. A dispute has arisen over the city council's proposed claim under a local area plan to control land, in a flood basin, on a border of the school property, and dedicate the land to native flora and fauna. The council state they have 'been very supportive of the Islamic College — this is not a religious decision, it is purely a planning requirement'; the college proposers claim the decision has a religious basis and that it puts the viability of the school at risk.⁹⁶ However, at least one councillor is reported to have publicly expressed concern about the Islamic nature of the school:

... more time was needed to address the concerns of residents who feared the possibility of religious and racial clashes such as those seen in southern cities and overseas. Cr Young said: 'If what is occurring overseas is to occur here then that is scary. I'm worried about the tension that is in the community, which is fundamentally on religious grounds'.⁹⁷

V CONCLUSION

In the US, direct funding of religious-affiliated private schools does not occur as this is held to be in contradiction of the US Constitution Establishment Clause. However, as the tracing of judicial decisions, and of policy, shows, there are many areas where provision of funds and/or

resources, both physical and human, are allowed, on the basis of neutrality of effect on religion, and equity of provision for all. This reflects the trend in public funding provision in Australia where successive policies and provision acts have provided funds to both public and private schools, regardless of religious affiliation, for provision of specified programs and services such as English as a Second Language (ESL), multicultural education projects, equity projects to address the involvement of both girls and boys in education or to assist rural and/or disadvantaged schools, computers, assistance for students with special needs, and general facilities such as libraries and science facilities.

The core difference between the two nations and the impact of the constitutional establishment clauses is that in Australia non-specified funding is also provided directly to the private schools on a per capita basis for both general expenses and building infrastructure. Funding to private schools is not limited by area of funding, but is restricted in dollar terms, with the private sector as a whole receiving proportionally less funding than the public school sector.⁹⁸ By contrast, in the US, funding cannot go directly to schools for a student's tuition but, through provisions such as IDEA, can go to parents of students with disabilities as the conduit to a school. Paradoxically, in these circumstances, the funding being provided for tuition often greatly exceeds the cost of provision in a public school space.

A general consensus may be that, for practical purposes, judicial interpretations of the establishment clauses at the federal level for public funding to religious-affiliated private schools in the US and Australia are merging. The new player in the US is the impact of state constitution establishment clauses that may be more restrictive than the federal *Constitution* establishment clause.

What is more concerning is where we may be headed in Australia. The recent Australian local government decisions just discussed may be demonstrating that while the issue of public funding for private schools with a religious affiliation has been settled at federal and state government levels, the lowest level of government in Australia, city councils through their planning powers, is demonstrating its capacity to control the fabric of society. In the Australian system of politics, political parties, and appointments to the public service, most politicians are members of a party, with responsibility to party policies overriding individual electorate responsibilities. Public servants at all levels are appointed on merit, not elected. This has the advantage of providing some degree of separation between politicians and public servants and the public. By contrast, elected local council authorities are directly involved in decisions at local levels. They may be more sensitive to the demands of the electorate in order to hold their positions, particularly in areas where the geographic size of a council authority, and the electorate of the local member, are small.

It may be that in Australia the Federal or state governments will need to implement clearer policies about the funding and development of private schools in order to prevent any covert discrimination that may occur in response to media-intensified paranoia. While state governments have a role in the accreditation of private schools, perhaps they should be given a greater role in determining the placement and establishment of such schools also. The accreditation act in Queensland already provides for the placement of school, competing schools,⁹⁹ and provision of education to students of diverse cultural and religious backgrounds.¹⁰⁰ Perhaps control of the decision for a school to be built should be placed at this level.

Keywords: school funding; private schools; religion; establishment clauses; US; Australia.

ENDNOTES

- 1 The First Amendment also offers other rights including freedom of speech that are not a focus of this discussion.
- 2 Section 116, *Commonwealth of Australia Constitution Act 1901*. Section 116 further states ‘and no religious test shall be required as a qualification for any office or public trust under the Commonwealth’, an area also not a focus of this discussion.
- 3 Throughout this article, the term ‘public’ school is used to refer to government-run schools and ‘private’ to schools not run by the government. In Australia the private school sector consists of Catholic faith schools and ‘independent’ schools that may or may not have religious affiliation. More than 30 per cent of students in Australia attend private schools, across all levels, with one third of these in Catholic faith schools. In the US, the existence of charter schools can confound the private/public divide, but are not the focus of this discussion.
- 4 *Individuals with Disabilities Education Act* (20 USC. §§ 1400 et seq.).
- 5 For a fuller explanation and the current interpretation of such public funding, see Ralph Mawdsley, ‘When Should Public School Districts in the US Have to Reimburse Parents under the IDEA for the Unilateral Private School Placement of Their Children with Disabilities?: The US Supreme Court Reexamines the Issue in Its 2009 Decision, *Forest Grove School District v T.A.*’ (2009/in press) 14(2) *International Journal of Law & Education*.
- 6 This is not to say that the issue of funding to any private school, versus public school, is not contentious with sections of the populace.
- 7 *No Child Left Behind Act* (20 USC §§ 6301 et seq.)
- 8 Many private schools are aligned through a school system, for example, through Catholic diocese.
- 9 The latter act provides authority to the federal Minister for Education to approve new schools, approve change to school structures or revoke school approvals.
- 10 Australia has six (6) states and two (2) territories, hereafter referred to as ‘states’.
- 11 International Center for Educational Statistics. Private School Universe Survey, Table 2. Number and percentage distribution of private schools, students, and full-time equivalent (FTE) teachers, by religious or nonsectarian orientation of school: United States, 2007–08. See <http://nces.ed.gov/surveys/pss/tables/table_2008_02.asp> at November 2009.
- 12 International Center for Educational Statistics. Digest of Education Statistics. Table 2. Enrolment in Education Institutions, by Level and Control of Institutions, fall 1980 through fall 2008. See <http://nces.ed.gov/programs/digest/do8/tables/dt08_002.asp> at November 2009.
- 13 See generally, Ralph Mawdsley and Johan Beckmann, ‘The US Supreme Court Continues to Struggle With the Meaning of the Establishment Clause and Its role in Assuring Fair and Balanced Treatment of Religion’ (2005) 10(1) *Australia & New Zealand Journal of Law and Education* 73.
- 14 330 US 1 (1947).
- 15 Ibid 18.
- 16 Ibid.
- 17 392 US 236 (1968).
- 18 Ibid 243-44.
- 19 403 US 602 (1971).
- 20 Ibid 612-13.
- 21 See *Lamb’s Chapel v Center Moriches Union Free School District*, 508 US 384, 398 (1993) where Justice Scalia eloquently expressed his frustration over the *Lemon* test’s long life:
Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon stalks* our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under.
- 22 413 US 825 (1973).
- 23 413 US 756 (1973).
- 24 Ibid 786.

25 Ibid 779-80.
 26 421 US 349 (1975).
 27 433 US 229 (1977).
 28 Ibid 240.
 29 444 US 644 (1980).
 30 Ibid 658.
 31 473 US 402 (1985).
 32 20 USC. § 2701 et seq.
 33 *Aguilar*, 473 US 402, 412-13.
 34 521 US 203 (1997).
 35 483US 388 (1983).
 36 509 US 1 (1993).
 37 Ibid 8.
 38 530 US 793 (2000).
 39 20 USC. §§ 7301-7373.
 40 Ibid § 7351(b)(2).
 41 Ibid § 7372(b).
 42 *Mitchell*, 530 US 793, 803.
 43 Ibid 808.
 44 Ibid. This reversal applied in both cases to the Court's determination that loaning instructional materials to religious schools and providing transportation for field trips was an establishment Clause violation.
 45 536 US 639 (2002).
 46 474 US 481 (1986).
 47 *Witters v State Com'n for the Blind*, 112 Wash 2d 363 (Wash, 1989).
 48 Rev. Code of Wash. Art. 1, § 11.
 49 Local governments in Australia are known as 'councils', the term used in this article. Councils in different states can have quite different regional geographic size; Queensland with an area of 1.7m sq km has 73 local councils, which can cover a region of 70 000 sq km. Local governments are mainly concerned with planning and development and provision of local services.
 50 *States Grants (Income Tax Reimbursement) Act*, No. 20 of 1942, the *Income Tax (War-time Arrangements) Act*, No. 21 of 1942 (the act co-opting state resources), the *Income Tax Assessment Act*, No. 22 of 1942, and the *Income Tax Act*, No. 23 of 1942.
 51 *South Australia v Commonwealth (First Uniform Tax Case)* [1942] HCA 14, (1942) 65 CLR 373 [access online, www.austlii.edu.au, unpaginated].
 52 In most instances, individuals only had to complete one income tax form with columns for the state and federal tax. Tax liability in more than one state required additional returns.
 53 *South Australia v Commonwealth (First Uniform Tax Case)* [1942] HCA 14, (1942) 65 CLR 373. Most dissent focused on the *War-Time Arrangements Act*, found by Latham CJ to be invalid but accepted by 3 of the 5 justices. The Act was to continue only until the end of the financial year following the end of the war.
 54 Peter Hanks and Deborah Cass, *Australian Constitutional Law* (6th ed, 1999) [9.6.7]. Despite a further challenge by two states, the system has remained in place (*Victoria v Commonwealth (The Second Uniform Tax Case)* (1957) 99 CLR 575, in essence supporting the original constitutional interpretation of financial power of the federal government).
 55 Latham CJ stated in the *First Uniform Tax Case*, 'Equally, it is said, the Commonwealth cannot lawfully make an offer of money to a State which, under the conditions which actually exist, the State cannot, on political or economic grounds, really refuse'. However, in *Attorney-General (Vict.) v Ex Rel. Black v The Commonwealth ('DOGs case')* [1981] HCA 2, [38] Barwick CJ stated with respect to federal appropriation grants, 'The operation of the conditions depends on the State's acceptance of the grant. It is no answer to the consequence of this fact that economically speaking a State may have little choice'. Most states would not be able to provide any public service without federal grants and most grants have substantial conditions reflecting federal policy.

- 56 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('Engineers' case') [1920] HCA 54; (1920) 28 CLR 129.
- 57 *New South Wales v Commonwealth* ('Work Choices case') [2006] HCA 52.
- 58 *Australian Constitution* s 51: The (Commonwealth) Parliament shall, subject to this Constitution have power to make laws for the peace, order and good government of the Commonwealth with respect to: ... (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.
- 59 *Australian Constitution* s 51(xxxv): The (Commonwealth) Parliament shall, subject to this Constitution have power to make laws for the peace, order and good government of the Commonwealth with respect to: ... (xxxv): conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.
- 60 *Pape v Commissioner of Taxation* [2009] HCA 23, challenging the constitutional validity of the *Tax Bonus for Working Australians Act (No 2) 2009*. The appropriation clauses that the plaintiff argued did not apply were s 81 Consolidated Revenue Fund, and s 83 Money to be Appropriated by Law. The plaintiff, Bryan Pape, is an academic and legal professional committed to the study of Australian federal and constitutional authority and corporations and tax law. For his commentary on the decision, see Bryan Reginald Pape, 'The Tax Bonus Case or Did the Commonwealth Cry Wolf?' Paper presented at the The Samuel Griffith Society Twenty First Annual Conference, 28-30 August 2009, Adelaide, SA <<http://www.une.edu.au/staff/images/PapeaddressSamuelGriffithSociety.pdf>> at 30 November 2009.
- 61 *Australian Constitution* s 51: The (Commonwealth) Parliament shall, subject to this Constitution have power to make laws for the peace, order and good government of the Commonwealth with respect to: (xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.
- 62 An argument used to support federal funding of private schools ('*DOGs case*' [1981] HCA 2, [14]: Wilson J citing the *Schools Commission Act 1973* (Cth)).
- 63 ABC, 'The Battle for State Aid', *Timeframe*, 1997 <<http://www.abc.net.au/time/episodes/ep7.htm>> at 30 November 2009.
- 64 The Federal government has a maximum term of three years in Australia, but no set minimum term. Terms are not fixed and elections can be called on provision of appropriate notice.
- 65 *Ibid*.
- 66 National Archives of Australia records, *Australia's Prime Ministers, John Gorton* (undated) <<http://primeministers.naa.gov.au/meetpm.asp?pageName=before&pmId=19>> at 3 August 2009.
- 67 National Archives of Australia records. *Treasury Analysis of Submission No 359. New and Expanded Measures in Education. Decision 410(M)*. (undated) <<http://naa12.naa.gov.au/scripts/imagines.asp?B=1849630&I=1&SE=1>> at 3 August 2009.
- 68 *DOGs case* [1981] HCA 2, 146 CLR 559. Other states supported the federal legislation.
- 69 *Ibid* 584.
- 70 *Ibid* 656. The High Court in *Black* also argued that the establishment clause in the Australian Constitution, and the constitutional papers, did not establish a separationist view of church and state (at 654). While the US and Australian establishment clauses appear similar on the surface, Barwick CJ stated that the use of the term 'for' rather than 'respecting' was deliberate: 'The divergence in language to which I have earlier referred is apparent from the use of the word "respecting" in the American text and the word "for" in s 116. What the former may fairly embrace, quite clearly the latter cannot: and that is so, in my opinion, even without placing critical significance on the purposive nature of the Australian expression and the lack of such an element in the American text. ... However, in the interpretation and application of s. 116 the establishment of religion must be found to be the object of the making of the law. Further, because the whole expression is "for establishing any religion", the law to satisfy the description must have that objective as its express and, as I think, single purpose. Indeed, a law establishing a religion could scarcely do so as an incident of some other and principal objective. In my opinion, a law which establishes a religion will inevitably do so expressly and directly and not, as it were, constructively.': at 579.

- 71 See, eg, L Doherty 'Legal Challenge to Federal Cash for Religious Teaching' *Sydney Morning Herald* (Sydney), 5 May 2004 <<http://www.smh.com.au/articles/2004/07/05/1089000092854.html>> at 3 August 2009. The religion of focus was Catholic education, however, not minority religions.
- 72 *States Grants (Schools) Act 1976* (Cth).
- 73 *States Grants (Schools) Act 1976* (Cth) s 8(2)(b).
- 74 *States Grants (Schools Assistance) Amendment Act 1981* (Cth) Sect. 11, new s 34A(2) (to be inserted after s 34 of the Principal Act) (emphasis added).
- 75 *Education (Accreditation of Non-State Schools) Regulation 2001* (Qld) r 7.
- 76 *Education (Accreditation of Non-State Schools) Act 2001* (Qld) s 17(1)(b)(i).
- 77 *Education (Accreditation of Non-State Schools) Act 2001* (Qld) s 84(4)(a).
- 78 *Education (Accreditation of Non-State Schools) Act 2001* (Qld) s 84(4)(b).
- 79 Funding eligibility is determined by a committee with the final decision resting with the (state) Minister (*Education (Accreditation of Non-State Schools) Act 2001* (Qld) s 71), on the basis of a recommendation from the board on the basis of deliberations by the Non-State Schools Eligibility for Government Funding Committee (*Education (Accreditation of Non-State Schools) Act 2001* (Qld) s 3(2)(c)).
- 80 *Schools Assistance Act 2008* (Cth), s 11(2) Financial assistance to a State for a non-government school, or another non-government body, must not be paid unless there is an agreement between the Commonwealth and the relevant authority of the school or body.
- 81 *Schools Assistance Act 2008* (Cth) s (11)(4)(c); *Schools Assistance (Learning Together — Achievement Through Choice and Opportunity) Act 2004* (Cth) s 39(a)(i). Further the state must describe such funds as 'a payment made out of money paid to the State by the Commonwealth' (s 39(a)(ii)).
- 82 Independent School Queensland, *Australian & Queensland Government Funding for Independent Schools Choice & Diversity An Information Booklet for ISQ Member Schools* (2009), 8.
- 83 See *Review of Non-Government Schools in NSW: Report 1* (2002) 79, 80 <<http://www.det.nsw.edu.au/reviews/ngsreview/>> at 30 November 2009.
- 84 For example, *Racial Discrimination Act 1975* (Cth) Schedule International Convention on the Elimination of All Forms of Racial Discrimination s 3(1), *Equal Opportunity Act 1984* (SA) s 85ZE, *Equal Opportunity Act 1995* (Vic) s 6, *Anti-Discrimination Act 1991* (Qld) s 7.
- 85 *Cf Aguilar v Felton* 473 US 402 (1985), where the city did not want 'to adopt a system for monitoring religious content of publicly funded Title 1 classes'.
- 86 E Gosch, 'School Closed As Director Charged' *The Australian* (Perth, 10 December 2007) <<http://www.theaustralian.news.com.au/story/0,25197,22896920-2702,00.html>> at 3 August 2007. The school was also employing unqualified teachers and issues were raised about student numbers.
- 87 The director of the Islamic group of schools and two school principals were charged with defrauding the West Australian and Federal governments of more than \$3m by inflating student numbers, with the activities alleged to have occurred over a number of years: A Buckley-Carr, (2008) 'Islamic School on Fraud Charges' *The Australian* (Sydney), 28-29 June 2008. The trials are still pending on these matters.
- 88 'Camden Council rejects Islamic school', *The Sydney Morning Herald* (Sydney), 27 May 2008 <<http://www.smh.com.au/news/national/camden-council-rejects-islamic-school/2008/05/27/1211654025143.html>> at 3 August 2009. See also, Rebecca Senescall and Alicia Bowie, 'Council Unanimously Rejects Muslim School', commenting that 'Seven of the councillors spoke, but all stuck to the script of speaking on the planning-based objections rather than wider community concerns'. *Camden Advertiser* (Camden), 27 May 2008 <<http://www.camdenadvertiser.com.au/news/local/news/general/reject-islamic-school-council-report-says/775511.aspx#>> at 3 December 2008.
- 89 *The Qur'anic Society v Camden Council* [2009] NSWLEC 1171, Brown C.
- 90 *Ibid* [10].
- 91 *Ibid* [29].
- 92 *Ibid* [35], [39].
- 93 <<http://www.camden-h.schools.nsw.edu.au/>> at 3 August 2009.
- 94 *Ibid* [119].

- 95 SBS (2009) 'Council Approves Muslim School in Sydney' (30 June 2009) <<http://www.sbs.com.au/news/article/1042101/Council-approves-Muslim-school-in-Sydney>> at 3 August 2009.
- 96 A Caldwell, 'Muslim School in New Fight', *The Courier-Mail* (Brisbane), 30 July 2009, 21.
- 97 Jeremy Pierce, 'Christians Won't Protest As Council Approves Gold Coast Islamic School', *The Courier Mail* (Brisbane), (February 4 2009), citing one councillor as voting against the approval on the grounds. <<http://www.news.com.au/couriermail/story/0,,25002827-3102,00.html>> at 30 November 2009. For the reaction of some of the protestors, see Jeremy Pierce, 'Muslim School Plan Draws Gold Coast Protest', *The Courier Mail* (Brisbane), 1 December 2008, <<http://www.news.com.au/couriermail/story/0,,24737109-3102,00.html>> at 3 December 2009. Environmental cases involving educational developments abound. The decisions are not always supported by appeal courts or biased against particular religions. For example, The Hills Shire Council did not approve a childcare development by Mr Anthony El-Hazouri. It is not known if the centre were to have religious affiliation. However, El-Hazouri was successful in appeal to the Land and Environment court and had the rejection overturned. The Commissioner and experts found that all requirements for such a development could be met (*El-Hazouri v The Hills Shire Council* [2009] NSWLEC 1043). By contrast, to be even-handed, the extension of use of a Presbyterian Church premises to a non-profit English language college for international students was also overturned in Western Australia by the Town of Bassendean, affirmed on appeal by the church. The new purpose was found to be a major, not 'incidental', change of use of land not serving the local community (*Bassendean Presbyterian Church and Town of Bassendean* [2009] WASAT 196). However, no commentary on the religion of the church exists, as opposed to clear public demonstrations against proposed Islamic institutions.
- 98 While other analyses provide data that indicate private school funding has grown and exceeds public school funding in Australia (see, eg, Doug Stewart and Charles Russo, 'A comparative analysis of funding non-government schools in Australia and the United States' (2001) 13(1) *Education and the Law* 29, 34), such estimates usually do not consider funding from all public sources. A current estimate is that if the federal and state governments were to fund the private school sector on parity with the public school sector, an additional \$5 billion would be needed annually: Victorian Parents Council, 'Funding for Non-Government School Students' (2009) <<http://www.vicparentscouncil.vic.edu.au/current-issues/funding-a-statistics>> at 3 December 2009.
- 99 *Education (Accreditation of Non-State Schools) Act 2001* (Qld) s 84(4)(a).
- 100 *Education (Accreditation of Non-State Schools) Act 2001* (Qld) s 84(4)(b).