

# A QUESTION OF CHARACTERISATION: CAN THE COMMONWEALTH FACILITATE THE IMPOSITION OF RELIGIOUS OBSERVANCES? *HOXTON PARK RESIDENTS ACTION GROUP INC v LIVERPOOL CITY COUNCIL*

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## I INTRODUCTION

The ‘religious observances clause’ of s 116 of the *Australian Constitution* provides that ‘[t]he Commonwealth shall not make any law ... for imposing any religious observance’. In *Hoxton Park Residents Action Group Inc v Liverpool City Council* (*‘Hoxton Park’*),<sup>1</sup> the appellants argued that Commonwealth legislation governing federal funding of private schools was, in its application to a particular Islamic school in suburban Sydney, a law for imposing religious observances. The general argument was that since the school imposed religious observances on its students and the federal funding enabled the school to operate, the Commonwealth law operated to facilitate the school’s imposition of religious observances on its students. It followed, so the argument went, that the Commonwealth law was a law for imposing religious observances.

The New South Wales Court of Appeal rejected that argument and the High Court refused an application for special leave to appeal saying there is ‘no reason to doubt the correctness [of] the conclusion of the Court of Appeal’.<sup>2</sup> Whilst the Court of Appeal might have come to the correct conclusion, there are, as this article will show, three serious flaws in the reasoning adopted by the Court of Appeal that deserve critical attention. Those flaws concern the role of legislative purpose in s 116 analysis, whether s 116 prohibits laws that impose religious observances indirectly and the role of consent in determining a religious observances clause challenge. These flaws need to be highlighted and critiqued lest they erroneously become accepted features of s 116 jurisprudence.

This article is structured as follows. Part II provides an overview of the background and facts of the case. Part III summarises the decision at first instance and Part IV summarises the decision of the Court of Appeal. Parts V–VII critique three key aspects of the Court of Appeal’s reasoning. Part V deals with the Court of Appeal’s reasoning that the impugned legislation did not have a purpose connected with the imposition of religious observances and that such a purpose was necessary for a breach of s 116. The article argues that the Court of

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1 (2016) 344 ALR 101.

2 *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2017] HCASL 60 (8 March 2017). In accordance with its usual practice in deciding special leave applications, the High Court gave no reasons to explain how it came to this conclusion.

Appeal was too quick to dismiss the possibility that the impugned legislation did indeed have such a purpose and argues that, in any event, an improper purpose is not necessary for a breach of s 116. Part VI deals with the Court of Appeal's reasoning that it is only laws of their own force and by which the Commonwealth itself directly imposes religious observances that will breach s 116. The article argues that a law which authorises or facilitates a non-Commonwealth entity or person to impose a religious observance will be invalid by reason of s 116. Such a law imposes a religious observance albeit indirectly.

In Part VII, the article deals with the Court of Appeal's reasoning that a law imposing a religious observance might be rendered valid by the consent of the affected person. The article argues that this analysis is incoherent since consent and imposition are mutually exclusive concepts and it incorrectly moves the analytical focus away from whether a law may be characterised as one for imposing religious observances. Part VIII concludes by explaining how despite the flaws in the Court of Appeal's reasoning the conclusion in the case was nevertheless correct. The conclusion is correct because, although the law may have in some way assisted with the school imposing religious observances on its students, any connection between the law and the imposition of religious observances was too tenuous, insubstantial or distant to permit the law to be characterised as a law for imposing religious observances.

## II BACKGROUND AND FACTS

When the litigation commenced, the Malek Fahd Islamic School operated over three campuses in the western suburbs of Sydney, including in Hoxton Park. The school is conducted by Malek Fahd Islamic School Ltd (the second respondent), a company limited by guarantee, and is part of a network of Islamic schools operated under the umbrella of the Australian Federation of Islamic Councils Inc (the third respondent). The Australian Federation of Islamic Councils Inc had power, among other things, to appoint directors to the board of Malek Fahd Islamic School Ltd and to determine who was hired as school principal.<sup>3</sup> The Australian Federation of Islamic Councils Ltd owned the land on which the school operated and leased that land to Malek Fahd Islamic School Ltd under a long-term lease.<sup>4</sup> Liverpool City Council was a respondent on the basis that the appellants had earlier sought to challenge the development consent granted by the Council for the construction of the school in other proceedings.<sup>5</sup> The Commonwealth, which

3 *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2015] NSWSC 136 (3 March 2015) [24].

4 This arrangement caused problems. The Commonwealth found that the rent payable on the lease was above market rates and that this was a device to impermissibly transfer federal education funds from the school to the Australian Federation of Islamic Councils Inc: see *Malek Fahd Islamic School Ltd and Minister for Education and Training* [2016] AATA 1087 (23 December 2016). This situation was not relevant to the case before the Court of Appeal.

5 *Hoxton Park Residents' Action Group Inc v Liverpool City Council* (2010) 246 FLR 207.

provided funding to the school, and New South Wales, through which the federal funding of the school was channelled through s 96 grants, were also respondents.

The appellants were the Hoxton Park Residents Action Group Inc, a local activist organisation that appears principally concerned with the establishment of the school in question, and one of its members, Marella Harris, a local resident who had contested the 2013 federal election as a One Nation candidate. By what was described by Pembroke J in the Supreme Court of New South Wales as ‘lengthy, muddled and unsatisfactory litigation’,<sup>6</sup> the appellants agitated a number of legal claims to invalidate planning approval for the school and government funding of the school. The objective of the appellants was to bring about the school’s closure.<sup>7</sup> There have been at least 10 written judgments connected with the litigation since 2010.<sup>8</sup>

At first instance, the appellants attacked the federal funding of the school under each of the first three clauses of s 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’. The claim was not that s 116 prohibits Commonwealth funding of religious schools generally. Rather, the claim was that s 116 prohibits Commonwealth funding of this particular school because of its particular features.<sup>9</sup> Perhaps because of the ‘muddled’ way the case was presented, Pembroke J described this distinction as ‘elusive, and its practical application may be difficult’.<sup>10</sup>

At first instance, the appellants had sought from the Supreme Court a:

Declaration that Part 4 of *Schools Assistance Act 2008* (Cth) and Part 3 of *Australian Education Act 2013* (Cth) is invalid pursuant to *Constitution* section 116 to the extent that it authorized the Fifth Defendant [ie the Commonwealth] to grant financial assistance to the Fourth Defendant [ie New South Wales] for the purpose of funding educational services at the Hoxton Park school conducted by the Second Defendant [ie Malek Fahd Islamic School Ltd] which includes:

...

Compulsory Prayers for all students in the form of ‘Salaat’

6 *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2015] NSWSC 136 (3 March 2015) [3].

7 *Ibid.*

8 See *Hoxton Park Residents’ Action Group Inc v Liverpool City Council* (2010) 246 FLR 207; *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2010] NSWLEC 242 (26 November 2010); *Hoxton Park Residents Action Group Inc v Liverpool City Council [No 2]* [2010] NSWLEC 259 (14 December 2010); *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 81 NSWLR 638; *Hoxton Park Residents Action Group Inc v Liverpool City Council [No 2]* (2011) 256 FLR 156; *Hoxton Park Residents Action Group Inc v Liverpool City Council [No 3]* (2012) 190 LGERA 119; *Hoxton Park Residents Action Group v Liverpool City Council [No 4]* [2012] NSWLEC 67 (29 March 2012); *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2012] NSWSC 1026 (31 August 2012); *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2014] NSWSC 322 (11 March 2014); *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2014] NSWSC 372 (25 March 2014).

9 *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2015] NSWSC 136 (3 March 2015) [11], [13].

10 *Ibid* [3], [13].

Washing ceremonies for all students in the form of ‘Wudu’

The compulsory wearing by all female students of the scarf or hajib [sic]

The segregation of student men and women at school assemblies for prayer.<sup>11</sup>

Pembroke J, at first instance, described the facts as ‘hardly contentious’.<sup>12</sup> As well as providing an education to students, in accordance with a curriculum and syllabus prescribed by the New South Wales Board of Studies, Teaching and Educational Standards,<sup>13</sup> the school also required its students to participate in various religious activities. Relevantly to the appellants’ emphasis on the particular features of this school, Pembroke J described the religious practices that take place at the school:

The routine of daily life at the School follows a recognisable pattern. A form of prayer known as Salaat is compulsory (and takes about 15 minutes a day, though longer on Fridays). A cleansing ritual known as Wudu is performed prior to prayer. Halal food is provided at the tuckshops. Children are required to wear the school uniform, including for females a head-cloth as a mark of female distinction and modesty. Religious studies in the Islamic faith are compulsory in primary school [at the campus]. And at the Mosque on the Greenacre campus and in the prayer hall of the primary school [at Hoxton Park], females are segregated from males. ...

The School obviously requires religious observance by pupils during their hours of attendance, which is presumably one of the reasons why parents enrol their children there.<sup>14</sup>

Until the end of 2013, Commonwealth funding of non-government schools was provided in accordance with the *Schools Assistance Act 2008* (Cth). From January 2014, funding was provided in accordance with the *Australian Education Act 2013* (Cth) (*Australian Education Act*) and the *Australian Education Regulation 2013* (Cth) (*Australian Education Regulation*). The appellants were found to lack standing to challenge past expenditure<sup>15</sup> and the focus of the appellate proceedings concerned the *Australian Education Act* and the *Australian Education Regulation* as the relevant legislative framework.

The *Australian Education Act* is complex but its general legislative scheme is relatively straightforward. The Act grants funds, calculated in accordance with various formulae set out in the Act, to the states and territories on condition that the states and territories distribute the funds in accordance with the conditions set out in the Act. In respect of non-government schools, such as Malek Fahd Islamic School, that received funding under the earlier legislative regime,<sup>16</sup> the relevant conditions include that the states and territories distribute the funds to the ‘approved authority’ for the school which must then spend the funds ‘for the

11 Ibid.

12 Ibid [17].

13 Ibid [5].

14 Ibid [23], [25].

15 Ibid [77].

16 *Australian Education Act* pt 3 div 5.

purpose of providing school education' at the school.<sup>17</sup> The *Australian Education Regulation* provides that the purposes of school education include, among other things, funding for staff salaries and professional development and the general operating expenses of a school.<sup>18</sup> Approved authorities are also required to enter into 'implementation plans'<sup>19</sup> (referred to in practice as Funding Agreements) with the Commonwealth in respect of the school.<sup>20</sup> Malek Fahd Islamic School Ltd was the approved authority in respect of the Malek Fahd Islamic School.<sup>21</sup>

A single judge of the Supreme Court had originally struck out the substantive s 116 claims in 2010<sup>22</sup> but that strike out decision was subsequently overturned on appeal to the Court of Appeal in 2011 and the matter remitted to the Supreme Court.<sup>23</sup> This article begins its analysis of the religious observances clause claim from the Supreme Court's fresh consideration of it following the remitter. It is from that decision the appellants appealed to the New South Wales Court of Appeal.

### III FIRST INSTANCE

At first instance, the case was heard over five days before Pembroke J in the Equity Division of the Supreme Court of New South Wales. Pembroke J summarised the plaintiffs' religious observances clause claim as involving the question of

whether the Commonwealth has funded, managed and directed the 'project' (or the School or its Hoxton Park campus) in contravention of Section 116 of the *Constitution* because the Commonwealth's decisions and payments are properly characterised as being:

...

- (ii) for imposing any religious observance, in that the School is a faith based educational facility that imposes on any child or person attending it, of whatever background, the religious observance of the Islamic religion ...<sup>24</sup>

Pembroke J briefly rejected the plaintiffs' claim of a breach of the religious observances clause. Pembroke J reasoned:

I reject the plaintiffs' contention that, directly or indirectly, either the *Schools Assistance Act* or the *Australian Education Act* or the terms of Commonwealth funding, 'impose any religious observance' on any person, by force of law or otherwise. The plaintiffs' starting premise, at its highest, is that the School or its Hoxton Park campus, imposes religious observance on those who attend the

17 *Australian Education Regulation* reg 29(1).

18 *Ibid* reg 29(2).

19 *Australian Education Act* s 78(3)(b).

20 *Ibid* pt 7.

21 *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2015] NSWSC 136 (3 March 2015) [29].

22 *Hoxton Park Residents' Action Group Inc v Liverpool City Council* (2010) 246 FLR 207.

23 *Hoxton Park Residents Action Group Inc v Liverpool City Council* [No 2] (2011) 256 FLR 156.

24 *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2015] NSWSC 136 (3 March 2015) [14].

school. But this contention, even if accepted, does not logically establish that the *Schools Assistance Act* or the *Australian Education Act* has the prohibited purpose or object of imposing a religious observance. Neither Act has the purpose or effect of requiring any person to attend the School or its Hoxton Park campus or to engage in any religious observance or practice.<sup>25</sup>

#### IV THE COURT OF APPEAL

The plaintiffs appealed to the New South Wales Court of Appeal where the matter was heard by Beazley P, Basten and Macfarlan JJA. Beazley P and Basten JA delivered separate judgments. Macfarlan JA agreed with Beazley P.<sup>26</sup>

Both judgments agreed with the primary judge's characterisation that the school imposed religious observances on its students. Beazley P said '[t]hat pupils at the School are required to comply with certain religious observances may be accepted.'<sup>27</sup> Basten JA referred to '[t]he fact that the school imposed such a requirement [to participate in religious observances]'.<sup>28</sup> According to both judgments, that was not enough to permit the conclusion that the impugned legislation breached the religious observances clause of s 116.

The principal reason for the Court of Appeal's conclusion was that the impugned laws did not have the purpose of imposing any religious observances. Both judgments found that existing High Court authority on s 116 holds that for a law to be invalid under s 116 it must have a prohibited purpose.<sup>29</sup> Bound by these authorities, the Court of Appeal proceeded to apply the principles to the case at hand. The impugned laws in this case did not have the purpose of imposing any religious observance. Their purpose was entirely educational according to the Court of Appeal.

Basten JA also held that the consent of the students' parents or guardians to the religious observances, manifested by the enrolment of their child at the school in full knowledge of school requirements, vitiated the existence of any *imposition* of religious observances.<sup>30</sup> Participation in those religious observances was consensual and not imposed according to Basten JA.

There are three essential aspects of reasoning in this case that are flawed. The first is the role of purpose in s 116 analysis and whether a law must have a prohibited purpose in order to violate s 116. The second issue concerns the correct approach to characterisation: can a law that facilitates the imposition of religious observances, rather than directly imposes religious observances, be characterised

25 Ibid [67].

26 *Hoxton Park* (2016) 344 ALR 101, 161 [295].

27 Ibid 128 [133].

28 Ibid 158 [281].

29 Ibid 121–2 [101]–[106], 128 [132]–[135] (Beazley P), 154 [265] (Basten JA).

30 Ibid 158 [280]–[281].

as a law ‘for imposing any religious observance’? The third issue is the meaning of ‘imposing’ and whether consent vitiates the existence of an imposition.

## V THE ROLE OF PURPOSE

There were two issues concerning the role of purpose in this case. The first was whether prohibited purpose is the test for invalidity under s 116. The Court of Appeal acknowledged that improper purpose may not be the correct test for invalidity under s 116 but explained that it was bound to apply that test in the circumstances of this case. The second issue was whether the impugned laws had a purpose of imposing religious observances. The Court of Appeal gave unpersuasive reasons for holding that the impugned laws did not have such a purpose.

### A *Is Prohibited Purpose the Test for Invalidity?*

Relying on existing High Court authority on s 116, the Court of Appeal held that for a law to be invalid under s 116 it must have a prohibited purpose.<sup>31</sup> The rationale for this proposition is that in s 116 the word ‘for’ means ‘for the purpose of’. The leading High Court authority on this point is *Attorney-General (Vic) ex rel Black v Commonwealth (‘DOGS Case’)*,<sup>32</sup> a case concerning the establishment clause of s 116.

In the *DOGS Case*, Barwick CJ emphasised that improper purpose is essential to invalidity under s 116 and that this was the consequence of the presence of the word ‘for’ in the provision. He distinguished the language of s 116 from the language of the religion clauses of amend I of the *United States Constitution* (‘First Amendment’), which states: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’. Barwick CJ wrote:

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.<sup>33</sup>

The other majority judges in the *DOGS Case* all adopted the improper purpose interpretation of ‘for’ based on distinguishing s 116 from the religion clauses of the First Amendment, but did not go as far as Barwick CJ who held that an impugned law must have a ‘single purpose’ to attract invalidity under s 116.<sup>34</sup> The

31 Ibid 121–2 [101]–[106], 128 [132]–[135] (Beazley P), 154 [265] (Basten JA).

32 (1981) 146 CLR 559.

33 Ibid 579.

34 Ibid.

other majority judges accepted that an impugned law with additional purposes not prohibited by s 116 would be invalid. Gibbs J wrote:

More importantly, the words of s 116 did not reproduce verbatim those of the First Amendment. The latter speaks of a law ‘respecting an establishment of religion’ and those words appear wider than those of s 116 which refer to ‘any law for establishing any religion’ — words which look to the purpose of the law rather than to its relationship with a particular subject matter ...<sup>35</sup>

Stephen J wrote:

the First Amendment requires that ‘Congress shall make no law respecting an establishment of religion’, a restriction of wider scope than s 116’s prohibition of laws ‘for establishing any religion’. To illustrate this wider scope one may use another of the restrictions in s 116, thus avoiding the effect of any preconception about the meaning of ‘establishing’: a law which did no more than require all places of entertainment to be closed on Sundays would not be a law ‘for’ imposing any religious observance whereas it might well be one ‘respecting’ the imposition of some religious observance.<sup>36</sup>

Wilson J wrote:

Furthermore, it seems to me that the words ‘for establishing’ are not comparable with the words ‘respecting an establishment’. The former words convey the sense of ‘in order to establish’, and speak quite specifically of the purpose of the law in terms of the end to be achieved. ‘Respecting’ conveys the notion of ‘in respect of’ a particular subject-matter ...<sup>37</sup>

In his judgment, Mason J recognised that ‘for’ could mean ‘with respect to’ but held that it did not have that meaning in the context of s 116. He wrote:

There is a second distinction between the language of s 116 and the First Amendment. We speak of any ‘law *for* establishing’ any religion. The Americans speak of a law ‘*respecting* an establishment’ of religion. In *Lamshed v Lake*, Dixon CJ, when referring to s 122, equated ‘for’ with ‘with respect to’ in its application to the government of the [Northern] Territory. Here, however, we are dealing, not with a grant of legislative power, but with a prohibition against the exercise of legislative power. In such a context ‘for’ is more limiting than ‘respecting’; ‘for’ connotes a connexion by way of purpose or result with the subject matter which is not satisfied by the mere circumstance that the law is one which touches or relates to the subject matter. In this respect the first prohibition in s 116 is narrower than its American counterpart.<sup>38</sup>

The holding in the *DOGS Case* that the test for invalidity under s 116 is improper purpose and that this is the test because of the word ‘for’ was followed by the High Court in *Kruger v Commonwealth*,<sup>39</sup> a case concerning the free exercise clause of s 116. The High Court does not suggest that the role of purpose in s 116 varies

35 Ibid 598.

36 Ibid 609.

37 Ibid 653.

38 Ibid 615–6 (emphasis in original), citing *Lamshed v Lake* (1958) 99 CLR 132, 141.

39 (1997) 190 CLR 1.



between the provision's clauses. In *Kruger*, Brennan CJ,<sup>40</sup> Dawson,<sup>41</sup> Toohey,<sup>42</sup> Gaudron<sup>43</sup> and Gummow JJ<sup>44</sup> all held that the impugned legislation did not have a purpose of prohibiting the free exercise of religion and was therefore not invalid by reason of s 116. The High Court accepted, three judges explicitly and three judges implicitly, that a law with multiple purposes, one of which was prohibited by s 116, would be invalid but emphasised that a law must possess an improper purpose to be invalid.<sup>45</sup>

In 2011, in one of the earlier judgments involving this litigation, the New South Wales Court of Appeal consisting of Allsop P, Beazley and Basten JJA recognised that the ongoing authority of the *DOGS Case* about the role of purpose and the meaning of 'for' is open to doubt, but did not pursue the point.<sup>46</sup> The reasoning in the *DOGS Case* is unsound for at least two reasons. First, the reasoning methodology in the *DOGS Case* is now regarded as flawed.<sup>47</sup> In the *DOGS Case*, the majority adopted a narrow interpretation of s 116 and expressly indicated that adopting a narrow interpretation was a deliberate interpretive choice.<sup>48</sup> High Court authority since the *DOGS Case* holds that prohibitions on power should not be interpreted narrowly.<sup>49</sup> This approach has been expressly held to apply to s 116.<sup>50</sup>

Further, the *DOGS Case* was decided before the High Court held in *Cole v Whitfield* that reference to the Convention Debates was permissible in constitutional interpretation.<sup>51</sup> The contemporary High Court regularly relies on analyses of the textual development of constitutional provisions at the Federal Convention as an aid to interpretation. Recent examples include *Williams v Commonwealth*<sup>52</sup> concerning federal executive spending powers, *Fortescue Metals Group Ltd v Commonwealth*<sup>53</sup> concerning discriminatory taxation and federal preferences

40 Ibid 40.

41 Ibid 60–1.

42 Ibid 86.

43 Ibid 133–4.

44 Ibid 160–1.

45 Ibid 40 (Brennan CJ), 60–1 (Dawson J), 86 (Toohey J), 133 (Gaudron J), 142 (McHugh J), 160 (Gummow J).

46 *Hoxton Park Residents Action Group Inc v Liverpool City Council [No 2]* (2011) 256 FLR 156, 166 [33], 166–7 [36].

47 See 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, 66–8; Luke Beck, 'The Establishment Clause of the *Australian Constitution*: Three Propositions and a Case Study' (2014) 35 *Adelaide Law Review* 225, 226–30.

48 *DOGS Case* (1981) 146 CLR 559, 603 (Stephen J), 614–15 (Mason J), 653 (Wilson J).

49 *Street v Queensland Bar Association* (1989) 168 CLR 461, 489 (Mason CJ), 518–19 (Brennan J), 527–8 (Deane J), 554–5 (Toohey J), 569–70 (Gaudron J) ('*Street*'); *JT International SA v Commonwealth* (2012) 250 CLR 1, 33 [41]. 'The judgments in *Street*, in direct contrast to those ... in the *DOGS Case* just eight years previously ... were infused with the notion that important constitutional guarantees should be liberally construed': George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 277 (citations omitted).

50 *Williams v Commonwealth* (2012) 248 CLR 156, 223 [110].

51 (1988) 165 CLR 360, 385.

52 (2012) 248 CLR 156.

53 (2013) 250 CLR 548.

to a state, *Alqudsi v The Queen*<sup>54</sup> concerning trial by jury for federal indictable offences, and *Re Day [No 2]*<sup>55</sup> concerning disqualification from being chosen as a senator.

The Court of Appeal in *Hoxton Park* also accepted the point that the reasoning methodology adopted in the *DOGS Case* was flawed. However, as Beazley P explained, ‘the appellants did not refer the Court to any aspect of the Convention debates that was relevant to the construction of s 116 or to the present case.’<sup>56</sup> Beazley P considered it ‘inappropriate for the Court to embark upon an examination of the debates without being directed to specific aspects of the debates and without any adequate submission explaining the import of the debates to the issue.’<sup>57</sup>

The second, and related, reason why the reasoning in the *DOGS Case* is unsound is that reference to the Convention Debates shows that the framers of s 116 saw no difference in meaning between ‘for’ and the American ‘respecting’. In other words, an examination of the drafting history of s 116 demonstrates that a significant part of the reason given in the *DOGS Case* for the conclusion concerning the meaning of ‘for’ turns out to be false.

The Australasian Federal Convention voted on 2 March 1898 to adopt the following text:

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 religions [sic] test shall be required as a qualification for any office or public trust under the Commonwealth.<sup>58</sup>

It is significant that the word ‘for’ appears only once and not in the religious observances clause. H B Higgins, who moved the clause, treated ‘for’ and ‘respecting’ as synonymous in his remarks to the Convention. For example, he said: ‘In the *Constitution of the United States* there is a provision ... that the Federal Parliament [ie Congress] is not to make any law *for* the establishment of any religion.’<sup>59</sup>

The Convention’s Drafting Committee later modified the clause into its present form, with the word ‘for’ included in each of the first three clauses. The Chair of the Drafting Committee, Edmund Barton, told the Convention that the Drafting Committee had ‘endeavoured to faithfully interpret the wishes of’ the Convention in collating the final document.<sup>60</sup> It follows that when the Convention voted to approve the final Constitution Bill, the vote was conducted on the understanding

54 (2016) 258 CLR 203.

55 (2017) 343 ALR 181.

56 *Hoxton Park* (2016) 344 ALR 101, 121 [99]–[100].

57 *Ibid.*

58 *Official Report of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1769 (Henry Higgins).

59 *Ibid* (emphasis added).

60 *Official Report of the Debates of the Australasian Federal Convention*, Melbourne, 16 March 1898, 2440 (Edmund Barton).

that the inclusion or absence of the word ‘for’ in s 116 made no difference to the meaning of the provision.

It follows that there is no basis in the drafting history of s 116 to distinguish ‘for’ from ‘respecting’. The consequence of this is that the reasoning in the *DOGS Case* on the meaning of ‘for’ is factually incorrect.

If prohibited purpose is to remain the test for invalidity under s 116, the *DOGS Case* is not a persuasive authority on that point and other reasons for retaining that interpretation will need to be found. Alternatively, a ‘with respect to’ interpretation of the word ‘for’ in s 116 might be adopted, which would be consistent with the provision’s drafting history. The result of such an interpretation would be that a law with an effect prohibited by s 116 would be invalid.<sup>61</sup>

The Court of Appeal’s decision in this case cannot be taken as an endorsement of the ‘for the purpose of’ interpretation set out in the *DOGS Case*. As Beazley P pointed out, the way the appellants conducted their case meant that the Court of Appeal was not presented with an opportunity to rule on the correct interpretation of the word ‘for’ in s 116.<sup>62</sup> In the absence of submissions on the correct interpretation of ‘for’, the Court of Appeal had no alternative but to follow existing, albeit flawed, High Court authority. In a future case, a litigant may well present arguments for departing from the interpretation in the *DOGS Case*.

## **B The Purpose of the Impugned Laws**

By following the ‘for the purpose of’ interpretation of the word ‘for’ in s 116, the Court of Appeal therefore had to consider whether the impugned laws had an improper purpose. The Court of Appeal held that the impugned laws did not have a purpose of imposing religious observances. The purpose of those laws was educational. For example, Beazley P said:

Even in allowing for the funding of religious schools, the purpose of the Acts, both in their objects and in their specific provisions, was the funding of education and not the imposition of any religious observances incidental to the religious character of a recipient school.<sup>63</sup>

This reasoning is not necessarily persuasive. The *Australian Education Regulation* provides much of the operational detail of the schools funding regime. Regulation 29 provides:

- (1) For paragraph 78(2)(a) of the Act, an approved authority for a school must spend, or commit to spend, financial assistance that is payable to the authority in accordance with:
  - (a) Division 2 or 5 of Part 3 of the Act (recurrent funding for participating schools); or

61 See Luke Beck, ‘The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the *Australian Constitution*’ (2016) 44 *Federal Law Review* 505.

62 *Hoxton Park* (2016) 344 ALR 101, 121 [100].

63 *Ibid* 128 [135].

- (b) Part 4 of the Act (recurrent funding for non-participating schools);  
for the purpose of providing school education.
- (2) Without limiting subsection (1), the purpose mentioned in that subsection includes the following:
  - ...
  - (c) general operating expenses of the school ...

The legislative text expressly indicates that among the purposes of the legislative regime is the purpose of funding the general operations of schools that receive funds. To fund the general operations of a school is to facilitate those general operations. It is a fact, as found by the primary judge and accepted by the Court of Appeal, that the Malek Fahd Islamic School imposed religious observances on its students.<sup>64</sup> The general operations of the Malek Fahd Islamic School therefore included imposing religious observances. It would appear open to argue that one of the purposes of the legislative regime is therefore to fund, and thereby facilitate, the imposition of religious observances on students.

The point here is not that the impugned legislation in fact had a prohibited purpose. The point relates to the mode of reasoning employed by the Court of Appeal. The former Chief Justice of the High Court Murray Gleeson has observed that '[i]t has often been pointed out by some judges, and sometimes forgotten by others, that few Acts of Parliament pursue only a single purpose'.<sup>65</sup> The Court of Appeal in this case appears to be among the forgetful judges. To say that the legislative regime has an educational purpose is not an answer to the claim that it has an additional purpose of a kind proscribed by s 116. After all, the High Court in the *DOGS Case* and *Kruger* accepted that a law might have multiple purposes and that it is enough for invalidity if one of those purposes is prohibited by s 116.<sup>66</sup>

The Court of Appeal needed to provide far more analysis of the purposes of the legislative regime before it could be concluded that the impugned legislation did not have a prohibited purpose. The Court of Appeal needed to explain why the prohibited purpose identified by the appellants was not among the purposes of the impugned legislation.<sup>67</sup>

64 Ibid 128 [133].

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

66 *DOGS Case* (1981) 146 CLR 559, 604; *Kruger* (1997) 190 CLR 1, 40, 86, 133.

67 On legislative intention and statutory purposes see, eg, Stephen Gageler, 'Legislative Intention' (2015) 41 *Monash University Law Review* 1; Jim South, 'Are Legislative Intentions Real?' (2015) 40 *Monash University Law Review* 853.

## VI FACILITATING THE IMPOSITION OF RELIGIOUS OBSERVANCES

The third flawed aspect of the reasoning in *Hoxton Park* is the conclusion that it is only laws which of their own force and by which the Commonwealth itself imposes religious observances that will breach s 116. There are good reasons to conclude that this is wrong and that a law which authorises or facilitates a non-Commonwealth entity or person to impose a religious observance will be invalid by reason of s 116. The text of s 116 does not provide that ‘the Commonwealth shall not impose any religious observance’. Section 116’s text is wider than that and prohibits the Commonwealth from ‘mak[ing] any law ... for imposing any religious observance’.

The Court of Appeal came to its decision partly on the basis that it is only laws by which the Commonwealth itself directly imposes religious observances that will violate the religious observances clause of s 116. For example, Basten JA explained:

It was not right to say that the Commonwealth required that the school provide religious instruction and hence imposed religious observance on the children. The fact that the school imposed such a requirement, and obtained funding from the Commonwealth, does not mean the Commonwealth imposed any such requirement.<sup>68</sup>

This analysis appears to miss the relevant point. The relevant issue is not whether the Commonwealth has itself imposed any religious observance. The relevant issue is whether the impugned laws can be characterised as laws ‘for imposing any religious observance’. The appellants did not contend that the Commonwealth itself imposed any religious observances. The appellants contended that the impugned laws should be characterised as laws for imposing religious observances. The appellants’ essential reasoning was that the Commonwealth funded and thereby facilitated the school’s operations and that those operations included imposing religious observances. The result, so the argument went, was that the Commonwealth funded and thereby facilitated the imposition of religious observances. For this reason, the impugned laws were said to answer the description of laws ‘for imposing any religious observance’.

There is High Court authority that supports the idea that a law that does not itself but which facilitates the imposition of religious observances by others may be characterised as a law for imposing religious observances. Referring to the free exercise clause, but with reasoning equally applicable to the other clauses of s 116, Gaudron J said in *Kruger*:

And the need to construe guarantees so that they are not circumvented by allowing to be done indirectly what cannot be done directly has the consequence that s 116 extends to provisions which authorise acts which prevent the free exercise of religion, not merely provisions which operate of their own force to prevent that exercise.<sup>69</sup>

<sup>68</sup> *Hoxton Park* (2016) 344 ALR 101, 158 [281].

<sup>69</sup> *Kruger* (1997) 190 CLR 1, 132. See also *Cunningham v Commonwealth* (2016) 335 ALR 363, 377 [58] where Gageler J explains that a law that ‘authorise[s] or effect[s] an acquisition of property’ is subject to s 51(xxxi) of the *Australian Constitution* (emphasis added).

There are historical examples of laws that authorise a person to impose religious observances on others. For example, the *Popish Recusants Act 1605*<sup>70</sup> imposed a penalty on any person whose servants did not attend weekly Anglican church services.<sup>71</sup> The purpose and effect of this law was to ensure that servants attended weekly church services even though no direct legal obligation was imposed on the servants themselves. The *Chimney Sweepers Act 1788*<sup>72</sup> required every master chimney sweep to ‘require [his] Apprentice to attend the Publick Worship of God on the Sabbath Day’.<sup>73</sup> The purpose and effect of this law was to ensure that apprentices attended Sunday worship even though no direct legal obligation was imposed on the apprentices themselves. In Australia, the *Van Diemen’s Land Act for Apprenticing the Children of the Queen’s Orphan Schools in This Island 1838* (VDL) required that the master or mistress of any orphan indentured to them as an apprentice ‘cause such apprentice to attend divine service when practicable at least once every Sunday’.<sup>74</sup> The purpose and effect of this law was to ensure that orphans attended Sunday worship even though no direct legal obligation was imposed on the orphans themselves. The *Sydney Grammar School Act 1854* (NSW) authorised the making of regulations ‘for securing the due attendance of the pupils for divine worship’.<sup>75</sup> The *Sydney Police Act 1833* (NSW),<sup>76</sup> *Police Offences Statute 1865* (Vic)<sup>77</sup> and *Ordinance for Regulating the Police in South Australia 1844* (SA)<sup>78</sup> each had similar provisions requiring local authorities to cause Sunday to be duly observed. Although these laws did not impose any legal obligation on the people it was intended should participate in religious observances, each of these laws can fairly be described as laws ‘for imposing any religious observance’.

The Court of Appeal’s conclusion that it is only laws which of their own force and by which the Commonwealth itself imposes religious observances that will breach s 116 is wrong. It is contrary to the ordinary rules concerning the characterisation of laws, contrary to High Court authority on s 116 and, as the legislation noted above shows, inconsistent with the history of the mischief the religious observances clause prohibits. However, for reasons that will be explained in Part VIII of this article, the appellants would not have succeeded even if the Court of Appeal had accepted that a law which authorises or facilitates a non-Commonwealth entity or person to impose a religious observance will be invalid by reason of s 116.

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

71 *Ibid* s 32.

72 *Chimney Sweepers Act 1788*, 28 Geo 3, c 48.

73 *Ibid* sch 1.

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

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

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

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

78 *Ordinance for Regulating the Police in South Australia 1844* (SA) ss 16–17.

## VII IMPOSING AND THE ROLE OF CONSENT

Another flaw in the Court of Appeal's reasoning in this case is the suggestion that a law imposing a religious observance might be rendered valid by the consent of the person on whom the religious observance is imposed. As noted above, Basten JA held that the consent of the students' parents or guardians to the religious observances the school requires its students to participate in vitiates the existence of any imposition. Basten JA wrote:

[C]entral to the concept of 'imposition' is the element of religious observance which is non-consensual. With respect to children, the source of any consent must be found in the beliefs and intentions of the parents. There is no suggestion that any parent is under any threat or improper pressure to send their children to a particular non-secular (or secular) school.<sup>79</sup>

This reasoning is problematic. A religious observance imposed on a child or young person with the consent of the child or young person's parents or guardians is nevertheless *imposed* on the child or young person. It is nevertheless *non-consensual* from the perspective of the child or young person, whose consent has not been sought. It is not clear why a law that does this can escape characterisation as a law 'for imposing any religious observance'.

Moreover, the reasoning is inconsistent the text of s 116. The religious observances clause does not provide that the Commonwealth shall not make any law for imposing any religious observance *unless that religious observance is imposed on a child or young person with the consent of the parents or guardians of that child or young person*. Section 116 does not have such a qualification or exception. It is not clear how the consent of a third party can cancel or render nugatory an express constitutional denial of power to the Commonwealth. The Commonwealth has no power whatsoever to enact laws for imposing any religious observance on anyone, even in circumstances where the person on whom the religious observance is imposed has no objection to the compulsory nature of the religious observance.

Basten JA's reasoning would also remove children and young people from the protection of s 116. Such a result is contrary to High Court authority on s 116. In *Krygger v Williams*,<sup>80</sup> the plaintiff was a teenage boy who claimed that a law requiring him to engage in compulsory military training prohibited the free exercise of his religion. In *Kruger*, some of the plaintiffs were children or young people at the relevant times who had been taken from their families resulting in the Stolen Generations. Their claim was that removal from their families and communities meant they had been prevented from participating in the religious practices of their families and communities. In neither case did the High Court reject the s 116 claim on the basis of the age of the plaintiffs or their status as children or young people. In *Krygger*, the High Court made no mention at all of the boy's parents let alone whether they were happy for him to participate

<sup>79</sup> *Hoxton Park* (2016) 344 ALR 101, 158 [281].

<sup>80</sup> (1912) 15 CLR 366 ('*Krygger*').

in military training. Whilst the parents in *Kruger* did not consent to what had happened, their consent or non-consent was not relevant to the analysis.

The reason why parental or individual consent was not relevant in these cases is that s 116 does not grant personal rights. It is a denial of legislative power. As the High Court has said in relation to the implied freedom of political communication but with reasoning equally applicable to other denials of legislative power:

The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?<sup>81</sup>

Applying this reasoning to the context of the religious observances clause, the question is not whether a person has consented to participation in a religious observance. The question is not even whether a religious observance has in fact been imposed on a person. The central question is whether an impugned law answers the description of a law ‘for imposing any religious observance’.

## VIII CONCLUSION: THE COURT OF APPEAL’S CONCLUSION IS CORRECT BY AN APPLICATION OF THE ORDINARY PRINCIPLES OF CHARACTERISATION

This article has highlighted three significant flaws in the reasoning in *Hoxton Park* and advanced three doctrinal propositions concerning the interpretation and application of the religious observances clause. First, it is not necessary for an impugned law to have an improper purpose in order for there to be a breach of the religious observances clause. Secondly, a law may breach the religious observances clause, even though it does not directly impose a religious observance, by authorising or facilitating someone else to impose a religious observance. Thirdly, whether a person consents to participation in a religious observance is an issue that distracts from the central question of whether an impugned law answers the description of a law for ‘imposing any religious observance’.

Despite the flaws in the Court of Appeal’s reasoning, the conclusion that the legislative regime governing federal funding of non-government schools does not breach the religious observances clause appears to be correct. In her judgment, Beazley P said ‘[t]here is no basis for either Act to be *characterised* as a law

81 *Unions NSW v New South Wales* (2013) 252 CLR 530, 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 150; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 125, 149, 162, 166–7; *Cunliffe v Commonwealth* (1994) 182 CLR 272, 326; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560; *Hogan v Hinch* (2011) 243 CLR 506, 554 [92]; *Wotton v Queensland* (2012) 246 CLR 1, 31 [80]; *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 73–4 [166]; *Monis v The Queen* (2013) 249 CLR 92, 189 [266].



for imposing religious observance'.<sup>82</sup> In this short comment lies the correct rationale for the Court of Appeal's conclusion. In *Street*, Brennan J explained that the technique of '[c]haracterization is a useful and familiar process when the validity of a law depends on the grant of, or restriction on, legislative power'.<sup>83</sup> *Street* concerned the limitation on power imposed by s 117 prohibiting states from discriminating against residents of other states. In *Castlemaine Tooheys Ltd v South Australia*, a case concerning the guarantee of freedom of interstate trade and commerce, the High Court spoke of the 'task of characterization of laws challenged for alleged contravention of s 92'.<sup>84</sup> The process of characterisation is just as relevant to s 116 as it is to other prohibitions on power such as these.

The Court of Appeal's conclusion in *Hoxton Park* is best justified by an application of the ordinary principles of characterisation. As the appellants argued, it may well be true that the impugned legislation facilitated or assisted with the imposition of religious observances by the school on its students. However, the connection between the legislation and the imposition of religious observances was, in the words of Dixon J in *Melbourne Corporation v Commonwealth*, 'so insubstantial, tenuous or distant' that the legislation cannot sensibly be said to answer the description of a law 'for imposing religious observances'.<sup>85</sup>

By contrast, the same is not true of the *Chimney Sweepers Act 1788*,<sup>86</sup> which required every master chimney sweep to 'require [their] Apprentice to attend the Publick Worship of God on the Sabbath Day',<sup>87</sup> or the *Sydney Grammar School Act 1854* (NSW), which authorised the making of regulations for securing the due attendance of the pupils for divine worship'.<sup>88</sup> Those laws, although like the laws in *Hoxton Park* not of their own force directly imposing religious observances on anyone, do fairly answer the description of laws 'for imposing any religious observance'. The connection between those laws and the imposition of a religious observance is substantial and cannot be described as 'insubstantial, tenuous or distant'.<sup>89</sup>

The real issues in *Hoxton Park* did not concern the meaning of 'imposing' or 'religious observance'. The real issue in the case concerned only the question of whether the impugned laws answered the description of laws 'for imposing any religious observance'. That question should have been answered by a clear application of the ordinary principles of characterisation.

82 *Hoxton Park* (2016) 344 ALR 101, 128 [135] (emphasis added).

83 *Street* (1989) 168 CLR 461, 508 (emphasis added).

84 (1990) 169 CLR 436, 470. See also *Cunningham v Commonwealth* (2016) 335 ALR 363, 377 [60] speaking of the 'ultimate question of characterisation' in respect of the restriction on power concerning acquisition of property on unjust terms provided by the *Australian Constitution* s 51(xxix).

85 (1947) 74 CLR 31, 79, quoted in *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397, 413 [35].

86 *Chimney Sweepers Act 1788*, 28 Geo 3, c 48.

87 *Ibid* sch 1.

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

89 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 79 (Dixon J), quoted in *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397, 413 [35].



