

WHEN IS AN OFFICE OR PUBLIC TRUST ‘UNDER THE COMMONWEALTH’ FOR THE PURPOSES OF THE RELIGIOUS TESTS CLAUSE OF THE AUSTRALIAN CONSTITUTION?

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I INTRODUCTION

The religious tests clause of s 116 of the *Australian Constitution* prohibits religious tests for any office or public trust ‘under the Commonwealth’.¹ The few cases decided by the High Court concerning the religious tests clause, including most recently *Williams v Commonwealth* (*School Chaplains Case*),² provide no explanation of what the expression ‘under the Commonwealth’ might mean. This paper seeks to develop an interpretation of the expression ‘under the Commonwealth’ as it is used in the religious tests clause that is meaningful, avoids undesirable and perverse outcomes, reconciles the existing cases and is consistent with s 116’s drafting history. The paper argues that an office or public trust will be ‘under the Commonwealth’ for the purposes of the religious tests clause when the office or public trust stands in a familial relationship with the federal government, understood as encompassing not just its executive arm but also its legislative and judicial arms.

The paper begins in part II by providing some general background to s 116. Part III outlines the approach adopted by this paper for determining the meaning of the expression ‘under the Commonwealth’. The paper then turns in part IV to identifying two potential meanings of the word ‘under’ based on the case law considering the religious tests clause and on a textualist analysis of the use of that word in various parts of the *Constitution*. In part V, the paper identifies various senses in which the religious tests clause might be using the term ‘the Commonwealth’ based on a textualist analysis of the use of that expression in various parts of the *Constitution*. Part VI considers the various possible interpretations of the expression ‘under the Commonwealth’ based on the possible permutations of the meanings of ‘under’ and ‘the Commonwealth’. It assesses whether each interpretation is meaningful, avoids undesirable and perverse outcomes, reconciles the existing cases and is consistent with s 116’s drafting history. Using these criteria, the paper comes to an interpretation by a process of elimination. Part VII of the paper offers some concluding remarks.

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1 In full, s 116 of the *Constitution* reads: ‘The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.’

2 (2012) 248 CLR 156.

II SECTION 116

Section 116 is one of few provisions in the *Constitution* that may be seen as protecting rights.³ The provision contains four prohibitions. The first three clauses of the section prohibit the Commonwealth from making laws for ‘establishing any religion’, ‘imposing any religious observance’ or ‘prohibiting the free exercise of any religion’. The fourth prohibition, which is the focus of this article, is not expressed as a denial of law-making power. It simply prohibits any requirement of a religious test for any ‘office or public trust under the Commonwealth’.

The operation of s 116 might protect rights to some extent but that was not the general purpose for which it was included in the *Constitution*.⁴ The political background to the provision is interesting.⁵ In the late 1890s, various Protestant denominations pursued a campaign to secure what they called a ‘recognition’ of God in the *Constitution*. As a result of that campaign, the Australasian Federal Convention of 1897–8 agreed to insert the words ‘humbly relying on the blessing of Almighty God’ in the constitutional preamble. At the same time, the small Seventh Day Adventist denomination pursued a counter-campaign seeking to prevent any recognition of God in the *Constitution* and, instead, the inclusion of a religious freedom provision. The Seventh Day Adventists were concerned that the religious words of the preamble might give rise to an implied power to make laws on the subject of religion. They were particularly concerned that the Commonwealth might be empowered to enact national Sunday closing laws, which they objected to since they observed Saturday as the Sabbath and found oppressive since they wished to work on Sundays.⁶

At the Australasian Federal Convention of 1897–8, Henry Bournes Higgins, later a judge of the High Court, proposed what ultimately became s 116. What has been described as the ‘standard account’ of the argument Higgins advanced at the Convention for s 116 holds that Higgins’ concern was to counteract the possibility that an implied or inferential power to legislate on the subject of religion might be derived from the religious words of the preamble.⁷ That account of Higgins’ argument has been the subject of a recent challenge. I argue that Higgins’ argument was not about the possibility of implied or inferential powers but about a realisation by Higgins that the Commonwealth’s enumerated powers were wide enough to authorise at least some laws on the subject of religion.⁸ Despite these differing accounts of the specifics of Higgins’ argument, there is a consensus that

3 For an overview of some of the leading cases, see George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 256–72.

4 *Ibid* 257: ‘It is difficult to discern in the Convention debates any general view that ... s 116 was intended to protect individual interests in autonomy and dignity.’

5 See generally Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891–1906* (Melbourne University Press, 1976); Luke Beck, ‘Higgins’ Argument for Section 116 of the Australian Constitution’ (2013) 41 *Federal Law Review* 393, 397–8.

6 See Ely, above n 5, chs 3, 6.

7 See Beck, ‘Higgins’ Argument’, above n 5, 394–7 for a collection of the commentaries adopting this interpretation of the argument.

8 *Ibid* 400–15.

s 116 was proposed principally for the purpose of denying the Commonwealth power rather than for the purpose of protecting rights.

The course of discussion at the Convention does not reveal any detailed consideration of the meaning of the religious tests clause of s 116.⁹ The scope of the religious tests clause, which is ascertained in large part by determining when an office or public trust is 'under the Commonwealth', is, therefore, not clear from the provision's history. Nor, as will be seen, has the meaning of 'under the Commonwealth' been the subject of any serious consideration by the High Court on the few occasions that the religious tests clause has come before it.

III THE APPROACH OF THIS ARTICLE

The only occasion on which the meaning of the religious tests clause has come before a full bench of the High Court was in 2012 in the *School Chaplains Case*.¹⁰ In a recent critique of this case, I argued that the High Court failed to give proper consideration to the meaning of 'under the Commonwealth'.¹¹ In doing so, I suggested an approach for determining what 'under the Commonwealth' might mean, but did not seek to apply that approach or draw conclusions from it in any serious way.¹² This paper takes that suggested approach as its starting point.

The approach is textualist and, as such, focuses on the text of the religious tests clause. In the *School Chaplains Case*, Gummow and Bell JJ wrote 'the phrase "office ... under the Commonwealth" must be read as a whole'.¹³ The separate judgments of French CJ,¹⁴ Hayne,¹⁵ Crennan¹⁶ and Kiefel JJ¹⁷ indicated their agreement with Gummow and Bell JJ on s 116 issues. In my critique, I complained that the ellipsis used by Gummow and Bell JJ obscured a means by which the meaning of 'under the Commonwealth' might be discerned.¹⁸

The expression used in the religious tests clause is 'office or public trust under the Commonwealth'. The qualifier 'under the Commonwealth' attaches to both 'office' and 'public trust'. It follows that it is possible for an office to exist 'under the Commonwealth' and that it is possible for a public trust to exist 'under the Commonwealth'. As such, 'under the Commonwealth' must be taken to do the same work in respect of both 'office' and 'public trust'. What that work is depends

9 The drafting history of the clause is traced in Luke Beck, 'The Constitutional Prohibition on Religious Tests' (2011) 35 *Melbourne University Law Review* 323, 334–7.

10 (2012) 248 CLR 156.

11 Luke Beck, '*Williams v Commonwealth: School Chaplains and the Religious Tests Clause of the Constitution*' (2012) 38(3) *Monash University Law Review* 271, 291–3.

12 *Ibid* 291.

13 (2012) 248 CLR 156, 223 [110].

14 *Ibid* 179–80 [4].

15 *Ibid* 240 [168].

16 *Ibid* 341 [476].

17 *Ibid* 374 [597].

18 Beck, '*Williams v Commonwealth*', above n 11, 291.

on the meaning of ‘under’ as well as on the meaning of ‘the Commonwealth’, since it is one party to the ‘under’ relationship. A careful interrogation of each of the two components of the expression ‘under the Commonwealth’ is necessary. This was not done in the *School Chaplains Case*.¹⁹ Indeed, in his separate judgment in that case, Heydon J went so far as to say ‘[t]he word “under” in s 116 has no significance’.²⁰

As discussed below, ‘the Commonwealth’ could mean a number of things. For example, it could mean the federal government or it could mean the Australian nation. If it is not possible for either an ‘office’ or a ‘public trust’ to have an ‘under’ relationship with ‘the Commonwealth’ in a particular sense then there would be good reason to conclude that ‘the Commonwealth’ is not being used in that sense in the religious tests clause because it is not a meaningful interpretation. In order to implement this analysis, it is necessary to have an example of a position that is a public trust but not simultaneously an office (given the possibility that the two categories of position might not be entirely distinct), as a working example.²¹

The best example would appear to be the position of elector for members of the Commonwealth Parliament.²² That position is probably not an office. It certainly does not meet the indicia set out by Isaacs J in *R v Murray and Cormie; Ex parte Commonwealth*, where his Honour explained that ‘[a]n “officer” connotes an “office” of some conceivable tenure, and connotes an appointment, and usually a salary’.²³ However, the position of elector is a public trust. Justice Higgins, who as noted above was responsible for the inclusion of s 116 in the *Constitution* at the Constitutional Convention,²⁴ explained the concept of a public trust in *R v Boston*, a case concerning the prosecution of a politician alleged to have taken a bribe. His Honour, said:

All the relevant cases rest on the violation of a public trust. ‘The nature of the office is immaterial as long as it is for the public good’ (*R v Lancaster*). An agreement between a trustee and an estate agent to share commission on a sale is void and the trustee has to account to the beneficiaries for his share. But it is not an indictable matter, as it is not a public trust — a trust ‘concerning the public’ (*R v Bembridge*). Bribery of electors for Parliament is a crime at common law (*R v Pitt; Hughes v Marshall*); so is bribery of one who can vote at an election for alderman (*R v Steward*); so is bribery of a clerk to the agent of French prisoners of war, to procure exchange of some out of their time (*R v Beale*, cited in note to *R v Whitaker*); so is a promise to bribe a municipal councillor as to the election of mayor (*R v Plympton*); bribery of electors for assistant overseer of a parish (*R v Jolliffe*, cited in *R v Waddington; R v Lancaster*). So that the application is

19 Ibid.

20 *School Chaplains Case* (2012) 248 CLR 156, 334–5 [444].

21 Beck, ‘The Constitutional Prohibition on Religious Tests’, above n 9, 347–9.

22 Beck, ‘*Williams v Commonwealth*’, above n 11, 291–2.

23 (1916) 22 CLR 437, 452.

24 See generally Ely, above n 5; Beck, ‘Higgins’ Argument’, above n 5.

not confined to public servants in the narrow sense, under the direct orders of the Crown.²⁵

Consistent with Higgins J's analysis is this academic definition: 'a person holds a public trust if they exercise public or governmental functions'.²⁶ The position of elector is therefore a public trust. An elector for the Commonwealth Parliament's position must be one 'under the Commonwealth' and is thus one that must not be subject to a religious test.²⁷

In the situation where it is possible for both offices and public trusts to have an 'under' relationship with 'the Commonwealth' in various senses then reasons will need to be found for preferring one sense over any others.

In a 2010 speech, French CJ described constitutional interpretation as involving:

look[ing] to the words of the Constitution and to their possible meanings and application. The interpretive choices or choices of application presented will be informed by principles developed in previous decisions of the Court. They will also be informed by the history and historical context of the words or phrases in issue and by their functions within the structure of the Constitution. The way in which these and other factors present themselves for consideration will depend upon the nature of the case which falls for decision.²⁸

The approach described by French CJ is the approach of this article. The article looks to the words 'under the Commonwealth' and to their possible meanings and application. To assess the possible meanings of 'under the Commonwealth' determined by the approach described above, this paper adopts four criteria, which are consistent with French CJ's remarks. Those criteria are, first, as noted above, the interpretation is meaningful; second, the interpretation avoids undesirable and perverse outcomes; third, the interpretation reconciles the existing cases; and, fourth, the interpretation is consistent with s 116's drafting history, as limited as the insights are that may be drawn from it. As French CJ's remarks suggest, there is nothing novel or unusual about the approach to the interpretative question explored in this article. The approach is simply orthodox Australian constitutional interpretation.

25 (1923) 33 CLR 386, 410–11 (citations omitted).

26 Beck, 'The Constitutional Prohibition on Religious Tests', above n 9, 349. See also John Barrett, 'Public Trusts' (2006) 69 *Modern Law Review* 514, 516: 'the word "trust" was in statutory use, from at least the late seventeenth century, to describe the personal obligation of those exercising governmental power'.

27 Sections 7 and 24 of the *Constitution*, which require that members of Parliament be chosen by the people, would also operate to invalidate any disenfranchisement based on religion: see generally *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

28 Chief Justice Robert French, 'Theories of Everything and Constitutional Interpretation' (Speech delivered at the Gilbert & Tobin Centre of Public Law 2010 Annual Constitutional Law Conference Dinner, Sydney, 19 February 2010) 7–8.

IV 'UNDER'

This section explores the potential meanings of the word 'under' as it appears in the religious tests clause. Only three cases, each discussed below, have been decided on the religious tests clause. In terms of their results, the three cases suggest that members of federal Parliament and federal public servants hold their positions 'under the Commonwealth' but that persons employed by contractors engaged by the Commonwealth executive government, and in accordance with criteria set out by the Commonwealth executive government, do not. However, those cases provide limited and conflicting guidance on what 'under' might mean. Two of the cases suggest, but do not expressly hold, that 'under' should be understood as signifying some sort of relationship of supervision. A third case suggests, but does not expressly hold, that 'under' should be understood as signifying a relationship that might usefully be described as familial.

A 'Under' as a Relationship of Supervision

There are two cases that suggest 'under' in the religious tests clause should be understood as signifying some sort of relationship of supervision. The first case is *Church of Scientology v Woodward*.²⁹ In that case, the plaintiff alleged that Woodward, who was Director-General of the Australian Security Intelligence Organisation ('ASIO'), had caused or permitted ASIO to communicate security assessments to Commonwealth Ministers about certain current and potential Commonwealth employees. The assessments claimed that those persons were 'security risks' by reason of their membership of the Church of Scientology. The plaintiff's contention was that this meant that ASIO had required a religious test for an office under the Commonwealth. The claim was struck out by Aickin J. His Honour made the point that '[t]he provision of information to a prospective employer cannot be regarded as the imposition of a religious test *by the provider of the information*'.³⁰ His Honour commented that the substance of the Church's claim 'seems really to be that the Commonwealth itself required a religious test' and added, 'but that does not particularize the allegation [as spelt out in the statement of claim]'.³¹ In his quite brief judgment, which focused on the issue of the imposition of a religious test, it appears that Aickin J took it as uncontroversial that Commonwealth public servants hold their position 'under the Commonwealth'. Since public servants are plainly subject to supervision in

29 (1982) 154 CLR 25, 79. The case was decided on 7 November 1979 and was reported as an appendix to the later case *Church of Scientology Inc v Woodward* (1982) 154 CLR 25. The later case did not deal with s 116.

30 Ibid 83 (emphasis added).

31 Ibid. In a short case note, Leslie Glick suggested that Aickin J was too quick to strike out the s 116 claim since 'surely it is open to argue that the proper interpretation of those words in section 116 is that no instrumentality of the Commonwealth should participate in any steps which impose a religious test as part of a qualification': Leslie Glick, 'Church of Scientology Inc v Mr Justice Woodward' (1980) 11 *Federal Law Review* 102, 107.

various forms it seems that Aickin J understood 'under' to signify a relationship of supervision.

The second case is the *School Chaplains Case*,³² and in that case the word 'under' was the subject of brief comment. The case concerned what was then the National School Chaplaincy Program. Under that program, the Commonwealth would enter into contractual relations with chaplaincy provider organisations who would employ chaplains and deploy them to schools. The Commonwealth set out the criteria for appointing a person as a chaplain and the range of tasks a chaplain would be permitted to perform, although which of the permitted tasks a chaplain would actually perform would be determined by individual schools. The High Court rejected a claim that the chaplains held an office under the Commonwealth. Gummow and Bell JJ, with whom French CJ,³³ Hayne,³⁴ Crennan³⁵ and Kiefel JJ³⁶ agreed, wrote:

The chaplains engaged by SUQ [the relevant chaplaincy provider organisation] hold no office under the Commonwealth. The chaplain at the Darling Heights State Primary School is engaged by SUQ to provide services under the control and direction of the school principal. The chaplain does not enter into any contractual or other arrangement with the Commonwealth. That the Commonwealth is a source of funding to SUQ is insufficient to render a chaplain engaged by SUQ the holder of an office under the Commonwealth.

It has been said in this Court that the meaning of 'office' turns largely on the context in which it is found, and it may be accepted that, given the significance of the place of s 116 in the *Constitution*, the term should not be given a restricted meaning when used in that provision. Nevertheless, the phrase 'office ... under the Commonwealth' must be read as a whole. If this be done, the force of the term 'under' indicates a requirement for a closer connection to the Commonwealth than that presented by the facts of this case.³⁷

Elsewhere, this passage has been described as appearing

to suggest, although it is not clear, that control and direction by the Commonwealth, the existence of a contractual or other direct arrangement with the Commonwealth and the provision of funding by the Commonwealth are factors pointing in the direction of a conclusion that a sufficiently close connection between an office and the Commonwealth exists such that the office can be said to be under the Commonwealth. It is, however, unclear whether other factors might be relevant and, if so, what those factors are. Gummow and Bell JJ, therefore, appear to be suggesting that there is no

32 (2012) 248 CLR 156.

33 Ibid 179–80 [4].

34 Ibid 240 [168].

35 Ibid 341 [476].

36 Ibid 374 [597].

37 Ibid 223 [109]–[110] (citations omitted).

single test for when a position is ‘under the Commonwealth’ and that it is a question of the totality of the circumstances.³⁸

However, in a general sense, given the sorts of factors pointed to, it rather appears that Gummow and Bell JJ understood the word ‘under’ to signify some sort of relationship of control or supervision. The range of factors pointed to by Gummow and Bell JJ indicate that supervision may take differing forms and is not limited to the kind of relationship typified by a manager and an employee who reports directly to that manager. The existence of direct contractual relations would constitute a relationship of control or supervision, for example, in that the contract would control the duties of a position, and the ability to have recourse to legal enforcement of the contract under ordinary legal principles can be seen as a form of supervision.

A similar understanding of ‘under’ appears to hold in respect of another constitutional use of that word: ‘office of profit under the Crown’. By s 44(iv) of the *Constitution*, a person who holds an ‘office of profit under the Crown’ is disqualified from sitting in Parliament. There has only been one case considering that expression as it appears in s 44(iv). In *Sykes v Cleary*,³⁹ the High Court held that a Victorian public school teacher, an employee of a State government department, held an office of profit under the Crown. The reasoning in that case appears to suggest that ‘under’ can be understood as signifying a relationship of supervision. In determining whether the scope of ‘office of profit under the Crown’ extended to state as well as federal public servants, the High Court was partly guided by the traditional rationale for excluding public servants from Parliament. Brennan J, for example, described the rationale in this way:

it is undesirable that a person be subjected to the possibly conflicting responsibilities and loyalties and the potential for abuse of power or opportunity which may be involved in, or flow from, concurrent membership of the national Parliament and the holding of an office of profit under the Crown. Implicit in it is a perception of the need to preserve the freedom and independence of the Parliament and to limit the control or influence of the executive government.⁴⁰

That description views public servants as being under some form of supervision in their work.

Further, the word ‘under’ in the expression ‘office of profit under the Crown’ has been the subject of discussion in respect of that ground of parliamentary disqualification in other jurisdictions. A similar ‘under’-as-supervision perspective appears also to hold in respect of the same ground of disqualification in s 13B of the *Constitution Act 1902* (NSW). In *The Constitution of New South Wales*, Twomey summarises the position in this way:

38 Beck, ‘*Williams v Commonwealth*’, above n 11, 284.

39 (1992) 176 CLR 77.

40 Ibid 122.

It has also been contended that the reference to the office being 'under' the Crown connotes a degree of supervisory power by the Crown over the office. Accordingly, the office of a judge or royal commissioner, while being 'under the Crown' to the extent that the appointment is made by the Governor, may not be an 'office of profit under the Crown' for the purposes of s 13B because the office-holder is required to act independently and is not subject to any direction or supervision by the Executive.

A court, in determining whether an office is 'under the Crown', will take into account whether the officer has been appointed by, and is removable by, a representative of the Crown (such as the Governor, a Minister or an officer of the Crown) and whether the officer is accountable to the Crown and subject to the supervision of an officer appointed by the Crown.⁴¹

The view taken here is expressly that 'under' signifies a relationship of supervision.⁴² Indeed, in respect of mayors, Twomey writes that since those positions are 'not generally subject to the direction or supervision of the government, one would assume that it is not an office held "under the Crown"'.⁴³ To similar effect, Gerard Carney has written that the expression 'under the Crown' 'requires some measure of control'.⁴⁴ Scholars take the same view of the meaning of 'under the Crown' in the context of that ground of disqualification in Victoria. In the case of employees of statutory authorities, John Waugh writes that 'the court is likely to consider the degree of direct or indirect ministerial control over the appointment and the work of the officer' in determining whether the position is one under the Crown.⁴⁵ Similarly, Greg Taylor writes that '[i]n cases of doubt, whether an office or place is under the Crown is to be determined by considering the nature and degree of control which the Crown exercises over the person in question'.⁴⁶ These scholars take the word 'under' as suggesting some sort of relationship of supervision.

A view that 'under' signifies a relationship of supervision for the purposes of the expression 'under the Crown' appears to hold sway in the United Kingdom. In 1941, the House of Commons formed a Select Committee on Offices or Places of Profit under the Crown to investigate the law and practice of disqualification from the House of Commons. Part of the committee's work was a consideration of the *Succession to the Crown Act 1707* under which the appointment to or holding of certain positions 'from the Crown' and other positions 'under the Crown' had slightly different consequences for disqualification from Parliament. The committee sought the advice of the Attorney-General on the distinction between *from* and *under*. The Attorney-General advised that an office from the Crown 'is

41 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 437–8 (citations omitted).

42 See also Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008) 148–52.

43 Twomey, above n 41, 438.

44 Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000) 67–8.

45 John Waugh, 'Disqualification of Members of Parliament in Victoria' (2005) 31 *Monash University Law Review* 288, 298.

46 Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 235.

an office to which the Crown appoints',⁴⁷ in the sense of by the monarch personally and 'not through the medium of a minister'.⁴⁸ By contrast, in respect of the offices under the Crown, the Attorney-General advised:

An office under the Crown need not be from the Crown. ... In considering whether an office is under the Crown one has to consider who appoints, who controls, who dismisses and the nature of the duties. If the Crown itself has the power of appointment and dismissal, this would raise a presumption that the Crown controls, and that the office is one under the Crown. ... If the duties are duties under and controlled by the Government then the office is, *prima facie*, at any rate, an office under the Crown, and the appointment would normally be made by a Minister or by someone who clearly held an office under the Crown.⁴⁹

Similarly, the Clerk of the House of Commons advised the committee in oral evidence that the distinction has traditionally been understood such that the key feature of 'from' is the directness of the appointment while the key feature of 'under' is some degree of payment or control by the Crown.⁵⁰

Whilst these sources and the legal position in the United Kingdom are not authoritative or determinative of the meaning of the *Australian Constitution*, their substance is consistent with and serves to reinforce the analysis of *Sykes v Cleary* above. The Attorney-General's memorandum has also been cited by at least one other Australian scholar in a discussion of the meaning of the expression 'office of profit under the Crown' in the context of that ground of disqualification from the Victorian Parliament.⁵¹ Ultimately, the point being made is that one sensible meaning of the word 'under' is to signify a relationship of supervision.

Of course, it must be emphasised that the meaning of legal words and expressions is coloured by their general purpose and context. The fact that 'under' means one thing in one context does not mean that it bears that same meaning in a different context. To give a different example, a judge of the High Court is not an 'officer of the Commonwealth' within the meaning of s 75(v),⁵² although judges of other federal courts are⁵³ and all federal judges, including High Court judges, are described in the constitutional text as holding an office.⁵⁴ The reason for that conclusion has everything to do with context: it would be odd for the *Constitution*

47 Select Committee on Offices or Places of Profit under the Crown, *Report*, House of Commons Paper No 121, Session 1940–1 (1941) app 1, 135.

48 *Ibid* xiii [17].

49 *Ibid* app 1, 136. This passage was quoted in Kathryn Cole, "'Office of Profit Under the Crown" and Membership of the Commonwealth Parliament' (Issues Brief No 5, Parliamentary Library, Parliament of Australia, 1993) 3–4.

50 Select Committee on Offices or Places of Profit under the Crown, above n 47, 36 [385].

51 Waugh, above n 45, 296.

52 *Federated Engine Drivers & Firemen's Association of Australasia v Colonial Sugar Refining Co Ltd* (1916) 22 CLR 103, 109, 117. *Contra* John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 784.

53 See, eg, *R v Judges of Federal Court of Australia; Ex parte WA National Football League (Inc)* (1979) 143 CLR 190.

54 *Constitution* s 72.

to empower the High Court to issue the constitutional writs against itself. What the preceding discussion clearly establishes is that the word 'under' is capable of bearing a meaning signifying a relationship of supervision.

It is also important to emphasise that there is an important condition to understanding 'under' as signifying a relationship of supervision. The second party to the 'under' relationship must be of such a nature that it is capable of exercising a supervisory function. If the second party is not of such a nature then 'under' cannot sensibly be understood in this sense. This relates to the criterion of meaningfulness that will be employed in part VI below in assessing the various possible interpretations of 'under the Commonwealth'.

B 'Under' as a Familial Relationship

The word 'under' is also capable of bearing a meaning other than one signifying a relationship of supervision. The constitutional text itself uses the word 'under' in other senses. However, not all such uses will be relevant as an aid to understanding the meaning of that word in the religious tests clause. In the religious tests clause, 'under' is used to express a relationship between two functioning entities: on the one hand, either an office or public trust and, on the other, 'the Commonwealth'. The most relevant other uses of the word 'under' in the constitutional text are therefore those where the word serves a similar function. This excludes from consideration the use of the word in phrases such as 'may resign his office by writing under his hand'⁵⁵ or 'has been convicted and is under sentence'.⁵⁶ In those phrases, the word 'under' is serving a quite different function.

A potentially instructive use of 'under', in a sense different to that discussed above, is in the preamble. As noted above, there is an important historical link between the preamble and s 116. In part, the preamble to the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 63 Vict, c 12 refers to 'one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established'. A simple textual analysis of this phrase reveals that a nation may exist 'under' the Crown whilst simultaneously also existing 'under' the *Constitution*.

In what sense does the Australian nation exist 'under' the Crown? And in what sense does the Australian nation exist 'under' the *Constitution*? The first question may well be anachronistic and meaningless nowadays given Australia's evolution to legal independence.⁵⁷ The preambular description of the Australian nation as being 'under' the Crown of the United Kingdom is today factually and legally

55 Ibid.

56 Ibid s 44(ii).

57 See *Sykes v Cleary* (1992) 176 CLR 77, 118–9. See generally George Winterton, 'The Acquisition of Independence' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 31.

false. Australia is no longer a British dominion.⁵⁸ Nevertheless, that description still has explanatory value in understanding the meaning of the word ‘under’.

The description of Australia existing ‘under’ the Crown appears to suggest some kind of familial relationship. The word ‘familial’ here is intended to draw an analogy with a family tree that might be constructed for a person and the various lineal relationships that exist within it. In the preamble, the Crown appears to be viewed as historically and logically prior to the Commonwealth of Australia. It is almost as if the preamble is suggesting the Commonwealth of Australia is the progeny of the Crown. Indeed, in their *Annotated Constitution of the Commonwealth of Australia*, John Quick and Robert Garran, in a discussion of the words ‘under the Crown’ in the preamble, invoke the metaphor of family. They refer to those words as indicating an ongoing relationship to the ‘mother country’ and as serving as an affirmation that the Commonwealth of Australia is intended to remain part of the British Empire.⁵⁹

A similar answer of familial relationship appears to be possible to the second question. The Australian nation is ‘under’ the *Constitution* in the sense that it is created by it. The Commonwealth of Australia is the progeny of the *Constitution*. The Commonwealth of Australia owes its existence to the Crown and to the *Constitution*. This indicates that the word ‘under’ is capable of bearing a meaning signifying some sort of familial relationship.

The notion of familial relationship should not necessarily be understood as restricted to a relationship of progeny or origins in any strict sense. The British Crown is not literally the direct progenitor of the Commonwealth of Australia in the way the *Constitution* might be considered to be. However, there is (or at least was at an earlier point in time) nonetheless a relationship between the British Crown and the Commonwealth of Australia that can fairly be described as familial. Indeed, the notion of familial relationship should be understood in a sense far broader than that of progeny. For example, in a context removed from the religious tests clause that nevertheless highlights the point, it might be said that the various Australian states stand in a familial relationship to one another, notwithstanding that not all of them were carved out and detached from what was originally the colony of New South Wales. The familial relationship between the Australian states would, however, be horizontal rather than vertical in nature. Queensland, for example, is in a familial relationship with New South Wales but is not ‘under’ New South Wales. This relationship is in fact analogous to the relationship of the various parts of the British Empire referred to by Quick and Garran.⁶⁰

There is a single case on the religious tests clause that suggests ‘under’ should be understood in this vertical familial sense. That case is *Crittenden v Anderson*.⁶¹

58 Furthermore, there is no longer any such thing as the Crown of the United Kingdom of Great Britain and Ireland. The political entity is now the United Kingdom of Great Britain and Northern Ireland.

59 Quick and Garran, above n 52, 295.

60 Ibid.

61 (Unreported, High Court of Australia, Fullagar J, 23 August 1950), extracted in Current Topics, ‘An Unpublished Judgment on s 116 of the Constitution’ (1977) 51 *Australian Law Journal* 167, 171.

Anderson was a practising Catholic and had been elected to the House of Representatives. Crittenden challenged Anderson's election under s 44(i) of the *Constitution*, which disqualifies any person who 'is under any acknowledgment of allegiance, obedience, or adherence to a foreign power' from being elected to or sitting in Parliament. Crittenden's argument was that the mere fact of Anderson's Catholicism meant Anderson had acknowledged allegiance, obedience or adherence to the 'Papal State'. That argument was rejected by Fullagar J on the basis that '[e]ffect could not be given to the petitioner's contention without the imposition of a "religious test"'.⁶²

Although not expressly stated, implicit in this decision is an acceptance that members of federal Parliament hold their positions 'under the Commonwealth'. Members of Parliament are not, of course, subject to direction or supervision in the performance of their core functions. It is true that aspects of the work of members of Parliament are the subject of legal regulation: their remuneration and their access to and use of various entitlements are regulated by statute,⁶³ for example, and their conduct is subject to the disciplinary powers of the House in which they sit.⁶⁴ This does not amount to 'supervision' in the relevant substantive sense that word is being used for here. As Meagher JA explained in *Sneddon v New South Wales* considering the position of members of the New South Wales Parliament:

Nor is the member accountable to the State acting by the executive in the discharge of any legislative or parliamentary function. Nor can he or she be controlled, directed or interfered with by the State in the discharge of those functions. Indeed the principle of responsible government requires that the member be and remain, as far as possible, independent of improper influence of the executive government so as to be able to watch and call it to account if necessary.⁶⁵

Unlike, for example, the public servants in *Church of Scientology v Woodward*, a member of Parliament has an independence in the conduct of his or her core functions that means he or she cannot be described as subject to any substantive supervision.⁶⁶

Accordingly, it is most improbable that Fullagar J's implicit acceptance that members of Parliament hold their position 'under the Commonwealth' was an acceptance that they are subject to any sort of substantive direction or supervision by the Commonwealth. On the other hand, it might fairly be said that there is a familial relationship with the Commonwealth.

The point of the preceding discussion is to demonstrate that the word 'under' in the religious tests clause is capable of being understood in the sense of signifying a vertical familial relationship.

62 Ibid.

63 *Parliamentary Entitlements Act 1990* (Cth).

64 *Constitution* s 49; *Parliamentary Privileges Act 1987* (Cth) s 5.

65 *Sneddon v New South Wales* [2012] NSWCA 351 (1 November 2012) [224].

66 The practical, political reality of party discipline is not relevant to the present legal discussion.

V WHAT IS 'THE COMMONWEALTH'?

So far this article has identified two possible meanings of the word 'under' as it is used in the religious tests clause. This section considers the potential meaning of 'the Commonwealth' as the second part of the compound expression 'under the Commonwealth'.

A *The Constitution Uses 'the Commonwealth' in Multiple Senses*

In none of the cases mentioned above dealing with the religious tests clause was there any analysis of what 'the Commonwealth' might mean. The meaning of that expression was either not in issue or simply assumed to be obvious. It is not obvious. The *Australian Constitution* uses the expression 'the Commonwealth' a number of times and in a number of different senses. Those senses are: in a geographical sense; in the sense of the Australian nation; and in the sense of the federal government.

In a geographical sense, 'the Commonwealth' is used in various places in the *Constitution*. Those places include s 21 ('if the President is absent from the Commonwealth'), s 37 ('if the Speaker is absent from the Commonwealth'), s 51(xx) ('trading or financial corporations formed within the limits of the Commonwealth'), s 101 ('within the Commonwealth') and s 118 ('[f]ull faith and credit shall be given, throughout the Commonwealth ...').

There are many places in the *Constitution* where 'the Commonwealth' is used in the sense of the Australian nation or the Australian body politic as a whole. Some of those places are: s 24 ('people of the Commonwealth'), s 25 ('people of the State or of the Commonwealth'), s 51 ('peace, order, and good government of the Commonwealth'), and s 121 ('[t]he Parliament may admit to the Commonwealth or establish new States'). The expression 'the Commonwealth' is also used in this sense in the covering clauses. For example, covering cl 3 ('the people ... shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia'), covering cl 4 ('[t]he Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect'), covering cl 6 ('"*[t]he Commonwealth*" shall mean the Commonwealth of Australia as established under this Act'), and covering cl 8 ('a State of the Commonwealth').

In respect of this sense of 'the Commonwealth', it is worth noting these remarks in the *School Chaplains Case* made in the context of a discussion on the scope of federal executive power:

the Commonwealth parties' ultimate submission appears to proceed from the assumption that the executive branch has a legal personality distinct from the legislative branch, with the result that the Executive is endowed with the capacities of an individual. The legal personality, however, is that of the Commonwealth of Australia, which is the body politic established

under the *Commonwealth of Australia Constitution Act 1900* (Imp), and identified in covering cl 6.⁶⁷

There are also places in the *Constitution* where 'the Commonwealth' is used in the sense of the federal government (understood more broadly than simply the federal executive government). Those places include, most notably perhaps, s 75(v) referring to the High Court's jurisdiction to decide cases in which the constitutional writs are sought against any 'officer of the Commonwealth'. Quick and Garran refer to the use of 'the Commonwealth' in this sense in this way:

In several sections of the Constitution the term 'Commonwealth' is used inartistically to denote the Central Government as contrasted with the Governments of the States, *ie*, 'The Legislative Power of the Commonwealth,' sec. 1; 'the Executive Power of the Commonwealth,' sec. 61; 'the Judicial Power of the Commonwealth,' sec. 71. These expressions refer to the Legislative, Executive, and Judicial Powers granted by the Constitution to the various organs of the Central Government.⁶⁸

B The Senses of 'the Commonwealth' Relevant to the Religious Tests Clause

There are also places in the *Constitution* where it is not immediately clear in what sense 'the Commonwealth' is being used. The religious tests clause of s 116 is one such place. In the religious tests clause, 'the Commonwealth' is obviously not used in any geographical sense. The religious tests clause uses either the sense of the federal government or the Australian nation.

The first possibility is that the religious tests clause uses 'the Commonwealth' in the sense of the federal government, understood in a sense broader than simply the federal executive government. The Attorney-General for South Australia suggested an interpretation to this effect in written submissions in the *School Chaplains Case*, but the issue did not receive attention from any of the other parties or in the judgments.⁶⁹ In this sense, it is as if the provision read 'no religious test shall be required as a qualification for any office or public trust under *the federal government*'. Reading 'the Commonwealth' in this way appears to be consistent with the intended purpose of the religious tests clause. At the Convention Debates, in speaking to the clause he introduced and which ultimately became s 116, Henry Bournes Higgins indicated his understanding that he was only limiting federal power:

My idea is to make it clear beyond doubt that the powers which the states individually have of making such laws as they like with regard to

67 *School Chaplains Case* (2012) 248 CLR 156, 237 [154] (citations omitted).

68 Quick and Garran, above n 52, 368.

69 Attorney-General (SA), 'Written Submission of the Attorney-General for the State of South Australia (Intervening)', Submission in *Williams v Commonwealth*, S307/2010, 20 July 2011, [51]: 'the "Commonwealth" referred to in the fourth clause includes both the Commonwealth Parliament and the Executive Government of the Commonwealth'.

religion shall remain undisturbed and unbroken, and to make it clear that in framing this Constitution there is no intention whatever to give to the Federal Parliament the power to interfere in these matters.⁷⁰

The second possibility is that the religious tests clause uses ‘the Commonwealth’ in the sense of the Australian nation. In this sense, it is as if the provision read ‘no religious test shall be required as a qualification for any office or public trust under *the Australian nation*’. As discussed below, reading ‘the Commonwealth’ in this sense may have the consequence that the prohibition on religious tests extends to state offices and state public trusts. During the second reading debate on the Commonwealth of Australia Constitution Bill 1900 (Imp) at least one member of the Imperial Parliament understood ‘the Commonwealth’ in this sense. That member considered that the effect of the religious tests clause would be ‘that there should be no possible disability upon religious grounds in any sense in Australia’ and ‘that religion shall be no bar of any kind throughout the length and breadth of Australia’.⁷¹

This discussion shows that ‘the Commonwealth’ as used in the religious tests clause could plausibly have either the meaning of the federal government or the Australian nation.

VI WHEN IS AN OFFICE OR PUBLIC TRUST ‘UNDER THE COMMONWEALTH’?

The above analysis has suggested that there are two possible meanings of ‘under’ and two possible meanings of ‘the Commonwealth’. There are therefore four possible ways of understanding ‘under the Commonwealth’. In this section, each potential interpretation will be considered in turn and assessed according to the criteria of meaningfulness, avoidance of undesirable and perverse outcomes, reconciliation of the existing cases and consistency with s 116’s drafting history. Through a process of elimination, that assessment shows that the most satisfactory interpretation of ‘under the Commonwealth’ for the purposes of the religious tests clause is that where ‘under’ is understood as a familial relationship and ‘the Commonwealth’ is understood as the federal government encompassing its legislative, executive and judicial arms.

70 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1769 (Henry Bournes Higgins).

71 United Kingdom, *Parliamentary Debates*, House of Commons, 21 May 1900, vol 83, col 798–800 (William Redmond). It should be noted that the member in question was an Irish MP and was making a political point about the religious disabilities in effect for holding public office in Ireland at the time.

A 'Under' as Supervision and 'the Commonwealth' as the Australian Nation

The first possible way of understanding 'under the Commonwealth' — 'under' as supervision and 'the Commonwealth' as the Australian nation — can be immediately discounted. The nation cannot supervise the holder of an office or public trust, other than in the extremely indirect sense that everyone (including those who hold public positions) is subject to law, and the laws of Australia ultimately derive from the fact that there exists an Australian nation. For example, a public servant cannot be subject to control and direction in any meaningful or substantive sense by the nation. This interpretation fails the fundamental criterion of meaningfulness.

B 'Under' as Supervision and 'the Commonwealth' as the Federal Government

The second possible way of understanding 'under the Commonwealth' is with 'under' signifying a relationship of supervision and 'the Commonwealth' meaning the federal government. This is a meaningful possibility. For example, it sits comfortably with the result in *Church of Scientology v Woodward*. The public servants in that case are subject to supervision by the federal government.

There is, however, a significant hurdle to accepting this possibility as the correct interpretation. That hurdle is that it would have undesirable and ahistorical consequences. It would, for instance, mean that *Crittenden v Anderson* was wrongly decided. In other words, it would have the consequence that membership of federal Parliament may be conditioned upon the satisfaction of religious tests. After all, as noted above, members of Parliament cannot sensibly be described as being subject to any sort of substantive supervision by the federal government (understood more broadly than the federal executive government) because they are not subject to any substantive supervision in the exercise of their core functions. This is plainly an undesirable, and indeed a perverse, result.

History also suggests that this consequence should not eventuate in the face of a prohibition on religious tests.⁷² It has been said that 'parliamentary religious tests are a paradigmatic example' of religious tests.⁷³ Indeed, adopting this second possible interpretation would mean that the federal Parliament could enact an Australian version of the *Test Act 1678*, 30 Car 2 (sometimes known as the *Second Test Act*). The long title stated that it was '[a]n Act for the more effectual preserving [of] the King's Person and Government by disabling Papists from sitting in either House of Parliament.' Among other things, the Act required all parliamentarians to take the oath of supremacy, which acknowledged the King's supreme authority in all spiritual and ecclesiastical matters. For Roman Catholics, taking this oath

72 See Reid Mortensen, *The Secular Commonwealth: Constitutional Government, Law and Religion* (PhD Thesis, University of Queensland, 1996) 283.

73 Beck, 'The Constitutional Prohibition on Religious Tests', above n 9, 344.

would have the effect of repudiating the Pope's spiritual authority. The Act also required parliamentarians to take another, rather long, oath that repudiated central Roman Catholic beliefs. That oath commenced:

I AB do solemnly and sincerely in the presence of God profess, testify and declare that I do believe that in the sacrament of the Lord's Supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ at or after the consecration thereof by any person whatsoever; and that the invocation or adoration of the Virgin Mary or any other saint, and the sacrifice of the Mass as they are now used in the Church of Rome are superstitious and idolatrous ...⁷⁴

It should be noted that the *Second Test Act* did not in terms prohibit 'papists' from sitting in Parliament. It set requirements — including the oaths — that a Roman Catholic true to his faith (and it was only men at the time who could sit in Parliament) could never agree to satisfy.

A similar undesirable outcome is that this interpretation would give the religious tests clause the effect of not prohibiting religious tests for electors of the federal Parliament since the voting function of electors is, like the central functions of parliamentarians, a function that is undertaken independently.

This hurdle appears to be a sufficient basis for concluding that this possible interpretation cannot be the correct or preferable interpretation. The interpretation fails in a serious manner on the avoidance of undesirable and perverse outcomes criterion. It involves a conclusion that is methodologically unsound. It also prevents a reconciliation of the decided cases on the religious tests clause.

C 'Under' as a Familial Relationship and 'the Commonwealth' as the Australian Nation

The third potential interpretation of 'under the Commonwealth' requires reading 'under' as indicating a familial relationship and 'the Commonwealth' as the Australian nation. This interpretation satisfies the meaningfulness criterion. It appears to sit comfortably with the result in both *Church of Scientology v Woodward* and *Crittenden v Anderson*.

With regard to *Church of Scientology v Woodward*, it can fairly be said that federal public servants have a familial relationship with the Australian nation in a number of possible ways. One such way is that a federal public servant's position ultimately owes its existence to the Australian nation in a kind of loose progenitor sense; this might be seen as somewhat similar to the way in which the Commonwealth of Australia can be seen as 'under the Crown'. A federal public servant is ultimately the 'progeny' of the federal government and the federal government exists only because the nation exists. As regards *Crittenden v Anderson*, a similar description of the relationship of a member of federal Parliament and the Australian nation

⁷⁴ *Test Act 1678*, 30 Car 2.

also appears possible. It also appears possible to say that electors for the federal Parliament stand in a familial relationship with the Australian nation. Indeed, the *Constitution* commands that members of Parliament be 'chosen by the people of the Commonwealth'.⁷⁵

There is, however, a hurdle to accepting this interpretation as the correct or preferable interpretation. That hurdle is that the interpretation might include state officials as holding their positions 'under the Commonwealth'. State officials are in a familial relationship with the relevant state in the same way federal officials are in a familial relationship with the Australian nation. Since the states are themselves in a familial relationship with the Australian nation it follows that so too are state officials, albeit a degree removed. This result does not necessarily pose a problem of coherence. Indeed, it appears to be a result open when a comparison is made with the religious tests clause of the *United States Constitution*. Article VI of the *United States Constitution* states in part:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

It would appear open to read that provision as meaning that 'officers of the United States and of the several States' hold their offices 'under the United States'.⁷⁶ This would give the American religious tests clause a state as well as federal operation. The issue has never been decided by the United States Supreme Court. The question did, however, come before the Supreme Court in *Torcaso v Watkins*⁷⁷ where it was argued that a requirement imposed by Maryland law that notaries declare a belief in the existence of God as a qualification for appointment violated the religious tests clause of the *United States Constitution*. The Supreme Court held that the Maryland religious test was unconstitutional as violating the religion clauses of the First Amendment, which is binding on the states by reason of the Fourteenth Amendment. In a footnote, the Supreme Court said that because the case was being decided on that basis 'we find it unnecessary to

75 *Constitution* s 24 (House of Representatives). See also s 7 (Senate: 'chosen by the people of the State').

76 It should be noted that the *United States Constitution* uses various 'office'-related language, including in art I § 3 ('Office of honor, Trust or Profit under the United States'); art I § 6 ('Office under the United States', 'civil Office under the Authority of the United States'); art II § 4 ('civil Officers of the United States'). What these expressions mean and the relationship between them is the subject of ongoing debate. See, eg, Seth Barrett Tillman, 'Interpreting Precise Constitutional Text: The Argument for a "New" Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, and the Religious Test Clause — A Response to Professor Josh Chafetz's *Impeachment & Assassination*' (2013) 61 *Cleveland State Law Review* 285; Zephyr Teachout, 'Gifts, Offices and Corruption' (2012) 107 *Northwestern University Law Review Colloquy* 30; Seth Barrett Tillman, 'Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle' (2012) 107 *Northwestern University Law Review* 399; Zephyr Teachout, 'The Anti-Corruption Principle' (2009) 94 *Cornell Law Review* 341.

77 367 US 488 (1961).

consider appellant's contention that [the religious tests clause of the *United States Constitution*] applies to state as well as federal offices'.⁷⁸

There is, however, lower American judicial authority that the religious tests clause of the *United States Constitution* does indeed apply to state as well as federal offices. In *Silverman v Campbell*,⁷⁹ the South Carolina Supreme Court considered two identical provisions of the *South Carolina Constitution*, which provided: 'No person who denies the existence of a Supreme Being shall hold any office under this Constitution.'⁸⁰ The Court held that those provisions violated not only the First Amendment as binding on South Carolina by reason of the Fourteenth Amendment but also the religious tests clause of the *United States Constitution*.⁸¹ Unfortunately, the South Carolina Supreme Court offered no reasons in support of this latter conclusion. An academic note of the case suggests that 'the most likely explanation is that the court considered state offices to be "under the United States"''.⁸²

Whilst including state officials within the scope of persons holding their positions 'under the Commonwealth' would not necessarily pose a problem of coherence, it is inconsistent with the express intentions of Higgins in proposing s 116. As noted above, Higgins explained that the intended function of s 116 was limited to the federal sphere. The Attorney-General for South Australia made this point in written submissions in the *School Chaplains Case*, arguing that it is

clear from the text of s 116 that where it refers to any office or public trust under the Commonwealth it is not concerned with the 'federal community'. That is, s 116 does not apply in any of its four aspects to the States. This is consistent with the history of the provision in the constitutional conventions.⁸³

Similarly, proposals contained in the Constitution Alteration (Post-War Reconstruction and Democratic Rights) Bill 1944 (Cth) and Constitution Alteration (Rights and Freedoms) Bill 1988 (Cth) to amend the religious tests clause were based on the assumption that the religious tests clause did not extend to state offices and trusts. The 1944 proposal included a provision stating: 'Section one hundred and sixteen of this Constitution shall apply to and in relation to every State in like manner as it applies to and in relation to the Commonwealth.'⁸⁴ The 1988 proposal would have amended 'under the Commonwealth' to read 'under

78 Ibid 489 n 1 (Warren CJ, Black, Douglas, Clark, Brennan, Whittaker and Stewart JJ). Cf the obiter remarks in the dissenting opinion in *Ex parte Garland*, 71 US 333, 397 (Miller J for Fuller CJ, Miller, Swayne and Davis JJ) (1866) denying that the religious tests clause could apply to the states.

79 486 SE 2d 1 (SC, 1997).

80 *South Carolina Constitution* arts VI § 2, XVII § 4.

81 *Silverman v Campbell*, 486 SE 2d 1, 2 (Finney CJ) (SC, 1997).

82 James Lowell Underwood, 'The Dawn of Religious Freedom in South Carolina: The Journey from Limited Tolerance to Constitutional Right' (2002) 54 *South Carolina Law Review* 111, 145 n 170.

83 Attorney-General (SA), 'Written Submission of the Attorney-General for the State of South Australia (Intervening)', Submission in *Williams v Commonwealth*, S307/2010, 20 July 2011, [52] (citations omitted).

84 Constitution Alteration (Post-War Reconstruction and Democratic Rights) Bill 1944 (Cth) cl 3.

the Commonwealth, a State or a Territory'.⁸⁵ Both proposals failed when put to referendum.⁸⁶

Of course, the language chosen by legislative drafters is not always apt to carry their intentions into effect and legislative language sometimes has unforeseen effects.⁸⁷ Nevertheless, on the criterion of consistency with s 116's drafting history, this interpretation is not satisfactory.

D 'Under' as a Familial Relationship and 'the Commonwealth' as the Federal Government

The final potential interpretation of 'under the Commonwealth' involves viewing 'under' as signifying a familial relationship and 'the Commonwealth' as the federal government (understood in the broad sense). It is only this interpretation that satisfies the criteria of meaningfulness, avoidance of undesirable and perverse outcomes, ability to reconcile the existing cases and consistency with s 116's drafting history.

On the meaningfulness criterion, this interpretation is consistent with both *Church of Scientology v Woodward* and *Crittenden v Anderson*. Federal public servants have a clear familial relationship with the federal government: they are the functionaries of the executive branch of the federal government. Members of federal Parliament also have a familial relationship with the federal government. The legislature is a branch of the federal government, and the Parliament 'consist[s]', in part, of the Senate and the House of Representatives,⁸⁸ which in turn are 'composed' of the elected senators and members.⁸⁹ It is also possible to say that electors for the Commonwealth Parliament — 'the people of the Commonwealth' — have a familial relationship with the federal government in that they are responsible for choosing, almost as progenitors, the legislative branch of government, which in turn produces the executive branch, which in turn has responsibility for appointing the judicial branch. Indeed, in *West Lakes Ltd v South Australia*,⁹⁰ a case about manner and form requirements at state level, King CJ described electors as forming part of the 'legislative structure'⁹¹ because the members of the legislature represent and are chosen by the electors.⁹² In encompassing electors within its scope, this interpretation avoids undesirable outcomes.

The decision in the *School Chaplains Case* also appears consistent with this interpretation. As noted above, the High Court appears to have taken the view

85 Constitution Alteration (Rights and Freedoms) Bill 1988 (Cth) cl 4.

86 For a brief overview of the referendum campaigns, see Mortensen, above n 72, 211–20.

87 See Beck, 'The Constitutional Prohibition on Religious Tests', above n 9, 352.

88 *Constitution* s 1 (emphasis added).

89 *Ibid* ss 7, 24 (emphasis added).

90 (1980) 25 SASR 389.

91 *Ibid* 398.

92 *Ibid* 397.

that it is a matter of degree whether a position is ‘under the Commonwealth’. This is perfectly consistent with the notion of a familial relationship. If thought is given to a person’s family tree, it would generally be conceded that there comes a point where a particular individual is so distantly related to another individual that it would not ordinarily be accepted that they are part of the same ‘family’. This appears to be the approach in the *School Chaplains Case*. There was a relationship between the school chaplains and the Commonwealth. The chaplains were employed by organisations that were in a direct contractual relationship with the Commonwealth. The High Court simply decided that the particular nature of that relationship was too distant to be classed as ‘under the Commonwealth’ and, therefore, on the analysis being presented here, as too distantly related to be considered in a familial relationship.

This interpretation not only reconciles the result of each of the three decided religious tests clause cases, it is also consistent with the drafting history of the provision. It gives effect to the stated general purpose of the provision.⁹³ The notions of ‘distantly related’ and ‘degree’ may readily be employed in this interpretation to exclude state officials from being considered as holding positions ‘under the Commonwealth’.⁹⁴ Although there is a relationship between state officials and the Commonwealth in the way explained above, it would be open for the High Court to consider, perhaps by analogy with the result in the *School Chaplains Case*, that relationship too distant to be classed as familial.

In the final assessment, it is only this fourth possible interpretation that is entirely satisfactory. This interpretation is meaningful, avoids undesirable and perverse outcomes, reconciles the existing cases and is consistent with s 116’s drafting history.

VII CONCLUSION

In their *Annotated Constitution of the Commonwealth of Australia*, Quick and Garran were dismissive of the religion clauses of the First Amendment to the *United States Constitution*,⁹⁵ upon which most of s 116 was based.⁹⁶ They considered those clauses to be ‘superfluous’, since the *United States Constitution* did not grant Congress an express religion power, and wrote: ‘No logical or constitutional reasons have been stated why such a negation of power which had never been granted and which, therefore, could never be legally exercised, was

93 On this interpretation, there might still be some indirect limitation in respect of state offices. Williams and Hume, above n 3, 257, speculate that the religious tests clause ‘could extend, for example, to prohibit religious tests for a state statutory office if holding that office was a precondition to appointing that state officer to a Commonwealth office’.

94 The notion of degree played a role in Gibbs J’s explanation of the meaning of the establishment clause of s 116 in *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 604: ‘It may be a question of degree whether a law is one for establishing a religion’.

95 *United States Constitution* amend I: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’.

96 See Beck, ‘Higgins’ Argument’, above n 5, 402; Ely, above n 5, 79.

introduced into the instrument of Government.⁹⁷ They took a different view of the religious tests clause of art VI of the *United States Constitution*,⁹⁸ on which the religious tests clause of s 116 is based. They considered the provision to be 'necessary' and 'of practical use and value' since without it there would be nothing to prevent religious tests for offices and trusts.⁹⁹ Quick and Garran did not offer any analysis of the meaning of the provision and thus did not examine how far the Australian provision was of practical use and value. This paper has done that by examining when an office or public trust is 'under the Commonwealth' for the purposes of the religious tests clause of the *Australian Constitution*.

This paper has examined various potential interpretations of the expression 'under the Commonwealth' and assessed them against the criteria of meaningfulness, avoidance of undesirable and perverse outcomes, ability to reconcile the existing cases and consistency with s 116's drafting history. On this basis, the paper concludes that an office or public trust will be 'under the Commonwealth' for the purposes of the religious tests clause when the office or public trust stands in a vertical familial relationship with the federal government, understood as encompassing not just its executive arm but also its legislative and judicial arms.

97 Quick and Garran, above n 52, 952.

98 See above Part VI(C).

99 Quick and Garran, above n 52, 952.