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THE FINANCING OF RELIGION: GUIDELINES FOR LEGAL REGULATION

ABSTRACT

This paper begins with an overview of how the law regulates religious groups and religious activities through the facilitation, or prohibition, of their financing. It then discusses four guidelines for the courts and legislatures to follow in such regulation, namely: respect for freedom of religion as detailed in s 116 of the Constitution, domestic human rights legislation and in the common law, legal neutrality through the non-discriminatory treatment of religions *inter se*, regulation based upon full information, and finally, a pragmatic appreciation of the limited utility of attempted legal suppression of religion. The paper concludes that the legal regulation of religious financing is inextricably linked to the interests of the state.

INTRODUCTION

An important way in which the law interacts with the practice of religion is through regulating the financing of religious groups and religious activities. Like most other groups in society, religious groups require funds to finance their operations. Generally, one would expect funds to come from the faith-motivated generosity of group members or, perhaps, from sympathetic non-members, but they could also be generated through commercial activities and, increasingly in Australia, through government funding of faith-motivated activities that coincide with the state's welfare objectives. The acquisition and generation of income by religious groups may be significantly enhanced through the conferral of fiscal privileges such as an exemption from income tax.

Since at least mediaeval times the law has controlled how and when the financing of religion is allowed and thereby has affected the free expression of religious faith. Such control occurs in two main ways: first, the law facilitates the financing of some religious activity by granting enforcement mechanisms and fiscal privileges in relation to religious purposes that satisfy the legal definition of charity; and

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secondly, the law prohibits the financing of religious beliefs and activities that are perceived to conflict with the state's interests.[1]

The question of how such regulation, facilitative or prohibitive, ought to occur is receiving increasing attention in Australia. For example, the fiscal privileges accorded to some religious activities and groups have come under increasing scrutiny, as in the 2008 High Court decision of *Commissioner of Taxation v Word Investments Ltd* which concerned a challenge to the charitable status of a corporation created to generate funds from purely secular activities for religious, evangelistic, purposes.[2] A majority of the Court confirmed the corporation's entitlement to tax exemptions, but Kirby J, in dissent, questioned both the appropriateness of religious groups receiving fiscal exemptions for evangelistic activities and the competitive advantage given to the corporation in question.[3] In an apparent response to similar concerns in the United Kingdom, statutory amendments to English charity law require religious bodies to affirmatively prove that they provide a public benefit to society, rather than relying on presumptions of benefit, thereby placing a greater onus on religious groups to justify charitable privileges.[4] In addition, religious charities, as part of the not-for-profit sector generally, are the subject of a 2008 Senate Committee report recommending wide-reaching regulatory reforms.[5] The application of anti-terrorism legislation to religious funding, on the other hand, is a contemporary example of the prohibition of religiously-motivated giving.[6]

These developments provoke questions concerning the relevance to society of religious activity and the extent to which the financing of such activity should be facilitated or discouraged by the state. All this suggests that a consideration of the appropriate guidelines for legal regulation of religious financing is timely. Hence,

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1 Indirect regulation occurs through doctrines and legislation that safeguard the autonomy of faith-motivated donors. See, eg, *Allcard v Skinner* (1887) LR 36 Ch D 145 (equitable undue influence); *McCulloch v Fern* [2001] NSWSC 406 (Unreported, Palmer J, 28 May 2001) (unconscionable dealings), *Trade Practices Act 1974* (Cth) s 52 (misleading or deceptive conduct) and Part IVA (unconscionable conduct). Another indirect way in which the law controls the operation of religious groups is through the power to withhold planning permission for religious buildings. See, eg, Andrew West, 'Behind Ethnic Divide: It's Land', *Sydney Morning Herald* (Sydney), 13 October 2008.

2 *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204 ('*Word Investments*').

3 Ibid 248–50. See also, Senate Standing Committee on Economics, Parliament of Australia, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008) 83–4.

4 *Charities Act 2006* (UK) c 50, s 3. Matthew Harding, 'Trusts for Religious Purposes and the Question of Public Benefit' (2008) 71 *Modern Law Review* 159.

5 Senate Standing Committee on Economics, Parliament of Australia, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008).

6 The impact upon freedom of religion of Australian legislation enacted in response to the 'war on terror' is one of the subjects of a current Australian Human Rights Commission project, *Freedom of Religion and Belief in the 21st Century*, Discussion Paper (2008) 5.

this article considers first, how the law has regulated the expression of religious faith to date through the facilitation and prohibition of religious financing, and secondly, the common principles or guidelines that should govern these modes of regulation. The focus is upon Australian and English law.

I An Overview of the Legal Regulation of Religious Financing

A *Facilitation of Religious Financing*

Many religious groups operate as unincorporated associations, that is, they have no legal status apart from that of their individual members and that 'membership' may be a fluctuating group that is difficult to precisely identify at any time.[7] This creates practical problems regarding the ownership of property and the receipt of funds. One solution is for the governing body of the association, or another body created for this purpose, to hold the property of the association on trust for its purposes.[8] Thus, for pragmatic reasons, many religious groups choose to operate by way of trusts for purposes.

Generally, the law does not countenance trusts for purposes unless those purposes are held to be charitable. This is because of enforcement problems and policy objections to trusts of indefinite duration.[9] Charity has a technical meaning derived from case law since the Statute of Elizabeth in 1601. There is a vast and complex tapestry of charity cases concerning trusts for religious purposes. It suffices to say here that the 'advancement' of religion is a recognised charitable purpose[10] and that the religious purpose must be public in nature, rather than private.[11] In addition, the religious purposes must confer a public benefit, although once the purposes

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7 Other legal structures utilised by religious bodies include the corporation limited by guarantee and the incorporated association. For a discussion of the relative advantages of these and other structures, see, Senate Standing Committee on Economics, Parliament of Australia, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008) ch 7.

8 See generally, *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565.

9 See generally, H A J Ford, 'Dispositions for Purposes' in P D Finn (ed), *Essays in Equity* (1985) 159. Enforceability concerns include standing and whether the trust's purposes are too abstract to be easily scrutinised. The Attorney-General has standing to enforce charitable trusts and such trusts may operate indefinitely. The court has power to deal with trusts for purposes that become obsolete or fulfilled by way of cy-pres schemes. See generally, Gino Dal Pont, *Charity Law in Australia and New Zealand* (2000).

10 See, Dal Pont, above n 9, 164–5. 'Religion' is given a wide and inclusive meaning in Australia: *Church of the New Faith v Commissioner of Payroll Tax (Victoria)* (1983) 154 CLR 120.

11 In other words, it must benefit members of the community at large, however small in number, rather than a private group of individuals. *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297. This problematic element is sometimes referred to as a requirement of public benefit, which then leads to confusion with the separate requirement that the trust's purposes be beneficial. See, J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [1010] at n 53. On the

are shown to be for the advancement of religion such a benefit is presumed until displaced by contrary evidence.[12]

Whether religious purposes are charitable is not only important where there is a trust for those purposes. A peculiarity of charity law is that the trusts definition of charity was adopted by legislatures as a means of conferring fiscal and other benefits.[13] So whether a religious body is eligible for exemption from income tax, fringe benefits tax, rates and stamp duty, for example, will depend, at least in part, upon whether its purposes are charitable within the trusts law meaning of that term. Thus, the legal definition of charity is important even to religious groups that have a separate legal persona through incorporation and thus are not so reliant upon trusts. This dual function of charity law invests the decision to grant or withhold charitable status with immense importance.

B *Prohibition of Religious Financing*

A religious group may be made illegal by legislation.[14] If that is the case then its financing may be legislatively barred as well,[15] but in any event it will be precluded at common law. As a matter of public policy, the courts do not enforce a trust for superstitious purposes: that is, 'one which has for its object the propagation of the rites of a religion not tolerated by the law',[16] even though otherwise it would be a

application of the public purpose requirement to religious trusts see, Dal Pont, above n 9, 167.

12 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [1010], [1034] citing Lord Greene MR in *Re Coats' Trust* [1948] Ch 340, 346; Dal Pont, above n 9, 166. *Contra* Jeffrey Hackney, 'Charities and Public Benefit' (2008) 124 *Law Quarterly Review* 347. Hackney argues that purposes for the advancement of religion are incontrovertibly of public benefit. It is difficult to reconcile this with *Gilmour v Coates* [1949] AC 426 discussed below.

13 Where the term 'charity' is used in legislation it is presumed to carry its common law meaning. *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317; *Central Bayside General Practice Association Ltd v Commissioner of State Revenue of the State of Victoria* (2006) 228 CLR 168, 178, n 28. On the tax treatment of charities in Australia see, Ann O'Connell, 'The Tax Position of Charities in Australia – Why Does It Have To Be So Complicated?' (2008) 37 *Australian Tax Review* 17.

14 This is subject to constitutional safeguards such as s 116 of the *Constitution* discussed below.

15 In relation to the financing of religious groups or religious acts linked to terrorism, see, *Criminal Code Act 1995* (Cth) s 102.6 and Division 103. For a discussion of the breadth of such provisions see, Miriam Gani and Gregor Urbas, 'Alert or Alarmed? Recent Legislative Reforms Directed at Terrorist Organisations and Persons Supporting or Assisting Terrorist Acts' (2004) *Newcastle Law Review* 23.

16 Hubert Picarda, *The Law and Practice Relating to Charities* (2nd ed, 1995) 104, quoting from William Robert Augustus Boyle, *A Practical Treatise on the Law of Charities* (1837) 242. On superstitious uses see, *Bourne v Keane* [1919] AC 815; *Nelan v Downes* (1917) 23 CLR 546, 566; Gareth Jones, *History of the Law of Charity 1532–1827* (1969).

valid charitable trust. Historically, this type of prohibition was important in relation to the practices of Roman Catholicism that were made illegal upon the Reformation:

> The Reformation had made the Protestant religion the established faith, and therefore the Courts regarded other faiths as false religions and that it was a matter of public policy to refuse to carry out trusts opposed to the established faith.[17]

From 1689 trusts for non-conformist Protestant groups were permitted[18] and, in the early to mid-nineteenth century, the lifting of restrictions against first, Unitarians, then Jews and Roman Catholics, further widened the enforceability of trusts for religious purposes.[19] Examples of religious groups prohibited or suppressed by legislation in Australia in the last century include the Jehovah's Witnesses, the Scientology movement, and smaller new religions such as those practising witchcraft, paganism and fortune-telling.[20] Today, suppression of religious groups in Australia is more likely to be associated with the prevention of terrorism.[21]

Even in relation to religions that are not expressly prohibited by legislation the common law reserves the right to void a trust for purposes that, inculcates 'doctrines adverse to the very foundations of all religion, and [that] are subversive of all morality'.[22] Gino Dal Pont has argued that this reflects the general trust law

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17 *Nelan v Downes* (1917) 23 CLR 546, 566 (Isaacs J). See also, *Bowman v Secular Society Ltd* [1917] AC 406, 448–51 (Lord Parker of Waddington); J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [1040].

18 *The Toleration Act 1689* 1 Wm & M, c 18. After this trusts for religions that accept 'the fundamental doctrines of the Christian faith' were considered to be valid charitable trusts.

19 With respect to Unitarianism, see, Michael Blakeney, 'Sequestered Piety and Charity – a Comparative Analysis' (1981) *Journal of Legal History* 207, 211. *Roman Catholic Charities Act 1832* 2 & 3 Wm 4, c 115; *Religious Disabilities Act 1846* 9 & 10 Vict, c 59.

20 See generally, NSW Anti-Discrimination Board, *Discrimination and Religious Conviction* (1984) Chapter 5; James T Richardson, 'Minority Religions ("Cults") and the Law: Comparisons of the United States, Europe and Australia' (1995) 18 *University of Queensland Law Journal* 183; Human Rights and Equal Opportunity Commission, *Article 18: Freedom of religion and belief* (1998). In relation to the Jehovah's Witnesses, see, eg, *National Security Act 1939–1940* (Cth). In relation to Scientology, see, eg, *Psychological Practices (Scientology) Act 1965* (Vic); *Scientology Prohibition Act (1968)* (SA); *Scientology Act 1968* (WA). In 1998 the Human Rights and Equal Opportunity Commission recommended that certain State legislation forbidding the practice of witchcraft and fortune-telling be repealed. There are now no Australian laws prohibiting witchcraft and fortune telling although South Australia still has an offence of purporting to act as a spiritualist with intent to defraud: *Summary Offences Act 1953* (SA) s 40. See also, Lynne Hume, 'Witchcraft and the Law in Australia' (1995) 37 *Journal of Church and State* 135.

21 Pursuant to the *Criminal Code Act 1995* (Cth); *Charter of the United Nations Act 1945* (Cth) and *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Cth).

22 *Thornton v Howe* (1862) 54 ER 1042, 1044.

requirement of public benefit: any trust proved to be to the 'public detriment' will be invalidated. Whilst it is difficult to find case law examples on point, he suggests 'the involvement of children in sexual acts, brainwashing and dangerous psychological techniques' as hypothetical examples of religiously-motivated conduct that would fall under this heading.[23]

Religious financing may also be partially restricted or prohibited. An early example is the *Mortmain and Charitable Uses Act* 1736 which invalidated charitable trusts of land made within twelve months of a settlor's death.[24] One of the motivations for this legislation was a fear that persons close to death were particularly vulnerable to abuse of spiritual influence and this was being exploited to the detriment of family who would otherwise inherit the real estate.[25] Hence, the legislation invalidated potentially suspect dispositions. Family provision legislation is a contemporary example of legislation that restricts the ability of religiously motivated donors to leave property to a religious group.[26]

Thus, the law may either promote religious activity through conferral of charitable status and consequent privileges, or suppress religion by prohibiting the financing of religious activity that is perceived to be harmful to the state's interests or the interests of others. In the remainder of this article I consider whether there are common principles that should guide the legislatures and courts in such regulation. There are four possible guidelines.

II Guidelines for Regulation

A *Freedom of Religion*

Given that the regulation of religious financing clearly may inhibit the free expression of religious beliefs, how should a right to freedom of religion restrain such regulation? As we shall see, legislative protection of the right to freedom of religion is patchy in Australia and, in any event, it is not an absolute right. It may be overridden by security interests of the state and must be balanced with the legal

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23 Dal Pont, above n 9, 167.

24 9 Geo 2, c 36.

25 See generally, Gareth Jones, *History of the Law of Charity 1532–1827* (1969). 'The reason for this statute was… to hinder gifts by dying persons, out of a pretended or mistaken notion of religion, as thinking it might before the benefit of their souls to give their lands to charities which they paid no regard to in their lifetime… the legislature blended two inconveniences together, the acts of languishing and dying persons, and the disherison of heirs.' *Attorney-General v Lord Weymouth* (1743) 27 ER 11, 13 (Lord Hardwicke LC). See also the equitable doctrine of undue influence which raises an automatic presumption of undue influence in relation to large gifts or contracts between a spiritual leader and follower, hence rendering such transactions voidable unless proved free from undue influence. *Allcard v Skinner* (1887) 36 Ch D 145.

26 See further, Pauline Ridge, 'Moral Duty, Religious Faith and the Regulation of Testation' (2005) 28 *University of New South Wales Law Journal* 720.

rights of others. Similarly, although respect for the right to freedom of religion has been influential in the common law, there too, the right is not absolute.

There are several sources for a right to freedom of religion in Australia but none is comprehensive in its application. Section 116 of the Constitution only binds the Commonwealth Parliament, although this extends to the Commonwealth's exercise of legislative power in relation to the Territories.[27] Moreover, it appears that s 116 does not confer a right to a remedy upon individuals.[28] There are no other entrenched constitutional protections of freedom of religion in Australia,[29] although Tasmania's *Constitution Act 1934* (Tas) also recognises a right to religious freedom.[30] International human rights protection in relation to freedom of religion through art 18 of the *International Covenant on Civil and Political Rights*[31] has been implemented in the ACT and Victoria. A right to freedom of religion has also been recognised in the common law.

1 *Constitutional Protection of Freedom of Religion*

Section 116 of the Constitution states:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[32]

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27 *Kruger v Commonwealth* (1997) 190 CLR 1, 85–6 (Toohey J), 121, 131 (Gaudron J), semble 160–1 (Gummow J). *Contra* 60 (Dawson J), 142 (McHugh J). It is difficult to discern Brennan J's view on the application of s 116 to the Commonwealth's s 122 legislative power for the Territories, however given that he discusses s 116, it can be argued that he supports the majority view. Referenda to extend the operation of s 116 to the States failed in 1944 and 1988. See further, NSW Anti-Discrimination Board, *Discrimination and Religious Conviction* (1984) [2.25]; Beth Gaze and Melinda Jones, *Law, Liberty and Australian Democracy* (1990) 245.

28 *Kruger v Commonwealth* (1997) 190 CLR 1, 125 (Gaudron J).

29 *Grace Bible Church Inc v Reedman* (1984) 54 ALR 571; *Kruger v Commonwealth* (1997) 190 CLR 1, 124–5 (Gaudron J).

30 Section 46: (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

31 ('*ICCPR*'), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

32 Section 116 has been argued in the following cases: *Krygger v Williams* (1912) 15 CLR 366; *Judd v McKeon* (1926) 38 CLR 380; *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* (1943) 67 CLR 116; *Attorney-General (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 559; *Kruger v Commonwealth* (1997) 190 CLR 1. See generally, Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18 *Monash University Law Review* 207; Joshua Puls, 'The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26 *Federal Law Review* 139.

Could s 116, and specifically the third clause, 'the Commonwealth shall not make any law for… prohibiting the free exercise of any religion…', be used to restrain the Commonwealth in relation to regulation of religious financing? It seems unlikely that facilitative legislation, such as that conferring fiscal privileges, for example, could have the effect of prohibiting the free exercise of religion so as to come within the third clause of s 116. Even if such legislation operates to confer benefits on some religious groups or activities to the exclusion of others this would not be a 'prohibition' of the free exercise of religion, as whether or not I receive a tax deduction for tithing in accordance with my religious beliefs does not prohibit the free exercise of my beliefs. It might make it less palatable but I am still free to tithe.[33] Furthermore, in deciding whether a law is 'for' prohibiting the free exercise of religion one must consider the purpose or purposes of the law rather than its effect.[34] The purpose of a law conferring fiscal privileges on religious groups that meet the definition of 'charity' is not to prohibit the exercise of religion that does not meet the definition. The third clause of s 116 is not breached here.

Justice Kirby in his dissenting judgment in the 2008 *Word Investments* case suggested that s 116, construed as a whole, *restricts* the Commonwealth Parliament's power to facilitate religious activity rather than promotes a greater right to the free exercise of religion. In his view, s 116 epitomises a fundamental aspect of Australian constitutionalism, namely, 'the secular character of the Commonwealth and its laws and the separation of the governmental and religious domains'.[35] This meant, at the least, that any legislation providing economic support to particular religious groups, or, presumably, religion generally, must be construed strictly and narrowly. Similarly, Murphy J, also in dissent, in the earlier High Court case of *Defence of Government Schools* said that s 116 'recognises that an essential religious liberty is that religion be unaided by the Commonwealth.'[36]

Their Honours' dissenting views are at odds with the majority decision in the *DOGS case*. In that case, Commonwealth legislation that provided federal education funding to non-government schools, the overwhelming majority of which were religious schools,[37] was challenged on the basis that it contravened the first clause of s 116: 'The Commonwealth shall not make any law for establishing any religion.'

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33 My thanks to my colleague, Asmi Wood for this example.

34 *Kruger v Commonwealth* (1997) 190 CLR 1, 160–161 (Gummow J, Dawson J agreeing). Gaudron J at 131–3 would extend s 116 to laws that by their operation rather than their terms prevent the free exercise of religion so long as a purpose of the law was to prevent the free exercise of religion. Brennan CJ at 40 required that the law prohibit the free exercise of religion by its terms; and Toohey J at 86 held that the purposes of the law must be considered rather than their operation or administration. See also, Tony Blackshield, 'Religion and Australian Constitutional Law' in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds) *Law and Religion* (2005) 81, 106–107.

35 *Word Investments* (2008) 236 CLR 204, 249.

36 *Attorney-General (Vic); ex rel Black v Commonwealth* (*'DOGS case*') (1981) 146 CLR 559, 632.

37 The legislation in question gave funding for education, however, the appellant argued that such funds would also further religious purposes.

A majority of the High Court held that the funding legislation did not infringe s 116 because it did not amount to 'the establishment of a religion'.[38] Importantly, the majority accepted that s 116 did not prevent the 'giving of aid to or encouragement of religion'.[39] This is in contrast to the tone of Kirby J's dissenting judgment in *Word Investments* that such aid is 'deeply offensive' and also overrides Murphy J's view of s 116.[40] Thus, at the very least, s 116 does not impede the Commonwealth's ability to facilitate religious financing so long as this does not amount to the establishment of a religion.

Section 116 is of more relevance to the prohibition of religious funding particularly when, as usually will be the case, the prohibition is concomitant with the illegality of the religious group in question. The wartime decision of *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* illustrates the problematic application of s 116 to such a scenario.[41] In 1941 the Adelaide Company of Jehovah's Witnesses, a small incorporated association with approximately 200 to 250 members, was dissolved and its property confiscated pursuant to a declaration by the Governor-General that the group was 'prejudicial to the defence of the Commonwealth and the efficient prosecution of the war'.[42] The Jehovah's Witnesses challenged the legality of the empowering regulations on several grounds including that they contravened s 116. The case does not directly concern the legislative prohibition of religious funding, but because the group was declared illegal, any funding by way of gift or trust would have been invalid at common law. Hence, the decision gives some indication of how a challenge to a Commonwealth legislative prohibition of religious funding, such as the current bans on the funding of religious groups listed as having links to terrorism, would fare.

All members of the High Court held that the Jehovah's Witnesses' right to the free exercise of religion as formulated in s 116 must give way to the interests of the society as a whole:

> It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.[43]

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38 The majority of the Court refused to follow United States jurisprudence concerning 'establishment' of religion and preferred instead to construe the prohibition in s 116 narrowly as concerning only the creation or endorsement of a state religion.

39 *Attorney-General (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 559, 582 (Barwick CJ); 616 (Mason J). See also, Tony Blackshield, 'Religion and Australian Constitutional Law' in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds) *Law and Religion* (2005) 81, 98–99.

40 *Word Investments* (2008) 236 CLR 204, 250.

41 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 ('*Jehovah's Witnesses case*').

42 Ibid 118. The declaration was authorised by regulations made pursuant to the *National Security Act 1939–1940* (Cth).

43 Ibid 131 (Latham CJ).

For Latham CJ there was no question but that the Jehovah's Witnesses' doctrines were 'prejudicial to any defence of the Commonwealth against any enemy.'[44] These doctrines included that it was wrong to participate in warfare and that all organised political bodies, including the Commonwealth government, were 'organs of Satan'. This was so even though he accepted that:

> such a provision as s. 116 is not required for the protection of the religion of a majority. The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities.[45]

The Court held that the challenged legislation was a proportionate response in time of war and would override s 116 although, ultimately, the regulations were found to be invalid on other grounds.

The High Court's approach in the *Jehovah's Witnesses case* significantly limits the efficacy of s 116 in restraining the Commonwealth's regulation of religious financing given that it will be difficult for religious groups to overcome the rhetoric of national security when the state is under threat, particularly if the group in question is small and unpopular. James T Richardson has demonstrated that minority religious groups, particularly new religions, generate much more fear and hostility than is warranted in relation to their size and the danger that they pose.[46] In retrospect, one would think that the small group of Jehovah's Witnesses posed little threat to the defence of the Commonwealth in the Second World War. Interestingly, the 'more socially respectable' Quakers, a much larger pacifist group, did not suffer the same regulation.[47] Indeed there had been a strong Christian pacifist movement in the 1930s in Australia.[48] A convincing case has been made that the Commonwealth's actions against the Jehovah's Witnesses were taken at the behest of the Australian Roman Catholic hierarchy and it seems very probable that the group's rhetoric against established religion, as well as government, had made it universally unpopular and consequently vulnerable to such lobbying.[49] Ironically, however, the group's numbers are said to have doubled during the period of its prohibition and the significance of this will be returned to below.

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44 Ibid 146.

45 Ibid 124.

46 James T Richardson, 'Minority Religions ("Cults") and the Law: Comparisons of the United States, Europe and Australia' (1995) 18 *University of Queensland Law Journal* 183. See also, NSW Anti-Discrimination Board, *Discrimination and Religious Conviction* (1984) Chapter 5.

47 Roger Thompson, *Religion in Australia: A History* (2nd ed, 2002) 92.

48 Ibid.

49 See, NSW Anti-Discrimination Board, *Discrimination and Religious Conviction* (1984) [5.30]–[5.34].

Thus, the rights protected by s 116 are not absolute and may be overridden by majority interests.[50] In applying s 116 we must ask first, is a purpose of the legislation to prohibit the free exercise of religion, and secondly, is the legislation a proportionate response to some overriding public policy or potential harm? The *Jehovah's Witnesses case* is important in relation to the latter question as it demonstrates how easily the right to religious freedom of a socially unpopular minority group can be overborne by the state's interests. As Peter Bailey has pointed out, the 'low threshold of protection' accorded by s 116 is further emphasised by the fact that the regulations in question in that case were struck down as beyond the defence power.[51]

2 *Human Rights Protection of Freedom of Religion*

Respect for freedom of religion in the regulation of religious financing is clearly required at the level of international human rights law. Article 18(1) of the *ICCPR* ratified by Australia, provides that:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Article 18(3) qualifies this right as follows:

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

Article 6 of the 1981 *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief* [52] elaborates upon the freedoms inherent in art 18 of the *ICCPR* although these are qualified in the same terms as art 18(3).[53] Importantly, for the purposes of this discussion, art 6 of the *Declaration* includes the freedom:

> (b) To establish and maintain appropriate charitable or humanitarian institutions, and,

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50 This has been confirmed in later constitutional cases. *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120; *Kruger v Commonwealth* (1997) 190 CLR 1.

51 Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009) 303.

52 GA Res 36/55, UN GAOR, 36th sess, UN Doc A/36/684 (1981) ('the *Declaration*').

53 See Article 1(3) of the *Declaration*.

> (f) To solicit and receive voluntary financial and other contributions from individuals and institutions.

These two paragraphs contain the most explicit guidance yet on how a right to religious freedom might guide the legal regulation of religious financing and it is worthwhile speculating on how they might affect Australian law in this area.[54] The freedom to solicit and receive contributions – para (f) – presupposes that there are efficient, safe and accountable legal mechanisms and structures for receiving and dealing with such contributions – para (b).[55] Hence, the two paragraphs are closely related in their operation.

The international provisions are clearly relevant to the facilitative regulation of religious financing for they require legal structures that enable all religious groups to safely and efficiently manage their finances; that is, the law must not discriminate in this respect.[56] It is questionable whether the current array of legal structures and mechanisms available to religious groups in Australia, including purpose trusts, incorporated and unincorporated associations and companies limited by guarantee, fully comply with the right to freedom of religion as elaborated upon in para (b) of art 6. The 2008 Senate Committee report on *Disclosure regimes for charities and not-for-profit organisations* found that there were legal and practical restrictions on many of the structures currently used by not-for-profit organisations including religious groups, and recommended that a mandatory specialist legal structure suitable for all not-for-profit organisations, including charitable organisations, be developed.[57] Such a reform would be a positive step in meeting the requirements of art 6 of the *Declaration*. Other recommendations of the Committee that were directed at simplifying the regulation of fundraising and ensuring greater public accountability of not-for-profit organisations generally would also be beneficial with respect to para (f) of art 6.[58]

Paragraphs (b) and (f) of art 6 of the *Declaration* may be breached by the prohibition of religious financing, such as follows when a religious group is made illegal. This depends upon whether one of the justifications set out in art 18(3) of the *ICCPR* and art 1(3) of the *Declaration* applies, namely that the prohibition is necessary for 'public safety, order, health, or morals or the fundamental rights and freedoms of others'. Presumably, the prohibition of funding of religious groups associated with terrorism pursuant to s 102.6 and Division 103 of the *Criminal Code Act 1995* (Cth) would be justified in this way by the Commonwealth. Similarly, even the common law prohibition in *Thornton v Howe* of trusts for purposes that inculcate 'doctrines

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54 See Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (2005) for a discussion of the international jurisprudence concerning art 6(b) and (f).

55 Ibid 271.

56 Ibid 272.

57 Senate Standing Committee on Economics, Parliament of Australia, *Disclosure regimes for charities and not-for-profit organisations* (2008) Chapter 7.

58 Ibid 1–4.

adverse to the very foundations of all religions, and [that]… are subversive of all morality' could comply with art 18(3).

The right to freedom of religion as expressed in international human rights law is not automatically binding upon Australian courts and legislatures. The specificity of art 6 of the *Declaration* is not replicated in domestic Australian law, however art 18 of the *ICCPR* has been implemented in the *Human Rights Act 2004* (ACT)[59] and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (collectively, 'the Human Rights Acts').[60] The Human Rights Acts operate by way of a dialogue model and distribute human rights protection across the three branches of government.[61] To take the *Human Rights Act 2004* (ACT) as an example, ACT legislation must be interpreted so far as possible to be compatible with human rights.[62] In deciding whether legislation is compatible, international law may be considered.[63] In a proceeding before the Supreme Court, if the Court finds that relevant ACT legislation is inconsistent with a human right then the Court may make a declaration of incompatibility,[64] but is not empowered to strike down inconsistent legislation, that is, parliamentary sovereignty is unaffected.[65] Nor does the Act confer remedial rights upon individuals. The Act also requires that Bills be scrutinised for compatibility with human rights before enactment.[66] Since the beginning of 2009 the Act extends to the actions of public authorities and also allows other entities to opt into these obligations.[67]

How might the Human Rights Acts of the ACT and Victoria apply to the regulation of religious financing? It appears that much of charity law will be unaffected: the Acts regulate legislation and executive actions, rather than the common law. If the law of charity were to become codified, as is the likely outcome of the recent recommendations of the Senate Standing Committee on Economics, then depending

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59 Section 14. See generally, Hilary Charlesworth and Gabrielle McKinnon, 'Australia's First Bill of Rights: The Australian Capital Territory's Human Rights Act' Law and Policy Paper 28, Centre for International and Public Law, (2006); Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009). Bailey uses the terminology of 'human rights acts'.

60 Section 14.

61 Carolyn Evans, 'Responsibility for Rights: the ACT Human Rights Act' (2004) 32 *Federal Law Review* 291. Peter Bailey notes that the term 'dialogue' is not strictly accurate: Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009) 177.

62 Section 30.

63 Section 31. The public accessibility of the international law resources is a factor that must be considered by the court in deciding upon its weight: s 31(2)(c). Material in the ACT legislation register is considered accessible: s 31(3). Interestingly, the *Declaration* is not contained in the legislation register.

64 Section 32.

65 Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009) 175.

66 Part 5.

67 Part 5A.

upon jurisdiction, the Human Rights Acts will apply to such codification as well as to the decisions of the body set up to administer the legislation.[68]

Even where legislative regulation of religious financing is in question, the right to freedom of religion in the Human Rights Acts is subject to 'reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society'.[69] Thus, it is possible to mount an argument similar to that in the *Jehovah's Witnesses case* that the safety of a 'free and democratic society' is jeopardised by a particular religious group and that therefore the freedom of religion of its members is legitimately compromised. There is, however, an important difference between the application of s 116 in the *Jehovah's Witnesses case* and that of the Human Rights Acts: the latter require a court to assess the reasonableness of the impugned legislation against a non-exhaustive list of criteria. Thus, s 28(2) of the *Human Rights Act 2004* (ACT) states,

> In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
>
> (a) the nature of the right affected;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relationship between the limitation and its purpose;
>
> (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

To return to the facts of the *Jehovah's Witnesses case*, if the High Court had been required to consider explicitly 'any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve' for instance, then it may have found that the regulations in question breached s 116. Monitoring of the Jehovah's Witnesses' activities, and restricting publication of their views, may well have been sufficient to ensure that the group's activities did not compromise Australia's defence and, therefore, prohibition of the group and confiscation of its assets was not reasonable. This approach can be said to 'maximise' the human right to religious freedom of the members of the minority religious group.[70] Hence, the Human Rights Acts' requirements that the reasonableness of the legislative

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68 As is already the case in relation to charity law in England and Wales. Senate Standing Committee on Economics, Parliament of Australia, *Disclosure regimes for charities and not-for-profit organisations* (2008). For an insightful consideration of the impact of English human rights legislation upon the application of the *Charities Act 2006* (UK) to religious trusts, see Harding, above n 4. Specifically, Harding considers whether legislative changes that require trusts for religious purposes to demonstrate a public benefit will lead to decisions that are incompatible with the *Human Rights Act 1998* (UK).

69 Section 28(1).

70 For a helpful discussion of a 'maximising principle' for human rights see, Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009) [2.4].

restriction on the freedom of religion be explicitly considered may lead to decisions that better protect the interests of minority religious groups because they require courts to address human rights concerns in detail, with transparency, and with a view to maximising the infringed rights.

Although the domestic implementation of international human rights is limited as yet in its application to the regulation of religious financing, international human rights instruments have been referred to as a normative influence upon Australian law more generally, including the common law. Most famously, Brennan J in *Mabo v Queensland (No 2)* referred to the 'powerful influence' of the *ICCPR* upon the common law; international law was 'a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.'[71] Commentators on the human rights Acts in Australia and England have also argued that the mere presence of such legislation provokes a general cultural shift in the attitude of courts, legislatures and public bodies to the benefit of minority religious groups, and that this is likely to occur in Australia following the enactment of the ACT and Victorian legislation and with the prospect of similar legislation in other Australian jurisdictions.[72] Thus, it is to be expected that the human right to religious freedom as articulated in art 18 of the *ICCPR* and art 6 of the *Declaration* will have an influence upon Australian law beyond the specific application of the ACT and Victorian Human Rights Acts and that this will influence the regulation of religious financing.

3 *Common Law Protection of Freedom of Religion*

Even aside from the growing influence of international law upon the common law, it can be argued that historically the principle of freedom of religion has been a normative influence upon the Australian courts. The importance of freedom of religion in Australia is often cited by judges as a fundamental truth supporting a decision made on more specific grounds. As early as 1917, for example, the High Court upheld a trust for the saying of masses for the souls of a testatrix and her husband contrary to the English law on the subject and relying, in part, on the 'public policy' inherent in s 116 of the Constitution:

> It is not unimportant that the people of the Commonwealth have declared their public policy on the subject by sec. 116 of the Constitution…That does not, of course, determine the internal law of the States with regard to trusts, but, in the absence of any controlling enactment, it is a strong indication of public

71 (1991) 175 CLR 1, 42 (Brennan J).

72 See, eg, Carolyn Evans, 'Responsibility for Rights: the ACT Human Rights Act' (2004) 32 *Federal Law Review* 291; Anthony Bradney, 'Religion and Law in Great Britain at the End of the Second Christian Millenium' in Peter W Edge and Graham Harvey (eds) *Law and Religion in Contemporary Society: Communities, Individualism and the State* (2000) 17.

> policy which runs directly counter to the contention that the celebration of the Mass should be held in law to be a superstition.[73]

The High Court decision in *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* is a more recent example of the normative influence of respect for freedom of religion upon the regulation of religious financing.[74] The context to the litigation involved both facilitative and prohibitive regulation of the Scientology movement.[75] The High Court appeal itself concerned whether the Church of the New Faith, the Australian embodiment of Scientology, was 'a religious institution' and hence entitled to State pay-roll tax exemptions; however, the backdrop to the litigation involved legislation banning the teaching, practice and application of Scientology, and the receiving of fees for such teaching, practice and application.[76] Mason ACJ, and Wilson and Murphy JJ affirmed the fundamental importance of freedom of religion in Australian society and consequently took a broad and inclusive view of the indicia of religion that encompassed the Scientology movement.[77]

On the other hand, the right to freedom of religion cannot be used to justify a decision not supportable on more specific legal grounds. In *Grace Bible Church Inc v Reedman*, the South Australian Supreme Court in its appellate jurisdiction had to consider whether State legislation imposing registration requirements upon a religious school infringed the appellant's right to religious freedom.[78] The appellant's argument that 'there was an inalienable right to religious freedom at common law', or by virtue of South Australia's history was resoundingly rejected by the Court.[79]

The principle of freedom of religion in the common law, as with its manifestation in s 116 and human rights law, is not absolute. Religious practices in particular are subject to general laws for '[r]eligious conviction is not a solvent of legal

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73 *Nelan v Downes* (1917) 23 CLR 546, 568 (Isaacs J); 575 (Powers J): 'I hold that in Australia, where all religions are free and each man is allowed to worship God according to his own conscience and belief, whatever that may be, the bequest [is valid].'

74 (1983) 154 CLR 120.

75 For a history of Scientology in Australia, see *Church of the New Faith v Commissioner for Pay-Roll Tax* [1983] VR 97, 99 (Crockett J); Hilary M Carey *Believing in Australia: A Cultural History of Religions* (1996) 181–2. For a comprehensive discussion of litigation involving Scientology, see NSW Anti-Discrimination Board, *Discrimination and Religious Conviction* (1984) 207–14.

76 *Psychological Practices Act 1965* (Vic).

77 (1983) 154 CLR 120, 130 (Mason ACJ and Brennan J); 150 (Murphy J). Wilson and Deane JJ in their joint judgment did not refer to the principle of freedom of religion and instead gave an empirical analysis of the indicia of the major world religions (173). In a less well-known decision of the High Court around the same time the Scientology movement was not treated so generously in relation to its attempted challenge to ASIO scrutiny of their members. See further, Beth Gaze and Melinda Jones, *Law, Liberty and Australian Democracy* (1990) 283–4.

78 (1984) 54 ALR 571.

79 Ibid 574, 578 (Zelling J).

obligation'.[80] And significantly, the principle that religious freedom is contingent upon the safety and stability of the state also is entrenched in the common law.[81]

To summarise the discussion so far, the right to freedom of religion, although limited in its direct application in Australia, is relevant to the regulation of religious financing. It means that the courts and legislatures should refrain from restricting the funding of religion unless the activities of the religious group threaten the rights of others in a democratic society or are contrary to general laws. One challenge is how to balance the right to freedom of religion with the interests of the state and other individuals in a way that protects minority religious groups from prejudice. The rights-maximising approach taken in the ACT and Victorian Human Rights Acts offers a way forward in this respect. If international law's articulation of the right to freedom of religion is followed, then state facilitation of the financing of religion in the provision of appropriate legal structures and mechanisms must be not be restricted unless such restriction is reasonable and justified according to detailed criteria. The challenge will be to maximise the right to religious freedom in the face of a perceived or actual threat of religiously motivated terrorism.

B *Legal Neutrality*

The next principle that may guide the regulation of religious financing concerns the non-discriminatory treatment of religions *inter se*. A consistent theme of the legal facilitation of religious financing is that of a professed judicial reluctance to evaluate the merits of any religious faith. As the 19th and 20th centuries progressed, and certainly nowadays, judges generally refrain from comment upon the merits of particular religious beliefs and practices and treat all religions as equal in the eyes of the law.[82] This approach is known as 'legal neutrality'. So, for example, Lord Reid in 1949 in the House of Lords case of *Gilmour v Coates*, said,

> But since diversity of religious beliefs arose and became lawful the law has shown no preference in this matter to any church and other religious body. Where a belief is accepted by some and rejected by others the law can neither accept nor reject, it must remain neutral.[83]

In its most positive form, the approach has been described by Mason P of the New South Wales Court of Appeal as 'judicial agnosticism'.[84]

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80 (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J).

81 *Bowman v Secular Society* (1917) AC 406, 466 (Lord Sumner): 'The attitude of the law both civil and criminal towards all religions depends fundamentally on the safety of the State'.

82 Dal Pont, above n 9, 150.

83 [1949] AC 426, 455.

84 *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498, 504. See also, *Versani and others v Jesani and others* [1998] 3 All ER 273, 280 (Morrit LJ).

There are two aspects to legal neutrality that can be drawn out of these and similar statements. First, they suggest that the courts do not engage in any normative assessment of the religion in question, but simply apply the legal principles in a neutral and objective fashion. Secondly, the courts do not favour one religion over another.

The origins of this neutral approach to religious belief are not as benign as might appear and perhaps this explains why even today its application is problematic. The approach can be traced to 1862 and Sir John Romilly's decision in *Thornton v Howe*.[85] The question for the Court of Chancery in that case was whether a testamentary trust of real property to be used to promote the writings of a nineteenth century prophetess, Joanna Southcott, was a valid charitable trust. The problem was that despite her immense popularity in the early 19th century,[86] Joanna Southcott's teachings, although not illegal, did not strike a chord with establishment Christianity.[87] But in Sir John Romilly's view, although these teachings 'were very foolish',

> I am of opinion, that if a bequest of money be made for the purpose of printing and circulating works of a religious tendency, or for the purpose of extending the knowledge of the Christian religion, that this is a charitable bequest… In this respect, I am of opinion that the Court of Chancery makes no distinction between one sort of religion and another… Neither does the Court, in this respect, make any distinction between one sect and another.[88]

On the face of it, this statement seems very tolerant of unorthodox beliefs, however, such tolerance was the 'kiss of death' to the bequest in *Thornton v Howe*.[89] Sir John Romilly's finding that the trust was charitable meant that it fell foul of the *Mortmain and Charitable Uses Act 1736* and was void because it was a trust of land created in a will within 12 months of the testator's death.[90] Nonetheless, Sir John Romilly's judgment is regularly cited as exemplifying the law's tolerant approach to religion without mention of this statutory context or the ambivalence of Sir John Romilly's comments. Thus, in a factually similar 20th century case involving a trust to publish a considerable quantity of religious writings that, according to expert evidence, had no value, the court applied *Thornton v Howe* to validate the trust.[91] The outcome in

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85 (1862) 54 ER 1042.

86 '[B]y one conservative estimate, a total of 108,000 copies of her various works were published and circulated from 1801 to 1816, making her one of the most popular writers of her time…'. Sylvia Bowerbank, 'Southcott, Joanna (1750–1814)', *Oxford Dictionary of National Biography* (2004); <http://www.oxforddnb.com/view/article/26050> at 31 July 2008.

87 Her teachings included that she was impregnated by the Holy Ghost.

88 (1862) 54 ER 1042, 1044.

89 Hubert Picarda, *The Law and Practice Relating to Charities* (3rd ed, 1999) 114.

90 9 Geo 2, c 36. See above at n 24 and see generally, Gareth Jones, *History of the Law of Charity 1532–1827* (1969) Chap VII.

91 *Re Watson (deceased); Hobbs v Smith* [1973] 1 WLR 1472 (Plowman J). Picarda is critical of this case and suggests it may be inconsistent with the House of Lords

the modern case was the opposite to that in *Thornton v Howe* because the *Mortmain and Charitable Uses Act 1736* was no longer in operation, yet Sir John Romilly's statement of principle was cited without mention of the different statutory context.

The concept of legal neutrality raises some interesting questions. On the one hand, it is laudable in its sentiment and is consistent with the right to freedom of religion. It seems an appropriate guideline for courts and legislatures to follow in regulating religious financing. But how credible is the claim of judicial agnosticism if it ignores, or deflects attention from, inherent biases in the legal principles themselves? And does it go too far in suggesting that no discussion of the merits of particular religious beliefs is allowed? The following discussion considers first, the accuracy of the claim of legal neutrality in relation to judicial regulation of religious financing, and secondly, whether the law should be neutral in this area.

1 *Is the Law Always Neutral in the Regulation of Religious Financing?*

Clearly, the regulation of religious financing is not always neutral in its application to different religious groups. When prohibiting the financing of religious groups the state makes a normative judgment that certain religious beliefs are not tolerable. This is apparent even in *Thornton v Howe* itself with respect to doctrines 'adverse to the very foundations of all religion, and… subversive of all morality'.[92] In such a case the court must engage in a normative assessment of the beliefs in question.

Even with respect to facilitative regulation where a neutral approach generally is assumed, the notion of neutrality is an ideal that is not always achieved. Apart from the biases of individual judges through prejudice, ignorance or religious enculturation,[93] much more problematic is embedded bias in the legal doctrines themselves. The case that historically there was an embedded anti-Catholic doctrinal bias in the English regulation of religious giving has been convincingly made.[94] The 1949 House of Lords decision in *Gilmour v Coates* is one example.[95] The question was whether an *inter vivos* trust for the purposes of a Roman Catholic order of nuns was a valid charitable trust. As discussed above, to be a valid charitable trust the purposes must be for the advancement of religion and for the public benefit although generally public benefit is assumed in relation to religious purposes. The religious order in question was an enclosed community who 'devoted their lives to prayer, contemplation, penance and self-sanctification within their

decision in *Gilmour v Coates* [1949] AC 426 discussed below. Hubert Picarda, *The Law and Practice Relating to Charities* (3rd ed, 1999) 114.

92 (1862) 54 ER 1042, 1044. See above Part I(B).

93 See further, President Keith Mason, 'Unconscious Judicial Prejudice' (Speech delivered at the Supreme and Federal Courts Judges' Conference, January 2001).

94 Michael Blakeney, 'Sequestered Piety and Charity – A Comparative Analysis' (1981) *Journal of Legal History* 207; Jonathon A. Bush, '"Include Me Out": Some Lessons of Religious Toleration in Britain' (1990–1) 12 *Cardozo Law Review* 881.

95 [1949] AC 426. The origins of the approach taken in *Gilmour v Coates* are found in *Cocks v Manners* (1871) LR 12 Eq 574. See, Pauline Ridge, 'Legal Regulation of Religious Giving' (2006) *Law and Justice* 17.

convent'.[96] Lord Reid gave a strong affirmation of legal neutrality towards religious giving:

> The law of England has always shown favour to gifts for religious purposes. It does not now in this matter prefer one religion to another. It assumes that it is good for man to have and to practise a religion but where a particular belief is accepted by one religion and rejected by another the law can neither accept nor reject it. The law must accept the position that it is right that different religions should each be supported irrespective of whether or not all its beliefs are true.[97]

Nonetheless, the trust was held to be invalid because no public benefit could be proved, that is, there was insufficient objective, tangible, proof of a public benefit once one discounted Roman Catholic belief in the efficacy of prayer. Hence the presumption of public benefit was overturned.[98] Furthermore, the alleged edification of Catholics and the community generally from the nuns' example was too 'indirect, remote, imponderable and… controversial'.[99]

On one view, the Law Lords in *Gilmour v Coates* were simply applying in a neutral manner legal doctrine, namely, the public benefit requirement as interpreted in previous cases. It would be improper for them to evaluate and accept evidence of an intangible spiritual benefit derived from one religious faith. Indeed, Matthew Harding has recently argued that courts in a liberal society have no other choice:

> In a community that adheres to liberal principles, it is thought that a decision-maker, such as a judge, must provide reasons for his or her decisions that may be accepted by everyone irrespective of their religious beliefs. [100]

Harding could have found further support for that view in the fact that the Australian federal government has enacted legislation to ensure that enclosed religious communities such as the one in *Gilmour v Coates* receive charitable status in Australia.[101] On Harding's approach, such decisions are better suited to the legislature rather than the courts, although even the legislature is subject to the same liberal constraints as the courts in assessing public benefit.

The decision in *Gilmour v Coates* is questionable, however, because of the discrepancy between the court's profession of neutrality and its application of a doctrine that inevitably favoured Protestant expressions of Christianity over Roman

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96 Ibid 426.

97 Ibid 458–9.

98 Ibid 446 (Lord Simonds); 459 (Lord Reid).

99 Ibid 447 (Lord Simonds); see also, 461 (Lord Reid).

100 Harding, above n 4, 170. But see**,** Peter W Edge and Joan M Loughrey, 'Religious Charities and the Juridification of the Charity Commission (2001) 21 *Legal Studies* 36, 42.

101 *Extension of Charitable Purpose Act 2004* (Cth).

Catholicism and all other religious traditions that give primacy to the private expression of religious faith.[102] Also putting the approach in *Gilmour v Coates* into doubt is the contrasting approach taken in the Irish charity jurisdiction and in some Australian courts to trusts for the saying of masses for the souls of the dead.[103] So, for instance, in the High Court decision of *Nelan v Downes* decided twelve years before *Gilmour v Coates*, the High Court validated a trust for the saying of masses for the souls of the testatrix and her husband. In so doing, the Court accepted the evidence of the Roman Catholic Church as to the benefits to its community, including intangible spiritual benefit, from the celebration of the mass.[104] The specific issue in *Gilmour v Coates* is not a live one in Australia anymore.[105] Nonetheless the case illustrates the difficulty of ensuring true neutrality. Other examples of embedded doctrinal bias in the regulation of religious financing remain but will not be discussed further here.[106]

Thus, legal doctrines that regulate religious financing may be inherently biased against some religious beliefs and practices; that is, they are not neutral in their application. This leads to my second question concerning legal neutrality: should the law strive for neutrality in the facilitation of religious financing?

2 *Should the Law be Neutral in its Facilitation of Religious Financing?*

There is a strong case for neutrality in relation to the provision of legal mechanisms and structures that enable all religious groups to manage their finances safely and appropriately. This is supported by the right to freedom of religion as expressed in the *ICCPR* and specifically art 6 of the 1981 *Declaration*. It also finds support in the charity case law where a strong theme is that religion is beneficial to society and generally ought to be supported. In Lord Reid's words again, the law 'assumes

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102 NSW Anti-Discrimination Board, *Discrimination and Religious Conviction* (1984) [4.117].

103 See eg, *Maguire v Attorney-General* [1943] IR 238; *Nelan v Downes* (1917) 23 CLR 546; *Crowther v Brophy* [1992] 2 VR 97.

104 (1917) 23 CLR 546, 563 (Barton CJ quoting from *O'Hanlon v Logue* (1906) 1 IR 247, 279).

105 In England, however, amendments to the *Charities Act 1996* (UK) came into force in 2008 that reinforce the public benefit requirement in English law by removing the presumption that purposes for the advancement of religion are beneficial unless proved otherwise. Proof of public benefit is now always required. This may exacerbate the problems exemplified by *Gilmour v Coates*. See, Charity Commission for England and Wales, *Charities and Public Benefit, statutory guidance on public benefit*, January 2008, and, *Consultation on Draft Supplementary Guidance on Public Benefit and the Advancement of Religion,* February 2008. Harding, above n 4.

106 Embedded doctrinal bias favouring mainstream religions occurs in the equitable doctrine of undue influence in its application to religious giving. See further, Pauline Ridge, 'Undue Influence in the Context of Spiritual Influence and Religious Faith' (2003) 26 *University of New South Wales Law Journal* 66. And embedded bias has been noted with respect to the definition of religion in English charity law. See, eg, Peter W Edge and Joan M Loughrey, 'Religious Charities and the Juridification of the Charity Commission' (2001) 21 *Legal Studies* 36, 46.

that it is good for man to have and to practise a religion'.[107] Justice Cross in *Neville Estates Ltd v Madden* put it this way: 'As between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none.'[108] To the extent, then, that the law does not recognise all trusts for religious purposes it fails to be neutral. Similarly, to the extent that it does not provide other suitable legal structures for religious groups, it fails to be neutral. Thus, both the principle of legal neutrality and the principle of freedom of religion, support greater legal facilitation of religious funding in the provision of mechanisms and structures for holding and managing finances by religious groups. The 2008 Senate Committee recommendation that a mandatory specialist legal structure be created for all not-for-profit groups is a way forward in this regard.[109]

However there is a discrepancy between the idea that facilitative regulation should be neutral and the historical function of charity law which was precisely the opposite. Historically, the state used the filter of charity to promote its interests; only religious groups whose activities were considered either consistent with, or not opposed to, the state's interests were able to claim all the benefits of charitable status. The state's self-interest is exacerbated by the strong link between charitable status and fiscal privileges. In Lord Cross's words, 'the law of charity is bedevilled by the fact that charitable trusts enjoy two quite different sorts of privileges.'[110]

A first step towards resolving this discrepancy is for the legislature to sever the link between the charitable status of religious activity for enforcement purposes (the trusts law function of charity law) and the charitable status of religious institutions for fiscal purposes (the tax law function of charity law). That is, trusts for religious purposes should be enforceable subject only to the current limits on religious freedom, namely that such purposes are not illegal, 'adverse to the very foundations of all religion' or 'subversive of all morality'.[111] The law to this extent then would embody neutrality and accord with international human rights law. But should the state be similarly constrained in relation to fiscal privileges? This is a more difficult question and its resolution is beyond the scope of this paper.[112] Is a self-interested approach by the state when a religious group seeks privileges beyond legal recognition, such as fiscal benefits, reconcilable with the neutrality principle? On the one hand, a self-interested approach by the state, for instance by requiring evidence of an objective general public benefit from religious activities, seems justified where public revenue is at stake. On the other hand, the withdrawal or restriction of existing fiscal benefits may unacceptably curtail the free expression of religious faith and may raise concerns of preferential treatment of specific religious groups.

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107 *Gilmour v Coates* [1949] AC 426, 459.

108 [1962] Ch 832, 853.

109 Senate Standing Committee on Economics, Parliament of Australia, *Disclosure regimes for charities and not-for-profit organisations* (2008) Chapter 7.

110 *Dingle v Turner* [1972] AC 601, 624–5 (Lord Cross).

111 *Thornton v Howe* (1862) 54 ER 1042, 1044.

112 As to the courts' responsibility for neutrality in relation to fiscal legislation, see *Word Investments* (2008) 236 CLR 204, 250 (Kirby J).

C *Informed Regulation*

The next suggested guideline for the regulation of religious financing requires only brief mention: such regulation, whether through legislation or case law, must be fully-informed. As much information as possible, regarding the religious group and its beliefs, must be available to legislators and courts before restrictions are placed upon religious financing. Anthony Bradney has written generally on this issue and demonstrated through case studies that judges are much more sympathetic towards 'obdurate', fervent, believers when fully apprised of their beliefs. Similarly, Mason ACJ and Brennan J in *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* acknowledged the danger that 'acculturation of a judge in one religious environment would impede his understanding of others'[113] and emphasised the importance of having evidence of the beliefs of the religious group in question.[114] If the religious writings are obscure then the religious group has an obligation to explain them to the court.[115]

D *The Futility of Legal Regulation That Suppresses Religious Activity*

My final proposed guideline for the regulation of religious financing is more in the nature of a caveat. It concerns the likelihood that legal regulation that aims to suppress a religious group's activities through prohibiting or otherwise restricting its financing is unlikely to succeed. Hence, prohibition or suppression of religious financing should be a last resort for the law. Put simply, if the law restricts the funding of a religious group or its activities the members of that group will work around the law and/or will change their practices to accommodate the law. Several historical illustrations support this pragmatic attitude. The ecclesiastical corporation was solely developed as a legal device for the Catholic Church to avoid early Mortmain legislation that prohibited perpetual gifts of land, namely trusts, to the Church.[116] The practices of Roman Catholics using trust law to finance suppressed religious activity during the 18th and 19th centuries are well documented.[117] And, more recently, it has been suggested that the Victorian legislation banning certain Scientology practices simply drove the group to tailor those practices to accord with a conventional understanding of religion.[118] Similarly, James T Richardson argues

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113 (1983) 154 CLR 120, 133.

114 Ibid 129–30.

115 Ibid 142.

116 *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565, 598. S J Stoljar, *Groups and Entities: An Inquiry into Corporate Theory* (1973) Chapter 9.

117 See, eg, *Parfitt v Lawless* (1872) LR 2 P&D 462 (secret trusts). See further, Chantal Stebbings, 'Roman Catholics, Honorary Trusts and the Statute of Mortmain' (1997) 18 *Legal History* 1; Pauline Ridge, 'Legal Regulation of Religious Giving' (2006) *Law and Justice* 17, 27.

118 Exemptions were given in the *Psychological Practices Act 1965* (Vic) for ministers of 'recognized religions' (as defined in the *Marriage Act 1961* (Cth)). Perhaps as a response to this legislation and certainly as part of an international effort to obtain the recognition and privileges associated with religious groups, the Scientology

that American religious groups were forced to become much more aggressive in their marketing and fundraising precisely because of the constitutional ban on state support.[119] This argument is relevant to the efficacy of current Commonwealth anti-terrorism legislation. The historical evidence suggests that prohibition of religious funding drives such funding underground; it would seem more effective to require, instead, accountability and transparency.

Conclusion

Historically, the legal regulation of religious financing was driven by the interests of the state. Where religious groups were beneficial to society their financing was facilitated; where they were perceived to threaten peace and stability then their activities and financing were correspondingly curtailed. In both areas the law has had a significant impact upon the expression of religious faith. I have argued that the state must be guided in its regulation of religious financing by respect for freedom of religion, legal neutrality, full information as to the religious beliefs in question, and a pragmatic recognition of the limited utility of outright prohibition of religious financing. The first two suggested guidelines have immediate implications for the current law. Most importantly, the growing influence of the right to religious freedom as expressed in art 6 of the 1981 *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief* requires that appropriate legal structures and financing mechanisms be available to all religious groups. The 2008 Senate Committee recommendations regarding the creation of a specialist legal structure for not-for-profit groups are one possible way forward in this regard. Moreover, according to domestic human rights legislation, any limitation on the right to freedom of religion must be fully and transparently justified in a way that maximises the human right. The challenge here is to maximise the rights of minority religious groups when state security is perceived to be under attack. The concept of legal neutrality also reinforces the need for non-discriminatory facilitation of religious financing, however a greater awareness of embedded doctrinal biases in the law is still required. The concept of neutrality in the law of charity has been problematic in the past, perhaps because of the dual functions of charity law. Distinguishing the trusts enforcement function of the charity definition from its significance for tax exemption purposes is necessary, as the application of legal neutrality raises different concerns in the two scenarios. One important and unresolved question is the extent to which the state's self-interest should be constrained by neutrality in relation to the use of public revenue to subsidise religious activity.

movement engaged in 'rebadging' their practices as expressly religious. See, *Church of the New Faith v Commissioner for Pay-Roll Tax* [1983] VR 97, 136–7 (Brooking J).

119 James T Richardson, 'Minority Religions ("Cults") and the Law: Comparisons of the United States, Europe and Australia' (1995) 18 *University of Queensland Law Journal* 183, 186.

In 1920 the legal historian Sir William Holdsworth charted the slow but steady progress of English law towards toleration of all religious faiths.[120] He argued that these developments were not inexorable and irreversible; rather, they reflected the stability and strength of the state and its consequent ability to withstand religiously motivated attack. Furthermore, the courts, in Holdsworth's view, followed the lead of Parliament and if Parliament should consider the state to be vulnerable to attack on religious grounds then it would revert to stricter regulation and prohibition of certain religious faiths. The courts then would follow suit by taking a more discriminatory attitude. Whether Holdsworth's thesis will continue to hold good given the increased human rights protection afforded to freedom of religion remains to be seen. The so-called 'War on Terror' precipitated by the September 11 terrorist attacks in the United States, and consequent legislative crackdown on religious activity associated with terrorism, will test this but the questions are only beginning to be asked.[121]

120 W S Holdsworth, 'The State and Religious Nonconformity: an Historical Perspective' (1920) 36 *Law Quarterly Review* 339.

121 See, Australian Human Rights Commission, *Freedom of Religion and Belief in the 21st Century*, Discussion Paper, (2008) 5.