COMPULSORY RELIGIOUS BROADCASTS AND THE CONSTITUTION

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This article questions the validity of section 103 of the Broadcasting and Television Act 1942 (Cth) and of certain programme standards of the Australian Broadcasting Tribunal. Section 103 and the standards purport to require licensed radio and television stations to broadcast religious material. They may be invalid because of the guarantee of religious freedom in section 116 of the Constitution. Section 103 has become more controversial in recent times, and there have been suggestions that its principle of a right of access to the airwaves should be extended beyond religious material.

I HISTORY

For several decades there has been controversy about the place of religion in Australian broadcasting.[1] The Gibson Committee Report[2] of 1942 criticised the small amount of time which commercial radio stations devoted to religious broadcasts. It noted that 16 of 85 stations responding to a survey of the Committee broadcast no religious programmes at all. The *Report* said that some stations had encountered "inter-denominational difficulties" but nevertheless:

> the statement made by one station that "it does not broadcast any sectarian programme" seems wholly unjustifiable by an organisation to which the Government of a Christian country has granted a type of monopoly.[3]

In 1943 the issue was raised again in stronger terms by the Parliamentary Standing Committee on Broadcasting. In its *Report*[4] the Committee rejected the arguments of commercial radio representatives against compulsory religious broadcasts. The Committee said that Parliament had given commercial stations "a kind of monopoly" to broadcast. It criticised "the lack of long-range vision of the national interest" on the

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[1] B. Cole, "The Australian Broadcasting Control Board and the Regulation of Commercial Radio in Australia Since 1948" (Ph. D. thesis, Northwestern University, 1966; University Microfilms Inc. No. 67-4211) 316-337.

[2] *Report of the Joint Committee on Wireless Broadcasting* (1942) Parl. Pap. No. 73.

[3] *Id.*, 8.

[4] *First Report of the Parliamentary Standing Committee on Broadcasting* (1943) Parl. Pap. No. 93, 7-8.

part of so many stations which had failed to transmit religious broadcasts voluntarily. The Committee concluded that:

> So powerful is the influence of radio in winning or weakening recognition of the fact that the Christian conception of life, with all that it implies, is vital to the future welfare of Australia, that we have no hesitation in recommending it should be made compulsory for commercial stations to allocate, free of station time charge, the hour 11 a.m. to noon on Sundays for a religious session, arranged in conjunction with the church authorities of a particular locality.[5]

The recommendation was opposed by commercial broadcasters,[6] but the Australian Broadcasting Act 1948 (Cth) imposed the following duty on the Australian Broadcasting Control Board:

Section 6K(2)(b)(ii) the Board shall, in particular—

> ensure that divine worship or other matter of a religious nature is broadcast for adequate periods and at appropriate times and that no matter which is not of a religious nature is broadcast by a station during any period during which divine worship or other matter of a religious nature is broadcast by that station.

The Board was thus required to intervene in a most sensitive area of broadcasting despite opposition from station licensees. Successive *Annual Reports* of the Board reflected some lack of enthusiasm for the task.[7] It appears from the *Reports* that most, but not all, stations met the standards of religious broadcasting set by the Board.[8] This was not the only instance in which the Board was less enthusiastic about implementation of a broadcasting law than the Government which introduced it.[9]

The appointment of the Royal Commission on Television in 1953 raised the religious broadcasting controversy again. Broadly speaking, the Churches, in their submissions to the Royal Commission, advocated free television time for religious broadcasts whilst commercial interests such as prospective station licensees and advertising agencies opposed it.[10] The Commission concluded that:

> Any specific provision requiring the allocation of time by commercial stations to religious bodies would be premature at this stage, and we would think that there, as with other aspects of programmes, the annual review of the performance of stations in connexion with the renewal of licences . . . will be a convenient

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[5] *Id.*, 8.

[6] B. Cole, note 1 *supra*, 318.

[7] Australian Broadcasting Control Board, *Third Annual Report* (1950-1951) 16; *Fourth Annual Report* (1951-1952) 21; *Fifth Annual Report* (1952-1953) 23; *Sixth Annual Report* (1953-1954) 22; *Seventh Annual Report* (1954-1955) 21.

[8] *Ibid.*

[9] M. Armstrong, "The Broadcasting and Television Act 1948-1976: A Case Study of the Australian Broadcasting Control Board" in R. Tomasic (ed.), *Legislation and Society in Australia* (1980) 124, 126-136.

[10] Royal Commission on Television, *Report of the Commissioners* (1954) 95-99.

and effective way of securing that the stations do not neglect their responsibilities.[11]

II THE CURRENT LAW

The Menzies Government was not content to avoid a "specific provision". In 1956 it repealed the old section 6K(2)(b)(ii) which applied to radio and enacted a provision almost identical with section 103 of the current Broadcasting and Television Act to apply to both radio and television:

> A licensee shall broadcast or televise from his station Divine Worship or other matter of a religious nature during such periods as the Tribunal determines and, if the Tribunal so directs, shall do so without charge.[12]

The only change to section 103 since 1956 has been the substitution of "the Tribunal" for "the Board" by section 17 of the Broadcasting and Television Amendment Act (No. 2) 1976 (Cth). As a result of that Act the Australian Broadcasting Tribunal took over the programme powers of the former Australian Broadcasting Control Board.[13] The current determinations purportedly made under section 103 go further than simply indicating the time limits during which the religious broadcasts are to be made. Television Programme Standards 21 and 22 state:

> 21. The following principles should be applied in the allocation of time for the televising of religious matter (other than sponsored religious matter):
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> (a) Time should be allocated for the televising of matter of a religious nature to the extent of at least one per cent of the normal weekly hours of service, with a minimum of 30 minutes each week, to be scheduled either as a complete unit occupying the whole time allocated; or as a series of programmes on one or more days of the week;
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> (b) Station time as allocated shall be provided, free of charge, to the Church or religious body concerned, but reasonable charges may be made to cover costs other than those of a programme presented in, and using the normal facilities of, a studio under the control of the licensee;
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> (c) Time should be allocated among the various Churches and denominations as far as practicable in proportion to the number of adherents to each denomination in the area served by the station as shown in the latest Census; such arrangements should be made by mutual agreement between the licensees and representatives of the Churches and denominations and should have regard to the suit-

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[11] *Id.*, 98-99.

[12] Broadcasting and Television Act 1956 (Cth) ss. 8, 40, 61.

[13] M. Armstrong, "The New Law of Broadcasting" [1977] *A.C.L.D.* 1-4.

ability for televising of the services or other religious matter proposed to be televised;

(d) Religious programmes should be prepared and presented only by responsible persons or bodies, and should not contain statements ridiculing any form of religious belief.

22. After consideration of recommendations by its Advisory Committee on Religious Programmes the Board requires that some but not necessarily all of the following types of programme shall be televised by each station during the time provided free of charge:

(a) Talks and discussions with either direct or indirect religious intention.

(b) Feature material, documentaries, or dramatised matter bearing directly or indirectly on religious principles.

(c) Divine Worship, preferably in a form adapted for television; if pre-recorded it should, on the day of transmission, be consistent with the church calendar.

(d) Matter relating to religious or moral principles in the form either of musical programmes or of short announcements. Such items will be acceptable for televising in free station time only if they are additional to one or more of the other types of programme named in this paragraph.

(e) Other matter which may be approved by the Board.

These standards originally determined by the Board became standards of the Australian Broadcasting Tribunal on 1 January 1977.[14] Radio licensees are governed by the similar requirements of Broadcasting Programme Standards 16 and 17. The principal difference is that radio licensees must broadcast one hour per week of religious matter, rather than the 30 minutes required of television licensees.[15] Section 103 and the other relevant powers of the Tribunal only apply to licensed stations. They do not apply to the National Broadcasting Service of the Australian Broadcasting Commission.

III THE CONSTITUTION

It is necessary to consider whether section 103 or the programme standards can be reconciled with section 116 of the Constitution. Section 116 states that:

> 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.

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[14] Broadcasting and Television Amendment Act (No. 2) 1976 (Cth) s. 18(11).

[15] Australian Broadcasting Control Board, *Broadcasting Programme Standards* (2nd ed. 1967) standard 16(a); *Television Programme Standards* (2nd ed. 1970) standard 21(a).

One difficulty in deciding whether section 103 contravenes any of the four prohibitions of section 116 is that the reported cases contain little exposition of the first two prohibitions, the two which are relevant to section 103.[16] These are the prohibitions of establishment of any religion and of the imposition of any religious observance. In 1963 Pannam wrote: "The limits of the section remain obscure and its content is ill-defined".[17] Pannam has traced the history of section 116 through successive drafts of the Constitution and the Convention Debates.[18] It appears from his account that section 116 as a whole cannot be traced back to any surviving fully-reasoned analysis of possible threats to religious liberty expected by the founders. The most specific factor in the adoption of the section was the legally ill-founded fear expressed by the Victorian delegate Mr H. B. Higgins (as he then was) at the Melbourne Convention of 1898 that the reference to "the blessing of Almighty God" in the preamble to the Constitution would confer on the Commonwealth a power to legislate with respect to religion.[19]

If the words "for establishing any religion" are to be interpreted broadly, section 103 may be regarded as establishing some religions or all religions by giving them a special approval or endorsement. Further, if the words "for imposing any religious observance" are also interpreted broadly, then section 103 may impose a religious observance on a station licensee which is legally obliged to transmit a religious broadcast. United States authorities do embody a broad approach which would very likely invalidate section 103. The First Amendment to the United States Constitution says *inter alia* that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .". The classic explanation of the United States "establishment clause" was given by the Supreme Court in 1947:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be

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[16] Principally, *Krygger* v. *Williams* (1912) 15 C.L.R. 366; *Judd* v. *McKeon* (1926) 38 C.L.R. 380; *Adelaide Company of Jehovah's Witnesses Inc.* v. *Commonwealth* (1943) 67 C.L.R. 116; *Sellars* v. *Nielsen* (1943) St. R. Qd. 217; *Smith* v. *Handcock* (1944) 46 W.A.L.R. 21; *Kiorgaard* v. *Kiorgaard* (1967) Qd. R. 162; *Evers* v. *Evers* (1972) 19 F.L.R. 296; *Crittenden* v. *Anderson* noted (1977) 51 *A.L.J.* 171.

[17] C. Pannam, "Travelling Section 116 with a U.S. Road Map" (1963) 4 *M.U.L.R.* 41.

[18] *Id.*, 48-56. See also J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 951-953.

[19] *Convention Debates* (1898) i, 654-656.

> levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State".[20]

The "wall of separation" doctrine based on a letter written by Jefferson has been refined in a series of cases since 1947 dealing with various forms of government aid to religious education and with religious activities associated with state schools.[21] The most recently endorsed test for determining whether a statute is permissible under the "establishment clause" was stated by Stewart J. delivering the opinion of the Supreme Court in *Meek* v. *Pittenger*:[22]

> First, the statute must have a secular legislative purpose . . . Second, it must have a "primary effect" that neither advances nor inhibits religion . . . Third, the statute and its administration must avoid excessive government entanglement with religion.

It is these principles which have led American writers to argue that various practices and policies of the United States Federal Communications Commission infringe the First Amendment.[23] These practices and policies involve less coercion than section 103 or the Programme Standards mentioned above.

It is not necessary to refer in detail to the United States decisions in order to show that the Supreme Court would hold section 103 invalid as a manifest attempt by Parliament to involve government (the Tribunal)

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[20] *Everson* v. *Board of Education* 330 U.S. 1, 15-16 (1947) *per* Black J. See generally L. Loevinger, "Religious Liberty and Broadcasting" (1965) 33 *Geo. Wash. L. Rev.* 631; L. Pfeffer, *Church, State and Freedom* (2nd ed. 1967); D. Giannella, "Religious Liberty, Nonestablishment, and Doctrinal Development, Part I: The Religious Liberty Guarantee" (1967) 80 *Harv. L. Rev.* 1381; "Part II: The Nonestablishment Principle" (1968) 81 *Harv. L. Rev.* 513; L. Lacey, "The Electric Church: An FCC—'Established' Institution" (1979) 31 *Fed. Com. L.J.* 235.

[21] Principally, *McCollum* v. *Board of Education* 303 U.S. 203 (1948) (release from compulsory state school education time for religious education in public school buildings); *Zorach* v. *Clauson* 343 U.S. 306 (1952) (similar release for religious education not given in school buildings); *Engel* v. *Vitale* 370 U.S. 421 (1962) (prayer readings in state schools); *Abington School District* v. *Schempp* 374 U.S. 203 (1963) (Bible reading in state schools); *Epperson* v. *Arkansas* 393 U.S. 97 (1968) (statute prohibiting study of evolution in state-supported schools); *Board of Education* v. *Allen* 392 U.S. 236 (1968) (textbooks for parochial schools); *Lemon* v. *Kurtzman* 403 U.S. 602 (1971) (teachers' salaries, instructional material and texts for religious schools); *Tilton* v. *Richardson* 403 U.S. 672 (1971) (state support for church-related college facilities); *Committee for Public Education* v. *Nyquist* 413 U.S. 756 (1973) (grants, reimbursements and tax relief for non-state education); *Committee for Public Education and Religious Liberty* v. *Regan* 48 U.S.L.W. 4168 (1980) (state reimbursement of church-related schools for meeting official testing, reporting and recording obligations).

[22] 421 U.S. 349 (1975) 358.

[23] L. Loevinger, note 20 *supra*; L. Lacey, note 20 *supra*, 235.

in religious matters and to advance religion without any apparent secular purpose. The particular United States decision which would be most clearly fatal to section 103 is *Engel* v. *Vitale*[24] which arose from the direction by a New York Board of Education that the following prayer be said aloud by each class in its public schools:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.[25]

The opinion of the Court delivered by Black J. expressly rejected the argument that the non-denominational nature of the prayer avoided infringement of the "establishment clause".[26] Although section 103 does not give recognition to a particular denomination, it does create an official requirement that the existence of religious values (if not a God or Gods) be recognised, just as did the prayer requirement.

IV "ESTABLISHING ANY RELIGION"

There are two factors which might lead the High Court to follow a different path from that followed by the United States Supreme Court. First, the High Court could define "establishment" more narrowly to refer only to the kind of establishment enjoyed for a brief time in colonial New South Wales by the Church of England.[27] There is, of course, no established Church in Australia.[28] Cumbrae-Stewart suggested that the prohibition of establishment probably applies only to the following:

> (i) declaring a certain religion to be true and making its principles formally binding on the State . . .;
> (ii) reforming abuses in an existing religion and controlling changes in it ("establishment" in the sense of "the Church of England as by law established");
> (iii) assisting a religion and making its decrees and anathemata effective . . .;
> (iv) giving State assistance in the plantation of a religion in a new area ("establishment" in one of its popular senses).[29]

That appears to be the most specific definition of "establishment" in section 116 which has yet been ventured. It is likely that the High Court will interpret "establishment" more narrowly than the Supreme Court. For better or worse, the less sociological, less legislative and more

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[24] 370 U.S. 421 (1962).
[25] *Id.*, 422.
[26] *Id.*, 430-431.
[27] This type of "establishment" is considered in *Wylde* v. *Attorney-General for N.S.W.* (1948) 78 C.L.R. 224. See also E. Campbell and H. Whitmore, *Freedom in Australia* (2nd ed. 1973) 388.
[28] *Nelan* v. *Downes* (1917) 23 C.L.R. 546, 550, 568, 572.
[29] F. Cumbrae-Stewart, "Section 116 of the Constitution" (1946) 20 *A.L.J.* 207, 208. See also W. Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed. 1976) 135.

literal approach of the High Court should ensure that result.[30] Sawer has classed the authorities on the meaning of free exercise of religion in section 116 as cases in which "it seems more probable that the decision was arrived at independently of the American decision and the latter is noted mainly as a matter of interest".[31] In contending for a narrow view of the "establishment" clause Lane has said that "it is difficult to interest the High Court either in history or in societal interests: it prefers 'pure' law (not altogether unwisely)".[32]

The second factor which could limit the use of the United States decisions arises from the verbal difference between section 116 and the First Amendment. The High Court could interpret section 116 as allowing the establishment of religion in general, while prohibiting only the establishment of any particular religion. Section 103 appears not to establish any particular religion. A quite logical distinction can be made between the United States "establishment of religion" and the Australian "establishing any religion" along the lines suggested by Lumb and Ryan:

> This [the verbal difference] suggests that what s. 116 is aimed at is any type of assistance tending to promote the interests of one Church or religious community as against others. A non-discriminatory law which is directed towards assisting religion generally may fall foul of the American provision but may not be invalid under s. 116.[33]

With varying degrees of confidence, the commentators such as Quick and Garran,[34] Wynes,[35] Lane,[36] Cumbrae-Stewart,[37] Campbell and Whitmore,[38] Sawer,[39] and Crommelin and Evans[40] suggest that such an interpretation is plausible. The lone dissenter is Pannam who asserts that

> the clear meaning of the phrase is that a silent "whatsoever" is to

[30] "Swearing in of Sir Owen Dixon as Chief Justice" (1952) 85 C.L.R. xi, xiii-xiv; S. Kadish, "Judicial Review in the High Court and the United States Supreme Court" (1959) 2 *M.U.L.R.* 4 (Pt I), 127 (Pt II); Sir Douglas Menzies, "Australia and the Judicial Committee of the Privy Council" (1968) 42 *A.L.J.* 79, 81; G. Evans, "The Most Dangerous Branch? The High Court and Constitution in a Changing Society" and commentaries thereon in D. Hambly and J. Goldring (eds.), *Australian Lawyers and Social Change* (1976) 13-76.

[31] G. Sawer, "The Supreme Court and the High Court of Australia" (1957) 6 *J. Pub. L.* 482, 504. But see G. Sawer, *Cases on the Constitution of the Commonwealth of Australia* (3rd ed. 1964) 158.

[32] P. Lane, "Commonwealth Reimbursements for Fees at Non State Schools" (1964) 38 *A.L.J.* 130, 132.

[33] R. Lumb and K. Ryan, *The Constitution of the Commonwealth of Australia Annotated* (2nd ed. 1977) 362.

[34] J. Quick and R. Garran, note 18 *supra*, 951.

[35] W. Wynes, note 29 *supra*, 134.

[36] P. Lane, note 32 *supra*, 132.

[37] F. Cumbrae-Stewart, note 29 *supra*, 207.

[38] E. Campbell and H. Whitmore, note 27 *supra*, 387.

[39] G. Sawer, *Australian Federalism in the Courts* (1967) 171.

[40] M. Crommelin and G. Evans, "Explorations and Adventures with Commonwealth Powers" in G. Evans (ed.), *Labor and the Constitution 1972-1975* (1977) 24, 40.

> be read in, making it "any religion whatsoever". "Any" is a word of emphasis in section 116, not one of qualification.[41]

His interpretation is also quite plausible, but may be countered by arguments that the offending interpretation could still be derived even if the word "whatsoever" were inserted and that the founders would have said "whatsoever" if they had meant "whatsoever".

It would be possible to argue from a tantalising dictum of Latham C.J.[42] in *Adelaide Company of Jehovah's Witnesses Inc.* v. *Commonwealth*[43] that section 116 prohibits an establishment of religion *in general* of the kind which section 103 would appear to involve. He said:

> The prohibition in s. 116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion. No Federal law can impose any religious observance. Defaults in the performance of religious duties are not to be corrected by Federal law—*Deorum injuriae Diis curae.* Section 116 proclaims not only the principle of toleration of all religions, but also the principle of toleration of absence of religion.[44]

Jehovah's Witnesses was a "free exercise" case, so the Latham dictum might properly be regarded as limited to the third prohibition in section 116, and not as extending to the other prohibitions. However, its terms are manifestly general. Even if the dictum is restricted to the "free exercise" prohibition the principle enunciated would apply equally to the "establishment" clause because both involve the same problem of interpreting the phrase "any religion". There is thus some authority as well as some reason behind the Pannam interpretation. However, the narrower interpretation seems a little closer to the actual wording of the section and a little more likely to be adopted by the Court. Section 103 has therefore a reasonably good chance of passing the "establishment" test in section 116.

V "IMPOSING ANY RELIGIOUS OBSERVANCE"

It is necessary to consider whether section 103 is a law "for imposing any religious observance". This second prohibition does not raise the same semantic difficulties as the first prohibition. The immediate purpose of the founders in drafting it appears to have been to prevent the Commonwealth from enacting Sunday observance laws.[45] That actual

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[41] C. Pannam, note 17 *supra*, 61.

[42] Who was himself President of the Victorian Rationalists for some time: E. Neumann, *The High Court of Australia: A Collective Portrait 1903 to 1972* (2nd ed. 1973) 20. He was also President of the Rationalist Society of Australia: G. Sawer, note 39 *supra*, 170.

[43] (1943) 67 C.L.R. 116.

[44] *Id.*, 123.

[45] J. Quick and R. Garran, note 18 *supra*, 952; C. Pannam, note 17 *supra*, 53-56; E. Campbell and H. Whitmore, note 27 *supra*, 385.

purpose need not, of course, limit the meaning of the words as interpreted by the Court.[46] Not only is there an absence of High Court authority on the "religious observance" clause; there is no comparable provision in the United States Constitution to generate principles that might be applied in Australia. The Supreme Court deals with what in Australia could be "religious observance" problems under the wide, absolutist "establishment" doctrine.[47] Australian legal commentators have not thrown much light on whether section 103 can be said to be "for imposing any religious observance", although Campbell and Whitmore consider that the section arguably imposes a religious observance upon stations.[48]

One difficulty in applying the "religious observance" prohibition to section 103 is to determine whether the "matter of a religious nature" in the section involves an "observance" in terms of section 116. Clearly "Divine Worship" would be an observance, but a station licensee is not restricted to "Divine Worship". There must be doubt about whether a programme within section 103 which simply discusses a religious problem would amount to a "religious observance"; a phrase which connotes ritual or custom. There is no power in section 103 to prevent a licensee from broadcasting non-devotional religious discussion programmes in fulfilment of any obligation validly imposed by section 103. The narrow interpretation of section 116 likely to be adopted would emphasise the word "observance" so as to limit the prohibition to acts which have "religious significance either sacramentally, magically or symbolically".[49]

Supposing that section 103 is directed to "religious observance" is its purpose to "impose"? It is arguable that there is no imposition on the broadcast audience who will be free to tune to any station which is not broadcasting a compulsory or voluntary religious broadcast. Even if all stations were directed to transmit religious broadcasts at the same time pursuant to section 103, viewers and listeners would be free to turn off their receivers altogether. This kind of argument has been rejected in the United States "establishment" cases, which have held public school prayers or Bible readings to infringe the First Amendment even where children are allowed to excuse themselves.[50] As the Supreme Court said in *Engel* v. *Vitale*:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official

[46] P. Brazil, "Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular" (1961) 4 *Univ. Q. L.J.* 1, 16-21.

[47] *E.g., Gallagher* v. *Crown Kosher Super Market* 366 U.S. 617 (1961); *Wisconsin* v. *Yoder* 406 U.S. 205 (1972).

[48] Note 27 *supra*, 280.

[49] F. Cumbrae-Stewart, note 29 *supra*, 209.

[50] *Engel* v. *Vitale* 370 U.S. 421 (1962).

> religion whether those laws operate directly to coerce nonobserving individuals or not.[51]

This principle seems applicable to imposition of a religious observance in the Australian context. An imposition within the meaning of section 116 would probably occur if even one outlet for broadcasts to the community is compelled to transmit religious material.

It is easier to show that section 103 is an imposition on the actual licensees of stations. A licensee *must* broadcast "matter of a religious nature" during any periods determined by the Tribunal. Freedom to schedule programmes is inevitably restricted. Within such periods, freedom of subject-matter is also restricted: non-religious or anti-religious programmes may not be shown. To establish that section 103 is invalid it is necessary only to show that it envisages the imposition of a religious observance. It is not strictly necessary to show that an impugned law actually imposes an observance because the word "for" used in section 116 makes the *purpose* of a law the factor which determines validity or invalidity.[52] The need to look at purpose or object could cause difficulty in deciding on the validity of a provision which had a primarily non-religious object but had the incidental effect of imposing a religious observance. However, there is no such problem with section 103. In its terms, it is concerned with introducing religious programmes into broadcasting and with nothing else.

It is just possible that section 81(2) and (3) of the Broadcasting and Television Act 1942 (Cth) removes whatever religious liberty station licensees enjoy under section 116 of the Constitution. That section forbids *inter alia* the granting of a licence to any person except a corporation. In the *Jehovah's Witnesses* case Latham C.J. said:[53]

> It is obvious that a company cannot exercise a religion. In the United States of America it has been decided that only natural persons, and not artificial persons, such as corporations, have the privileges and immunity of free speech and of assembly under the Constitution: See *Hague* v. *Committee for Industrial Organization* (1939) 307 U.S. 496, at p. 514.

He went on to concede the Jehovah's Witnesses' corporation locus standi because to do otherwise would in his opinion have been to allow a possible trespass by the Commonwealth to go unchallenged.[54] To deny the benefit of section 116 to corporations would be to open a large loophole. The High Court would be likely to extend section 116 to corporations in situations like that under discussion. Otherwise, provisions like section 81(2) and (3), which has a legitimate primary purpose in

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[51] 370 U.S. 421, 430 (1962).

[52] *Adelaide Company of Jehovah's Witnesses Inc.* v. *Commonwealth* (1943) 67 C.L.R. 116, 132 *per* Latham C.J.

[53] *Id.*, 147.

[54] *Ibid.*

the licensing and anti-monopoly sections of the Act, could be used to avoid section 116 or to minimise its practical scope.

The reference to United States authority made by Latham C.J. was not entirely apposite since the relevant point in *Hague* v. *Committee for Industrial Organization* was decided by reference to the words of the first section of the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment speaks of "all persons born or naturalised in the United States". There is no corresponding phrase in section 116. Furthermore, the Supreme Court had in 1940 in *Times-Mirror Co.* v. *Superior Court*[55] actually upheld the right of a newspaper corporation to freedom of expression without considering the argument that its corporate personality would disqualify it from First Amendment protection. If a newspaper corporation can enjoy freedom of expression, then surely a broadcasting corporation can enjoy freedom of religion. In any event, only six years after *Jehovah's Witnesses* the Supreme Court unequivocally held a corporation protected by the Fourteenth Amendment in *Wheeling Steel Corporation* v. *Glander*.[56] The modern Supreme Court extends First Amendment rights and liberties to natural persons and corporations equally. One famous instance is *New York Times Co.* v. *Sullivan*[57] in which the Court upheld the right of a New York newspaper corporation to free speech in spite of Alabama law.

VI THE PROGRAMME STANDARDS

Even if section 103 is valid, the programme standards mentioned above[58] may well be invalid. Section 103 authorises the Tribunal to determine the periods for religious broadcasts and to determine whether the broadcasts will be made free of charge. It does not authorise any regulation of the content or religious denomination of the broadcasts. Yet the standards do purport to regulate content. For example, Television Programme Standard 21(c) requires that the free time be allocated between the churches and denominations in proportion to the number of their adherents in the service area of a station. Television Programme Standard 21(d) prohibits "statements ridiculing any form of religious belief" while Standard 22 is entirely concerned with indicating the type of religious programme to which the free broadcast time should be devoted. Subject to the Constitution, these requirements may be authorised by section 99 of the Broadcasting and Television Act. It requires licensees to transmit programmes "in accordance with standards determined by the Tribunal". Section 99 would clearly authorise general

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[55] Decided with *Bridges* v. *California* 314 U.S. 252 (1941); *Pennekamp* v. *Florida* 328 U.S. 331 (1946) in which one of the successful petitioners was a corporation.

[56] 337 U.S. 562 (1949).

[57] 376 U.S. 254 (1964).

[58] Australian Broadcasting Control Board, *Television Programme Standards* (2nd ed. 1970) standards 21, 22; *Broadcasting Programme Standards* (2nd ed. 1967) standards 16, 17.

programme requirements about matters such as clarity of diction or suitability for children. Such standards could extend to religious programmes as to all others. But does section 99 authorise programme standards concerning the content of religious programmes as such? It could be argued that in section 103 Parliament specified the aspects of religious programmes which were to be regulated: *expressio unius est exclusio alterius.*[59] However, it is doubtful whether there is any implied inconsistency between such a use of section 99 and section 103. Parliament may arguably have intended section 99 to govern religious programmes as much as programmes of any other type. Section 103 could be seen as conferring additional power in the particular area of religious programmes without any implication that the general powers are excluded.

The major problem with the programme standards mentioned is constitutional. If programme standards of the Tribunal are affected by section 116, the standards mentioned may well be invalid. The relevant prohibitions of section 116 operate only on "laws". It appears from decisions on section 109 of the Constitution that programme standards are not themselves "laws". There is no apparent reason why the word "law" in section 116 would have a different meaning in section 109. Section 109 invalidates "a law of a State" which is inconsistent with "a law of the Commonwealth". Subordinate legislation made by Commonwealth administrative authorities has been held not to constitute "law of the Commonwealth". Thus, an industrial award is not a law but merely a factum upon which an industrial law operates to create a right or duty.[60] In *Airlines of N.S.W. (No. 1)*[61] it was said that Air Navigation Orders, Aeronautical Information Publications and Notices to Airmen were not "laws" within the meaning of section 109; although through each of these the Director-General of Civil Aviation was empowered by the Air Navigation Regulations (made under the Air Navigation Act) to make enforceable rules.[62] Programme standards and directions about religious programmes are therefore not "laws", but facta upon which section 103 and section 99 operate together with section 132(1), the general enforcement section of the Act.

However, the programme standards are not immune from section 116.

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[59] *Anthony Hordern & Sons Ltd* v. *Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 C.L.R. 1; *R.* v. *Wallis; ex parte Employers Association of Wool Selling Brokers* (1949) 78 C.L.R. 529, 550-551; *Commonwealth* v. *Queensland* (1975) 134 C.L.R. 298; *Leon Fink Holdings Pty Ltd* v. *Australian Film Commission* (1979) 24 A.L.R. 513; D. Pearce, *Statutory Interpretation in Australia* (1974) 35-36.

[60] *Waterside Workers' Federation of Australia* v. *J.W. Alexander Ltd* (1918) 25 C.L.R. 434, 464; *Ex parte McLean* (1930) 43 C.L.R. 472, 479; *R.* v. *Kelly; ex parte Victoria* (1950) 81 C.L.R. 64, 81; *Collins* v. *Charles Marshall Pty Ltd* (1955) 92 C.L.R. 529, 540.

[61] *Airlines of N.S.W. Pty Ltd* v. *N.S.W.* (1964) 113 C.L.R. 1.

[62] *Id.*, 31 *per* Taylor J.

In *Ex parte McLean* Dixon J. explained how a federal industrial award may prevail over State industrial legislation:

> (i) The power of the Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State enables the Parliament to authorise awards which, in establishing the relations of the disputants, disregard the provisions and the policy of the State law;
>
> (ii) the *Commonwealth Conciliation and Arbitration Act* confers such a power upon the tribunal, which may therefore settle the rights and duties of the parties to a dispute in disregard of those prescribed by State law, which thereupon are superseded;
>
> (iii) sec. 109 gives paramountcy to the Federal statute so empowering the tribunal, with the result that State law cannot validly operate where the tribunal has exercised its authority to determine a dispute in disregard of the State regulation.[63]

This principle may be adapted as follows to fit the different circumstances of section 116. The prohibitions in the section restrict only the making of laws such as section 103 and section 99. Assuming the validity of those sections, they cannot be interpreted as authorising an incursion into the area protected by section 116. Therefore, a standard or direction which would infringe section 116 if it were itself a law will be invalid. The invalidity will not result from conflict with section 116 itself. The standards or directions will be *ultra vires* section 103 or section 99 and therefore invalid. This kind of reasoning was adopted by Carmichael J. in *Evers* v. *Evers*[64] when he held himself unable to discriminate against any religion in the course of exercising matrimonial causes jurisdiction:

> The Commonwealth, in pursuance of its powers, enacted the laws which give this Court its jurisdiction and powers. The Commonwealth cannot confer on the courts which it creates powers which the Commonwealth itself is prohibited from exercising. It follows that the court cannot prohibit the free exercise of any religion.[65]

The same might be said of the jurisdiction and powers of the Tribunal in relation to section 116. A more direct approach was taken by McTiernan J. in *Jehovah's Witnesses* when he suggested that section 116 "creates a restriction both on legislative and executive power".[66] Whilst this approach removes the need to enquire about the meaning of "law", it is difficult to reconcile with the text of section 116.[67]

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[63] (1930) 43 C.L.R. 472, 484-485.

[64] (1972) 19 F.L.R. 296.

[65] *Id.*, 302.

[66] (1943) 67 C.L.R. 116, 156.

[67] P. Lane, "Commonwealth Reimbursements for Fees at Non State Schools" (1964) 38 *A.L.J.* 130, 132.

Once it is established that the religious Programme Standards are subject to section 116, they appear likely to be void. As they make more specific the obligation of a licensee to broadcast religious matter, they are even more likely to constitute the imposition of a religious observance than section 103 itself. Furthermore, Television Programme Standard 21(c) could infringe the "establishment" clause of section 116. By requiring a kind of proportional representation of religious broadcasts in a station service area, that standard has the effect of requiring broadcasts of specific, identifiable religions instead of just "matter of a religious nature". On a liberal interpretation of the "establishment" clause, Standard 21(d) would also be invalid because it prohibits attacks on religious beliefs. These principles apply with equal force to all other powers of the Tribunal, including its licensing powers under Part IIIB of the Broadcasting and Television Act. The licence of radio station 3AW (Melbourne) contains the following condition:

> The licensee shall, for the sum of $200 per annum, permit the Catholic Church to broadcast on each Sunday between 9.00 pm and 10.00 pm, or during such other periods aggregating one hour per week as may be mutually agreed upon by the licensee and the Catholic Church, and approved by the Tribunal.

It is understood from officers of the Tribunal that this is the only such licence condition and that it is not objected to by the licensee. The condition may well be *ultra vires* as an establishment of a particular religion.

VII NEW ATTITUDES TO SECTION 103

Attitudes to religion have changed considerably since section 103 was enacted. The Churches have become more interested in presenting short "spot" announcements to advertise a religious message.[68] The scheduling of those "spots" in prime time has sometimes been resisted by licensees.[69] At the time of the debate over abortion which surrounded the Medical Practice Clarification Bill 1973 (Cth) some church groups sought to use the time allocated to them under section 103 for anti-abortion broadcasts. Some licensees resisted use of the time for this material on the ground that it was social or political material and not "of a religious nature".[70] A more pronounced change has been the increasing difficulty faced by the Churches in supplying enough suitable

[68] Australian Broadcasting Control Board, Advisory Committee on Religious Programmes, *Religion and the Broadcast Media* (1970) 4, 16-17; interview with Mr D. A. Jose, A.B.C.B. Director of Programme Services 1949-1971, 25 June 1976; interview with Mr J. G. Quaine, formerly A.B.C.B. Director of Programme Services and now Director of the Programme Services Branch of the Australian Broadcasting Tribunal, 13 May 1974.

[69] Interviews with Mr D. A. Jose and Mr J. G. Quaine.

[70] Interview with Mr J. G. Quaine.

well-produced material to fill the time allocated.[71] There has always been difficulty in forging a common approach between the different churches and between the church broadcasting organisations in the different States.[72]

The major development of recent years has been a challenge to the policy basis of section 103. In 1975 the Working Party on Public Broadcasting presented its *Report* to the Minister for the Media.[73] The *Report* provided the policy basis for the grant of the first non-commercial, non-A.B.C. public broadcasting station licences in the same year. It noted the interest of religious groups in applications for public broadcasting licences and the diversity of programme styles and formats expected of public broadcasting. It said of the religious broadcasting interests:

> Under those circumstances it is unreasonable for them alone, of all interest groups, to be afforded special legislative provision for access to national and commercial stations. (They would, however, have the same access rights as other groups, to public stations discussed later in this chapter.) Similarly, for both the ABC and commercial networks religious broadcasts should be a matter of choice.[74]

In 1976 the Australian Broadcasting Control Board received and published the *Report* of its Advisory Committee on Programme Standards. As well as submissions from church groups supporting section 103, the Committee received submissions from the Humanist Society of Victoria, the Television Society of Australia and the Christian Broadcasting Association, all of which opposed compulsory time for religious broadcasts.[75] The Committee was itself divided on this issue and refrained from making any recommendation.[76]

In its *Self-Regulation Report* of 1977 the Australian Broadcasting Tribunal surveyed a considerable range of submissions and attitudes concerning section 103 and towards the whole topic of religious broadcasts.[77] For example, the *Report* noted the view of the major churches that Australia was "historically and sociologically a Christian country . . .". Views in opposition to this were also noted.[78] It reported agreement

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[71] Australian Broadcasting Control Board, Advisory Committee on Religious Programmes, *Religion and the Broadcast Media* (1970) 7, 16.

[72] Interview with Mr D. A. Jose.

[73] Working Party on Public Broadcasting, *Report to the Minister for the Media* (1975).

[74] *Id.*, 62.

[75] Australian Broadcasting Control Board, Advisory Committee on Program Standards, *Report* (1976) 46-47.

[76] *Id.*, 47.

[77] Australian Broadcasting Tribunal, *Report on the Public Inquiry into the Concept of Self-Regulation for Australian Broadcasters* (1977) 107-116.

[78] *Id.*, 110.

among the Churches "that 'other religions' should have access to the media . . .".[79]

The Tribunal stated its belief that "the final arbiters on the question of what constitutes a religious program should be the recipients of that program".[80] It referred to criticism of the current programme standards which require allocation of time to religions in proportion to the number of their adherents; and agreed with a submission that the programme standards do not " 'ensure access for a fully representative range of thought within the Australian Christian community and [do] nothing at all for those not in that Christian mainstream' ".[81] The broad conclusions of the Tribunal attempted to place the obligations of a licensee to provide religious programmes:

> within the broader context of community service programming, and licence renewal would be consequential on a licensee's performance in this and other areas during the term of a licence. . . Adequate safeguards for the provision of religious programs can be instituted through the licence granting/renewal procedure. Criteria for assessing a station's performance in this program area can be determined and incorporated as part of this procedure.[82]

That approach would obviously remove grounds for criticism of the rigidity of the current standards. But it could raise fresh constitutional problems. For reasons mentioned above, the Tribunal cannot use its licensing powers to pursue objectives prohibited to the Commonwealth Parliament.[83] This would hamper any attempt by the Tribunal to require religious broadcasts through its licensing powers.

The Tribunal did not recommend any legislative change. Arguments that section 103 infringed section 116 of the Constitution were mentioned but not pronounced upon.[84] The *Report* said:[85]

> The Tribunal recommends that Section 103 of the *Broadcasting and Television Act* 1942 should stand for the time being, although we do not intend to make any specific determinations pursuant to this Section.

This recommendation is open to various interpretations, particularly in view of the other recommendations already quoted from the *Report*. In its 1978-1979 *Annual Report* the Tribunal referred as follows to Broadcasting Programme Standard 16(a) which requires one hour of free radio time per week for religious matter:[86]

> This requirement has operated for many years and its relevance to contemporary broadcasting is a matter which the Tribunal intends

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[79] *Ibid.*
[80] *Id.*, 111.
[81] *Id.*, 113.
[82] *Id.*, 116.
[83] See text at notes 60-67 *supra*.
[84] Note 77 *supra*, 112-113.
[85] *Id.*, 114, 116.
[86] Australian Broadcasting Tribunal, *Annual Report 1978-1979* 46.

to examine as part of the development of new program standards and industry codes.

It made a similar statement about the corresponding Television Programme Standard 21(a).[87] No proposal to alter any of the religious programme standards has yet been published by the Tribunal. The only proposal likely to affect the programme standards was contained in the Broadcasting and Television Amendment Bill (No. 2) 1980 (Cth). Clause 8 of that Bill would, if enacted, remove any power of the Tribunal to make religious programme standards under section 99.[87a] The Tribunal would be limited to making determinations under section 103 itself and to the kind of licensing discretion envisaged in the *Self-Regulation Report*. It is thus clear that section 103, together with other attempts to require religious broadcasts, is likely to be a continuing source of constitutional dispute.

VIII CONCLUSION

There in some irony in the increasing controversy over section 103. Because of the exceptional nature of section 116 of the Constitution, religion is probably the only area of programming in which the Commonwealth may not legislate for compulsory access to the airwaves. The breadth of Commonwealth power to legislate about broadcast programmes under section 51(v) of the Constitution has been indicated by the High Court in *R.* v. *Brislan; ex parte Williams*[88] and *Jones* v. *Commonwealth (No. 2)*.[89] This power is, of course, subject to section 116. If section 103 were held invalid, the Commonwealth might pursue the alternative course of making appropriations to support religious broadcasting. It is not clear whether appropriations under section 81 of the Constitution are subject to section 116.[90] The issue may be resolved in litigation over education grants for Church schools.[91]

For some years in Australia and overseas there has been a demand for access to the airwaves by groups other than station licensees. United States law provides some access of that kind through rights of reply and the "fairness doctrine" which have been upheld by the Supreme Court.[92]

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[87] *Id.*, 71.

[87a] The Bill lapsed on the dissolution of the House of Representatives for the 1980 Federal Election.

[88] (1935) 54 C.L.R. 262.

[89] (1965) 112 C.L.R. 206.

[90] G. Winterton, "The Appropriation Power of the Commonwealth" (LL.M. Thesis, University of Western Australia, 1968; 4 *Australian Law Theses and Seminar Papers* (1976) fiche 41/1-41/8) 343.

[91] An action brought by the Defence of Government Schools Organisation against the Commonwealth: *A.-G. for the State of Victoria ex rel. Black* v. *Commonwealth* (argued before the High Court in 1980 but not decided at the time of going to press).

[92] *Red Lion Broadcasting Co.* v. *F.C.C.* 395 U.S. 367 (1969); *C.B.S.* v. *Democratic National Committee* 412 U.S. 94 (1973); B. Schmidt, *Freedom of the Press* v. *Public Access* (1976) 119-216; M. Price, "Taming *Red Lion*: The First

Section 103 is the clearest attempt by Australian law to provide a right of access to broadcasting for any interest in the community. Groups like the Federation of Australian Commercial Television Stations argue that section 103 is both legally invalid and wrong in principle.[93] However other people, religious and non-religious, argue that section 103 should be extended to a wider range of interests. For example, the Justice in Broadcasting organisation told the self-regulation inquiry of the Tribunal:

> [T]he present statutory obligation on broadcasters on programs of a religious nature should be replaced by wider provisions for community access for non-commercial groups... Religious programs should be seen within the larger context of the need to ensure adequate access to broadcasting facilities for non-commercial groups—with a message to communicate to the listening public.[94]

If the specifically religious character of section 103 were removed, the constitutional issue would also be removed. Henry Mayer has said that "[t]he argument ought to be not that religion should be deprived of it but that other interests should also have access".[95] That broader argument is likely to be more hotly contested as the electronic media become even more pervasive in Australian society.

Amendment and Structural Approaches to Media Regulation" (1979) 31 *Fed. Com. L.J.* 215; W. Chamberlin, "The FCC and the First Principle of the Fairness Doctrine: A History of Neglect and Distortion" (1979) 31 *Fed. Com. L.J.* 361. S. Simmons, *The Fairness Doctrine and the Media* (1978).

[93] Federation of Australian Commercial Television Stations, *Eleventh Annual Report* (1971-1972) 60.

[94] Note 77 *supra*, 112.

[95] H. Mayer, "What Should (and Could) We Do About the Media" in G. Major (ed.), *Mass Media in Australia* (1976) 164, 202.