



## Précis Paper

### A Challenge to the Constitutional Validity of the Commonwealth Funding Religious Schools

This is an interesting analysis of the constitutional law basis of funding independent schools and the loss of subsidy. It is a worthy watch and listen between Counsel and instructing Solicitor who represented the school.

#### **Discussion Includes**

- The facts and findings in *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2016] NSWCA 157 which deals with a challenge to the constitutional validity of the Commonwealth funding the States for religious schools
- The construction of section 96 & 116 of the Commonwealth of Australia Constitution Act
- The test for establishing the purpose for which funding is offered and its use
- The pending appeal of the Court of Appeal's decision in this case to the High Court

## Précis Paper

# A Challenge to the Constitutional Validity of the Commonwealth Funding Religious Schools

1. In this edition of BenchTV, Ben Katekar (Barrister) and Rick Mitry (Solicitor) discuss the recent decision of the NSW Court of Appeal (Beazley P; Basten and Macfarlan JJA) in *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2016] NSWCA 157 which involved a challenge to the constitutional validity of Commonwealth funding to the States for religious schools.
2. Mr Katekar and Mr Mitry successfully represented the second and third respondents, the Australian Federation of Islamic Councils and the Malek Fahd Islamic School, by defeating the constitutional challenge in the Court of Appeal.

### Background

3. The Commonwealth funding arrangements with independent schools involves the Commonwealth largely funding these schools by first transferring funds to the State Government before it is then transferred to the schools. This funding is provided to independent schools under strict conditions including that the school is not to be run for profit and that school governance is run in accordance with the relevant legislation. The Commonwealth Government became suspicious that the Malek Fahd board was not complying with these governance requirements and put the school on notice that the Government would cease funding unless satisfactory explanation was provided.
4. The Malek Fadh Islamic School was established over 20 years ago and according to Mr Mitry the school has been very successful academically. However, in the lead up to the proceedings in the Supreme Court the school had decided to pursue expansion plans which involved the purchase of land in Hoxton Park by the Australian Federation of Islamic Councils for a new campus.
5. At the same time as this dispute between the school and the Government, the Hoxton Park Residents Action Group applied to the Land and Environment Court to stop the land purchased at Hoxton Park from being used as a school. This challenge was made on the basis that the funding of an Islamic school by the Commonwealth was in breach of the Constitution. Specifically, the funding was alleged to be unconstitutional in that (1) the funding of independent schools by the Commonwealth was beyond the powers in ss 51 and 96 of the *Commonwealth Constitution* and (2) the purpose of the funding regime contravened

s 116 of the *Constitution* (e.g. in that the purpose was to establish Islam as the religion of Hoxton Park).

Argument 1: There was no power for the Commonwealth to provide funding for religious schools

6. The structure of the Commonwealth's education funding arrangement is premised on s 96 of the Constitution, which provides

**SECTION 96:**

***Financial assistance to States***

*During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.*

7. The importance of s 96 to Commonwealth funding of schools is that the Commonwealth does not have an express power to fund schools under any head of power in section 51 and thus has to rely upon providing funds to the States with conditions in order to further education policy goals. As highlighted above, the conditions on which the Commonwealth provides funding to the States includes that the States ensure that schools meet certain educational criteria. Significantly, neither religious observance nor any matter related to religion are conditions of the Commonwealth's funding offers to the States.
8. Notwithstanding this ability to provide conditional financial assistance to the States under s 96, the Residents Group argued that because there was no express power under s 51 of the Constitution for the Commonwealth to regulate schools, the funding arrangement was unconstitutional.
9. The respondents' argument in reply was that s 51(xxxvi) provides that the Commonwealth may make laws in respect of which this Constitution makes provision and thus the provision under s 96 would be brought within the express powers of s 51 by the 'back-door' as it were.

Argument 2: That the Commonwealth's funding of the proposed school in Hoxton Park contravened s 116 of the Constitution

10. The Residents Group's second argument was that the school in Hoxton Park was establishing a religion in the area on the basis that prior to the school there was no Muslims in the area. It was alleged that the Commonwealth's funding of the school thus contravened s 116 of the Constitution which provides:

**SECTION 116:**

***Commonwealth not to legislate in respect of religion***

*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.*

11. The Residents Group challenged the funding of the Malek Fahd School on all three limbs of s 116, namely, that the funding was a law for the purpose of (1) establishing a religion, (2) imposing religious observance and (3) prohibiting the free exercise of religion.
12. The respondents essentially argued in reply that in order for section 116 to be infringed it is necessary that the Commonwealth government effectively established a State religion.

**The Proceedings**

13. When the matter proceeded to the Supreme Court before Pembroke J, both of the Residents Group's arguments were hastily rejected. In relation to the second argument, his Honour noted that the school had all of the same features as any other religious school. The school was not focused on just learning about the Islamic religion and in fact religious teaching at the school was shown to be less than such teaching at many other schools which affiliated with other religions.
14. The matter then proceeded on appeal. In response to the Residents Group's arguments, the Court of Appeal noted that sections 96 and 116 should be read together. The effect of reading the provisions in this way is that the Commonwealth may make laws for the payment of grants to States on specified conditions provided that the conditions do not contravene an express or implied limitation on the power, such as that provided by s 116.
15. Importantly, both the judge at first instance and the Court of Appeal identified that the Commonwealth was legitimately offering funding on conditions and was not forcing the States to take the funding in that it was a non-coercive exercise. Accordingly, so long as the offer of funding was not coercive the arrangement would not breach s 96 however it may have still involved a breach of s 116.
16. As an aside, a Majority of the Court of Appeal (Basten JA dissenting) found s 51(xxxvi) was necessary for the Commonwealth to have power to provide the funding, whereas Basten JA found that the Commonwealth's arrangement would have been within power without reliance on s 51(xxxvi).

17. The main dispute in the Court of Appeal was whether the funding breached s 116. As aforementioned, the relevant test for breach of s 116 is whether the funding regime was for the purpose of (1) establishing a religion, (2) imposing religious observance or (3) prohibiting the free exercise of religion.
18. In order to answer this question, it was necessary to make clear exactly what the effect of the funding regime was. Ultimately, the conditions on the funding were about educational criteria and had nothing to do with the need for religious criteria to be met. Thus, it could not be said that the legislation was passed for any of the alleged purposes.
19. More specifically, in relation to the first limb about establishing a religion, the respondents referred to *Attorney-General (Vic); Ex rel Black v Commonwealth* [1981] HCA 2; 146 CLR 559, where there was a similar challenge to the funding of Catholic schools. The Majority of the High Court there found that s 116 provided a fetter on Commonwealth power rather than a constitutional guarantee of a human right (such as the implied freedom of political communication from *Lange v Australian Broadcasting Corporation* [1997] HCA 25; 189 CLR 520). Furthermore, the Court set out multiple circumstances that would constitute a breach of the first limb. For example, the first limb would be contravened where the law set up a religion as an institution of the Commonwealth, established a national church or favoured one church over another, or where the Commonwealth's purpose was to set up a reciprocal relationship between the Commonwealth and a particular religion. None of these purposes could be attributed to the Commonwealth here. Essentially, the Hoxton Park residents were concerned that the funding was effectively setting up the Islamic religion in Hoxton Park but the fetter provided by s 116 is a much different one, looking more to the intentions of the Commonwealth rather than any alleged effects.
20. In relation to the second limb about a law for imposing religious observance, the question was again resolved by reference to the purpose of the funding arrangement. One factor the plaintiffs pointed to was that the Malek Fahd School required a commitment from all students that they support the school's Islamic values and ethos. Furthermore, there was a compulsory form of prayer and a requirement for female students to wear head cloths. It was argued that because the Commonwealth indirectly funded the school and the school had these requirements, the money was essentially for those purposes. The difficulty with this link was that this was clearly not the Commonwealth's purpose in entering into the funding arrangement with the States in that the conditions of the funding had no religious related aspects and was simply geared to how many students were educated there.
21. In relation to the third limb, it was argued that because the school had certain religious requirements, the Commonwealth's funding arrangement had the purpose of the preventing children at the school from the free exercise of religion. This failed for similar reasons in that

the purpose of the funding arrangement was to provide for education, nor was it the case that children were required to attend the school. In fact, the reality of the funding arrangement was that it was a system that promoted plurality and choice because it simply placed no religious restrictions on the States receiving Commonwealth funding for education. In *Krygger v Williams* [1912] HCA 65; 15 CLR 366, there was a challenge to compulsory military training on the basis that because the training provided for extensive military drills the trainees were unable to freely exercise religious observance. The High Court similarly rejected this argument and noted that 'to require a man to do a thing which has nothing at all to do with religion is not prohibiting him from the free exercise of religion'. However, the situation in *Hoxton Park v Liverpool Council* was one step further removed because the Commonwealth was not even requiring anyone to do anything.

22. In summary, Residents Group's claims were rejected entirely by Pembroke J at first instance and his Honour's determinations were upheld on appeal.

#### Attempt to Adduce New Evidence

23. After the hearing, the Residents Group attempted to adduce further evidence regarding the Commonwealth government's concerns about the school's corporate governance. This attempt was resisted on a number of grounds including that it is necessary to show special circumstances to adduce fresh evidence particularly on appeal and even more so after the appeal hearing.
24. Furthermore, the evidence that was sought to be adduced was just the transcript of a press conference and was accordingly merely hearsay.
25. But the key difficulty with this evidence was that it was irrelevant to the appellant's case in that it did not provide any evidence that the Commonwealth's funding to the States was for any purpose related to religion.
26. Ultimately, the application to reopen for the purpose of adducing further evidence was rejected.

#### Implications

27. At the time of this presentation, the judgment of the Court of Appeal was awaiting a decision on whether special leave to appeal to the High Court would be granted to the Residents Group on the basis that the second and third limbs of s 116 were infringed by the funding arrangement. However, since then the Residents Group's application for special leave was refused.

28. The presenters note that the decision of the Court of Appeal does not have any real precedential authority in that their Honours simply followed the previous decisions of the High Court. However, Mr Katekar mentions in passing that it was decided that the American cases on the US Bill of Rights provisions relating to freedom of religion did not help in construing s 116 in that the language of the provisions is very different.

## **BIOGRAPHY**

### Rick Mitry

Partner, Mitry Lawyers, Sydney

Rick Mitry founded his practice, specialising in international and human rights law, as well as criminal and commercial litigation. He has practised since 1978 as a barrister and solicitor, personally involved in several high profile cases, public inquiries and matters of international law and diplomacy. Rick has also published a number of articles discussing topics of the law, business, rights and international matters.

### Ben Katekar

Barrister, New Chambers, Sydney

Ben Katekar was admitted as a Solicitor in 1991, practising until 2003 when he was called to the NSW Bar. He specialises in insolvency and commercial litigation.

## **BIBLIOGRAPHY**

### Focus Case

*Hoxton Park Residents Action Group Inc v Liverpool City Council* [2016] NSWCA 157

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/composite/benchmark\\_07-07-2016\\_insurance\\_banking\\_construction\\_government.pdf](https://benchmarkinc.com.au/benchmark/composite/benchmark_07-07-2016_insurance_banking_construction_government.pdf)

### Judgment Link

<https://www.caselaw.nsw.gov.au/decision/5779a2f4e4b058596cb9cfdb>

### Cases

*X v A*

*Y v B*

*Z v C*

### Legislation

*XYZ*