

CHAPTER 12 Quick and Garran's Account

Anyone familiar with Quick and Garran's analysis of the meaning and scope of Section 116 in their *Annotated Constitution of the Australian Commonwealth* will regard the conclusions reached in the preceding chapter with surprise. Overall, and in points of detail, there are clear differences. In this chapter an attempt is made to show that their analysis of Section 116 is seriously defective on both the factual and the interpretative side. An explanation of the presence of these defects is also offered.

As to the factualness, one may cite a number of more or less serious inaccuracies. Quick and Garran mistakenly drew a sharp contrast between the 'numerous and largely signed petitions' in favour of the recognition of deity in the preamble, and 'a few petitions... in opposition to the proposal'.² This was quite misleading in view of the numerous signatories of those (relatively) few counter-petitions.

They were also factually in error in regard not only to the amendment to Clause 109 which Higgins *wanted* to propose but also in regard to the amendment which he *actually* proposed. According to Quick and Garran, Higgins moved to amend Clause 109 to make it read,

A State shall not, nor shall the Commonwealth, make any law prohibiting the free exercise of any religion, or imposing any religious test or observance.³

However, according to the Hansard of the debate,⁴ Higgins had become dissatisfied with certain features of that amendment, and wished that the clause instead read,

A State shall not, nor shall the Commonwealth, make any law prohibiting the free exercise of any religion, or for the establishment of any religion, or imposing any religious observance.

And in the end the only amendment Higgins *actually* moved was to add 'nor shall the Commonwealth' after 'A State shall not'.

However, perhaps their most serious factual error arose in their treatment of the American background. Higgins had claimed that the 1892 Congress decision to tie a Sunday closing condition to any offer of financial aid to the World Fair was religiously motivated, in that it was based on an earlier declaration by the Supreme Court that the United States was a 'Christian country'. However, according to Quick and Garran,

In the debates which took place in Congress during the passage of the amending Bill, no reference appears to have been made to any religious aspect of the proposed closing of the Exposition on Sundays, or to the case of the Church of the Holy Trinity v. United States.⁵

This is not so. Not only was Congress, as the *Congressional Record* for 1890-2 shows, besieged by petitions – mostly from religious bodies – praying that the exposition be closed on Sunday, but the debate in the Senate on 11, 12 and 13 July 1892 (to look no further) included copious references to 'religious aspects'.⁶ Many of these references moreover involved precisely the sort of analysis (the United States is a Christian nation, etc.) that was advanced shortly before by the Supreme Court in the Holy Trinity case. One should not perhaps attribute any particular piety to the members of the United States Senate in this. It may well have been, as the Washington reporter of the *New York Times* suggested, that 'the essence of the whole business' was the intention of some senators 'to gain the esteem of a good many people who had petitioned them to vote against Sunday opening'.⁷ But even if the motives of these senators derived more

from political interest than religious sentiment, what they clearly enough were *doing* was seeking to make Congress, in this particular matter at least, a conduit for imposing on visitors to the World Fair the wishes of a religiously motivated Sunday observance pressure group. The field secretary of the American Sabbath Union clearly thought so too:

We are prepared to make Congress understand that this is a Christian Nation. We would be a set of fools to give up the battle now, after gaining victory over Congress in the World's Fair.⁸

There scarcely can be any doubt that the Sunday closure amendment, regardless of the secular nature of the power under which it was passed, was in essence a religious law.

Discussing the arguments in support of Section 116 which Higgins put before the Convention, Quick and Garran declared,

The prohibition contained in the [United States] first amendment was one of the ten articles in the so-called 'American Bill of Rights' adopted after the establishment of the Union, in order to satisfy popular demands and sentiments. No logical or constitutional reasons have been stated why such a negation of power, which never had been granted and which, therefore, could never be legally exercised, was introduced into the instrument of Government. It does not appear that its necessity has ever been demonstrated. Still, that was one of the grounds on which Mr. H. B. Higgins asked the Convention of 1898 to adopt the section now under consideration.⁹

In stating that 'No logical or constitutional reasons have been stated why such a negation of power, which never had been granted and which, therefore, could never be legally exercised, was introduced into the instrument of Government', Quick and Garran have merely begged in advance what is fundamentally at issue between themselves and Higgins. When they further say, after having declared that 'It does not appear that its [the first amendment's] necessity has ever been demonstrated', that 'Still, that was one of the grounds on which Mr. H. B. Higgins asked the Convention of 1898 to adopt [Section 116]', their argument simply is mystifying. It is not at all clear what they regard this 'ground' of Higgins to be. Grammatically it would seem that the 'ground' which they attribute to Higgins, as one of his reasons for seeking to incorporate American first amendment provisions relating to religion into the Australian Constitution, was the 'necessity' of these provisions. But not only is this an odd reason, in the sense of question-begging; more fundamentally, it would seem that the 'ground' which they attribute to Higgin the debate.

At times Quick and Garran do not so much perpetrate a factual error as convey a misleading impression. After summarising Higgins's arguments in favour of including a provision that, as they somewhat inconsistently but accurately put it, 'clearly denied to the Federal Parliament' the 'power to deal with religion in any shape and form', Quick and Garran went on to say, but without further comment, that 'These arguments were allowed to prevail.'¹⁰ Well of course they were. But the unargued hint is that really they should not have been.

A final piece of misleading writing may be noted. Referring to the guarantee of religious liberty, 'A State shall not make any law prohibiting the free exercise of any religion', which was include din the draft federal Constitution handed down by the 1891 Convention, Quick and Garran remarked,

How such a clause crept into the Bill of 1891 it is difficult to conjecture. It was rejected without hesitation by the Convention of 1898, which saw no reason or necessity for interfering with the States in the free and unfettered exercise of their power over religion.¹¹

One may note the one-side rhetorical loading of such phrases as ‘crept into’, ‘rejected without hesitation’ and ‘no reason or necessity’. With regard to the actual question of why the religious liberty provision ‘crept into’ the Draft, J. A. La Nauze remarks briefly but aptly that ‘Inglis Clark could have told them’.¹²

The most pertinent feature of these errors and inexactitudes is not so much the carelessness they show – although that is food for thought – as the fact that they mislead, so to speak, in a single direction. The impression they collectively convey is that Higgins’s new clause was accepted for inexact and defective arguments, that it did not reflect a wide base of public feeling, and that, constitutionally speaking, there was something a little improper about it.

What positive interpretation do Quick and Garran provide of the meaning and scope of Section 116? They offer little explicit commentary on the provision relating to religious observances. Concerning the ‘religious test’ provision, their most substantial point was that it was ‘of practical use and value’.¹³ With regard to the other two provisions, those relating respectively to the ‘establishment’, and to the ‘free exercise’ of religion, they made it clear that these provisions were based on, and were essentially reproductions of, the American first amendment.¹⁴ That is, Quick and Garran did not deduce from the slight terminological difference of the Australian from the American version any sort of distinctive Australian interpretation. Indeed, in this connection it is of interest to note that when Quick himself, in his 1896 *Digest of Federal Constitutions*, translated the American first amendment into legal English of the 1890s, he used words strikingly similar to those of Section 116. Congress, Quick then wrote, could pass ‘no law for establishing any religion’, and ‘no law prohibiting any religion’.¹⁵

How did Quick and Garran interpret the meaning and scope of the ‘free exercise’ provision? Briefly they took the view that it was only *opinions* and *beliefs* that strictly were made ‘free’, in the sense of being placed beyond the scope of Commonwealth legislation. Religious *actions* of an uncivil, inhuman or cruel nature could be regulated by the Commonwealth, if they were performed in connection with a subject about which the Commonwealth was empowered to legislate.¹⁶

Two crucial questions arise. Was this how the provision was understood by the United States Supreme Court? Was it the way it was understood by the Federal Convention? So far as the first question is concerned, there can be little doubt that Quick and Garran have accurately captured the Supreme Court’s interpretation at that time. That interpretation, it is generally agreed,¹⁷ was the one laid down in *Reynolds v United States* (1878) and *Davis v Beason* (1890).¹⁸ Quick and Garran cite both judgments. The most succinct statement of this interpretation is perhaps the following, from the Reynolds judgment: ‘Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.’¹⁹

However, the understanding of this provision by the Federal Convention was more complex. Symon, whose personal view was that belief should be free but that actions should not, had considered on 8 February that the ‘free exercise’ provision went beyond this, that it protected religious actions as well as religious opinions. However, by 2

March, perhaps having studied the American judgments, he became convinced that it protected only opinions. Barton, in both debates, although certainly aware of the American decisions, took the view that nevertheless the 'free exercise' provision might prevent any legislature from regulating religious *acts* of a cruel or inhuman nature. Higgins said little on this point but may have agreed with Barton as to the scope (although disagreeing with him as to the desirability) of the 'free exercise' provision. Inglis Clark, who was not a member of the 1897-8 Convention, was nevertheless in a certain sense part of this particular debate, for the actual words 'for prohibiting the free exercise of any religion' came originally from the draft Constitution he submitted to the 1891 Federal Convention. Furthermore, in an 1897 memorandum to the Convention, to accompany the amendments suggested by the Tasmanian legislature, Clark defined what *he* regarded as the meaning of this provision. In his view, equality was the key:

In its present form Section 109 secures religious equality for all the citizens of a State, so far as it prevents the State from placing the adherents of any form of religion under any disadvantage or restriction in the exercise of it in comparison with adherents of other forms of religion...²⁰

While Clark's 'equality of State-imposed disadvantages' interpretation was not actually cited in either the 7 or 8 February, or 2 March, debates, it may still have represented the position of some of the delegates, especially the Tasmanian ones.

Of course, it does not follow from the fact that such differences of interpretation existed among the delegates, that any of them thought that what they were advancing was anything other than what the American 'free exercise' provision *really* meant. Some may have, but in view of the general familiarity of many of the legally trained delegates with American judicial interpretation, it is more likely that some of them thought, as indeed the United States Supreme Court today thinks, that the interpretation of this provision in the *Reynolds v United States* and *Davis v Beason* judgments simply was wrong. One may note the familiarity verging on contempt with which Barton analysed the argument of the Supreme Court in *Church of the Holy Trinity v United States*.²¹

One can conclude that Quick and Garran's interpretation of the meaning and scope of the 'free exercise' clause, while skirting some of the complexities, was nevertheless broadly defensible. However, this is more than can be said about their interpretation of the meaning and scope of the 'no establishment' provision. Their interpretation of this provision is based on the following definition of the 'establishment' of religion:

By [this] is meant the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others. It is not intended to prohibit the Federal Government from recognising religion or religious worship. The Christian religion is, in most English speaking countries, recognised as a part of the common law.²²

The same two questions arise as before. Firstly, was this the conception of establishment that, at the time, the Supreme Court of the United States understood to be prohibited by the 'no establishment' provision? Secondly, was this the conception of establishment that the members of the Federal Convention thought they were prohibiting?

Before considering these two questions, it will be useful to say something about the variety of senses the term 'establishment' could at that time carry in English-speaking courts. Three fairly distinct senses can be identified, which may conveniently be termed the 'strict separationist', the 'non-preferential' and the 'English'. Broadly, the difference was as follows. In the 'strict separationist' sense of 'establishment', a law could be

said to ‘establish’ religion if it did one or more of the following things: declared or assumed or prescribed adherence to any doctrine of any or every church; conferred public office as of right on any officer of any or every church; financed the charitable or educational institutions of any or every church; paid the salaries of the officers of any or every church; or subsidised the erection of any building of any or every church. To do any of these things was, in the ‘strict separationist’ sense, to ‘establish’ a religion. In the non-preferential sense, a law could be said to ‘establish’ religion if it produced any of the foregoing results with respect to some but *not* all churches. In the English sense, a law could be said to ‘establish’ religion, if it conferred on any church, in a substantial way, the kind of legal and financial privileges that the Church of England in the eighteenth and nineteenth century *did* enjoy, but that other English churches of that time did *not*.

What then, at about this time, did the United States Supreme Court deem to be prohibited by the ‘no establishment’ clause? In what sense, or senses, that is, did it understand the term ‘establishment’? Quick and Garran clearly take the view that it was the ‘no preference’ view which prevailed in the United States Supreme Court. That is, Congress was permitted, if it wished, to assist religion in any way, so long as it did so non-preferentially. But was that really the Court’s position? Three judgments are relevant. Two of them Quick and Garran could and did notice: *Reynolds v United States* (1878) and *Bradfield v Roberts* (1899). The third, *Quick Bear v Leupp* (1908), was handed down a few years after they wrote.

Quick and Garran noticed the relevance of *Reynolds v United States* for the interpretation of the ‘free exercise’ provision. However, they did not mention that this judgment was in the 1890s the *locus classicus* for the Supreme Court’s interpretation of the ‘no establishment’ provision. In that judgment the Court accepted, ‘almost as an authoritative declaration of the scope and effect’ of the ‘no establishment’ provision, the following statement made by Thomas Jefferson, while president, to the Danbury Baptist Association:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith and worship; that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declares that their Legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof’, thus building a wall of separation between Church and State.²³

Plainly, in adopting Jefferson’s ‘wall of separation’ doctrine, the Court here was opting for the strict separationist rather than the no-preference or English interpretation of the scope of the ‘no establishment’ provision.

The majority judgment in *Bradfield v Roberts* (1899) involved a more complex interpretation of the ‘no establishment’ provision. In 1897 Congress appropriated \$30,000 for the erection of two buildings in the District of Columbia to be used for the benefit of poor patients. The commissioners of the district contracted to construct a building on the grounds of the Providence Hospital Corporation, a corporation chartered by Congress but consisting entirely of Catholic Sisters of Charity. This action by the federal government was challenged in the Supreme Court on the basis that it violated the ‘no establishment’ provision of the first amendment.

The court held that the district commissioners’ contract with the Providence Hospital Corporation was not in violation of the first amendment. Although the hospital was

conducted under the auspices of the Roman Catholic church and was staffed by the Catholic Sisters of Charity, the charter of its incorporation was a purely secular one.

Assuming that the hospital is a private eleemosynary corporation, the fact that its members... are members of a monastic order or sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial, as is also the allegation regarding the title to its property... The facts... do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organisation, or of no organisation at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into.

Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation, which is incorporated under an act of Congress, and its powers, duties and character are to be solely measured by the charter under which it alone has any legal existence.

There is no allegation that its hospital work is confined to members of that church, or that in its management the hospital has been conducted so as to violate this charter in the smallest degree. It is simply the case of a secular corporation being managed by people who hold the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists...²⁴

Once more the court upheld a strict separationist viewpoint. Quick and Garran, citing this case, remarked only that 'An appropriation of money to a hospital conducted by a Roman Catholic sisterhood is not a law respecting an establishment of religion', thereby altogether overlooking the nuance of the actual judgment.

It is relevant, too, to note in passing that at this time Congress, no less than the Supreme Court, was committed to theoretically strict separationism. In 1897 Congress included in its Appropriation Act for the District of Columbia a statement declaring it

To be the policy of the Government of the United States to make no appropriation of money or property for the purpose of founding, maintaining or aiding by payment for services, expense, or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control.²⁵

The third relevant Supreme Court judgment, *Quick Bear v Leupp* (1908), also related to an alleged breach of the 'no establishment' provision. Certain treaty funds, held by the federal government as trustee, had been paid to the Bureau of Catholic Indian Missions as the designation of the Indians to cover the cost of their tuition. The court held these payments to be constitutional, since they came strictly speaking from private and not public funds. However, had the payments come from public funds, it is clear the Court would have taken a different view:

But it is contended that the spirit of the Constitution requires that the declaration of policy that the government shall make no appropriation whatever for education in any sectarian schools should be treated as applicable on the grounds that the actions of the United States were always to be undenominational and that, therefore, the Government can never act in a sectarian capacity, either in the use of its own funds or in that of the funds of others, in respect of which it is the trustee; hence that

even the Sioux trust fund cannot be applied for education in Catholic schools, even though the owners of the fund so desire it. But we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof.²⁶

Again, it is the strict separationist viewpoint which was held by the Supreme Court.

From this brief survey it is clear that Quick and Garran were at variance with the facts in suggesting that the United States Supreme Court interpreted the 'no establishment' provision on 'no preference' lines. Before turning to the question of which interpretation one should attribute to the Federal Convention, it would be appropriate to say something about the source of Quick and Garran's error.

What happened was that Quick and Garran linked themselves completely, and without qualifications, to an earlier 'no preference' stream of interpretation in American jurisprudence. Mainly under the influence of Judge Story, the Supreme Court in the first half of the nineteenth century had moved some way, in *Terret v Taylor* (1815) and *Vidal v Girard's Executors* (1844),²⁷ towards adopting the 'no preference' interpretation of the first amendment. According to Story, in his 1833 *Commentaries on the Constitution*,

Every American colony, from its foundation down to the Revolution, with the exception of Rhode Island, if, indeed, that state be an exception, did openly, by the whole course of its laws and institutions, support and sustain in some form the Christian religion, and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the States down to the present period without the slightest suspicion that it was against the principles of public law or republican liberty... Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of State policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation... The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to an hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution (the vice and pest of former ages), or the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.²⁸

In *Vidal v Girard's Executors* he declared further that 'the Christian religion is part of the common law'.²⁹

A recent historian, R. E. Morgan, himself a firm supporter of the *idea* of the 'no-preference' interpretation, found himself constrained to remark that 'the most interesting thing' about Story's viewpoint was 'its aberrational quality... [I]t never led anywhere.' He continued,

Could later accommodationists have marshalled sufficient support in courts or legislature for their plans of supportive co-operation between governments and the churches in America, it would have been perfectly possible to reach back to Story for historical support. This has not been done, however, and the Story approach sits high and dry, out of the mainstream of American constitutional law.³⁰

Yet it never did sit completely high and dry. In the latter half of the nineteenth century it was vigorously advocated by Thomas Cooley, in his *Principles of Constitutional Law*. Cooley not only asserted that 'the Christian religion was always recognised in the

administration of the common law', but defined the 'establishment of religion' as 'the setting up or recognition of a State church, or at least the conferring upon one church of special favours and advantages which are denied to others.'³¹ This, almost word for word, was the definition offered by Quick and Garran. So on can see *what* Quick and Garran have done, if not necessarily why. That question will be taken up later

As to whether the members of the Federal Convention interpreted the 'no establishment' provision in Quick and Garran's 'no preference' way, it is clear that they did not. In the debate on 2 March, as the analysis of the preceding chapter makes clear, the 'no establishment' provision was uniformly regarded as securing the complete non-involvement of the Commonwealth in religious matters.

In gauging what the delegates thought, one can add to an analysis of the views they expressed a consideration of what they read. La Nauze, in *The Making of the Australian Constitution*, has stated in connection with James Bryce's *The American Commonwealth* (1888), that

In the years ahead [of 1890] the cleverest and the dullest of the men of the Conventions would quote Bryce to add weight to their words. The Americans themselves regarded that book highly; it taught them a lot about themselves; but to them a federal system was 'natural'. Most Australians, for all the rhetoric about union, really knew little about the technicalities of federation and the mysteries of divided sovereignty. *The American Commonwealth* might have been deliberately written for their instruction. It is again Deakin who speaks, but nearly seven years later: 'An Authority, to whom we have often referred since 1890, an authority to whom our indebtedness is almost incalculable, is the Hon. Mr Bryce.'³²

What, then, did Bryce say on Church-State and Religion-State issues in the United States? 'No voice', he wrote,

has ever since been raised in favour of reverting – I will not say, to a State establishment of religion – but even to any State endowments, or State regulation of ecclesiastical bodies. It is accepted as an axiom by all Americans that the civil power ought to be not only neutral and impartial as between different forms of faith, but ought to leave these matters entirely on one side, regarding them no more than it regards the artistic or literary pursuits of the citizens. There seems to be no two opinions on the subject in the United States.³³

Bryce of course was not referring only, or even mainly, to American jurisprudence. Nor obviously, in the last sentence, did he mean to be understood in a strictly literal way. But the implication is clearly that the legal consensus of the time was of the 'strict separationist' kind.

One must conclude that Quick and Garran's interpretation of the meaning and scope of the 'no establishment' provision, in both the United States Supreme Court of that time and the Federal Convention, is on the evidence indefensible. In respect to both, Quick and Garran have flown in the face of a massively consistent body of evidence.

But how could they have made such a mistake? Both were present during the Federal Convention – Quick as a Victorian delegate, and Garran initially as Reid's secretary and later as assistant to the drafting committee.³⁴ Each without doubt was in an excellent position to know what happened. Indeed that probably is the main reason why their rhetorically forceful analysis has stood virtually unchallenged for so long. It is true that each – but especially, or at any rate more evidently, Quick, - was at the time firmly opposed to the line Higgins took in proposing Section 116. Garran, in *The Coming Commonwealth*, published shortly before the Convention met at Adelaide in 1897,

expressed considerable doubt as to whether a religious liberty provision, such as that contained in the 1891 draft, was ‘necessary’.³⁵ Quick voted against Higgins’s new clause. Yet what is hard to understand is their hostility towards Higgins and towards the viewpoint he represented. Especially one should ask this of Quick, since patently the style and tone of the commentary on the ‘recognition’ amendment, and on Section 116, was Quick’s rather than Garran’s.

It probably is relevant that Quick was a ‘loyal Methodist’³⁶ and that from an early stage he was associated with the ‘recognition’ movement. In his 1896 *Digest of Federal Constitutions* he reproduced a ‘patriotic and stirring’ poem written by ‘Wm. Gay, the Bendigo poet’, which began,

From all divisions let our land be free,
For God has made us one.

and which, after indicting Australians-in-general for their greed, pettiness, and dividedness, concluded,

O let us rise, united, penitent,
And be one people, - mighty, serving God.³⁷

At the Bathurst Convention Quick had been one of the supporters of Gosman’s ‘recognition’ motion. In the constitutional committee at Adelaide it was Quick who proposed a ‘recognition’ clause.

It is likely that Quick personally felt strongly about the religious side of federation. This strength of feeling may very well be a key not only to the distinct animosity shown to Higgins, but also to the *Annotated Constitution*’s advocacy of the ‘no preference’ interpretation. That, after the Melbourne Convention, Higgins became perhaps leading the leading Victorian campaigner against the Federation Bill, may be another key. A clear possibility, suggested by Quick’s equivocal discussion on 2 March of Glynn’s recognition proposal, is that Quick hoped that the insertion of a ‘recognition’ clause would enable the Commonwealth eventually to aid religion in a substantial although non-preferential way. Perhaps, having lost the debate, Quick in the *Annotated Constitution* was hoping still to win the interpretation. That is, in precisely the same way in which the National Scripture Education League was striving to interpret the ‘secularity’ provision of the 1872 Victorian Education Act to mean that state schools should be non-denominational, rather than exclude religion altogether, so Quick was striving to interpret the ‘no establishment’ provision to mean, not strict separation, but merely that preferential assistance to denominations was prohibited. Indeed the two moves were so similar conceptually and rhetorically, and the former, in church circles at any rate, so intellectually respectable, that it is not implausible to suggest that Quick knew quite well what he was doing, and thought it morally and intellectually defensible.

However this analysis of motives, while circumstantially plausible, remains speculative. What does nevertheless stand out, as beyond reasonable doubt, is that Quick and Garran’s analysis of the scope and meaning of Section 116, especially of the ‘no establishment’ provision, is so often shot through with mis-statement and tendentious rhetoric that from the point of view of understanding the original meaning of this section of the Constitution it simply should be disregarded.