

36. In *Church of the New Faith v The Commissioner for Payroll Tax* (1983) 154 CLR 120 (High Court of Australia), that Court concluded that, according to a contemporary definition, Scientology is a religion. Three judgments were given by the Court: a joint judgment of Mason ACJ and Brennan J, a judgment by Murphy J, and a joint judgment by Wilson and Deane JJ. The essential parts of these judgments were as follows:

i The question before the High Court as stated in the joint opinion of Mason ACJ and Brennan J was whether it should give special leave for the following issue to be argued:

"whether the beliefs, practices and observances which were established by the affidavits and oral evidence as the set of beliefs, practices and observances accepted by Scientologists are properly to be described as a religion?" (Page 130).

ii Mason ACJ and Brennan J (at page 130) stated that leave should be given for this issue to be considered because of the legal importance of the concept of religion and the paucity of Australian legal authority on the subject. As Mason ACJ and Brennan J explained:

"... Freedom of religion, the paradigm freedom of conscience, is the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s.116 of the Constitution and identifies the subject matters which other laws are presumed not to affect. Religion is thus a concept of fundamental importance to the law. Moreover, although this case does not arise under s.116 of the Constitution or under any part of the fourfold guarantee of religious freedom, it is inevitable that the judgments in the Supreme Court, so long as they stand without consideration by this Court, will influence the construction placed upon s.116 of the Constitution by other Australian Courts."

iii At pages 131-132, Mason ACJ and Brennan J observed that the guarantee of freedom of religion would be subverted if religion were defined so as to exclude from its ambit minority religions out of the main streams of religious thought: "... minority religions - not well established and accepted - stand in need of especial protection."

iv At pages 132-133, consideration is given to literature in the field of comparative religion and the difficulties of identifying the common indicia of all religions. Mason ACJ and Brennan J, however, concluded that this was not necessary since the "... relevant enquiry is to ascertain what is meant by religion as an area of legal freedom or immunity, and that enquiry looks to those essential indicia of religion which attract that freedom or immunity. It is in truth an enquiry into legal policy." (Page 133).

v At page 140, Mason ACJ and Brennan J rejected the theistic test suggested in England in *Segerdal* and *South Place Ethical Society* [1980] 1 WLR 1565 (ChD), noting that the 1855 Act in issue in *Segerdal*, by referring to "worship", probably intended to refer to theistic religions.

vi At page 143 it was found that Scientology involved belief in supernatural principles, if not a Supreme Being. Mason ACJ and Brennan J therefore concluded (at page 148) that Scientology was a religion as that term was properly defined:

"... there is no doubt that a belief in the transmigration of or infinite reincarnation of thetans is a belief in a supernatural principle. That belief does not require a concomitant belief in a Supreme Being before it qualifies as a religious belief. It is akin to the beliefs of Buddhism from which a large part of Mr Hubbard's ideas are said to be derived ..." (Page 143).

vii In a separate judgment Murphy J concluded that Scientology had "easily discharged the onus of showing that it is religious" (page 162). At page 154 he observed that:

"Most religions have a god or gods as the object of worship or reverence. However, many of the great religions have no belief in God or a Supreme Being in the sense of a personal deity rather than an abstract principle. Theravadan Buddhism, the Samkhya school of Hinduism and Taoism are notable examples ..."

viii Murphy J explained at page 156 that Courts do not assess the legitimacy or value of beliefs because:

"... the scriptures or writings of most religions are about the supernatural, mysteries and psychic events, as well as of often obsolescent theories about nature, they are frequently contradictory ... Ambiguities, obscurities and contradictions are found in holy books of many other religions. Religious language is frequently deliberately obscure and symbolic so as to hide mysteries from the uninitiated and communicate effectively with the unconscious mind ..."

ix In a separate joint judgment, Wilson and Deane JJ stated that the word "religion" was not susceptible to the type of definition which would enable the question whether a particular system of beliefs and practices is a religion to be determined by the use of syllogism or formal logic (page 171). They observed, however, of the requirements of belief in a Supreme Being which had been identified by the Court below and which were not shared by Buddhists and Jains:

"... For the purposes of ordinary statutory construction in present day Australia however, we are unable to accept, as an essential element of "a religion", a characteristic which is, even arguably, not possessed by one or more of what are generally accepted as leading religions" (page 173).

x Wilson and Deane JJ set out at page 174 a non-comprehensive list of indicia of religion which they held, at pages 176-177, to be satisfied by Scientology:

"One of the more important indicia of a "religion" is that the particular collection of ideas and/or practices involves a belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has a "religion". Another is that the ideas relate to man's nature and place in

the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth and perhaps more controversial, indicium ... is that the adherents themselves see the collection of ideas and/or practices as constituting a religion."

37. The approach adopted by the High Court of Australia has been endorsed and applied without qualification in the High Court of New Zealand: *Centrepoint Growth Trust v CIR* [1985] 1 NZLR 678 (Tomplins J). If permission to apply for judicial review is granted the Claimants will invite the Court to adopt the reasoning of the Australian High Court in preference to the comments of the Court of Appeal in *Segerdal*. It should be noted that Scientology does in fact involve belief in a Supreme Being as described by Dr Wilson.
38. The Claimants seek permission to apply for judicial review to challenge the Policy. If permission is granted, the Court will be invited to hold that:
- 38.1 Scientology is a religion.
- 38.2 The Policy violated Mr Heaton's essential rights to manifest, worship, practise and observe Scientology as a religion under Article 9(1) of the Convention.
- 38.3 There was discrimination contrary to Article 14 on grounds of religion against Mr Heaton and Reverend Pady and the Church of Scientology.
- 38.4 The Policy is ultra vires.
- 38.5 The Policy should be quashed.

DAVID PANNICK QC

PUSHPINDER SAINI