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# THE CONSTITUTIONAL PROHIBITION ON RELIGIOUS TESTS

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*[Section 116 of the Australian Constitution sets out four important guarantees of religious freedom. The fourth clause of that section provides that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'. During the Convention Debates, the religious tests clause was described as being the least necessary clause of s 116 on the basis, first, that there were no remaining religious tests in the Australian colonies and, second, that it was outlandish to think that the Commonwealth would ever impose one. This article seeks to explore the meaning of the religious tests clause and refute those two suggestions. It seeks to show that at the time of Federation religious tests remained in the Australian colonies. It also seeks to show that the Commonwealth today, albeit unconstitutionally, requires the satisfaction of religious tests for certain public positions.]*

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## I INTRODUCTION

On 2 March 1898, Edmund Barton told delegates to the Constitutional Convention at Melbourne that in the Australian colonies 'we have wiped out every religious test'<sup>1</sup> and that 'it is not possible' that a religious test for a position of public trust would ever be required by the Commonwealth for which the Convention was drafting a constitution.<sup>2</sup> On both counts, the man who would become Australia's first Prime Minister and one of the first judges of the High Court of Australia was wrong. Not every religious test had been wiped out and the Commonwealth would in fact go on to require religious tests for public offices and positions of public trust. It still does.

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<sup>1</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1771 (Edmund Barton).

<sup>2</sup> *Ibid* 1772.

1829 referred to 'place[s] of trust or employment, relating to the government of any city, corporation, borough, burgh, or district'.<sup>185</sup> Thus, it might be said that a person holds a public trust if they exercise public or governmental functions.<sup>186</sup> The United States Supreme Court has also referred to notaries as holding an office of trust,<sup>187</sup> and police officers as holding a position of public trust.<sup>188</sup> And, as noted above, the first Members of the Executive Council in New South Wales were required to take 'the usual oath for the due execution of their ... trust'.<sup>189</sup>

#### VI WHEN IS AN OFFICE OR PUBLIC TRUST UNDER THE COMMONWEALTH?

The final matter for analysis is consideration of when an office or public trust is 'under the Commonwealth'. In most cases, the analysis should be straightforward. Commonwealth officials hold their office under the Commonwealth. Thus, chaplains of the Australian Defence Force hold an office under the Commonwealth.

The proposition that the parliamentary presiding officers each hold an office under the Commonwealth should be uncomplicated. However, certain provisions of the *United States Constitution* might be read as suggesting otherwise. The *United States Constitution* describes the Speaker of the House of Representatives, who is a Member of Congress, as one of its '[o]fficers'.<sup>190</sup> But the *United States Constitution* also provides: 'and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office'.<sup>191</sup> The only immediately apparent way of reconciling those two provisions would be to say that whilst the Speaker holds an office it is not one 'under the United States'.<sup>192</sup> Those provisions also suggest that Members of Congress do not hold an office under the United States. Nonetheless, *Crittenden v Anderson* considered it as given that Members of the Commonwealth Parliament hold their office and/or public trust under the Commonwealth. Since the parliamen-

<sup>185</sup> 10 Geo 4, c 7, s 19. A similar expression is found in the *Corporations Act 1661*, 13 Car 2, c 1, s 4.

<sup>186</sup> See also *Tito v Waddell [No 2]* [1977] Ch 106; *Dixon v United States*, 465 US 482 (1984); *R v Boston* (1923) 33 CLR 386, 405–12 (Higgins J).

<sup>187</sup> *Torcaso v Watkins*, 367 US 488, 490 (Black J for Warren CJ, Black, Douglas, Clark, Brennan, Whittaker and Stewart JJ) (1961). In addition, overseers of the poor and the highways have been described by counsel as holding places of public trust in argument before the Supreme Court: *Trustees of Dartmouth College v Woodward*, 17 US 518, 611 (Marshall CJ for the Court) (1819).

<sup>188</sup> *Gilbert v Homar*, 520 US 924, 932 (Scalia J for Rehnquist CJ, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer JJ) (1997).

<sup>189</sup> 'Governor Darling's Commission' in Library Committee of the Commonwealth Parliament, *Historical Records of Australia: Series I — Governors' Despatches to and from England* (1922) vol 12, 99, 101.

<sup>190</sup> *United States Constitution* art I § 2.

<sup>191</sup> *Ibid* art I § 6.

<sup>192</sup> See generally Seth Barrett Tillman, 'Interpreting Precise Constitutional Text: The Argument for a "New" Interpretation of the Incompatibility Clause, the Removal and Disqualification Clause, and the Religious Test Clause — A Response to Professor Josh Chafetz's *Impeachment and Assassination*' (Working Paper, Faculty of Law, National University of Ireland, 2011) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1622441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622441)>.