CHURCH OF THE NEW FAITH v. COMMISSIONER FOR PAY-ROLL TAX[1]

[Exemption of a 'religious institution' from Pay-roll tax — Whether scientology a 'religion' — Whether rights of a body practising unlawful activity are legally enforceable — Use of expert evidence to interpret an Act of Parliament.]

INTRODUCTION

Although Australia as a nation lacks its own Bill of Rights, there are certain fundamental freedoms set out in the Federal Constitution. Section 116 of the Constitution expressly precludes the legislature from making any law to establish a religion, to enforce any religious observance or to prohibit the exercise of any religion. Further to this basic right to freedom of religious persuasion, there exists a range of fiscal concessions in the various tax and revenue Acts around Australia for 'religious institutions'. Provided a body has the necessary characteristics to be classified as 'religious', it can save substantial amounts of pay-roll tax, land tax, stamp duty and other fees and charges imposed at the State and Commonwealth level.

The precise guidelines to be applied to organizations which are on the border-line between being *bona fide* religious organisations and being something else have been elusive at best, probably because the assessment of the beliefs and activities of men by other men is such a subjective exercise. There have been few bodies in recent times which have caused as much controversy in this regard as Lafayette Ron Hubbard's Church of Scientology. This body was founded in 1952 in England by an American, L. R. Hubbard,[2] and later spread to the United States and Australia. The literature promulgated by the organization consists of books, pamphlets and monographs written by Lafayette Ron Hubbard, although the authorship of a number of more recent publications is disputed. In addition to spreading its message through literature, the Association has been involved in the use of a number of psychological practices. The most important of these is the use of the E-meter (electropsychometer) to detect and monitor emotional reactions. Following the rapid establishment of scientology in Victoria in the early 1960's the practices of the association came under the scrutiny of the Bolte government, which appointed a Board of Enquiry in November 1963 to investigate the practice of scientology. A report was tabled in State Parliament in September 1965 which totally condemned the activities of the organization: in particular the psychological techniques used on the members of the scientology movement. In late 1965 the Psychological Practices Act was passed with the object of preventing the practice of certain psychological activities by unregistered persons. In particular, section 30 prohibited the use of E-meters by unregistered persons and section 31 prohibited the practice or teaching of scientology for reward.[3] Scientology was defined in Section 31(2) as meaning:

> the system or purported system of the study of knowledge and human behaviour advocated in the writings of Lafayette Ron Hubbard and disseminated by the Hubbard Association of Scientologists International . . . and includes any system or purported system associated with or derived from the same and the system or purported system known as dianetics.

Prior to 1969 the scientologists practised under the name of the Hubbard Association of Scientologists, becoming incorporated in that year in South Australia as the 'Church of the New Faith Incorporated'. This company was registered as a foreign company in Victoria under this name. In 1975 the Corporation changed its name in South Australia to the 'Church of Scientology Incorporated'. This

[1] [1983] V.R. 97. An appeal against this decision was made to the High Court. In a decision handed down on 27 October 1983, the High Court allowed the appeal, and did not adopt the Victorian Supreme Court's views on the meaning of 'religion'. This appeal will be the subject of a further analysis by Mr Darian-Smith in the next issue of the Review ((1984) 14 *M.U.L.R.*).

[2] Controversy has raged for nearly five years as to whether L. R. Hubbard is in fact dead or alive. The running of the Church of Scientology has been left solely in the hands of 'disciples' for a considerable period of time and this has in turn led to considerable internal fighting between certain factions within the Church.

[3] Sections 30-32 of the Psychological Practices Act 1965 (Vic.) were repealed by Act No. 9736 of 1982, the Psychological Practices (Scientology) Act.

name change was not recognised by the Commissioner for Corporate Affairs in Victoria and was never registered.

The current action came about in 1977 when the Church of the New Faith applied for an exemption from having to pay pay-roll tax on the basis that it was a 'religious institution' for the purposes of section 10(b) of the Pay-roll Tax Act 1971 (Vic.). That provision exempts any 'religious institution' from liability for pay-roll tax. The application for exemption was rejected by the Commissioner for Pay-roll Tax on the principal ground that the Church of the New Faith Inc. was not a 'religious institution'. After the objection of the scientologists was rejected by the Commissioner, the matter was referred to the Victorian Supreme Court for resolution.[4]

THE TRIAL DECISION

For Crockett J., hearing this action at the trial level, the question to be decided was simply one of whether the Church of the New Faith Inc. was a 'religious institution'. His Honour conceded that the plaintiff company was clearly an institution but that simply because it chose to call itself a church it was not automatically 'religious' in character.

The two fundamental problems for Crockett J.'s purpose were firstly that the scientologists had not always called themselves a church[5] and secondly that in more than one place in their own literature they expressly rejected the notion that scientology was a religion.[6] His Honour explored the period before 1969 when the scientologists still called themselves the Hubbard Association of Scientologists International, a name which his Honour observed 'has a peculiarly secular ring about it'.[7] He went on to quote from *Testing*, a magazine produced by the scientologists in Melbourne in the early 1960's, in the following terms:

> 'H.A.S.I. is non-religious — it does not demand any belief or faith nor is it in conflict with faith. People of all faiths use Scientology.'[8]

It is unquestionably the case that a metamorphosis came over the H.A.S.I.'s literature and activities in the period immediately after the passage of the Psychological Practices Act 1965. Part of the catalysis of this change can be seen in the exemption given from the operation of the Psychological Practices Act to 'anything done by any person who is a priest or minister of a recognized religion in accordance with the usual practise of that religion'.[9] 'Recognised religion' was defined to mean a religion whose ministers or members were authorised to celebrate marriages under the Marriages Act 1961-1966 (Cth), or which was officially recognized by the Governor in Council by a proclamation published in the Government Gazette.[10] Thus it was that recognition of scientology as an acceptable religion became the goal of the H.A.S.I. in the decade after 1965.

The elaborate process by which the outward trappings and literature of the organization were changed was carefully documented by Crockett J. His Honour observed that the symbolism and ritual of the association 'took on many of the characteristics of a Christian denomination'[11] and that simultaneously:

> the essentially secular philosophy in which scientology was embedded had to be, and was, reinterpreted (if not re-written) in terms of a theological philosophy.[12]

Almost overnight, scientolgists had adopted christening, marriage and funerary ceremonies, commenced Sunday 'worship' and even began to call the E-meter a religious 'artifact' to be used in 'the Church confessional'. The organisation was promoted as being 'non-profit' and many of the original

[4] Heard at the trial level by Crockett J. on 20, 21, 24-27 November 1980 and 18 December 1980.
[5] [1983] V.R. 97, 99.
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] Psychological Practices Act 1965 (Vic.), s. 2(3)
[10] *Ibid.* s. 2(4).
[11] [1983] V.R. 97, 101.
[12] *Ibid.*

works of L. Ron Hubbard were rewritten to give further credence to the apparently conventional religious activity in which the organisation was thenceforth engaging.

This 'grotesque parody of Christianity' could be traced back to a 1959 scientology publication entitled *Ceremonies of the Founding Church of Scientology*. The booklet was produced in America at that time ostensibly to support the application of the scientologists in the U.S.A. to have their organization incorporated as a church. Crockett J. explained that no necessity to follow suit arose in Australia until the activities of scientologists were proscribed by the Victorian Government. What happened from 1966 onwards was thus a completely cynical manipulation of the organization's activities in order to achieve the protection of section 116 of the Constitution. Crockett J. said[13] that the leaders of the scientology movement in Australia could be taken to be familiar with the judgment of Latham C.J. in the *Jehovah's Witnesses* case,[14] in which the Chief Justice had expressly declared that section 116 of the Constitution existed to protect the minority believer from any form of persecution.[15] His Honour was satisfied that the evidence presented to the Court had demonstrated 'that the ecclesiastical appearance now assumed by the organization was no more than colourable in order to serve an ulterior purpose'.[16]

His Honour went on to consider the approaches of the English courts to scientology in *R. v. Registrar General; ex parte Segerdal*.[17] Lord Denning M.R. was quoted at length and his conclusion, namely that scientology was not a religion but 'a philosophy of the existence of man or of life',[18] noted with interest. Crockett J. commented on the effect of the *Segerdal* decision:

> Again, with characteristic adaptability the organization, obviously with the opinions of the Court of Appeal in mind, has subsequent to that decision introduced into its services reverential references to a deity referred to as the author of the universe or supreme being . . .[19]

As if that was not enough, prayers were introduced to the organization's activities and the original writings of L. R. Hubbard were glossed over or abandoned altogether.

Paradoxically, the radical changes made were successful in gaining an exemption from pay-roll tax in South Australia,[20] Western Australia,[21] and New South Wales,[22] and from income tax in the Australian Capital Territory.[23] Senator Lionel Murphy (as he then was) also improved the plaintiff's position by declaring it a 'recognised denomination' under section 26 of the Marriage Act 1961-1966 (Cth) for the purpose of celebrating marriages. Crockett J. observed that these were purely administrative decisions and did not help resolve the issue at hand. The available Australian authority afforded little further assistance in deciding whether scientology was a religion and his Honour concluded that the religious trappings of the Church of the New Faith were nothing more than a 'sham'.[24] The ceremonies it practised were nothing more than a 'mockery' of conventional religion and led to the following conclusions:

> Thus scientology as now practised is in reality the antithesis of a religion. The very adroitness — and alacrity — with which the tenets or structure were from time to time so cynically adapted to meet a deficiency thought to operate in detraction of the claim to classification as a religion serve to rob the movement of that sincerity and integrity that must be cardinal features of any religious faith.[25]

Having disposed of the post-1965 activities of the scientologists for the 'chicanery' which they clearly were, his Honour still had to determine that scientology had not been a religion prior to 1965 as

[13] *Ibid.* 103.
[14] *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 C.L.R. 116.
[15] (1943) 67 C.L.R. 116, 124.
[16] [1983] V.R. 97, 103.
[17] The decision of Ashworth J. in the Divisional Court [1970] 1 Q.B. 430; and of the Court of Appeal [1970] 2 Q.B. 697.
[18] [1970] 2 Q.B. 697, 707.
[19] [1983] V.R. 97, 106.
[20] On 14 January 1975.
[21] On 3 February 1975.
[22] On 22 March 1977.
[23] An exemption granted by the Deputy Federal Commissioner of Taxation.
[24] [1983] V.R. 97, 108.
[25] *Ibid.* 109.

well. If it had been a religion then, the protection of section 116 of the Constitution applied. Upon canvassing the authorities,[26] his Honour concluded that the common denominator of these decisions, and all standard dictionary definitions of 'religion', was that:

> as religion is essentially a dynamic relation between man and a non-human or superhuman being, it can never dispense with a higher form of knowledge which is concerned not with the human subject but with the divine object.[27]

As none of the evidence showed that scientology was based upon the sort of dynamic relationship between man and god that 'religion' seemed to require, no basis existed upon which the Church of New Faith could be classified as a 'religious institution'. Crockett J. conceded that some of the present adherents of scientological thought might believe they were practising religious belief but that fact was irrelevant to the issue as '[g]ullibility cannot convert something from what it is to something which it is not'.[28]

The Church of the New Faith appealed from this decision to the Full Court of the Victorian Supreme Court.

THE FULL COURT DECISION

The appellant did not succeed in having the decision of Crockett J. reversed on any point it raised. The chief importance of the Full Court decision lies in the way the various judgments broadly addressed themselves to a number of key issues.

(a) The Meaning of 'Religion'

Chief Justice Young was the only member of the Court who carefully analysed the corporate constitution of the Church of the New Faith. The reason he did this was to establish whether the Church of the New Faith was even an 'institution', for the purpose of the Pay-roll Tax Act 1971. His Honour decided that an association incorporated and registered in Victoria as a foreign company did come within a broad view of the meaning of institution.

His Honour then sought a definition of scientology, a word which was not 'to be found in any reputable dictionary',[29] and discovered that the scientologists themselves had defined it in early literature of the H.A.S.I. as being the 'study of knowledge'. His Honour tried to establish some pattern of consistency in the basic definition through the various publications of the H.A.S.I. He found the 20 'scientology' publications to be couched in obscure, confusing and contradictory terms. Such confusion was deliberate in his Honour's view and he added that 'one of the reasons for writing in this way is that it permits an explanation of the functions or purposes of the organization to be trimmed to whatever advantage is sought or can be obtained'.[30]

Interestingly enough, one publication, *The Scientology Religion*, contained a passage which attempted to define 'religion' in general terms and then claimed all of those characteristics for scientology. This publication was originally published in 1954 and the edition examined by the Court was dated 1974. By way of contrast his Honour cited passages in the publication *Testing* of April 1961 which expressly said scientology was non-religious.[31] The scientologists claimed that considerable 'evolution' of their philosophy had occurred over a 25 year period, necessitating the insertion of adhesive pages in some of the older publications. Invariably the additions and alterations were designed to give scientology the stamp of a 'religion'.

Young C.J. agreed with Crockett J. that if one had only the constitution of the Church of the New Faith Inc. and the publication *The Scientology Religion* to judge by, scientology was *prima facie* a religion. He noted that the trial judge had however concluded on the totality of the evidence that

[26] Including the *Jehovah's Witnesses case* (1943) 67 C.L.R. 116 (per Latham C.J. at 123-4); *Segerdal's case* [1970] 2 Q.B. 697; and *Barralet* v. *Attorney General* [1980] 3 All E.R. 918, 924.
[27] [1983] V.R. 97, 111.
[28] *Ibid.*
[29] *Ibid.* 115-6.
[30] *Ibid.*
[31] *Ibid.*

scientology as practised was a mockery of religion and the antithesis of religion.[32] His Honour was somewhat troubled by these conclusions unless some fuller explanation was provided.

> These conclusions may well be right and there is undoubtedly some basis for them in the evidence. Yet it seems to me that conclusions of that character, when applied to so amorphous a concept as religion, are difficult if not impossible to sustain without either forming an opinion upon the truth of the doctrines propounded or making an assessment of the sincerity with which the professed beliefs are held . . .[33]

His Honour said that it was not for a court to determine the truth of any particular religion, 'however grotesque, however absurd, however offensive it appears to be'. There was, however, a point where a court could 'say that a so-called religion is no more than a mockery'.[34] Precisely how to define a religion has always been an enigma for the courts except in the instance where what is being considered is clearly a 'sham'. Courts in Australia have been very careful not to impose restrictions on the operation of section 116 of the Constitution because, as Latham C.J. remarked in the *Jehovah's Witnesses Case*,[35] '[w]hat is religion to one is superstition to another'.[36]

Young C.J. observed that generally the courts had avoided having to give a generalized test for determining what constitutes a religion by confining themselves to the particular issue in dispute. However his Honour was drawn into an argument about defining religion in a broad sense by the heavy reliance of the appellant on the American case of *Malnak v. Yogi*,[37] in particular on the judgment of Circuit Judge Adams. That particular judgment had isolated three indicia (all present in familiar religions) by which an unfamiliar set of ideas could be examined to see if it was classifiable as a 'religion'.

The first of Judge Adams' indicia was the nature of the ideas. Did they deal with man's nature or his place in the Universe or other such fundamental questions? The second of the indicia was the comprehensiveness of the system of belief which answered these fundamental questions. A religion must have a broad scope and is not usually confined to the answering of one question. Indeed, a theory like the 'Big Bang' theory answers a fundamental question about the creation of the universe but does not of itself constitute a 'religion'. The third key element was whether there are 'any formal external, or surface signs that may be analogized to accepted religions'.[38] These external indications might include services, ceremonial functions and the existence of a hierarchy of clergy.

Young C.J. was critical of the reliance by the scientologists on these three indicia because they chose to ignore Judge Adams' warning that these things alone did not constitute a 'final' test for religion.[39] His Honour agreed that these three considerations were useful indications but added that there were additional factors which should also be examined. His Honour settled on a list of six considerations against which scientological ideas could be placed in order to determine if they were 'religious' in character. These were the three from *Malnak v. Yogi* and three others, yielding the following list:

1. The nature of the ideas.
2. Comprehensiveness.
3. The trappings.
4. Public acceptance.
5. Method of joining.
6. Commercialism.[40]

His Honour proceeded to assess the 'set of ideas' before him in terms of his six criteria. He began with the nature of the ideas, which was in his view the most important. The answering of this question

[32] *Ibid.* 119.
[33] *Ibid.*
[34] *Ibid.* His Honour cited as an example of a religion which was a mockery the Neo-American church in *United States v. Kuch* (1968) 288 F. Supp. 439 which purported to involve the ingestion of psychedelic drugs and which had 'Puff, the Magic Dragon' as its official song.
[35] (1943) 67 C.L.R. 116.
[36] *Ibid.* 123.
[37] (1979) 592 F. 2d. 197.
[38] Cited by Young C.J., [1983] V.R. 97, 122.
[39] (1979) 592 F. 2d. 197, 210.
[40] [1983] V.R. 97, 123-7.

was made difficult by the ambiguity and obscurity of many of the ideas and also that they had allegedly 'evolved' since the early days. His Honour reached the conclusion that ultimately scientology is 'more concerned with psychology than with ultimate truth'[41] and was therefore not entitled to be described as religion. In respect of comprehensiveness, scientology provided almost no guide to moral conduct and, in the absence of generalized answers to so-called 'ultimate' questions about mankind, could not be said to satisfy the second criterion either.[42] Turning to the services and outward ceremonial 'trappings' of scientology, Young C.J. concluded that the ceremonies currently practised by scientologists were not a part of the original organization created by L.R. Hubbard but were a later addition superimposed on those ideas.[43] For that reason the *bona fides* of those ceremonies were in doubt and very little weight could be placed on them.

Having concluded that the *Malnak v. Yogi* criteria were not met his Honour gave brief consideration to the three criteria he had added to the list. In looking at whether scientology had gained public acceptance as a religion in Victoria, Young C.J. said that any degree of administrative recognition in other States was no guide and that there was not sufficient recognition by the general public of scientology as religion to call it a religion.[44] Furthermore, the fact that a prospective member of the 'church' had to fill out an application form and pay not less than $5.00 was 'hardly what one would expect to find as the method of becoming a practising believer and suggests rather the joining of a voluntary association devoted to objects contained in the constitution'.[45] Finally his Honour briefly examined the extensive commercial uses to which the ideas of scientology were put, ranging from the marketing of counselling courses to the sale of E-meters to the public. In conclusion, the Chief Justice was clearly satisfied that scientology could not be classified as a religion.

Kaye J. was the other judge in the Full Court who gave some general consideration to the meaning of religion as it might apply in the context of section 10(b) of the Pay-roll Tax Act 1971. His Honour considered that religion was not a technical term and that it should be given its everyday meaning when it appeared in an Act of Parliament like the Pay-roll Tax Act.[46] Some guide to its everyday meaning could be obtained by referring to standard dictionaries[47] and to the decisions of the courts. The approach of the United States Supreme Court was briefly examined in the light of the leading case of *United States v. Seeger*[48] in which it was decided that the test of a 'religious' belief would be an objective one based upon the importance of the belief held to its holder. This clearly went further than any dictionary definition because it allowed any sincerely held belief which occupied an equivalent place in the life of the believer to the belief in God held by an orthodox Christian to be classifiable as 'religious'. His Honour declined to apply this form of test in Victoria and instead sought to formulate his own.

While agreeing in general terms with the judgment of the Chief Justice, Kaye J. did not expressly adopt the six guidelines proposed by Young C.J. Instead he characterized religious belief in the following terms:

> what distinguishes the belief or feelings with which a religion is concerned, and is fundamental to it, is the recognition of the existence of a superior or supernatural being or power with whom an individual has a personal relation and upon whom his own existence depends. The 'Superior or Supernatural Being or Power' may be referred to by the individual by any of a number of names, including Allah, God or Jehovah; but it is immaterial by what name the deity is known or called. Indeed, the superior being may be without name. Furthermore, it may not be a single identity; two or more gods may consitute the foundation of a man's belief. The belief or feeling of the individual in relation to the deity is a personal one; although he may recognize and respect that others have their own god, his relationship to his own deity is characterized by the belief that his is the true and only deity.[49]

[41] *Ibid.* 125.
[42] *Ibid.*
[43] *Ibid.* 126.
[44] *Ibid.*
[45] *Ibid.* 127.
[46] *Ibid.* 133.
[47] His Honour referred to the *Shorter Oxford English Dictionary, Webster's Third New International Dictionary*, and the Random House *Dictionary of English Language*.
[48] (1965) 380 U.S. 163.
[49] [1983] V.R. 97, 130.

Going back to pre-1965 scientology literature, his Honour found that repeated reference was made to the fact that scientology was non-religious, and that private religious belief was something upon which scientology did not impinge. Furthermore, upon an examination of the rules and Constitution of the Church of the New Faith, it was clear that they failed to disclose 'acknowledgment of a particular deity by all members of the Church of the New Faith or a relationship between all members with that deity'.[50] In short, there was not the exclusiveness of belief in a particular deity that characterizes recognized religions and nothing to stop each member from holding quite individual beliefs in different deities. For these reasons it was not possible to classify scientology as 'religion' and Kaye J. refused to disturb the trial judge's findings.

(b) Expert Testimony

In the course of the original trial Crockett J. had faced difficulties with so-called 'expert' evidence which purported to show that scientology was a religion. The evidence was tendered in affidavit form and his Honour had refused to admit it into evidence. One of the grounds upon which the scientologists appealed was that such evidence should have been admissible.

Chief Justice Young was the only Full Court judge to consider the 'expert' testimony issue and he was of the opinion that Crockett J. had done the right thing in rejecting the evidence.[51] The Chief Justice said that where the Court was considering the interpretation and application of legislation, 'expert' evidence could not be used to aid in this process. Indeed, even if the evidence was admissible it would be of little help in the present case, as religion was not a concept definable by an expert witness. In short, every man is his own expert on the question of religious belief. His Honour was also critical of the 'expert' evidence given because five of the six witnesses in question had had only the Constitution and general rules of the Church of the New Faith and only two of the 20 publications produced in court on which to base their testimony. When 'tendentious' documentation was used to support an opinion the court could not really give that evidence much weight at all,[52] irrespective of its admissibility under the rules of evidence.

(c) Whether Tax Exemption Available to Law-Breaker

Early in the Full Court hearing the issue was raised as to whether the appellant's claim to an exemption from the Pay-roll Tax Act 1971 (Vic.) might be founded on an illegality in that it was at that time contravening the Psychological Practices Act 1965 (Vic.). Young C.J.[53] and Kaye J.[54] chose not to deal with this issue at all in their judgments but Brooking J. devoted almost his entire opinion to this point.

The Commissioner for Pay-roll Tax had not at any stage sought to rely upon the Psychological Practices Act, but Brooking J. felt that the Court had a responsibility to look at the ramifications of the appellant's ongoing breaches of that Act. His Honour relied upon affidavit and *viva-voce* evidence to establish that by 1978 there were 12 ordained ministers of scientology in Victoria[55] and as many as five thousand members of the church by the time of the hearing. Furthermore, E-meters were frequently being used in blatant contravention of section 30 of the Psychological Practices Act. In its defence the Church of the New Faith sought always to rely on section 2(3) of the Act which exempted the priest or minister of a recognized religion from the operation of the Act. Although Crockett J. had already explored the position of scientology as a 'recognised religion'[56] in other States, it was clearly the case that no such protection existed in Victoria. Even if section 2(3) of the Act were applicable, Brooking J. observed that the following situation applied to any scientologists who were not 'priests' or 'ministers':

[50] *Ibid.* 134.
[51] See *Clark v. Ryan* (1960) 103 C.L.R. 486.
[52] [1983] V.R. 97, 129.
[53] *Ibid.* 128. The Chief Justice expressly refrained from considering this issue as he did not need to do so in order to reach his decision.
[54] *Ibid.* 136. His Honour did not consider the issue because the respondent had not sought to rely upon it in the appeal.
[55] *Ibid.* 137.
[56] For the purposes of s. 2(4) of the Psychological Practices Act.