THE STATUS OF CLERGY OF THE ANGLICAN CHURCH OF AUSTRALIA: EMPLOYEES OR OFFICE HOLDERS?

A minor thesis in fulfillment of the requirements for the degree of Master of Laws.


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STATEMENT OF AUTHORSHIP.

I certify that the attached document is my original work. Except where acknowledgement is made in the text, no other person's material has been used and none of the material has been presented by me for another qualification at the University of Melbourne or at any other institution.

Dated at Bendigo this 22nd day of April 1997.

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ABSTRACT.

The acceptance of the traditional view that clergy are the holders of an office has been the subject of challenge over past years and is increasingly being challenged nowadays. In particular, there have been claims by clergy and their dependents for worker's compensation benefits, claims by clergy for wrongful or unfair dismissal and claims by third parties alleging vicarious liability on the part of the Church.

Changes in technology, among other matters, have led to an increase in the number of employees who work from a home office. When the remuneration, associated fringe benefits and other entitlements received by clergy are taken into account, it appears that there is little difference between the employee working from a home office and clergy holding parish appointments.

This thesis re-considers the status of clergy in the Anglican Church of Australia.

There is considered first the administration of the Anglican Church of Australia. This is followed by a consideration of the concept of employment and the concept of an office. Associated with this consideration are two matters which require specific examination.

The first of these is the incidence of income tax. Most clergy have income tax
deducted at source in accordance with the 'pay as you earn' provisions of the relevant legislation. Yet, these provisions are applicable only to employees. The issue which arises, and which is examined, is whether by participating in this method of payment of income tax clergy are estopped from denying an employment status. It is concluded that both in law and by direction of the Commissioner of Taxation this is merely a matter of convenience and does not constitute evidence of employment status.

The second of the associated issues is that of the parson's freehold. The concept of a 'living' is not part of the law or practice of the Anglican Church of Australia. Had it been so, it would have added considerable weight to the argument in favour of the status of office holder. Accordingly, the support for office holder status is weakened.

A review of the common law in Australia and elsewhere leads to the conclusion that the status of office holder is still the accepted view.

The employment relationship is a contractual relationship made between two parties, an employee and an employer. Therefore, there is examined the issue of who might be the employer of the clergy. The conclusion is that there is no person or body who has sufficient involvement, control or responsibility to be described correctly as an employer.

Finally, there is a consideration of the source of the responsibilities and rights
of clergy.

The conclusion is that the traditional view of clergy as office holders has not been displaced and is still applicable to-day.
1. **Introduction.**

The need for a re-consideration of the status of clergy.

Traditionally, clergy have been regarded as office holders and not employees. However, this traditional view is now being challenged both by some within the Church and, more particularly, by those outside the Church. In recent times in Australia and elsewhere allegations and claims have been made by and against ordained members of the various churches including the Anglican Church. These claims can be placed into one of three groups, namely:

* claims for wrongful or unfair dismissal;
* claims for worker's compensation benefits;
* claims seeking recovery from 'the church' by way of vicarious liability for the misbehaviour of its clergy.

Each of these types of claims depends for success to a great extent upon establishing an employer - employee relationship involving the minister concerned. There are some clergy who clearly are employees. For example, those engaged as chaplains to schools or hospitals clearly are employees of the school or hospital concerned. This paper, however, is concerned with parish clergy being those who are incumbents of a parish or who hold appointments as assistant clergy within a parish.
There are at least three substantial reasons why it has become necessary to re-consider the question.

First, claims alleging an employer - employee relationship are being made and will continue to be made. Currently in Victoria there is one claim by the widow of a deceased Anglican priest seeking workcare benefits and another claim alleging unlawful assault by a priest for which, it is alleged, the Church is vicariously liable.¹ Similar allegations have been made, according to the media, against the Roman Catholic Church. Although it may be that in the particular circumstances of individual cases ‘the Church’ is primarily liable, more often than not these claims rest upon vicarious liability and, therefore, the establishment of an employer - employee relationship. Consequently, the Church must be prepared to address the issue.

Secondly, nowadays a minister’s remuneration package resembles that which is available to employees in industry. Although there are differences among the various dioceses, in general parish clergy are entitled to the following benefits:

* a stipend from which there is deducted income tax, Medicare contributions, superannuation contributions and such other deductions as are authorised by the minister;

* a motor vehicle or a travelling allowance;

¹ These matters are within the writer’s personal knowledge.
* the provision of housing to a specified standard;

* sickness and accident benefits;

* superannuation to which a parish or the diocese may have contributed;

* annual leave and long service leave;

* The use of a corporate card to enable business expenses for income tax purposes to be charged against a specified account.

Increasingly in Australia stipends are paid through a central diocesan fund. Whilst it is by no means conclusive, the argument in favour of an employment relationship is strengthened if the income for the stipend fund is a levy imposed upon a parish which levy is not directly related to the stipend commitments for that parish. It is not unknown for parishes to be levied, for example, according to their ability to pay and, thus, some parishes will subsidise other parishes.

In Victoria there is a Provincial Stipends Committee consisting not only of representatives of all the dioceses but also of people who are experienced in the field of industrial relations. Every half year the committee meets and considers what, if any, variations there ought to be in the stipends and
allowances. Its recommendations are usually followed in each of the Victorian dioceses. May it be argued that this is a form of enterprise bargaining? From time to time concerns are expressed at the membership of clergy upon a diocesan stipends committee but, in one sense, they may be considered ‘employee’ representatives. Further, although it is open to a parish to pay in excess of the recommended amount within that diocese, it is not permissible to pay below that amount.

This leads on to a further matter. Nowadays, enterprise agreements are moving away from the provision of penalty rates. Usually an hourly amount is agreed upon which takes into account that employment may be required at weekends, evenings or public holidays. Alternatively, for some staff an individual employment agreement is entered into with provision for a yearly salary. Such an agreement will recognise the necessity for the fulfilment of duties outside traditional working hours and in excess of 35 - 40 hours per week.

Thus, the issue is whether the remuneration package provided to clergy is similar to that provided to those who are employed in industry at a comparable level of responsibility. If it is, does that advance the argument in favour of an employment relationship?

Thirdly, changes in the nature of employment in industry and in the professions lessen the traditional differences between clergy and employees.
There is one principal factor which has contributed to a change in the nature of an employment relationship. No longer are employees confined to a specified place of employment. It is becoming more common for employees to work from their home. To a great extent this has been brought about by changes in technology. On-line computers, E-mail communication facilities, mobile telephones connected to a switch board and the like have enabled a more effective use of a home office arrangement. Within the Commonwealth public service this practice has been recognised by the Australian Public Service Home Based Work Interim Award, 1994. To a lesser extent, this change has been brought about by the desire of male employees to be involved in child caring responsibilities and thus enable a wife to be employed away from the home. This latter situation is not unknown in some rectories.

The conclusion which may be drawn is that the differences between the parish clergy and employees in industry in the manner in which their respective responsibilities are fulfilled and for which they receive remuneration are narrowing.

If clergy are in fact employees there follows a great number of consequences. Of these, the most significant is that numerous statutory provisions, previously regarded as inapplicable, will become applicable. Among these will be the Commonwealth and State legislation which will import into the relationship of clergy and their employers a host of terms relating to that
relationship. In particular, the Workplace Relations Act 1996 (Cth) will open the way for claims of unfair dismissal and for the formation of an industrial association.

Consequent upon the decision of the Anglican Church in Australia to permit the ordination of women, there is a need for the Church to consider the question of maternity leave. However, if there is an employment relationship, in keeping with current industrial practice and with legislation, the requirement will be for the provision not merely of maternity leave but the broader parental leave.

Other legislative provisions which will come into operation, bringing with them far reaching consequences, include those relating to occupational health and safety, compensation for work related injuries and disease, equal opportunity and affirmative action. It is important to appreciate that religious organisations are exempt from the operation of these statutory measures not because they are religious organisations but because there is no employment relationship between clergy and the organisation.

In addition to the application of the statutory provisions, a finding of an employment relationship will bring into operation duties and responsibilities implied into the contract of employment by the common law. From the point of view of the clergy, as employees, two such duties which would be highly relevant are the duty to obey the employer's reasonable and lawful directions
and the duty to change one's place of employment if so directed (if in fact such is still a common law duty to be observed by an employee).

The former duty goes to the centre of a priestly vocation. Repeatedly it has been argued that the relationship between a minister and the Church is 'pre-eminently of a spiritual character'\textsuperscript{2}, that what distinguishes this relationship from one of employment is 'the spiritual nature of the functions of the minister'\textsuperscript{3}. To be subjected to detailed directions is incompatible with the spiritual character of the functions of clergy.

From the point of view of 'the Church', the relevant common law responsibility is the assumption of the duty of vicarious liability. This doctrine is described as the situation 'when the law holds one person responsible for the misconduct of another, although he is himself free from blameworthiness or fault'.\textsuperscript{4} A common example of the operation of the principle of vicarious liability is its application to the employment relationship although, in such a relationship, its operation is confined to those acts which are incidents of the employee's employment.

Nonetheless, to date the unanswered question, and without doubt the most important question, is: if parish clergy are employees, who is the employer? A

\begin{footnotesize}
\footnote{Rogers v Booth, [1937] 2 All ER 751, 754.}
\footnote{President of the Methodist Church v Parfitt, [1984] 1 QB 368, 375.}
\end{footnotesize}
secondary issue is to be able to identify the contract of employment and, in particular, the terms of the contract.

If there is no employment relationship, what then is the status of the clergy? How may their entitlements be enforced? How, if at all, may they be disciplined and dismissed?

There is considered first the administration of the Anglican Church of Australia. Thereafter there is examined the concept of employment and the concept of an office. Matters incidental to these aspects, yet relevant to the identification of the status of clergy, are the parson’s freehold and the incidence of taxation. These discussions are followed by a review of the approach of the common law. If clergy are employees, it is necessary to consider who is the employer; if clergy are not employees, it is necessary to consider the source of their responsibilities and rights.
2. The administration of the Anglican Church of Australia.

The Church of England came to Australia with the first fleet as a State religion. Pursuant to Letters Patent dated the 18th January 1836 Dr. William Broughton became the first bishop of Australia.\textsuperscript{5} Subsequently, by Letters Patent dated the 18th August 1842 the Diocese of Tasmania was formed. Then, again by Letters Patent, in 1847 the Dioceses of Adelaide, Melbourne and Newcastle were formed. Upon their formation fresh Letters Patent were issued whereby the Diocese of Sydney was created and Bishop Broughton, formerly Bishop of Australia, was appointed Bishop of the Diocese of Sydney.\textsuperscript{6} Thereafter, dioceses have been formed, abolished and amalgamated.

The situation to-day is that the Anglican Church of Australia is divided into 23 dioceses. The dioceses are grouped together in ‘provinces’ which are coterminous with state boundaries. Within the Province of Victoria there are five dioceses being those of Melbourne, Ballarat, Bendigo, Gippsland and Wangaratta.

By 1850 there were five dioceses in Australia being those of Sydney, Melbourne, Tasmania, Adelaide and Newcastle. At that stage it became


\textsuperscript{6} Ibid 39 - 44.
necessary to provide for two matters. The first was to grant to each diocese the power to organise itself and to have that right recognised. The second was to provide a better system whereby clergy might be disciplined.

In Victoria the diocesan constitution is to be found in the *Church of England Act* 1854. This Act enabled the Church of England in Victoria (being in fact at that time only the Diocese of Melbourne) to establish means whereby it might regulate its affairs. The method chosen was to allow a bishop to convene a synod of licensed clergy and lay representatives. Pursuant to section 2, any regulation, Act or resolution-

affecting the affairs of the said Church . . . shall be binding on every such Bishop and his successors and on the Clergy and lay members of the said Church residing within the Diocese for which such synod shall have been convened.

The Act provided safeguards to prevent any conflict with State legislation and to ensure that any measure received the concurrence of a majority of the clergy and of the laity and the assent of the bishop.

Section 3 of the Act enables the synod to establish a commission 'for the trial of all Ecclesiastical offences'. The Commission may exercise its jurisdiction only in respect of clergy and the only penalty which it may recommend to the bishop is 'suspension from or deprivation of an Ecclesiastical Office or Benefice'.

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7 18th Victoria No. 45.
The initial legislation in Tasmania was the Church of England Constitution Act 1858.

In New South Wales, although there had been earlier legislation, the initial effective enactment was the Church of England Constitution Act 1902. A schedule to this Act contained the Constitutions for the management and good government of the Church of England within the State of New South Wales. As with Victoria, the Constitution allowed each diocese to meet in synod and provided in section 3 that:

[All ordinances of the Synod shall be binding upon the Bishop and his successors, and all other members of the Church within the Diocese, but only so far as the same may concern their respective rights, duties and liabilities as holding any office in the said Church within the Diocese.]

In South Australia, Queensland and Western Australia the constitutions were established by way of a consensual compact between the bishop on the one hand and the clergy and laity on the other hand made in 1855, 1868 and 1872 respectively. In each case the constitution provided for the diocese to meet in synod.

The result was that in Australia the Anglican Church developed by way of autonomous dioceses and, until 1962, was an integral part of the Church of England. Although from time to time there were meetings of the provincial synods and a general synod, 'there [was] a strange and paradoxical lack of

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8 This Act, and the Constitution set out in the Schedule, were the subject of discussion in Baker v Gough [1963] NSWSR 1345.
authority in these higher bodies'.

The Anglican Church of Australia came into existence as an independent church derived from the Church of England on the 1st January 1962. On the 6th October 1955 the General Synod of the then Church of England in Australia approved of a proposed constitution. That constitution was then submitted for consideration by each diocese within Australia and was approved by each diocese. Subsequently, the parliaments of each State of Australia enacted legislation giving effect to the constitution. In Victoria the relevant enactment is the Church of England in Australia Constitution Act 1960.

The change of name from the Church of England in Australia to the Anglican Church of Australia was approved by the General Synod in 1966 and came into effect on the 24th August 1981 following enactments of the parliaments of the States and Territories.

The Constitution preserved as the structure of the Church the division into dioceses. Thus, in section 7 it is provided that:

A diocese shall in accordance with the historic custom of the One Holy Catholic and Apostolic Church continue to be the unit of organisation of this Church and shall be the see of a bishop.

Further, section 69 (1) provides as follows:

Subject to all necessary parliamentary enactments this Constitution

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shall apply to every diocese of the Church of England in Australia and
Tasmania which assents to the constitution, whether before or after
this Constitution takes effect, and to every diocese formed or admitted
to General Synod under this Constitution. . .

Of particular importance is section 70 which provides that:

The Constitution and all canons and rules passed and made
hereunder shall be binding on the bishops, clergy and laity as members
of this Church and for all purposes connected with or in any way
relating to church trust property.

The effect of section 70 is that any person, lay or clerical, who claims
membership of the Anglican Church of Australia is bound by the Constitution
and the canons and rules made pursuant to provisions in the Constitution.

It follows that for a member of the Anglican Church in Australia there are at
least two constitutions. There is the constitution of the Anglican Church of
Australia and there is the constitution of the diocese in which that person
resides. In addition, in New South Wales, Queensland, Western Australia
and South Australia there are provincial constitutions which allow for the
holding of a provincial synod.

This situation is explained by K.S. Chittleborough in the following terms:

The formal principles and practical operations of authority in the
Anglican church are contained in the constitutional documents of the
various dioceses, and these reveal a common pattern amidst their
variety - namely that legislative authority resides neither in the "house"
of bishops, nor in the various committees and bureaus of the church,
but in diocesan synods, and to a lesser degree in provincial and
national synods.¹⁰

In so far as employment type conditions are concerned, the General Synod has enacted canons relating to superannuation for retired clergy and to the provision of long service leave for clergy. In addition there has been established an Appellate Tribunal with original jurisdiction in respect of constitutional matters and an appellate jurisdiction from diocesan and provincial tribunals. There is also a Special Tribunal with jurisdiction in relation to ecclesiastical offences alleged to have been committed by a bishop.

However, there is no legal entity such as 'The Anglican Church of Australia' or 'The Diocese of Melbourne' although in South Australia the synods of each diocese are incorporated. In the Diocese of Sydney there is an incorporated body which is responsible for the diocesan administrative duties. Save in those instances, neither the synod nor the diocesan council is a legal entity. The only legal entity in each diocese is its trust corporation. These corporations have been established by the respective synods pursuant to the provisions of state legislation such as the Trusts Corporations Act 1884 (Vic) (as amended). A corporation established by a diocese pursuant to the provisions of this Act is so established for the express and sole purpose 'of holding property in trust for the benefit of the Church within such Diocese'. As an incorporated body a diocesan trust corporation may sue and be sued. But any action by or against it must be confined to its role as trustee of property. In particular, it is not the employer of clergy who hold appointments within a

11 48th Victoria No. 797.
diocese.

It follows that the legal nature of the Church is similar to that described by Lord Templeman in Davies v Presbyterian Church of Wales. In referring to the Presbyterian Church of Wales, His Lordship said:

The church is thus an unincorporated body of persons who agree to bear witness to the same religious faith and to practise the same doctrinal principles by means of the organisation and in the manner set forth in the constitutional deed.

This same approach had been adopted earlier in Macqueen v Frackelton. In this case the clergyman alleged wrongful dismissal by the Presbyterian Church of Queensland. The direct issue was whether the civil courts had jurisdiction over a spiritual body. The nature of a church and questions of authority within the church were described thus by O'Connor J.:

It has long been settled by British Courts that a religious body not being a State Church is merely a voluntary association bound together by a consensual compact - that the rights of its members inter se depend entirely on the terms and conditions of the compact; that the terms and conditions constitute a contract in which every member binds himself to the whole body and to every other member to act in accordance with its provisions. If, as is generally the case, the Church has, by its Constitution created bodies clothed with executive and judicial powers for managing and controlling its spiritual disciplinary and business interests, the Civil Courts will not in general interfere with their acts and decisions. It is only when such bodies exceed their powers, and assume to themselves an authority which the contract has not given them, that the Civil Courts will intervene, and then, only, when the party complaining of the wrongful act or decision establishes the fact that he has thereby been injured in his property or in the exercise of some civil right. Any member who has been so injured may

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13 Ibid 325.
14 (1909) 8 CLR 673.
obtain redress in the Civil Courts, and his proceedings must be directed against those of his fellow members who have contrary to the contract assumed authority to do the act or give the decision which has caused him injury.\textsuperscript{15}

In language similar to that used in \textit{Davies}, Griffiths C. J. observed that:

\textit{[T]he Presbyterian Church, like any other religious body in Australia, is in the eyes of the law a voluntary association, the mutual relations and obligations of the members of which are regulated by the terms of an agreement or consensual compact to which they are parties.}\textsuperscript{16}

The compact to which the Chief Justice referred was adopted in June 1900 and was set out in the Schedule to the \textit{Presbyterian Church of Australia Act} 1900 (Qld). Section 2 of the Act provides that ‘the Basis of Union and Articles of Agreement set forth in the Schedule to the Act shall have the full force and effect of law’. As already noted, there are similar statutory provisions applicable to the Anglican Church.

\textsuperscript{15} Ibid 696 - 7.

\textsuperscript{16} Ibid 679.
3. **The concept of employment.**

The modern history of employment has its origins in the industrial revolution of the late 18th and early 19th centuries. One of the results of that revolution was the shift of the workforce from a rural community to an urban community. The subsequent employment of labour in the new factories was instrumental in the destruction of the feudal system and of the guild system. It was this shift which led to the development of laws regulating the employment relationship.

Nonetheless, a contract of employment was not, and is not, the sole means whereby one person could provide labour for the benefit of another. Therefore, because of the consequences of being categorised as employees (as discussed earlier on pages 5 and 6) it became necessary to be able to distinguish those relationships which constituted a contract of employment from those which constituted other arrangements. For there to be a contract of employment two questions need to be answered. First, is the relationship between the persons a contractual relationship and, secondly, if there is a contract, is it a contract of employment? Thus, in the delivering the advice of the Privy Council in *Australian Mutual Provident Society v Allan and Another*\(^\text{17}\) Lord Fraser said:

> The relationship between the parties was undoubtedly regulated by a contract of some sort; the question in this appeal is whether the contract was one of service or one of agency.\(^\text{18}\)

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\(^{17}\) *(1978) 52 ALJR 407.*

\(^{18}\) *Ibid 408.*
When one is considering whether a person is an employee or an independent contractor, the first question presents little, if any, problem. Provided that the elements of a contract as recognised by the law are present, including the requisite intention, the relationship will be a contractual relationship. The more difficult question is whether the contract may be designated a contract of employment. However, if the person concerned is an office holder there may well be no contractual relationship of any nature.

When seeking to ascertain how one may recognise an employment relationship it is possible to see in Yewens v Noakes\(^\text{19}\) the embryonic formulation of the control test. Bramwell L.J. stated that ‘a servant is a person subject to the command of his master as to the manner in which he should do his work’.\(^\text{20}\) Yet, the decision credited with the formulation of the control test is that of McCardie J. in Performing Rights Society Ltd. v Mitchell and Brooker (Palais de Dance) Ltd\(^\text{21}\) In the words of his Lordship:

\[\text{It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is, of course, one only of several to be considered but it is usually of vital importance.}\(^\text{22}\)

This approach was developed by Latham C.J. in Federal Commissioner for

\(^\text{19}\) (1880) 6 QBD 530.
\(^\text{20}\) Ibid 532.
\(^\text{21}\) [1924] 1 KB 762.
\(^\text{22}\) Ibid 767.
Taxation v J Walter Thompson (Australia) Pty Ltd.\textsuperscript{23} when he observed that an employer has a dual right of control. First, the employer can direct the type of work to be performed by the employee and, secondly, the employer may determine the manner in which the work is to be performed.

However, the changing nature of employment rendered this test insufficient. Two factors have contributed to a re-consideration of the appropriateness of the fact of control as a means of determining whether an employment relationship exists. The first is the fact that some employees have specialist skills which, on occasions, exceed those of the employer and the second is that no longer is an employee confined to a specified place of employment.

These changes in the nature of employment led the High Court to move away from the fact of control to the right to control. Thus, in Zuijs v Wirth Bros Pty Ltd\textsuperscript{24}, a decision concerning a worker's compensation claim by a skilled acrobat, the Court adopted a test of the ultimate right to control. This involved an analysis of the work relationship and an examination of the duties and obligations of the person performing the work.

Neither the fact of control nor the ultimate right to control has received universal recognition. An alternative approach has been to consider the extent to which the work being performed is an integral part of the business.

\textsuperscript{23} (1944) 69 CLR 227.

\textsuperscript{24} (1955) 93 CLR 56.
being conducted. This is sometimes referred to as the ‘organisational’ or ‘integration’ test.

This approach is credited to Lord Denning who, in Stevenson Jordan & Harrison v MacDonald & Evans, said:

One feature which seems to run through the instances is that under a contract of service a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract of services, his work, although done for the business, is not integrated into it but is only accessory to it.

In the United Kingdom this ‘integration test’ has been relied upon in decisions in which hospitals have been found to be vicariously liable for the negligence of their medical staff.

However, the High Court has repeated its preference for the right of control rather than organisational integration. In Oceanic Crest Shipping Co. v Pilbara Harbour Services Pty Ltd, Gibbs C.J. commented:

It is however not right to say that this [integration] test, which involves difficulties of its own, has been accepted as the decisive test in Australia or that the degree of control which the employer can exercise is irrelevant in considering whether the relationship of master and servant exists.

26 Ibid 111.
28 (1985) 160 CLR 626.
The facts in the *A.M.P. v Allan* case\(^2^9\) and the decision of the Privy Council led to the suggestion of a 'consistency' test. In the judgment delivered by Lord Fraser there were repeated references to the inconsistencies between the terms of the contract under discussion and the terms of a contract of employment. Those inconsistencies included:

(i) the ability of the respondent to delegate to another the performance of the work;

(ii) the right of the respondent to incorporate himself;

(iii) the express description of the relationship between the parties in their agreement as that of principal and agent;

(iv) the fact that the respondent was not required to report his whereabouts nor his activities nor to ask for leave of absence when he took a holiday;

(v) that he used a room in his own house as an office;

(vi) that he claimed 'a relatively large amount' of business expenses as a deduction from his gross income for income tax purposes;

and

\(^{2^9}\) *ALJR* 407.
(vii) the right to enter into a partnership in connection with the Society's business.

A similar approach was adopted by MacKenna J. in *Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance.* 30 In this case the issue was whether an owner-driver was an employee for the purposes of social security law. His Honour said:

A contract of service exists if these three conditions are fulfilled. (I) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service to his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service. 31

He continued:

The third and negative condition is for my purpose the important one... An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. 32

Nonetheless, as the nature of employment becomes more sophisticated so the means of determining whether a contract of employment exists will become more sophisticated. No one factor will be conclusive. The situation is expressed well by Bray C.J. in the South Australian Supreme Court decision

31 Ibid 515.
32 Ibid 516 - 517.
which led to the Privy Council appeal in the A.M.P. v Allan case, when he said:

There is no magic touchstone. The court has to look at a number of indicia and then make up its mind into which category the instant case should be put. It is a question of balancing the indicia pro and con... But the power of control over the manner of doing the work is very important, perhaps the most important of such indicia.

These decisions and the various approaches to the issue were considered by the High Court in Stevens v Brodribb Sawmilling Co. Pty Ltd. The respondent was the owner and operator of a sawmill at Orbost. Stevens was engaged as a truck driver and was injured as a result of the negligence of Gray, a person engaged by the respondent as a snigger. Stevens claimed compensation from the respondent alleging that the respondent was vicariously liable for Gray's negligence. To establish this proposition it was necessary to establish that Gray was an employee of the respondent. In addition, it was claimed that Stevens himself was an employee.

In addressing these issues, Mason J. acknowledged that the degree of control was 'a prominent factor'. However, he continued:

[The] existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question... Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of

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33 R v Allan; ex parte Australian Mutual Provident Society Ltd. (1977) 16 SASR 237.
34 Ibid 248.
equipment, the obligation to work, the hours of work and the provision for holidays, the deduction of income tax and the delegation of work by the putative employee.\footnote{26}

In response to the argument that regard should be had to the organisational test, His Honour’s approach was ‘to treat the elements of organisation simply as a further factor to be weighed, along with control, in deciding whether the relationship is one of employment or of independent contractor’.

Nonetheless, having considered the organisational test, his conclusion was:

Of the two concepts, the legal authority to control is the more relevant and the more cogent in determining the nature of the relationship.\footnote{27}

The question of whether beauty consultants who sold cosmetic products through a ‘party plan system’ were employees was before the Full Court at the instigation of the Commissioner of Pay-Roll Tax in \textit{Commissioner of Pay-Roll Tax v Mary Kay Cosmetics Pty Ltd}.\footnote{28} In delivering the principal judgment, Gray J. referred to the various decisions relating to the control test and repeated that the degree of control was a significant matter. However, he was required to consider the extent to which control was imposed by the provisions contained in the respondent’s manual which was supplied to the consultants. In respect of this matter he said:

So far as the provisions of the manual are said to evidence a degree of control, I cannot accept that any significant control over the beauty consultants is achieved by this means. The agreement does not require a beauty consultant to comply with the manual’s directions. Most of the imperative utterances of the manual merely state the requirements of the general law or the requirements of the formal contract. \ldots For the rest, even if the requirements of the manual are expressed imperatively, they are clearly in the nature of advice. Very

\footnote{26}{Ibid 24.}
\footnote{27}{Ibid 27.}
\footnote{28}{[1982] VR 871.}
few of the provisions of the manual are such that its breach would affect the interests of the respondent and thus justify a termination. In short, the manual carries no teeth so far as a beauty consultant is concerned, except in the instances where compliance is required on other grounds.\textsuperscript{39}

Although clergy are not provided with 'manuals' they are directed, for example, to use the services contained in specified prayer books and to comply with the rubrics applicable to those services. By analogy, such a direction would not constitute 'any significant control'.

One of the indicia referred to by Lord Fraser in the \textit{A.M.P.} case was the intention of the parties as evidenced by their description of the relationship.

The written agreement is the principal, though not the only, source of information as to the nature of the contractual relationship between the parties.\textsuperscript{40}

This proposition was expressed more forcefully by Lord Denning MR in \textit{Massey v Crown Life Insurance Co.}\textsuperscript{41}

The law, as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it . . . On the other hand, if the parties' relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them.

Although these general principles and their application to clergy will be

\textsuperscript{39} Ibid 80.

\textsuperscript{40} (1978) 52 ALJR 407, 409.

\textsuperscript{41} [1978] 1 WLR 676, 679.
considered at a later stage, it is of value to observe that the assumption of any clear demarcation line between an employee and an independent contractor by reference to these tests is not without challenge.

Adrian Brooks has argued\textsuperscript{42} that the characterisation of a person as an employee or independent contractor should be replaced by a 'performance of work' category. Pursuant to this proposal, a contract of service and a contract for services would be replaced by a contract for the performance of work. He argues that it is impossible to define a contract of employment from a contract for an independent contractor. This argument is supported by a consideration of the various responsibilities, duties and liabilities which exist in a contract of employment which in itself leads to the conclusion that there is no difference between such obligations and those which arise in a contract for services.

One advantage of this approach is that it would remove from the debate any consideration of the reason why it is necessary to identify the worker as employee or independent contractor. As Brooks comments:

\begin{quote}
[T]he answer which the courts give to the question whether the claimant is or is not an employee or whether one of the parties is or is not an employer depends on why the question is being asked.\textsuperscript{43}
\end{quote}

The possibility of the application to clergy of the responsibilities, duties and


\textsuperscript{43} Ibid 48.
liabilities to which Brooks referred is the very reason why it is necessary to consider the status of clergy. However, with clergy the possible categories are not employee or contractor but employee or office holder.
4. **The concept of an office.**

Traditionally clergy have been regarded as office-holders rather than employees. For example, in *Scandrett v Dowling*[^44] under the heading 'Admitted matters' Priestley J.A. included the following:

> A bishop of the Church is as such the holder of an office in the Church. A priest of the Church is as such the holder of an office of the Church and is ordained for the office and work of a priest in the Church of God not limited to any Diocese of the church.

The status of a priest was unrelated to the matters which were before the Court in that case. Nonetheless, in a case where much of the history and constitutional authority of the Church was canvassed both in argument and in the reasons for judgement, it is important to record that this was an admitted matter and was not challenged by members of the Court.

It is necessary, therefore, to examine the concept of 'an office'.[^45]

Whereas there are many decisions relating to the concept and nature of the employment contract, there are few relating to the concept and nature of an office. In addition, the position is complicated by the accepted use of the term 'officer' to describe a person who without doubt is an employee. This terminology is used in some statutes when referring to persons who are

[^44]: (1992) 27 NSWLR 483

employees.47 Those appointed to certain positions within employee organisations are described as ‘officers’ in the relevant industrial legislation.48

In Wool Selling Brokers Officers Association v Employers Association of Wool Selling Brokers,49 a case concerning ‘administrative officers’ engaged by the respondents, Kelly C.J. in considering the meaning of ‘officer’ expressed himself thus:

There is in some places a growing tendency to apply the term "officers" to persons who are very evidently not entitled to it. An "officer" is the holder of an "office". And "office" is a concept not equivalent to employment.

*Webster's New International Dictionary* gives the following exhaustive meaning of "office" (p. 1690): "a special duty, trust, charge or position conferred by an act of governmental authority or for a public purpose; a position of trust or authority conferred by an act of governmental power; a right to exercise a public function or employment and receive the emoluments (if any) thereto belonging; as an executive or judicial office; a municipal office; - distinguished from employment. In its fullest sense an office embraces the elements of tenure, duration, duties and emoluments, but the element of emoluments is not essential to the existence of an office. In the wider sense, any position or place in the employment of the government, especially one of trust or authority; also, that of an employee of an incorporation invested with a part of the executive authority. . . . Office commonly suggests a position of (esp. public) trust or authority. . . ."

The same dictionary (Webster) defines "officer" as "one who holds an office; specifically a person lawfully invested with an office, whether civil, military or ecclesiastical or whether under the State or a private corporation or the like; as a church officer; a police officer; an officer of an insurance company."

"Officer" cannot, therefore, be used as a synonym for "employee". For the function of representation or agency, with usually the authority to make decisions in dealing with outsiders without reference of the

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47 Corporations Law s10; Occupational Health and Safety Act 1985 (Vic) s 52.


49 (1950) 67 CAR. 224, 227.
transaction to superior direction, is the element in the position of an "officer" which, in whatever varying degrees, distinguishes it from that of a mere "employee".

Blackstone described an office as 'a right to exercise a public or private employment and to take the fees or emoluments thereunto belonging'.\textsuperscript{50} This description was drawn upon by Windeyer J in \textit{Marks v The Commonwealth}.\textsuperscript{51} The issue in this case was whether a resignation by an army officer was effective without the assent of the Governor-General. During the course of his judgment His Honour said:

The legal concept embodied in the expression resignation of an office is founded upon the historic idea of offices, ecclesiastical, civil or military, held of the Crown or of a corporation, as a form of property. Beginning in the middle ages, this proprietary idea persisted into the nineteenth century; it has left a legacy to the law and language of the present day. In medieval times and for long afterwards the grant of an office was made in much the same form as the grant of land.\textsuperscript{52}

Whether or not a person was an office holder or an employee was relevant in \textit{Great Western Railway Co. v Bater}.\textsuperscript{53} Pursuant to the Income Tax Act 1842 the appellant had been assessed in respect of income received by a clerk on the basis that he was the holder of an office or employment of profit. The Railway Co. argued that the clerk should have been assessed personally as an employee. Lord Atkinson quoted with approval the following description of an office provided by Rowlatt J. in the initial trial of the action:

\begin{quote}
A subsisting, permanent, substantive position, which has an existence independent of the person who filled it [and] which went on and was
\end{quote}

\textsuperscript{50} Commentaries, Vol 2. 36.

\textsuperscript{51} (1984) 111 CLR 549.

\textsuperscript{52} Ibid 567.

\textsuperscript{53} [1922] AC 1.
filled in succession by successive holders.\textsuperscript{54}

In a similar context this description was referred to in McMillan v Guest\textsuperscript{55} by Lord Atkin who 'without adopting the sentence as a complete definition' described it 'as a generally sufficient statement of the meaning of the word'.\textsuperscript{56}

Yet, in Edwards (Inspector of Taxes) v Clinch\textsuperscript{57} Lord Wiberforce said:

[A] rigid requirement of permanence is no longer appropriate . . . and continuity need not be regarded as an absolute qualification. But still if any meaning is to be given to "office" in this legislation . . . the word must involve a degree of continuance (not necessarily continuity) and of independent existence; it must connote a post to which a person can be appointed, which he can vacate and to which a successor may be appointed.

There have been a number of decisions which, in endeavouring to distinguish an office holder from an employee, have relied upon the independent functions or duties of an office holder. In Musgrave v The Commonwealth\textsuperscript{58} Dixon J. referred to an 'independent responsibility cast on him by law'.\textsuperscript{59} This expression was used by Brennan J. in Oceanic Crest Shipping Co. v Pilbara Harbour Services Pty. Ltd.\textsuperscript{60}

When the Crown or a public authority is the employer of a public officer who is charged by statute with the exercise of an "independent responsibility cast on him by law" . . . what is done in discharge of that responsibility is not done on behalf of the employer. The Crown or public authority, having no authority either to discharge that

\textsuperscript{54} Ibid 15.

\textsuperscript{55} [1942] AC 561.

\textsuperscript{56} Ibid 564.

\textsuperscript{57} [1981] 3 All ER 543.

\textsuperscript{58} (1937) 57 CLR 514.

\textsuperscript{59} Ibid 548.

\textsuperscript{60} (1985) 160 CLR 625.
responsibility or to control its discharge, is not acting through the officer and what is done by the officer in the discharge of the independent responsibility by the employee is not regarded as being done in the course of his employment as a servant of the Crown or public authority.\(^{61}\)

In commenting upon this decision McCary observes:

> If a position has attached to it some independent duties derived from some source other than the orders of the employer (such as a statute, for example, a companies Act or pilotage legislation, or perhaps the registered rules of an organisation or derived from the common law) it is more likely to be an office.\(^{62}\)

Another approach has been to rely upon the notion of tenure which is usually associated with an office. Thus, in *The King v Murray, Cormie: Ex parte The Commonwealth*\(^{63}\) Isaacs J. said: ‘an “officer” connotes an “office” of some conceivable tenure, and connotes an appointment and usually a salary’.

In discussing the idea that tenure may be a relevant indicator, Macken, McCary and Sappideen comment that ‘the idea of tenure seems to mean that the person cannot be removed at pleasure or will, but only on cause being shown after an opportunity to be heard’.\(^{64}\) Likewise, McCary suggests that ‘the idea of tenure seems to mean that the person cannot be removed at pleasure or will, but only on cause being shown after an opportunity to be

\(^{61}\) Ibid 662.


\(^{63}\) (1916) 22 CLR 437, 452.

Although it is correct that an officer-holder may not 'be removed at pleasure or will', the weight to be given to such a requirement when it is used to characterise a person as the holder of an office rather than an employee is now reduced. Provisions such as those contained in s 170CG of the Workplace Relations Act 1996 (Cth) require that an employer may not terminate the employment of an employee without cause being shown and after an opportunity being provided to the employee to be heard.

This blurring of the distinction between an employee and an office-holder is illustrated by Brennan J’s use of the expression ‘officer-employee’ in the Oceanic Crest Shipping case. This expression is applicable in a number of decisions to the claimants who, although by name or by their apparent nature are officer-holders, were successful in claims for wrongful dismissal.

In Social Club v Bicketon Phillips J in the Employment Appeal Tribunal set out the following as being the relevant matters in deciding whether a person was an office holder:

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65 Above n 62 15.
(1) the nature of the payment made to the person; was it styled an honorarium or a salary;

(2) the mode and frequency of payment; was it fixed in advance; was payment made on a periodical basis; or was it agreed upon at the end of the engagement as a token of the work that had been completed.

(3) did the individual have a right to payment or was it paid as a mere 'bounty';

(4) the size of the payment;

(5) whether the person concerned is exercising the functions of an independent office or is subject to the control and orders of others;

(6) the extent and weight of the duties performed; the smaller they are the less likely that the person is an employee;

(7) the description given to the payment; its treatment in the accounts; its treatment for tax and national insurance purposes.

Historically, in England an incumbent was appointed to a ‘living’ or ‘benefice’.
Income, being the ‘living’, came from the glebe rent and varied enormously from parish to parish. The living was supplemented by the ‘Easter Offering’, being the only direct giving by the parishioners, and by the fees from weddings and funerals and by payments arising from additional activities such as teaching and chaplaincy work. It follows that there was no uniformity in the size of the living available to clergy; nor was there regularity in the date of payment or amount of the income. This situation was consistent with the concept of an office and inconsistent with the concept of employment.

At the time of the European settlement of Australia the Church of England came to Australia as the State religion. The chaplains and other Church of England clergy who arrived subsequently were paid from the public purse as civil servants. The concept of ‘a living’ was not brought to Australia.

Nowadays, in Australia the source of an incumbent’s income is the parish itself augmented in some cases by diocesan resources.

The payment made to a member of the clergy was styled a ‘stipend’. The nature of a stipend was considered in Rogers v Booth. A claim by a Salvation Army officer for worker’s compensation depended upon establishing that the officer was a ‘workman’. When considering the remuneration which was provided to Salvation Army officers, although it was not styled ‘stipend’, Sir Wilfrid Greene M.R. observed:

[1937] 2 All ER 751.
The circumstances that a monetary sum is paid to officers who enter into this relationship is, in my opinion, quite insufficient to change the relationship from what it otherwise would be. It is quite obvious that, if officers are devoting the whole of their lives to this service, the Army would make provision to maintain them, and that it in effect does. But that does not mean that the sum which is paid has any similarity to wages or salary, or any payment given contractually for services given or for services rendered. It is a maintenance payment, to enable them to carry on the work that they have undertaken.\textsuperscript{69}

As is concluded in the next chapter, deductions of income tax and Medicare contributions from the stipend are to be regarded as a matter of convenience and are made at the direction of the Commissioner of Taxation. Therefore, the fact that such deductions are made does not assist in the identification of the status of clergy.

The size of the stipend may vary from parish to parish and from diocese to diocese although endeavours are made to maintain consistency at least within a diocese. One result of the uniformity of stipends is that it is not possible, as it is in the commercial world, to reflect in the remuneration levels of experience, responsibilities or seniority.

Of all the factors to be considered, the independent function, it is suggested, provides the best indication of an officer-holder. In the words of McCarry:

The capacity to exercise an independent function which the employer cannot exercise would seem to provide a more useful basis for identifying an officer than the other criteria which have been mentioned. In exercising that function the person will not be subject to the control of the 'employer'.\textsuperscript{70}

\textsuperscript{69} Ibid 755.
\textsuperscript{70} Above n 62 18.
5. **The incidence of taxation.**

It is common practice throughout the Australian dioceses for income tax instalments to be deducted from the stipends of clergy and for a group certificate to be issued at the end of each financial year. However, there are numerous persons or groups shown as the 'employer'. For some, the diocese itself is shown as the employer; in other dioceses either the parish or, as in the Diocese of Sydney, the church wardens are nominated as the employer; occasionally the diocesan property trust is given as the employer. The issue which arises from this practice is whether clergy have acknowledged that they are employees and are estopped from denying that status.

Many of the decisions relating to the possibility of the existence of an employment relationship arise at the instigation of, or as a result of action taken by, taxation authorities. In such a case in New Zealand, *Challenge Realty Ltd v Commissioner of Inland Revenue*[^1][^2], real estate sales personnel had been treated by the respondent as self-employed. In 1989 the respondent took a different view and treated them as employees. Among other matters, Holland J. considered whether the respondent was estopped from adopting the changed view. The appellants, and others in similar positions, had organised their affairs on the basis that the respondent considered that they were self-employed. He adopted the following words of Woodhouse P. and Richardson J. in

[^1]: [1990] 3 NZLR 42.
Commissioner of Inland Revenue v Lemmington Holdings Ltd.\textsuperscript{71}:

As we have said, the Commissioner cannot be estopped by past conduct from performing his statutory obligation to make assessments as and when he thinks proper. It is his present judgment as to the statutorily imposed liability for tax that counts.

In Australia, Division 2 of Part VI of the Income Tax Assessment Act 1936 (Cth) provides for the collection by instalments of income tax including Medicare contributions. Section 221C (1A) provides:

Where an employer pays to an employee salary or wages, the employer shall, at the time of paying the salary or wages, make a deduction from the salary or wages at such rate (if any) prescribed in accordance with sub-section (1) as is applicable.

In Taxation Ruling TR 92/17 issued by the Commissioner of Taxation on the 10th December 1992 there appears the following paragraph:

15 Religious practitioners who receive a stipend or other form of remuneration (including non-cash benefits) are employees for the purposes of the FBTAA\textsuperscript{72} (see the definitions of "current employee" in section 136 (1) of the FBTAA and "employee" in subsection 221A (1) of the ITAA). Consequently, if the requirements of section 57 of the FBTAA are satisfied, any fringe benefits provided to a religious practitioner who is an employee of a religious institution are exempt benefits. (It should be noted that the consequences of a view that religious practitioners are not employees is that non-cash benefits provided to a religious practitioner generally would be assessable income on ordinary concepts in the hands of the religious practitioner.)

With respect, the bold assertion of the employment status of 'religious practitioners' by reference to the definitions contained in the Act cannot be accepted. The definition of 'current employee' as contained in section 136 (1) of the FBTAA is 'an employee within the meaning of Division 2 of Part VI of the

\textsuperscript{71} [1982] 1 NZLR 517, 523.

\textsuperscript{72} Fringe Benefits Taxation Assessment Act 1986 (Cth).
Income Tax Assessment Act 1936'.

Within this Division the relevant definition section is section 221A (1). A number of definitions need to be considered, namely:

"Employee" means a person who receives, or is entitled to receive, salary or wages;

"Salary or wages" means salary, wages, . . . or allowances paid . . . to an eligible person . . . ;

"Eligible person" means:
   (a) a person who is an employee within the ordinary meaning of that expression; or
   (b) a person who holds or performs the duties of an appointment, office or position under the Constitution or under the law of the Commonwealth, a State or a Territory; or . . .

In so far as clergy are concerned, these provisions do not advance the position one way or the other. Since clergy do not hold office under the law of the Commonwealth nor of a State or a Territory, the effect of these definitions is to leave wholly unresolved the question of whether clergy are employees.

Nonetheless, there remains the question of whether by agreeing to the deduction of income tax instalments clergy have acknowledged that they are employees.

In the Taxation Ruling referred to there is to be found in paragraph 16 the following:

It does not follow that a religious practitioner who comes within the meaning of "employee" in sub-section 221A (1) of the ITAA is an
employee at common law. That question must be determined in accordance with common law principles: for example, see Davies v Presbyterian Church of Wales [1986] 1 WLR 323.

In addition, in President of the Methodist Conference v Parfitt\textsuperscript{73} one of the arguments advanced by the applicant, who appeared in person before the Court of Appeal, was that income tax and national insurance contributions were deducted from his stipend and that he was, therefore, an employee. Of this argument Dillon LJ commented:

I derive no assistance from the treatment of ministers' stipends for income tax purposes or from the treatment of ministers as employed persons in respect of national insurance contributions. These treatments are based on convenience and compromise and do not represent any binding decision in principle on the status of ministers; this is most clearly stated in relation to the national insurance contributions.\textsuperscript{74}

Thus, paragraph 16 of the Taxation Ruling is consistent with the opinion of Dillon LJ. It follows that although instalments of income tax are required to be deducted from the stipend payable to clergy, that requirement of itself not only does not create an employment status but it is to be disregarded when considering the matters which will determine the status of clergy. It is 'a matter of convenience' for both the clergy and the Commissioner of Taxation.

It is noteworthy to observe that the status of clergy was considered by the Commonwealth Department of Social Security. The particular issue was the assessment of 'Employer provided' benefits in respect to the income test applicable to eligibility for family payments. In a response to an inquiry made on

\textsuperscript{73} [1984] 1 QB 368.
\textsuperscript{74} Ibid 377.
behalf of the Diocese of Sydney, the Assistant Secretary, Family Payment Branch, advised as follows:

The Attorney-General's Department advised that in the absence of written contracts between Ministers and the Diocese or parish in question, the Anglican Ministers in the Sydney Diocese are not employees. To be an employee, it would be necessary for the Minister to have a contractual relationship with the Diocese or parish.\textsuperscript{75}

The different treatment accorded to the status of clergy by two departments of the same government confirms that such treatment is relevant only as 'a matter of convenience'. This in itself does not advance the discussion one way or the other save that by acquiescing in the deduction of income tax at source clergy are not acknowledging an employee status.

\textsuperscript{75} Letter dated the 11th August 1995 addressed to 'Anglican Church of Australia National Office'.
6. **Parson's freehold.**

Historically, upon appointment to a parish clergy could remain in that parish until death. Subsequently a retirement age was introduced which limited the tenure of the incumbent. Such tenure is referred to as a 'parson's freehold'.

A parson, persona ecclesiae, is one that has full possession of all the rights of a parochial church. He is called parson, persona, because by his person the church, which is an invisible body, is represented; and he is himself a body corporate, in order to protect and defend the rights of the church (which he personates) by a perpetual succession. . . . A parson has, during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues.\(^{76}\)

To appreciate the significance of the 'parson's freehold' it is necessary to consider the method of appointment of a priest to the position of an incumbent of a parish. According to Blackstone there are four pre-requisites to becoming a parson in the sense described above. They are holy orders, presentation, institution and induction. The last two are the relevant steps in so far as parson's freehold is concerned. 'Institution' is described by Blackstone as 'a kind of investiture of the spiritual part of the benefice: for by institution the care of the souls of the parish is committed to the charge of the clerk'.\(^{77}\) 'Induction' is described as 'giving the clerk corporal possession of the church . . . with intent to give all parishioners due notice . . . to whom their tithes are to be paid'.\(^{78}\)

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77 Ibid 383.

78 Ibid 383.
Thus, ‘on his institution an incumbent becomes responsible for the cure of souls committed to him, whereas on his induction he becomes invested with the temporal part of the benefice’. 79

It follows that if a priest is possessed of a parson’s freehold the argument in favour of employment status is lessened if only because the ability to remove him or her from that position is more limited than that which is applicable to an employee. Nonetheless, this cannot be regarded as conclusive since restrictions upon the right of removal from a position may be expressed or implied in a contract of employment.

Blackstone identifies the ways whereby a priest may lose the freehold as:

* death;
* cession, being the acceptance of another benefice which is incompatible with the continuance of the existing benefice;
* consecration to the office of bishop;
* resignation; and
* deprivation. 80

When referring to resignation Blackstone’s comment is ‘but this is of no avail, till accepted by the ordinary; into whose hands the resignation must be

80 Above n 76, 393 - 4.
made'.\textsuperscript{81} Likewise, when discussing resignation, Bursill says:

Phillimore calls resignation a 'grave subject' and Gibson states - '... no person appointed to a Cure of Souls, can quit that Cure, or discharge himself of it, but upon good motives, to be approved by the Superior who committed it to him...'.\textsuperscript{82}

In \textit{Marks v The Commonwealth}\textsuperscript{83} Kitto, Taylor and Menzies JJ clearly had no doubts but that at common law an officer of the Queen could not resign without Her Majesty's permission which she was under no obligation to give. Authority for this proposition was found in \textit{Hearson v Churchill}.\textsuperscript{84} The decision in Marks was applied by the same court in \textit{O'Day v The Commonwealth of Australia}.\textsuperscript{85}

It follows that if the resignation of an incumbent is ineffective until it is accepted, as is argued by Blackstone and Bursill, the argument that they are office holders is advanced. In \textit{Re Church of England Curates}\textsuperscript{86} Parker J. commented in relation to assistant clergy, referred to as 'curates':

It is impossible to say, with any real accuracy, that they can be dismissed at the will of the vicar. They can only be dismissed with the consent of the bishop, and, as I gather, for some reasonable ground - either that their services are no longer required or, possibly, that there has been some misconduct or deficiency on their part which would justify their dismissal, but in every case the bishop must consent.

\textsuperscript{81} Ibid 393.

\textsuperscript{82} Above n 79, 261.

\textsuperscript{83} (1964) 111 CLR 549.

\textsuperscript{84} [1892] 2 QB 144.

\textsuperscript{85} (1964) 111 CLR 599.

\textsuperscript{86} [1912] 1 Ch 563.
Similarly, if the curate himself wants to resign, I doubt whether he can resign without the consent of the bishop. Certainly, he can not do so without giving a certain amount of notice in that behalf to the bishop.  

Deprivation may occur either as a result of the commission of an ecclesiastical offence or as a result of a conviction in a civil court of a crime serious enough to justify deprivation. Section 54 (2) of the Constitution of the Anglican Church of Australia provides:

A diocesan tribunal shall in respect of a person licensed by the bishop of the diocese, or any other person in holy orders resident in the diocese, have jurisdiction to hear and determine charges of breaches of faith ritual ceremonial or discipline and of such offences as may be specified by any canon ordinance or rule.

Pursuant to the Canon to Specify Offences Under Sections 54, 55 and 56 of The Constitution, the further offences prescribed by the General Synod to be ecclesiastical offences are:

Unchastity;

Drunkenness;

Habitual and wilful neglect of ministerial duty after written admonition in respect thereof by the bishop of the diocese;

Wilful failure to pay just debts; and

Conduct disgraceful in a clergyman and productive or likely to be productive of scandal or evil report.

However, although it may be that the existence of a parson's freehold may be inconsistent with an employment relationship, within Australia, there have

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87 Ibid 569.
88 Canon No. 4 of 1966.
been many changes which throw doubt upon whether a parson’s freehold still exists. Not the least of these changes is the failure to separate ‘institution’ and ‘induction’. The words are frequently interchanged as though their meanings were similar if not identical. Indeed, on occasions neither word is used, the incumbent being ‘commissioned’. Gwynne J. in _Wadham and Ors v The Lord Bishop of Adelaide and Ors_ has expressed his opinion that:

Institution, induction and collation are not applicable to the English Established Church in the Colonies. All that is required is the presentation to the Bishop, and his licence to the particular cure which, followed by entry by the Clerk upon the Church, gives him full and complete possession.

An examination of Australian practice and case law relating to the dismissal of clergy supports the view that the concept of the parson’s freehold is not part of Australian ecclesiastical law.

In the Diocese of Bendigo the licence issued to an incumbent upon induction into a parish contain the words ‘reserving to us and our successors the power to revoke at pleasure this licence and authority’. There is no recorded instance in the Diocese of Bendigo when a bishop has relied upon this reservation but one needs to ask whether there are any restrictions upon the use of such a power. At the very least, the application of the principles of natural justice would require that the incumbent be provided with an

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86 (1868) 2 SALR 127.
89 Ibid 148.
91 The licence given to the plaintiff in _Baker v Gough_ contained the words: ‘This Licence shall be at any time revocable at our will and pleasure’.
opportunity to show cause why the licence should not be revoked. A further question is whether the exercise of the power to revoke is confined to those occasions applicable to deprivation.

In *Gent v Robin and Ors*[^2] the plaintiff, an ordained priest, had been issued with a licence by the Bishop of Adelaide, Bishop Robin, as the priest-in-charge of a district. The licence contained the words:

> Reserving unto ourselves and our successors Bishops of Adelaide nevertheless the right to revoke on giving three months' notice this Licence, or by endorsement thereon to change the boundaries of the District in which you are to perform the said Office of Priest.

Upon the receipt of complaints about the conduct of the plaintiff, the bishop detailed those complaints to the plaintiff and asked for his response. Subsequently the bishop wrote to the plaintiff advising him that his licence would be withdrawn at the expiration of three months. The plaintiff argued unsuccessfully that his licence could be revoked only after conviction by the ecclesiastical court of an ecclesiastical offence. Piper AJ expressed his opinion thus:

> The Bishop has seen fit to reserve to himself the right to cancel on notice the licence which he granted to the plaintiff. I see nothing in the consensual contract or the documents incorporated with it to prohibit him from doing that if he thinks fit so to do.^[3^]

In *Gregory v Bishop of Waiapu*[^4] the licence which had been revoked as a result of which the proceedings were brought was expressed:

[^3]: Ibid 358.
to reserve to ourselves, and our successors, Bishops of Waipaa, full
power and authority, subject to the provisions of Title A, Canon II, and
of the Title D, Canon II, to revoke these presents and all things therein
contained, whenssoever we see just cause to do so.

Unlike the Bendigo licence, this reservation does require that there be 'just
cause' for the revocation.

[It is noted that such a reservation is contained only in the licence of a vicar
appointed to a parochial district. Clause 21 of Title A, Canon II provides that
the incumbent of a parish shall not be removed except for an ecclesiastical
offence and upon a decision of the relevant tribunal.]

Yet, in 1907 the Diocese of Wangaratta enacted a measure entitled 'An Act
for the Removal of Clerks in Certain Cases'. The relevant sections were 4
and 10. The operative part of section 4 was in the following terms:

[It shall be lawful for the Bishop whenever in his opinion the interests
of the parishioners shall seem to him to render such action necessary
to require by writing under his hand without the formulation of any
charge and without any hearing by a committee of reference or
otherwise the resignation by any clerk of and from any or every parish
benefice charge cure curacy or office held by him.

Section 10 provided:

Every decision and action by the Bishop under the provisions of this
Act shall be final and conclusive.

Nowhere in the Act was there provision for the person concerned to be given
an opportunity to show cause why he should not be dismissed. In Gladstone
y Armstrong\footnote{[1908] VLR 454.} a'Beckett J. held that the ordinance was a valid enactment of
the Diocesan synod and that there was no requirement to provide the priest
with an opportunity to be heard.

I think that the Act No. 3 made an incumbent removable at the
pleasure of the Bishop without giving him an opportunity to be heard in
his defence, that the Bishop has availed himself of this power, and that
the plaintiff has therefore no case.\footnote{Ibid 465.}

With respect, if such a situation were to occur to-day, a failure to follow the
principles of natural justice would allow for a successful appeal. In this
regard, the approach adopted in Ex parte Thackeray: re Bishop of
Newcastle\footnote{(1874) 13 SCR (NSW) 1.} is to be preferred. In that case the Bishop of Newcastle, having
heard certain ‘scandalous reports’ of Mr. Thackeray, summarily withdrew his
licence. It was held by Hargrave and Cheeke JJ that despite the oath of
canonical obedience taken by a priest disciplinary action could not be taken
without allowing the priest to be given details of the misbehaviour alleged and
providing an opportunity for the priest to respond to the allegations.

In New South Wales the \textit{Church of England Constitution Act} 1902 contains a
schedule entitled ‘Constitutions for the management and good government of
the Church of England within the State of New South Wales’. Clauses in that
Schedule are referred to as ‘Constitutions’. The 20th and 21st Constitutions
relate to the ability for licences to be withdrawn and are in the following
terms:

20 The Synod of each Diocese may also, by ordinance, make provision for dealing with cases of incapacity for, or inefficiency in, the discharge of ministerial duty by Clergymen licensed by the Bishop within the Diocese, and may also make provision for the apportionment of any emoluments appertaining to the office of any such Clergyman between the Clergyman found incapable or inefficient and his successor.

21 The Synod of each Diocese shall have power to determine by ordinance in what cases the licence of a Clergyman licensed within the Diocese may be suspended or revoked. Such licence may be suspended or revoked by the Bishop of the Diocese at a Clergyman's own request, or (after opportunity given to him to show cause) in such of the said cases as the Synod shall by ordinance determine. Save as aforesaid, the licence shall not be suspended or revoked except as a consequence of a judgment or finding of the tribunal or of some other court of competent jurisdiction.

The effect of these Constitutions was referred to by Jacobs J. in Baker v Gough[98] The plaintiff was the chaplain at the King's School and for that purpose held a licence from the Archbishop of Sydney. The Council of the School, having unsuccessfully sought the plaintiff's resignation, dismissed him and sought from the Archbishop a revocation of the plaintiff's licence. The Council relied upon the provisions of the diocesan School Chapels and Chaplains Ordinance 1954, clause 10 of which provided as follows:

(a) The School Council may by a vote of the majority of its members after opportunity has been given to a Chaplain or Assistant Chaplain to show cause dismiss such Chaplain or Assistant Chaplain from his office and shall give written notice of such dismissal to the Archbishop who shall upon receiving such notice revoke the licence of such Chaplain or Assistant chaplain.

[98] [1963] NSWJR 1345.
It was held, first, that the provisions of the 21st Constitution are not restricted to licences of those admitted to the cure of souls and, secondly, that the mandatory language of the latter part of clause 10 (a) was ultra vires. The ultra vires finding arose because there was no requirement or provision allowing for the clergyman concerned to show cause why the licence should not be revoked as is required in the 21st Constitution.

Pursuant to the provisions in these Constitutions the Synod of the Diocese of Sydney has enacted the Incapacity and Inefficiency Ordinance 1906. That Ordinance was invoked and relied upon in 1972 when the licence of the incumbent of the parish of St. Saviour's Redfern, who had life tenure, was revoked because the congregation had shrunk for reasons other than demographic; the reason attributed was that he was incapable of effective ministry.

The Ordinance was again invoked in late 1994 to revoke the licence of the then incumbent of the parish of Pymble following substantial complaints to the Archbishop from parishioners over the incumbent’s style of leadership. However, before the licence was revoked an independent inquiry was conducted at which the minister concerned was represented by legal counsel.99

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99 For greater detail of these two matters see the Personal Explanation of the Chancellor of the Diocese of Sydney, Mr Justice Handley, delivered to the Synod of the Diocese on the 1st November 1994.
The issue is whether the ability of a bishop to withdraw the licence of a minister constitutes so severe an interference with the concept of the parson's freehold that the status of the minister must be that of an employee and not that of an office holder. It is suggested that while the power of revocation is exercised only upon valid cause being shown and only after the minister concerned has been allowed an opportunity to show cause, the existence of that power does not advance the argument either way; such a power may be equally applicable to an office holder as to an employee.

This gives rise to the question: what is a valid cause? Those matters which for generations have been regarded as ecclesiastical offences, being those matters which have been referred to on pages 43 and 45 above, and which are enshrined in the ordinances of the dioceses and of the Australian Church will constitute 'a valid cause'. But is 'inefficiency' as referred to in the Sydney ordinance a valid cause? In the Diocese of Gippsland section 16 of the Appointments Act 1994 is in the following terms:

16 (1) If the Bishop is satisfied that the incumbent of a parish is causing, by acts or omissions, serious detriment to the parish, the Bishop may ask the incumbent to show cause -

(a) why the incumbent should not be transferred to another appointment; or
(b) why the appointment of the incumbent should not be terminated.

In the Diocese of Wangaratta there has been established a Tenure Board the responsibility of which is to consider 'whether in the best interests of the Parishioners of any Parish the Incumbent thereof if he be of more than five
years standing in Priest's Orders should be called upon to resign'.

Provision is made for the incumbent's right to be heard but if the Board were to so advise the Bishop, then:

Upon receiving any such report it shall be lawful for the Bishop if he shall see fit and without assigning any reason other than such report by writing under his hand to require the resignation of such Incumbent of and from every parish benefice charge Cure curacy or office held by him.¹⁰¹

Of concern in this ordinance is the expression 'in the best interests of the Parishioners'. In the Diocese of Gippsland the criterion is 'causing serious detriment' but 'the best interests of the Parishioners' may well have no boundaries.

In the Diocese of Melbourne provision has been made whereby the Archbishop may suspend an incumbent from a parish and may revoke the incumbent's licence if 'it is in the best interests of the parish or of the incumbent of the parish that the incumbent be suspended'. There are extensive procedural provisions to be followed which will ensure the application of the rules of natural justice but a pre-requisite to suspension is a finding that 'a breakdown has occurred in the pastoral relationship in the parish that is irretrievable'.¹⁰²

¹⁰⁰ The Parish Administration Act 1984, section 51.

¹⁰¹ Ibid, section 55.

The issue is not whether there is a need for means to deal with 'irretrievable breakdown' or 'causing serious detriment'. Such measures are preferable to placing an incumbent on trial for an ecclesiastical offence. The issue is whether the conclusion which must be drawn is that the ability to remove an incumbent from an appointment, even though the principles of natural justice have been observed, destroys the concept of parson's freehold.

To this may be added the further consideration, that no matter what may have been the position previously, the general situation in the Australian dioceses is that there is no requirement for the resignation to be accepted by the bishop before it becomes operative. Most diocesan legislation requires only that the resignation will not take effect until the expiration of a specified period of time.

In such circumstances, two of the strong arguments in support of the office holder status have been removed. Yet, this does not in itself mean that the status of the clergy is that of employees.
7. **A review of the common law.**

In English common law the starting point is the decision of Parker J. in *Re Employment of Church of England Curates.*

The *National Insurance Act* 1911 required all persons 'who are employed' to be covered by Health insurance in accordance with the provisions of the Act. The Insurance Commissioner instigated this action in respect of two curates, alleging that they were employed by their respective vicars.

Of the two curates against whom the Insurance Commissioner brought the proceedings the first was a 'licensed' curate. That is, he held a licence from the bishop to serve in a specified parish. From the argument of those representing him it appears that the allegation was that he was employed by the vicar as the incumbent of the parish.

The second of the two curates was 'unlicensed'. That is, he held no licence from a bishop other than permission to officiate. In modern terms, he was on probation. It was argued, unsuccessfully, on his behalf that the Act was applicable, his relationship with the vicar being akin to that of a solicitor and his clerk.

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103 [1912] 2 Ch. 563.
Parker J. held that neither curate was an employee. He expressed his conclusion in the following words:

I have come to the conclusion that the position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose duties and rights are defined by contract at all. It appears to me that there can be no pretence in reality for arguing that the relation between him and his vicar, or between him and his bishop, or between him and anyone else, is the relation of employer and servant.\textsuperscript{104}

In reaching this conclusion he relied, first, upon the inability for a curate to be dismissed or to resign without the consent of the bishop.

The second matter which was considered in the judgement was the duties to be performed by a curate as appears from the following passage:

Further, when I come to consider the duties of the curate, it appears to me that those duties are in no way defined by any contract of employment between him and anyone else. He owes, no doubt, a certain amount of obedience to the vicar . . . but the duty which he owes to the vicar is not a duty which he owes because of contract, but a duty which he owes to an ecclesiastical superior. He owes one kind of duty to the bishop and another kind of duty to the vicar, and one may have greater control over his actions than the other, but whatever authority either exercises over him is an authority which can be exercised by virtue of the ecclesiastical jurisdiction, and not an authority which depends in any case upon contract.\textsuperscript{105}

The great importance of this decision is not simply the finding that the curates were the holders of an ecclesiastical office, but the reasons advanced in support of this conclusion. The matters of tenure and of independent functions or duties are consistent with the matters upon which, in later decisions relating to office holders generally, it was sought to be able to distinguish an office from an

\textsuperscript{104} Ibid 568 - 569

\textsuperscript{105} Ibid 569 - 570
employment relationship.

The absence of a contractual relationship carried considerable weight in Rogers v Booth.¹⁰⁶

Sir Wilfrid Greene M.R. with whom Romer L.J. and Scott L.J. agreed, studied the manual entitled 'The Orders and Regulations for Officers of the Salvation Army'. He then concluded:

What I have read is quite sufficient to show the general nature of the institution, and the characters of the relationship of those who become officers in it, towards their General, and the institution as a whole. It is a relationship pre-eminently of a spiritual character. They are united together for the performance of spiritual worship, and, in order to carry out efficiently the ends they have in view, they submit to a very strict discipline and a very strict command. On the face of that, it appears to me that the necessary contractual element which is required before a contract of service can be found is entirely absent.¹⁰⁷

It appears to me, therefore, that the appellant cannot establish, not merely a contract of service, but also any contractual relationship at all which could possibly become a contract of service, and, in my opinion, the appellant fails on the ground.¹⁰⁸

This approach was further developed by the Court of Appeal in President of the Methodist Conference v Parfitt.¹⁰⁹ Parfitt was a minister of the Methodist Church. He lodged a complaint of unfair dismissal with the Industrial Tribunal. The Tribunal's jurisdiction arose from the Employment Protection (Consolidation) Act

¹⁰⁶ [1937] 2 All ER 751.
¹⁰⁷ Ibid 754
¹⁰⁸ Ibid 755
¹⁰⁹ [1984] 1 QB 368.
1978. Under the Act only an 'employee' could complain of unfair dismissal. 'Employee' is defined in the Act as an individual who has entered into or works under a contract of employment.

The decision of the industrial tribunal was upheld by the Employment Appeal Tribunal. The lay members of the Tribunal (who constituted the majority) held that the detailed arrangements between a minister and the church and the high degree of control to which a minister was subject indicated that Parfitt was an employee. Waterhouse J., the Chairman of the Tribunal, dissented.

The Methodist Church successfully appealed to the Court of Appeal. In legal terms, there were two issues before the Court. First, did the respondent have a contract and, secondly, if he did, was it a contract of employment?

The following matters were relied upon by the respondent:

* the Church treated him as an employee for the purposes of national insurance contributions;
* deduction of income tax was made from his stipend at source;
* there was a scheme of compulsory superannuation in existence;
* his entitlement to holidays.

May L.J. quoted with approval the following passage from the judgment of the Chairman of the Tribunal:

I am unable to accept that either party to the present proceedings intended to create a contractual relationship. Moreover, the elaborate code of practice and discipline of the Methodist Church... does not seem
to me to be capable of formulation in terms of a contract between identifiable parties.\textsuperscript{110}

In the principal judgement delivered by Dillon L.J. he commented:

Even so, however, in my judgement, the spiritual nature of the functions of the minister, the spiritual nature of the act of ordination by the imposition of hands and the doctrinal standards of the Methodist Church which are so fundamental to that church and to the position of every minister in it make it impossible to conclude that any contract, let alone a contract of service, came into being between the newly ordained minister and the Methodist Church when the minister was received into full connection.\textsuperscript{111}

Despite the elaborate detail of the standing orders in relation to the manse and the furniture and fittings to be provided by the circuit for the newly appointed minister on the circuit, it seems to me that it follows, from a correct appreciation of the spiritual nature of the minister's position and relationship with the church, that the arrangements between the minister and the church in relation to his stationing throughout his ministry and the spiritual discipline which the church is entitled to exercise over the minister in relation to his career remain non-contractual.\textsuperscript{112}

This decision was followed in Davies v Presbyterian Church of Wales.\textsuperscript{113} The appellant complained of unfair dismissal. The Industrial Tribunal had held that he was an employee of the Presbyterian Church. The Employment Appeal Tribunal allowed an appeal from this decision holding that it was bound by the decision in Parfitt's case. The Court of Appeal upheld the Appeal Tribunal's decision. From this decision the appellant appealed to the House of Lords.

In the judgement there is not disclosed the reason for the dismissal or the authority by which such dismissal was given.

\textsuperscript{110} Ibid 380
\textsuperscript{111} Ibid 375
\textsuperscript{112} Ibid 376
\textsuperscript{113} [1986] 1 WLR 323
The Book of Orders and Rules provided for the establishment of the General Assembly which, among other matters, has supervision of all financial matters including the Sustentation Fund from which the minimum stipend for every clergyman was paid. For this purpose every congregation paid a minimum of 1,200 pounds. From the stipend there were deducted income tax and pension contributions.

The principal judgement was delivered by Lord Templeton with whom the other members agreed. Two passages are of value to this discussion. The first relates to the nature of the church.

The church is thus an unincorporated body of persons who agree to bear witness to the same religious faith and to practise the same doctrinal principles by means of the organisation and in the manner set forth in the constitutional deed. The constitutional deed contains powers of amendment save in respect of faith and doctrine. The present constitution of the church is to be found in the book of Order and Rules of the Presbyterian Church of Wales, which was published in 1978.  

There was a consideration of the possible contractual relationships beginning with the following passage:

My lords, it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual. But in the present case the applicant cannot point to any contract between himself and the church. The book of rules does not contain terms of employment capable of being offered and accepted in the course of a religious ceremony. **The duties owed by the pastor to the church are not contractual or enforceable.** A pastor is called and accepts the call. His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God. If his manner of serving God is not acceptable to the church, then his pastorate can be brought to an end by the church in accordance with the rules. The law will ensure that a pastor is not deprived of his salaried pastorate save in accordance with the provisions of the book of rules but an industrial tribunal cannot determine
whether a reasonable church would sever the link between minister and congregation.\textsuperscript{115} [Emphasis added].

Of the reverse situation, that is, the church's relationship with the incumbent minister, His Lordship said:

The duties owed by the church to the pastor are not contractual. The law imposes on the church a duty not to deprive a pastor of his office which carries a stipend, save in accordance with the provisions set forth in the book of rules [Emphasis added].\textsuperscript{116}

And finally:

There is indeed an agreement between all members of the church to perform and observe the provisions of the book of rules, but that agreement will only be enforceable at law in respect of any property rights to which a member is entitled under the terms of the agreement. By no stretch of the imagination can such an agreement constitute a contract of service.\textsuperscript{117}

This is the strongest statement denying employment status to clergy.

The decisions in Rogers, Parfitt and Davies negate any suggestion that by reason of being the established church, the Church of England was in a special position. This aspect is carried further by virtue of the decision in Santokh Singh v Guru Nanak Gurdwara.\textsuperscript{118} A Sikh priest had alleged unfair dismissal. The Industrial Tribunal, whose decision was upheld in the Employment Appeal Tribunal and the Court of Appeal, applied the principles contained in the decisions in Parfitt and Davis and found that there was no contract of employment. In the Court of Appeal it was argued, among other matters, that:

\textsuperscript{115} Ibid 329

\textsuperscript{116} Ibid 324

\textsuperscript{117} Ibid 330

\textsuperscript{118} [1990] ICR 309.
it was wrong to try to draw a close parallel between Christian churches and Sikh temples for the Sikh church is not a centralised body; each Sikh temple negotiates its own terms with those whom it engages;

there was a strict control over the activities of a Sikh priest; an example given was that a Sikh priest must not leave the temple on Sunday under any circumstances without the approval of the committee of management.

Neil L.J. approved of the following passage from the judgement of the Tribunal:

The relations between the applicant as a priest or Granthi and the [temple] as a religious institution were not governed by a contract of employment or service, but arose from his status as a minister of religion performing work of a spiritual nature as part of his vocation and religious duty.\textsuperscript{119}

Thus, again the spiritual nature of the duties to be performed has carried greater weight than the factors which might indicate an employment relationship.

The proposition that it was possible to be both a spiritual servant of God and a secular servant of the church had been argued, unsuccessfully, in Parfitt's case. Among other matters, the Court of Appeal was unable to find the requisite intention for the creation of a legal relationship.\textsuperscript{120}

Despite this, it was reported in the Church Times of London of the 3rd March 1995 that an industrial tribunal had ruled that the Reverend Dr. Alex Coker who

\textsuperscript{119} Ibid 314.
\textsuperscript{120} [1984] 1 QB 368, 376 - 7.
'was removed the diocese's payroll last June', had a contract of service with the Diocese of Southwark. This opened the way for Dr. Coker to bring an action for unfair dismissal. Details of Dr. Coker's position and of the reasons for his dismissal were not provided.

The chairman of the tribunal is reported to have said:

The relationship between a curate and his God is a matter separate from his relationship with the Church. I have great difficulty in seeing why the spiritual nature of his work should preclude the existence of a contract of employment.

In Australia, similar matters were raised in *Macqueen v Frackleton*. Upon an appeal from the Supreme Court of Queensland, the High Court was asked to decide whether the civil courts had jurisdiction over a spiritual body such as the Presbyterian Church of Queensland. Indirectly the case involved the question of wrongful dismissal.

In language similar to that used in *Davies*, Griffiths C.J. observed that:

[T]he Presbyterian Church, like any other religious body in Australia, is in the eyes of the law a voluntary association, the mutual relations and obligations of the members of which are regulated by the terms of an agreement of consensual compact to which they are parties.

The compact to which the Chief Justice referred was adopted in June 1900 and was set out in the Schedule to the *Presbyterian Church of Australia Act 1900* (Qld). Section 2 of the Act provides that "the Basis of Union and Articles of Agreement set forth in the Schedule to the Act shall have the full force and effect

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121 *(1909) 8 CLR 673.*
122 *Ibid* 679
of law.

On the direct issue the conclusion of the Chief Justice was as follows:

It is sufficient to say that the only way in which respective rights of the parties can be regarded in a Court of law is in the aspect of rights arising under a consensual compact, the interpretation of which is for the Court, and not for the parties to the contract, to determine.¹²³

O'Connor J. reached a similar conclusion. He referred to the nature of a religious group as a voluntary association and expressed the opinion that the civil courts will interfere only when the church has exceeded its powers.¹²⁴

This case is important because it is the only case in which the High Court has considered the nature of a religious body, the source of its powers and the right of civil courts to interfere in the exercise of those powers.

These matters were relevant when the authority of a single diocese, the Diocese of Canberra and Goulburn, to ordain women priests was challenged in the New South Wales Court of Appeal in Scandrett v Dowling.¹²⁵ This case is considered subsequently in this thesis.

On the 8th March 1996 Justice Hector Soubliere in an Ontario Court delivered judgment in a matter in which an Anglican priest, Arthur Brewer, alleged wrongful

¹²³ Ibid 689

¹²⁴ The relevant quotation from this judgment is set out above at p 15.

¹²⁵ (1992) 27 NSWLR 483
dismissal. The defendants were the Diocese of Ontario and Bishop John Baycroft. Brewer claimed $125,000.00 in damages on the ground that he failed to receive reasonable notice of the termination of his appointment.

It was reported that His Honour described the plaintiff as an ecclesiastical office-holder and that he was neither a contractor nor an employee. Instead, a priest was 'in a partnership with the bishop' sharing authority over the parish.\textsuperscript{128} Obviously, the expression 'partnership' could not have been used in accordance with the legislative definition of 'partnership'.\textsuperscript{127} Subject to that qualification, it is perhaps the most accurate description of the relationship between a bishop and his clergy. Throughout Australia and, indeed, throughout the world-wide Anglican communion, upon the induction of a priest into the incumbency of a parish it is the custom for the diocesan bishop to say to the priest words such as 'accept this charge which is both yours and mine'.\textsuperscript{128}

However, although this description may be appealing as an ecclesiastical analysis, it is not acceptable as a legal analysis for, as indicated, it fails to comply with the legal description of a partnership.

It follows that the common law supports the conclusion that clergy are not in an employment relationship. Unfortunately, in none of the cases did it become

\textsuperscript{126} Ecumenical News international. Internet eni@wcc-coe.org 8th March 1996

\textsuperscript{127} Partnership Act 1958 (Vic) s 5(1).

necessary to consider who might be the employer although it was raised, albeit in passing, in *Moses v The Diocese of Colorado*.129

8. **Who is the employer?**

The very nature of a contract is that there must be at least two parties. If there is a contract of employment to which clergy are a party, one must be able to identify a person or persons or body as the other party who will be the employer. Yet, most of the decisions have failed to address this aspect concentrating instead upon either the responsibilities and duties of clergy or the lack of intention to enter into a contractual relationship. If a contract of employment is alleged, those who may be that other party are the diocesan bishop, the diocese itself or the parish.

Although the specific details vary from diocese to diocese, the appointment of a member of the clergy to the position of incumbent of a parish or as an assistant priest or deacon within a parish is made by the bishop of the diocese. However, it is usual that he is advised by a committee consisting of lay members of the parish and lay and clerical representatives of the diocese. Nonetheless, the bishop has the sole discretion as to whether or not to appoint the nominated person.

Again, although the specific details may vary, it is usual that if the committee has failed to nominate to the bishop an acceptable person within a prescribed period, its rights of nomination lapse and the appointment is exercised by the bishop alone.
Upon this standard procedure, some dioceses have grafted modifications. For example, within the Diocese of Melbourne the Archbishop has the right to make every third appointment irrespective of the advice of the appointments committee.

When a person is to be appointed to a parish other than as an incumbent, the right of appointment is the sole prerogative of the bishop.

Upon appointment as the incumbent of a parish the priest is required to declare, among other matters, that he or she will conform to the ordinances and regulations of the synod of the diocese. In return, the priest receives from the bishop a licence which is the authority to exercise the rights and responsibilities associated with the position of incumbent of the parish. Further, the incumbent is entitled to the remuneration applicable to that appointment. The minimum total remuneration package will be in accordance with that laid down by the diocesan regulations.

Unless the diocesan legislation otherwise provides, once appointed an incumbent retains that position until death, retirement, resignation or until the appointment is otherwise lawfully terminated. Upon giving notice, an incumbent is entitled to resign from the position at any time and for any reason. Some, but not all, dioceses impose a retiring age for the clergy. However, in effect, a retirement age is imposed by the provisions of the General Synod's Superannuation Canon.
Thus, in summary form, it is the bishop who makes the appointment: provides the priest with the licence to officiate; it is the diocese: synodical legislation which sets the minimum remuneration package, including the provision of accommodation to a prescribed standard but it is the parish which must supply the various components of that package.

If the bishop were a corporation sole, as is sometimes believed, it would add weight to the possibility of the bishop being the employer. A 'corporation sole' is described as:

A body politic having perpetual succession, constituted in a single person, who, in right of some office or function, has a capacity to take, purchase, hold and demise . . . real property, and now, it would seem, to take and hold personal property, to him and his successors in such office for ever the succession being perpetual, but not always uninterruptedly continuous.\textsuperscript{130}

Halsbury includes as examples of a corporation sole an archbishop and a bishop, by implication, of the Church of England. Yet, this approach has not been argued in the various matters which have been before the courts. In the Australian Commentary on Halsbury the learned authors say that 'Australia has no ecclesiastical corporations sole'.\textsuperscript{131} However, this should be understood to mean no corporation sole at common law. It is possible for an ecclesiastical person to be created a corporation sole by statute. Thus, section 4 of the \textit{Roman Catholic Church Property Act} 1911, Western


\textsuperscript{131} Ibid para. 1207.
Australia, provides:

4 (1) For the purposes of this Act and of the Roman Catholic Church Lands Act 1895, the said Bishop for the time being shall be a corporation sole, by the name of "The Roman Catholic Archbishop of Perth", with perpetual succession, and by and in that name may sue and be sued and shall have power to purchase, take, and hold property and (subject as hereinafter provided, and to the trusts and dispositions aforesaid) to sell, mortgage, lease, or dispose of any property hereby vested, and may in respect of any real or leasehold property hereby vested exercise all powers conferred on the Bishop for the time being administering the Ecclesiastical affairs of the Roman Catholic Church of Western Australia, and his successors in office, by the Roman Catholic Church Lands Act 1895.

The Letters Patent which were issued to the early bishops of Australia, among other matters, constituted them corporations sole. However, nowadays bishops of the Anglican Church of Australia are not corporations sole either at common law nor by statute. Not only do they not hold property by virtue of their office, but by statute corporations have been established to hold property on trust for the various purposes of the Church within each diocese. For example, in Victoria the Trusts Corporation Act 1884 provides the legal structures under which most Anglican church property is held and managed in the various Victorian dioceses. The Act allows for the establishment of a body corporate in each diocese to hold property on trust for the benefit of the church. Section 5 provides that the bishop may transfer to the body corporate any property vested in him and his successors for church purposes and, further, that if he has not done so prior to his death, 'the same shall become vested in the body corporate without any conveyance'.

Therefore, although it is the bishop who has the prime responsibility for clergy appointments, he has no funds at his disposal to provide the component of the remuneration. Further, although the bishop assented to the synodical regulations, it is the synod of a diocese that determines the various components of the remuneration package.

It follows that although there is an offer of an appointment and an acceptance of that offer there is no intention, at least so far as the bishop is concerned, to enter into a contract of employment. The primary role of the bishop is to grant to the priest a licence authorising that priest to officiate within the diocese.

From the point of view of the clergy, the suggestion that an acceptance of an appointment offered by the bishop may create a contractual relationship negates the concept of 'a calling' to that appointment.

In addition there are limits upon the extent of control which a bishop has in respect of clergy within his diocese. He lacks both the 'detailed control' referred to by McCardie J. in the Performing Rights Society case\textsuperscript{132} and the ability to direct the type of work to be performed and the manner in which the work is to be performed as was described by Latham C.J. in Federal Commissioner for Taxation v J. Walter Thompson (Australia) Pty Ltd\textsuperscript{133}.

\textsuperscript{132} [1924] 1 KB 762.

\textsuperscript{133} (1944) 69 CLR 227.
In *Ex parte Thackeray: re Bishop of Newcastle*\(^{134}\) the principal issue was whether in disciplinary proceedings against a clergyman the bishop must conform with the rules of natural justice. Although it did not touch specifically upon the issue of the relationship between them, the Court held that although upon ordination clergy agreed to obey the commands of their bishop, that agreement was confined to those commands which the bishop was by law authorised to impose.

This poses the question: what commands does the law authorise a bishop to impose upon the clergy? In *Renault v Sheffield, Roman Catholic Bishop of Kamloops as Corporation Sole and Bishop of Kamloops*\(^{135}\) Houghton L.J.S.C. in the Supreme Court of British Columbia said of the Roman Catholic Bishop of the Diocese of Kamloops 'his power over a priest is ecclesiastical, not civil'.

Cripps records:

The principal duties of a bishop towards his clergy will be found to be comprised, in ordination, whereby he calls them into existence as persons ecclesiastical; in instituting or licensing them to their benefices or cures; in visiting them and exercising superintendence over their morals; and enforcing discipline and obedience to the laws ecclesiastical; for which purpose he has now been vested with ample power: and in suspending them or depriving them for due cause.\(^{136}\)

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\(^{134}\) (1874) 13 SCR NSW 1.

\(^{135}\) (1988) 29 BCLR (2d) 171.

Thus, the control that may be exercised by a bishop over his clergy is restricted to ensuring compliance with the ordinances and regulations of the diocesan synod. In all other matters and, in particular, in relation to the exercise of spiritual activities, the authority of the bishop is confined to the provision of advice, instruction and encouragement. In these circumstances the extent of control falls short of that required to justify a finding of an employment relationship.

Nonetheless, this conclusion is contrary to that of the majority opinion in *Moses v The Diocese of Colorado*\(^7\) in which the complainant sought damages from the Diocese of Colorado and its bishop, Bishop Frey, for injuries she sustained as a result of sexual relations with her parish priest from whom she had sought counselling. Initially her action had been against the priest but he became a bankrupt and thereby effectively terminated the proceedings against himself.

In the circumstances, the issues before the Court were as follows:

(1) Was the Diocese vicariously liable for a tortious action carried out by a priest?

(2) Was the Bishop in breach of a fiduciary relationship?

\(^7\) (1993) 863 Pacific Reporter 310.
(3) Had there been a negligent hiring of an employee?

The priest, Robinson, was newly ordained and had been appointed as an assistant to the complainant’s parish. However, the diocesan files relating to Robinson contained reports including a reference to ‘sexual identification ambiguity’. This was known to Bishop Frey but was not conveyed to anyone in the parish.

Following the misconduct the Bishop was told of the allegations, yet appointed Robinson to another parish as its rector. Further, when the complainant came to Bishop Frey with her allegations the Bishop instructed her to talk to no one other than her husband about the matter.

The Chief Justice dissented from the decision of the other members of the Court on a material aspect and it is important to consider the two opinions.

The majority was of opinion that for there to be negligent hiring there must be an employment or an agency relationship. The majority ran together employment and agency. Yet, although they found that there had been negligent hiring, they did not identify who was the employer. However, in one passage they came close to suggesting that the employer was the vestry.

Schoener also testified that the Diocese is represented by the bishop. . . . Schoener acknowledged that the vestries make the final hiring decision but ”[t]he vestries or the managing bodies of the Episcopal
congregation [are] counting on the bishop for checking out the clergy. Although they do the actual hiring they assume they are being given candidates who have a clean bill of health." 138

Despite this suggestion they found against the defendants, namely, the diocese and the bishop, on the ground of negligent hiring. In so doing they observed:

All of these facts indicate that a priest is not independent of the Diocese but is controlled by the Diocese and the bishop. The priest’s education is monitored by the bishop, he is put through a screening for hire by the Diocese which includes psychological examination. The priest’s compensation is affected by the bishop, the priest’s discipline is controlled by the bishop, and every part of the form of a priest’s counselling is regulated by the Diocese. The evidence at trial created a factual issue regarding whether an agency relationship existed. The trial court properly submitted this issue to the jury for determination and the jury found that there was an agency relationship between Father Robinson and the Diocese.139

In referring to the possibility that Bishop Frey may be the employer, in a dissenting opinion, Rovira C.J. separated employment and agency relationships but appears to have considered that the vestry was the employer of Robinson. However, as the action was not against the vestry, it was not necessary to make that finding. His finding was that there was no employment relationship with the diocese and, by implication it would appear, with Bishop Frey. For example, he commented:

The uncontradicted evidence presented at the trial established that the diocese neither had the right of continuous control over Father Robinson nor exercised that "right". . . . I would hold that no evidence

138 Ibid 326.
139 Ibid 327.
was presented at trial to support the jury's verdict that an agency relation existed between Robinson and the diocese and that, as a matter of law, no such relationship was established here.\textsuperscript{140} 

And, subsequently in his judgment he observed:

Like continuous control in the context of agency, the power of continuous control is a critical element, or prerequisite, to finding an employer - employee relationship. . . .

As noted above, the undisputed evidence reveals that the diocese neither had nor exercised the right to control Father Robinson's day-to-day activities. Similarly, the undisputed evidence established that the diocese did not have the power or authority to either hire or terminate Father Robinson.

Finally, it was undisputed that the parish, acting through its vestry, was the entity which compensated Robinson for his services, and not the diocese or Bishop Frey. . . .

Thus, I am of opinion that the uncontradicted evidence precludes, as a matter of law, a finding that the diocese and Father Robinson occupied an employer - employee relationship.\textsuperscript{141}

While I concede that the evidence cited by the majority establishes that a bishop can exert influence over assistant priests, such influence falls far short of establishing the requirements needed to prove an agency or employment relationship.\textsuperscript{142}

With respect to those who constituted the majority, it is inappropriate to run together the agency relationship and an employment relationship. The two are neither the same nor inter-changeable. Therefore, the exclusion of liability based on agency, that is, the opinion of the Chief Justice, is to be preferred.

\textsuperscript{140} Ibid 332 - 333.

\textsuperscript{141} Ibid 333 - 334.

\textsuperscript{142} Ibid 335.
On the question of employment the differences between the majority and the Chief Justice reflect the arguments that are being presented in the United Kingdom courts and in the Australian courts. The approach of the Chief Justice is in keeping with the decisions in Parfitt, Davies and Frackleton.

The Chief Justice rejected the finding of the jury that the diocese was vicariously liable. In the absence of an employment relationship vicarious liability cannot be established. In fact, the majority also reversed the decision of the trial court on the question of vicarious liability on the basis that the misconduct was committed outside the course and the scope of the priest's employment.

Both the majority and the Chief Justice accepted that Bishop Frey was in breach of his fiduciary duty towards the complainant and with this there can be no objection in the circumstances of the case.

The observations of the Chief Justice that 'the diocese neither had nor exercised the right to control Father Robinson' reflects the position within the Anglican Church of Australia. What power a diocese has, as contrasted with the power of its bishop, is exercised only through its synod. From one point of view, of all the possible employers, it is the diocesan synod which has the greatest authority over the clergy. It is the synod which has the power to enact legislation and to make regulations which will be binding upon the clergy of that diocese. However, the synod must act within the terms of its
own constitution and has no authority to impose control over the exercise of the spiritual responsibilities of the clergy.

Rarely does the synod of the diocese have the resources to provide the remuneration package. Those resources are provided by the parishes. Even in those dioceses where the stipend is paid from a central fund the fund is by nature a contra account with the monies coming from the parishes initially.

Thirdly, in the absence of enabling synodical legislation, a diocese has no authority to enter into any contractual agreement, including a contract of employment. Thus, as was said by Dillon LJ in Parfitt's case:

I have no hesitation in concluding that the relationship between a church and a minister of religion is not apt, in the absence of clear indications of a contrary intention in the document, to be regulated by a contract of service. 143

The third possible employer is the parish. Within a parish authority is exercised by the church wardens and the parish council or vestry. But such authority is restricted to that which is granted by the synodical regulations. One of the responsibilities of the parish council is to raise money, among other reasons, for the payment of the stipend. Further, the parish, through the parish council, is responsible for the provision and maintenance of the residence.

On the other hand, neither the parish nor the parish council has the authority

to appoint or dismiss an incumbent or assistant clergy. Nor does the parish have any control over the exercise of the duties of their clergy sufficient to satisfy the requirements of the right to control concept.

Accordingly, in Australia the position is very similar to that explained by Dillon in *Parfitt*. The inability to identify an employer together with the lack of intention to enter into a contract of service add weight to the conclusion that clergy are not employees.
9. Sources of responsibilities and rights of clergy.

The great benefit of a contract of employment is that the respective rights and obligations of the parties are established by the contract. They may be expressed in the contract itself or they will be incorporated by reference to documents such as legislation, regulations, industrial awards and the employer’s policy documents. In addition it may be that some of the terms are implied by the common law.

In the absence of a contract it is not unreasonable to inquire as to the source of the responsibilities and the rights of clergy.

In Davies v Presbyterian Church of Wales\(^{144}\) Lord Templeton referred to the nature of the Church. He described it as:

\[\text{[A]n unincorporated body of persons who agree to bear witness to the same religious faith and to practise the same doctrinal principles by means of the organisation and in the manner set forth in the constitutional deed.}\]

From these words it may be concluded that the source of the responsibilities and rights which are applicable to clergy are to be found in the faith, the doctrinal principles and the constitution of the Church.

A similar approach was adopted by Griffiths C.J. in Macqueen v Frackelton\(^{145}\).

\(^{144}\) [1986] 1 WLR 323.

\(^{145}\) (1909) 8 CLR 673.
He observed that the mutual relations and obligations of the members of the Presbyterian Church of Australia were regulated by 'the terms of an agreement or consensual compact to which they are parties'. The compact referred to was the Basis of Union and Articles of Agreement contained in the schedule to the Presbyterian Church of Australia Act 1900 (Qld).

It follows, first, that one must identify any relevant faith, doctrinal principles and constitution and, secondly, that there be a connection with the person concerned to satisfy the Chief Justice’s description of that person as being one of the 'parties'.

Within the Anglican Church of Australia the threefold order of bishop, priest and deacon requires that a person be ordained as a deacon before he or she is ordained as a priest. In the service by which a person is made a deacon the ordinand is asked:

Will you accept the order and discipline of the Anglican Church of Australia, submitting yourself to the lawful authority of your bishop and others set over you in the Church?\footnote{A Prayer Book for Australia. Broughton Books (1995) 787.}

In addition, immediately prior to an ordination and subsequently at the induction of a priest as the incumbent of a parish, the person concerned is required to declare in writing that he or she will conform to the Acts and the regulations of the diocese for which the ordinand is to be ordained or in which the parish is situated.
Accordingly, it is possible to find that the clergy have agreed to be bound by the doctrinal principles and the relevant rules and regulations of the Anglican Church of Australia as applicable within the diocese concerned.

Those rules and regulations are to be found in the following documents:

1. The Constitution of the Anglican Church of Australia. This document was approved by the General Synod of the Church on the 5th October 1955 and came into effect on the 1st January 1962. It was given statutory recognition by the parliaments of the Commonwealth and of each State and Territory.

2. The canons made by the General Synod pursuant to the provisions of the Constitution.

3. The constitution of each province of the Church. Provinces are coterminous with the state boundaries with the exception of Tasmania which is described as an extra-provincial diocese. The Province of Victoria has a provincial council instead of a provincial synod. The function of the Council differs from that of a synod and, in particular, it has no authority to make rules or regulations unlike the synod of a province.

4. The Constitution of a diocese in which they are serving from time
to time.

5. The resolutions, regulations and legislation of the synod of that diocese.

The canons, resolutions, regulations and legislation which may be made or enacted must not be contrary to the civil law. It had been assumed that, save for that qualification, when made they are binding upon members of the Anglican Church of Australia within Australia, the province or the diocese as the case may be. However, this view was challenged in relation to the national Constitution in *Scandrett and Others v Dowling and Others*.¹⁴⁷ The plaintiffs sought to have the Supreme Court of New South Wales restrain Bishop Dowling from proceeding with his intention to ordain as priests certain women. The argument of the plaintiffs was that to proceed with the ordination of women relying solely upon a diocesan ordinance was contrary to the Constitution.

In the Court of Appeal Mahoney JA held that the only terms of the Constitution which were enforceable in the civil courts are those relating to property. He stated the issues before the Court in these terms:

> The essential question for present purposes is the effect of the Act upon the nature of the operation of those portions of the Constitution which deal with the power of ordination of women and in particular the power of a bishop to ordain women and the power of the General Synod to grant

¹⁴⁷ (1992) 27 NSWLR 483.
such a power.\footnote{Ibid 500. The Act referred to was the Anglican Church in Australia Constitution Act 1961 (NSW) in the schedule to which is set out the Constitution.}

His Honour’s opinion was that the rules set out in the Constitution were enforceable only to the extent that the rules of a voluntary association with such a constitution would be enforceable.\footnote{Ibid 502.}

He concluded:

As I have indicated, I accept that in general the rules of the Anglican Church impose legally enforceable rights and obligations on its members: this, I think, is the position in relation, for example, to matters of property referred to in ss 2-7 of the 1961 Act and generally in the Constitution: see, for example, chapter X. But I do not think that all of the doctrines, rituals and disciplinary procedures imported into the rules by, for example, cl 1-4 of the Constitution were intended to act as legally binding contractual terms.\footnote{Ibid 508.}

Priestley JA, with whom Hope A-JA agreed, expressed a similar opinion, saying:

Section 2 of Act 16 of 1961 in my opinion makes it as clear as words can make it that the binding legal effect of the Constitution is limited to purposes connected with or in any way relating to the property of the Church. Matters of faith and organisation not connected with or related to Church property are not made any more binding at law than they were before the Act was passed.\footnote{Ibid 512 - 3.}

Both Mahoney and Priestley JJA were of opinion that the extent of the powers of a bishop in relation to ordination had not been established in the proceedings before them and, therefore, it was not open to them to conclude that Bishop Dowling had acted contrary to the Constitution. To a great extent this was because of the manner by which the proceedings came before the Court of Appeal. When the matter came before Hodgson J for directions in the Equity Division, he ordered that various questions first be determined in the Court of
Appeal.

Nonetheless, although their observations were obiter dicta, with respect, such an interpretation of the Constitution cannot be correct. It is not in keeping with the observations contained in Rogers v Booth\(^{152}\) and in Parfitt's case\(^{153}\) and it appears to be contrary to the decision of the High Court in Macqueen v Frackelton.\(^{154}\) Priestley AJ discussed this decision at length\(^{155}\) and sought to distinguish it by reference to the different language used in the respective legislation, namely the Presbyterian Church of Australia Act 1900 (Qld) and the Anglican Church in Australia Act 1961 (NSW).

Further, the decision and the reasons advanced in support of it are also in conflict with the provisions of legislation which confers upon the synod of a diocese the authority to make rules which are binding upon Anglicans. For example, the Church of England Act 1854 (Vic) provides in s 2:

> Every regulation Act and resolution of such Synod made by the Bishop and the Clergy and Laity thereat respecting the affairs of the said Church . . . shall be binding on every such Bishop and his successors and on the Clergy and Lay Members of the said Church residing within the Diocese for which such Synod shall have been convened and on none other and on them only so far as such regulation Act or resolution may concern the position rights duties and liabilities of any Minister or member of the said Church or any person in communion therewith in regard to his ministry membership or communion or may concern the advowson or right of patronage in or management of the property of the said Church. . . .

\(^{152}\) [1937] 2 All ER 741.

\(^{153}\) [1984] 1 QB 368.

\(^{154}\) (1909) 8 CLR 673.

\(^{155}\) (1992) 27 NSWLR 483, 555 - 559.
The preferred position is that the provisions contained in the Constitution of the Anglican Church of Australia and the canons and rules made pursuant to those provisions are binding upon the clerical and lay members of the Church to the extent that they are not contrary to the civil law.
10. Conclusion.

A finding that clergy are employees would have a great number of consequences for the clergy and for the Church itself. In Australia there have been many changes in the remuneration, entitlements and rights which are vested in members of the clergy. The increase in the number of employees who carry out their work from a home office, in some cases pursuant to an industrial award, has increased the suggestion that clergy, by analogy, are employees. As a result, there is a blurring of the previous clear lines of demarcation. This blurring has been compounded by legislative provisions which classify clergy as employees for the purposes of that legislation alone.

In particular, the application to stipends of the provisions of the Income Tax Assessment Act relating to 'pay as you earn' deductions of income tax at source suggests that clergy have elected to be regarded as employees and are thereby estopped from denying that status.

However, case law has treated such an arrangement as a matter of convenience. In addition, the Commissioner of Taxation has ruled, in effect, that the arrangement does not render clergy employees at common law.

The concept of a 'living' as applicable in the Church of England has not been part of the ecclesiastical law or practice within Australia. This has removed one of the strong indicators of office holder status.
An employment relationship is a contractual relationship. Although it is possible to identify the possible terms which may be applicable to the clergy, other matters necessary to the existence of a contract are lacking. The spiritual nature of the duties undertaken and expected of clergy in themselves distinguish the relationship from one of employment. It must be recognised that there are some clergy who, although undertaking and exercising spiritual duties, are clearly employees. Such persons include, for example, those who are employed as chaplains by schools and hospitals. In these situations the intention of the parties and the extent of control over them outweighs the spiritual nature of their duties.

On the other hand, for those clergy who are appointed to parishes as incumbents or assistants, it is the spiritual nature of their duties which has led to the conclusion that the degree of control which the common law requires for a finding that a person is an employee is lacking. In addition, there is lacking the element of an intention by a bishop and individual clergy to enter into a contractual relationship.

Finally, the division of responsibility relating to the appointment to a position, the payment of stipends and the right to remove clergy from a position create difficulties in identifying who is the employer. This too tells against a finding of employment status.

It is clear that at the present time the common law in Australia and elsewhere
regards clergy as office holders and not employees.

For clergy to be regarded as the holders of an office matches the 'independent responsibility' referred to by Dixon J. in Musgrave v The Commonwealth\textsuperscript{156} and fulfills the description of an office given by Rowlett J as:

\begin{quote}
[A] subsisting, permanent, substantive position, which has an existence independent of the person who filled it [and] which went on and was filled in succession by successive holders.\textsuperscript{157}
\end{quote}

The High Court has not had occasion to re-consider the matter since MacQueen v Frackelton. However, the approaches adopted by superior courts elsewhere lead to the assumption that the High Court would not reach a different conclusion and that the status of office holders accorded to the clergy would not be displaced.

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\textsuperscript{156} (1937) 57 CLR 514.

\textsuperscript{157} Great Western Railway Company v Bater\textsuperscript{[1922]} 2 AC 1, 5.
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