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Discrimination, Language and Freedom of Religion: Two Important Law and Religion decisions in Australia

Neil J Foster



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**Discrimination, Language and Freedom of Religion: Two Important Law
and Religion decisions in Australia**

Associate Professor Neil Foster¹

Australia, unlike the United States of America, has not had a long history of controversy over religious freedom or establishment issues. Perhaps the historical origins of the countries might offer some explanation: one settled by many whose religious commitments led them to leave their own countries to find a place to practice their religion; the other by convicts for whom religion probably played a small part on their lives!

But as a part of the increasingly globalized and multi-cultural Western world, legal issues relating to religion are now becoming of greater interest even in Australia. More law schools, like mine, are teaching “Law and Religion” in different versions.

And within the last year, the issues raised by the intersection of Western legal systems and religious commitment have come before 3 superior courts in Australia, and are likely to continue to do so. In this paper I will outline fairly briefly two important cases that raise these matters, and describe how the courts in Australia are dealing with them. (My colleague Professor Rochow will be discussing the other important decision with an impact on law and religion issues, the High Court’s ruling that a same-sex marriage law enacted by the Australian Capital Territory was invalid.)²

The two cases I will be discussing are drawn from disparate areas of life and from two separate appellate courts. One comes from a State court and deals with the extent to which a Christian organization, offering services in a “secular” marketplace, will be allowed to be true to its fundamental beliefs. The other raises the interesting and vexed issue of whether a religious organization may decline to offer services that are seen as important by some of their own members.

As it turns out, the questions raised by these, and by the same-sex marriage case, provide to some extent a neat summary of the spectrum of issues facing believers in the modern world. To what extent will a religious viewpoint which historically has supported certain institutions of the society at large, be over-turned when society’s moral perceptions change? To what extent will the broader community accommodate religious organisations and believers when they no longer agree with the majority on moral issues? And finally, how should disputes within a religious organization be resolved in a way that preserves the religious freedom of all concerned?

¹ BA/LLB, BTh (ACT), DipAMin (Moore), LLM (Newc); Lecturer in Law and Religion, Newcastle Law School, University of Newcastle, NSW, Australia; comments welcome to neil.foster@newcastle.edu.au.

² *Commonwealth v Australian Capital Territory* [2013] HCA 55 (12 December 2013) (the *Same Sex Marriage case*).

1. Christian Camps and Discrimination: *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014)

In this decision, the Victorian Court of Appeal, by a 2-1 majority, ruled that the organization Christian Youth Camps Ltd (“CYC”) was liable for sexual orientation discrimination due to declining a booking for a weekend camp from a same-sex support group. By a different 2-1 majority, however, it ruled that the individual who had declined the booking, Mr Rowe, was *not* liable.³

Background Facts

The complainant organisation, Cobaw, runs a project called “WayOut”, designed to provide support and suicide prevention services to “same sex attracted young people”. The co-ordinator of the project approached CYC (a camping organisation connected with the Christian Brethren denomination) to inquire about making a booking at a Phillip Island campsite (near the city of Melbourne) that was generally made available to community groups. Mr Rowe, to whom she spoke, informed her that the organisation would not be happy about making a booking for a group that encouraged a homosexual “lifestyle”, as he later put it.

There was some factual dispute about what was said in the telephone conversation. However, in the end the issues were fairly clear. There had been a refusal to proceed with a booking; the reason for the refusal was connected with Cobaw’s view to be presented during the camp that “homosexuality or same sex attraction is a natural part of the range of human sexualities” (see [28]), and CYC’s opposition to this view was a result of what it saw as required by the Scriptures.. Despite this, the Tribunal (constituted by Judge Hampel of the Victorian County Court), ruled against the CYC and Mr Rowe, and ordered that they had unlawfully discriminated and should be jointly liable to pay a fine of \$5000.⁴

The primary liability imposed was under ss 42(1)(a) and (c), and s 49, of the *Equal Opportunity Act 1995* (Vic) (“*EO Act 1995*”). These provisions prohibited discrimination on certain grounds (among which were same sex sexual orientation, and personal association with persons of same sex sexual orientation), in the areas of “services”, in “other detriments”, and in accommodation.⁵ But the Tribunal said that it also had to take into account the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which in effect is a general “Bill of Rights” for Victoria.⁶ The *Charter* contains a prohibition on discrimination, in s 8; importantly, it also contains a right to freedom of religion and religious practice in s 14, and a right to freedom of expression in s 15.

³ An earlier, slightly more discursive, comment on the case can be seen at N Foster, “Christian Youth Camp Liable for Declining Booking from Homosexual Support Group” (April 21, 2014), available at SSRN: <http://ssrn.com/abstract=2430493>.

⁴ See *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd & Rowe* [2010] VCAT 1613 (8 Oct 2010).

⁵ The previous legislation has now been replaced by the *Equal Opportunity Act 2010* (Vic), which contains provisions to similar effect, most of which came into operation on 1 August 2011.

⁶ Australia as a whole has no “Bill of Rights”, of course, unlike the United States, the United Kingdom and most other Western democracies. Why this is so, and some of the arguments for and against, are discussed in a collected set of essays *Freedom of Religion under Bills of Rights* edited by Paul Babie and Neville Rochow (University of Adelaide Press, 2012). Victoria and the ACT are the only two law-making jurisdictions in Australia that have enacted general statutory protection for human rights.

The *EO Act 1995* contained two exemptions based on religion. Section 75(2) provided:

- (2) Nothing in Part 3 applies to anything done by a body established for religious purposes that –
- (a) conforms with the doctrines of the religion; or
 - (b) is necessary to avoid injury to the religious sensitivities of people of the religion.

And s 77 provided:

Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

The Tribunal held, however, that neither of these provisions assisted either the CYC or Mr Rowe.

Issues on appeal

The main issues⁷ that the Court of Appeal dealt with can be summarised as follows:

1. Was the Victorian *Charter* relevant to the case?
2. Was the relevant refusal discriminatory on the basis of sexual *orientation* of the participants, or could it be seen as based on the support that the weekend was to offer for homosexual *activity*?
3. Was CYC alone liable under the Act, or were both CYC and Mr Rowe potentially liable?
4. Could CYC rely on the s 75 defence applying to a “body established for religious purposes”?
5. Could Mr Rowe rely on the s 77 defence on the basis of the necessity to comply with his “genuine religious beliefs or principles”?
6. Could CYC as an incorporated body rely on the s 77 defence?

1. Application of the Charter

The Tribunal had ruled that the *Charter* was relevant, even though it had commenced on 1 Jan 2008 and the events at issue here occurred before then. Maxwell P ruled that this was a mistake; while the *Charter* required courts dealing with issues that arose after 1 Jan 2008 to interpret legislation passed before that date in accordance with its principles, it was not fully retrospective. Matters that had taken place before its commencement should be dealt with under pre-*Charter* law: see [176]-[179]. Redlich JA at [509] agreed on this point; Neave JA should probably be seen as agreeing with the other members of the Court on the point.⁸

2. Discrimination based on Orientation or Behaviour?

CYC argued that the decision not to accept the booking from Cobaw was not based on the “sexual orientation” of the participants, but upon the advocacy of homosexual activity which the event would involve- see [52].

⁷ Some other minor preliminary issues are not discussed in this overview.

⁸ See her Honour's comments at [360], expressing general agreement with Maxwell P where not otherwise indicated.

All members of the Court rejected this argument. Maxwell P, for example, supported comments that had been made by the Tribunal which were to the effect that sexual orientation is “part of a person’s being or identity” and that:

To distinguish between an aspect of a person’s identity, and conduct which accepts that aspect of identity, or encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity.⁹

In other words, to criticise homosexual sexual activity is to attack those people who identify as homosexual. The following quote at [61] from the UK Supreme Court decision in *Bull & Bull v Hall & Preddy* [2014] 1 WLR 3741 was supported, where Lady Hale said:

Sexual orientation is a core component of a person’s identity which requires fulfillment through relationships with others of the same orientation.¹⁰

Redlich JA gave detailed consideration to the issues- see [442]-[447]- but essentially took the same position put forward by Maxwell P that “sexual orientation [is] inextricably interwoven with a person’s identity” (at [442]). His Honour then went on to consider a Canadian decision¹¹ holding that a printing company was guilty of sexual orientation discrimination when refusing to print leaflets which were “promoting the causes of” homosexual persons.

[446]... Efforts to promote an understanding and respect for those possessing such a characteristic should not be regarded as separate from the characteristic itself. To draw such a distinction was inconsistent with the prohibition against discrimination under the Code.

In the end, then, all members of the Court of Appeal took the view that a refusal to support an activity providing support for homosexual sexual *activity*, was the same as discrimination against homosexual *persons*. The view that sexual “orientation” is a fundamental part of human “identity”, and the view that this must then be allowed expression in sexual activity, seems to be accepted.¹²

3. Institutional or Individual liability?

The third major issue in the decision was whether CYC alone, or both Mr Rowe and CYC, should be held liable for whatever discrimination had occurred. This raised important questions about how legislation applying to corporate bodies should be viewed.¹³ Given the law and religion focus of the present note, however, the discussion is summarised briefly here.

⁹ Maxwell P at [57], quoting Judge Hampel in the Tribunal, [193]. See para [59] where Maxwell P says that « her Honour was right to reject the distinction between ‘syllabus’ [the teaching to be conveyed on the weekend] and ‘attribute’, for the reasons which her Honour gave. »

¹⁰ At [2014] 1 WLR 3755 [52].

¹¹ *Ontario (Human Rights Commission) v Brockie* (2003) 222 DLR (4th) 174, a decision of a 3-member bench of the Ontario Superior Court of Justice (Divisional Court) on appeal from a decision of a Board of Inquiry set up under the *Ontario Human Rights Code*.

¹² For a popular-level comment on, and critique of, this view see N Foster, *Pressure Points* (Brief Books; Sydney: Matthias Media, 2014) <http://www.matthiasmedia.com.au/bb-pressure-points> at 13-15.

¹³ For previous comment in the health and safety context, see N Foster, "Personal civil liability of company officers for company workplace torts" (2008) 16/1 *Torts Law Journal* 20-68; "Manslaughter by Managers: The Personal Liability of Company Officers for Death Flowing from Company

Maxwell P took the view that the liability of a corporation under the legislation was “direct”, based on the actions of officers and employees of the corporation whose actions are deemed, under a relevant “attribution rule”, to be those of the company.¹⁴ His Honour said that the provision of the legislation headed “vicarious liability,” s 102 of the *EO Act 1995*, was not dealing with these standard cases of employees discriminating in the course of carrying out their normal duties.¹⁵ He then also ruled that, since corporations were “directly” liable for the actions of officers or employees, this implied that the legislation did **not** intend to also make those individuals personally liable.¹⁶ On this basis, his Honour over-turned the Tribunal’s finding against Mr Rowe, while upholding the liability of CYC.

By contrast, both the other members of the Court found that each of CYC and Mr Rowe could be held jointly and severally liable for discrimination. Neave JA noted that the term “vicarious liability”, used in the heading to s 102, did not necessarily need to have all the implications of the common law doctrine of vicarious liability.¹⁷ Even if, as seems plausible, a corporation could have been “directly” liable for breach of the *EO Act 1995* (see [378]), this did not automatically mean that the employee whose actions were deemed to create such direct liability for the company, would then be excused- see [371]. With respect to the views of Maxwell P, Neave JA seems clearly correct at this point. The President arguably moved too quickly from the imputation of direct liability to the company, to the view that the employee should therefore be immune.

Redlich JA agreed with Neave JA generally on this issue, holding that both CYC and Mr Rowe could be held liable for any discrimination that had occurred. His Honour said that there was, in effect, simply no need to search for an “attribution rule” for direct liability for CYC, when s 102 provided the relevant rules- see paras [456]-[457].

The result is that there was a 2-1 majority in the Court of Appeal judgment in favour of the proposition that both the company, and the employee who commits the relevant direct act, can be held liable for discrimination. As we will see below, however, since one of those in favour of this view (Redlich JA) was not in favour of the final order that was made by the Court, it could be argued that the precedential status of this proposition is unclear. It is submitted that as a matter of law the view of Neave JA and Redlich JA is to be preferred.

4. Did CYC as “body established for religious purposes” have a s 75 defence?

Workplace Safety Breach" (2006) 9 *Flinders Journal of Law Reform* 79-111; "Personal Liability of Company Officers for Corporate Occupational Health and Safety Breaches: section 26 of the Occupational Health and Safety Act 2000 (NSW)" (2005) 18 *Australian Journal of Labour Law* 107-135.

¹⁴ See paras [97]-[122].

¹⁵ See paras [124]-[138].

¹⁶ At para [123].

¹⁷ See the comment at para [371]- this is “not a true example of vicarious liability”. Maxwell P at [126] had supported his view that s 102 did not deal with the “ordinary” case of an employee acting on behalf of an employer partly by noting that at common law vicarious liability only applied where the employer was not personally liable. But Neave JA, with respect, seems to be correct to note that the phrase is not necessarily intended here to have all the implications of the common law doctrine.

While both parties could be potentially held liable for discrimination, only CYC could rely on the defence under s 75, which applied to “a body established for religious purposes”. (The word “body” clearly implied a corporate entity of some sort, not an individual.)¹⁸

The Tribunal had ruled that CYC could not rely on the s 75 defence for a number of reasons: that it was not a body “established for religious purposes”, and in any event that the refusal of accommodation did not “conform with the doctrines” of any relevant religion, nor was it necessary to “avoid injury to the religious sensitivities” of believers. The Court of Appeal agreed. It denied the status of “body established for religious purposes” to CYC because it engaged in the commercial activity of providing its premises to hire to all comers.

Maxwell P distinguished the decision of the High Court in an important recent decision, *Federal Commissioner of Taxation v Word Investments* (2008) 236 CLR 204, which had held that a body which was itself clearly set up for religious purposes (Bible translation in that case) could still be regarded as “charitable” even though it engaged in secular commercial enterprises to provide funding for those religious purposes. The implication here seems to be that if the Christian Brethren church had *directly* run the camping activities, rather than setting up CYC as a separate organisation, it would have been able to rely on s 75(2).

This characterisation of CYC is one of the most problematic aspects of the decision. It is also the feature of the decision that is likely to have the most impact in other jurisdictions around Australia, all of whom have an equivalent of s 75 as a defence.

It is submitted that the decision is problematic because there were a number of features of CYC’s constitution that demonstrated that as a body it had religious goals. The result of this reasoning, if followed elsewhere, seems to be that even a body with explicitly faith-driven objects may be found to not be a body “established for religious purposes” if it engages in a wide range of community services which do not explicitly require a faith commitment from the recipients. It may be queried whether this is a good policy outcome. Well known service bodies such as the Salvation Army or St Vincent de Paul offer services to members of the public without inquiring as to their faith stances. Is it really the case that these bodies cannot be said to be established for “religious purposes”? They would presumably argue that Jesus’ teaching in the parable of the Good Samaritan,¹⁹ and a range of other teaching in the Bible, makes “care for widows and orphans”²⁰ and other community activities a “religious purpose” for those who are committed to Christ.

Despite finding that CYC was not entitled to rely on s 75 defences, Maxwell P went on to consider whether, if it were, it could have justified the refusal of the booking on doctrinal or other grounds under s 75(2).

His Honour applied a narrow view of “religious activity” which virtually excluded anything except church services and bible studies. Even if CYC had been a religious body, the doctrinal defences, his Honour held, could not apply to “secular”

¹⁸ Maxwell P is correct at [158], to note that Mr Rowe himself could not have directly relied on s 75, and would need (if he otherwise discriminated) to rely on s 77. However, this would not preclude Mr Rowe, if sued separately as somehow having an imputed liability for the actions of CYC, invoking s 75 as a defence that CYC could have invoked. But it seems that the legislation here, and other such legislation around Australia, does not usually deem officers and employees who are not directly involved in discrimination to be so liable.

¹⁹ Luke 10:25-37.

²⁰ James 1:27 – “Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress and to keep oneself from being polluted by the world.” (NIV)

activities. In para [269] he said that CYC's decision to "voluntarily enter the market for accommodation services" meant that it had to behave in a way that did not allow any consideration of "doctrinal" issues.

In case this was in error, however, his Honour considered whether there would have been any clash with doctrine. He accepted the reasoning of Judge Hampel in the Tribunal, who had adopted the submission of a theological expert that "doctrines" of the Christian faith were to be confined to matters dealt with in the historic Creeds, none of which mentioned sexual relationships- see [276]-[277].

His Honour then further went on to consider what result would have followed were he to accept that views about the exclusivity of sexual relationships to marriage, and the nature of marriage as between a man and a woman, were in fact "doctrines". He noted that these views functioned as moral guidelines for those within the church, and that no doctrine of Scripture required interference with those outside the church who chose to behave otherwise- see [284]. Hence in his Honour's view a refusal of accommodation cannot have been "required" by Christian doctrine. On this point he held that "conforms to" doctrine must mean that there is "no alternative" but to act in this way- [287].

These views may be queried. The question of what is a "doctrine" was resolved by a comparison of expert evidence by a Tribunal that had no real familiarity with the faith concerned. Can it really be Parliament's intention that judges of secular courts make a decision as to what is a "core" doctrine or not of a particular faith?²¹

In addition, the view that action in "conformity" with doctrine must be "required" or "compulsory" seems far too narrow. This very view was recently decisively rejected by the European Court of Human Rights in the case of *Eweida v United Kingdom* [2013] ECHR 37. There the action of British Airways in ordering its staff member not to display a cross was at one stage defended on the basis that wearing a cross was not "required" by Christian doctrine. The ECHR in considering a claim under the freedom of religion provision in art 9 of the *European Convention on Human Rights* ruled at [82] that it was not necessary to show a breach of religious freedom that the action in question be "compulsory". In that case the wearing of a cross, while not a "duty", was clearly a "manifestation" of religious commitment. While the language of s 75(2) is not the same as that of art 9, a similar approach would seem to be desirable. (And it should be noted that Maxwell P accepted that international human rights jurisprudence on freedom of religion was, while not binding, certainly a relevant source to which Australian courts should look- see [192]-[198].)²²

The other point that should be noted is that Maxwell P's discussion of Christian doctrine not requiring the "shunning" of non-Christian persons who do not conform to it (which is clearly correct), fails to deal with the question whether an organisation can be seen to be providing support for a particular *viewpoint* which has been announced when a booking is made. This point was picked up by Redlich JA in his discussion of s 77 (see below), and is also applicable to the question whether providing a booking here would have involved the CYC providing encouragement

²¹ On this point see the comment of Redlich JA when discussing the s 77 defence at [525]: "Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety (citing *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207, 220 [36] (Nettle JA).) The Tribunal was neither equipped nor required to evaluate the applicants' moral calculus."

²² See also Neave JA at [411], noting that the Court "can also take account of international jurisprudence on the right to freedom of religion".

and a platform for teaching which they perceived as contrary to an important part of Christian belief. There is a similar approach taken to the s 75(2)(b) question of an injury to “religious sensibilities”. The fact that previously no inquiry had been made of the sexual practices of those attending the camps was taken to mean that simply allowing homosexual persons to attend was not of itself an interference with religious sensibilities. His Honour failed to consider the issues raised by a clear declaration on the part of the person booking that the aim of the camp included an aim of “normalising” homosexual activity, which the CYC considered contrary to their beliefs.

Redlich JA at [439] point (4) very briefly expressed his agreement with Maxwell P that that, for the purposes of s 75, “the beliefs or principles upon which CYC relied were not ‘doctrines’ of the religion”. It seems his Honour was adopting the very narrow view of “doctrines” as purely stemming from the historic Creeds. As will be seen, his Honour later took a broader view of “beliefs” under s 77.

It is odd that the whole *Cobaw* decision very rarely refers to the fairly similar NSW litigation in *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010).²³ In particular, one of the issues in that case was whether a belief that marriage between a man and a woman was the ideal way for a child to be raised, could be justified as being a “doctrine” of the Wesley Mission. After an initial Tribunal finding to the contrary, the Court of Appeal directed a new hearing, noting that there was a need to consider “all relevant doctrines” of the body concerned.²⁴ On referral to the Tribunal, it held that the word ‘doctrine’ was broad enough to encompass, not just formal doctrinal pronouncements such as the Nicene Creed, but effectively whatever was commonly taught or advocated by a body, and included moral as well as religious principles.²⁵ It may be that the Victorian Court of Appeal considered that this final decision, being one of an administrative tribunal not a superior court, was not binding; but it seems unusual that it was not even noted. Certainly some comments of the NSW Court of Appeal at the penultimate stage of these proceedings were relevant, and in accordance with the High Court’s directions to intermediate appellate courts in Australia,²⁶ should have been taken into account unless regarded as “plainly” wrong.

5. Mr Rowe and s 77 “genuine religious beliefs or principles”?

For those judges who considered that Mr Rowe was potentially personally liable, the defence in s 77 required consideration. Maxwell P, while holding that in fact Mr Rowe was not personally liable, also offered his views on the question.

For **Maxwell P** any possible s 77 defence (which authorises actions by a person where “necessary ... to comply with the person’s genuine religious beliefs or principles”) was ruled out for reasons similar to those which his Honour thought would have ruled out the s 75(2) defence applicable to CYC: because it was not “necessary” to refuse a booking for Mr Rowe to comply with his religious beliefs.

²³ And see the final stage of the litigation in *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010). The one and only reference to the litigation in the *Cobaw* appeal is to be found in a very brief footnote, n 141, to the judgment of Maxwell P, on the fairly technical issue of what “established” means.

²⁴ See the CA decision, per Allsop P at [9].

²⁵ *OW & OV v Wesley Mission*, 2010 [ADT], [32]-[33].

²⁶ See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107 at [135]-while the comment relates directly to “uniform national legislation”, it would seem to apply here where legislation in most States, while not completely uniform, usually includes some defence relating to “doctrine”.

The rule that sex should only be between heterosexual persons who were married to each other was a rule of “private morality” and even on its own terms did not have to be applied to others- see [330]. As noted above, this of course ignored the fact that Mr Rowe was being asked to support a message of the “normality” of homosexual activity with which he fundamentally disagreed.

Neave JA’s discussion of the s 77 point is important, because for her Honour s 77 was a live issue, given that Mr Rowe could be personally liable. Her Honour’s judgment warrants careful attention, especially since it could be argued her Honour misunderstood some of the UK and European jurisprudence to which she referred in reading the Victorian legislation.

There was never any dispute about the content of the relevant Christian teaching, or that Mr Rowe was genuinely motivated by that content. What is unfortunate is that Neave JA moves from this issue of the “objectivity” of the relevant necessity, into other more debatable propositions- see para [426]. While it is true that “subjectively held religious beliefs of one individual do not always override the human rights of others”, this is not what Lord Walker is referring to in the quote then given from *R v Secretary of State for Education and Employment; ex parte Williamson* [2005] 2 AC 246 (“*Williamson*”). Lord Walker’s comment, that “not every act which is in some way motivated or inspired by religious belief is to be regarded as the manifestation of religious belief”, is not concerned with the question of subjectivity or objectivity. His Lordship was discussing the meaning of “manifestation”, and considering whether the fact that some behaviour was “motivated” or “inspired” by belief could always be regarded as a “manifestation” of that belief.

It is submitted that Neave JA’s reliance on *Williamson* and some older UK and ECHR decisions shows a lack of familiarity with recent European law and religion jurisprudence. For example, her Honour at [428] cites Lord Walker’s comment about the “distinction between the freedom to hold a belief and the freedom to manifest that belief” as playing an “important part” in European and UK cases. That may well have been true until recently. In particular, there were European and UK decisions which came close to holding the very harsh view that the right to freedom of religion in the employment context, for example, could be perfectly well protected by the fact that an employee whose religious freedom was impaired could leave and find another job.

But since the decision in *Eweida v The United Kingdom* [2013] ECHR 37 noted above, it has been clear that this is no longer the approach to be followed in Europe in dealing with art 9 of the ECHR. The court commented at [83]:

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, **rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance** when considering whether or not the restriction was proportionate. (emphasis added)

These recent developments are relevant because Neave JA justifiably notes that courts in Australia should be aware of international developments. However, in doing so they need to be aware of the current state of law in these areas.

It has to be said that, while Neave JA does refer to the *Eweida* decision, her Honour has not captured the complexity of the issues and the important changes in

EU jurisprudence signalled by the decision.²⁷ In particular, her Honour's comment at [433] that it was important to consider whether the discriminatory act arose from a "core feature" of the discriminator's religious beliefs, is contradicted by the finding of the *Eweida* court noted previously that the particular behaviour need not be "mandated" by religious belief.

At [434] her Honour, taking the "narrow" view of religious belief that mainly sees it as applicable to "church services" or "religious rules", says that:

the exemption does not apply in situations where it is not necessary for a person to impose their own religious beliefs upon others, in order to maintain their own religious freedom. (footnote omitted)

Presumably her Honour sees the refusal of Mr Rowe here as amounting to such an "imposition". Yet to reframe the question in this way seems wrong for two reasons. The first and most obvious is that Mr Rowe was not seeking to "impose" anything on Cobaw. It was Cobaw who were seeking to enter into a contract with CYC through Mr Rowe. Indeed, if either side of the relationship were "imposing" on the other, it was Cobaw who were demanding that CYC make their facilities available to facilitate a camp, whose avowed message of support for the normality of homosexual relationships flew in the face of CYC's stated commitment to orthodox Christianity.

Second, however, and more importantly, this statement of how the relevant balance should be struck assumes that it is up to the Court of Appeal to do the "striking". But, as Redlich JA powerfully argues, that is to misunderstand how the legal norms here are spelled out. While there is a need to strike a balance between competing human rights, it is *Parliament* that has struck that balance, by spelling out the situations in which a person's religious commitment may over-ride the law of discrimination. Here, however, Neave JA seems to be endeavouring to formulate the appropriate balance herself.

Again, there is no attention paid to the imposition upon Mr Rowe of a course of behaviour that supports a view he opposes on religious grounds. That this has been forgotten emerges in para [436], where Neave JA regards it as inconsistent of Mr Rowe to have conceded that he would not have refused accommodation to lesbian parents who were attending a school camp of some sort. To say that this "contradicts" his assertion that he regarded the denial of a booking as necessary to comply with his beliefs misses the point badly. There is nothing inconsistent in Mr Rowe's assertion that he would have been happy to accept a booking for a normal school camp, even if he knew there were same sex parents who were part of the group; while being unwilling to accept a booking from a group whose very *raison d'être* was the "normalisation" of behaviour seen by him as contrary to God's word.

²⁷ In particular it must be said that her Honour's summary of the conjoined *Ladele* proceedings in fn 285 to para [431] is somewhat misleading. To say that the registration of civil partnerships was a "secular task which was not protected by the right to religious freedom" may capture the flavor of some comments by Lord Neuberger in the 2009 Court of Appeal decision, at [52] (which I critique in some detail in the paper cited at n **Error! Bookmark not defined.** above). But it does not represent the views on appeal in the ECHR *Eweida* decision (where the *Ladele* case was joined in the appeal). In the ECHR it was clearly acknowledged, for reasons noted above in the main text, that the directive that Ms Ladele register civil partnerships **did** have a serious impact on her religious freedom, and required justification under the principles set out in arts 9 and 14 of the Convention- see para [104] of the judgment. That in the end the Court ruled that it was justified and proportionate in achieving other aims, did not detract from the fact that it was in fact a serious issue of Ms Ladele's religious freedom, rather than simply being "not protected" as Neave JA suggests.

By contrast to the decisions of the other members of the Court, **Redlich JA** considered that not only was s 77 applicable to Mr Rowe, it applied to give him a defence against the claim for discrimination. His Honour's comments are very important for a proper application of a religious freedom defence in Australia.

He commented at [502] that the Tribunal had been wrong to conclude that the s 77 defence did not apply for four reasons:

- A too-narrow construction of the defences;
- An insistence on an “objective” test as to whether the religious beliefs “compelled” action;
- Holding that commercial activity was an area with limited scope for religious freedom; and
- Inferences that were drawn about the CYC's commercial activity.

On the issue of the **construction** of the defences, Redlich JA noted that the Tribunal had explicitly taken guidance from the Victorian *Charter* in ruling that it, the Tribunal, needed to strike the appropriate balance between freedom from discrimination and freedom of religion- see [510]. In particular, since the defences in ss 75-77 “impaired the full enjoyment” of a Charter right to non-discrimination, they should be read very “narrowly”- [512]. This, his Honour held, was an error.

It was an error, not only because the Victorian *Charter* was not applicable to these events, but also because the *EO Act 1995* cannot be said to have only one purpose, as if freedom from discrimination was its sole object. It is Parliament that has set up a system to balance these rights with other important rights, such as religious freedom. It is not up to the Tribunal (or, one may add, a Justice of Appeal) to undertake the balancing process as they see fit. His Honour commented at [515]:

When, as is so obviously the case with s 77, Parliament adopts a compromise in which it balances the principle objectives of the Act with competing objectives, a court will be left with the text as the only safe guide to the more specific purpose.²⁸ Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.²⁹

As his Honour said, the Tribunal had adopted an “unworkably narrow interpretation of the exemption in s 77, calculated to frustrate the very purpose of the exemption”- see [517].

On the question of the “**objective**” test as to whether behaviour was “**compelled**” by religion, Redlich JA noted the inappropriateness of a secular Tribunal or court weighing up moral obligations under a religious set of doctrines or beliefs.³⁰ Instead, while not arguing for a completely “subjective” test, his Honour said that the subjective beliefs held by the alleged discriminator required at least some consideration- [526]. In part his Honour relied on the fact that the provisions of s 77 had actually previously been criticised by a Parliamentary scrutiny body as too easy to satisfy, and that in later legislation, the *Equal Opportunity Act 2010*, the equivalent provision required discrimination to be “reasonably necessary”. However, his Honour went on in para [533] to note that even a requirement that discrimination be

²⁸ *Kelly v The Queen* (2004) 218 CLR 216, 235 [48] (Gleeson CJ, Hayne and Heydon JJ).

²⁹ *Nicholls v The Queen* (2005) 219 CLR 196, 207 [8] (Gleeson CJ).

³⁰ Citing a passage from R Ahdar & I Leigh *Religious Freedom in the Liberal State*, Oxford, 2005 at 164 referring ironically to the “amateur theologian-cum-Tribunal”, an apt description in my view for what had happened at the Tribunal level in *Cobaw*.

“reasonably necessary” would not be so narrow as the approach to s 77 adopted by the Tribunal in this case.

In particular, his Honour rejected the view that activity in the *commercial* sphere was somehow not covered by the s 77 defence. Again his Honour criticised the tendency of the Tribunal to give too much attention to international jurisprudence that required the balancing process to be undertaken by judicial or tribunal officers. In particular he noted at [539] that the Strasbourg court in Europe had interpreted the art 9 right there in a narrow way where a person chose to engage in the commercial marketplace such as by employment.

Actually it must be said that, while his Honour’s views about the narrow approach of European and UK courts to these questions at paras [539]-[540] were correct until recently, the courts since *Eweida* have adopted a much broader approach, as noted above. Nevertheless, his Honour’s general point about the need for courts to observe the balance struck by Parliament, and not to strike out on a balancing process themselves unless invited to do so by Parliament, seems correct.

Redlich JA then undertook a careful analysis of the Canadian *Brockie* case mentioned previously,³¹ in which he stressed that the outcome of the case was that the court held that there *could* be the refusal of a service in the commercial sphere “where its use would reasonably be seen to be in conflict with core elements of the belief”- see [542] ff.

It is worth noting the facts of *Brockie* in more detail. The Board of Inquiry there had found Mr Brockie guilty of discrimination because he declined to print leaflets for an organisation whose literature indicated that it “represented [the] interests of “gays” and “lesbians””. The Board ordered that Mr Brockie was to provide printing services to “lesbians and gays and to organizations in existence for their benefit”- see para [17] of the appeal decision. In the course of their decision, as noted above, the judges of the Divisional Court ruled that “efforts to promote an understanding and respect for those possessing any specified characteristic should not be regarded as separate from the characteristic itself”- see [31].

Mr Brockie in turn argued that to require him to support and promote the cause of homosexuality would require him to behave in a way which conflicted with his Christian beliefs, and would be a breach of his right to freedom of religion under the Canadian *Charter* – see *Brockie*, [37]. The Divisional Court impliedly rejected the narrow view that rights to freedom of religion could not operate in the “commercial” sphere, by agreeing that in some circumstances the very broad order of the Board, that Mr Brock publish whatever the organization requested, would indeed amount to a disproportionate burden on his freedom of religion.

[49] However, the order [of the Board] would also extend to other materials such as brochures or posters with editorial content espousing causes or activities clearly repugnant to the fundamental religious tenets of the printer. The *Code* prohibits discrimination arising from denial of services because of certain characteristics of the person requesting the services, thereby encouraging equality of treatment in the marketplace. It encourages nothing more. If the order goes beyond this, the order may cease to be rationally connected to the objective of removing discrimination.

The Divisional Court then provided some examples of the distinctions it thought needed to be drawn:

[56] If any particular printing project ordered by Mr. Brockie (or any gay or lesbian

³¹ See above, n 11.

person, or organization/entity comprising gay or lesbian persons) contained material that **conveyed a message proselytizing and promoting the gay and lesbian lifestyle** or ridiculed his religious beliefs, such material might reasonably be held to be in direct conflict with the core elements of Mr. Brockie's religious beliefs. On the other hand, if the particular printing object contained a directory of goods and services that might be of interest to the gay and lesbian community, that material might reasonably be held not to be in direct conflict with the core elements of Mr. Brockie's religious beliefs. (emphasis added)

The Board's order that the specific printing project go ahead was upheld, but it was to be qualified by the addition of extra words:

[59]...Provided that this order shall not require Mr. Brockie or Imaging Excellence to print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed.

When this aspect of the decision is taken into account, it can be seen that the final order of the Court is more in line with the submissions of CYC than those of Cobaw. Redlich JA noted that Judge Hampel in the Tribunal in *Cobaw* had found that the aims of the proposed camp included "conduct... which accepted or condoned same sex attraction, or encouraged people to view same sex attraction as normal, or a natural and healthy part of the range of human sexualities"- see [443]. In this way requiring the CYC to make their camping facilities available to Cobaw was indeed to "convey a message" that was contrary to CYC's beliefs (and hence to fall within the area that the Divisional Court in *Brockie* said would have been going too far and beyond power.)

Redlich JA commented at [544] that, consistently with the outcome in *Brockie*, s 77 "protects such an obligation when it arises in similar circumstances". Any judicially created limit which would restrict the operation of s 77 in the commercial sphere would undermine the very balance that Parliament itself has chosen to strike:

[550]...The section does not confine the right to manifest religious beliefs to those areas of activity intimately linked to private religious worship and practice. The legislature **intended that it operate in the commercial sphere**. The approach of the Strasbourg institutions confining freedom of religion to freedom to believe and to worship is not reflected in the legislative policy of the Act, or in the text of the exemption, which **permits a person's faith to influence them in their conduct in both private and secular and public life**.³² (emphasis added)

Redlich JA's concluding discussion of how s 77 ought to have been applied in the particular circumstances of this case brings together these themes, and clearly demonstrates the error of the Tribunal. His Honour notes that it is not necessary for an activity to be a "religious" one such as a church service or evangelism, for it to be an activity that is motivated by religious belief. While CYC may not have been a body "established for religious purposes", it was a body with a religious character, and Mr Rowe of course had his personal religious commitments. He was entitled to the benefit of s 77.

³² See Professor Patrick Parkinson, 'Accommodating Religious Belief in a Secular Age: The Issue of Conscientious Objection in the Workplace' 34(1) *UNSW Law Journal* 281. See his criticisms of *Ladele* and *McFarlane*, and the jurisprudence on religious freedom under the ECHR that has shown little recognition of conscience-based claims in the workplace.

In particular his Honour clearly brings out the point made above, that refusing the booking was appropriate once the purpose of the seminar was made known to Mr Rowe. It was reasonable of CYC to offer its services to all without making any particular enquiries about their personal beliefs. But:

[567]...What enlivened the applicants' obligation to refuse Cobaw the use of the facility was the **disclosure of a particular proposed use** of the facility for the purpose of discussing and **encouraging views repugnant to the religious beliefs of the Christian Brethren**. The purpose included raising community awareness as to those views. It was the facilitation of purposes antithetical to their beliefs which compelled them to refuse the facility for that purpose. To the applicants, acceptance of the booking would have made them **morally complicit** in the message that was to be conveyed at the forum and within the community. (emphasis added)

As his Honour noted at [571], it could hardly be doubted that if told that a seminar to be run at the campsite would be aiming to persuade the attendees to deny the Christian faith, that CYC would have been entitled to decline the booking. The proposed purpose here was seen as just as antithetical to the beliefs of the members of the organisation.

Hence his Honour held that s 77 excused Mr Rowe from liability. He also went on briefly to note that once s 77 operated in relation to an employee whose actions had made the employer liable, then the employer was also not liable- see [578].

6. Could CYC as an incorporated body rely on the s 77 defence?

The final of the major issues in the case was: could the corporate body CYC rely on the s 77 defence "directly"? That is, since s 77 applies to a "person", and since under established principles of interpretation "person" usually includes an incorporated body, could CYC argue that it had relevant "religious beliefs or principles" which were protected?

Maxwell P took the view that the s 77 defence was not applicable at all to a corporate body- see [309] ff. His Honour's main reasons were by reference to the scheme of ss 75-77, which seemed to distinguish between rights given to "bodies" and those to "persons". In particular his Honour said that it would be odd if a corporate body could rely on the apparently wider defence in s 77, if it did not satisfy the description of a "body established for religious purposes" under s 75. He conceded that "churches" had been said in European jurisprudence to have "rights of religious freedom", but disputed that those rights were appropriate for other incorporated bodies- see [322].

Neave JA agreed with Maxwell P on this issue- see [413]-[422]. Redlich JA did not; his Honour noted that corporations are regularly held liable for various "states of mind" attributed from their controllers. While there might be problems in other cases, in this situation all the directors of CYC were required to subscribe to a statement of faith- see [479]. The different provisions in s 75 and s 77 operated in different areas and to exclude corporations from s 77 would produce anomalous results, particularly for small businesses where the defence would be excluded if they decided to adopt a corporate structure for other reasons- see [490].³³

³³ It should be noted, as international developments are often taken into account in the human rights area, that since the decision in *Cobaw* the US Supreme Court has ruled that a for-profit, "closely held" corporation has rights of religious freedom as a "person" under the Federal *Religious Freedom*

Summary and Evaluation

In brief, the result of the decision on the six points noted above, then, was:

1. Was the Victorian *Charter* relevant to the case? No, by all members of the Court.
2. Was the relevant refusal discriminatory on the basis of sexual *orientation* of the participants, or could it be seen as based on the support that the weekend was to offer for homosexual *activity*? All members of the Court rejected the distinction. A decision based on activity, or support for the activity, would be seen as a decision based on sexual orientation.
3. Was CYC alone liable under the Act, or were both CYC and Mr Rowe potentially liable? By a 2-1 majority (Neave JA & Redlich JA), both CYC and Mr Rowe were potentially liable.
4. Could CYC rely on the s 75 defence applying to a “body established for religious purposes”? No- because (by all members of the Court) it was not established for such purposes. Nor, apparently, was it necessary to decline the booking based on its “doctrines” (although Redlich JA found that it had a defence based on its “beliefs” under s 77).
5. Could Mr Rowe rely on the s 77 defence on the basis of the necessity to comply with his “genuine religious beliefs or principles”? Neave JA said that the s 77 defence was not made out; Redlich JA that it was. As Maxwell P had ruled that the obligations did not apply to Mr Rowe personally, the decision fining Mr Rowe was overturned, though for two completely different reasons.
6. Could CYC as an incorporated body rely on the s 77 defence? By a 2-1 majority (Maxwell P & Neave JA), no- a body that did not fall within s 75 could not rely on a general s 77 defence.

The fact that the Court was split in different ways on different issues makes the precedential value of some of its comments problematic. For the purposes of a future court wanting to know what principle of law flows from this case, where different reasons are offered by different members of an appellate court for coming to the same outcome, is it not possible to say that there is any specific *ratio* of the decision. Kirby J in *XYZ v Commonwealth* [2006] HCA 25; (2006) 227 ALR 495; (2006) 80 ALJR 1036 at [71] summed up the principle in this way:

the binding rule is to be derived from the legal principles accepted by those members of the Court who, for common reasons, agreed in the Court's orders

Here there are some propositions in *Cobaw* for which there is no majority among those Justices who concurred in the final outcome (support for a proposition offered by members of the Court who did not agree in the outcome cannot be aggregated under this principle.) So there is no majority *ratio* here on the question as to whether under the legislation a corporate body has “direct” liability, or whether its liability is “vicarious” based on the specific statutory version of attributed liability. Of those members of the Court who found CYC liable, Maxwell P favoured direct liability and Neave JA vicarious; since Redlich JA found that CYC was not liable, his Honour’s support for vicarious liability cannot be counted.

Restoration Act (RFRA) 1993: see *Burwell, Sec of Health and Human Services v Hobby Lobby Stores Inc* 134 S.Ct. 2751 (30 June 2014).

However, there do appear to be relevant majorities for the following views:

- That a corporation cannot rely on the s 77 defence applying to “persons”- this view was adopted by Maxwell P and Neave JA, who agreed that CYC were liable.
- That a body situated similarly to CYC is not a “body established for religious purposes” and hence cannot rely on the s 75 defences- a view shared by all members of the Court. Of course it will be necessary to isolate which characteristics of such a body preclude “religious purposes”, but it seems that operating competitively in a commercial marketplace may do so. (There may, it seems, be majority support for a related issue, which is that a body established for religious purposes needs to find its “doctrines” in official doctrinal statements. However, since as noted above on this issue the *Cobaw* court seems to ignore previous comments made by the NSW Court of Appeal in *OV & OW*, it may be that this aspect of the decision would not be binding in a NSW court at least.)
- That the Victorian *Charter* does not apply to events occurring before its commencement.
- That discrimination on the basis of sexual orientation occurs when differentiation on the basis of homosexual activity, or support for homosexual activity, takes place.

Of these matters, the third is likely not to be of much continuing relevance, given that the *Charter* has now been in effect some time. But the first, second and fourth are important propositions likely to have a future impact.

The practical effect of these views on faith-based organisations in the future may be significant. Some that immediately come to mind are as follows:

1. That a general freedom of religion defence applying to “persons” does not apply to incorporated bodies seems to be a serious derogation from freedom of religion. Similar issues, of course, have recently been litigated in the United States of America in relation to the possible application of healthcare initiatives requiring organisations to fund the provision of abortions, and whether those provisions apply equally to commercial entities which may be run on Christian principles.³⁴
2. The very narrow view adopted as to the characteristics that a body has to have before it will be held to be “established for religious purposes” will have an impact on the application of defences similar to s 75 of the previous Victorian Act, which are in place around Australia. While this will clearly be a question of fact to be dealt with on a case by case basis, the fact that a body all of whose board were required to subscribe to a statement of faith, and 40% of whose direct objects made a reference to its desire to act in accordance with faith principles, was found not to be established for such purposes, will be of great concern to similar bodies which operate in the commercial sphere with an aim of showing Christian love and concern to the community at large. Despite the attempt to distinguish the High Court decision in *Word Investments*, the comments on this issue do not really seem to conform to the decision in that case.

³⁴ See the *Hobby Lobby case*, above n 33. Redlich JA at para [563] notes that in the US there has previously been support for the view that “persons or entities engaged in commercial activities for profit can have a religious identity when discriminated against”.

3. While it seems consistent with international decisions on the matter such as the *Bull v Hall* case, it will still be of concern to many religious organisations and believers that a policy based on upholding traditional Christian views about human sexuality, based on *behaviour*, is being interpreted as amounting to discrimination against the *persons* involved. But this seems to be something that Christian organisations will need to take into account- even if, in the end, they resolve that to be faithful to their principles they need to continue to make decisions as they have done in the past.

Will the *Cobaw* decision be the last word on these issues? With great respect, it is submitted that there are some important legal errors in the decision that would justify an appeal to the High Court of Australia. Since, as Maxwell P himself notes at [14], this litigation raises novel (for Australia) and inherently difficult issues of the conflict of rights, and since there is a fair degree of uncertainty remaining over some of these important issues even after this decision, it is to be hoped that the High Court would accept the invitation to consider the issues on appeal if offered by one or more of the parties.³⁵

Finally, there are some comments of the President here that could be so dangerous if misread and taken out of context, that it is worth highlighting them, and what they actually mean. They occur in paras [65]-[66] which are reproduced below in full, with the possibly confusing remarks highlighted.

[65] Both in his statement and in his oral evidence, Mr Rowe expressed the view that it was not ‘homophobic discrimination’ for him to hold (on religious grounds) a different view from Ms Hackney regarding homosexuality. The same point was raised by the grounds of appeal.³⁶

[66] **This contention must also be rejected.** What occurred on 7 June 2007 was not merely the expression of a difference of opinion. Plainly enough, that would not have constituted discrimination. Rather, what occurred was that, because of his strong belief that homosexual sexual activity was morally wrong, Mr Rowe on behalf of CYC refused to allow the Resort to be used by SSAYP for an activity in which their identity as such would be expressed and affirmed.

If the highlighted words are simply read on their own, they may be taken to suggest that his Honour is rejecting the proposition that simply holding a different view on homosexuality does not amount to “homophobic discrimination”. In other words, his Honour may be read as saying that it *is* homophobic to hold a private opinion on religious grounds that homosexuality is wrong.

But when the two paragraphs are read together, this is clearly *not* what his Honour is saying. What is being “rejected” in para [66] is the implication of the quoted statement in the prior paragraph that the decision of the Tribunal was simply *based* on a privately held religious opinion alone. Indeed, his Honour explicitly goes on to say: “expression of a different opinion... would not have constituted discrimination”.

So it is absolutely clear, despite what seems to be the case on a first reading, that Maxwell P is not saying that either holding, or “expressing”, a view about

³⁵ Press reports indicate that an application for special leave to appeal is being made; at the time of preparing this paper the application had not yet been heard.

³⁶ Ground 4(d).

appropriate sexual activity or “orientation” will of itself amount to “homophobic discrimination”.

2. Language and Church Meetings: *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26 (19 March 2014)

This second case to be discussed did not involve a conflict between a religious organisation and the wider “secular” society; instead, it raises the thorny question of relationships *within* a religious body, and whether there can be actions for discrimination taken by one section of a religious body, against another.

The circumstances arose out of the fact that a number of congregations (“wards”) of the LDS church in the Brisbane area had previously been conducting church meetings in the Samoan language, for the benefit of members of the Samoan LDS community. A re-organisation of the church resources, including it seems a desire to make the church meetings more accessible to the broader community,³⁷ led to a decision that the previous Samoan services would from now on be conducted in English, and members of the church were forbidden from speaking at the front of the meetings, praying or singing in any language other than English.

This action was brought as a class action by a number of Samoan-speaking church members, against the leadership of the church, with the aim of restoring some at least of the Samoan meetings. The actions were brought under s 46PO of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), alleging unlawful discrimination by the Church against the applicants as members of the Church. Racial discrimination was alleged, pursuant to s 9 of the *Racial Discrimination Act* 1975 (Cth) (“RDA”). The claim was heard by a Federal Magistrate and failed, and this appeal then ensued to the Full Court of the Federal Court of Australia.

While the claim was one for racial discrimination, freedom of religion was one of the main issues at stake. Under s 9(1) RDA:

- (1) It is unlawful for a [person](#) to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of **any human right or fundamental freedom** in the political, economic, social, cultural or any other field of public life. (emphasis added)

The definition of “human right or fundamental freedom” refers to art 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, (“the RD Convention”) which in turn includes, in para (d)(vii), “The right to freedom of thought, conscience and religion”. So the issue came down to whether there had been denial of a religious freedom right on a racially discriminatory basis (although other rights, such a right to “nationality”, including use of one’s own language, and a right to freedom of expression, were also said to be engaged).

The Full Court noted that at some points the Magistrate had identified the relevant right as a right to have public worship “provided” in the Samoan language, whereas in fact the claim was not simply that it was not “provided” from the front, but

³⁷ It was also noted, at [19] that “many of the Samoan youth who attended these wards were unable to speak the Samoan language”.

also that the congregation members were not able to “join in” with singing and other activities in Samoan. To this extent they ruled that the Magistrate had made an error. The relevant question was best framed as, whether there was a “right to worship publicly as a group in their native language”? See para [50].

Having identified the question, the Full Court went on to say that there was no such right established by the relevant international instruments. The relevant paragraph of the RD Convention referred to

- (iii) The right to nationality;
- ...
- (vii) The right to freedom of thought, conscience and religion;
- (viii) The right to freedom of opinion and expression;
- ...

As the court said, it was not clear exactly how these three rights, or any alleged combination of them, gave rise to a right to public worship in a particular language:

54 The appellant did not explain precisely how it was that an alleged “right” to worship publicly as a group in one’s native language existed separately and apart from these three nominated rights. The closest the appellant came to an explanation was senior counsel’s statement that the asserted “right” was the expression of one or other or all of the three article 5 rights (ie, article 5(d)(iii), (vii) and (viii)). It was unclear precisely how this was put.

For those who are familiar with the classic Australian legal comedy film *The Castle*, which includes a bumbling solicitor attempting to assert his client’s rights with no clear understanding of the Constitution, the argument here sounds suspiciously like “It’s the vibe...!”³⁸ Nevertheless, the Full Court spent some time carefully examining the relevant instruments to see if indeed such a right could be found.

Given the early days of consideration of freedom of religion issues by Australian courts, there are some important features of this discussion.

- It was noted that, in accordance with the general principles of interpretation adopted by Australian courts, extrinsic material such as comments by UN bodies and decisions of other courts and tribunals around the world could be taken into account in determining the content of the fundamental rights and freedoms at stake.
- In particular, comments on the meaning of rights under the *International Covenant on Civil and Political Rights* (the ICCPR) could be taken into account, where those rights mirrored those referred to in art 5 of the RD Convention- see [62].
- As well as art 18 of the ICCPR dealing with religious freedom, art 27 referred to minority rights.
- In particular, in addition to referring to the UN material, the jurisprudence of the European Court of Human Rights, on the application of analogous rights under the European Convention on Human Rights, was a valuable source of guidance on the issues- see [70].

³⁸ See the first minute of the clip at <http://www.youtube.com/watch?v=wJuXIq7OazQ>.

In the end, however, the claim failed because the various instruments could not be read to find the claimed right; as the court commented:

68 It may therefore be accepted that, as elaborated by article 18 of the ICCPR, the right to freedom of religion referred to in article 5(d)(vii) of CERD includes personal freedom, either individually or as a group, to engage in public worship. Article 27 of the ICCPR also recognises, in the case of a linguistic minority, a personal right to use the minority language amongst the minority group, in private and in public. The argument for the appellants at the hearing of the appeal was, in substance, that these rights merged into a right to worship publicly as a group in Samoan within the Church. For the reasons outlined below, this argument fails.

In effect, the ensuing discussion of the freedom of religion area adopted decisions of the ECHR which held that, while religious freedom was an important right, and indeed while it extended as a right to religious organisations acting on behalf of their members, as well as to the individual members,³⁹ in essence members of a religious body did not enjoy religious freedom rights that could be asserted against their religious body. The court made the point by the citation of a recent ECHR decision:

78 ...[I]n the case of dissent from Church rulings, an individual's freedom of religion is protected by the right to leave the Church. Thus, in *Sindicatul "Pastorul Cel Bun" v Romania* (2014) 58 EHHR 10 (*"Sindicatul 'Pastorul Cel Bun' v Romania"*), the Grand Chamber, overturning a controversial and earlier decision, reiterated (at [136] to [137]) that:

The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. **Were the organisational life of the community not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable ...**

In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones. **Similarly, Article 9 of the Convention does not guarantee any right to dissent within a religious body; in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his [or her] freedom to leave the community** (see *Mirolubovs and Others v Latvia*, no 798/05, § 80, 15 September 2009).

(Emphasis added)

While conceding that in some cases it may be effectively "impossible" for a person to leave a religious community if they disagreed with the leadership, the Court held that there was no evidence that this was the case here. The religious freedom of the Samoan worshippers was protected by their ability to leave the congregations concerned and to gather in other places where they could worship in their own language. In effect, to grant a right to worship in their own language to a group within

³⁹ See para [76], citing Julian Rivers, "Religious Liberty as a Collective Right" (2001) 4 *Law and Religion: Current Legal Issues* 227. For more recent work by Professor Rivers on the rights of religious organisations see *The law of organized religions: between establishment and secularism* (Oxford : Oxford University Press, 2010).

the churches, contrary to decisions that had been made by church leaders, would interfere with the freedom of the church leadership to lay down principles for the church. As they later commented in also rejecting an argument based on “minority rights” under art 27 of the ICCPR, at [102], it was important to recognise “the protection afforded by article 18 of the Covenant for the religious freedom of the Church on behalf of its adherents”.

In the end, then, the court rejected the claims of racial discrimination, on the basis that there had been no interference with the “fundamental human rights” of the Samoan speakers, including no interference with their freedom of religion.

It may be noted in passing that the approach of the Full Court of the Federal Court here, in emphasising the rights of the religious organisation to make its own internal rules for operation, has some resemblance to the approach of the US Supreme Court in its decision in *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC* 132 S Ct 694 (2012). In that decision the Supreme Court held that the “free exercise” clause of the First Amendment to the US Constitution required that a general law relating to disability discrimination could not apply in relation to the decision of a church to dismiss someone regarded as a “minister” within the church. The similarity lies in an approach that regards internal church affairs as best resolved by the church rather than by the application of other legislation.

However, there may still be unanswered questions following this decision. While the decision hinged on the question whether “fundamental rights” had been impaired, or not, it was formally a decision on racial discrimination. It is worth posing the question: how would the court have reacted to a decision of a hypothetical church that it would not admit persons of a particular race to its meetings at all? Would such a decision be supported on the basis that the persons concerned could choose to worship elsewhere? While logically the reasoning in this case would seem to support this view, there seems to be something worse about such a decision (which arguably would have no rational justification) than a decision based on the need to open up meetings to non-Samoan speakers. And under another legal regime, the decision of the House of Lords in *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2010] 2 AC 728, [2009] UKSC 15 (16 Dec 2009), which outlawed admission criteria adopted at a Jewish school based on the religion of the mother of the child as racially discriminatory, may point to the need for more thought on this issue in the future in Australia.

In conclusion, these cases, along with the *Same Sex Marriage* decision, illustrate the fact that law and religion issues are becoming an increasingly important area for Australian courts. The willingness of the courts to take into account international jurisprudence on the topics is encouraging, although as noted above in relation to the *Cobaw* decision, if this is done the courts will need to meet the challenge of ensuring that the relevant decisions are properly understood, and recent developments are taken into account. But the emphasis in these cases that freedom of religion is an important human right, which must be given proper and careful consideration, is very much to be welcomed.