December 18, 2014

High Court of Australia declines leave to appeal CYC v Cobaw

Neil J Foster

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This is a short note commenting on the ruling of the High Court of Australia in *Christian Youth Camps Limited v Cobaw Community Health Services Limited and Ors* [2014] HCATrans 289 (12 December 2014) ("*CYC v Cobaw Special Leave*") refusing special leave to appeal, and pointing out some implications for the future.

The decision being appealed from

I have previously written a couple of notes about the April 2014 decision of the Victorian Court of Appeal in *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 ("*CYC v Cobaw CA*") which can be downloaded at http://works.bepress.com/neil_foster/78/ (a detailed comment) and http://works.bepress.com/neil_foster/88/ (a briefer note).

In short, CYC declined to accept a booking requested by Cobaw for a campsite they operated, on the basis that they were informed that the aim of the booking was to run an event at which young people would be taught that homosexuality was part of the range of normal and natural human sexuality. CYC, a Christian group, saw this viewpoint as inconsistent with their beliefs, and indicated that they would not accept the booking. They, and the officer who had made the decision to refuse the booking, Mr Rowe, were found by a Tribunal to have discriminated against Cobaw on the grounds of "sexual orientation", under ss 42 and 49 of the *Equal Opportunity Act* 1995 (Vic) ("*EOA* 1995"), and fined. By a 2-1 majority (Redlich JA dissenting) the Court of Appeal upheld the finding of unlawful discrimination and the penalty against the organization, although by a different 2-1 majority (and for differing reasons) holding that Mr Rowe was not liable.

I have previously critiqued the Court of Appeal decision on a number of grounds. One of these was that the Court did not distinguish between the action of declining a booking on the grounds that the organization disagreed with the *viewpoint* being presented by Cobaw, and the action of declining a booking based on the *identity* of those persons as homosexual.

Other grounds of criticism relate to the way that two of the defences under the legislation were interpreted. Section 75 of the *EOA* 1995 provided a defence for a "body established for religious purposes" that their action which would otherwise be discriminatory conformed to "the doctrines of the religion" or was "necessary to avoid injury to the religious sensitivities of people of the religion". Section 77 provided a defence for a "person" where the otherwise illegitimate discrimination was "necessary for the … person to comply with the person's genuine religious beliefs or principles".

The s 75 defence was held by the whole Court not to apply, as CYC were not a "church" as such, even though it clearly was intended to operate for the benefit of the Christian Brethren church, and its officers were all expected to agree with the doctrines of the church. In addition, a very narrow view of "doctrines" which had been adopted by the lower Tribunal, effectively limiting the relevant beliefs to broad issues of Christianity other than views of sexual morality, meant that even if CYC had been a relevant body its decision would not have been mandated by its doctrines.

The s 77 defence was held by a majority of 2-1 not to be applicable to the CYC as an incorporated association, giving a narrow reading to the word "person". Applying s 77 to the officer of the organization, Mr Rowe, two of the appeal judges would have denied that it applied to Mr Rowe, again partly on the basis that beliefs about sexual morality were not relevant beliefs.[1] But on this point Redlich JA in dissent seemed to distinguish between "doctrines" and "beliefs", and would have found that Mr Rowe's beliefs were justification for him declining to accept the booking. Redlich JA pointed out that it was one thing to offer services to people without distinguishing between them on the basis of their personal characteristics; but it was going further than that to require a religious believer to provide support for a viewpoint that was contrary to their fundamental commitments.

The refusal of special leave

A brief comment about the "special leave" procedure may be appropriate. Most final appellate courts in the common law world have a "filtering" process to manage the immense number of possible appeals that might be brought from lower court decisions. In each system the "aspirational" goal of perfect justice (even expressed in the fairly modest form that every case receives the best possible consideration from all relevant judicial bodies) has to be balanced with pragmatic considerations of workload, and indeed the need not to waste valuable judicial time and energy on hopeless cases.[2]

The High Court of Australia is the final appellate tribunal in the country, and can hear decisions on both federal and state law. In civil cases the filtering mechanism used is that of application for special leave to appeal.[3] An attenuated panel of the Court (2 or 3 Justices) will hear arguments from the parties as to whether or not a full-blown appeal will be heard. (The equivalent system in the United States Supreme Court is usually called an application for "certiorari", an ancient administrative law remedy that is also applied as a filter in that system.)

The *CYC v Cobaw Special Leave* decision was heard by a three-member bench, made up of their Honours Crennan, Kiefel and Bell JJ. After a one hour hearing Crennan J announced the decision to refuse special leave, effectively on the basis that the case merely involved an issue of statutory interpretation of the repealed *EOA* 1995, which had later been replaced by the *Equal Opportunity Act* 2010 (Vic) ("*EOA* 2010"). The implication was that, since the statute had now been repealed, it was no longer appropriate to spend court time considering its proper interpretation. This suggests that the relevant grounds for grant of special leave being considered were those under s 35(a)(i) of the *Judiciary Act* 1903 (Cth), that a matter is "of public importance,

[1] The fact that the majority of the Court of Appeal overturned the finding of liability against Mr Rowe flowed from a technical ruling by Maxwell P that, if an organization were found to have breached the Act, this meant that the officer who made the actual discriminatory decision could not be found liable. In my longer comment I offer some reasons for concluding that this ruling was probably wrong, and on this particular issue the other members of the Court of Appeal disagreed with Maxwell P.

[2] See the Hon M Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30 *UNSW Law Jnl* 731-752, who notes that the system aims to ensure that "the Court selects its business wisely and deploys the relatively scarce judicial resources appropriately for the performance of the functions of the nation's final appellate and constitutional tribunal" (at 733).

[3] See ss 35, 35A of the *Judiciary Act* 1903 (Cth).

whether because of its general application or otherwise". Her Honour also added that in accordance with s 35(b), their Honours were not persuaded that "the interests of the administration of justice, either generally or in the particular case" required a grant of leave.

It is submitted that this decision was, with respect, incorrect. Counsel for CYC, Mr M R Pearce SC, made a number of valuable points that were not accepted by the Court. In addition, it seems that an important point which Mr Pearce did not mention ought to have had a great deal of weight with the court, as required by s 35(a)(ii) of the *Judiciary Act*, and was not considered.

The arguments put by Mr Pearce included the following persuasive points (references are to line numbers of the transcript available from Austlii in its original formatting):

- That the provisions of the *EOA* 2010 were in fact not substantially different from those of the *EOA* 1995 (ll 39-43); hence a decision of the High Court on this case would have provided valuable guidance for future decisions under the 2010 Act;
- Not only this, but the provisions of the 1995 Act were almost identical to a number of similar provisions in other State legislation of a similar nature (ll 45-63);
- That questions as to whether "person" in this and similar legislation includes a reference to an incorporated body are not only still "live issues" in Victoria but also in Tasmania, and may come up elsewhere, having recently been the subject of the *Hobby Lobby* decision in the United States (ll 88-136);
- That the general interpretation of the legislation, whereby a "broad" reading was given to the "prohibition" sections and a "narrow" reading to the defences, was an error of law which required correction; in particular, two serious errors flowed from this:
    - That the Court ended up adding additional words to the defences which narrowed their scope (such as, for example, requiring that a belief be "fundamental" before it could be relied on by way of a defence): ll150-190;
    - That there was a fundamental incoherence in the way that the "attribute" of homosexuality for the question of the prohibition on discrimination was seen to be made out, not only in terms an of internal view, but also in terms of external behaviour (in other words, as Mr Pearce put it, "there is no material distinction between the attribute and its outward expression", l 217); but when the defence of religious belief came to be considered, the court inconsistently refused to allow the "outward expression" of religious belief in terms of adherence to Biblical sexual morality, to be acknowledged (ll 216-223, 240-248).
    - Hence the CYC ought to have been allowed to express their religious commitment by not providing material

> support for a view that contradicted their fundamental beliefs.

Mr P J Hanks QC argued in support of the Court of Appeal's decision, in particular stressing the differences between the 1995 and the 2010 legislation. On behalf of the Victorian Equal Opportunity and Human Rights Commission, Ms K L Eastman SC agreed with Mr Hanks that the legislation had significantly changed, and also argued that with the advent of the Victorian human rights charter[4] a number of new issues would have to be considered today, which made the question of how the case ought to have been decided under the 1995 Act less important.

Mr Pearce responded very well to some of these arguments before concluding. However, there is one point which it seems was not made to the court which arguably could have been put. Under s 35(a)(ii) of the *Judiciary Act* the High Court is to consider, in deciding whether or not to grant special leave, whether the proceedings involve a question of law "in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts… as to the state of the law."

In any federation such as Australia, the potential arises for state appellate courts to differ on legal issues. A key part of the role of the High Court as final appellate court in the country is resolution of those differences. In this area, it seems strongly arguable that there is a fundamental legal issue as to which state appellate courts differ, and as to which the High Court should have offered a definitive opinion.

In the NSW decision of *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155, issues of a clash between religious belief and "sexual orientation discrimination" were also at stake. A Christian foster-care agency had declined to place children with a same sex couple due to their belief that a heterosexual marriage relationship was the ideal child-raising environment, a belief based on their reading of the Bible. At an earlier Tribunal hearing the Tribunal had taken the view that the relevant "doctrines" of the church concerned had to be sought in agreed statements of faith such as the historic Christian creeds, which were agreed to by all Christians. Hence they said that the church could not rely on its view of Biblical sexual morality, which the Tribunal held were not shared by all Christians.

Allsop P (as his Honour then was) rejected this view. His Honour commented:

> [9] The error made by the Tribunal in respect of s 56(d)[5] was to ascribe a meaning to the paragraph as other than requiring an investigation of the doctrines of the religion that the body was established to propagate (using the word "established" in the sense used in the reasons of Basten JA and Handley AJA). It will be the present form of "the doctrines of that religion" that is the subject of enquiry in order to ascertain whether the act or practice of the body "conforms to" them. The section does not provide for some of the doctrines of that religion, or the doctrines of part of that religion, to be examined (such as, for instance, those doctrines held in common with

[4] *Charter of Human Rights and Responsibilities Act* 2006 (Vic), which was not in force at the time of the events in the current litigation.

[5] Of the NSW *Anti Discrimination Act* 1977, very similar to the "defence" provision in s 75 of the 1995 Victorian Act. Section 56 is still in force in NSW.

> other Christian denominations). Rather, it provides for the examination of the doctrines (meaning all relevant doctrines) of the religion (meaning the whole of the religion) that the body was established to propagate.

The other members of the NSW Court of Appeal agreed (see para [41].) Yet this approach, broadly to allow the particular religious group to determine what its own relevant "doctrines" are, rather than to have that matter determined by a secular tribunal or court, runs contrary to the decision of both the Tribunal in the *CYC v Cobaw* decision and also to that of the Victorian Court of Appeal.[6]

While the two decisions relate to different pieces of legislation, the relevant provisions are so close to each other that it is clear that a court that must now apply these provisions will be in some doubt as to which approach should be applied.[7] It seems, with respect, to have been a serious error of law for the Victorian Court of Appeal to have ignored this aspect of the NSW Court of Appeal decision in coming to its views on the issue.[8] It is also odd that the High Court's attention was not drawn to this question.

The failure of a final appellate court to deal with a significant issue touching on religious freedom, on technical grounds to do with the appeal process, has interesting echoes in recent decisions of the United States Supreme Court. That court in *Hollingsworth v Perry* 133 S.Ct. 2652 (2013) declined to resolve the question whether the US Constitution contained a "right to same sex marriage" on appeal from the decision of a single Federal judge that a Californian law introduced after a popular referendum on the topic, providing that marriage was only between a man and a woman, was invalid. The reason of the majority for declining to resolve the issue was that only the Californian government had the "standing" to challenge the decision, and it had declined to do so. More recently a number of Federal Circuit Courts of Appeal have ruled that the US Constitution contains such a right, but again in a decision on Oct 6, 2014 the Supreme Court by majority refused to grant "certiorari" (as noted before, under provisions effectively equivalent to the Australian special leave provisions.)[9]

Implications for the Future

[6] See Maxwell P in *CYC v Cobaw CA*, at [276]-[277], approving the reasoning of the lower Tribunal in adopting the evidence of a theological expert relied on Cobaw, to the effect that the "doctrines" of the Christian faith were to be confined to matters dealt with in the historic creeds (and rejecting contrary evidence provided by another theologically qualified expert on behalf of CYC.)

[7] See the comments of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 81 ALJR 1107 at [135] referring to the need for state appellate courts when interpreting "uniform national legislation", as well as when deciding common law matters, to defer to previous decisions of other state appellate courts unless convinced they are "plainly" wrong. While legislation in this area is not "uniform", the relevant schemes are so similar that these injunctions clearly ought to be taken into account. But courts in all States are now left with what seems to be an irreconcilable clash between two decisions of superior appellate State courts on this issue.

[8] The only reference to the *OV & OW* decision in the *CYC v Cobaw* Court of Appeal decision is a passing footnote, n 141, on a minor technical issue. The fact that the reference is there, however, brings out very sharply the oddness of the Victorian court's failure to refer to the major issues dealt with in that litigation, which closely related to those dealt with in the *CYC v Cobaw* case.

[9] At that time no Federal Circuit Court had ruled that a "right to same sex marriage" did not exist. But more recently other Federal Circuit Courts of Appeal have so ruled, so it seems likely that the Supreme Court will have to make a decision fairly soon.

To return to Australia, what are the implications of the rejection of the special leave application in *CYC v Cobaw*? A number of suggestions can be offered.

The **first point** to make very clearly is that a decision of the High Court not to grant special leave to appeal, does *not* mean that the decision of the lower court has been approved by the Court. As McHugh J commented in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595 at 643:

> Refusal of special leave creates no precedent and is binding on no one.

The effect of a refusal to grant special leave, then, neither affirms the validity of the decision of the lower appellate court, nor in any way strengthens it. It remains as it was previously, as an authority of full precedential force within the jurisdiction within which it was decided (here, Victoria). It also continues to have whatever persuasive force it held for courts in other jurisdictions before the application for special leave was made.[10] But, as Sir Anthony Mason put it writing extracurially:

> [t]he refusal of special leave is not an affirmation of the decision or of the reasons for decision below.[11]

It remains open, then, for a future litigant in another State to argue that *CYC v Cobaw CA* was "plainly wrong", or of course for a future Victorian litigant to refer to features of the new *EOA* 2010, or relating to the Victorian Charter (which, it should be recalled, contains a right to freedom of religion), which would distinguish a possible future case from the earlier one.

Second, however, there are a number of features of the CA decision that are unsatisfactory and will need to be examined closely in the future. I have noted these at the end of my other notes previously referred to, but for ease of reference these are what I consider to be the main problematic points.

- The CA decision held that a corporation could not rely on a religious freedom defence available to "persons" generally. Interestingly the arguments on this point in the Special Leave hearing put by Mr Hanks concentrated most closely on the specific structure of the now-repealed *EOA* 1995 (see ll 400 ff), and her Honour Bell J interjected to comment that arguments either way were clearly available (see ll 415, 433-434.) So this point will be open for further argument in a different piece of legislation, and again the recent contrasting decision of the US Supreme Court in the *Hobby Lobby* case (decided after *CYC v*

[10] In other words, as noted above, in accordance with the decision in *Farah v Say-Dee* other state courts should normally follow it unless persuaded that it is plainly wrong. But the added complication here comes from the fact that NSW courts will be obliged to apply the decision in *OV & OW* where the two decisions clash.

[11] "The Use and Abuse of Precedent" (1988) 4 *Aust Bar Review* 93-111, at 96. For further comments on the precedential value of special leave refusals, see The Hon M Kirby "Precedent in Australia", paper presented at the International Academy of Comparitive Law Conference, Utrecht, The Netherlands (10-16 July 2006) at 18-19; D O'Brien, *Special Leave to Appeal* (2nd ed; Sup Ct of Qld Library, 2007) at 48-50; M Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2012) at 300. Sir Anthony Mason at n 8 notes that this follows the practice of the House of Lords in the UK, as spelled out, for example, in *Wilson v Colchester Justices* [1985] 2 All ER 97 at 100.

Cobaw CA was handed down) may have some influence with a future court.[12]

- The CA decision to rule on the content of "doctrines" rather than to leave that decision to the religious believers concerned (subject, of course, to obvious questions about sincerity, recent invention, and general coherence)[13] has been noted previously, and seen to be arguably contrary to the approach taken in the NSW *OV & OW* case. Arguably any non-Victorian court will have to make a decision as to which intermediate appellate court it will follow on this point.
- The finding in these proceedings that a distinction based on support for a message about the "normality" of homosexual behaviour, from a distinction based on the identity of the persons concerned, was not a valid one, will remain of some concern to many Christian organisations. It seems this is a battle that may need to continue to be fought. In this respect the dissenting decision in *CYC v Cobaw CA* of Redlich JA, and indeed the arguments put on this point by Mr Pearce SC in the Special Leave application, will prove to be helpful.
- The ruling in the CA decision upholding the finding that CYC were not an organization "established for religious purposes" also remains of some concern. If there is one over-riding lesson for Christian organisations who are concerned to uphold Biblical sexual morality, it would be that they should be very clear and open about their purposes. If their purposes are indeed religious ones, they should be spelled out in clear terms on websites and public documents. It may even be that, in the current social context, an organization that has previously relied on a very general and broad doctrinal statement to define its important beliefs, will need to supplement that document by clear statements about a commitment to Biblical standards of sexual behaviour.

In conclusion, the refusal of special leave to appeal the *CYC v Cobaw CA* decision was unfortunate and arguably wrong. But, while leaving the current law of Australia in some confusion, it still leaves open the possibility for Australian courts to move forward with a clearer set of guidelines in the other cases that may come up into the future. And it leaves open the possibility of a future High Court decision which may resolve some of these issues in way which strikes an appropriate balance between important rights of non-discrimination, and fundamental rights of religious freedom.

[12] See *Burwell v Hobby Lobby Stores Inc* 134 S Ct 2751 (2014).

[13] For an excellent note debunking allegations that "religious views" cannot be challenged on these grounds, see B Adams and C Barmore, "Questioning Sincerity: The Role of the Courts after Hobby Lobby" (Nov 7, 2014) 67 *Stanford Law Rev Online* 59-66, noting that courts have had a lot of experience testing the sincerity of alleged beliefs against actual behaviour: "There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity" (at 59).

Neil Foster
Associate Professor in Law, Lecturer in Law and Religion,
Newcastle Law School

18 Dec 2014