March, 2022

The Majority Opinion: A Commentary

Neil J Foster

The Majority Opinion

A commentary

NEIL FOSTER[1]

Introduction

The Appellate Tribunal of the Anglican Church of Australia has released two Opinions relating to proposed change in church laws by two Australian dioceses (Wangaratta and Newcastle). The effect of the Majority Opinion[2] is that it is lawful for a diocese to approve a church service to pronounce a formal blessing on a same-sex couple married under Australian civil law. The long-term impact of this Opinion may be serious for the unity of the Anglican Church of Australia (ACA), as it touches on issues which are dividing the Anglican Communion around the world.

My overall focus is on the use of the word 'doctrine' and how the reasons of the majority in the Opinion might be used in future by the secular courts in Australia and by others in the ACA.

The *Majority Opinion* concerns the possible use of a 'blessing' service for a same-sex couple who have been married under Australian civil law. It is clear from the background to the introduction of the service that it is explicitly designed to be used to 'bless' marriages entered into between same-sex couples. I will leave it to others to comment on the theological and ecclesiastical implications of the word 'bless', but I take it that in general, when used of an act by a person, it is a word used to express approval for, and support of, a particular thing. To 'bless' a relationship between two persons is not just to express support for the individuals concerned, but also to express approval of, and support for, their entering into that particular relationship.

Australian law was amended in 2017 to allow same-sex couples to enter into marriages under the *Marriage Act 1961* (Cth).[3] The amended Act, however, assumes that some religious organisations will not want to offer same-sex marriage – see ss 47 and 47A which

1 Associate Professor of Law, Newcastle Law School, NSW. Views expressed here are, of course, my own and not necessarily those of my institution.

2 *Primate's References re Wangaratta Blessing Service* (11 November 2020) Appellate Tribunal of the Anglican Church of Australia; at https://anglican.org.au/wp-content/uploads/2020/11/AT-Wangaratta-11112020-Final.pdf. There was a 5-1 split in the Opinions. The dissenting reasons are referred to here, but most of the comments relate to the joint reasons of the majority.

3 See my comment on the event in 'Australia adopts same sex marriage: law and religion implications' (Dec 7, 2017) https://lawandreligionaustralia.blog/2017/12/07/australia-adopts-same-sex-marriage-law-and-religion-implications/ .

allow ministers of religion and religious marriage celebrants to decline to perform such ceremonies. The reason for this is that a number of religious traditions regard homosexual activity as contrary to God's will. In the Christian tradition, this view is supported by the clear teaching of the Bible, evidenced in the New Testament by passages such as Romans 1 and 1 Corinthians 6.

The Anglican Church of Australia, in a resolution of its General Synod in 2017, has affirmed that:

> the **doctrine** of our church, in line with traditional Christian teaching, is that marriage is an exclusive and lifelong union of a man and a woman (emphasis added).[4]

(Note, as it will be important in the following context, that General Synod explicitly uses the word 'doctrine' to refer to this proposition.)

Diocese of Wangaratta

The ACA does not offer marriage to same-sex couples. But some within the denomination have proposed that the church offer a service of 'blessing' for such couples who are married in accordance with the current provisions of the *Marriage Act 1961*.

One such proposal was put forward by the Diocese of Wangaratta. A new liturgy was proposed – it is set out in full as an Appendix to the majority reasons in the Opinion (from pp 65–67.)[5] It provides for a 'blessing' to be pronounced on two persons civilly married 'as they continue their married life together'. (Note that already at that point, the liturgy is identifying the same-sex couple as 'married' for the purposes of the Anglican Church.) It then gives thanks for their love, and in particular for 'the physical and emotional expression of that love.' In the context it is difficult to see this as anything but an expression of approval for homosexual physical intimacy.

A new liturgy was proposed—it is set out in full as an Appendix to the majority reasons in the Opinion...

The Opinion does note at some points that not all same-sex relationships involve sexual activity.[6] But given the long historical and biblical understanding of the institution as a place appropriate for sexual activity between the couple, and in particular the highly sexualised nature of modern Western society, examples of such a celibate relationship are likely to be rare. In particular, it is interesting to note that when the Opinion tries to craft a definition of 'marriage' which

4 See 'MARRIAGE, SAME-SEX MARRIAGE AND THE BLESSING OF SAME-SEX RELATIONSHIPS', adopted 7 Sept, 2017, at https://anglican.org.au/the-general-synod/search-resolutions-of-gs-sessions/?sid=2827 .

5 A service of blessing using the liturgy, for a same-sex legally married couple, was apparently held 10 days after the Tribunal opinion was handed down: https://tma.melbourneanglican.org.au/2020/12/first-same-sex-marriage-blessing-conducted-after-tribunal-decision/: 'Bishop John Parkes, the retired Bishop of Wangaratta, blessed the marriage of retired clergy the Revd Dr John Davis and the Revd Rob Whalley using the liturgy approved by Wangaratta Synod in August 2019.' (accessed 24 February 2022)

6 See, for example, para 27, noting 'the very real possibility that some marriages will not involve sexual intimacy that infringes the Biblical proscription(s) relied upon'.

will allow same-sex couples, at para 18, the majority include among the minimal requirements 'human actors of the age of sexual maturity'. The potential for sexual intimacy between the married persons is presumably why the *Marriage Act 1961* contains a prohibition on under-age marriage and a list of 'prohibited relationships'.[7]

This new liturgy purported to be made under authority of a General Canon of the General Synod of the ACA passed in 1992. The 1992 Canon in cl 5(2) allows a minister of a local church to use novel forms of service not set out in authorised prayer books: 'a minister of that diocese may on occasions for which no provision is made use forms of service considered suitable by the minister for those occasions'.

However, a limitation on this power is contained in cl 5(3):

> (3) All variations in forms of service and all forms of service used must be reverent and edifying and must **not be contrary to or a departure from the doctrine of this Church**. (emphasis added)

A challenge to the use of the Wangaratta blessing service was made, in broad terms, on the basis that the service itself was indeed contrary to 'the doctrine of this Church'. The challenge was by way of a reference by the Primate of the ACA to the Appellate Tribunal (the Tribunal).

The Tribunal is empowered by the Constitution of the ACA, s 63(1), to give its opinion on a 'question arising' under the Constitution. The validity of the order of service depends on its compliance with cl 5(3) of the 1992 Canon, which by its reference to 'the doctrine of this Church' raises a question under the Constitution.

Constitutional provision for assistance on doctrine questions

Under s 58(1) of the Constitution:

> Before … giving an opinion on any reference the Appellate Tribunal shall in any matter involving doctrine upon which the members are not unanimous upon the point of doctrine and may, if it thinks fit, in any other matter, obtain the opinion of the House of Bishops, and a board of assessors consisting of priests appointed by or under canon of General Synod.

In this case the Tribunal did refer four specific questions to be answered by a Board of Assessors, and by way of advice from the House of Bishops (see para 279). The questions were very narrowly worded. But even so, it is apparent that both these bodies gave opinions *against* the endorsement of same-sex relationships by a formal service of blessing. See the comments of Member Davidson in dissent:

> [87] The unanimous views of both the House of Bishops and Board of Assessors is that Scripture teaches that homosexual practice is sinful, that persistent, unrepentant, sin threatens salvation and that such behaviour should not be blessed by the Church.

7 See *Marriage Act 1961* (Cth) paras 23B(1)(b) and (e).

Yet the majority concludes otherwise. They do so because of the narrow view they take of the word 'doctrine' (and also the word 'faith').

The central question

The main question which required resolution here, then, was whether a form of service which blessed a same-sex relationship would be 'a departure from the doctrine of this Church'.

The 1992 Canon was made by the General Synod; the majority noted at para 54, pursuant to s 4 of the Constitution which gives authority to the Synod:

> to alter or revise ... forms [of worship]..., provided that all such ... forms ... are consistent with the Fundamental Declarations contained herein and are made as prescribed by this Constitution.

The specific clause in the 1992 Canon making a service invalid if it departed from 'the doctrine of this Church' was treated as a general reference to the Fundamental Declarations outlined in Sections 1–3 of the Constitution. In theory a service might not be a departure from 'the doctrine' of the Church but still be in some way not 'consistent' with the Fundamental Declarations. If that were the case, however, then the 1992 Canon would be invalid to the extent that it authorised such a service. So, the broader question was: Was the service consistent with the Fundamental Declarations?

The Fundamental Declarations in the Constitution are ss 1–3:

> 1. The Anglican Church of Australia, being a part of the One Holy Catholic and Apostolic Church of Christ, holds the Christian Faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds known as the Nicene Creed and the Apostles' Creed.
>
> 2. This Church receives all the canonical scriptures of the Old and New Testaments as being the ultimate rule and standard of faith given by inspiration of God and containing all things necessary for salvation.
>
> 3. This Church will ever obey the commands of Christ, teach His doctrine, administer His sacraments of Holy Baptism and Holy Communion, follow and uphold His discipline and preserve the three orders of bishops, priests and deacons in the sacred ministry.

For the purposes of the question involved here, the key relevant phrases seem to be:

- 'the Christian Faith as professed by the Church of Christ from primitive times';
- The Scriptures as 'the ultimate rule and standard of faith given by inspiration of God and containing all things necessary for salvation';
- 'obey the commands of Christ, teach His **doctrine**'. (emphasis added)

Other contributions to this volume will address other issues, but in this chapter, I want to focus on the meaning of the word 'doctrine' in s 3 (which, of course, must inform the phrase 'the doctrine of this Church' in cl 5(3) of the 1992 Canon).

How did the Majority Opinion approach the central question?

The task of the Tribunal in any reference of this sort is, of course, a challenging one. On the one hand, it must address the specific question which it is empowered to answer, whether a proposal is 'inconsistent' with the Fundamental Declarations, or a 'departure' from the doctrine of the Church. Such consideration will mean that it will need to offer a view on the content of doctrines of the Church, so as to determine the question of inconsistency. On the other hand, the formal defining of doctrines at large is not the Tribunal's remit. Its task is the narrower one of judging the consistency question.

The current President of the Tribunal is the Hon Keith Mason AC QC, a highly respected former President of the NSW Court of Appeal. It seems likely that it was President Mason who wrote the Majority Opinion.

In approaching that task, the Tribunal will naturally use interpretative techniques that are drawn from the mainstream legal system. One factor here will be that the legal members of the Tribunal are drawn from that system, and have usually included one or more current or retired senior judges. The current President of the Tribunal is the Hon Keith Mason AC QC, a highly respected former President of the NSW Court of Appeal. It seems likely that it was President Mason who wrote the Majority Opinion. Another factor encouraging the use of standard judicial techniques for interpreting legislation is that section of the Constitution, s 74(7), which explicitly applies the *Acts Interpretation Act 1901-1948* of the Commonwealth to the interpretation of its provisions (that is, that Act as it stood in 1948). As both the Majority and the Minority Opinions note, a now-repealed Synod Rule, Rule XIX, also applied the 1948 Act to the interpretation of Canons made prior to 1996 (such as the 1992 Canon authorising the Wangaratta blessing service) – see Majority Opinion at para 138, Minority Opinion of Member Gillian Davidson (herself a senior lawyer) at para 8.

Is the blessing of a same-sex marriage, then, inconsistent with the 'doctrines of the Church' or the Fundamental Declarations?

At first glance the answer seems obviously, yes.

The 2017 resolution of General Synod, noted above, stated that the 'doctrine' of the Church is that 'marriage is an exclusive and lifelong union of a man and a woman'. The very fact that the words of the service, as previously noted, refer to the union of same-sex parties as a 'marriage', stands in sharp contradiction to the words of this resolution.

Further, no-one can deny that the long-standing view of the Christian church from the earliest of times ('the Christian Faith as professed by the Church of Christ from primitive times' as s 1 of the Fundamental Declarations puts it) was that homosexual activity was contrary to God's will. It seems then that Scripture ('the ultimate rule and standard of faith given by inspiration of God', s 2) itself speaks clearly on the topic. In Romans 1:26–28 Paul refers to homosexual activities as 'shameless acts' warranting God's judgment, and in 1 Corinthians 6:9–10 he says that 'men who practise homosexuality' are among those who will not inherit the kingdom of God. These matters and many others are brought together with clarity in Member Davidson's dissent.

Finally, for the moment, the Tribunal was provided (pursuant to s 58 of the Constitution noted above) with opinions from the House of Bishops and the Board of Assessors which

answered the very specific questions asked by the Tribunal in ways which were clearly consistent with the Minority Opinion of Ms Davidson.

But the majority disagree, concluding that a blessing of a same-sex union is not inconsistent with the 'doctrines of the Church'. They do so by narrowing the meaning of the word 'doctrine'.

They start by noting that there is a definition of 'doctrine' provided in s 74(1) of the Constitution:

> 'Doctrine' means the teaching of this Church on any question of faith.

But they say that this does not provide any clear guidance – see para 143. Nor does the somewhat circular comment in s 74(4) that 'any reference to faith shall extend to doctrine'.

The majority then express their commitment to the principle of *stare decisis*[8] (see para 158: the Tribunal 'will not lightly depart from its earlier decisions on matters of constitutional import') and say that they will adhere to previous Tribunal decisions on the question (see para 166: 'We are not disposed to depart from the settled meaning of 'doctrine' in the Constitution'). What, then, is this 'settled meaning'?

The majority claim that comments of four members of the Tribunal in 1987 determine the meaning of the word 'doctrine'. They are as follows:

Archbishop Rayner

» From para 148: '"Doctrine" must therefore be understood in the Constitution as the Church's teaching on the faith which is necessary to salvation.'[9]

Justice Handley

» From para 150: Member Handley was quoted as saying that propositions which are 'not part of the Christian faith professed by the Church, [...] not dealt with in the Creeds, and do not directly involve matters necessary for salvation' are not a matter of 'doctrine'.[10] Even on a reading of this statement most generous to the majority view here, Mr Handley is offering three criteria for 'doctrine', not the single 'necessary for salvation' one. When his whole statement is seen in context, he is saying that 'doctrine' takes its meaning from the context of the use of the word 'faith' in s 1 of the Constitution, and just prior to the quote used here he says:

> The definition of faith in Section 74(1) is not at all helpful but the sense in which the word is used in the Constitution appears from Section 1. This refers to the Christian faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds.[11]

» So it seems clear that the question of what was professed 'from primitive times' is a major criterion, though he goes on to add the other two as noted. But there is no way that his

8 Latin, 'the decision stands'; this is the legal doctrine of precedent where a court is bound to follow previous decisions.

9 Archbishop Rayner, *Report of the Appellate Tribunal Re Ordination of Women to the Office of Deacon Canon 1985* 4 March 1987 ('the March 1987 Opinion'), at p 49.

10 The quote is taken from pp 115–16 of the March 1987 Opinion.

11 Ibid 115.

position can be taken to mean that something is only 'doctrine' if it is 'necessary for salvation'.

Justice Young

» Another quote offered in support of the majority view, at para 149, is a lengthy quote from Young J from the March 1987 Opinion which contains no reference at all to the supposed 'necessary for salvation' criterion. Perhaps the only part of the quote which might support the majority view is that Young J says that the provisions of the Constitution 'make a very definite distinction between the rules of order and conduct on the one hand, and the teaching of the Church in matters of faith on the other'. So perhaps the quote is included to distinguish 'rules of conduct' as propositions of morality, from other propositions. But the quote is quite unclear, and as noted makes no reference to the 'necessary for salvation' criterion.

Justice Tadgell

» Finally, at para 151 the majority refer to the 1987 comments of Tadgell J which also make no reference to a 'necessary for salvation' criterion, but as to which they comment: 'we understand him to be referring, like the others in the majority, to 'doctrine' in the narrow constitutional sense'. What this 'narrow' sense is, with respect, not fully explained by the quotes offered.

In the end, the support that the majority find for a view that 'doctrine' is restricted to that which is 'necessary to salvation' can only be found in the quote provided from Archbishop Rayner. Yet in the context even this quote does not support their conclusion. This is clearly demonstrated by the Minority Opinion of Member Davidson, at paras 123ff of her Opinion. I recommend a reading of her full analysis, but in brief it is as follows.

In the relevant comment from Archbishop Rayner, there is ambiguity as to which word the final 'which' clause is meant to be attached. The majority view here takes it to be attached to the word 'teaching', meaning that doctrine is only 'teaching... necessary to salvation'. But the other view, demonstrated to be much more likely, is that it is attached to the word 'faith', so that the reference is to the teaching of the Church concerning the 'faith which is necessary to salvation', i.e., the Christian faith. As Member Davidson notes, on p 49 of the March 1987 Opinion the Archbishop immediately goes on to make 'faith' the subject of his next sentence:

> That faith is grounded in scripture and set out in the creeds; and the Church's doctrine or teaching on that faith may be explicated and developed, provided it is always subject to the test of scripture. For reasons already advanced, I do not see the limitation of ordination to males as required by scripture, nor is it referred to in the creeds.[12]

Agree or not with the Archbishop's views on this point, his criteria for determining 'doctrine' seems to be 'scripture' and 'the creeds', with no reference to some sub-set of scriptural views that are 'necessary to salvation'. As Member Davidson illustrates (at para 36):

12 March 1987 Opinion p 49.

> If doctrine is only that teaching which is necessary for salvation, and if, as Article VI requires, Scripture contains everything necessary for salvation, then why would Archbishop Rayner state that 'doctrine or teaching on that faith may be explicated and developed, provided it is always subject to the test of scripture'?

But that in the end seems to be the view that the Majority Opinion adopts. They assert without any clearer explanation that 'the settled meaning of "doctrine" in the Constitution' (at para 166) is this 'narrow' view that something is only doctrine if 'necessary for salvation' (see para 177). They conclude that 'none of the BCP [Book of Common Prayer] teachings about marriage are "teaching(s) on the faith which is necessary to salvation"' (at para 180).

As previously indicated, this reasoning is not persuasive. A narrow reading of previous comments, taken out of their initial context, has led the majority into error. The Minority Opinion of Ms Gillian Davidson spells this out in much more detail.

Possible future (secular) consequences

This narrow view of the word 'doctrine', offered by the majority of the Appellate Tribunal as a formal understanding of the word for the Anglican Church of Australia, has the potential to have far-reaching impacts in other areas of the law. A specific example can be seen in the decision of the Victorian Court of Appeal in *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* (2014) 308 ALR 615; [2014] VSCA 75, where, by a 2:1 majority the Victorian Court of Appeal ruled that the organisation Christian Youth Camps Ltd (CYC) was liable for sexual orientation discrimination when it declined a booking for a weekend camp from a youth support group affirming the validity of same-sex activity.[13] A key part of the defence offered in that decision by CYC was that s 75 of the *Equal Opportunity Act 1995* (Vic) meant that religious groups were not liable for discrimination if their actions conformed with 'the doctrines of the religion'.

President Maxwell, who gave the majority decision on this point, accepted the ruling of a lower Tribunal which 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 paras 276–7. Of course, the Majority Opinion of the Appellate Tribunal will not formally be binding on a court in the 'mainstream' legal system, but the fact that the Appellate Tribunal's opinion was supported by a senior retired President of the NSW Court of Appeal means that it may have influence as a 'persuasive' precedent on a later court.

It has to be said that the decision of the Victorian Court of Appeal on this point is by no means clearly the correct view of the matter under the general law. A contrasting approach can be found in the decision of the NSW Court of Appeal (decided after Mr Mason's retirement in 2008) in *OV & OW v Members of the Board of the Wesley Mission Council* (2010) NSWCA 155. There the Court of Appeal (Allsop P, Basten JA & Handley AJA) held that the Equal Opportunity Division of the Administrative Decisions Tribunal (EOD)

13 For a detailed analysis of the decision, see Neil J Foster, 'Christian Youth Camp liable for declining booking from homosexual support group' (2014); available at: http://works.bepress.com/neil_foster/78/.

had been in error in its reading of a similar defence in a case involving the actions of the Wesley Mission in declining to place a foster child with a same-sex couple. The EOD at first instance had ruled that 'doctrine' in the defence provision in s 56 of the *Anti-Discrimination Act 1977* (NSW) had to be a 'doctrine' agreed upon by the whole of the Christian church. The Appeal Division had overturned this ruling, holding that it was sufficient for a belief to be relevant for it to be one shared by a 'sub-section' of the church, such as that represented by the teachings of John Wesley. The Court of Appeal agreed with this ruling and expressed no doubts that a belief in man/woman marriage as the norm for a family could be regarded as a 'doctrine' of the Wesleyan Mission. For example, they commented at para 54:

> The question the Tribunal needed to address was whether a refusal in 2003 to consider an application to authorise a same-sex couple to foster a child conformed at that time with the doctrines of the religion which the Wesley Mission was, as at 2003, established to propagate.

On referral back to the EOD, in *OW & OV v Members of the Board of the Wesley Mission Council* (2010) NSWADT 293, the members of the EOD accepted that views on homosexual activity formed part of the 'doctrine' of the church.

> [33] ... [W]hile there is no relevant doctrine of the Uniting Church which would bind the Wesley Mission the **Mission itself is entitled to propagate its own doctrines on the subject of homosexuality** and may do so by teaching or other means not necessarily amounting to the formal pronouncement of a 'doctrine'.
>
> [34] In our opinion the statements made by Dr Garner quoted above encapsulated in paragraphs 54 and 58 of his affidavit constitute a 'doctrine' within the meaning of s 56 of the religion which the Wesley Mission was established to propagate in 2003. (emphasis added)

These decisions simply illustrate that the question of whether a view on sexual morality may be a 'doctrine' of a church arises in the secular courts as well as in the Anglican Church of Australia, and unfortunately the narrow view taken by the Majority Opinion of the Appellate Tribunal may encourage a narrow view of the word to be taken by such courts in the future, with the result that clauses protecting religious freedom may be unduly read down.

Some sharp questions for the Anglican Church of Australia and its General Synod

Other parts of the Majority Opinion, while on the one hand disclaiming any intention of settling controversial theological points, seem clearly directed at opening up the way for the ACA to fully recognise same-sex marriages as 'marriage' for the purposes of the church. The history of changes in marriage law is presented as if all elements of the institution were apparently open to revision at any time, with no serious attempt being made to see how the Bible's view of the man/woman marriage covenant informs the overall movement of biblical theology. At one stage an attempted definition of the 'core' elements of marriage is offered:

> [18] Despite the variations in the law and practice of marriage over time and place, there must be core elements of the institution. These appear to include human actors of the age of sexual maturity; intention as to permanency; and (a basic level of) mutual consent. In the setting of the Australian Constitution, the High Court of Australia suggested that the juridical concept of 'marriage' refers to:
>
> 'a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.'[14]

The quotation from the High Court of Australia decision affirming that 'marriage' for the purposes of the *Commonwealth Constitution* can be extended to same-sex relationships is significant. Like the Appellate Tribunal here, the High Court felt obliged to offer a 'core' set of elements of marriage to avoid the label being completely emptied of meaning. But like the Appellate Tribunal, the High Court offered no compelling reason based on the purposes of the institution as to why its list, rather than some other list, should be adopted. Indeed, the Appellate Tribunal feels the need to supplement the High Court's criteria for its own purposes, adding 'sexual maturity' and 'consent' to the court's woefully inadequate set of criteria.

At least the High Court decision, if it is not free from criticism,[15] can perhaps be understood, because the Court is a secular tribunal trying to come up with a definition that is suitable for a multi-faith country. But the Appellate Tribunal is meant to be a body tasked with operating as a key part of the Anglican Church of Australia, holding 'the Christian Faith as professed by the Church of Christ from primitive times', and committed to 'obey the commands of Christ, teach His doctrine, administer His sacraments of Holy Baptism and Holy Communion, follow and uphold His discipline'. Yet the Appellate Tribunal has devised a set of core elements of marriage which deliberately exclude the man/woman covenant that Scripture and tradition place firmly at the centre of the relationship. The 'discipline' of the Lord Jesus addresses behaviour in accordance with the Creator's purposes, and affirms that sexual immorality (which there can be no doubt includes homosexual activity) defiles a person in God's sight: see Mark 7:20–23,

> And he said, 'What comes out of a person is what defiles him. For from within, out of the heart of man, come evil thoughts, **sexual immorality**, theft, murder, adultery, coveting, wickedness, deceit, sensuality, envy, slander, pride, foolishness. All these evil things come from within, and they defile a person.' (emphasis added)

And yet this 'defiling' behaviour, the Appellate Tribunal majority asserts, may now receive the blessing of the church. Not only that, but other passages in the Majority Opinion, while recognising that 'at the moment' church law does not allow same-sex marriage, seem designed to make the argument that it should. See the following:

14 *Commonwealth v Australian Capital Territory* (2013) HCA 55, 250 CLR 441 at [23].

15 See the short but compelling critique by highly respected constitutional scholar Prof Anne Twomey:'Same-Sex Marriage and Constitutional Interpretation' (2014) 8 *Australian Law Journal* 613–616.

> [39] it **may be taken** that the canon law of the ACA **presently** restricts solemnisation of matrimony to the wedding of one man and one woman…
>
> [70] No one argues in this Reference that it is **presently** lawful for a same-sex marriage to be solemnised in the ACA… (followed by an extensive review of how marriage law has changed over time)
>
> [74] Many of the Biblically-justified incidents of what was sometimes called 'Christian marriage' have since 1662 been varied by the Church of England and/or by the ACA and/or by the State with the acquiescence of those Churches….And it presents the question of identifying **why the teaching about a monogamous heterosexual union is in a different legal category**…
>
> [179] The General Synod may decide to make no more changes to the 1662 'doctrine of marriage' but we have **not discerned a constitutional barrier** against this. (emphasis added)

The final quote is the most significant. It virtually amounts to an invitation for someone to challenge the current church view that same-sex marriage should not be approved. Indeed, it seems apparent that if the majority view were accepted, that a previously concluded same-sex 'marriage' under civil law could lawfully be blessed by an approved liturgy, then it takes little foresight to see that there will be immediate pressure to change the reluctantly accepted view 'presently' held by the church that such a union should not be given full liturgical 'marriage' status.

Even if the majority's narrow criterion of 'necessary to salvation' is accepted, it seems hard to understand why the majority do not accept that active support for homosexual activity does not meet that criterion. In one of the main passages that addresses the topic in the New Testament, 1 Corinthians 6:9–11, we read:

> Or do you not know that the unrighteous will not **inherit the kingdom of God**? Do not be deceived: neither the **sexually immoral**, nor idolaters, nor adulterers, nor **men who practise homosexuality**, nor thieves, nor the greedy, nor drunkards, nor revilers, nor swindlers will **inherit the kingdom of God**. And such were some of you. But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and by the Spirit of our God. (emphasis added)

The passage is quite clear: salvation (inheriting the kingdom of God) is not offered to the 'unrighteous' who are unrepentant. Yes, the gospel of free grace says that forgiveness for all these sins is available, when someone repents and puts their trust in the Lord Jesus Christ. But the behaviours listed in vv. 9–10, if unrepentantly persisted in, will mean that a person is not accepted as forgiven and will be excluded from the kingdom. One of those behaviours is homosexual activity. Support for homosexual activity is, then, a question of salvation. But while acknowledging that this passage speaks to matters that relate to 'salvation' in para 214, the Appellate Tribunal insists that it cannot be a matter of constitutionally relevant 'doctrine'.

In the end, perhaps wavering again in its restriction of 'doctrine' to matters 'necessary for salvation', the majority conclude:

> [258] But we have not been persuaded that the particular Wangaratta blessing service contravenes any commands of Christ, doctrines in the canonical scriptures

> or even doctrines recognised in the formularies of the Church in such a way as to reveal inconsistency with the Fundamental Declarations.

The fact is that the word 'doctrines', when used in the Constitution, seems to have the obvious meaning of teachings on matters that relate both to faith and conduct, and that is the way that most members of the Anglican Church of Australia would approach the matter if they were not seeking to avoid the consequences of the clear teachings of Scripture.

In the end, the answer suggested by the majority is that the Church takes steps to clarify its position through its governing synod and Bishops:

> The application of that teaching on salvation to the matter at hand is a task for the discernment of the General Synod, diocesan synods and Bishops.

The majority – whilst conveniently ignoring that General Synod only recently described the teaching that marriage is a covenant between a man and a woman, and did so while the change to the *Marriage Act* that allowed same-sex unions was being debated – concludes:

> General Synod is the place to draw disciplinary or liturgical lines if it is the will of the Church to have uniformity in this particular matter or in the matter of what may or may not be blessed in worship. [226]

All that one can say is that it is to be hoped that General Synod will speak, once more, with a clearer voice on this topic when it comes to consider the matter; to bring clarity to the bedrock questions raised by this Majority Opinion.