Some thoughts on Law, Religious Freedom and the “Commercial Sphere”

Neil J Foster
In an introductory way, I want to discuss briefly today some questions raised by recent legal decisions and controversies that squarely raise the question: can there be religious freedom in the “commercial sphere”? In particular, the issues that are being presented very starkly in the West today are: can believers who offer general commercial services in the marketplace, do so in a way which is consistent with their fundamental religious commitments? Can a believer who is an employee maintain their religious identity while working for a “secular” employer? If so, what are the appropriate limits? If the answer to both questions is, No, then what impact will this have on the operation of the marketplace and the lives of believers? For it seems likely that if religious believers are “driven out” of the commercial sector, then even from purely pragmatic grounds the economy will be losing a group of participants which it badly needs for their honesty and hard work. (Rachael Kohn reminded us last night of the various factors which make believers valuable contributors to the commercial sphere.)

In particular, some high-profile decisions of courts in Western countries in recent times have brought these issues to the fore. There are a number, but the ones I want to briefly highlight today are:

- The *Eweida* decision from the European Court of Human Rights, discussing whether an employee has a right to wear a symbol of their religious faith, contrary to a generally applicable “dress code” applied to all employees;

- The *Bull v Hall* decision from the UK, raising the question whether those who provide accommodation to others in their own homes can choose to provide that service in a way which comports with their religious beliefs;

- The *Hobby Lobby* decision from the US, raising the question whether a for-profit closely held corporation has “religious freedom” rights, and if so whether it may decline to offer certain medical procedures to its employees when those procedures would be immoral according to the religious commitments of those who run the corporation;

- The *CYC v Cobaw* decision from the Australian State of Victoria, which raised the question whether a group which offers holiday camping services can decline a booking from a group whose avowed aim for the booking was to espouse a view contrary to the religious commitments of those who run the group.
Before we note the facts and outcomes of some of those cases, I want to highlight some common themes. In each of those cases there is said by many commentators to be a question as to whether religious freedom can apply to those who operate in the “commercial sphere” or the “secular marketplace”, or some such similar phrase. I would like to pause and notice what is happening here. There seem to be a couple of intertwined assumptions at work:

1. That human life can be divided up into “spheres” or “areas of operation”. Now in one sense no-one would dispute this- we all have a general sense that the time we spend earning money is a “work” context, the time we spend just living in our house is a “home” context, the time we spend at the beach might be called a “leisure content”, if we go to church we might call that a “church context”. But equally, we would all recognise that these things overlap and intersect. Who I am as a human being, while my behaviour might change in different contexts, remains essentially the same.

2. The second assumption that flows from these comments is that “freedom of religion” is something that happens on my own time! So obviously I have freedom to choose whether I go to church or not, and which one. But there is a deep suspicion that I might bring my religious commitments with me into other contexts, and in particular in my work, or in my interaction with customers if I run a business, then I must leave my religion behind.

3. Thirdly, if a believer were to behave in the “marketplace” in accordance with their convictions, they would be in some sense “imposing” those convictions on others. (In my view, while we don’t have time to explore it further today, the whole discourse of “imposing” needs to be challenged. To refuse to support a viewpoint contrary to my faith is not to “impose” anything on someone else, unless there is a real issue of structural power and authority. Where both parties operate as equals, no-one is doing any “imposing”.)

Some examples may suffice.

- In Christian Youth Camps Limited v Cobaw Community Health Service Limited [2014] VSCA 75 Maxwell P made these comments in holding that the CYC were not an “organisation established for religious purposes”:

> [269]... CYC has chosen voluntarily to enter the market for accommodation services, and participates in that market in an avowedly commercial way. In all relevant respects, CYC’s activities are indistinguishable from those of the other participants in that market. In those circumstances, the fact that CYC was a religious body could not justify its being exempt from the prohibitions on discrimination to which all other such accommodation providers are subject. That step — of moving from the field of religious activity to the field of secular activity — has the consequence, in my opinion, that in relation to decisions made in the course of the secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise. (emphasis added)

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In the same case, Neave JA said:

[431] International cases have taken a number of factors into account in deciding whether particular prohibitions infringe the right to hold and manifest a religious belief. Where the act claimed to be discriminatory arises out of a commercial activity, it is less likely to be regarded as an interference with the right to hold or manifest a religious belief than where the act prevents a person from manifesting their beliefs in the context of worship or other religious ceremony. That is because a person engaged in commercial activities can continue to manifest their beliefs in the religious sphere.

[435] ...the appropriate balance between religious freedom and freedom from discrimination would be struck by holding 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. (emphasis added)

Where do these views come from? We can say with some confidence that they do usually not come from the religious believer. I can only speak with authority about the Christian faith, but I think it will be applicable to others, that just because religion concerns a fundamental orientation of a person to a higher cause, work cannot be left out of what it means to be a believer. In the New Testament, for example, there are a number of injunctions about how a master is to behave towards a slave, and vice versa. True, in many situations this in its context would have been a “household” matter, but the closest analogy we have is the employment relationship. Values such as honesty are enjoined on all believers in all contexts, not just at home or in church. Thieves are told to stop stealing and work to earn money in Ephesians 4:28. In the book of James in the New Testament, we read that rich people are condemned for not paying the wages that they promised to oppressed workers (5:1-6).

The view that religious people ought not to apply their faith in the workplace may come from a deep suspicion of religion by some secular thinkers. Presumably none of them would object to Christians applying the doctrines of honesty, and generosity, and “working hard even when the boss is not watching”. But when it comes to Christians showing their commitment to their faith in other ways, problems arise.

But while open displays of religious faith may make some people feel uncomfortable, it is clear that a right to “religious freedom”, as spelled out in all the international instruments and other documents which support such a right, includes a right to “manifest” or “live out” religion across all spheres of life, except where such behaviour would unduly interfere with the rights of others. And the sooner that commentators and courts remember this, the sooner there will be a sensible balance struck in this area.

That is why it has been refreshing in recent years to see at least some courts and judges recognise the importance of taking into account religious commitment, and accommodating it where possible, in the workplace. In Eweida & Ors v The United Kingdom [2013] ECHR 37, for example, after different views were expressed in the UK, the European Court of Human Rights agreed that the desire of Ms Eweida to wear a cross to manifest her Christian commitment was a matter of religious freedom, and that the blanket prohibition on visible jewellery

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3 Such as, of course, art 18 of the ICCPR.
imposed by her employer, British Airways, was not sufficiently justified by “image” concerns to legitimately over-ride her freedom of religion.4

In the *Hobby Lobby* decision (*Burwell, Sec of Health and Human Services v Hobby Lobby Stores Inc* 134 S.Ct. 2751 (2014)), regulations promulgated under new health insurance arrangements in the US required employers’ group health plans to provide coverage for employees’ medical care, including some contraceptive methods which evidence established may have had the effect of preventing an already fertilized egg from developing. A number of Christian employers objected to this requirement, arguing that it required them to provide for what they regarded as the moral equivalent of an abortion, termination of the life of the fetus.

The Federal government had provided exemptions from these requirements for specifically “religious” organisations, but case considered here was brought by the Christian owners of “closely held companies” - that is, entities that were incorporated but which did not offer shares on the stock exchange, and in which all the relevant board members shared religious convictions about abortion. These were not charitable companies, they were “for profit” companies, but argued that since all the decision makers were Christians who shared these views, the companies were entitled to the benefit of the protection of religious freedom provided by the Federal *Religious Freedom Restoration Act* (“RFRA”).

Under the RFRA, the Federal Government may not “substantially burden” a person’s exercise of religion “even if the burden results from a rule of general applicability” (a clause designed to overcome the limits imposed on First Amendment free exercise claims by the earlier decision of *Employment Division v Smith* 494 US 872 (1990)), unless the Government demonstrates that there is a “compelling governmental interest” and the relevant burden is “the least restrictive means of furthering” that interest. The legislation explicitly provides that this extends to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief”.

The majority of the Supreme Court (5-4, as often in these cases) found in favour of Hobby Lobby and ruled that the relevant federal regulations were invalid in their application to the company. They held that the word “person” used in RFRA could extend to “closely held for-profit corporations”, as in these cases protecting the free-exercise rights of closely held corporations would protect the religious liberty of the humans who own and control them. (The Court refused to comment on extending these rights to large, publicly traded corporations, while doubting that such would be able to plausibly claim such rights given the diversity of interests involved.) The Court said that while views could differ as to whether paying for someone’s abortion morally implicated the payer, it was sufficient that there was an “honest conviction” about this held by the business owners on genuine religious grounds. Hence requiring them to pay would burden their free exercise.

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4 A recent claim has been made by an airlines worker in Australia of a similar nature - see “Qantas worker files discrimination claim over crucifix ban” (Oct 21, 2014) [http://www.heraldsun.com.au/news/law-order/qantas-worker-files-discrimination-claim-over-crucifix-ban/story-fni0fee2-1227097778650](http://www.heraldsun.com.au/news/law-order/qantas-worker-files-discrimination-claim-over-crucifix-ban/story-fni0fee2-1227097778650). It is not clear whether it would be decided in a similar way in Australia, especially as there is no freestanding right to religious freedom in most States.
Finally, assuming without really discussing that the Government had a compelling interest in providing these medical techniques to employees, on the question of whether the “least restrictive” means had been adopted the court said that it had not. Other possibilities including the Government simply picking up the cost itself, or extending the existing exemption applying to religious organisations, to these “religious” closely held for-profit companies.

In Australia, in the Cobaw decision, a sexual orientation discrimination complaint was upheld against Christian Youth Camps (CYC), who had declined a booking from a group whose purpose was to run an activity putting the view (contrary to traditional Christian teaching) that homosexuality was a normal and natural part of life. The majority of the Court of Appeal rejected the application of certain defences under the Victorian legislation, in part because of this issue, that CYC were part of the “commercial marketplace”. Redlich JA, however, in dissent, pointed out that it was a false dichotomy to seek to set religious freedom, and commercial activity, in opposition to one another. Referring to the specific defence provided under that Act to religious believers, his Honour commented:

[551] ...The language is clear as to when the proscribed conduct in Part 3 will not apply. 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. (emphasis added)

His Honour examined in some detail a Canadian decision, in which a printer was fined for not providing his services to advertise a same sex support group, and noted that while the printer had been obliged to print certain leaflets, the Canadian Charter right to religious freedom protected the printer from being forced to produce material which completely contradicted his religious beliefs.

The UK case mentioned previously, Bull & Bull v Hall & Preddy [2013] UKSC 73 (27 November 2013), involved owners of a boarding house who were held to have discriminated on the basis of sexual orientation against a same sex civil partnership couple to whom they denied a double bed. They said that their policy was to deny a double bed to any couple who were not married. The UK Supreme Court differed by 3-2 as to whether this was “direct” or “indirect” discrimination, but in the end all agreed that there was no relevant defence applicable to the owners.

So while some courts have ruled against believers who seek to rely on their faith in making decision in the commercial sphere, others have been able to protect religious freedom in those circumstances. There is room for much more discussion on these issues, but what I want to stress here is that some of the assumptions that have been made by the courts, as to the need to “compartmentalise” religion and the marketplace, are not correct. Sometimes at a popular level these remarks may assume a high “wall of separation” between

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7 See Giles on the Further Reading list for an important comment on the decision.
religion and the marketplace (in the sense some believe operates between church and government.) Serious commentators today recognise that even in the United States, home to the “wall of separation” metaphor, it is a bad reading of the First Amendment in relation to government. And it is certainly not relevant to different aspects of the private sector.

The High Court of Australia has commented on these issues in its decision in Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited [2008] HCA 55 (3 December 2008) (“Word Investments”). In short, in that case a Christian Bible translation group had set up a business that conducted a number of “commercial” activities. The Commissioner of Taxation tried to argue that the fact that these entities operated in the commercial sphere removed their “charitable” status, which came about due to the promotion of religion. But the majority of the High Court disagreed. They said, at [24]:

It is therefore necessary to reject the Commissioner’s arguments so far as they submitted that Word had a “commercial object of profit from the conduct of its business” which was “an end in itself” and was not merely incidental or ancillary to Word’s religious purposes. Word endeavoured to make a profit, but only in aid of its charitable purposes. To point to the goal of profit and isolate it as the relevant purpose is to create a false dichotomy between characterisation of an institution as commercial and characterisation of it as charitable.

(emphasis added)

In some of the cases that have been decided in recent years, there are signs that courts are accepting this “false dichotomy”. A better approach would be to recognise that religion, for a believer, informs all aspects of life. Redlich JA puts it very well in his dissent in the Cobaw decision:

Each of the major religions rejects any notion of separation of religious duty by insisting that activity in the marketplace carries with it moral responsibility for the manner in which the business is conducted. For example, the vocation of the business person is regarded as ‘a genuine human and Christian calling’. Engagement in commerce, in the Christian context, ‘actively enhance[s] the dignity of employees and the development of virtues such as solidarity, practical wisdom, justice and many others.’ In the United States, religious discrimination laws recognise that persons or entities engaged in commercial activities for profit can have a religious identity when discriminated against or when discriminating against others on religious grounds. These laws do not reflect any incompatibility between commercial activity for profit and religious pursuits.

By way of suggesting further areas for discussion, let me put forward 5 propositions.

1. Religious belief is a serious issue, and a genuine religious commitment will usually inform and shape a person’s very “identity”. To require them to abandon that commitment when

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9 Ibid 4.

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playing a part in the world of commerce is discriminatory and irrational.

2. As a **business operator**, a believer should normally be expected to provide normal, value-neutral services or goods to all members of the community, regardless of their sex, race, religion, sexual orientation or other irrelevant characteristic.

3. However, it may be possible to draw a line between “ordinary” market services and those that involve “creative” activity, which would normally be seen as signalling the support of the provider for the activity. It would seem to be unreasonable, for example, for a Muslim artist to be forced to accept a commission from a Christian group wanting a picture symbolising Jesus’ superiority over all other religions. In that case the artist’s creative skills would be forced into providing a message he personally objected to. In this way one might legitimately argue that a conservative Christian baker asked to decorate a cake providing a message of support for same sex marriage should be able to decline the commission without being accused of discriminating on grounds of sexual orientation.\(^\text{11}\)

4. A believer may also play a role in the marketplace as an **employer**. Where an organisation has been set up to further religious purposes, it seems reasonable that it be able to operate in accordance with those purposes, and not be required to include as part of its core organisation those who are opposed to such purposes, or who would like to behave in ways that contradict the moral values of the religion concerned. “Balancing clauses” to allow organisations to make these decisions are present in most discrimination legislation in Australia, although they are from time to time under attack.\(^\text{12}\)

5. A believer may also play a role as an **employee**, and the importance of religious freedom as a principle ought to challenge employers to accommodate reasonable desires for employees to manifest their faith (such as in relation to wearing religious symbols, or seeking to negotiate time off for religious ceremonies.) The *Eweida* decision in Europe was important here, as rejecting a principle which had previously been suggested in some European and UK decisions that any employee not allowed to practice their faith at work could just solve the problem by quitting their job and getting another one!\(^\text{13}\)

It is to be hoped that future court decisions, and Parliamentary framing of religious freedom in Australia, will begin to reflect the reality that religion may

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\(^{11}\) See “Legal threat over gay cake refusal” *The Guardian*, 6 Nov 2014:  

\(^{12}\) In the lead-up to the Victorian State election, the Opposition have made winding back some elements of the current law part of their platform: see "Victorian ALP to limit religious exemptions" [http://newsletter.cen.edu.au/aacs/article/victorian-alp-to-limit-religious-exemptions/](http://newsletter.cen.edu.au/aacs/article/victorian-alp-to-limit-religious-exemptions/).

\(^{13}\) See the Squelch article on the reading list.

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be a key part of a person’s identity, and that recognising this will provide a fairer and more just workplace.

Further Reading