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# Christian Youth Camp liable for declining booking from homosexual support group

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# Christian Youth Camp liable for declining booking from homosexual support group

The Victorian Court of Appeal has handed down an important and lengthy judgment on appeal from a decision fining a Christian youth camping organisation, and one of its officers, for declining a booking from a homosexual support group.[1] In *Christian Youth Camps Limited & Ors v Cobaw Community Health Service Limited & Ors* [2014] VSCA 75 (16 April 2014) the court, by a 2-1 majority, said that the organization CYC was liable; but by a different 2-1 majority, ruled that the individual who had declined the booking, Mr Rowe, was *not* liable.

## 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 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 the CYC's view of the philosophy of support for homosexuality as a valid expression of human sexuality; their opposition to this view was a result of what was seen by the CYC to be required by the Scriptures. Despite these things, 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.

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.[2] 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. The *Charter* contains a general 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.

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

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[1] The Tribunal decision appealed from was *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd & Rowe* [2010] VCAT 1613 (8 Oct 2010).

[2] 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.

> (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.[3]

**Issues on appeal**

The main issues[4] 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 member, Judge Hampel, 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 paras [176]-[179]. Redlich JA at [509] agreed on this point; Neave JA should probably be seen as impliedly agreeing, as she made no specific comment on the issue.

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[3] For my earlier comments on, and criticism of, the Tribunal decision see my paper "Freedom of Religion in Practice: Exemptions under Anti-Discrimination Laws on the Basis of Religion." *Law and Religion: Legal Regulation of Religious Groups, Organisations and Communities- Melbourne Law School, University of Melbourne*, 15- 16 July 2011. Available at: http://works.bepress.com/neil_foster/46 .

[4] In this brief note I have omitted some other minor preliminary issues, most of which were resolved by Maxwell P, with whom on these points the other Judges agreed.

**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 eg the summary at [52]. This argument was rejected by Maxwell P, who 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.[5]

In essence, his Honour seems to be saying that to criticise homosexual sexual activity is to attack those people who identify as homosexual. In particular 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 fulfilment through relationships with others of the same orientation.[6]

This view, that decisions made on the basis of same sex sexual activity, or support for such, are in effect decisions that discriminate against *persons* who identify as homosexual, seems to be impliedly supported by Neave JA (who simply says at one point that, apart from the question of personal liability, she dismissed the appeal for "substantially the same reasons" as the President- see [360]; and by Redlich JA. His Honour gave more detailed consideration to the issues- see paras [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 decision[7] 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.

As will be noted later, Redlich JA also relied heavily on other aspects of the same decision in finding that in fact CYC and Mr Rowe could rely on the s 77 defence. But on this issue, of whether there had been discrimination or not, his Honour agreed with the other members of the Court.

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[5] 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. »

[6] At [2014] 1 WLR 3755 [52].

[7] *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*.

In the end, then, all members of the Court of Appeal in *Cobaw* seem to take the view that a refusal to support an activity providing support for homosexual sexual *activity*, is 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.

### 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 is an issue that took up a large part of the judgments in the Court, and it is a fascinating legal question about how legislation applying to corporate bodies should be viewed.[8] Given that the focus of my immediate interest in this note, however, is the law and religion question, I will deal with it briefly here.

To sum up, Maxwell P takes the view that the liability of a corporation under the legislation is "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.[9] His Honour says that the provision of the legislation headed "vicarious liability," s 102 of the *EO Act* 1995, is not dealing with these standard cases of employees discriminating in the course of carrying out their normal duties.[10] He then also comes to the view that, since corporations are "directly" liable for the actions of officers or employees, this means that the legislation does **not** intend to also make those individuals personally liable.[11] 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 find that each of CYC and Mr Rowe can be held jointly and severally liable for discrimination. Neave JA notes that the term "vicarious liability", used in the heading to s 102, does not necessarily have to have all the implications of the common law doctrine of vicarious liability.[12] Even if, as seems plausible, a corporation can be "directly"

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[8] Indeed, the question of corporate and personal liability is a matter I have dealt with myself 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 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.

[9] See paras [97]-[122].

[10] See paras [124]-[138].

[11] At para [123].

[12] 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.

liable for breach of the *EO Act* 1995 (see [378]), this does not automatically mean that the employee whose actions are deemed to create direct liability for the company, will then be excused- see [371]. With respect to the views of Maxwell P, it seems to me that Neave JA is correct at this point. The President has moved too quickly from the imputation of direct liability to the company, to the view that the employee should therefore be immune.

Neave JA then also supported this view from her consideration of s 102, the "vicarious liability" provision. As her Honour noted, by reference to academic commentary, the term "vicarious liability" is often used loosely in anti-discrimination legislation, to refer to different forms of "attributed liability".[13] Hence there is no need to assume that the Act uses the term only in situations where the corporate employer would be otherwise innocent of wrongdoing, as the common law usage would imply.[14]

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. Indeed, it seems that Redlich JA, with respect, analysed the situation best when his Honour said that there was, in effect, 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 is 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 which was made, it could be argued that the precedential status of this proposition is unclear. My own view, for what it is worth, is that as a matter of law the view of Neave JA and Redlich JA is to be preferred.

### 4. Could CYC rely on the s 75 defence applying to a "body established for religious purposes"?

While both parties could be potentially held liable for discrimination, only CYC could rely on the s 75 defence, which applied to "a body established for religious purposes". (The word "body" clearly implied a corporate entity of some sort, not an individual.)[15]

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

[13] See para [385], citing Ress, Lindsay & Rice *Australian Anti-Discrimination Law* (Federation Press, 2008).
[14] See the comment of Maxwell P at [126] on this issue.
[15] In this area I agree with the comments of Maxwell P at [158], 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.

sensitivities" of believers. In effect, for similar reasons, the Court of Appeal agreed. In my view this 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 like NSW, all of whom have an equivalent of s 75 as a defence.

**(a) Was CYC a "body established for religious purposes"?**

Maxwell P agreed with the decision of Judge Hampel that CYC was not such a body. There is a long discussion and review of the evidence at paras [199]-[254]. Features which pointed to the "religious purposes" of CYC were its establishment by the Brethren denomination, the fact that it was required to operate "in accordance with the fundamental beliefs and doctrines of the Christian Brethren", that it had to aim to create an "obviously Christian" atmosphere, that its provision of camping facilities was to provide "an opportunity to communicate the Christian faith", that those who visited the campsites should "experience Christian life and values", and that it had power to advance to the Trustees of the Brethren church money for "charitable" purposes- see paras [204]-[205]. Members of the Board of CYC were to subscribe to the Brethren declaration of faith- [206].

On the other hand, Maxwell P regarded a number of other features of the way that CYC operated as counting against the body being one that was operated "for religious purposes": advertising on the website and brochures did not contain any explicit reference to Christianity; the site was regularly booked by secular groups; there was no prohibition of any particular type of activity offered on their advertising, and camps were not required to have any Christian content (even though Christian groups did also occasionally use the site.)

The President cited at length from a judgment of Dixon J in an old case dealing with a testamentary bequest, *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1, where his Honour said that to establish the charitable category of a trust for religious purposes, the actual activities themselves must be "religious". From the examples given by Dixon J, this meant "directly" religious-spiritual teaching, support of clergy or church buildings or gifts to religious societies. Undertaking a "secular" activity could not be a "religious" purpose, even if motivated by religious reasons- [231]-[232].

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 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).

With respect, it seems as though his Honour is very much relying on a narrow view of what "religion" requires in saying that CYC was not established for "religious purposes". At [246] he characterises the "very purpose for which CYC

exists" as "the commercial activity of making campsite accommodation available to the public for hire". Yet that is not what CYC's founding documents say. Of the 10 substantive objects, set out in para [205], 4 contain an explicit reference to CYC's religious goals. Maxwell P acknowledges that these exist but still concludes that the main activity is a secular one, and suggests that only if CYC were offering "avowedly religious" camps could it have been described as having religious purposes- [249].

On the question as to whether freedom of religion should receive a "broad" or "narrow" interpretation, see also the earlier comments of Maxwell P at [180]-[188]. On the one hand, his Honour suggests that current High Court Chief Justice French J (as he then was) got it wrong in the earlier decision of *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 by giving a broad reading to a "freedom of speech" defence in the RDA. But on the other hand he says that the exemptions in ss 75-77 should not be "read down" and that neither one of the "co-existing rights" (that is, freedom from discrimination or freedom of religion) should be "privileged over the other"- at [188]. With respect, while there is lip service paid to the equal status of the rights concerned, it is hard to avoid the conclusion that indeed the discrimination right is being given a much broader reading than that of freedom of religion.

Neave JA seems to impliedly support Maxwell P's comments on the question of whether CYC is a body established for religious purposes (see [360] where her Honour states in effect that where she makes no other comment on issues, she agrees with the President.) Redlich JA at [439] point (4) also indicates his agreement that CYC was not a "religious body established for religious purposes" (although it should be noted that the first occurrence of the word "religious" in that phrase is not to be found in s 75(2).)[16] With respect, his Honour later makes a number of important points about s 77 (noted below) which seem to me to imply that he ought perhaps to have been more willing to revisit the question of whether CYC was a body "established for religious purposes".[17]

The result of this unanimity on this point in the decision, 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"?

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[16] And in this respect, if his Honour is applying that incorrect phrase to his analysis (ie the legislation does not require the body to be characterized as a "religious" body) it might be said that his decision on this point proceeds on the basis of a misunderstanding.

[17] For example, in para [550] his Honour correctly points out that, unlike some decisions of the European Court of Human Rights (as to which see the discussion below when s 77 is considered), the defence in s 77 "operate[s] in the commercial sphere" and "permits a person's faith to influence them in their conduct in both private and secular and public life". While these comments relate to s 77, the logic of his Honour's remarks apply to s 75 as well. The emphasis on the commercial aspects of the CYC's activities was allowed to undercut the fact that all these activities were explicitly grounded in Christian faith.

They would presumably argue that Jesus' teaching in the parable of the Good Samaritan,[18] and a range of other teaching in the Bible, makes "care for widows and orphans"[19] and other community activities a "religious purpose" for those who are committed to Christ.

If a distinction between these bodies, and groups like the CYC, is sought in the fact that CYC charged commercial rates for their services, this seems to be committing the error that Redlich JA points out later in his Honour's discussion of s 77, of assuming that commercial involvement and religious commitment are incompatible. Does the fact that a Salvation Army fundraiser may charge for sausage sandwiches really preclude them from being a body "established for religious purposes"? Nevertheless, this outcome seems arguable when this aspect of the *Cobaw* decision is taken into account.

**(b) If so, was the refusal of accommodation justified by its doctrines or the sensitivities of believers?**

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).

Yet again, his Honour operated on 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" activities. In para [269] 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]. Indeed, his Honour went on to helpfully explain to the CYC what measures they should have taken if they were serious about this doctrine, such as warning guests that sexual activity outside marriage should not take place on the campsite- see [290].

[18] Luke 10:25-37.

[19] 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)

There are a number of serious problems with this whole passage of the judgment, in my view. One is that the question of what is a "doctrine" is being resolved by a comparison of expert evidence by a Judge who has 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?[20]

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 (15 January 2013). 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 that it was not necessary to show a breach of religious freedom that the action in question be "compulsory". At [82] the Court commented:

> In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a **sufficiently close and direct nexus** between the act and the underlying belief must be determined on the facts of each case. In particular, there is **no requirement on the applicant to establish that he or she acted in fulfilment of a duty** mandated by the religion in question (emphasis added).

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].)[21]

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 and a platform for teaching which they perceived as contrary to an important part of Christian belief. There is a similar approach

[20] 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."

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

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 sinful.

Since Neave JA agreed with Maxwell P that CYC were not a "religious" body, her Honour did not discuss the possible application of s 75 to the corporation. 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, although his remark is so brief that one cannot be sure. As will be seen, his Honour later took a broader view of "beliefs" under s 77.

It is perhaps worth noticing at this point the odd fact 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.)[22] 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.[23] 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.[24] 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 were relevant, and in accordance with the High Court's directions to intermediate appellate courts in Australia,[25] should have been taken into account unless regarded as "plainly" wrong.

### 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"?

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

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[22] 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.

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

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

[25] 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".

Mr Rowe was not personally liable, also offered his views on the question. (As we will note in a moment, his Honour also held that CYC could not rely on s 77, so in fact his comments here are what we might call doubly "hypothetical" or *obiter dicta*; but they may of course be influential in other decisions.)

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. The rule that sex should only be between a heterosexual married couple 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 has to be said that in my respectful view her Honour has misunderstood some of the UK and European jurisprudence which she refers to in reading the Victorian legislation.

The point that the standard of "necessity" must be objectively, not entirely subjectively, determined seems clearly correct. Her Honour's view at [425] that the phrase "necessary to comply" means "what a reasonable person would consider necessary for Mr Rowe to comply with his genuine religious belief" sums this up well.

However, 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 her Honour moves from this issue of the "objectivity" of the relevant necessity, into other more debatable propositions. This can be seen in 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.

In fact it has to be said 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 very 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 important decision of the European Court of Human Rights in *Eweida and others v The United Kingdom* [2013] ECHR 37 (15 January 2013) 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]:

> [I]n cases involving restrictions placed by employers on an employee's ability to observe religious practice, the Commission held in several decisions that the possibility of resigning from the job and changing employment meant that there was no interference with the employee's religious freedom (see, for example, *Konttinen v. Finland,* Commission's decision of 3 December 1996, Decisions and Reports 87-A, p. 68; *Stedman v. the United Kingdom,* Commission's decision of 9 April 1997; compare *Kosteski v. "the former Yugoslav Republic of Macedonia"*, no. 55170/00, § 39, 13 April 2006). However, the Court has not applied a similar approach in respect of employment sanctions imposed on individuals as a result of the exercise by them of other rights protected by the Convention, for example the right to respect for private life under Article 8; the right to freedom of expression under Article 10; or the negative right, not to join a trade union, under Article 11 (see, for example, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 71, ECHR 1999-VI; *Vogt v. Germany*, 26 September 1995, § 44, Series A no. 323; *Young, James and Webster v. the United Kingdom*, 13 August 1981, §§ 54-55, Series A no. 44). 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)

As a commentator on this decision has noted:

> *Eweida* was an important turning point in Article 9 jurisprudence, with the Strasbourg Court recognising that an individual's desire to express their religious belief *publicly*, beyond the context of church and home, could outweigh the secular interests of an employer. The case stands as an important recognition of the need to attribute a basic weight to individuals' desires to manifest their religion.[26]

I have taken the time to comment on these recent developments, simply 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

[26] J Maher, "Proportionality analysis after Eweida and Others v. UK: Examining the Connections between Articles 9 and 10 of the ECHR" (21 June 2013), Oxford Human Rights Hub, http://ohrh.law.ox.ac.uk/?p=2019 (accessed 20 April 2014).

[27] In particular it must be said that her Honour's summary of the *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

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", generously accepts that there could be serious issues where a secular law on discrimination:

> compels the alleged discriminator to refrain from conduct which is **r**equired by their religion (for example participation in religious ceremonies or observance of dietary laws) or to actively participate in an act prohibited by their religion, for example celebrating a marriage between a same sex couple. However, 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. (footnote omitted)

There are a number of comments to be made about this somewhat disturbing paragraph.[28] For a start it seems hard to imagine a circumstance where anti-discrimination laws would otherwise require someone to not participate in a religious ceremony or observance of a dietary rule. But the rule that her Honour sees as "striking the right balance" has to do with it not being necessary for "a person to impose their own religious beliefs upon others, in order to maintain their own religious freedom". 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

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critique in some detail in my paper cited at n 3 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 is was in fact a serious issue of Ms Ladele's religious freedom, rather than simply being "not protected" as Neave JA suggests.

[28] Since her Honour noted one in a footnote (omitted from the above quote), I will do so also. Footnote 289 in para [434] demonstrates that the tolerance of the secular world for religious people so long as they stay in the "religious sphere" is accompanied by a continued demand to shrink that "religious sphere" as much as possible. Arguments for recognition of same sex marriage, where it has not yet been approved, continue to be accompanied by loud declaration that "of course" this won't affect religious people, since Christians will not be required carry out these ceremonies. Except that the decision of the Saskatchewan Court of Appeal here noted suggests that religious objections by "civil" celebrants will not be tolerated. In the UK, where same sex marriage is now lawful, though accompanied by various provisions supposedly preventing Anglican clergy from being required to carry out these ceremonies, press reports suggest that a wealthy gay couple are planning to challenge the legislation in the ECHR so that they can have their "day in church".

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. Yes, there is a need to strike a balance between competing human rights. But it is *Parliament* which has struck that balance, by spelling out the situations in which a person's religious commitment may over-ride the law of discrimination. (See below.) Here, however, Neave JA seems to be endeavouring to formulate the appropriate balance herself.

Again, as with the comments of Maxwell P noted previously, 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 completely 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, is almost incomprehensible. It almost seems that her Honour has decided that, whatever Mr Rowe and CYC say, their "real" reason for refusing the booking was a dislike of homosexual persons. In reality, 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'etre* was the "normalisation" of behaviour seen as contrary to God's word.

Finally, the comparison that Neave JA finds apt in para [437] is telling. Her Honour concedes that the case of *Bull v Hall* [2013] UKSC 73, [2014] 1 All ER 919 is "not on all fours" with the *Cobaw* case. This is an understatement. In the *Bull* case Christian proprietors of a boarding house had declined double bed accommodation to a same sex couple. A fundamental difference between the UK and the Victorian legislation was that the UK law concerned had *no* general defence provision applying to individuals, unlike s 77 of the Victorian *EO Act* 1995.[29] Hence it was not very surprising that boarding house proprietors were found to have unlawfully discriminated.[30] When Neave JA says that this case reassures her that s 77 "achieves an appropriate balance" she must, with respect, be wrong; there was no equivalent provision at all at issue in the *Bull* case. Her Honour's comment would only be true if s 77 provided no effective protection whatsoever.

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

[29] A fact noted by Maxwell P at [311] n 177.

[30] Although in my view the majority decision in *Bull* can be criticized for giving little weight to the fact that the criterion used by the Halls was not explicitly whether the couple concerned were of the same sex, but whether they were married. However, it seems that even on this view the minority in *Bull* were correct to find that there would have been "indirect discrimination."

defence against the claim for discrimination. His Honour's comments are, in my view, 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 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.[31] 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.[32]

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.[33] 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,

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

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

33 Citing a passage from R Adhar & 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*.

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 "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 (and, it should no doubt be implied, his Honour's colleagues on the Court of Appeal) 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 undertakes a careful analysis of the Canadian *Brockie* case mentioned previously,[34] in which he stresses 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 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

[34] See above, n 7.

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 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**.[35] (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.

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?

This brings us the final of the major issues in the case: 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

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[35] 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.

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].

**Summary and Preliminary 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.

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, are currently being litigated in the United States of America in relation to the possible application of new 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.[36]

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.
3. While it seems consistent with international decisions on the matter such as the *Bull v Hall* case, it will still be of some concern 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.

Finally, will the *Cobaw* decision be the last word on these issues? With great respect, it seems to me 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 if offered by one or more of the parties.

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21 April 2014

[36] See the "Hobby Lobby" litigation. Oral argument in the US Supreme Court appeal in *Sebelius v. Hobby Lobby* has now been heard- see http://clrforum.org/2014/04/02/clr-podcast-on-sebelius-v-hobby-lobby/ for a helpful overview of the issues. 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".

## Additional Note

There are some comments of the President here that could be so dangerous if misread and taken out of context, that I think it is worth highlighting them, and what they actually mean. They occur in paras [65]-[66] which I reproduce 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.[37]
>
> [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 is simply based on a privately held religious opinion alone. Indeed, his Honour explicitly goes on to say that "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 neither simply holding, nor "expressing", a view about appropriate sexual activity or "orientation" will of itself amount to "homophobic discrimination".

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37 Ground 4(d).