

Chapter 4

Religious Freedom and the Law in Australia

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Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.

– *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785 at 787, per Mason ACJ and Brennan J.

Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity.

– *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 at [560] per Redlich JA.¹

In this paper I want to discuss how the law protects freedom of religion in Australia. While as is well known there is no overarching “Bill of Rights” in operation in Australia, protection of this “fundamental right” takes place, even in a fragmented way, under a number of laws. The paper considers the protection provided by the Constitution of Australia, the impact of international treaties, the effect of the common law, domestic charters in specific States, and the “balancing” provisions of discrimination legislation.²

Protection of Religious Freedom under the Constitution of Australia

One of the key features of the Australian legal system is that we are a Federation, governed by a written Constitution. The Parliament of the Commonwealth of Australia is given certain specific fields in which it can legislate; the States hold the “residual” powers of legislation, although if the Commonwealth has passed a valid law it can override State law on that topic. This federal division of powers is an important background to considering how religious freedom is protected.

The Constitution of Australia contains a clear restriction on federal law-making powers, designed to protect religious freedom. This is section 116 of the Constitution:

116. Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or **for prohibiting the free exercise of any religion**, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth. [emphasis added]

(Section 116 also deals with “establishment” issues, whether the Commonwealth can create or support a religious body, and religious tests. But for present purposes the focus is on the “free exercise” aspect.)

The provision is similar to, and was enacted in clear knowledge of, similar phrasing in the First Amendment to the Constitution of the United States of America. But it has become clear in later interpretation that the High Court of Australia, in the few cases where the provision has been considered, will not automatically follow the Supreme Court of the United States. There are only a half dozen High Court decisions dealing with the free exercise clause of section 116.

Krygger v Williams (1912) 15 CLR 366

The first of the High Court decisions on section 116 is tantalisingly brief. Mr Krygger was a Jehovah’s Witness, apparently (see the Blackshield article at 80; I am not sure that it directly emerges in the report). As such Krygger objected to involvement in, and support for, military operations. The Commonwealth had passed a law requiring all men to report for military training under Part XII of the *Defence Act* 1903.

Krygger was convicted of failing to report for military training, and sentenced to be “committed to the custody of a sergeant-major for 64 hours” (being the amount of time per year he was supposed to report for training). He appealed to the High Court that the law was an interference with his free exercise of his religion.

It is important to understand that the legislation did contain provisions relating to “conscientious objection” to bearing arms – but those provisions said that while the person who was an objector was only to be given non-combatant roles (such as working behind the lines or in an ambulance), they still had to report for training.

The two judges of the High Court who heard the matter were dismissive and could hardly see the problem. They clearly regarded the matter as resolved by the provision for non-combatant status. But for Krygger it seems likely that the more important issue was that his personal involvement as a non-combatant would still be providing support for a war effort to which he fundamentally objected.

Still, there are some very broad statements which treat freedom of religion very lightly. Griffith CJ said at 369:

To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.

Barton J was no more sympathetic:

. . . the Defence Act is not a law prohibiting the free exercise of the appellant’s religion, nor is there any attempt to show anything so absurd as that the appellant could not exercise his religion freely if he did the necessary drill. I think this objection is as thin as anything of the kind that has come before us. (at 372-373)

Judd v McKeon (1926) 38 CLR 380

This next decision does not primarily involve section 116 but has some interesting comments by Higgins J on the provision. The case was a prosecution for failing to vote at a Senate election. The legislation said that in order to escape liability the elector had to have a “valid and sufficient reason.” The reason he offered was that he was a socialist, and that all the candidates were capitalists, and hence he preferred none of them!

It was not the first time in Australia, then, that someone faced this dilemma. But the majority of the High Court said that he just had to vote anyway, “valid and sufficient” reasons being things unconnected with the over-arching obligation to vote, such as family illnesses or natural disasters or the like.

Higgins J, however, disagreed. His Honour thought that a political reason could have been valid. And, in particular, his Honour thought that if the elector had a *religious* objection to voting, then section 116 would operate to excuse him from doing so (at 387). He then offered some comments about *Krygger*, which one might have thought should have precluded a section 116 argument here if the words used by the judges in that case were meant seriously (since, after all, one could argue, in the words of Griffiths CJ, that voting “had nothing to do with religion”).

But Higgins J seems to suggest that he would not agree with all that was said in *Krygger*:

The case of *Krygger v. Williams* under the Defence Act may be accepted in its entirety without this case being affected. There a youth was charged under sec. 135 with failing to render the personal service required of him, military service as a senior cadet, “without lawful excuse.” The Act did not allow conscientious objection to such military service as a “lawful excuse.” Such an excuse was excluded by the law; but the law had made provision for allotment of conscientious objectors to non-combatant duties (sec. 143 (3)). This was the limit of the “lawful excuse,” the only excuse allowed by law. There is no such limit here in the words “valid and sufficient reason.” The distinction is obvious, whatever view one may take of the fact that the two Judges in that case treated the defendant’s conscientious objection to perform military duties – to attend drill, to serve as a cadet – as if it were a mere objection to fight. A man may of course assist the operations of a combatant force as much by doing its fatigue duty as by standing in the firing line. (at 389-390)

The last two sentences suggest that his Honour was not entirely persuaded by the reasoning in *Krygger*.

Provisions on compulsory voting still require a “valid and sufficient” reason for not doing so but, those like Jehovah’s Witnesses who have a religious objection to voting, are regarded as having such a reason. On its website the Australian Electoral Commission comments:

41. Under s 245(14) of the Electoral Act or s 45(13A) of the Referendum Act the fact that an elector believes it to be a part of his or her religious duty to abstain from voting constitutes a valid and sufficient reason for not voting.³

Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth (1943) 67 CLR 116

This case is really the major Australian authority on freedom of religion under section 116; and, while it seems not to support a broad meaning of the phrase, on closer analysis I think it lays the ground for a sensible view. The case involved the Jehovah’s Witnesses again, but this time on a much broader scale than in *Krygger*, which was just one member declining military training. Here

the denomination as a whole was under threat. The Court noted that the theology of the Jehovah's Witnesses involved the view that all organised political entities (up to and including the British Empire) were "organs of Satan," and that it was the duty of all members of the church to not participate in human wars. In addition they would refuse to take an oath of allegiance to the King.⁴

While these views were unpopular in peacetime, at the height of the Second World War, when many Australians were fighting and dying overseas for the British Empire, they were pretty explosive. So much so that under a general regulation-making power given by the *National Security Act 1939* (Cth), regulations called the *National Security (Subversive Associations) Regulations 1940* had been made, and under those regulations the Governor-General had declared the Jehovah's Witnesses to be a subversive association, and the Commonwealth had taken over its main meeting centre.

The regulations were struck down as invalid. But, importantly for purposes of this paper, the reason for their invalidity was not that they breached section 116, but that they went beyond either the regulation-making power, or else beyond the constitutional power involved, as being too far-reaching. In particular, one of the features that struck the judges concerned was that under the regulations organisations were prohibited from advocating "unlawful doctrines," which was defined to include "any doctrine or principle advocated by a declared body". Since the Jehovah's Witnesses were within a tradition that honoured the Bible, their doctrine included such subversive tenets as the Ten Commandments! Even Latham CJ, who would have supported most of the regulations, thought this part of the regulations went too far – see 144. But, overall, three out of the five justices ruled that the regulations were too broad and were, in effect, a disproportionate response to the danger posed by the Jehovah's Witnesses.

Hence, as noted above, section 116 was not the reason for invalidity. But in the course of their judgments their Honours made some very interesting comments on the section. Latham CJ, for instance, noted that:

- section 116 is a clear and general prohibition on all laws, and so is an important limit on law-making power (at 123);
- it must be read to operate on a broad definition of "religion," and to include a protection even for those of "no religion" (at 123); this will even include "non-theistic" religions such as some forms of Buddhism (at 124);
- it is an important feature of section 116 that it protects, not just the "majority" or "popular" religion, but provides protection of "minorities, and, in particular, of unpopular minorities" (at 124);
- the provision covers not only opinions but also actions in reliance on religious opinions:

The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion. (at 124)

- however, not all religions are good or helpful, and free exercise of religion must be balanced with other interests – his Honour cited some decisions from the United States and concludes that the test to be applied must be something like, does a law amount to an "undue" infringement of freedom of religion, taking into account other important interests

(at 128);

- still, Latham CJ was careful to point out that he did not agree with some of the United States cases. In particular, he noted that the sort of approach adopted in *Reynolds v United States* 98 US 145 (1879) (allowing a law against polygamy to override then-current Church of Latter Day Saints beliefs simply because it had a plausible public interest) seems too narrow a view of an important freedom:

When the suggestion that religious beliefs should be superior to the law of the land is rejected as a matter of course, it may well be asked whether the very object of the constitutional protection of religious freedom is not to prevent the law of the land from interfering with either the holding of religious beliefs, or bona fide conduct in pursuance of such beliefs. (at 129)

- In this case, however, his Honour thought that the freedom of religion of the Jehovah's Witnesses had to give way to national security considerations – as otherwise this freedom would destroy all other freedoms:

It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community. The Constitution protects religion within a community organized under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organized. (at 131)

In a world post-September 11, 2001, the balancing of religious freedom and national security continues to be debated. The issues may come back again as the Government considers preventing people from going to explosive areas of the Middle East to join in the “Islamic State” so-called “caliphate”. Could it be argued that restriction of movement in this way affects the freedom of religion of those who think they are obliged to join Islamic State? Even if it were so argued, it seems likely that interests of national security would be held to override freedom of religion in this situation.

Other members of the High Court in the Jehovah's Witnesses case (who were more inclined to strike down the regulations as too broad in any event) gave less time to the section 116 issues, but effectively ruled in a similar way. Rich J (at 149) noted that freedom of religion was not absolute, and was subject to the restrictions “essential to the preservation of the community.” Starke J would have resolved the case without reference to section 116. He agreed with Latham CJ that it was an important protection of “religious liberty or freedom,” but again was not absolute and would have to give way to laws which were “reasonably necessary for the protection of the community and in the interests of social order” (at 154-155).

Williams J noted also that the right to freedom of religion had to give way in a situation of national defence; but it has to be said that his Honour was not very convincing when he suggested (at 160-161) that the activities of Jehovah's Witnesses in disseminating their doctrines would not be protected by section 116 “because in its popular sense such principles and doctrines would not be considered to be religion, but subversive activities carried on under the cloak of religion”! There is no suggestion that the Jehovah's Witnesses did not really believe these doctrines or hold them long before the Second World War broke out; it seems that these views

are contrary to those of the majority who recognise there is a real issue of interference with religious freedom.

Still, his Honour was prepared to invoke section 116 when considering the broad prohibition on “doctrines” which he and other members of the Court referred to in striking down the regulations as too broad:

As the religion of Jehovah’s Witnesses is a Christian religion, the declaration that the association is an unlawful body has the effect of making the advocacy of the principles and doctrines of the Christian religion unlawful and every church service held by believers in the birth of Christ an unlawful assembly. [Even] apart from s. 116 such a law could not possibly be justified by the exigencies and course of the war. But it is also prohibited by s. 116. (at 165)

Overall, then, while the case is one where section 116 did not operate on its own to protect the religious freedom of the Jehovah’s Witnesses, the Court affirmed the importance of the section, and that very serious grounds must be provided before religious freedom can be overridden. Here, in the middle of a desperate and global war, it was judged that the teaching that governments were “tools of Satan” was just too subversive of the war effort. But the very fact that the offensive regulations were struck down on other grounds may indicate that the Court was not entirely happy with the overall policy.

Kruger v Commonwealth (the “Stolen Generations case”) [1997] HCA 27; (1997) 190 CLR 1

It has to be said that this relatively recent decision of the High Court is one of the most unsatisfactory on section 116. I think this is partly because even the parties concerned saw section 116 as a “subsidiary” argument to others they were making. The action was an attempt to challenge the policies that led to Aboriginal children being removed from their parents, and it involved a number of very complex issues, including an attempt to create “implied rights” under the Constitution of freedom of movement and association, and issues to do with the impact of international law which had not been implemented domestically and how it could be taken into account.

Part of the argument, however, was that removing children from their families had an impact on the practice of their traditional religion, and hence it involved an interference with religious freedom under section 116. The section 116 claim failed, though the approaches taken by different members of the Court were varied.

Brennan CJ gave the argument very short consideration. He took the view that a law would only fall foul of section 116 if that were the law’s main intention: “To attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids. None of the impugned laws has such a purpose” (at 40).

Perhaps the least that can be said about that quote is this: while there may be an argument that this is the appropriate view to take for “establishment” issues (which was what the cited *DOGS* case was about), it seems arguable that this is by no means an appropriate approach in free exercise claims. After all, even in Latham CJ’s comments in the *Jehovah’s Witnesses* case, it was recognised that this is an important right of citizens that should not be lightly discarded.

Dawson J took the view (based on the previous decision in *R v Bernasconi* [1915] HCA 13; (1915) 19 CLR 629 on section 80 of the Constitution) that section 116 is not applicable to laws governing territories made pursuant to section 122; and hence, since all the complaints were about the actions of territorial laws, section 116 was not relevant (at 60). However, he also said that he would have agreed with Gummow J that if section 116 did apply, it did not impact on the relevant laws (at 60-61).

Toohy J (at 85-86) thought that section 116 did apply to territorial laws; but he also thought that the purposes of the law in question needed to be considered:

The question should therefore be asked: was a purpose of the Ordinance to prohibit the free exercise of the religion of the Aboriginals to whom the Ordinance was directed? It may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence. But I am unable to discern in the language of the Ordinance such a purpose. (at 86)

In contrast to Brennan CJ there is recognition that a law may have a number of “purposes”. But, again, there is a sharp line drawn between “purpose” and “effect” so that an effect (however serious and however disparately felt by people of a particular religion) would not be enough to breach section 116.

Gaudron J said that section 122 was clearly subject to section 116 (at 123). Her Honour noted, however, that while section 116 was an important limit on Commonwealth legislative power, it could not be said to create a constitutional “right” which could be sued upon in damages for a citizen, partly because the provision did not govern the States (who are free to establish religions or impair religious freedom as they see fit) (see the comments at 125).

On the question as to whether a law needs to have the “purpose” of impairing freedom of religion, or not, her Honour took a slightly wider view of the matter than some other members of the Court: “s 116 was intended to extend to laws which **operate to prevent the free exercise** of religion, not merely those which, in terms, ban it” (at 131) [emphasis added].

Her Honour also stressed the need to interpret constitutional guarantees broadly so as not to allow Parliament to circumvent them by laws that appear to have innocent aims. With respect, though, her subsequent analysis of the issue is hard to follow. She stresses that the “purposes” of the legislation are crucial. She does, however, distinguish between the remarks cited from *DOGS* about “the purpose” of legislation, relating to “establishment”, and points out that laws can have more than one purpose:

In *Attorney-General (Vict); Ex rel Black*, Barwick CJ expressed the view, in relation to that part of s 116 which protects against laws “for establishing any religion”, that for “[a] law to satisfy [that] description [it] must have that objective as its express and . . . single purpose.” If that is correct, it is because of what is involved in the notion of “establishing [a] religion”. Certainly, that notion involves something conceptually different from “imposing . . . religious observance”, “prohibiting the free exercise of any religion” or requiring religious tests “as a qualification for . . . office or public trust under the Commonwealth”, they being the other matters against which s 116 protects. Moreover, s 116 is not, in terms, directed to laws the **express and single purpose** of which offends one or other of its proscriptions. Rather, its terms are sufficiently wide to encompass **any law which has a proscribed**

purpose. And the principles of construction to which reference has been made require that, save, perhaps, in its application to laws “for establishing [a] religion”, s 116 be so interpreted lest it be robbed of its efficacy. (at 133) [emphasis added]

It seems that her Honour took the view that one of the purposes of the relevant legislation may indeed have been to interfere with freedom of religion:

Indeed, in the absence of some overriding social or humanitarian need – and none is asserted – it might well be concluded that one purpose of the power conferred by s 16 of the Ordinance was to remove Aboriginal and half-caste children from their communities and, thus, prevent their participation in community practices. And if those practices included religious practices, **that purpose necessarily extended to prohibiting the free exercise of religion.** (at 133) [emphasis added]

But her Honour took the view that the Commonwealth had not provided enough information for the issue to be determined.

McHugh J agreed with Dawson J that section 116 was not applicable to laws made under section 122 – at 142. Gummow J took a fairly narrow “purpose” approach, and concluded that the purpose of the legislation was not to interfere with free exercise – at 160. Interestingly, his Honour cited the controversial *Smith* decision from the United States as apparently an indication of the approach he preferred – see n 629 at 160.⁶

His Honour did, however, concede that legislation which seemed to be directed to other matters might be a “concealed” attack on religion and in those possible circumstances might be subject to attack under section 116 – see 161. His Honour also took the view that section 116 was applicable to laws passed under section 122 – see 167.

The upshot of *Kruger* seems to be that the majority of the Court took a reasonably narrow, “purposive” view of section 116, requiring a close examination of the purpose of relevant legislation to see if it had the purpose of impairing freedom of religion. Arguably this is something of a retreat from comments made by Latham CJ in the *Jehovah’s Witnesses* case, where his Honour there said that the purpose of legislation was only one factor in determining whether it breached section 116 (see *Jehovah’s Witnesses* at 132, though this passage itself was doubted by Gaudron J in *Kruger* at 132).⁷

Some members of the Court at least allowed that legislation could have more than one purpose, and Gaudron J demonstrated how even in this case it could have been concluded that one purpose at least of the relevant legislation was the impairment of free exercise of religion.

On the vexed question of whether section 116 governs the laws of the Territories made pursuant to section 122, Toohey, Gaudron and Gummow JJ are all clear that it does; Dawson and McHugh JJ that it does not; and Brennan CJ unfortunately does not offer a view (although the fact that his Honour explicitly found that the laws did not breach section 116 suggests that he may have been sympathetic to the view that it applied). So there is no clear majority on the point, which is presumably why a recent textbook states: “The court has not yet resolved the question whether s 116 applies to laws made under the territories power.”⁸

On balance, however, I think that when presented with the issue the Court will hold that section 116 applies to the Territories. I am reinforced in this view because in recent years, in *Wurridjal v Commonwealth* (2009) 237 CLR 309, a majority of the Court overruled past decisions

holding that the right to “just terms compensation” under section 51(xxxi) did not apply to the Territories. So there seems to be a definite trend to apply what few constitutional “protections” that there are equally to the Territories as to other parts of the Commonwealth.

Cheedy on behalf of the Yindjibarndi People v State of Western Australia [2010] FCA 690 (2 July 2010); upheld on appeal [2011] FCAFC 100 (12 August 2011)

This case, a decision at the appellate level in the Federal Court, raised the question of whether provisions of the *Native Title Act* 1992 (Cth) which allow mining to take place on native title land in some circumstances without the consent of the local native title holders were contrary to section 116 because they would impair the exercise of religious obligations under traditional indigenous spiritual views – one of which was that those who come onto land must do so with the consent of the land-holders, and others of which obliged free access to the land to carry out certain ceremonies.

The trial judge, McKerracher J, in effect rejected the argument because he adopted the High Court’s “purposive” approach in *Kruger*:

[73] The “effect” or “result” of a statute is not the primary test for assessing whether that statute is consistent with s 116. Section 116 directs attention primarily to the purpose of the impugned law, rather than to its “effect” or “result”. It may be that the effect of the law, in some circumstances, could assist in construing its purpose but the effect of the law is not the starting point.

[74] There is no indication at all that the purpose of s 38 or s 39 NTA is “for” prohibiting the free exercise of religion.

His Honour also commented that difficult issues were raised, as the decision being complained of was that of a Tribunal making an order (rather than directly a piece of legislation), and part of the basis for the order was State law:

[83] A further difficulty with the s 116 argument for the Yindjibarndi is that s 116 is directed at Commonwealth legislation. The complaint of the Yindjibarndi seems not to be against the enactment or content of s 38 or s 39 NTA, but rather against the decision made by the Tribunal. The Yindjibarndi contends that s 116 acts to modify the effect of s 38 and s 39 NTA by limiting the kinds of determinations the Tribunal may make to only those which do not impair religious freedom. Section 116 is directed to the making of Commonwealth laws, not with their administration or with executive acts done pursuant to those laws. Section 116 is not capable of regulating or invalidating the Tribunal’s decision. The relevant enquiry is whether the Commonwealth may enact s 38 and s 39 NTA.

[84] A law that authorises administrative acts or decisions which prohibit the free exercise of religion will only be a law *for* “prohibiting the free exercise of religion” and invalid pursuant to s 116 if the purposive content of the law is established.

[85] Neither s 38 and s 39 NTA, nor the Tribunal’s determinations, prohibit religious freedom because they do not prohibit anything. If any act did, it would be the grant of the MLAs the subject of the Tribunal proceedings. That grant is a separate administrative act and subject to separate considerations and controls. Any such grant would be made under the Mining Act which, being State legislation, is not subject to s 116 of the *Constitution*.

On appeal the Full Court of the Federal Court upheld the trial judge’s findings:

[92] Similarly, in the present case, there is nothing on the face of s 38 and s 39 to suggest that they have the **object of prohibiting** the free exercise of religion. Section 38 specifies the kind of determinations which the arbitral body may make. Section 39 sets out the

mandatory criteria which must be addressed by the arbitral body in the course of its inquiry. Some of the mandatory considerations such as the freedom to carry out rites, ceremonies, and other activities of cultural significance in accordance with traditions, which appears in s 39(1)(a)(iv), demonstrate a concern by the legislature with the protection of religious freedom.

[93] It follows from the application of the test for invalidity under s 116 of the Constitution explained in *Kruger* that the appellants' challenge to s 38 and s 39 on this basis cannot succeed. The primary judge was correct to so hold. [emphasis added]

The Full Court also noted the other problems identified by the judge:

[96] ...[W]e agree with the primary judge that the complaint of the appellants is essentially directed to the determinations of the Tribunal and the consequent grant by the State of the mining leases under State legislation. Section 116 applies to the making of laws by the Commonwealth. It does not apply to the determinations made by the Tribunal, to legislation enacted by State governments, or to actions of the State taken under State legislation. To the extent that the appellants complain about these matters, s 116 has no application.

In addition the Full Court noted that the Tribunal had made findings of fact on the proposed impairment of religious freedom, especially those concerning access to particular parts of the land to obtain ochre and other matters needed for religious ceremonies, which were to the effect that the mining companies in question were prepared to allow such access as was needed. So that in effect, as a matter of fact, there seemed to be no proven impairment of religious freedom.

Some other comments on Constitution, section 116

The above are the main decisions in which the free exercise clause of section 116 has been considered. But there are some comments on the provision in a couple of other cases worth mentioning. In *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373 at 388, Jackson J said:

Assuming that the “purpose” of . . . a law is to be gathered from its “effect” or the “result” which it achieves, and that if the law has the effect proscribed by s 116, it would be impossible to deny that the “purpose” of it was otherwise (that is, to say that it was not a law “for prohibiting the free exercise of any religion”), it is necessary to see what effect the decisions in question have . . .

This was an interesting case involving a decision to deport a “radical” Muslim cleric, Sheikh El-Hilaly. The claim was made that in doing so the minister had acted contrary to section 116, presumably by interfering with the free exercise of religion either by the Sheikh or else by those who wished him to be their religious leader. In the end the Court concluded that the “purpose” of the minister’s actions was not in any way to inhibit the free exercise of religion of anyone, and hence there was no contravention of section 116. Jackson J said at 389:

Accepting, however, that there will be some disruption of worship occasioned by the decisions in question it does not seem to me that there is in terms of s 116 any prohibition

of the free exercise of religion. Section 116 states in my view not merely the broad proposition that no religion shall be established, but also that no religion shall be prohibited. The term “prohibiting” in s 116 means what it says and appears to me to mean a proscription of the right to exercise without impediment by or under Commonwealth laws any religion which is the choice of the person in question.

The Migration Act 1958 itself contains no such proscription. Nor in my view is it possible to regard the refusal of the appellant to permit a particular person who is a minister of a religion to remain in Australia a prohibition of the free exercise of that religion. It may be that circumstances such as repeatedly refusing to allow any overseas ministers of a religion to enter or remain in Australia might in a different case amount to such a prohibition, but this is not the position here.

I must say I think there are some interesting issues here, which are somewhat elided by the judgment. Would it matter, for example, whether the behaviour and views of the Imam concerned were solely “religious” in nature or “political”? Can one, indeed, draw a line there? It seems to me that whatever view one takes of the matter, the “free exercise” of the Imam’s religion was being interfered with if his deportation was based on views expressed in sermons.

In many ways it might have been more honest to recognise this and to address directly the competing interests to be taken into account (such as whether it was against Australia’s interests in national security to have someone in leadership in the Muslim community advocating violent jihad, which seems to have been an arguable view of what was being said).

In *Halliday v Commonwealth of Australia* [2000] FCA 950 (14 July 2000) an “ambit” claim was made challenging the constitutional validity of provisions introducing the GST, and a section 116 issue was said to arise because, according to the claim, it was contrary to Islam for a Muslim person to collect tax on behalf of the government – see [16]. The claim was rejected; interestingly, the Court referred to a similar decision in the United States where an Amish person claimed the right not to pass on collected taxes to the government, and where it was held that the community interest in revenue collection had to take primacy – see *United States v Lee* [1982] USSC 40; 455 US 252 (1982), noted at [20]. Sundberg J commented:

[21] The GST laws (including the withholding provisions) do not prohibit the doing of acts in the practice of religion any more than did the military service law in *Krygger v Williams*. **At most they may require a person to do an act that his religion forbids. But that is not within s 116.** If the matter be approached by asking whether the law is a law “for prohibiting the free exercise of any religion”, in the sense that it is **designed** to prohibit or has the purpose of prohibiting that free exercise, the answer must be in the negative. It is plainly a law of general application with respect to taxation. There is no hint of a legislative purpose to interfere with the free exercise of a Muslim’s or anyone else’s religion. Nor is it a law that has the result or effect of prohibiting the free exercise of any religion. A person professing the Muslim faith can avoid committing the sin of acting as a tax collector by ensuring that he deals only with suppliers who quote an ABN. On the view espoused in *Lee*, the **importance of maintaining a sound tax system is of such a high order** that religious belief in conflict with the withholding of GST tax is not protected by s 116. When Latham CJ asked whether freedom of religion has been *unduly* infringed by a law, he was in my view asking a similar question to that posed by *Lee*. There is no **undue interference** here. Especially is this so when a person can avoid acting as a tax collector by dealing only with suppliers who quote an ABN. I have canvassed the various “tests” that can be

distilled from the cases. But the essential point, in my view, is that the withholding tax provisions do not prohibit the doing of any act in the practice of religion. The claim that the GST law offends s 116 has no prospect of success. [emphasis added]

While I do not disagree with his Honour's conclusion, the paragraph contains a "smorgasbord" of propositions, not all of which are consistent in my view with previous law or each other. The "undue" infringement discussion is a reasonable use of Latham CJ's decision in the *Jehovah's Witnesses* case. But is it really true that section 116 can *never* apply to a law because it requires someone to do something their religion forbids? (After all, that would have been a quick way of disposing of the issues in the *Jehovah's Witnesses* case; but it was not the way the Court approached it.)

The reference to whether a law is "designed" to prohibit a religion is a reference to the "purposive" test, which is, indeed, justified under *Kruger*. But then his Honour discussed the "importance" of the interest in tax collections, which is a "balancing" process. And then his Honour concludes that in any event a Muslim person could avoid the "tax collection" aspect altogether, so there is no real section 116 issue anyway!

With respect, there are some important issues, which it would have been better to have dealt with here. Simply being able to avoid the impact of a requirement by changing one's behaviour may not resolve the religious freedom issue. To take a more up-to-date example, suppose Federal anti-discrimination law were interpreted to mean that a person who baked wedding cakes, who refused to supply a cake in support of same sex marriage, was guilty of discrimination on the basis of sexual orientation? ⁹ Would it be a sufficient answer to a claim that this was an undue interference with free exercise of religion, to say that the person can avoid the problem by getting out of the wedding cake business?

See also *Daniels v Deputy Commissioner of Taxation* [2007] SASC 431 (7 December 2007), where the plaintiff claimed that the provisions of section 116 allowed him to decline to pay the proportion of his taxes which he calculated went to fund abortion. The Court not unnaturally declined to agree. Even apart from the complexities of administering a scheme where members of the public were allowed to take conscientious objection to the way their taxes were spent, it would seem be an unworkable system in principle.

Still, it seems clear that we have some way to go before the courts in Australia are really clear about how free exercise under section 116 should work. Given the limits of section 116 as a protection for religious freedom in Australia, are there other options? I want to flag three that may be possible: international obligations; common law protection; and domestic charters. I will also consider the important "indirect" protection provided by "balancing clauses" in anti-discrimination laws.

Protection of religious freedom other than through the Constitution, section 116

Protection under international conventions?

There are a number of important international treaties that protect religious freedom. Probably the most important one, which Australia has undertaken to be bound by, is the *International*

Covenant on Civil and Political Rights (the ICCPR), section 18 of which provides for a broad right of religious freedom. But under Australian law international treaties are not “incorporated” into our domestic law automatically; parliaments need to take a further step and pass implementing laws. Unless the Commonwealth or a State/Territory enacts specific legislation, the most that can be said (and this argument has been run in a couple of cases) is that, as a matter of judicial discretion in interpreting ambiguous legislation, the courts should presume that Parliament would intend to comply with international law (see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273). But, so far, no statute has been found to be sufficiently unclear in the area of religious freedom for this principle to be applied.

One case, however, where international obligations provided at least one reason for the decision was *Evans v NSW* [2008] FCAFC 130. In this decision a major ground for overturning restrictive NSW regulations that had prohibited the “annoying” of Catholic World Youth Day participants was that they interfered (without explicit parliamentary authority) with the fundamental common law right of freedom of speech. Branson & Stone JJ commented:

74 Freedom of speech and of the press has long enjoyed **special recognition at common law**. Blackstone described it as “essential to the nature of a free State”: *Commentaries on the Laws of England*, Vol 4 at 151-152. . . .

76 In its 1988 decision in *Davis v Commonwealth* (1988) 166 CLR 79, the High Court applied a principle supporting freedom of expression to the process of constitutional characterisation of a Commonwealth law. . . . In their joint judgment Mason CJ, Deane and Gaudron JJ (Wilson, Dawson and Toohey JJ agreeing) said (at 100):

Here the framework of regulation . . . reaches far beyond the legitimate objects sought to be achieved and **impinges on freedom of expression** by enabling the Authority to regulate the use of common expressions and by making unauthorised use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power . . .

78 The present case is not about characterisation of a law for the purpose of assessing its validity under the Constitution of the Commonwealth. The judgments in *Davis* 166 CLR 79 however support the general proposition that **freedom of expression in Australia is a powerful consideration** favouring restraint in the construction of broad statutory power when the terms in which that power is conferred so allow. [emphases added]

The evidence in that case disclosed that Evans and other members of the public were planning to demonstrate against what they perceived to be bad policies and doctrines taught by the Roman Catholic Church. The challenged regulations would have restricted their right to do so by requiring them not to “annoy” participants. The Federal Court held that these regulations should be struck down on the principle that the head legislation enacted by the Parliament of New South Wales should not be interpreted, in the absence of express words, as allowing regulations to be made which interfered with this fundamental common law right. This principle, known somewhat obscurely as the “principle of legality,” was also applied by some members of

the High Court in *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) and in a related case concerning freedom of speech, *Monis v The Queen* [2013] HCA 4 (27 February 2013).

The Federal Court in *Evans*, however, also incidentally referred to the value of religious freedom, supporting this by reference to the general terms of section 116 of the Constitution, and to Article 18 of the Universal Declaration on Human Rights.

79 In the context of World Youth Day it is necessary to acknowledge that another important freedom generally accepted in Australian society is freedom of religious belief and expression. Section 116 of the Constitution bars the Commonwealth from making any law prohibiting the free exercise of any religion. This freedom is recognised in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights (ICCPR) which, in Art 18, provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

International conventions can provide a model to encourage legislation and, as shall be shown in a moment, there is some local legislation that to some extent specifically adopts the ICCPR.

There was an attempt made to develop an argument along these lines in one of the cases noted previously. In *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2011] FCAFC 100 (12 August 2011) the applicants argued, in addition to their section 116 point, that the Court ought to interpret the native title legislation in accordance with the ICCPR to allow recognition of their freedom of religion. The trial judge and the Full Court rejected this claim. The legislation had no relevant “gaps” that the international obligations could fill. The Full Court said:

[106] . . . neither logic nor the judgment in *Teob* support the use of Australia's international obligations in the interpretation of the provisions under consideration in the absence of any ambiguity in the language of the provisions.

[107] If a provision has a clear meaning then that meaning either reflects Australia's international obligations or it does not. There is no scope for the application of any canon of construction to establish the meaning. But where there is more than one possible meaning of the provision, the canon of construction favouring Australia's international obligations is available to identify the intended meaning. In other words, the canon of construction only has work to do where the provision is open to more than one interpretation. This is the reason for the reference in the judgment in *Teob* to the use of the canon of construction for the purpose of resolution of ambiguity.

[108] Thus, the primary judge was correct to hold that a statutory provision will be construed so as to conform with Australia's international obligations only in order to resolve ambiguity in the language of the provision.

[109] As explained earlier in these reasons, there is no relevant ambiguity in s 38 and s 39 of the Act, and hence no occasion for resort to the international obligations contained in the ICCPR or the UN Declaration arose. The primary judge was correct to so determine.

A more recent decision where more positive reference was made to international religious freedom principles was *Ilaifi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26 (19 March 2014). The circumstances arose out of the fact that a number of congregations ("wards") of the LDS ("Mormon") church in the Brisbane area had previously been conducting church meetings in the Samoan language, for the benefit of members of the Samoan LDS community. A re-organisation of the church resources, including, it seems, a desire to make the church meetings more accessible to the broader community,¹⁰ led to a decision that the previous Samoan services would from now on be conducted in English, and members of the church were forbidden from speaking at the front of the meetings, praying or singing in any language other than English.

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

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

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

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

The Full Court noted that at some points the magistrate had identified the relevant right as a right to have public worship "provided" in the Samoan language, whereas in fact the claim was not simply that it was not "provided" from the front, but also that the congregation members were not able to "join in" with singing and other activities in Samoan. To this extent they ruled

that the magistrate had made an error. The relevant question was best framed as, whether there was a “right to worship publicly as a group in their native language”?¹¹

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

(iii) The right to nationality;

...

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

...

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

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

For those who are familiar with the popular movie, *The Castle*, the argument here sounds suspiciously like, “It’s the vibe ...!”¹² Nevertheless, the Full Court spent some time carefully examining the relevant instruments to see if, indeed, such a right could be found.

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

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

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

In effect, the ensuing discussion of the freedom of religion area adopted decisions of the ECHR which held that, while religious freedom was an important right and, indeed, while it extended as a right to religious organisations acting on behalf of their members, as well as to the individual members,¹³ in essence members of a religious body did not enjoy religious freedom rights that could be asserted against their religious body. The Court made the point by the citation of a recent ECHR decision:

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

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

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

While conceding that in some cases it may be effectively "impossible" for a person to leave a religious community if they disagreed with the leadership, the Court held that there was no evidence that this was the case here. The religious freedom of the Samoan worshippers was protected by their ability to leave the congregations concerned and to gather in other places where they could worship in their own language. In effect, to grant a right to worship in their own language to a group within the churches, contrary to decisions that had been made by church leaders, would interfere with the freedom of the church leadership to lay down principles for the church. As they later commented in also rejecting an argument based on "minority rights" under article 27 of the ICCPR, at [102], it was important to recognise "the protection afforded by article 18 of the Covenant for the religious freedom of the Church on behalf of its adherents".

In the end, then, the Court rejected the claims of racial discrimination on the basis that there had been no interference with the "fundamental human rights" of the Samoan speakers, including no interference with their freedom of religion. Nevertheless, the case is very important as one of the first occasions where there has been an extended comment by an appellate court on the application of international religious freedom principles to Australian law.

(It should be noted that there was also some comment on the application of international religious freedom principles in the Victorian Court of Appeal decision of *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014). I have

previously written on this decision and suggested that on the whole it was wrong, and the use of international sources is not very impressive. The decision is considered below on other issues.)¹⁴

Common law protection of religious freedom?

If international law does not provide strong religious freedom protection, can it be found in the common law tradition? While the common law has a long tradition of protecting freedoms in general, there is not a strong tradition of religious freedom in the common law. In fact, the common law developed in a country (England) where there was an established church, the Church of England, and at various points in history there were legal disabilities imposed on those from other religions.

Ahdar and Leigh in their important discussion of the issues (see their book on the Further Reading list) are generally sceptical about such a common law right. The closest the common law comes, perhaps, is a series of cases where the courts have interpreted private testamentary gifts by testators that were clearly designed to favour a particular religion in such a way that beneficiaries who were not of that religion might be able to take the gift.¹⁵ However, while one could argue that this approach supports the freedom of religion of the beneficiaries, it may be said that, at the same time, it undermines the freedom of religious choice made by the testator!

In Australia there was one attempt to invoke an implied religious freedom principle which effectively failed. In *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376 the Grace Bible Church was running a non-government school but had not received approval from the State educational authorities. They were convicted of an offence and fined. On appeal their argument was that the church had a religious objection to being required to have their curriculum approved by the State, and that, as Zelling J summarised it at 377: “there is an inalienable right to religious freedom and that that freedom cannot be abridged by any statute of the South Australian Parliament.”

As might perhaps have been expected, their argument did not succeed. The judgments of the Supreme Court are interesting but all conclude that there is no general “inalienable” right of religious freedom for the sort of reasons already noted. Zelling J commented that section 116 clearly only applies to the Commonwealth, not to the States, and there was no general common law right of religious freedom which could be said to have been inherited by South Australia, referring to the laws concerning heresy and blasphemy. The comment from Rich J in the *Jehovah Witnesses* case at 149, where his Honour said “[i]t may be said that religious liberty and religious equality are now complete”, was “not true in public law when Rich J wrote those words, nor is it true now” (Zelling J, at 379).

His Honour gave an interesting review of the early history of South Australia, noting that from an early time the State refused to fund religious bodies. But none of this history established a fetter on the power of the State Parliament.

The other members of the Full Court agreed, although Millhouse J said that he had been interested to read the comment of the High Court in the *Church of the New Faith* decision that I have used at the top of this paper.

A very interesting later South Australian decision touched on some of these issues. In *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, [1995] SASC 5532 (25 August 1995) there was an attempt to prevent a Commission of Inquiry examining the question whether certain religious beliefs which had been said to be “secret

women's business" of the Ngarrindjeri were genuine and long-standing beliefs, or whether, as alleged by some, they had been invented in recent years. (The beliefs had been involved in the question whether a particular bridge should be constructed.)¹⁶

Since the inquiry was set up by the State Government, section 116 was not directly relevant. An argument was made, however, that "freedom of religion" was an important common law principle, which the Court should not allow to be lightly overturned. In the end the members of the Full Court of the Supreme Court of South Australia agreed that simply making an enquiry into whether the beliefs were genuinely held, or not, did not of itself amount to an undue infringement of the freedom of religion of those who were said to hold the beliefs. Nevertheless, there were some interesting comments made about the importance of freedom of religion. Doyle CJ commented:

I accept that **freedom of religion is one of the fundamental freedoms** which entitles Australians to call our society a free society. **I accept that statutes are presumed not to intend to affect this freedom**, although in the end the question is one of Parliamentary intention. But in my opinion it cannot be said that conduct of the sort in question here (the institution and conduct of a mere inquiry), to the extent that it affects freedom of religion is, as such, unlawful at common law. Nor, in my opinion, does this freedom so limit the powers of the executive government that this inquiry, which it considers appropriate in the public interest, is beyond the power of the executive government if or to the extent that it affects freedom of religion . . .

For the purpose of these reasons I have assumed, without deciding, that the "women's business" the possible fabrication of which is the subject of inquiry, is an aspect of Aboriginal culture which is protected by the fundamental principle of freedom of religion. I likewise assume, without deciding, that **the inquiry will in fact intrude upon the freedom** of certain Ngarrindjeri people to hold and practise their religion, because of the practical compulsion to submit to scrutiny the substance of their beliefs and to disclose matters which they regard as secret. I stress that I have not decided either of these matters. (at 64 SASR 552-553) [emphasis added]

It seems to have been arguable that the conduct of the inquiry might have infringed upon a religious belief that information had to be kept secret, but even if so the strength of any common law presumption was not sufficient to override the specific power of the executive government to cause the issue to be inquired into. DeBelle J agreed with the Chief Justice, but expanded on some issues:

For the purposes of this action only, I am prepared to assume that the **freedom of religion is a fundamental freedom in our society**. Freedom of religion, the paradigm freedom of conscience, is the essence of a free society: *Church of the New Faith v The Commission of Payroll Tax (Victoria)* (1983) 154 CLR 120, per Mason ACJ and Brennan J at 130. But the freedom of religion like a number of other fundamental freedoms is **not absolute**. The freedom is not inalienable and may be regulated by statute: *Grace Bible Church v Reedman* (1984) 36 SASR 376. The extent to which this fundamental freedom renders other conduct unlawful at common law is open to serious question. Even if the holding of the Royal Commission constitutes an impairment of the freedom of religion, it is not clear whether as a matter of law it has the consequence that the impairment is unlawful or otherwise gives rise to any right which avails the plaintiff... (at 554-555)

The Royal Commissioner has the power to coerce witnesses: see s 11 of the Royal Commissions Act 1917. It may be a grave insult or at least an affront to a person who professes a particular belief to be required under pain of some penalty to attend and answer questions in respect of that belief. Compulsion to attend before a commission of inquiry and answer questions as to one's belief leads to justifiable concerns of a potential to interfere with the freedom to adopt and practise a religion of one's choice. The line between a mere inquiry and a step which impairs freedom of religion may be very fine and at times be very difficult to draw. But that is the kind of task which the courts are not uncommonly called upon to undertake. Having regard to the nature of the inquiry, I do not think there is any impairment of the free exercise of religion.

The inquiry stems from allegations that the women's business is a fabrication. Included in those who allege that the women's business is a fabrication are persons who say they are members of the Ngarrindjeri nation. The inquiry may, therefore, involve an examination of the beliefs of Ngarrindjeri women to determine the content of their belief. **That inquiry does not require an examination of the truth or falsity of the belief.** It is not concerned to establish whether the beliefs are consistent with that part of Aboriginal customary law and tradition which constitutes the religious beliefs of the Ngarrindjeri nation. It is not concerned to establish whether the belief is a rank heresy. **Instead, it is concerned with determining whether the asserted women's business has been recently manufactured by a group of Ngarrindjeri women.** One of the reasons for the inquiry is that a group of Ngarrindjeri women deny that the asserted women's business ever formed part of the religious beliefs of the Ngarrindjeri. The inquiry whether the asserted women's business forms part of the beliefs of Ngarrindjeri women will involve, among other things, an examination of the allegations as to fabrication, an examination of how long the belief as to the asserted women's business has existed and, if it is a recent held belief, when and how it came into existence. There may be difficulties in proving these matters, difficulties which are compounded because Aboriginal law and tradition is an oral tradition. But these are matters which are capable of being established by evidence of extrinsic facts. It is the limited nature of this inquiry which prevents it from being an impairment of the freedom of the Ngarrindjeri women to exercise their religious belief.

It is necessary to maintain a balance between the legitimate interests of those who seek to pursue a course of conduct and those who have a religious belief which seeks to prevent the desired course of conduct. If it is not possible to inquire whether the tenets of the asserted religious belief require that the conduct cease or to inquire whether the person who proclaims the belief genuinely believes it or to inquire whether it has been fabricated, those who are prevented from pursuing their legitimate interests are adversely affected without a proper opportunity of examining the case against them. As already mentioned, the freedom of religion is the paradigm freedom of conscience. No civilised society would seek to impose an improper restraint upon that freedom. Equally, no civilised society would wish to permit the freedom to be unfairly or improperly used as a means of preventing others from pursuing their legitimate interests. If an inquiry is constituted on the ground that the asserted belief is a fabrication, great care must be undertaken to ensure that there are proper grounds for the inquiry and that allegations of fabrication are not used as a cloak to hide the fact that the intention is to circumscribe the free exercise of that religion. The secret aspects of Aboriginal law and tradition deserve proper respect and care must be taken to ensure that there is no unlawful impairment of the freedom of Aboriginal people to practise their religion. But the nature of this particular inquiry and the manner in which it is being conducted do not impair the freedom of the Ngarrindjeri women to exercise their religious beliefs. (at 555-557) [emphasis added]

It is an interesting decision because it at least raises the possibility that a common law protection of free exercise is possible within the bounds of the “principle of legality,” although it can be overridden if Parliament (or, perhaps, the Executive) chooses to do so.

To sum up on this question: we have seen it is unlikely that there is a common law freedom of religion principle. If there were, it would not operate as a constitutional constraint on law-making by parliaments, but it could function (as in the recent past the freedom of speech principle has functioned) as a “presumption” which would inform courts when interpreting legislation. The “principle of legality” means that a court, when reading an Act of Parliament, will assume unless there are clear words to the contrary that Parliament does not intend to infringe a fundamental common law right. So if it could be argued that “freedom of religion” is, or perhaps has now become, a fundamental common law right, as “the essence of a free society,” then it may provide guidance for courts interpreting legislation.

Protection under specific charters of rights?

As most people are aware, Australia does not have a general Federal “Charter of Rights” (unlike the United States or even, today, the United Kingdom where the European Convention on Human Rights has to some extent been incorporated into local law). But individual jurisdictions have chosen to implement such charters, and both the State of Victoria (*Charter of Human Rights and Responsibilities Act* 2006 (Vic) section 14) and the Australian Capital Territory (*Human Rights Act* 2004 (ACT) section 14) have enacted general human rights instruments which contain explicit protections for religious freedom.

So far there have been few decisions considering these provisions.

A fascinating attempt to use section 14 of the Victorian Charter was made in *Valentine v Emergency Services Superannuation Board (General)* [2010] VCAT 2130 (29 July 2010), although ultimately unsuccessful. The pension of the widow of a former ambulance driver had been terminated on re-marriage sometime before 2008 when the Charter commenced. She was later told that the pension would be reinstated if she divorced her current husband or he died! She complained that, in effect, she was being penalised on the basis of her religion because her religious beliefs meant that she could not in all conscience seek a divorce.

The Tribunal ruled against her because all the relevant events had happened before the Charter commenced. But interesting comments were made at the end of the judgment:

[102] An argument . . . may be made, namely the provision of a penalty for Mrs Valentine for living in lawful matrimony with Mr Valentine rather than ‘in sin’ is in violation of her religious beliefs based on the right protected by Section 14 of the Charter. The oral argument in this proceeding did not take me to authorities on the scope which this protected right has been accorded in international human rights jurisprudence. In light of the conclusions which I have reached as to the non-operation of Section 32 of the Charter for the purposes of this dispute it is inappropriate therefore for me to say too much, beyond noting that there does seem to be some plausibility to the contention that a legal interpretation which would impose a significant financial penalty upon a citizen who adhered to her religious beliefs relative to matrimony could be regarded as a coercion or a restraint in her freedom to have or adopt a religion or belief in practice.

While it did not directly involve the application of section 14, the decision in *Aitken v The State of Victoria, Department of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547 (18 October 2012) mentioned the provision in passing. In this case, parents of children at a State school objected to the fact that Scripture classes (special religious instruction) were offered at the school their children attended, but their children were “singled out” because they had withdrawn them from the class. The Tribunal found that there had been no adverse impact on the children, and hence that there was no breach of the Charter or the legislation on discrimination.

However, the Tribunal commented briefly on the accepted approach to applying the Charter in interpreting Victorian legislation:

[97] The parties and the Commission submitted, that on current authority, the proper application of the Charter required first, ascertaining the ordinary meaning of the provision applying normal principles of statutory construction. Secondly, if on its ordinary construction the provision limits a right protected by the Charter, in this case those recognized by ss 14(1), 8(2) and (3), the next step is to determine whether the limitation of that right is demonstrably justified as a reasonable limit in accordance with s 7(2) of the Charter. Thirdly, if the limitation is not justifiable, an attempt had to be made to give the provision a meaning that is compatible with human rights and that is also consistent with the purpose of the provision. The respondent bore the onus of demonstrating that the limitation on the right was justifiable.

There is an interesting decision of Refshauge J in *R v AM* [2010] ACTSC 149 (15 November 2010) which considered some elements of section 14 of the ACT HRA. I will not go into it in detail, as the claim there related to freedom of “conscience” rather than of religion, but it is worth consulting to see how his Honour attempted to spell out when something may be a matter of “conscience”. He concluded that there needs to be something of a well-thought out view rather than a mere opinion. In the circumstances the attempt by AM to use a right of “conscience” to avoid the consequences of breaching a domestic violence order failed, partly because there was no clearly articulated “conscience” issue involved.

Section 14 was mentioned, although in the end it was not necessary to apply it, in *Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn & ACT Heritage Council (Administrative Review)* [2012] ACAT 81 (21 December 2012). There the Roman Catholic Diocese was applying to revoke a heritage declaration over a parish church so that it could undertake a redevelopment. Three members of the parish, however, wanted to apply to be heard on the heritage proceedings because they wanted to support the declaration. The Tribunal noted that arguably their rights under section 14 might be relevant (especially the rights involving “worship . . . as a community”), but concluded that even without taking section 14 into account the parishioners all had a sufficient “interest” in the matter to be able to be heard.

There appears to have been no other substantive consideration of the Human Rights Act (ACT), section 14, although it was mentioned briefly in passing in *Buzzacott v R* [2005] ACTCA 7 (1 March 2005), where it seems that a possible claim based on freedom of religion was being used as an excuse for the theft of a bronze coat-of-arms from Parliament House and its installation at a “tent embassy” – but it was not given any detailed discussion.

There seems little doubt that, as time goes on, these Charter provisions will provide further examples of claims for religious freedom. In general they do not provide “direct” remedies, but they do provide an avenue whereby a court may declare that a breach of a right has occurred, and they certainly provide an “interpretative” framework, which may influence the way legislation is to be read.¹⁷

There is a very little-known provision in the Tasmanian Constitution, section 46 of the *Constitution Act* 1934 (Tas), which “guarantees to every citizen” “free profession and practice of religion . . . subject to public order and morality.” The courts have apparently never considered the provision.

Anti-discrimination laws and “balancing provisions”

Finally, freedom of religion is also protected in two different ways under legislation that prohibits discrimination around Australia. The first is that in most jurisdictions – all except NSW and the Commonwealth – one of the grounds of unlawful discrimination is religious belief, so that it would be unlawful to sack someone, or deny them services, on grounds of their religious belief, where this was irrelevant to their employment or receiving the relevant services.

The jurisdictions where it is currently unlawful to discriminate against someone on the grounds of their religious commitment are:

- Queensland – Anti-Discrimination Act 1991, section 7(i) “religious belief or religious activity”;
- Tasmania – Anti-Discrimination Act 1998, section 16 (o) and (p): (o) “religious belief or affiliation;” (p) “religious activity”;
- Victoria – Equal Opportunity Act 2010, section 6(n) “religious belief or activity”;
- Western Australia – Equal Opportunity Act 1984 – Part IV of the Act deals with discrimination on the ground of “religious or political conviction” (see section 53);
- Australian Capital Territory – Discrimination Act 1991, section 7(i) “religious or political conviction”;
- Northern Territory – Anti-Discrimination Act 1992, section 19(1)(m) “religious belief or activity”;
- South Australia – no broad protection, but a specific provision in section 85T(1)(f) of the Equal Opportunity Act 1984 (SA) which prohibits discrimination in certain defined areas on the basis of “religious appearance or dress.”

While there are not many decisions on these provisions,¹⁸ there are two that go into the issues in some detail. In *McIntosh, Ahmad v TAFE Tasmania* [2003] TASADT 14 (10 November 2003) a claim for religious discrimination was made against the TAFE for refusing to provide a separate “prayer room” which the Muslim employee could use for prayer. The Tribunal concluded that there was no discrimination on the basis that any other member of staff who wanted a room set aside for their own purposes would also have been declined! The case noted that some accommodation had been made in rostering to allow the employee to attend a Mosque on Fridays.

The case of *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32 also raised a question of discrimination on the basis of religion. Here a lady who was in charge of a local St Vincent de Paul branch was told that she had to step down as she was not a Roman Catholic. There was an attempt to apply the provision of the Queensland legislation which allowed a

“religious body” to be exempt from the Act in terms of appointment of priests and ministers, training of such, and appointment of people to carry out “religious observances”.¹⁹

In the end the Tribunal found that the provision did not apply because the St Vincent de Paul Society was not a “religious body”! This somewhat surprising conclusion was expressed as follows:

On my reading of the constitution documents, the Society is not a religious body. It is a Society of lay faithful, **closely associated with the Catholic Church**, and one of its objectives (perhaps its **primary objective**) is a **spiritual one**, involving **members bearing witness to Christ** by helping others on a personal basis and in doing so endeavouring to bring grace to those they help and earn grace themselves for their common salvation. **That is not enough**, in my opinion, to make the Society a religious body within the meaning of the exemption contained in sub-sections 109 (a), (b) or (c).

Likewise, and despite the particulars which have been provided of the functions of the president relied upon, and the religious observances and practices said to be relevant, it does not seem to me that the fact that a conference president performs some functions (such as leading prayers) and has some duties (among a long list of duties), some with spiritual aspects and some with practical aspects, means that what happens at conference meetings, or what the president does in the discharge of his or her duties, involves “religious observance or practice”. [emphasis added]

While most people would see “Vinnies” as providing services to the poor rather than religious services, it does seem a bit odd that an organisation which can be described as it is in para [76] is not “religious”.²⁰

Second, and related to this, all jurisdictions whose laws prohibit discrimination on various grounds have included provisions that are designed to “balance” religious freedom with the right not to be discriminated against. So that, for example, while there is a general prohibition on employment decisions being made on the basis of gender, all jurisdictions allow **churches or other religious organisations** to decide only to appoint male clergy, because that is seen by some religious groups as a key part of their teachings.²¹ Agree with these teachings or not, the law takes the view that it reasonably preserves the religious freedom of believers in these groups, and the groups as a whole, to allow their religious freedom to be exercised in this way.²²

Interestingly, as well as these general provisions covering religious bodies, there is one that seems to be unique to Queensland governing access to “sacred sites”. Section 48 of the *Anti-Discrimination Act 1991* (Qld) provides:

48 Sites of cultural or religious significance

A person may restrict access to land or a building of cultural or religious significance by people who are not of a particular sex, age, race or religion if the restriction –

- (a) is in accordance with the culture concerned or the doctrine of the religion concerned; and
- (b) is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.

While this provision applies to a “person” generally, presumably it will mostly be used by those in charge of religious groups (an LDS official restricting access to a temple, for example).

But one can certainly imagine it being invoked by an elder from an indigenous clan wanting to keep, say, female tourists away from a site sacred to men.

In most jurisdictions, however, there is a major “gap” in discrimination legislation “balancing provisions” (as I prefer to call them), which is that few recognise that individual members of the public, as well as religious organisations and what we might call “religious professionals”, have religious freedom rights that may be impaired by uniform application of discrimination laws.²³

So, for example, if you run a business and want to apply Christian principles in your business, it may not always be possible to do so, depending on the type of issue that comes up. In NSW, an early decision under the *Anti-Discrimination Act 1977* in *Burke v Tralaggan* [1986] EOC 92-161 held that a Christian couple who refused to allow an unmarried couple to rent a flat they owned, on moral grounds, had unlawfully discriminated on the ground of “marital status” under section 48 of the Act. (An interesting article by Moens comments on this case.)

Suppose, instead of renting out a flat, you offer accommodation in your own house to casual visitors, in a “bed and breakfast” situation. Do you as an individual have the right under the law, on the basis of religious convictions about sexual behaviour, to decline to accept a booking for a double bed from a gay couple, or from an unmarried couple?

An issue of this sort came up in the United Kingdom, in *Bull v Hall* [2013] UKSC 73 (27 November 2013). The Bulls ran a boarding house. They had refused, on grounds of their religious views, to give double bed accommodation to a same sex couple. The Supreme Court upheld the decisions of lower courts fining them for breaching a regulation prohibiting discrimination on grounds of sexual orientation. There was a slight difference of opinion within the Court – three members found that this was “direct” discrimination, whereas two members held that it was “indirect” discrimination (in my view a better opinion, since the ground of their refusal was expressed to be that the couple were not married, not that they were homosexual). But even those who held it was indirect discrimination took the view that it could not be justified.

It is interesting to note that it may *not* be unlawful to do this in New South Wales. Under section 48 and section 49ZQ of the *Anti-Discrimination Act 1977* (NSW), which deal with provision of accommodation, there is an exemption that applies where the accommodation in question is one in which the provider also resides, and where less than six beds are provided. So it seems that the New South Wales Parliament has explicitly decided not to require someone who offers accommodation in what is in effect their own house, to comply with the discrimination law in this area. Section 23(3)(a) of the *Sex Discrimination Act 1984* (Cth) contains a similar exemption, although interestingly it only applies where there are no more than three beds provided. (Since the Commonwealth provision will override the State where there is a clash, the “3 bed” rule is the one that will have to be applied.)

It is somewhat ironical that, so far as I can discover, the only major provision in anti-discrimination legislation designed to provide protection for religious freedom for general citizens (in contrast to religious organisations or “professionals”) is contained in the law of Victoria.²⁴ The irony lies in the way that the scope of this provision has been so narrowly interpreted in a recent decision of the Victorian Court of Appeal.

The current provision is section 84 of the *Equal Opportunity Act 2010* (Vic):

Religious beliefs or principles

84. Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

The former Victorian Act contained a similar provision, section 77 of the *Equal Opportunity Act* 1995 (Vic):

77. 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.

This provision was subject to a very narrow reading in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014). There a Christian camping organisation, and its representative, Mr Rowe, were sued for sexual orientation discrimination when Mr Rowe indicated that the organisation would not accept a booking for a program which would be run for same-sex attracted young people and present homosexuality as a normal and ordinary part of life.

I have discussed the *Christian Youth Camps* decision in some detail previously.²⁵ But let me summarise briefly the ways in which the Court of Appeal here provided a very narrow reading of the apparently generous provisions of former section 77 of the 1995 Act, which will also affect future readings of section 84 of the 2010 Act. I will also note the dissenting view of Redlich JA, which may provide guidance in the future should the majority view not remain authoritative. (His Honour's views may also provide guidance in other jurisdictions, where appellate courts at least will need to decide whether or not the *CYC v Cobaw* decision is "clearly wrong" or not, if it is applicable to similar provisions elsewhere.)

On the question of the **necessity** of the relevant action for compliance with beliefs, Maxwell P ruled that Mr Rowe could not rely on section 77 as it was not "necessary" for him to apply sexual standards of morality from his religious beliefs to other persons. 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]. This ignored the fact that Mr Rowe was being asked to support a message of the "normality" of homosexual activity with which he fundamentally disagreed. As Redlich JA in dissent noted:

[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.

Neave JA discussed the meaning of the phrase, "necessary . . . to comply", and concluded that, while there was a subjective, honesty, element in the criterion, it also required some

objective consideration. She summed up the requirement as “what a reasonable person would consider necessary . . . to comply with his genuine religious belief”, at [425]. This seems to be correct, so long as “reasonable” means “a reasonable person who belongs to the particular religion”.

Redlich JA seems to have adopted a similar criterion:

[520] . . . the word “necessary”, in its application under s 77 to religiously motivated action, must mean action which a person of faith undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles.

Does the new wording of section 84, “reasonably necessary . . . to comply,” imply that the previous wording of section 77 was a purely subjective criterion? No, Neave JA concluded at [427]. The implication is that the change in section 84 was simply clarifying something that was already present in section 77. On this question Redlich JA seems to have taken a slightly different view. At [531]-[532] his Honour suggested that the contrast with the later provision supported a more “subjective” interpretation of the earlier one. On the other hand, he went on to comment that even if the provision required a showing of “reasonable necessity”: “[533] This test of necessity still falls short of the more demanding, and narrower, view of the Tribunal.”

In other words, the narrow approach of the Tribunal would still be inappropriate under the reformulated section 84.²⁶

Another aspect of the question of “necessary to comply” concerned the content of the religious beliefs. How was this to be determined? And was it sufficient if an action was “motivated” by belief, or did it have to be “required”.

Maxwell P again took a narrow view of these questions. He accepted the reasoning of Judge Hampel in the Tribunal. Hampel J 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 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]. In relation to Mr Rowe his Honour commented at [331]: “The very notion of compliance suggests that there is a rule, or a prohibition, which the religious believer must obey.”

Neave J at [435] also distinguished between some behaviour being “motivated by . . . religious beliefs” and being “necessary”. Redlich JA, in contrast to the majority, ruled that it was not necessary or appropriate for the court to make a decision about the “centrality” or “fundamental” nature of religious beliefs.²⁷ Nor was it necessary to show that the beliefs “compelled” the believer to do the act in question.²⁸

In what spheres of life is religion allowed to matter?

In the analysis offered by Neave JA at [429] what was at stake was said to be “protecting the right of individuals to hold religious beliefs and express them in worship *and other related activities* and protecting the rights of other members of a pluralist society to be free from discrimination” [emphasis added]. I have added the emphasis to highlight words of some concern. There is an unfortunate tendency in some commentary on religious freedom to see it merely as dealing with what goes on in church meetings. This description of religious freedom as relating to “worship and other related activities,” where “worship” is no doubt intended to mean “church meetings,” gives a very narrow scope to religious freedom.

That this is, indeed, what her Honour intended can be seen in the next paragraph, where she purported to rely on European jurisprudence to say:

[430] . . . 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*. [emphasis added]

As I pointed out previously, there were some 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 those views have now substantially been rejected by the decision of the European Court of Human Rights in *Eweida v The United Kingdom* [2013] ECHR 37 (15 January 2013) at [83] where the court accepted that a person who was sacked for their religious beliefs had, indeed, experienced a restriction on their religious freedom.

The narrow view, then, that somehow religious freedom protection does not apply in the commercial sphere, or only in a very attenuated way, does not receive support from current European jurisprudence. More importantly, it received no support from the wording of section 77. There were no words excepting “commercial activity” from the requirement to protect an action seen as necessary to comply with religious beliefs.

In effect, as Redlich JA noted in his dissenting judgment on this point in *CYC v Cobaw*, Neave JA was endeavouring to conduct the “balancing” process involved herself. But in fact that balancing process had already been conducted by Parliament, which had placed section 77 in its then-applicable form, into the legislation. As Redlich JA noted:

[474] The exemptions in ss 75, 76 and 77 of the Act protect aspects of what may be described as the ‘right to religious freedom.’ Where the legislature, in carving out an exemption from what would otherwise be discriminatory conduct, has struck a balance between two competing human rights, the task for the Court is not then one of determining how the balance should be struck. The Court must faithfully construe and apply the provisions without preconception or predisposition as to their scope so as to give effect to the legislative intent.

And later:

[515] When, as is so obviously the case with s 77, Parliament adopts a compromise in

which it balances the principal 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.²⁹ 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.³⁰

Redlich JA, contrary to the other members of the Court of Appeal, concluded that Mr Rowe *could* make out a defence under section 77. He said that the Tribunal had given an unjustifiably narrow reading of religious freedom, wrongly subordinating the provisions in sections 75 and 77 to “non-discrimination” rights. Instead, Parliament’s language had to be read as it stood. There was to be no presumption that religious freedom only applied in a “non-commercial” sphere. Indeed, the other provisions of the 1995 Act showed clearly that the non-discrimination obligations were intended to apply in the workplace and the marketplace. Hence the limits on those obligations drawn by sections 75 and 77 were clearly also operational in those areas.

His Honour concludes a very illuminating discussion on these issues as follows:

[572] Section 77 excuses an act of discrimination in the marketplace when it is known that to perform the act will facilitate a purpose that is fundamentally inconsistent with the person’s belief or principles. The application of the exemption does not depend upon CYC having advertised that it was a religious organisation or provided some means of forewarning that particular uses of their facility would be refused. The absence of such steps could not give rise to the inference that their religious principle or belief did not necessitate the refusal of the request. As adherents to the faith of the Christian Brethren the applicants’ beliefs dictated their response upon being informed of the intended use of their facility. Once the applicants were invested with knowledge of the purposes of the WayOut forum and the matters which, as Ms Hackney acknowledged, would inevitably be discussed, the applicants were bound by their principles and beliefs to refuse the use of their facility for that purpose.

It is greatly to be regretted that the majority did not approve these comments. An application for special leave to appeal to the High Court of Australia against the decision was refused.³¹

It is perhaps worth noticing at this point the odd fact that the whole *CYC* 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).³² While that case, like *CYC*, involved a “religious organisation,” comments also had to be made on the issues concerning the content of doctrine and its relevance to behaviour.

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.³³

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.³⁴ 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,³⁵ should have been taken into account unless regarded as "plainly" wrong. This seems to imply that a future appellate court in Australia which is not in either Victoria or NSW will have to choose between these two competing readings of similar legislation, and courts in those States will be required to take differing approaches. All that can be said with confidence is that these issues are still matters of some uncertainty.

The future of religious freedom in Australia

A great deal more could be said about all these matters, but hopefully this will provide a useful overview of religious freedom protection in Australia. On the whole our history has been fairly free from serious religious conflicts, and it is hoped that we can continue to enjoy the freedom to live in accordance with our fundamental beliefs, while respecting the rights of others.

Nevertheless, it seems clear that issues of religious freedom will emerge, especially (if examples from other parts of the Western world are taken into account), in connection with anti-discrimination laws relating to sexual orientation, and the possible recognition of same sex marriage. It would seem to be wise to increase the domestic protection for religious freedom by legislation that recognizes the strength of this important human right. One option would be to improve and clarify the balancing clauses now contained in Federal and State-based discrimination legislation, to recognise the legitimate religious freedom interests of believers better. Another possibility would be more general religious freedom legislation applying across the Commonwealth by enactment of broad protection based on the external affairs power and specific religious freedom treaties.

In the current atmosphere positions supporting increased religious freedom laws are not popular.³⁶ It will no doubt require continued public support from various actors to demonstrate the case for such changes. Hopefully those lawyers who themselves are convinced of the importance of religious freedom can have the courage to speak out and lead proposals for reform.

Further reading

- R. Ahdar & I. Leigh, *Religious Freedom and the Liberal State*, 2nd ed., OUP, 2013.
- Australian Human Rights Commission, *Freedom of religion and belief in 21st century Australia*, Research Report, Canberra, 2011.
- Tony Blackshield, "Religion and Australian constitutional law" in Peter Radan, Denise Meyerson and Rosalind F. Croucher, *Law and religion: God, the state and the common law*, London; New York, Routledge, 2005, 75-106.
- G. Blake, "God, Caesar and Human Rights: Freedom of Religion in Australia in the 21st Century" (2009) 31 *Aust Bar Review* 279.
- Alex Bruce, "Do Sacred Cows Make the Best Hamburgers?: The Legal Regulation of Religious Slaughter of Animals" [2011] *UNSWLawJl* 16; (2011) 34(1) *University of New South Wales Law Journal* 351.
- Sir J. Dingemans et al, *The Protections for Religious Rights: Law and Practice*, OUP, 2013,

- esp ch 4, “Comparative Perspectives”, Part A “Australia” by P. Babie (140-159).
- C. Evans & S. Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act*, LexisNexis Butterworths, 2008.
 - Neil J. Foster, “Freedom of Religion and Balancing Clauses in Discrimination Legislation,” *Magna Carta and Freedom of Religion or Belief Conference*, St Hugh’s College, Oxford, June 2015, at http://works.bepress.com/neil_foster/95
 - Anthony Gray, “Section 116 of the Australian Constitution and Dress Restrictions” [2011] *DeakinLawRw* 15; (2011) 16(2) *Deakin Law Review* 293
 - Justice Susan Kenny, “The right to freedom of religion” (FCA) [1999] *FedJSchol* 2 available at <http://www.austlii.edu.au/au/journals/FedJSchol/1999/2.html>
 - G. Moens, “The Action-Belief Dichotomy and Freedom of Religion” (1989) 12 *Sydney Law Review* 195-217.
 - C.L. Pannam, “Travelling s 116 with a US Road Map” (1963) 4 *Melb Uni L Rev* 41 (a classic early discussion of the issues).

Endnotes

1. As the paper will note, his Honour was in dissent from the majority decision in this case. But since the purpose of these introductory quotes is to set out principles that will unfold in the paper, rather than to provide an authoritative statement of the law, I maintain that I am at liberty to use this quote at this point!
2. An earlier version of this paper was presented at the 2015 Annual Conference of the J Reuben Clark Law Society, held at the University of Notre Dame, Sydney. Those interested in another review of this area may like to consult the recent Australian Law Reform Commission Interim Report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (IR 127), 3 August 2015, ch 4. The Commission is calling for responses to this Interim Report by 21 September 2015.
3. See http://www.aec.gov.au/about_aec/Publications/Backgrounders/compulsory-voting.htm (accessed 7 May 2015).
4. See the summary at pp 117-118, esp point 9.
5. *Attorney-General (Vict); Ex rel Black v The Commonwealth* [1981] HCA 2; (1981) 146 CLR 559 at 579, 615-616, 653. The case was sponsored by an organization called “Defence of Government Schools”, and hence often goes by the acronym “DOGS”.
6. As those interested in religious freedom issues in the US will know, the general approach of the US courts to religious freedom issues in recent years is to read the right very narrowly, so that if there is a “neutral” (i.e. not clearly anti-religious) reason for a law, it will not breach the First Amendment, following the decision in *Employment Division v Smith* 494 US 872 (1990).
7. See the comment of Gray (2011) at 316, with which I agree: “The test in *Kruger* for invalidity pursuant to [s 116], that the law be passed with the purpose of restricting religious freedom, is with respect too narrow”.
8. Clarke, Keyzer & Stellios, *Hanks Australian Constitutional Law: Materials and Commentary* (9th

ed, Australia, LexisNexis Butterworths, 2013) at 1174, [10.4.6].

9. Those interested in these issues will know that such cases have arisen elsewhere. The most recent seems to have been the decision of the Oregon Bureau of Labor and Industries to issue a penalty of \$135,000 against a small cake-making business, Sweet Cakes by Melissa, for declining to make a cake celebrating a same-sex wedding- see V. Richardson, “Oregon panel proposes \$135K hit against bakers in gay-wedding cake dispute”, *Washington Times*, April 24, 2015. An earlier decision in *Colorado* to a similar effect is currently being appealed.
10. It was also noted, at [19] that, “many of the Samoan youth who attended these wards were unable to speak the Samoan language”.
11. See para [50].
12. See the first minute of the clip at <http://www.youtube.com/watch?v=wJuXIq7OazQ>.
13. See para [76], citing Julian Rivers, “Religious Liberty as a Collective Right” (2001) 4 *Law and Religion: Current Legal Issues* 227. For more recent work by Professor Rivers on the rights of religious organisations, see *The law of organized religions: between establishment and secularism* (Oxford : Oxford University Press, 2010).
14. See Neil J. Foster (2014) “Christian Youth Camp liable for declining booking from homosexual support group” at: http://works.bepress.com/neil_foster/78 .
15. See Ahdar & Leigh, 2nd ed at 130.
16. Those interested in constitutional issues will note that this was part of the well-known “Hindmarsh Island Bridge” litigation, different aspects of which were considered in *Kartinyeri v Commonwealth* [1998] HCA 22; (1998) 195 CLR 337.
17. For further comment on these provisions, see ch 5 of the Evans text, and the discussion in Evans & Evans (2008).
18. For comment on some, see C. Evans, *Legal Protection of Religious Freedom in Australia*, Sydney, Federation Press, 2012, at 144-147.
19. The relevant provision was s 109 of the Qld ADA, which was virtually identical to s 37 of the Commonwealth SDA (although since the Commonwealth does not have a prohibition on religious discrimination, s 37 itself is not directly relevant – it relates to sex discrimination.)
20. This decision seems similar to, and perhaps something of a precursor to, the later decision in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014), where CYC were held not to be “a body established for religious purposes” under s 75 of the *Equal Opportunity Act* 1995 (Vic). See my note, above n 14, for comment on this issue.
21. See, for example, s 37 of the *Sex Discrimination Act* 1984 (Cth).
22. For more detailed consideration of “balancing clauses” in discrimination legislation, and their role in preserving religious freedom, see Neil J. Foster, “Freedom of Religion and

Balancing Clauses in Discrimination Legislation”, *Magna Carta and Freedom of Religion or Belief Conference*, St Hugh’s College, Oxford. Jun. 2015, at http://works.bepress.com/neil_foster/95.

23. There is a narrow group of organisations outside those formally classified as “religious organisations” which are able to rely on balancing provisions in the religious area, namely “educational institutions” conducting religiously-based schools. See, for example, *Discrimination Act* 1991 (ACT) ss 33, 44 and 46; ADA 1992 (NT), s 30(2); EOA 1984 (SA) s 34(3). In NSW there are a number of broad exceptions under the legislation applying to “private educational authorities”, which would seem generally to exempt all non-government schools, including most religious schools. But since most religious schools would be run by groups that most members of the public would call “religious”, these provisions may not add very much to the protection for religious organisations.
24. There is a provision in s 52(d) of the *Anti-Discrimination Act* 1998 (Tas) which allows a “person” to discriminate “on the ground of religious belief or affiliation or religious activity” insofar as it is in relation to an “act that –
(i) is carried out in accordance with the doctrine of a particular religion; and
(ii) is necessary to avoid offending the religious sensitivities of any person of that religion.” This provision, then, only applies as an exemption to discrimination on the basis of religion, and so is substantially narrower than the Victorian provision discussed in the text. So far as I am aware there are no reported decisions dealing with the Tasmanian provision.
25. See above, n 14.
26. There was some discussion of the differences between the 1995 and the 2010 legislation in the application for special leave to appeal to the High Court: see *Christian Youth Camps Limited v Cobaw Community Health Services Limited and Ors* [2014] HCATrans 289 (12 December 2014). Counsel for CYC noted that the provisions were very similar, but in the end the High Court refused leave, and one ground seemed to be the fact that it was a question of the interpretation of the old Act. For a review of the Special Leave application, see Neil J Foster, (2014) “High Court of Australia declines leave to appeal CYC v Cobaw”, at: http://works.bepress.com/neil_foster/89.
27. See [525]: “Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety.”
28. See [520]. It would be sufficient that it be an action that the person “undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles”.
29. *Kelly v The Queen* (2004) 218 CLR 216, 235 [48] (Gleeson CJ, Hayne and Heydon JJ).
30. *Nicholls v The Queen* (2005) 219 CLR 196, 207 [8] (Gleeson CJ).
31. See above, n 26.
32. 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 question of what “established” means.

33. See the CA decision, per Allsop P at [9].
34. *OW & OV v Wesley Mission*, 2010 [ADT], [32]-[33].
35. 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”.
36. Compare the popular outcry in the United States when the State of Indiana attempted to introduce a fairly standard version of religious freedom legislation previously adopted by many other States.