CHRISTIAN YOUTH CAMPS LTD and Another v COBAW COMMUNITY HEALTH SERVICES LTD and Another

COURT OF APPEAL

MAXWELL P, NEAVE and REDLICH JJA

20, 21 February, 2 August 2013, 16 April 2014

[2014] VSCA 75

Discrimination — Services — Accommodation — Refusal — Attribute — Sexual orientation — Camping facility — Proposed use by same sex attracted young persons — Religious opposition to homosexual sexual activity — Corporation — Conduct on behalf of corporation — Liability — Direct — Vicarious — Equal Opportunity Act 1995 (Vic) ss 49(a), 102.

Discrimination — Exceptions and exemptions — Whether conflict between obligation to act in non-discriminatory way and right to religious freedom — Refusal of accommodation — Proposed use of camping facility by same sex attracted persons — Attribution of states of mind — 'a body established for religious purposes' — 'necessary … to comply with the person's genuine religious beliefs or principles' — 'necessary to avoid injury to … religious sensitivities' — Equal Opportunity Act 1995 (Vic), ss 75(2), 77.

Human rights — Statutory interpretation — Religious freedom — Discrimination — Services — Accommodation — Refusal — Sexual orientation — Whether special rule of interpretation applicable — International human rights jurisprudence — Charter of Human Rights and Responsibilities Act 2006 (Vic), s 32.

The first respondent (**Cobaw**), an organization concerned with youth suicide prevention, approached the first applicant (**CYC**) about booking a residential camp on Phillip Island. CYC was established by trustees for the purposes of a denomination of a Christian church, who owned the camp. CYC managed the property, operating as a commercial accommodation provider which sought to secure such competitive advantage as its facilities and location might afford it. Cobaw wished to conduct a program at the campsite for same sex attracted young people, aiming to raise awareness about their needs and the effects of homophobia and discrimination on young people and rural communities generally. In response to Cobaw's approach, the CYC site manager (**the manager**) informed the Cobaw representative that CYC was a Christian organisation that would not be able to provide accommodation at the camp because the organisation's members believed that homosexual sexual activity was contrary to God's teaching as set out in the Bible.

Cobaw filed a representative complaint against CYC and the manager in the Victorian Civil and Administrative Tribunal, alleging that the manager's refusal of accommodation amounted to discrimination by the manager on the basis of the sexual orientation of those who would be attending the proposed camp, contrary to pt 3 of the *Equal Opportunity Act 1995* (**EO Act**), for which CYC was vicariously liable. Section 49(a) of the EO Act, in pt 3 of the Act, provided that a person must not discriminate against another person by refusing or failing to accept the other person's application for accommodation.

CYC and the manager denied that there had been any unlawful discrimination. They also contended that if the refusal of accommodation would otherwise have constituted unlawful discrimination, their conduct was lawful by reason of the religious freedom exceptions in ss 75 and 77 of the EO Act. Section 75(2) provided that nothing in pt 3 of the Act applied to anything done by a body established for religious purposes

that (a) conformed with the doctrines of the religion or (b) was necessary to avoid injury to the religious sensitivities of people of the religion. Section 77 provided that nothing in pt 3 of the Act applied to discrimination by a person against another person if the discrimination was necessary for the first person to comply with the person's genuine religious beliefs or principles.

Section 102 of the EO Act provided that, if a person in the course of employment or while acting as an agent contravened a provision of pt 3 or engaged in conduct which would contravene such a provision if engaged in by their employer, both the person and the employer or principal were to be taken to have contravened the provision.

Section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (**the Charter**) provided (with effect from 1 January 2008) that so far as it was possible to do so consistently with their purpose, all statutory provisions were to be interpreted in a way that was compatible with human rights.

In upholding the complaint, the tribunal rejected CYC's contention that none of the individuals represented by Cobaw had been denied accommodation. The tribunal also held that it was not necessary for the individuals to have been identified at the time of the application for accommodation, that neither religious freedom exception was applicable, and that s 32(1) of the Charter was applicable to the interpretation of the relevant provisions of the EO Act.

CYC and the manager appealed by leave. The Victorian Equal Opportunity and Human Rights Commission was named as a respondent. The Attorney-General intervened pursuant to the right conferred by s 34(1) of the Charter and submitted, inter alia, that the tribunal had erred in concluding that s 32(1) of the Charter was applicable.

The Court granted leave to the International Commission of Jurists and the Ambrose Centre for Religious Liberty to file written submissions as amici curiae.

After argument, the Court invited further submissions from the parties as to the basis on which the manager had been held to have contravened the EO Act.

Held,

by Maxwell P and Neave JA (Redlich JA dissenting), dismissing the appeal by CYC, and

by Maxwell P and Redlich JA (Neave JA dissenting), allowing the appeal by the manager:

Discrimination

(1) By the Court. It was open to the tribunal on the evidence to find that the individuals represented by Cobaw were discriminated against on the basis of their sexual orientation. There was no distinction to be drawn between discrimination based on an attribute or characteristic and discrimination based on expression and affirmation of that attribute or characteristic. [58]–[62], [65]–[66], [360], [440], [443], [447]–[448].

Australian Iron & Steel Pty Ltd v Banovic (1989) 168 CLR 165; *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 followed.

Ontario (Human Rights Commission) v Brodie (2003) 222 DLR (4^{th}) 174; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 607 [142]; *Preddy v Bull* [2013] 1 WLR 3741, sub nom *Bull v Hall* [2014] 1 All ER 919 referred to.

Liability of corporation

(2) By the Court. For the purposes of the EO Act, the act of refusal of accommodation by the manager was the act of the company.

By Maxwell P. The liability of CYC was direct and arose under general principles of agency. It did not rely on s 102 of the EO Act. [75]–[76], [78], [97]–[122].

By Neave JA. On balance, s 49(a) made CYC directly liable. In any case, s 102 made CYC liable for the acts of its manager. [378], [397]–[403].

By Redlich JA. Section 102 of the EO Act provided the basis upon which liability of the employer was established. [450]–[468].

Liability of manager

(3) By Neave and Redlich JJA, Maxwell P contra. The manager was also personally liable (subject to defences):

By Neave and Redlich JJA. The manager's personal liability flowed from the terms of s 49(a) of the EO Act, reinforced by s 102. Section 102 was intended to cover both the case where liability was imposed on an employer by analogy to the tortious principle of vicarious liability and the case where the company was directly liable and the act of its employee or agent was attributable to it. [364]–[367], [381]–[382], [392]–[403], [440], [456]–[457].

Box Hill College of Technical and Further Education v Fares [1992] EOC ¶92–464; *Commissioner of Police v Estate of Russell* (2002) 55 NSWLR 232, 245 [66], 247 [76] applied.

Per Redlich JA. The statutory form of attributed liability under ss 102 and 103 was fundamentally different to common law vicarious liability. By necessary implication, common law principles of derivative or vicarious liability had been excluded under the Act. [458], [466].

Per Maxwell P contra. Because CYC was directly liable, the logical corollary was that the manager could not have contravened the Act in his own right. The vicarious liability provisions of the EO Act had no application: they were engaged only where the EO Act did not otherwise make the employer responsible for the conduct of its agent. [123]–[125], [131], [148].

Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; *Director of Public Prosecutions Reference No 1 of 1996* [1998] 3 VR 352; *Director General, Department of Education and Training v MT* (2006) 67 NSWLR 237 referred to.

Discussion of vicarious liability and analogous principles. [126]–[147], [368]–[377], [384]–[390], [457]–[469].

Tesco Supermarkets Ltd v Nattrass [1972] AC 153; *TZ Ltd v ZMS Investments Pty Ltd* [2009] NSWSC 1465 considered.

Religious exemption — s 75(2)

(4) By the Court. The tribunal had not erred in concluding that the exemption under s 75(2) of the EO Act was not available to either CYC or the manager. [241]–[243], [245]–[253], [360]–[361], [440].

Per curiam. If CYC were to be taken to be a religious body, its refusal of the application for accommodation was not conduct which conformed with the

doctrines of the religion within s 75(2)(a) or which was necessary to avoid injury to religious sensitivities of people of the religion within s 75(2)(b). [262]–[269], [287], [290]–[292], [301]–[304], [360], [440].

Religious exemption — s 77

(5) By Maxwell P and Neave JA, Redlich JA dissenting. Parliament did not intend s 77 of the EO Act to be available to a corporation. [162], [309]–[326], [361], [417]–[422].

Edwards Books and Art Ltd v The Queen [1986] 2 SCR 713, 784; *Shergill v Khaira* [2012] EWCA Civ 983; *Hasan v Bulgaria* (2002) 34 EHRR 55 referred to.

Per Redlich JA dissenting. A corporation could seek to rely upon s 77. [477]–[491].

(6) By Maxwell P and Neave JA, Redlich JA dissenting. Assuming that the manager were a discriminator under s 49(a) of the EO Act, he was not exempted from liability by s 77. This was to be determined objectively. [292], [328]–[331], [361], [423]–[437].

Per Redlich JA dissenting. Section 77 demanded consideration of the subjective nature of the person's beliefs. [521]. The legislature intended that the exemption operate in the commercial sphere. [503]–[534], [550]–[573].

Ontario (Human Rights Commission) v Brockie (2003) 222 DLR (4^{th}) 174; *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 distinguished.

Interpretation and application of Charter to pre-Charter events

(7) By the Court. At the time of the events in question, s 32(1) of the Charter was inapplicable. The EO Act was to be interpreted and applied in accordance with ordinary principles of interpretation. These included consistency with international law. [175]–[176], [180]–[192], [360], [411], [510].

Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 287; *MBF Investments Pty Ltd v Nolan* (2011) 37 VR 116; *WBM v Chief Commissioner of Police* (2012) 43 VR 446 referred to.

Discussion of the interplay in the EO Act between the right to be free from discrimination and the right of religious freedom. [179]–[188], [195], [412], [514]–[518].

Bropho v Human Rights and Equal Opportunity Commission (2004) 135 FCR 105 explained.

Kelly v The Queen (2004) 218 CLR 216, 235 [48] referred to.

Decision of Victorian Civil and Administrative Tribunal (Judge Hampel V-P) [2010] VCAT 1613 affirmed.

Applications

These were applications pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* for leave to appeal on questions of law against a decision of the Victorian Civil and Administrative Tribunal upholding a claim for relief under the *Equal Opportunity Act 1995* (Vic). The facts are stated in the judgment of Maxwell P.

J G Santamaria QC with *P J Harris* and *M G R Gronow* (20 February 2013), *M R Pearce SC* with *P J Harris* (2 August 2013) for the first and second applicants.

D S Mortimer QC (20 February 2013) and *P J Hanks QC* (2 August 2013) with *J C McKenna, E A Bennett, E M Nekvapil* and *K E Foley* for the first respondent.

K L Eastman SC for the second respondent.

S G E McLeish SC, Solicitor-General, with *J Davidson* for the intervener (the Attorney-General for the State of Victoria).

F M McLeod SC, R B C Wilson and *R J C Watters* for the International Commission of Jurists, as amicus curiae, filed written submissions.

R Mimmo for the Ambrose Centre for Religious Liberty, as amicus curiae, filed written submissions.

Cur adv vult.

MAXWELL P

Summary

1 Freedom from discrimination is a fundamental human right. So too is freedom of religion. The present appeal arises under the *Equal Opportunity Act 1995* (Vic) (the **EO Act**)), which gives legislative force to the first of these rights. One of the objectives of the EO Act is:

> [T]o eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes.[1]

2 The EO Act recognises, however, that compliance with the obligation to act in a non-discriminatory way may, in certain circumstances, conflict with the enjoyment of the right to religious freedom. That is, a requirement that a person do, or refrain from doing, a particular thing in order to avoid prohibited discrimination may conflict with the religious doctrines to which the person subscribes.

3 The present case is said to involve just such a collision of these rights. At issue is the refusal by the applicants, Christian Youth Camps Ltd and Mark Rowe (to be referred to as **CYC** and **Mr Rowe** respectively), to allow the first respondent (**Cobaw**) to hire a camping resort owned and operated by CYC, for the purposes of a weekend camp to be attended by same sex attracted young people (**SSAYP**).

4 Cobaw is an organisation concerned with youth suicide prevention. It focuses particularly on SSAYP, aiming 'to raise awareness about their needs and the effects of homophobia and discrimination on young people and rural communities generally'.[2] CYC was established by the trustees of the Christian Brethren Trust, itself established for purposes connected with the Christian Brethren Church. Mr Rowe was the resort manager. CYC and Mr Rowe are opposed to homosexual sexual activity, as they consider it to be contrary to God's teaching as set out in the Bible.

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1 EO Act s 3(b).

2 See further [26]–[28] below.

MAXWELL P

5 The Victorian Civil and Administrative Tribunal (the **Tribunal**) held that the refusal amounted to unlawful discrimination on the basis of the sexual orientation of those who would be attending the proposed camp. On the appeal to this Court, CYC disputed that finding, maintaining that there was a fundamental distinction between an objection to 'the syllabus' to be taught at the proposed camp — that is, to beliefs or opinions which would be expressed by Cobaw to those attending the camp — and discrimination on the basis of the sexual orientation of those attending.

6 Before the Tribunal, CYC contended that if, contrary to their principal submission, the refusal would otherwise have constituted unlawful discrimination, the exemption provisions in the EO Act concerning religious freedom were applicable, such that there had been no contravention. As will appear, these exemptions apply to conduct 'by a body established for religious purposes'[3] and to discrimination by a person which is necessary for that person 'to comply with the person's genuine religious beliefs or principles'.[4] The Tribunal held that neither exemption was applicable.

7 The complaint brought by Cobaw alleged that it was Mr Rowe who had committed the act of discrimination. CYC, his employer, was said to be liable only vicariously. In the result, the Tribunal upheld both of these claims, concluding that Mr Rowe was directly liable and CYC vicariously liable for the contravention of the EO Act.

8 An appeal from a decision of the Tribunal is by leave only. The decision having been made by a Vice-President of the Tribunal, her Honour Judge Hampel, the application for leave is made to this Court.[5] As s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**) makes clear, the appeal is on a question of law only. A number of the grounds of appeal concern the Tribunal's findings of fact. It was common ground that the only question of law which could arise in relation to a finding of fact was the question whether it was reasonably open to the Tribunal on the evidence before it to make that finding.[6]

9 Central to the resolution of the questions raised by the appeal is the correct interpretation of the provisions of the EO Act. What has to be discerned is how the Victorian Parliament intended that the 'balance' be struck between the right to freedom from discrimination and the right to religious freedom, where the two came into conflict.

10 A threshold issue for the Tribunal, and again for this Court, was whether these questions of interpretation were governed by the interpretive rule in s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the

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3 EO Act s 75(2).
4 Ibid s 77.
5 The application for leave was referred to the bench which would hear the appeal if leave were granted.
6 *Victorian WorkCover Authority v Michaels* (2009) 26 VR 88, 91–2 [8], [11].

Charter). The Tribunal ruled that the Charter did apply. The Solicitor-General for Victoria, representing the Attorney-General as intervener, submitted that her Honour in that regard fell into error. As will appear, I would uphold that submission, although it was common ground that the error had no effect on the Tribunal's analysis or reasoning.[7] Section 32(1) being inapplicable, the questions of interpretation fell to be determined on ordinary principles of statutory interpretation.

11 For reasons which follow, I have concluded that there was no error of law in the Tribunal's conclusion that:

(a) there was discrimination on the basis of sexual orientation; and

(b) neither of the exemptions directed at preserving religious freedom applied in the circumstances of the case.

12 I have, however, concluded that the act of discrimination was committed by CYC itself, on whose behalf Mr Rowe was acting, and that he himself has no liability for the contravention. I would therefore allow Mr Rowe's appeal. In the case of CYC, on the other hand, I would grant leave to appeal but would dismiss the appeal.

13 These are very lengthy reasons. The Tribunal's reasons were of a comparable length. The hearing at first instance took 14 days, and the hearing of the appeal two full days. The appeal hearing would have been much longer but for the lengthy and helpful written submissions prepared by all participants, including the two bodies which made amicus submissions.[8] (As appears from pt 3 of these reasons, the Court itself raised a number of questions, which necessitated further written submissions and an additional day's hearing.)

14 It can safely be assumed that, in scale and complexity, these proceedings are without precedent in Victorian anti-discrimination law. But that is not, I think, an indication that discrimination law in this State has become impossibly complex, or that to bring — or defend — a claim of discrimination is now beyond the reach of ordinary Victorians. Rather, it is a reflection of the novelty — and inherent difficulty — of the questions which arise when rights come into conflict. Such questions have been much litigated elsewhere but, for Victoria, represent hitherto uncharted territory.

15 These reasons are organised as follows:

PART 1: THE COMPLAINT OF DISCRIMINATION

The relevant provisions of the EO Act.
The refusal of accommodation.
Who was refused accommodation?

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7 See [178] below.

8 The International Commission of Jurists (**ICJ**) and the Ambrose Centre for Religious Liberty.

Discrimination 'on the basis of' sexual orientation.
The proper comparator?
Who committed the act of discrimination?
No vicarious liability.

MAXWELL P

PART 2: THE RELIGIOUS FREEDOM EXEMPTIONS

The approach to interpretation
- section 32 of the Charter.
- interpreting exemptions which protect a human right.
- international human rights law.

The exemption under s 75(2):
- 'body established for religious purposes';
- 'conforms with the doctrines of the religion';
- 'necessary to avoid injury to religious sensitivities'.

The exemption under s 77:
- is the exemption available to a corporation?
- 'necessary to comply with religious beliefs or principles'.

PART 3: PROCEDURAL HISTORY

PART 1: THE COMPLAINT OF DISCRIMINATION

The relevant provisions of the EO Act

16 As the then Attorney-General told the Victorian Parliament in May 1995, the EO Act is the lineal successor of both the *Equal Opportunity Act 1977* (Vic) (enacted by the Hamer Liberal Government) and the *Equal Opportunity Act 1984* (Vic) (enacted by the Cain Labor Government). The Attorney-General noted that a comprehensive review of the 1984 Act by the Parliament's Scrutiny of Acts and Regulations Committee had made numerous recommendations for reform 'which the Committee felt were needed to meet the changing needs, beliefs and work patterns of Victorians'.

17 The Minister said:

> The concept of equal opportunity is concerned with ensuring that all people have equal access to specified public benefits and resources, such as employment, accommodation and access to goods and services.
>
> This bill seeks to promote the recognition and acceptance of everyone's right to equality of opportunity by prohibiting a decision maker from considering a person's irrelevant characteristics, such as their sex or age, when deciding whether to grant that person access to a particular benefit or resource.[9]

18 The objects of the EO Act are set out in s 3, as follows:

9 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1249 (Jan Wade, Attorney-General).

(a) to promote recognition and acceptance of everyone's right to equality of opportunity;

(b) to eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes;

(c) to eliminate, as far as possible, sexual harassment;

(d) to provide redress for people who have been discriminated against or sexually harassed.

19 Part 2 of the Act is headed 'What is Prohibited Discrimination?'. Section 6 contains a list of attributes 'on the basis of which discrimination is prohibited'. The relevant attribute in the present case is 'sexual orientation'.[10] Section 7, in turn, defines discrimination to mean 'direct or indirect discrimination on the basis of an attribute'. Section 8 defines 'direct discrimination' in these terms:

(1) Direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances.

(2) In determining whether a person directly discriminates, it is irrelevant:

(a) whether or not that person is aware of the discrimination or considers the treatment less favourable;

(b) whether or not the attribute is the only or dominant reason for the treatment, as long as it is a substantial reason.

In determining whether or not a person discriminates, the person's motive is irrelevant.[11]

20 Part 3 of the EO Act identifies the areas of activity in which discrimination is prohibited. Relevantly, the Act provides that a person must not discriminate against another person by:

- refusing to provide goods or services to the other person;[12] or
- refusing, or failing to accept, the other person's application for accommodation.[13]

The refusal of accommodation

21 As mentioned earlier, Cobaw approached CYC about booking a holiday camp at Phillip Island. The critical communications took place between Ms Sue Hackney on behalf of Cobaw and Mr Rowe on behalf of CYC. Ms Hackney was employed by Cobaw as the project co-ordinator of the WayOut Project, which is described as a rural Victorian youth and sexual diversity project. At the time of her first contact with CYC, Ms Hackney had held that position for five years.

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10 EO Act s 6(l).
11 Ibid s 10.
12 Ibid s 42(1)(a).
13 Ibid s 49(a).

22 Mr Rowe was the site manager at the Phillip Island Adventure Resort (**the Resort**), one of four campsites conducted by CYC. He had held that position since 2001, following CYC's acquisition of the Resort. Mr Rowe had been brought up as a member of the Christian Brethren Church. MAXWELL P

23 The conversation between Ms Hackney and Mr Rowe took place on 7 June 2007. Their respective accounts of the conversation, as set out in their witness statements, differed in important respects. There was extensive cross-examination of each of them, in the course of which a number of the differences disappeared. Mr Rowe, in particular, acknowledged under cross-examination that statements which he had attributed to Ms Hackney were, on reflection, based on his assumptions or interpretations.

24 After carefully reviewing the evidence, her Honour said she had:

> reached a very firm and clear view that on the points of material conflict between Ms Hackney's account of the conversation and Mr Rowe's, I prefer and accept Ms Hackney's.[14]

There was no challenge to this finding.

25 As the judge noted, Ms Hackney made a detailed contemporaneous file note of the conversation, and followed it up with a letter to Mr Rowe a fortnight later. The content of both the file note and the letter were consistent with the evidence which Ms Hackney gave. What follows is based on Ms Hackney's account but there was, in the end, no real dispute about the key elements of the conversation.

26 Ms Hackney told Mr Rowe that she was looking to book the Resort for a weekend. Mr Rowe then asked about the nature of the group and the activities which would be conducted over the weekend. Ms Hackney replied that her organisation:

> was a youth suicide prevention initiative that targeted same sex attracted young people and ... aimed to raise awareness about their needs and the effects of homophobia and discrimination on young people and rural communities generally.

27 Mr Rowe responded that the Resort was a Christian youth camp, which needed to be 'mindful of the aims and beliefs of groups that used their facilities'. He said that he did not know how 'the Board' would feel about a group such as Cobaw.

28 Ms Hackney said to Mr Rowe that she did not want to be disrespectful of their beliefs and that, through her experience of working with a range of Christian schools and organisations over the previous five years, she understood that there was a range of views about homosexuality:

> I said that I would, however, be honest about our project's aims and beliefs and that we did have the view that homosexuality or same sex attraction is a natural part of the range of human sexualities. I added that our project would

[14] *Cobaw Community Health Services v Christian Youth Camps Ltd* (Anti-Discrimination) [2010] VCAT 1613 (Judge Hampel) (**Reasons**) [138].

be conducting workshops etc over the weekend to plan ways to raise awareness.

29 Mr Rowe then said that the Board of CYC 'would have difficulties' taking a group such as Cobaw and that they would be better off investigating the availability of other camps in the area. He stated that CYC would not be able to take Cobaw because CYC was 'a Christian organisation that supports young people'.

30 The first question of fact before the Tribunal was whether there had been a 'refusal' within the meaning of the EO Act. Her Honour found that there had. The applicants' grounds of appeal, and their written submissions, challenged that finding. In oral argument, however, their counsel abandoned those grounds.

Who was refused accommodation?

31 The complaint of discrimination was made by Cobaw which, at the relevant time, was an incorporated body. But Cobaw did not complain that it had been discriminated against. Cobaw asserted that it was bringing the complaint as a 'representative body', within the meaning of s 104(1B) of the EO Act, and was doing so 'on behalf of the persons named in the Schedule' (**the individuals**).[15]

32 Section 104(1B) is a machinery provision which enables a representative body to bring to the Commission, and then to the Tribunal, one or more individual complaints of discrimination. There are several conditions to be satisfied before a complaint may be made by a representative body on behalf of named persons. In particular, each named person must have been entitled, as an individual, to make a complaint of discrimination in his or her own right.[16]

33 Accordingly, in the present case, it needed to be established that each named individual could complain of being refused services or accommodation on a prohibited ground. The complaint lodged by Cobaw alleged that the individuals had been discriminated against, in that they:

- were refused services;[17]
- were subjected to a detriment in connection with the provision of services to them;[18] and
- had an application for accommodation (made on their behalf by Ms Hackney) refused.[19]

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15 Although it was alleged in the Particulars of Complaint (**PoC**) that Cobaw had been refused services/accommodation, only the individuals were said to have been discriminated against.
16 EO Act s 104(1B)(a)(i).
17 PoC [31(a)].
18 PoC [31(b)].
19 PoC [32(a)].

(For the sake of simplicity, these reasons will refer only to the refusal of an application for accommodation.) MAXWELL P

34 The trial judge was satisfied that each of the individuals was entitled to make a complaint of discrimination. As her Honour noted,[20] the individuals fell into three categories, as follows:

(a) workers connected with Cobaw or its partner organisations;

(b) SSAYP involved in the WayOut project; and

(c) other young people involved in the WayOut project, who supported its aims.

35 Each of the 10 individuals who gave evidence said that he/she had intended to attend the forum. Each claimed to have been discriminated against because of the refusal of accommodation.[21] The Tribunal upheld those claims.[22]

36 The contention for CYC at trial was that none of the individuals had been refused accommodation and that it was Cobaw in its own right which had been refused accommodation. This was so, it was said, because Ms Hackney was acting in her capacity as an officer of Cobaw and on its behalf. It was 'a classic case of agency'.[23] It was Cobaw, as the sponsoring organisation, which needed to secure accommodation in order for it to conduct the proposed camp.

37 In any case, CYC contended, Ms Hackney could not have been acting on behalf of the individuals as their identity was not known to her at the date of her conversation with Mr Rowe. As at 7 June 2007, WayOut's partner organisations had simply been asked to start talking about who would like to go to the camp, although one organisation 'had pretty well finalised who wanted to go'.

38 The trial judge rejected CYC's contentions, holding that Ms Hackney was relevantly acting on behalf of the named individuals, being proposed attendees at the camp.[24] Her Honour said:

> Ms Hackney's evidence was that when she spoke to Mr Rowe, she told him she wanted to make a booking for a group of young people. She told him about the aims and purposes of the WayOut project. She described the aims and purposes of the forum. As Mr Rowe's evidence made clear, Ms Hackney referred to WayOut but did not make any reference to Cobaw during the conversation. I am satisfied that when Ms Hackney spoke to Mr Rowe, although she was acting within the scope of her employment, and so was in that sense the agent of Cobaw, she was seeking to make a booking on behalf of the proposed attendees of the forum.

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20 Reasons [62].
21 Ibid [64].
22 Ibid [175], [202]–[203].
23 Ibid [165], [170].
24 Reasons [172], [175].

> The named persons were part of that group of proposed attendees. The named persons have the relevant attributes. If the refusal to accept the booking was on the basis of those attributes, then the connection between the persons with the attributes and the refusal on the basis of the attributes necessary for the purposes of s 8, and ss 42 and 49 of the EO Act will be established.[25]

39 Her Honour held that it was not necessary for the individuals to have been identified at the time of the application for accommodation:[26]

> Again, I must apply a fair, large and liberal interpretation to the words 'other person' or 'another person', and the broadest interpretation consistent with the rights contained in the Charter. It would be a narrow and legalistic interpretation to restrict 'other person' or 'another person' to those identified by name, and attribute to the person alleged to have engaged in the discriminatory conduct.
>
> ...
>
> I am satisfied that when she spoke to Mr Rowe Ms Hackney was seeking to make a booking on behalf of the proposed attendees, and that the 10 named persons fall within that group. I am also satisfied that the proposed attendees have the attributes of (same sex) sexual orientation and personal association with the persons identified by their (same sex) sexual orientation. It follows that the application was made on behalf of the people including the named persons, and that they had the relevant attributes.[27]

40 Part 3 of these reasons traces the procedural history of this appeal and, in particular, of the evolution of the notice of appeal. As there described, the grounds of appeal did not challenge the finding that it was the named individuals who were refused accommodation. The only relevant ground was directed at a quite different point, namely, whether the refusal could have been 'on the basis of' sexual orientation given that Mr Rowe did not know the identity, less still the sexual orientation, of any of the individuals.[28]

41 After the appeal hearing had concluded, however, the applicants sought leave to amend the notice of appeal to add a ground contending that Ms Hackney could not have been acting on behalf of the individuals as they had not been identified at the time of the application. The amendment application is opposed by Cobaw. For reasons set out in pt 3, I would refuse leave to amend.

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25 Ibid [172].
26 Ibid [174].
27 Ibid [174]–[175].
28 See [345] below.

Discrimination 'on the basis of' sexual orientation MAXWELL P

42 Accordingly, the first question of law to be addressed on the appeal is whether it was open to the Tribunal, on the evidence, to conclude that the individuals were discriminated against 'on the basis of' their sexual orientation (or their personal association with persons identified by their sexual orientation). Was that attribute the reason — or at least a substantial reason — for Mr Rowe's refusal to accept the application for accommodation?[29]

43 The basis of Mr Rowe's objection to the proposed camp was made quite clear, both in his statement and in his oral evidence. He believed that homosexual activity was wrong because it was contrary to God's teaching as set out in the Bible. Accordingly, he said:

> It offends my Christian beliefs that young people in particular are told that there is nothing wrong with homosexual sexual activity.

Mr Rowe said:

> I believe that the Bible teaches that homosexual acts are not in accordance with God's plan for humanity. The Bible opposes same sex sexual practices by specific words ...
>
> The Bible makes a distinction between same sex friendship which occurs with people like David and Jonathan but has very strong words against homosexual sexual acts and relationships based on such acts. *Attempts to promote such relationships as acceptable do not conform to God's will*.[30]

44 As to the proposed camp, Mr Rowe said:

> In view of my Christian beliefs I was and am very concerned that a group like WayOut were going to say to kids with some same sex attraction that it was natural and healthy for them to adopt a homosexual lifestyle.

His understanding of how Ms Hackney described the purpose of the weekend camp:

> was that the weekend or forum was very much about telling the young teenagers or young people who attended that homosexual activity was natural and healthy.

45 In cross-examination, Mr Rowe confirmed that 'following through' on same sex attraction 'in sexual action' was wrong. He would discourage people from doing that. If he were in the position of making law 'based on what I believed God's word taught and said was right and wrong', he would outlaw homosexual sexual activity.

46 Mr Rowe's 'strong belief' was that:

> [T]he Bible teaches that God's intention is that sexual activity be expressed only within the boundaries of a marriage between a man and a woman and that the Bible strongly disapproves of any sexual activity outside such a marriage.

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29 EO Act s 8(1)(b); *University of Ballarat v Bridges* [1995] 2 VR 418, 424 (decided under the equivalent provisions of the *Equal Opportunity Act 1984* (Vic)).

30 Emphasis added.

Mr Rowe confirmed that, as a result, he would not:

> have a group promoting heterosexual young people to say it was healthy and natural to have sex before marriage either, because I believe that's also outside what I believe the Bible teaches.

47 It was submitted for the applicants on the appeal that, on a proper reading of Mr Rowe's evidence, he was objecting to Cobaw telling the young people attending the camp that it was appropriate to have sex outside marriage. In truth, it was said, Mr Rowe was voicing an objection to pre-marital sex, not to sexual activity between same sex attracted people. This was, so it was said, the only finding of fact reasonably open.

48 This point may be disposed of shortly. Enough of Mr Rowe's evidence has already been set out to show that the submission is without foundation. There was certainly reference in the evidence to the belief of Christian Brethren that sexual activity should take place only within a marriage between a man and a woman.[31] But this was not a case about pre-marital sex. On the contrary, the whole thrust and tenor of Mr Rowe's evidence, in his statement and in cross-examination, concerned what he referred to as 'homosexual sexual activity'. That activity, he believes, is expressly prohibited by the Bible. The evidence of CYC's expert witnesses was likewise directed at identifying the doctrinal foundation for that specific prohibition.

The judge's findings

49 The submission for CYC before the primary judge was as follows:

> [I]t was not the attribute of homosexuality of some of the attendees or association with homosexuals which was objected to by Mr Rowe, but rather the whole focus of the forum which was the promotion of homosexuality as a 'natural and healthy lifestyle' and in particular to young people ...[32]

As her Honour pointed out, Mr Rowe conceded in his oral evidence that the terms 'promoting homosexuality' and 'homosexual lifestyle' had not been used in the conversation.

50 Her Honour found:

> There is no evidence which provides any support for a suggestion Ms Hackney's words had implied that the purpose of the forum was to promote homosexuality or a homosexual lifestyle in the sense that Mr Rowe used those terms. Mr Rowe's acknowledgement that Ms Hackney had used the words natural, healthy and normal in the context of describing same sex attraction as part of the range of normal and healthy human sexualities makes that clear.
>
> I am satisfied that the effect of Mr Rowe's evidence is that, to him, promotion of homosexuality or a homosexual lifestyle involved any conduct, whether engaged in by same sex attracted people, or those with a personal association with people identified by their (same sex) sexual orientation, which accepted or condoned

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31 See [282] below.

32 Reasons [178].

MAXWELL P

same sex attraction, or encouraged people to view same sex attraction as normal, or a natural and healthy part of the range of human sexualities.

So understood, [CYC's] attempts to distinguish between homosexuality and promoting homosexuality fail. Mr Rowe's objection to promotion of homosexuality is, in truth, an objection to same sex attraction, or as [CYC] characterised it, homosexuality.[33]

51 Her Honour continued:

In my view, what [CYC] characterised as promotion of homosexuality and which I have characterised as engaging in conduct which accepts or condones same sex attraction, or encourages people to view same sex attraction as part of the range of normal, or natural and healthy human sexualities is, in truth, no more than affording people of (same sex) sexual orientation the same right as heterosexuals in respect of their sexual orientation. That is, to live their lives in the same way as a person who is heterosexual can; to accept their sexual orientation, and to have it accepted by others, to live openly as a person who is same sex attracted, to seek out and have relationships with people who are also same sex attracted, to engage in lawful sexual activity with a same sex attracted partner, and to speak openly of the issues relevant to people of same sex attraction, including discrimination and homophobia.

There is, in my view, no meaningful distinction which can be drawn between conduct based on a person's sexual orientation and conduct based on an objection to telling a person their sexual orientation was part of the range of normal, natural or healthy human sexualities. An objection to telling a person (same sex) sexual orientation is part of the range of normal, natural or healthy human sexualities is, in truth, an objection to (same sex) sexual orientation. It denies same sex attracted people the same rights to live as who they are, to express their sexual orientation in the manner they choose, and to gather with others of the same sexual orientation and those personally associated with them, to discuss matters of particular significance to them by reason of their sexual orientation, as heterosexuals enjoy.

...

In my view, the effect of Mr Rowe's evidence is that the reason for his refusal to accept the booking was because of his general objection to homosexuality, applied, in the circumstances with which he was presented in the telephone conversation with Ms Hackney, to this group, comprising young people who were same sex attracted or who had a personal association with people identified by their (same sex) sexual orientation. The effect of Mr Rowe's evidence was that identifying as same sex attracted, living openly as a same-sex attracted person, and engaging in same sex sexual activity constituted promotion of homosexuality or a homosexual lifestyle.

It follows that I am satisfied that the basis for the refusal of the booking by Mr Rowe was the (same sex) sexual orientation of the proposed attendees, or the personal association of the proposed attendees with persons identified by their (same sex) sexual orientation. I am satisfied this was the only, or dominant, reason for the refusal.[34]

33 Reasons [188]–[190].

34 Ibid [198]–[199], [202]–[203].

52 The applicants' submission was that her Honour had here fundamentally mischaracterised the nature of the objection to the proposed camp. The 'substantial reason' for Mr Rowe's response to Ms Hackney was:

> because of his concern from what he was told that the forum was to be used to propagate or encourage the notion that homosexuality was part of the normal range of human sexualities to young people. ... The attribute of the proposed attendees was not a reason let alone a substantial reason for his actions.

As the point was expressed in oral argument, Mr Rowe should be understood to have had 'no animus against homosexual people' or against 'forums for SSAYP or to help them'. Rather, his objection was to 'a syllabus that says it is all right'.

Consideration

53 Her Honour's finding as to Mr Rowe's reason for refusing the application for accommodation was a finding of fact. As is apparent, the complaint is that her Honour made the wrong finding. It follows that the applicants could only succeed on this aspect of the appeal if they could establish that the finding which her Honour made was not open on the evidence. (Although it was suggested in oral argument that the finding reflected a misconstruction of the relevant provisions, neither the grounds of appeal[35] nor the written submissions raised any such question of construction.)

54 The submission for CYC had a beguiling simplicity. It was obvious, so the argument went, that an objection to the views or opinions which would be conveyed to those attending the camp was quite different from an objection to the sexual orientation of those who would be attending. The point was clearly made in the grounds of appeal:

> It was the propagation of the belief or opinion that homosexuality is a normal and natural part of the range of human sexualities ... that [CYC] objected to and not the sexual orientation or personal associations of the [attendees].[36]

55 To illustrate this distinction, the submission drew attention to evidence which Mr Rowe gave under cross-examination, in response to the following hypothetical question put by senior counsel for Cobaw:

> If a group of school children ... with their same sex parents wanted to come to [the Resort] and the woman who rang up to make the booking said, 'Hi, we're a bunch of parents from X primary school; we are all same sex attracted people and we've all got kids and we want to bring our kids to [the Resort]', would you accept that group?

Mr Rowe's response, and the succeeding questions and answers, were as follows:

> MR ROWE: ... I would ask, like every family group, 'What are you about?' You know, 'Do you know what we are? Are you hoping to come here and,' you

35 Grounds 5(c)(ii), (d), (e) and (f).
36 Grounds of appeal 5(c)(ii).

know, 'enjoy and experience time together as family?' If I had a group just like you're saying ... come and I'd say, 'Are you about creating memories with everybody and all together, or are you about promoting something?' If it was about like you are saying and they want to come to the island, they could be able to stay with our facility.

COUNSEL: But if they said, 'We think it's normal and healthy for children to have parents of the same sex, two women as parents or two men as parents', is that where you draw the line if somebody said that to you in the conversation?

MR ROWE: I drew the line on this group because of the promotion to a group of people.

COUNSEL: I'm asking you about a hypothetical, Mr Rowe. I'm saying to you, I'm asking you that this woman that's ringing you up who's a lesbian and who has children — and she says to you, 'Well, of course we want to come away with our children and enjoy them and spend time together as a family, but we think it's normal and healthy for our children to have two women as parents'. Still going to let them come?

MR ROWE: I think I would in that case. I don't think they were there promoting it to everybody else. I don't think they've — I think that's the scenario you get — I think I would.

COUNSEL: They're already converted in your view, Mr Rowe. Is that the difference?

MR ROWE: No, the aim of CYC ... is set out clearly and is that we want all guests to be able to come and experience Christian values and Christian life. If we have an opportunity for them to come and it's not in direct contrast as in opposing or promoting something that's direct.

COUNSEL: Why in my example, Mr Rowe, is there any material difference? Here you have a lesbian woman saying to you, 'We think it's okay, we think it's normal and healthy for these children to have two women as parents'. That is just as objectionable as the scenario that we're all here talking about to your beliefs, isn't it?

MR ROWE: When Ms Hackney rang me and said her group — I said, 'What is the nature of your — what is your group about?' She said, 'Our group targeted same sex attracted young people to bring them away on camp to say it was okay to be same sex attracted'. It all comes down to, your Honour, that the content of the conversation I had — it was about the promotion of homosexuality as natural and healthy to a wide range of young people.

56 Mr Rowe agreed, under questioning from her Honour, that if CYC were to permit a group of same sex parents with children to hold a camp, it could be seen as promoting same sex parenting as normal and natural. He sought, however, to distinguish counsel's example from 'having forums, having input, standing up and actually teaching and speaking to young people who still may not be sure'. According to Mr Rowe, counsel's example was about:

> coming away as families with children and I would have assumed that that [the appropriateness of same sex relationships] would have been promoted the whole time that they were living wherever they were living.

57 The appeal submission for Cobaw was that the purported distinction —

between the sexual orientation of those attending the camp and what would be said to them about their sexual orientation — was misconceived. Reliance was placed on the following statement in her Honour's reasons:

> Sexual orientation, like gender, race and ethnicity, [is] part of a person's being, or identity. The essence of the prohibitions on discrimination on the basis of attributes such as sexual orientation, gender, race or ethnicity is to recognise the right of people to be who or what they are. ... To distinguish between an aspect of a person's identity, and conduct which accepts that aspect of identity, or encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity.[37]

As the amicus submission of the ICJ pointed out, the proposition that sexual orientation is an important aspect of a person's identity has been affirmed in other jurisdictions.[38]

58 In my respectful opinion, the finding which her Honour made about Mr Rowe's reason for refusing the application for accommodation was well open on the evidence. As the applicants themselves pointed out on the appeal, her Honour's task was to identify 'the true characterisation of the reason for [Mr Rowe's] conduct'. Successive decisions of the High Court have made clear that the task of the fact-finder in such a case is to determine why the impugned conduct took place, to determine the 'true basis' for the act or decision. The explanation or justification given by the decision-maker is relevant but not determinative.[39]

59 In my view, her Honour was right to reject the distinction between 'syllabus' and 'attribute', for the reasons which her Honour gave. There was no error of law.

60 Mr Rowe was aware that the camp would be attended by SSAYP. He knew that the purpose of the camp was to affirm, reinforce and support the sexual orientation of these young people. What Mr Rowe described as 'promotion' was, in truth, affirmation of same sex attraction as 'a natural part of the range of human sexualities'. As Ms Hackney told Mr Rowe, the WayOut project was responding to difficulties which are confronted by SSAYP as a result of homophobia and discrimination.

61 Mr Rowe was perfectly frank about his strong objection to sexual activity between same sex attracted people. It was, he believed, contrary to God's law and should be discouraged. CYC's expert witnesses confirmed that the

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37 Reasons [193].

38 See *R v Ministry of Defence; ex parte Smith* [1996] QB 517, 564; *R v Secretary of State for Trade and Industry; ex parte Amicus* [2004] EWHC (Admin) 860 [192]; *Egan v Canada* [1995] 2 SCR 513, 528; *Living Word Distributors Ltd v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570, 588 [67].

39 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 176; *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, 142–3 [157]–[160], 163 [236]; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 517 [44]–[45].

relevant religious prohibition was directed at the sexual act itself. As se- MAXWELL P
nior counsel for Cobaw pointed out in the Tribunal, sexual orientation and sexual attraction are inseparable.[40] Reliance was placed on the following statement by Baroness Hale in *Ghaidan v Godin-Mendoza*:

> Sexual 'orientation' defines the sort of person with whom one wants to have sexual relations. It requires another person to express itself.[41]

In the recent Supreme Court decision of *Preddy v Bull*,[42] her Ladyship expressed the point in this way:

> Sexual orientation is a core component of a person's identity which requires fulfilment through relationships with others of the same orientation.[43]

62 What Mr Rowe objected to about the proposed forum was that the SSAYP attending would be encouraged to accept their sexual identity, including its expression in sexual activity. They would be supported and reassured about their sexual orientation, in the face of the hostility experienced by them elsewhere.

63 In my opinion, the evidence regarding the hypothetical group of same sex attracted parents with children reinforced, rather than undermined, her Honour's conclusion. Mr Rowe's answers made clear that what he objected to was conduct which affirmed same sex orientation as 'normal and natural'. He was prepared to contemplate the possibility that the hypothetical group might be allowed to come to the Resort, provided that they made no show of their sexual orientation. For example, if they were wearing T-shirts proclaiming the virtues of same sex parenting, that would be permissible — but only if it was 'done in their own area'. Mr Rowe said he 'wouldn't go down there'.

64 What he would object to was the active expression of same sex orientation. In other words, he would not permit attendance by a group which would be explicit about same sex orientation or its appropriateness. He drew the same distinction in his evidence regarding pre-marital sex. He would not police the sexual activities of people attending the Resort — some of whom, he acknowledged, would be likely to engage in pre-marital heterosexual sex — but he would object to an event which affirmed, or proclaimed, or openly encouraged, pre-marital sex.

65 Both in his statement and in his oral evidence, Mr Rowe expressed the view that it was not 'homophobic discrimination' for him to hold (on religious grounds) a different view from Ms Hackney regarding homosexuality. The same point was raised by the grounds of appeal.[44]

66 This contention must also be rejected. What occurred on 7 June 2007 was

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40 Reasons [191].
41 [2004] 2 AC 557, 607 [142].
42 [2013] 1 WLR 3741; sub nom *Bull v Hall* [2014] 1 All ER 919 (***Preddy***).
43 Ibid 3755 [52].
44 Ground 4(d).

not merely the expression of a difference of opinion. Plainly enough, that would not have constituted discrimination. Rather, what occurred was that, because of his strong belief that homosexual sexual activity was morally wrong, Mr Rowe on behalf of CYC refused to allow the Resort to be used by SSAYP for an activity in which their identity as such would be expressed and affirmed.

The proper comparator?

67 Section 8 of the EO Act provides as follows:

> **8 Direct discrimination**
>
> (1) Direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances.

68 Having concluded that the refusal of accommodation was made on the basis of the sexual orientation of those proposing to attend the camp, the Tribunal had to decide whether they had been treated less favourably than Mr Rowe would have treated applicants without that attribute. Her Honour concluded that:

> [T]he appropriate comparison is with persons of a different attribute who wished to conduct a forum addressing issues relating to that part of their identity which is defined by or is intimately connected with that attribute. Thus, appropriate comparators in my view would be either young people with the attribute of heterosexuality ... or young people with the attribute of a particular race or ethnicity, ... who wish to conduct a forum to discuss issues of their identity intimately connected with that attribute.[45]

69 Her Honour concluded as follows:

> I am satisfied that a group of young people with the attributes of heterosexuality, or a particular race or ethnicity, proposing to conduct a forum to discuss matters intimately associated with their identity and connected with their common or defining attribute, would not have been treated in the same way, in that they would not have had their booking refused because they proposed to discuss matters relating to that part of their identity which is defined by or is intimately connected with that attribute.[46]

70 The applicants' written submission contended that the Tribunal had here 'applied the wrong test and misdirected itself in law'. In argument, however, counsel for the applicants conceded that if the attack on the 'basis of the refusal' failed, the attack on the 'proper comparator' must also fail.

71 That concession was properly made. There was, in any event, no misdirection. Her Honour addressed the question posed by the section and, given the range of possible comparators available, the choice which her Honour made

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45 Reasons [207].
46 Ibid [208].

was reasonably open.[47] Her Honour's conclusion about how the comparator group would have been treated was a conclusion of fact, and it was well open to her Honour on the evidence. MAXWELL P

72 I turn now to consider by whom the act of discrimination was committed.

Who committed the act of discrimination?

73 This proceeding raises an important question concerning the liability of a corporation for discriminatory conduct which occurs in the course of the corporation's business. The relevant prohibitions in pt 3 of the EO Act are expressed in these terms:

- 'A person must not discriminate against another person by refusing to provide goods or services to the other person';[48]
- 'A person must not discriminate against another person by refusing, or failing to accept, the other person's application for accommodation'.[49]

74 Where a complaint is made that there has been a discriminatory refusal of this kind, it is necessary to identify the 'person' who engaged in the alleged conduct. Where the service provider or accommodation provider is a corporation, and the decision to refuse is made by a person employed by the corporation to make such decisions, the question which arises is this: for the purpose of applying pt 3 of the EO Act, which 'person' committed the (alleged) act of discrimination? Was it the natural person (the employee) or the corporation on whose behalf the employee was acting in making the decision to refuse?

75 The answer to that question depends both upon the proper construction of the EO Act and upon the applicability, in this statutory context, of principles of agency and corporate personality. The following propositions are, however, uncontroversial:

1. A corporation is a 'person' for the purposes of the Act.[50]
2. The prohibitions against discrimination were intended to apply directly to the activities of corporations.
3. Corporations can act only through the agency of natural persons.
4. The only way a corporate provider of services or accommodation could itself commit an act of discriminatory refusal would be for a natural person, employed by the corporation to make such decisions, to refuse to provide the corporation's services or accommodation

47 Cf *Collier v Austin Health* (2011) 36 VR 1, 15 [66]ff.
48 EO Act s 42(1)(a).
49 Ibid s 49(a).
50 Except where a contrary intention appears: see [312] below.

(and to do so on a prohibited ground).

76 In my view, Parliament must have intended such an act of refusal to be attributable to the corporation for the purposes of the EO Act, so as to make the corporation directly liable as the 'person' committing the act of discrimination. Otherwise, no corporation could ever contravene the EO Act in its own right. (Vicarious liability is dealt with separately under the EO Act, and will be discussed below.)

77 The present case is, of course, of exactly this kind. Mr Rowe was employed by CYC to manage the Resort. He had full authority over the conduct of CYC's accommodation business at the Resort, including authority to accept or refuse applications for accommodation. When he refused Ms Hackney's request, he was acting on CYC's behalf.

78 For reasons which follow, I consider that this was an orthodox example of a corporation acting through a natural person — in this case, a manager. For the purposes of the Act, this was a refusal by CYC, not by Mr Rowe. That is not, however, how the proceeding has been conducted. As noted earlier, Mr Rowe was found to have committed the contravention; CYC's only liability was vicarious. And, as will appear, both Cobaw and the Attorney-General maintain that this is how the EO Act was intended to be applied in such circumstances.

The claim of discrimination

79 The claim brought by Cobaw on behalf of the individuals alleged that it was Mr Rowe who had committed the act of discrimination, by refusing the individuals' applications for accommodation. It was not contended that CYC had itself committed an act of discriminatory refusal. (Nor, apparently, did Mr Rowe take any such point in answer to the complaint against him.) The only liability alleged against CYC was vicarious liability, in reliance on s 102 of the EO Act.

80 The Tribunal upheld the complaints against Mr Rowe.[51] In refusing to take the booking, Mr Rowe had subjected the individuals to 'less favourable treatment' as defined in s 8(1) of the Act. He had contravened ss 42 and 49 in his own right.

81 As already mentioned, the complaint so far as it related to CYC relied on s 102 of the Act. Section 102 appears in div 4 of pt 6, which is headed 'Vicarious Liability'. Division 4 comprises ss 102 and 103, which provide as follows:

> **102 Vicarious liability of employers and principals**
>
> If a person in the course of employment or while acting as an agent—
>
> (a) contravenes a provision of Part 3, 5 or 6; or
>
> (b) engages in any conduct that would, if engaged in by the person's employer

[51] Reasons [209].

> or principal, contravene a provision of Part 3, 5 or 6—
>
> both the person and the employer or principal must be taken to have contravened the provision, and a complaint about the contravention may be lodged against either or both of them.
>
> **103 Exception to vicarious liability**
>
> An employer or principal is not vicariously liable for a contravention of a provision of Part 3, 5 or 6 by an employee or agent if the employer or principal proves, on the balance of probabilities, that the employer or principal took reasonable precautions to prevent the employee or agent contravening the Act.

82 In its pleading, Cobaw relied on s 102(a), contending that Mr Rowe had contravened the EO Act himself, and that he had done so both 'in the course of employment' and while acting 'as agent' for CYC.[52] Her Honour agreed, holding that when Mr Rowe refused to provide accommodation to the individuals, he was acting both in the course of his employment with CYC and as an agent for CYC.[53]

83 By force of s 102, the Tribunal held, 'both CYC and Mr Rowe have contravened' the relevant provisions. By operation of law, therefore, CYC was made liable — vicariously liable — for Mr Rowe's act of discrimination and was deemed to have contravened the EO Act.

84 As foreshadowed above, I consider that both the complaint as filed and the Tribunal's findings were based on a misapprehension of the legal capacity in which Mr Rowe was acting. When he refused to make the Resort available, Mr Rowe was not acting in his own right but as agent for CYC. It was CYC, not Mr Rowe, which offered accommodation to the public and it was CYC, acting through the agency of Mr Rowe, which decided whether or not to accept applications to hire its accommodation. For the purposes of the EO Act, the act of refusal was the act of the company, not of its agent.

85 As I have said, no such case was advanced by Cobaw at trial, and no point was taken at trial by Mr Rowe. Nor did any of the grounds of appeal challenge her Honour's conclusion that Mr Rowe was the contravenor and that CYC was (only) vicariously liable.

86 There are, however, numerous grounds of appeal disputing her Honour's findings that the religious freedom exemptions were not available either to Mr Rowe or to CYC. As will appear, the terms in which the exemptions are created make it necessary to decide whether it was the corporate entity or its human agent which committed the act of discrimination.

87 Because of the importance of correctly identifying the discriminator, the Court decided that it was necessary, notwithstanding that the issue had not been raised by the parties, to invite submissions on the following questions:

> Given that CYC was the accommodation provider, and Mr Rowe was found to

52 PoC [36]–[38].

53 Reasons [210], [229].

> have been acting in his capacity as agent for CYC, how could he have committed an act of discrimination in his own right? As a matter of law, was he not acting under the authority of his principal, CYC, such that the refusal of accommodation was in law the refusal of CYC, it being the accommodation provider?
>
> In relation to [that] question ... to what extent are common law agency principles applicable under the Act?[54]

The supplementary submissions

88 In supplementary submissions responding to these questions, the applicants changed their position quite dramatically. They submitted — for the first time — that the Tribunal had erred in finding that Mr Rowe was the contravenor and that CYC was only vicariously liable. According to this new submission, the conduct of Mr Rowe was conduct engaged in by him in his capacity as an employee of CYC. The accommodation which he was alleged to have unlawfully refused to make available was CYC's, not his.

89 According to the submission, common law agency principles should be applied to determine whether CYC had contravened a provision of the Act. There was nothing in the EO Act which excluded those principles, either expressly or by necessary implication. Since a body corporate could only act through human agency, the conduct of Mr Rowe, as the manager responsible for deciding whether to accept applications for accommodation, was the conduct of CYC itself.

90 It followed, so the applicants now contended, that Mr Rowe himself could not have contravened the Act. Accordingly, s 102 of the Act could not operate to make CYC vicariously liable. Section 102(a) was not engaged since Mr Rowe had not contravened himself. Nor was there any scope for s 102(b) to apply, since this was not a case of Mr Rowe engaging in 'conduct that, if engaged in by his employer, would have contravened' the Act. For it was conduct which CYC *had* engaged in, through the agency of Mr Rowe. In other words, CYC was either directly liable, or not at all. And Cobaw had never contended that CYC itself had committed the act of discrimination.

91 In response, Cobaw submitted that its reliance on s 102 was correct. It was said that Mr Rowe's conduct in refusing to take the booking fell within s 102(b):

> because it was conduct that would contravene a provision of Part 3 if engaged in by CYC itself (as the accommodation provider).

This was, it would appear, a change of position. As noted earlier, the pleaded complaint invoked only s 102(a), alleging that Mr Rowe had himself contravened the Act.[55] The supplementary submission did not indicate whether that allegation was maintained.

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54 See [342]–[344] below.

55 See [82] above.

92 Cobaw contended that the applicants' argument was 'circular'. Their reliance on the corporate status of the employer was said to be an attempt 'to avoid the operation of s 102': MAXWELL P

> Such an approach is misconceived because it would exclude an entire class of persons (those employed by corporations) from the operation of the EO Act on the mere basis that a company must act through people.
>
> For example, no person providing goods or services to the public on behalf of a company could be held liable for discrimination in the manner in which those goods or services were provided.
>
> Moreover, it is clear that s 102 is designed to capture precisely the current circumstances — that is, where an individual acts as an agent of an employer. The legislation makes clear that in that event, both the individual and the company employer will be liable.[56]

93 The submission for the Attorney-General (intervening) was to similar effect. The Minister contended that s 102 operated to the exclusion of common law principles. That section, together with ss 98, 99 and 103, 'set out the circumstances in which a body corporate may be responsible for the actions of its employees and agents'.

94 The Attorney's submission relied on the distinction drawn by Lord Reid in *Tesco Supermarkets v Nattrass*,[57] between:

- a person who is 'the embodiment of the company' or its 'directing mind and will';[58] and
- a person who is a servant, representative, agent or delegate of the body corporate.

According to Lord Reid, a person in the first category:

> is acting as the company and his mind which directs his acts is the mind of the company ... He knows and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, *a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability*.[59]

95 The Attorney-General submitted that Mr Rowe fell into the second of Lord Reid's categories. He was 'merely the company's servant or agent'. Accordingly, it was said, CYC's liability 'could only be a statutory or vicarious liability'. So far as vicarious liability was concerned, the Attorney-General submitted that ss 102 and 103:

> set out the circumstances in which an employer or principal, including a body

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56 Emphasis in original.

57 [1972] AC 153, 170 (***Tesco***).

58 Ibid 171, citing *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 and citing *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159, 172.

59 *Tesco* [1972] AC 153, 170. The highlighted passage was relied on by the Attorney-General.

> corporate, can be liable for the acts of its employees or agents. … [B]oth the parties are prima facie liable for the contravention.
>
> …
>
> It follows that an agent's refusal to provide accommodation on a ground prohibited by Part 3 renders both the agent and the principal responsible for contravening Part 3, and the question whether the refusal was, in law, that of the principal, does not arise.
>
> The Act asks a different question and does not attribute liability solely to a principal.
>
> Section 102(a) expressly contemplates that a person acting as an employer or agent may contravene a provision of Part 3 in that capacity.

96 Developing this submission in argument, the Solicitor-General submitted that the word 'refuse' in the relevant provisions of the EO Act was to be read literally. That is, the natural person who spoke the words of refusal — in this case, Mr Rowe — was the person who refused the application for accommodation, and hence contravened the Act. This was so regardless of whether or not it was his/her accommodation to offer. Whether that person's employer had any liability for the contravention was to be determined by recourse to s 102. In other words, s 102 of the EO Act left no room for consideration of whether the refusal was, in law, the employer's refusal.

Consideration

97 For reasons which follow, I consider that the applicants' supplementary submissions should be accepted on this point. CYC's liability for the discriminatory refusal was direct liability. The vicarious liability provisions have no application.

98 It was common ground that:

- CYC was the provider of the accommodation for which Ms Hackney applied;
- if the application had been accepted, the accommodation would have been provided by CYC;
- Mr Rowe had no accommodation of his own to provide; and
- Mr Rowe was authorised by CYC to accept or reject applications for accommodation on its behalf.

99 In those circumstances, it follows both from the language of the EO Act and from orthodox rules of attribution of conduct to corporations that the act of refusal was the act of CYC, not of Mr Rowe personally. As noted earlier, s 49 of the EO Act prohibits a person from discriminating against another person 'by refusing … the other person's application for accommodation'. As a matter of ordinary language, the reference to a person 'refusing' to provide accommodation must be a reference to a person who is in a position to

provide accommodation. Only the accommodation provider can sensibly be said to 'accept' or 'refuse' an application for accommodation. MAXWELL P

100 To take a commonplace example, if a person rings a hotel asking to book a room, and is told by the person in charge of bookings that there is no room available, it can hardly be doubted that it is the hotel proprietor (a company) which has refused the application for accommodation, not the person who answered the telephone call. The fact that the words of refusal are spoken by a servant of the company, duly authorised in that behalf, does not alter the analysis. It is, rather, the foundation of the analysis. Likewise, if the bookings officer accepted the booking, the contract which came into existence would be between the customer and the hotel company.

101 The point may be expressed differently, by reference to the Act's objective of eliminating discrimination. Parliament plainly intended that accommodation providers — like CYC, or the hotel proprietor in my example — be directly liable if they refused on a prohibited ground to provide accommodation. Equally obviously, in my view, Parliament intended that direct liability should attach when such decisions were made on their behalf by appropriately authorised officers. How else could the provider itself be liable?

102 Where — as here — the accommodation provider is a corporation, principles of agency and attribution are necessarily brought into play. Axiomatically, the corporation must rely on authorised persons to conduct the accommodation business on its behalf. As Brennan J said in *Northside Developments Pty Ltd v Registrar-General*:

> A company, being a corporation, is a legal fiction. Its existence, capacities and activities are only such as the law attributes to it. *The acts and omissions attributed to a company are perforce the acts and omissions of natural persons.* A company is bound by an act done when the person who does it purports thereby to bind the company and that person is authorized to do so or the doing of the act is subsequently ratified ...[60]

103 In the same case, Dawson J clarified the relationship between the principles of agency and the 'organic theory' of attribution (of which *Tesco*[61] is an example):

> The organic theory, which was originated by Lord Haldane LC in *Lennard's Carrying Co Ltd ...* has been used to impose liability upon companies beyond that which could be imposed by the application of the principles of agency alone. It is an approach which has been particularly useful in criminal cases where the liability of a company has depended upon a mental element ... But the organic theory merely extends the scope of an agent's capacity to bind a company and there must first be authority, actual or apparent. It is only then that a person may be regarded not only as the agent of a company, but also as the company itself — an organic part of it — so that '[t]he state of mind of [the agent] is the state of

60 (1990) 170 CLR 146, 171–2 (emphasis added) (***Northside Developments***).
61 [1972] AC 153.

> mind of the company': *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd*, per Denning LJ. *Thus the application of the theory depends in the first instance upon there being authority, that is to say, agency.*[62]

104 When any question arises as to the liability of a corporation for the conduct of such an authorised person, rules of attribution are engaged, as elucidated by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*.[63] As their Lordships said in *Meridian,* there would be little sense in deeming a company to exist as a fictional person:

> unless there were also rules to tell one what acts would count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called 'the rules of attribution'.[64]

105 The 'primary rules of attribution' are to be found in the company's articles of association. But further such rules are required, since:

> These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.
>
> ...
>
> The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability.[65]

106 The decision in *Tesco*,[66] relied on by the Attorney-General, laid down a specific rule of attribution, applicable in cases of a particular kind, being those where criminal liability is sought to be affixed to a corporation for an offence requiring proof of mens rea. In a case of that kind, the prosecution may need to establish that those who constituted the 'directing will or mind' of the company had the relevant state of mind.

107 As the Privy Council explained very clearly in *Meridian*, however, that partic-

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62 *Northside Developments* (1990) 170 CLR 146, 201–2 (citations omitted, emphasis added).

63 [1995] 2 AC 500, 506 (***Meridian***).

64 Ibid 506. See, in the different context of occupational health and safety, *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321, 328 [29]–[32].

65 *Meridian* [1995] 2 AC 500, 507.

66 [1972] AC 153.

ular rule of attribution was adopted in *Tesco* as a matter of construction of the statute which created the offence. The decision in *Tesco* did not purport to expound 'a general metaphysic of companies'.[67] To illustrate this point, their Lordships drew attention to the decision in *Re Supply of Ready Mixed Concrete (No 2)*[68] where — in a different context — a much less stringent rule of attribution had been adopted. The offence there in question required proof of the defendant company's knowledge. The House of Lords held that, for that purpose, the conduct and state of mind of an employee could be attributed to the company. As a matter of construction, it was immaterial that those who constituted 'higher management', and 'the directing mind', of the company had no relevant knowledge.[69]

MAXWELL P

108 In 1997, in *Director of Public Prosecutions Reference No 1 of 1996*,[70] this Court had occasion to apply the *Meridian* analysis in considering the possible liability of a company for offences such as manslaughter or negligently causing serious injury. Callaway JA (with whom Phillips CJ and Tadgell JA agreed) summarised the key propositions from *Meridian* in these terms:

> 1. The first step is to decide whether a corporation … is capable of committing the offence in question.
>
> …
>
> The next step is to decide whose acts or omissions, or state of mind, are, for the purposes of the relevant offence, to count as the acts or omissions or state of mind of the corporation.
>
> 2. The search is not for the officers, employees or agents for whose acts or omissions the corporation might be liable in a civil action. The question is whose acts or omissions or state of mind are taken to be the acts or omissions or state of mind of the corporation itself for the purpose at hand. *The liability is direct, not vicarious.*
>
> …
>
> 4. Sometimes only the board of directors acting as such, or a person at or near the top of a corporation's organisation, will be identified with the corporation itself. On other occasions, someone lower, and perhaps much lower, in the hierarchy will suffice.
>
> 5. The rule of attribution depends on the offence and on the facts of the case.[71]

109 In conclusion, Callaway JA said:

> As at present advised, I should have thought, with respect, that Lord Hoffmann's approach to the problem of corporate liability was correct, but it does not tell us the rule of attribution for either manslaughter or negligently causing serious injury. It merely provides a framework for analysis and *dispels the notion that, for all offences, the person with whom a corporation is identified must be its directing mind and will*.[72]

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67 [1995] 2 AC 500, 509.
68 [1995] 1 AC 456.
69 *Meridian* [1995] 2 AC 500, 508–9.
70 [1998] 3 VR 352.
71 Ibid 354–5 (emphasis added, citations omitted).
72 Ibid 355 (emphasis added).

110 Since that time, this approach — of identifying the 'rules of attribution' appropriate to the particular statutory context — has been widely applied, notably in successive decisions of the New South Wales Court of Appeal. For example, in *Director General, Department of Education and Training v MT*,[73] Spigelman CJ said:

> It is necessary to identify, in each specific statutory context, what Lord Hoffmann [in *Meridian*] has felicitously called 'the rules of attribution' ... These are rules adopted to determine which acts, knowledge or mental states of persons, through whom an organisation necessarily acts, are to be attributed to the organisation for the purposes of the legislative scheme.[74]

Again, in *North Sydney Council v Roman*,[75] McColl JA pointed out that it was necessary to identify 'the rule of attribution the legislature intended to apply ... taking into account the language of [the relevant provision], its content and policy'. As her Honour said, the rules of attribution appropriate for criminal liability are likely to be more stringent than those appropriate for civil liability.[76]

Attribution under the EO Act

111 The starting-point in the present case is that the EO Act was intended to apply to companies. A company is 'a person' for the purposes of the EO Act. Companies which provide services must not discriminate in the course of doing so. It is equally clear that liability under the EO Act for discriminatory conduct does not depend on proof of an intention to discriminate, or even of an awareness of the discrimination.[77] All that is required is proof that the alleged discriminator treated the other person less favourably on the basis of — that is, by reason of — an attribute.

112 Where the service provider is a corporation, the question of construction which arises is this: whose act, and whose reason for acting, was *for this purpose* intended to count as the act, and the reason for acting, of the company?[78] (As set out below, some comparable statutory schemes include their own rules of attribution as between companies and their servants and agents. The Victorian Act contains no such provision.)

113 In my opinion, Parliament is to be taken to have intended that the general principles of agency should apply where discriminatory conduct by a

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73 (2006) 67 NSWLR 237, 242 [17].

74 See also *Nationwide News Ltd v Naidu* (2007) 71 NSWLR 471, 504–5 [228]–[236] (***Nationwide News***); Presidential *Security Services of Australia Pty Ltd v Brilley* (2008) 73 NSWLR 241, 246–7 [15]–[18]; Bunnings *Group Ltd v Chep Australia Ltd* (2011) 82 NSWLR 420, 453 [109].

75 (2007) 69 NSWLR 240, 252–3 [43].

76 Ibid 252 [41]. In *AAPT Ltd v Cable and Wireless Optus Ltd* (1999) 32 ACSR 63, 88 [91]–[92], Austin J held that a 'special rule of attribution' was necessary in order to identify the corporate officers whose intentions were capable of being attributed to their company for the purposes of a particular provision of the *Corporations Law*.

77 EO Act s 8(2)(a).

78 *Meridian* [1995] 2 AC 500, 507.

company is alleged. There is nothing in the EO Act to suggest otherwise.[79] That is, Parliament intended that the conduct of those persons whom the company has authorised to provide the relevant services on its behalf should 'count as' the conduct of the company for this purpose. If that were not so, it would never be possible to establish that a company was itself a contravenor. MAXWELL P

114 The Commission submitted that this was how the EO Act should be interpreted. This was how the EO Act (and its predecessor) had conventionally been understood to operate. At the Court's request, the Commission identified a series of discrimination cases, adjudicated by the Tribunal or by the Commission over the period 1984–2013, said to illustrate the point.[80]

115 Where there is a refusal by such an authorised person to provide the company's services, and the refusal is on a prohibited basis, Parliament's intention was that the discriminatory refusal should 'count as' the company's discriminatory refusal. On this view, the conduct of Mr Rowe, which occurred within the scope of his authority and in the course of his employment as the manager of the Resort, 'counts as' the conduct of CYC.

116 It is unnecessary for the purposes of this proceeding to define the outer limits of this rule of attribution. As I have said, the rule undoubtedly applies to Mr Rowe, who had in effect complete authority from CYC to conduct its business at the Resort. Indeed, on the approach taken by the New South Wales Court of Appeal, he might be said to have been 'the mind and will' of CYC in relation to the conduct of that business.[81]

117 For reasons already given, the objectives of this legislation strongly suggest that Parliament intended a rule of attribution of wide scope. But whether Parliament intended that the rule should extend to the conduct of *any* servant or agent of a company, provided that the conduct was engaged in within the scope of that person's authority, is a question to be decided when it arises.

118 Reference should be made to statutory schemes which — unlike the Victo-

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79 Cobaw and the Attorney-General both submitted that the vicarious liability provisions (ss 102–3) excluded common law agency principles pro tanto. I deal with this below: [125] ff.

80 See, eg, *Rigby v Whitecliffs to Cameron Bight Foreshore Committee of Management* [2013] VCAT 1314, an impairment discrimination claim against a camping ground operator; *Parr v Steamrail Victoria* [2012] VCAT 678, a victimisation and sexual harassment claim against a recreational association; *SAF v ZON Pty Ltd* [2011] VCAT 88, a victimisation and impairment discrimination claim against a property management company; *Bayside Health v Hilton* [2007] VCAT 1483, concerning a sex and marital status discrimination claim against a hospital; *Towie v State of Victoria* [2007] VCAT 1489, an impairment discrimination claim against the Department of Justice; *Byham v Preston City Council* (1991) EOC ¶92-377, an impairment discrimination claim against a city council; *Whitehead v Criterion Hotel* (1985) EOC ¶92-129, a sex discrimination claim against a hotel; and *Henderson v Victoria* (1984) EOC ¶92-105, a sex discrimination claim against the State. In three further cases provided — *Perrett Abrahams v Qantas Airways Ltd* [2000] VCAT 1634, *Staberhofer v The City of Sale* (1990) EOC ¶92-292 and *Torres v Monash University* [2006] VCAT 1208 — the liability of the respondent companies was approached, at least implicitly, as a question of vicarious liability.

81 See *Nationwide News* (2007) 71 NSWLR 471, 505 [236].

rian Act — contain express rules of attribution. For example, s 84(2) of the (former) *Trade Practices Act 1974* (Cth) applied to:

> [a]ny conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate or by any other person at the direction or with the consent or agreement ... of a director, servant or agent of the body corporate ...

Such conduct was deemed,

> for the purposes of this Act, to have been engaged in also by the body corporate.

119 In *Walplan Pty Ltd v Wallace*,[82] Lockhart J said of s 84(2) that it was designed:

> to eliminate the necessity to apply the various and at times divergent tests of the common law relating to a corporation's responsibility for the act of its servants or agents. It extends those common law principles in order to facilitate proof of the corporation's responsibility.

Again, in *Trade Practices Commission v Tubemakers of Australia Ltd (No 2)*,[83] Toohey J said that s 84(2) did not:

> seek to make a corporation vicariously responsible; consistent with the theory expressed in *Lennard's Carrying Co Ltd* and *Tesco*, conduct of those persons is conduct of the corporation.[84]

(The distinction drawn here by Toohey J — between personal liability and vicarious liability — is critical. Where conduct is attributed to a corporation in this way, the liability is not vicarious. It is the liability of the company itself.[85])

120 To similar effect, but of more immediate relevance to the present legislative context, are provisions enacted first in s 123 of the *Disability Discrimination Act 1992* (Cth) and then s 57 of in the *Age Discrimination Act 2004* (Cth). Section 123 of the earlier Act provides as follows:

> **123 Conduct by directors, servants and agents**
>
> (1) If, for the purposes of this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:
>
> (a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and
>
> (b) that the director, servant or agent had the state of mind.
>
> (2) Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority is taken, for the purposes of this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

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82 (1985) 8 FCR 27.
83 (1983) 47 ALR 719.
84 Ibid (citations omitted).
85 See *Hamilton v Whitehead* (1988) 166 CLR 121, 127.

121 The Victorian Parliament was evidently content to rely on the common law principles which enable the conduct of the employee to be attributed to the company. As I have said, there is nothing in the EO Act to suggest any intention to exclude those principles from application. Clear words would have been required if that had been the intention.[86] MAXWELL P

122 The common law does not, of course, include any 'reasonable precautions' exception of the kind exemplified by s 123(2) of the *Disability Discrimination Act 1992* (Cth) set out above.[87] It will be a matter for the Victorian Parliament to consider whether the common law principles should be replaced by statutory rules of attribution and whether, as a matter of policy, a company should be exempted from direct liability for discriminatory conduct engaged in on its behalf if it it has taken reasonable precautions to prevent such conduct.

123 The logical corollary of this conclusion — that the conduct of Mr Rowe was conduct of CYC — is that Mr Rowe could not have contravened the EO Act in his own right. For the reasons given, he was not acting in his personal capacity but as the (agent of the) company. I deal later with whether he has any personal liability as an accessory under s 98 of the Act.[88]

No vicarious liability

124 Once it is established that CYC itself committed the act of discrimination, there is no need for any recourse to the statutory scheme for the imposition of vicarious liability. For the reasons already given, Mr Rowe's conduct is attributed to CYC by application of orthodox rules of attribution.

125 The provisions of s 102 are engaged only in a case where the EO Act does not otherwise sheet home to the employer responsibility for the conduct of its agent. As noted earlier, however, both Cobaw and the Attorney-General maintained that s 102 was applicable, and provided the only basis on which CYC could have been made liable. It is necessary, therefore, to explain these conclusions in a little detail.

126 The term 'vicarious liability' appears in the headings to both ss 102 and 103 and in the text of s 103 itself. It is a technical legal term and, there being no indication of a contrary intention, it may be presumed to have been used here in its accepted legal sense.[89] According to established legal usage, 'vicarious liability' for an act or omission means liability imposed on a person who has no personal liability for the act or omission, being 'free from fault'.[90]

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86 Cf *Christie v Permewan Wright & Co Ltd* (1904) 1 CLR 693, 700–1; *McRae v Coulton* (1986) 7 NSWLR 644, 663. Both these cases concern the cognate common law principle, ie, that what a person may do himself he may do through another person duly authorised to do so.

87 In the case of vicarious liability, the EO Act itself provides such an exception. See [81] above.

88 See [145]–[147] below.

89 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (7th ed, 2011) [4.13].

90 C Sappideen, P Vines (ed), *Fleming's The Law of Torts* (10th ed, 2011) [19.10]–[19.20]; M Davies, I Malkin, *Torts* (6th ed, 2012) [16.1]–[16.2]; *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 243.

127 By definition, therefore, direct liability and vicarious liability are mutually exclusive.[91] Where a person is directly liable for a wrong, the term 'vicarious liability' cannot meaningfully be applied to that person in respect of that wrong. In the field of tort, for example, where the liability of a principal for the wrongful act of its agent is direct, there is no scope for vicarious liability.[92] In such a case, the conduct of the agent is attributed to the principal in accordance with ordinary principles of agency.

128 Against that background, it can readily be seen that s 102 imposes vicarious liability properly so-called. That is, it imposes liability for a contravention of the EO Act on a person (employer or principal) who did not commit that contravention and who, therefore, has no direct liability. This is clear from the language used in the section, which imposes vicarious liability in two different circumstances, namely, where the employee or agent:

- contravenes the Act, and is therefore directly (personally) liable; or
- engages in conduct which, while not constituting a contravention by the employee or agent, *would be* a contravention if the conduct was engaged in by the employer or principal.

129 In neither of these circumstances will the employer or principal itself have contravened the Act. By force of the section, however, the employer or principal will be treated (vicariously) as having contravened the Act, unless it can establish that it took reasonable precautions to prevent the employee or agent contravening the EO Act (s 103).

130 Plainly enough, the purpose of s 102 is to create categories of liability for employers and principals *additional* to the categories of direct liability created by pts 3 and 4. If, however, an employer or principal has a direct liability for the conduct in question, s 102 has no work to do. In such a case, liability is imposed by direct application of the substantive provisions.

131 The present case illustrates how the scheme of the EO Act works. CYC contravened the Act (through the agency of Mr Rowe). Its liability is direct, and s 102 has no application. Unsurprisingly, the language of s 102 can be seen to be entirely inapplicable. That is, Mr Rowe neither contravened the EO Act, within the meaning of s 102(a), nor engaged in conduct 'which, if engaged in by [CYC], would have contravened' the EO Act, within the meaning of s 102(b). Since it *was* conduct engaged in by CYC, no occasion arises to make the counterfactual assumption which that paragraph requires.

132 The Attorney-General submitted that ss 102 and 103 'govern the liability of employers and principals for the acts of their servants or agents, and the common law can have no different application'. For the reasons already given, this submission must be rejected. These provisions have an impor-

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91 See, eg, *NIML Ltd v MAN Financial Australia Ltd* (2006) 15 VR 156, 171 [56] (***NIML Ltd***).

92 G E Dal Pont, *Law of Agency* (3rd ed, 2014) [22.3]; *Credit Services Investments Ltd v Evans* [1974] 2 NZLR 683, 685; *Scott v Davis* (2000) 204 CLR 333, 388 [168]; *NIML Ltd* (2006) 15 VR 156, 171 [56].

tantly different purpose, that of *extending* liability beyond that which can be established directly by common law principles of agency and rules of attribution. MAXWELL P

133 Attribution of direct liability to corporations on the basis described above leaves ample scope for s 102 to operate. In short, s 102 will attach liability to a principal or employer in at least the following types of cases, namely:

- where an employee contravenes a prohibition of the EO Act which is expressly directed at the conduct of employees in their capacity as such; or
- where the prohibited conduct is engaged in by an independent contractor while performing services on behalf of the employer or principal.

134 As to the first of these, pt 5 of the EO Act contains a series of prohibitions addressed directly to employees. For example, s 86(2)(a) provides that 'an employee must not sexually harass another person employed by his or her employer'. Section 91(1)(b) provides that 'an employee of an educational institution must not sexually harass a student at that institution'. Should an employee contravene a provision of this kind in the course of his/her employment, s 102(a) would render the employer vicariously liable for that contravention. The decision of the Full Federal Court in *South Pacific Resort Hotels Pty Ltd v Trainor*[93] illustrates the point. There, under relevantly similar provisions of the *Sex Discrimination Act 1984* (Cth), an employer was held vicariously liable for the sexual harassment of one of its employees by another employee.[94]

135 As to the second category, s 4 of the EO Act defines 'employee' to include both:

- a person engaged under a contract of service; and
- a person engaged under a contract for services.

That is, the term 'employee' in this Act covers independent contractors as well as those who would be understood to be employees in the conventional sense. The EO Act thus does away with the distinction which has given rise to such difficulty in the application of vicarious liability at common law.[95] The word 'employment' has the same extended meaning, so that the phrase 'in the course of employment' in s 102 includes 'in the course of providing services under a contract for services'.

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93 (2005) 144 FCR 402. The vicarious liability provision of that Act — s 106 — is set out in [138] below.

94 Similar findings have been made under comparable provisions of the *Anti-Discrimination Act 1977* (NSW): see *Shellharbour Golf Club Ltd v Wheeler* (1999) 46 NSWLR 253 and *NSW Breeding & Racing Stables Pty Ltd v V and X* [2005] NSWCA 114.

95 See, eg, *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

136 Some examples will illustrate how s 102 could operate in conjunction with this extended definition:

- a supplier of goods which engaged a driver to deliver its goods could be vicariously liable for a contravention of s 42(1)(a) if the driver refused, on a prohibited ground, to make a particular delivery;
- a vendor of land who engaged a real estate agent to market and sell the land could be vicariously liable for a contravention of s 47(1)(a) if the agent refused, on a prohibited ground, to deal with a particular prospective purchaser; and
- a sporting club which engaged a coach on a fixed-term contract could be vicariously liable for a contravention of s 65(a) if the coach refused, on a prohibited ground, to select a particular person in a team.

137 There may also be work for s 102 to do in conjunction with provisions such as s 42(1)(c), which provides:

> A person must not discriminate against another person—
>
> ...
>
> (c) by subjecting the other person to any other detriment in connection with the provision of goods or services to him or her.

Where the employer or principal is the provider of the goods and services, an individual employee might be directly liable for a contravention of s 42(1)(c) if —'in connection with the provision of the goods or services' by the employer — the employee subjected the customer to some 'other detriment'. Circumstances can readily be imagined where conduct — for example, using abusive language towards the customer — might properly be viewed as giving rise to personal liability on the part of the employee.[96] If that were the case, s 102(a) would make the employer vicariously liable for the employee's contravention.

138 The distinction between direct and vicarious liability is illustrated by the *Sex Discrimination Act 1984* (Cth), which contains both a statutory rule of attribution of conduct to a company (for direct liability) and a statutory scheme of vicarious liability. As to the first, s 107 provides:

> **107 Acts done on behalf of bodies**
>
> Where, for the purposes of this Act, it is necessary to establish that a body corporate has done an act on a particular ground, it is sufficient to establish that a person who acted on behalf of the body corporate in the matter so acted on that ground.

As to vicarious liability, s 106 provides:

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96 In *Houghton v Arms* (2006) 225 CLR 553, individual employees who made misleading statements in the course of the employer's business were held personally liable under s 9 of the *Fair Trading Act 1999* (Vic). It had not been suggested that their conduct was the conduct of the employer: [44].

MAXWELL P

106 Vicarious liability etc

(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:

(a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or

(b) an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

Consistency with legislative purpose

139 As noted earlier, Cobaw contends that an approach which attributes the conduct of a company's employee to the company has the unfortunate result that the employee will escape personal liability for the act of discrimination. This is said to be contrary to what must have been the intention of the legislature. The Attorney-General advances a similar contention, to the effect that the (implicit) legislative objectives of deterrence and denunciation would be best served by an interpretation which made the employee, rather than the employer, directly liable for discriminatory conduct occurring in the course of the employment.

140 There are, I think, two answers to these submissions. First, even if they were correct, they could not justify an interpretation which was contrary to the express language and purposes of the Act. Secondly, and in any event, the rule of attribution which I have identified is likely to have a much more powerful deterrent and denunciatory effect than an approach which singles out the individual employee as the sole direct contravenor.

141 The conclusion that CYC, not Rowe, committed the act of discrimination advances the legislative policy of non-discrimination. This is protective legislation, like the childcare legislation considered by this Court in *ABC Developmental Learning Centres v Wallace*.[97] The prohibition against discrimination is absolute. That is, a person (in this case, CYC) must not discriminate against another person by refusing to provide services to that other person on a prohibited ground. It need not be shown that the person knowingly or intentionally discriminated. Instead, the obligation imposed by the EO Act on a provider of services or accommodation is to ensure that, in the course of conducting the business of providing services or accommodation, there is no refusal on a prohibited ground.

142 On this view, it does not matter how or why it comes about that a prohibited refusal occurs. It is enough to prove that it did occur. As the EO Act stands, it does not matter that the company servant in question disobeyed company instructions, or acted out of personal prejudice. The fact is that there has

97 (2007) 16 VR 409.

been a contravention. The company has failed to ensure that no discriminatory acts took place. This implied obligation is even stricter than the express safety duty imposed on employers under s 21(1) of the *Occupational Health and Safety Act 2004* (Vic), since it is not qualified by words such as 'as far as reasonably practicable'.

143 Exposing employers to direct liability for discriminatory conduct creates a powerful incentive for them to ensure that their activities are conducted in compliance with the Act. Lord Diplock in *Tesco*[98] pointed out that the purpose of protective statutes 'is achieved only if the occurrence of the prohibited acts or omissions is prevented'. His Lordship continued:

> Where, in the way that business is now conducted, they are likely to be acts or omissions of employees ..., the most effective method of deterrence is to place upon the employer the responsibility of doing everything which lies within his power to prevent his employees from doing anything which will result in the commission of an offence.[99]

144 It would, of course, be open to the Victorian Parliament to legislate that, where an employer contravened a provision of the EO Act because of the actions of one of its employees, that employee was also personally liable. That is the effect of the Commonwealth statutes referred to earlier.[100] The Western Australian Parliament evidently had the same object in mind when it enacted s 35Z(1) of the *Equal Opportunity Act 1984* (WA), which provides:

> It is unlawful for a person, *whether as principal or agent*, to discriminate against another person on the ground of the other person's sexual orientation—
>
> (a) by refusing the other person's application for accommodation ...[101]

Liability of Mr Rowe as accessory?

145 The EO Act has its own accessory provision, in s 98, which provides as follows:

> A person must not request, instruct, induce, encourage, authorise or assist another person to contravene a provision of Part 3, 5 or 6.

There is an obvious difficulty, in a case such as the present, in applying this provision to Mr Rowe. For the reasons I have given, his action constituted the contravention by the company.

146 That does not conclude the question, however, as the High Court explained in *Hamilton v Whitehead*.[102] Where the conduct of an officer of a company is treated as the conduct of the company for the purposes of establishing the commission of an offence by the company, there is 'nothing conceptually wrong' with the officer being charged as an accessory to the principal of-

98 [1972] AC 153, 194.
99 Ibid.
100 See [118]–[120] above.
101 Emphasis added.
102 (1988) 166 CLR 121, 128.

fence. That case concerned the managing director of the relevant company, who was 'the actor in the conduct constituting the offences and had knowledge of all the material circumstances'.[103] The Court held that he should properly have been convicted, under the applicable provision creating accessory liability, of being 'knowingly concerned' in the commission of the offences by the company. MAXWELL P

147 Of the various alternatives provided for by s 98, the only one which might be said to apply here is 'assist'. There is clearly room for debate as to whether it could meaningfully be said of Mr Rowe's conduct that he 'assisted' CYC to contravene the prohibitions. On one view, the notion of 'assistance' is only capable of applying to the conduct of a person which is separate from the relevant conduct of the contravenor. It is unnecessary to explore this question further, however, since no such case was ever formulated against Mr Rowe, either at trial or on the application for leave to appeal.

Conclusion

148 It follows that the Tribunal erred in law in finding that Mr Rowe was the contravenor and that CYC was vicariously liable by virtue of s 102. Although this issue was not raised by the applicants in the grounds of appeal, and only addressed by them after the question had been raised by the Court, I consider that the Court has no alternative but to correct the error.

149 This is a matter of fundamental importance to the interpretation of the EO Act and its application to conduct engaged in on behalf of corporations by their authorised employees. A decision based on what I have concluded is an incorrect legal analysis cannot be allowed to stand. Moreover, as mentioned earlier, the identification of the discriminator has direct consequences for the applicability of the exemptions.

150 There is before the Court an application filed on behalf of Cobaw, for leave to file an amended notice of contention which includes the following ground:

> If the Tribunal fell into error of law in finding that [Mr Rowe] had contravened ss 42(1)(a), 42(1)(c) and 49(1) of the Act, the Tribunal's findings of fact were such that the only conclusion open to the Tribunal was that [CYC] had contravened ss 42(1)(a), 42(1)(c) and 49(1) of the Act.

In a supporting submission, Cobaw contended that leave should be granted because the proposed new contention arose directly out of an issue raised by the Court, and 'simply invoked' the Court's power under s 148(7)(a)(b) of the VCAT Act. The applicants do not oppose the grant of leave for that amendment.

151 In my opinion, leave should be granted. As I have said, this issue involves a question of law fundamental to the operation of the Act. Accordingly, quite different discretionary considerations arise from those relating to the

[103] Ibid 128.

additional ground of appeal which the applicants seek to add.

152 There is, in my view, no injustice in permitting this amendment. It concerns the correct legal characterisation of the facts as found by the Tribunal.[104] As Cobaw submitted, the course of the evidence would have been no different had the original complaint been formulated in this way.

153 For the reasons I have given, CYC was a contravenor, but not on the legal basis identified by the Tribunal. On the findings made by the Tribunal, the only conclusion open as a matter of law was that the act of discrimination was committed by CYC itself. In the circumstances, the powers conferred by s 148 of the VCAT Act enable this Court to make the order which the Tribunal should have made.[105]

154 The next question is whether the trial judge erred in her conclusion that neither of the exemptions relied on by CYC was applicable to this case.

PART 2: THE RELIGIOUS FREEDOM EXEMPTIONS

Summary

155 In her 1995 Second Reading Speech, the Attorney-General said:

> This bill attempts to strike a balance between the rights and freedoms of individuals by providing for limited exceptions where discrimination in the circumstances specified in the bill will not be unlawful. ... These exceptions balance the aims of equal opportunity and the elimination of discrimination and a number of competing considerations, such as the desire to infringe as little as possible on private spheres of activity.

156 The first relevant exception is to be found in s 75, which provides as follows:

> **75 Religious bodies**
>
> (1) Nothing in Part 3 applies to—
>
> (a) the ordination or appointment of priests, ministers of religion or members of a religious order;
>
> (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order;
>
> (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.
>
> (2) Nothing in Part 3 applies to anything done by a body established for religious purposes that—
>
> (a) conforms with the doctrines of the religion; or
>
> (b) is necessary to avoid injury to the religious sensitivities of people of the religion.

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104 Cf *Ravinder Rohini Pty Ltd v Krizaic* (1991) 105 ALR 593, 606; *Battye v Shammall* (2005) 91 SASR 315.

105 *Osland v Secretary, Department of Justice (No 2)* (2010) 241 CLR 320, 332–3 [20]; *DFJ v Secretary, Department of Justice* (2012) 36 VR 66, 82 [95]–[96].

MAXWELL P

(3) Without limiting the generality of its application, subsection (2) includes anything done in relation to the employment of people in any educational institution under the direction, control or administration of a body established for religious purposes.

157 CYC and Mr Rowe both relied on s 75(2). Although only CYC could claim to be 'a body established for religious purposes', the Tribunal accepted CYC's submission that 'Mr Rowe, acting as its agent, must also be entitled to invoke [the] protection' of s 75(2).[106] In the event, her Honour held that the exemption was not available to either of them, as CYC was not 'a body established for religious purposes'.

158 For reasons which follow, I consider that there was no error of law in arriving at that conclusion. I consider, however, that the exemption under s 75(2) could only ever have been available to CYC. If — contrary to my view — Mr Rowe were himself a contravenor, the only exemption which would have been available to him was s 77.

159 The second relevant exception is in s 77, which provides as follows:

> **77 Religious beliefs or principles**
>
> 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.

160 In relation to s 77, the Attorney-General said:

> The bill provides an exemption for discrimination which is necessary to comply with a person's genuine religious beliefs or principles. It aims to strike a balance between two very important and sometimes conflicting rights — the right of freedom of religion and the right to be free from discrimination.
>
> Equal opportunity legislation may sometimes compel individuals to change their conduct and practices in order to ensure that discrimination which may be harmful to others does not occur. *However, the government recognises that it is not acceptable to compel a person to act in a way that would compromise his or her genuinely held religious beliefs.* I wish to emphasise that religious beliefs must be absolutely genuine in order to qualify for the exemption and if a complaint is made that quality will have to be proven to the commission and/or tribunal.[107]

161 The Tribunal held that CYC, as well as Mr Rowe, was 'a person' for the purposes of s 77 and could invoke its protection. In her Honour's view, it was no more incongruous to attribute a religious belief to a corporation than to attribute other states of mind such as intention, which the law already recognised.[108] On the facts, however, the claim to exemption failed. Her Honour was not satisfied that the refusal of the application for accommodation was 'necessary to comply with the genuine religious beliefs

106 Reasons [229].

107 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1254 (Jan Wade, Attorney-General) (emphasis added).

108 Reasons [350]–[351].

or principles' of either Mr Rowe or CYC.[109]

162 As will appear, I do not consider that Parliament intended the s 77 exemption to be available to a corporation. On that view, the exemption could never have assisted CYC, though Mr Rowe — if he were a contravenor — could have invoked s 77.

163 Before I deal with the submissions on statutory interpretation, there is a preliminary point to be disposed of. In argument, senior counsel for the applicants submitted that ss 75(2) and 77 created 'exclusions' rather than 'exemptions'. He drew attention to the introductory words to each of the sections: 'Nothing in Part 3 applies to … ', which it was agreed created a 'zone of inapplicability'.

164 The EO Act provides its own answer to this submission. Section 12 is in these terms:

> This Act does not prohibit discrimination if an exception in Part 3 … or Part 4 or an exemption under Part 4 applies.

165 It can be seen that the distinction sought to be drawn is immaterial for present purposes.

166 What is unambiguously clear is that the prohibitions against discriminatory conduct in pt 3 have no application to conduct which falls within either s 75(2) or s 77. Such conduct is exempted, or excluded, or excepted, from the scope of the statutory prohibitions. Where conduct which would otherwise contravene one or more of those prohibitions falls within one of the exemptions, there is no contravention.

The approach to interpretation

167 Three issues of statutory interpretation were debated on the appeal, as follows:

(a) whether s 32(1) of the Charter was applicable;

(b) whether the special character of the religious freedom exemptions, being themselves protective of a human right, required the adoption of a 'broad' approach to their interpretation;

(c) whether and to what extent the interpretation of the exemptions might be informed by jurisprudence relating to the religious freedom guarantees in international human rights instruments.

I deal with each of these issues in turn.

109 Reasons [356].

Why s 32(1) does not apply MAXWELL P

168 Section 32(1) of the Charter provides as follows:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

169 As noted earlier, the Tribunal held that s 32(1) was applicable to the interpretation of the relevant provisions of the Act. In rejecting CYC's submission that the Charter had no application, her Honour drew attention to s 49(1) of the Charter, which provides:

> This Charter extends and applies to all Acts, whether passed before or after the commencement of Part II ...

Her Honour also referred to s 1(2)(b) of the Charter, which provides:

> The main purpose of this Charter is to protect and promote human rights by —
>
> (a) setting out the human rights that Parliament specifically seeks to protect and promote; and
>
> (b) ensuring that all statutory provisions, *whenever enacted*, are interpreted so far as is possible in a way that is compatible with human rights ...[110]

In her Honour's view, these provisions provided a complete answer to CYC's submission that s 32(1) was inapplicable because the Charter was a later enactment than the Act itself.

170 The other ground relied on by CYC was that the events the subject of the discrimination complaint had occurred before 1 January 2008, that being the date on which s 32(1) came into operation.[111] CYC relied on s 49(2) of the Charter, which provides:

> This Charter does not affect any proceedings commenced or concluded before the commencement of Part 2 [being 1 January 2008].

Her Honour also rejected this argument, reasoning as follows:

> This proceeding was commenced after that date. Once it is appreciated that s 32 of the *Charter* extends and applies to the interpretation of legislation, whenever enacted, it follows that, absent express provision to the contrary, it applies to the interpretation of legislation in any proceedings commenced after s 32 came into effect. The Court of Appeal and the Trial Division of the Supreme Court have, consistently with that, applied the interpretation provision of the *Charter* to conduct occurring before 1 January 2008, in proceedings commenced after that date.

171 The Solicitor-General appeared on the appeal for the Attorney-General, who intervened pursuant to the statutory right conferred by s 34(1) of the Charter. It was submitted that the Tribunal had erred in concluding that s 32(1) was applicable. The submission is expressed as follows:

> The complaint of discrimination arose out of conduct alleged to have occurred

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110 Emphasis added.

111 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 2(2).

in June 2007. The interpretive obligation in s 32 of the Charter Act commenced operation on 1 January 2008. To apply s 32 to the interpretation of the *Equal Opportunity Act 1995* (Vic) (**EO Act**) to events pre-dating the Charter Act would alter the rights, obligations and interests of the parties to the proceeding with retrospective effect. Although s 32 of the Charter Act applies to the interpretation of laws previously enacted, it does not do so with an operation retrospective to the Charter Act.

172 The Solicitor-General contended that the established common law statutory presumptions against retrospective legislation were applicable to the Charter, as to any other Act of the Victorian Parliament.[112] Accordingly, there being no indication of a contrary legislative intention, nothing in the Charter should be interpreted as retrospectively altering the rights, obligations or liabilities arising under an Act.

173 In relation to s 49(2), the Solicitor-General submitted that to apply s 32(1) to pre-Charter events simply because proceedings were issued after a particular date would make the Charter operate capriciously. Reliance was placed on the following statements by Lord Nicholls in *Wilson v First County Trust (No 2)*:

> Considerable difficulties, however, might arise if the new interpretation of legislation, consequent on an application of section 3, were always to apply to pre-Act events. It would mean that parties' rights under existing legislation in respect of a transaction completed before the EO Act came into force could be changed overnight, to the benefit of one party and the prejudice of the other. This change, moreover, would operate capriciously, with the outcome depending on whether the parties' rights were determined by a court before or after 2 October 2000. The outcome in one case involving pre-Act happenings could differ from the outcome in another comparable case depending solely on when the cases were heard by a court. Parliament cannot have intended section 3(1) should operate in this unfair and arbitrary fashion.
>
> [I]n general the principle of interpretation set out in section 3(1) does not apply to causes of action accruing before the section came into force. The principle does not apply because to apply it in such cases, and thereby change the interpretation and effect of existing legislation, might well produce an unfair result for one party or the other. The Human Rights Act was not intended to have this effect.[113]

174 The Victorian Equal Opportunity and Human Rights Commission, which was named as a respondent in the appeal, submitted that her Honour's conclusion was correct. The submission sought to distinguish the present case from those relied on by the Attorney-General, on the ground that the events with which those cases were concerned had occurred before any of the provisions of the Charter had come into force.

175 The submission pointed out that, at the time of the alleged discriminatory conduct in June 2007, the rights in pt 2 of the Charter (including the right

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[112] See *Collier v Austin Health* (2011) 36 VR 1, 5 [18]–[22]; *Victoria v Turner* (2009) VSC 66 [268]; *MBF Investments Pty Ltd v Nolan* (2011) 37 VR 116, 127 [31] (***MBF Investments***).

[113] [2004] 1 AC 816, 831–2.

to freedom of religion and the right to equality) were already part of the law of Victoria as rights which the Victorian Parliament sought to protect and promote. The definition of those rights was in force from 1 January 2007. In other words, from that date the Charter 'provided statutory recognition to the content of longstanding human rights at international law'. MAXWELL P

176 In my opinion, the submission for the Attorney-General is correct and must be upheld. The point may be expressed shortly. At the time of the events in question, the provisions of the EO Act were to be interpreted and applied in accordance with ordinary principles of interpretation. Section 32(1) of the Charter was not yet in force.

177 The question of whether CYC had engaged in prohibited discrimination fell to be determined by the provisions as in force at the date of the conduct in question. To be more precise, if the conduct in question was exempt under the pre-Charter interpretation of the relevant provisions, there was no contravention of the Act. No subsequent change in interpretation could affect CYC's liability. If s 32(1) were treated as applicable to the interpretive task, and if that resulted in the relevant provisions of the EO Act being interpreted differently from the interpretation which the law required as at June 2007, this would amount to a retrospective alteration of the law.

178 It follows that s 32(1) had no application to the task before the Tribunal.[114] The Tribunal's conclusion that s 32(1) applied was therefore erroneous. The error was, however, immaterial. All of the parties to the appeal, with the exception of the Commission, accepted that the interpretation of the relevant provisions of the EO Act would be the same whether or not s 32(1) applied. Accordingly, the error does not affect the validity of the Tribunal's decision.[115]

179 Nothing I have said here conflicts with s 49(1) of the Charter. The interpretive rule in s 32(1) applies to the interpretation of all pre-Charter Victorian statutes, except where (as here) the conduct to which the particular statute is said to apply occurred before 1 January 2008, when s 32(1) came into force.

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114 *MBF Investments* (2011) 37 VR 116, 127 [31]; *WBM v Chief Commissioner of Police* (2012) 43 VR 446, 467 [90].

115 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 354, 384; *Samad v District Court (NSW)* (2002) 209 CLR 140, 155 [44]; *Kozanoglou v Pharmacy Board of Victoria* [2012] VSCA 295 [121], [124].

Interpreting exemptions which protect a human right

180 The submissions of the interveners — the Attorney-General and the Commission — helpfully drew attention to relevant interpretive principles, as follows:

(a) being beneficial and remedial legislation, the EO Act is to be given a liberal construction, rather than one which is 'literal or technical';[116]

(b) since the EO Act is intended to eliminate discrimination 'as far as possible', the provisions of the EO Act should as far as possible be construed so as to eliminate discrimination;[117]

(c) aids to construction — such as the principle of liberal interpretation of remedial provisions — are generally invoked when there is some ambiguity on the face of the particular statutory provision.[118]

181 Since the task for the Court is one of statutory interpretation,[119] consideration must begin, and end, with the words which Parliament used to give effect to its intention.[120] Parliament has carefully defined in ss 75–7 the scope of the protection to be afforded to religious freedom within the framework of legislation established to ensure freedom from discrimination. Those provisions should be interpreted according to the ordinary meaning of the words used.

182 The Attorney-General submits, however, that a special interpretive principle applies to these exemptions. Because their purpose is to protect a human right, it is said, the exemptions must be given a 'broad' interpretation. This principle is said to be established by the judgment of French J, as a member of the Full Federal Court in *Bropho v Human Rights and Equal Opportunity Commission*.[121]

183 I would reject that submission. *Bropho* establishes no such principle. Leaving aside the fact that the views expressed by French J were not adopted by the other member of the majority in that case (Carr J), what his Honour said was expressly referable to — and only to — the quite different statutory scheme there under consideration.

184 *Bropho* concerned the *Racial Discrimination Act 1975* (Cth). The EO Act had been amended to insert s 18C, which made it an offence for a person to do an act which was 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person', if the act was done because of the race, colour or national or ethnic origin of the other person. The new offence provision was accompanied by s 18D, which relevantly provided:

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116 *IW v City of Perth* (1997) 191 CLR 1, 12, 39 (***IW***).
117 Ibid 12.
118 *Rose v Department of Social Security* (1990) 21 FCR 241, 244 (***Rose***).
119 *IW* (1997) 191 CLR 1, 12; *Rose* (1990) 21 FCR 241, 244.
120 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39].
121 (2004) 135 FCR 105 (***Bropho***).

MAXWELL P

> Section 18C does not render unlawful anything said or done reasonably and in good faith:
>
> (a) in the performance, exhibition or distribution of an artistic work ...

185 At issue was the interpretation of the phrase 'reasonably and in good faith' in s 18C. In the view of French J:

> The proscription in s 18C itself creates an exception to the general principle that people should enjoy freedom of speech and expression. That general principle is reflected in the recognition of that freedom as fundamental in a number of international instruments and in national constitutions.[122]

His Honour continued:

> The efficacy of the general principle so stated is demonstrated by approaches to statutory interpretation in relation to common law rights and freedoms set out in such decisions as *Potter v Minehan*, *Bropho v Western Australia* and *Coco v The Queen*.
>
> ...
>
> *Against that background s 18D may be seen as defining the limits of the proscription in s 18C and not as a free speech exception to it. It is appropriate therefore that s 18D be construed broadly rather than narrowly.*[123]

186 The structure of the EO Act is, of course, quite different. The religious exemptions are of general application, expressed to cover conduct across the broad scope of pt 3 of the Act. Sections 75–7 are not 'exemptions upon an exception'. They do not 'define the limits' of the prohibitions on discrimination. On the contrary, they are properly regarded as defining exemptions from the scope of those prohibitions.

187 It should be noted, moreover, that French J approved the following statement made by the primary judge:

> There is consequently nothing in either the Explanatory Memorandum or Second Reading Speech ... to suggest that the exemption provisions in s 18D should be read other than in *a way which gives full force and effect to them.*[124]

That is the approach which the Tribunal took in the present case. After considering the competing submissions on the correct approach to the interpretation of the exemptions, her Honour concluded as follows:

> I must therefore interpret ss 75(2) and 77, having regard to the purpose of those exceptions, namely to protect religious freedoms, and in a manner consistent with the rights to freedom of thought, conscience, religion and belief in s 14 of the *Charter*, and freedom of expression in s 15 of the *Charter* but also, so far as is possible, in a manner which is compatible with the rights to equality and freedom from discrimination in s 8 of the *Charter*. *I must do so in a way which does not privilege one right over another, but recognises their co-existence*.[125]

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122 Ibid 125 [72].
123 Ibid 125–6 [72]–[73] (emphasis added, citations omitted).
124 Ibid 126 [73] (emphasis added).
125 Reasons [225] (emphasis added).

188 For the reasons already given, the provisions of the Charter were not relevant as such, but her Honour's reference to them in this context demonstrates that she directed herself correctly on the approach to interpretation of the exemptions. That is, the exemptions must be interpreted according to their purpose of protecting religious freedom, and neither one of the 'co-existing' rights was to be privileged over the other.

International human rights law

189 Article 18 of the *International Covenant on Civil and Political Rights* (**the Covenant**) defines the right of religious freedom in the following terms:

> 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 beliefs 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.

190 As senior counsel for the Commission pointed out, art 18 draws a distinction between the freedom 'to have or to adopt' a religion or belief, and the freedom 'to manifest [that] religion or belief in worship, observance, practice and teaching'. Article 18 permits no limitation of any kind on the freedom to hold a religious belief. The freedom to manifest a religious belief, however, may be subject to limitations. As art 18.3 recognises, this freedom may need to be limited in order 'to protect … the fundamental rights and freedoms of others.'

191 Of what relevance are these provisions, or their equivalents in the *European Convention on Human Rights*, to the issues before the Court? This question was explored extensively on the appeal, both orally and in writing. The chief protagonists were the Attorney-General and the Commission, whose helpful submissions illuminated one of the more difficult issues in statutory interpretation.

192 It was common ground that, as a matter of established principle, courts should favour a construction of legislation which accords with Australia's obligations in international law.[126] The Attorney-General's submission quoted the following passage from the judgment of Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh*:

> [T]o require the courts to favour a construction, *as far as the language of the legislation permits*, that is in conformity and not in conflict with Australia's in-

[126] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; *Coleman v Power* (2004) 220 CLR 1, 26–7 [19]; *Royal Women's Hospital v Medical Practitioners Board* (2006) 15 VR 22, 39 [75].

> ternational obligations ... If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.[127]

193 At the same time, the Minister's submission raised a number of questions about the scope of this principle, namely, whether:

(a) the applicability of the principle depended upon there being an ambiguity in the statutory provision;

(b) its application to State law was weakened by the fact that it was the Commonwealth, not the States, which assumed the international obligations; and

(c) the principle 'must give way to a construction reached through ordinary means'.

194 It is unnecessary, in my view, to resolve any of these questions for the purposes of this appeal. On the assumption that Australia's obligations under the Covenant were relevant, all that could be said is that the provisions of the EO Act are in conformity, and not in conflict, with those obligations.

195 The EO Act gives effect to both rights — freedom from discrimination and freedom of religion. So far as it addresses the latter, the structure of the EO Act can be seen to reflect that which art 18.3 of the Covenant contemplates, namely, that the freedom to manifest a religious belief may be subject to restrictions necessary to protect the freedom of others. Under the EO Act, discriminatory conduct cannot be justified in the name of religious freedom unless it falls within one of the exemptions.

196 The Covenant is silent as to how such a balancing of rights is to be effectuated. As the Commission pointed out, parties are given a large 'margin of appreciation' in this respect. Hence, even if there were alternative interpretations available, the Covenant would provide no guidance as to which of the interpretations was to be preferred.

197 As the Attorney-General submitted, the exceptions 'reflect the careful balance struck by Parliament with respect to the potentially competing rights'. The task for this Court is to construe the particular language used, in its own statutory context.[128] At the same time, as the Attorney-General also submitted, it is both necessary and appropriate in construing the exemption provisions to have regard to their stated purpose, of protecting the right to religious freedom.

198 As noted earlier, the then Attorney-General in introducing the legislation referred specifically, but without elaboration, to the right of freedom of

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127 (1995) 183 CLR 273, 287 (emphasis in submission).

128 *Carr v Western Australia* (2007) 232 CLR 138, 143 [5]; *Re CSR Ltd* (2010) 183 FCR 358, 374–5; *MyEnvironment Inc v VicForests* (2013) 42 VR 456.

religion. It is an abstract concept, of uncertain scope. Some understanding of what the enjoyment of that right has been held to involve is, therefore, necessary in order to appreciate the context in which the provisions are to be construed. Thus, as will appear, the present Attorney-General's submissions relied on decisions of the European Commission on Human Rights, in support of his argument that the exemption in s 77 — which concerns religious belief — was intended to be available to corporations as well as to natural persons.[129]

The exemption under s 75(2)

199 As already noted, the Tribunal concluded that CYC was not 'a body established for religious purposes'. The factual background relevant to this issue was set out in detail by the Tribunal. There being no challenge to her Honour's findings of fact (apart from the ultimate finding), what follows is drawn from the reasons for decision.[130]

200 The land on which the Resort is situated is owned by the trustees of the Christian Brethren Trust. The Christian Brethren in Victoria is part of what was described as a world-wide movement of Christian Churches, initially called 'the Open Brethren', which began in the mid-19th century in England.

201 The Christian Brethren Trust is a trust registered under the *Religious Successory and Charitable Trusts Act 1958* (Vic), now named the *Religious and Successory Trusts Act 1958* (Vic). Section 5 of that Act permits trusts for 'public religious educational or charitable purposes' to be registered.

202 The Trust Deed was made on 1 August 1921. The trustees had acquired certain land and, by the Deed, declared that a place of worship and other buildings were to be erected on the land. These would be premises in which 'the meeting of the Assembly of the Open Brethren' would be held.

203 Under the Deed, no person would be permitted to use the premises to preach or expound God's word, or perform acts of religious worship, if they promulgated any doctrine or practice contrary to the 'fundamental beliefs and doctrines' of the Open Brethren (as they were then known). Specifically, no preaching would be permitted which was contrary to the following 'doctrines' listed in the Deed:

> Eternal Sonship and Deity of our Lord Jesus Christ, The full efficacy of His atonement only for the Sins of whomsoever believeth: The resurrection Ascension and Coming again of Our Lord Jesus Christ: The quickening indwelling and sanctifying Power of the Holy Spirit: the Eternal Punishment of the wicked and the Plenary Inspiration of the Holy scriptures.

204 By the terms of a supplemental Trust Deed dated 5 February 1962, the trustees were empowered to acquire real property and apply it towards the

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129 See [321] below.

130 Paragraphs [200]–[211] and [213]–[217] are based on [232]–[247] of the Tribunal's reasons.

establishment or conduct of 'such charitable purposes as the trustees deem likely to be of benefit for, or for the furtherance of, the objects and purposes of the Christian Brethren'. Shortly before they acquired the Resort land, the trustees recorded their view[131] that 'the conduct ... of camping, conference and other facilities' on the land was 'likely to be of benefit for or for the furtherance of the objects and purposes of the Christian Brethren'. MAXWELL P

205 CYC is the lessee of the Resort land from the trustees. CYC is a company limited by guarantee, formed in January 2001. It operates the Resort. By the terms of its constitution, CYC operates the 'camping program' or 'camping ministry' in its own right, not as a manager for or on behalf of the trustees. According to the constitution, the objects for which CYC is established are:

(a) to conduct such camping, conferencing and similar facilities for the benefit of the community and in accordance with the fundamental beliefs and doctrines of the Christian Brethren and in particular the doctrines referred in the Trust Deed dated 1 August 1921;

(b) to create an atmosphere throughout the facilities that is obviously Christian so that all who use the facilities are aware that the facilities are a place where God is honoured, where there is an atmosphere of peace, and where there is an opportunity of experiencing the truth of God's love;

(c) to provide through the provision of the camping, conference and related facilities, an environment and the opportunity to communicate the Christian faith in a way which is culturally relevant;

(d) to run camping, conference and related facilities to cater for all age groups but in particular to provide facility [sic] for primary and secondary school children;

(e) to permit the use of such facilities under CYC's control to be used for camping, conferencing and related facilities so as to create opportunities for all who visit the campsites[132] personally to experience Christian life and values;

(f) to provide accommodation and facilities for holidays for disadvantaged persons;

(g) to provide accommodation and facilities for other compatible charitable groups to use the facilities conducted or operated by CYC to develop and implement their own programs of care;

(h) to conduct and operate the [campsites] subject to and consistently with the provisions hereof;

(i) to conduct and operate the facilities so as to be independent from the Trust and to pay to the Trust such rental licence and/or other payments as shall be demanded by the Trustees for the use of the campsites;

(j) to make such further payments to the Trustees to advance such other charitable purposes deemed by the Trustees to be of benefit for or for the furtherance of the objects and purposes of the Christian Brethren or for other objects and purposes which are charitable in law and which are not inconsistent with the objects and purposes of the Christian Brethren; and

(k) solely for the purpose of furthering the purposes set out in the paragraph

131 CYC Constitution cl 1.7.

132 CYC operates three other camps.

> immediately above, CYC shall have the power to do all other things which are incidental or conducive to the attainment of the purposes indicated above.[133]

206 By cl 1.9 of CYC's constitution, its income and property must be applied 'solely towards the promotion of the objects of CYC as set forth in [the] Constitution'. The members of CYC are required to subscribe to a declaration of faith which, although couched in different language, is essentially the same as the 'fundamental beliefs and doctrines' listed in the Trust Deed.

207 A number of witnesses gave evidence about CYC's operations and activities. Most of this concerned the Resort, although there was some reference to the other activities conducted by CYC. Mr Rowe, Ms Linda Fry and Mr Darren Blood, all CYC employees working at the Resort, gave evidence about aspects of its activities. Mr George Buchanan, a director of CYC since its formation, gave evidence about CYC's activities more generally. He and Mr Rowe also referred to a 'Strategic Planning Document' (the **strategic plan**)) prepared in 1999 by Christian Youth Camps Inc, the predecessor to CYC. Reliance was also placed on the CYC website, the Resort website, and advertising or marketing brochures concerning CYC and the Resort, as they existed at the relevant time in 2007.

208 The strategic plan was, necessarily, of limited relevance. It predated the establishment of CYC, and the adoption of the objects set out above. For the most part, however, its content is consistent with those objects. That is, the mission of the predecessor company was said to be:

> [T]hrough camping, conferencing, facilities and programmes to create opportunities for all involved to personally experience Christian life and values.

That company's core purpose was said to be:

> **Living out the word of life**: A commitment to care and provide for, without favour, all the spiritual camping and conference needs of every guest and associate, potential and actual, at every opportunity.

209 As the Tribunal noted, the strategic plan set out a number of what were called 'presuppositions'. This section of the plan identified emerging trends in the field of recreational camping accommodation. Trends were identified in relation to church camps, school camps and corporate camps respectively. Under the heading 'General', the document stated:

- twenty years ago, secular camping made up 20% of the industry, whereas today it accounts for 80%;
- the Camping Association of Victoria (now Australian Camping Association) is a secular organisation recognised by the government as being the one which sets the standards;
- an increasing need for very large (300-plus) national conferences, both Christian and secular, some of which are held at the same place each year, and some of which rotate from state to state each year;

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133 Constitution cl 1.8.

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- many groups, particularly school and church groups, use a professional agency to book their camp;
- an increase in expectations of the quality of facilities, and of service;
- in an ageing society, there are more older individuals and couples who demand individual and suitable accommodation.

210 The company's 'sustainable competitive advantage' was said to derive from such things as the location of the sites, their attractiveness, the 'low tariffs' charged for the facilities and services offered and the 'consistency of standards'. The 'envisioned future' for the company was:

> To provide a 350+ bed conference and camping centre ensuring flexibility and financial viability, with a commercially respected standard of excellence in presentation, facilities and guest care.

The document concluded by listing the following 'Cornerstones':

1. Innovative buildings/facilities and technology
2. Standards — external and independent accreditation and quality trained staff and leaders
3. Safe, challenging programmes
4. Relevant Gospel message

211 The manner in which the Resort advertised its services in its brochures, and on its website, was directed to both secular camping activities and camps with an overtly religious component. The home page of the Resort website makes no reference to the Christian Brethren religion, the Christian Brethren Trust or to any overtly religious purposes of the Resort. The only reference to CYC is in the copyright notation at the very bottom of the homepage, which simply records that CYC holds the copyright.

212 Unsurprisingly, but significantly, there was no suggestion in any of the material which CYC made available to the public that, because of the beliefs (or doctrines) of the Christian Brethren, bookings would not be taken from persons of same sex sexual orientation. In this respect, the present case may be contrasted with that of *Preddy*,[134] recently decided by the UK Supreme Court. There, the proprietors of a private hotel held the same religious belief as the Christian Brethren, namely, that it was sinful to have sexual relations except within a marriage between a man and a woman. Unlike CYC, however, they stated clearly in their online booking form that rooms with double beds were not available for booking by same sex couples; and when a telephone inquiry was made, the caller would be asked whether the booking was for a married couple.[135]

213 Links from CYC's homepage lead to separate webpages describing the services offered, respectively, for church camps, youth camps, school camps,

134 [2013] 1 WLR 3741. The Supreme Court dismissed an appeal from the decision of the Court of Appeal: *Preddy v Bull* [2012] 1 WLR 2514.

135 *Preddy* [2013] 1 WLR 3741, 3746 [9], [10].

conferences, corporate groups and international groups. A person visiting the homepage who took a link to any of the pages for youth camps, school camps, conferences or corporate or international groups would not be exposed to any information about church camps. Nor do any of these linked pages make any connection to the Christian Brethren religion, the Christian Brethren Trust or to CYC, apart from the same copyright notation as appears on the homepage. There is nothing in the descriptions of these camps which indicates any religious component to the camps, or any religious connection or requirement as a pre-condition to booking. The link to church camps makes no specific reference to the Christian Brethren religion or the Christian Brethren Trust, although there is reference to Christian Youth Camps having 'for over fifty years provid[ed] quality Church Camp experiences'.

214 Nor do CYC's brochures make any reference to the Christian Brethren religion, the Christian Brethren Trust or to 'Christian Youth Camps Limited', or to church camps. The contact details, the email address and website address do not reveal that there is any connection with the Christian Brethren religion, the Christian Brethren Trust or any Christian association. The brochures contain a logo with the words 'A CYC trading company' but the email and website addresses 'cyc.org.au' give no indication of any Christian or Christian Brethren connection. The brochures contain the following words:

> The resort can accommodate a full range of educational camps, conferences, seminars, staff/team building and athletic training, or a simple family reunion, for groups from 20 to 420 plus guests.

215 The oral evidence confirmed that CYC operated the Resort in the manner held out in the website and the brochures. There is no restriction of any kind on who may book the Resort, or for what purpose. In particular, the services and accommodation offered by the Resort are not limited to camps for members of the Christian Brethren religion, or to camps which have a religious content connected with the Christian Brethren religion, or to camps conducted under the auspices of church groups or with an overt Christian or religious content.

216 Much of the camping business conducted by CYC at the Resort is secular: school camps, corporate camps and groups with no explicit religious connection. The Resort is operated as a commercial venture. Last year, its turnover was approximately $6 million and it returned approximately $1.5 million to the Christian Brethren trustees under the terms of its constitution.

217 CYC does conduct Christian camps at the Resort. It also provides its facilities for the conduct of Christian camps conducted by other church groups. The evidence revealed that CYC itself did not provide any religious input into camps run by other church groups. A significant part of the Resort's business is school groups, with students from both the public and private school system using the facilities. CYC provided no religious input, nor did

it require any religious content or observance from school groups, or other secular groups. Collingwood Football Club has stayed at the Resort, and another AFL club has visited and used the camp's facilities. There was no requirement for any religious content to be included. Similarly, there was no requirement for any religious content in camps conducted for corporate groups or in cultural experience camps for international groups or overseas students conducted at the Resort. MAXWELL P

218 The Tribunal concluded as follows:

> Having regard to this evidence as to the conduct and operation of the adventure resort by CYC at the time that Ms Hackney did her Google search, and at the time of the conversation between Mr Rowe and Ms Hackney, I am not satisfied that the common religion of the members and directors of CYC, the requirement that they subscribe to a statement of faith, or the connection with the Christian Brethren religion or trust is of itself sufficient to stamp a religious character on CYC, or of itself is sufficient to compel the drawing of a conclusion that the purpose or activity of such an institution is religious, to apply what was said by Mason ACJ and Brennan J in *Church of New Faith v Commissioner of Payroll Tax*.
>
> Nor having regard to those matters am I satisfied that the purposes themselves of CYC in the conduct of the adventure resort are religious. The camping activities offered by the adventure resort are themselves secular. Although the constitution of CYC declares that the establishment of CYC is actuated or inspired by a religious motive, the activities of CYC conducted at the adventure resort do not involve the spread or strengthening of spiritual teaching, the maintenance of the doctrines of the Christian Brethren religion or of the observances that promote or manifest it. The purposes of CYC, are not directly and immediately religious. They relate to the conduct of camping for both secular and religious groups. The religious groups are not confined to those who identify themselves as Christian Brethren. Although CYC has a relevant connection with a faith, church or denomination and the constitution of CYC declares that its establishment is considered to have a tendency beneficial to religion, or to a particular form of religion, that is clearly not sufficient.
>
> I am not satisfied that, for the purposes of considering whether CYC is able to claim the benefit of the exception from liability for conduct which is otherwise discriminatory under the Act, which is afforded to bodies established for religious purposes, that the significant secular component of the services offered by the adventure resort entitle CYC to the protection of s 75(2). I am not satisfied that for the purposes of s 75(2), that CYC is a body established for religious purposes. It follows from that that neither it, nor Mr Rowe acting as its agent within the scope of his employment can invoke the protection of s 75(2).[136]

136 Reasons [252]–[254].

'A body established for religious purposes'

219 The draft notice of appeal, as it stood at the commencement of oral argument,[137] contended only that the Tribunal's conclusion on this point was wrong. The same contention was expressed in two different ways. It was said that the Tribunal erred:

> (g) in considering that [CYC] was not a 'body established for religious purposes' within the meaning of s 75(2); and
>
> (h) in holding that the activities of [CYC] were such as to require a finding that it was not a body established for religious purposes within the meaning of s 75(2).[138]

The applicants' written outline confirmed that, except in one respect, these grounds were attacking a finding of fact.

220 As noted earlier, a finding of fact is not open to challenge on an appeal limited to questions of law unless it can be shown that the finding in question was not open on the evidence. Even after the applicants were given leave to file an amended notice of appeal, these grounds were not formulated in terms which correctly identified the question of law said to arise.

221 The one question of construction identified in the applicants' outline concerned the temporal connotation of the word 'established'. According to the outline, the question whether the body satisfied the statutory description had to be answered by reference to 'the objects or purposes for which the body was established in the past'. Hence, it was contended, her Honour had erred by examining CYC's current activities.

222 In oral argument, however, those submissions were abandoned. Senior counsel for the applicants accepted — correctly, in my view — that the word 'established' had an ambulatory meaning. The question to be addressed was whether, at the time of the alleged conduct, the body answered the statutory description of 'established for religious purposes'. Moreover, it was expressly conceded — once again, correctly, in my view — that the Court would therefore need to examine the character and purpose of the activities of CYC at that time.[139]

223 This last point needs to be emphasised, as it highlights the nature of the examination which s 75(2) requires. Senior counsel for Cobaw drew attention to what the High Court majority said in *Word Investments*[140] (a decision on which the applicants relied):

> [I]t is necessary to examine the objects, and the purported effectuation of those objects in the activities, of the institution in question.

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137 This is the '2011 notice', the genesis of which is described in pt 3 of these reasons: see [333]–[336].

138 2011 notice grounds (g) and (h).

139 See *Federal Commissioner of Taxation v Word Investments* (2008) 236 CLR 204, 216 [17], 224 [34] (***Word Investments***).

140 Ibid 216 [17].

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Counsel for the applicants acknowledged in argument that a body originally established for religious purposes, but which now operated for entirely commercial purposes, would no longer qualify as 'a body established for religious purposes'.[141]

224 In the course of argument, senior counsel for the applicants also articulated, for the first time, what were said to be other errors of construction. These were subsequently set out in the 2013 notice of appeal, in the form of a composite ground of appeal, as follows:

> (ga) The Tribunal erred in its construction of s 75(2) in holding that a body could not be a 'body established for religious purposes' if:
>
> (i) it required no tangible or explicit religious content as a condition of the provision of its facilities to users of those facilities;
>
> (ii) its purposes were not 'directly or immediately religious'; or
>
> (iii) there was a secular component of the services that it offered.[142]

I turn to consider each of these contentions.

Consideration

225 According to well-established principles of interpretation, the phrase 'a body established for religious purposes' must be construed in its statutory context. Attention must therefore be paid not only to the entirety of sub-s (2) but to the language of s 75 as a whole.

226 The subject-matter of sub-s (1) is religious observance and practice or, more accurately, the procedures for training and selection of those who will lead religious observance. Thus, paras (a) and (b) are concerned with the training and appointment of persons who will perform religious functions as priests or ministers or will take part in religious observance as members of a religious order. Paragraph (c) is concerned with the appointment of persons (other than by ordination) to perform functions in religious observance or practice.

227 Where sub-s (1) is concerned with persons who minister religion, sub-s (2) is concerned with religious institutions. The clear legislative intention of paragraph (a) is to exclude from the purview of the anti-discrimination provisions activities of a religious institution carried out in conformity with the doctrines of the particular religion. At the heart of this statutory protection lie the activities of churches and like institutions in which, or by which, religious observance is carried out. Part 3 of the EO Act can have no application to things done, or omitted to be done, in the course of or in connection with such activities, provided that the act or omission 'conforms with the doctrines of the religion'.

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141 See also *Word Investments* (2008) 236 CLR 204, 224 [34]; *OV and OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606, 617 [35]–[36].

142 2013 notice.

228 Paragraph (b) widens the protection afforded to religious institutions, enabling them to act — or refrain from acting —where that is necessary in order to protect 'people of the religion' against 'injury to [their] religious sensitivities'. At the heart of this protection, once again, will be the position of churches and like institutions which, in the eyes of members of the relevant religion, uphold and proclaim the doctrines of the religion. The clear intent of paragraph (b) is that such institutions should not be required to act in a way which would be seen by their members as contrary to the principles of the religion and which would therefore be offensive to their 'religious sensitivities'.

229 I do not mean to suggest that the scope of sub-s (2) is confined in its application to archetypal religious institutions of the kind I have referred to. Reference to such institutions does, however, highlight the fact that these exemptions are directed at protecting freedom of religion. As noted earlier, that freedom embraces both freedom of religious belief and freedom to manifest that belief.[143] Recognised institutions of religious worship and observance exemplify — and facilitate — the enjoyment of that freedom by members of the religion.

230 Against that background, I turn to consider the scope of the phrase 'body established for religious purposes'. As a matter of ordinary language, if a body is to satisfy this statutory description it must be able to be said of each of its purposes, or at least of its purposes taken as a whole, that they are *religious purposes*. In other words, the purpose(s) must have an essentially religious character.

231 It is here, as senior counsel for Cobaw submitted, that guidance can be gained from what was said by Dixon J in *Roman Catholic Archbishop of Melbourne v Lawlor.*[144] (The High Court was, of course, concerned with a quite different question, namely, whether the purposes of a particular testamentary bequest could be characterised as charitable.) Dixon J said:

> *In order to be charitable the purposes themselves must be religious; it is not enough that an activity or pursuit in itself secular is actuated or inspired by a religious motive or injunction*: the purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it. The purpose may be executed by gifts for the support aid or relief of clergy and ministers or teachers of religion, the performance of whose duties will tend to the spiritual advantage of others by instruction and edification; by gifts for ecclesiastical buildings, furnishings, ornaments and the like; by gifts to provide for religious services for sermons, for music for choristers and organists, and so forth; by gifts to religious bodies, orders or societies, if they have in view the welfare of others. A gift made for any particular means of propagating a faith or a religious belief is charitable; moreover a disposition is valid which in general terms devotes property to religious purposes or objects. *But, whether defined widely or narrowly, the purposes must be*

143 See [190] above.
144 (1934) 51 CLR 1 (***Lawlor***).

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> *directly and immediately religious.* It is not enough that they arise out of or have a connection with a faith, a church, or a denomination, or that they are considered to have a tendency beneficial to religion, or to a particular form of religion. The law has found a public benefit in the promotion of religion as an influence on human conduct; but it has no standard by which to estimate what public benefit that order is produced indirectly or incidentally by means which although they may be considered to contribute to the good of religion, are not in themselves religious and do not serve directly a religious object.[145]

232 It is immaterial for present purposes that the High Court was divided in *Lawlor*. What is illuminating about this passage is Dixon J's explanation of what it means to say that 'purposes themselves must be religious'. As I have said, that is precisely what the language of s 75(2) requires. The distinction drawn by Dixon J is crucial: if the object (of the gift or the institution) is 'an activity or pursuit in itself secular', then that is not a religious purpose even if it is 'actuated or inspired by a religious motive'.

233 It follows, in my view, that there was no error in the Tribunal's adoption of the phrase 'directly and immediately religious'. This was simply a way of explaining what was meant by 'religious purposes' in s 75(2).

234 As already mentioned, the applicants place considerable reliance on the recent decision of the High Court in *Word Investments*. But nothing said in that case affects the interpretation of the phrase 'religious purposes'. In that case, as the Court held, the taxpayer company *was* established for purposes which were themselves religious, namely, to preach and propagate the Christian religion; to train and send out teachers and preachers of the Christian religion; and to support evangelical missionary operations in Victoria and elsewhere. The Court concluded that, when the company's purposes were read as a whole:

> [E]ach of them on its true construction states a charitable purpose — a purpose of advancing religion in a charitable sense. Those which taken separately are beyond that purpose are to be read down as being within it.[146]

235 The issue in *Word Investments* was whether the taxpayer company could be properly characterised as a 'charitable institution', given that it engaged in commercial profit-making activities. In the view of the majority of the High Court, the trading activities did not alter the character of the company's purposes:

> Word endeavoured to make a profit, but only in aid of its charitable purposes. To point to the goal of profit and isolate it as the relevant purpose is to create a false dichotomy between characterisation of an institution as commercial and characterisation of it as charitable.[147]

Again:

> The inquiry, so far as it is directed to activities, must centre on whether it can be

145 Ibid 32 (emphasis added, citations omitted).
146 (2008) 236 CLR 204, 218 [20].
147 Ibid 219 [24].

> said that the activities are carried on in furtherance of a charitable purpose. ....
>
> The activities of Word in raising funds by commercial means are not intrinsically charitable, but they are charitable in character because they were carried out in furtherance of a charitable purpose.[148]

236 As noted earlier, the constitution of CYC requires that the income which it derives from providing camp facilities is to be applied in furtherance of CYC's own purposes. On the authority of *Word Investments*, if the correct conclusion were that CYC *was* established for religious purposes, it would not fail to meet the statutory description in s 75(2) merely because it carried on a secular profit-making activity in aid of those religious purposes.

237 The applicants' written outline relied on the fact that 'the surplus generated by CYC's activities is used wholly for Church purposes'. This was a reference to the Tribunal's finding that, in 2009, an amount of $1.5 million was returned by CYC to the trustees of the Trust.[149] It will be recalled that the Constitution of CYC provides for payments of two kinds to the trustees — licence fee payments for the use of the land on which the campsites are situated, and:

> [S]uch further payments to the Trustees to advance such other charitable purposes deemed by the Trustees to be of benefit for or for the furtherance of the objects and purposes of the Christian Brethren or for other objects and purposes which are charitable in law and which are not inconsistent with the objects and purposes of the Christian Brethren.

238 The flow of funds to the trustees was said to establish a direct parallel with the position in *Word Investments*. That is, although the activities of CYC in providing camp and conference facilities 'are not intrinsically charitable ... they are carried out in furtherance of a charitable purpose'.[150]

239 There is no such parallel, in my view. As the High Court made clear, the position of the taxpayer company (as a charitable institution) did not depend:

> on the mere fact that its revenues are applied solely to charitable purposes, but on the related fact that those are *its* sole purposes. ... Word is a company having purposes which are solely charitable and which carried on commercial businesses only in order to effectuate those purposes.[151]

For the reasons given in the next section, the purposes of CYC are not religious, let alone 'solely religious'. That being so, a provision directing the payment of any surplus to the trustees for application to exclusively religious purposes would not alter the character of CYC's purposes.

240 The relevant provision in CYC's constitution is not, in any case, confined to religious purposes. Rather, it authorises payments to the trustees to advance *charitable* purposes which, in addition to religious purposes, would

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148 Ibid 220–1 [26].
149 Reasons [246].
150 Relying on *Word Investments* (2008) 236 CLR 204, 220–1 [26].
151 *Word Investments* (2008) 236 CLR 204, 221 [27] (emphasis added). See also 225–6 [37].

encompass a range of non-religious purposes such as the relief of poverty, the advancement of learning and 'the advancement of objects of general public utility'.[152] MAXWELL P

241 Before returning to the question of fact — whether CYC was established for religious purposes — it is necessary to deal with the two other alleged errors of construction. It was contended that her Honour misconstrued s 75(2) in holding that a body could not meet the statutory description if 'it required no tangible or explicit religious content as a condition of the provisions of its facilities to use those facilities'. This point may be disposed of shortly. In the passage of the reasons to which this ground refers, her Honour was making a finding of fact about the nature of the activities carried on by CYC. She was not purporting to say anything about how the provision should be interpreted.

242 Likewise, it was contended that her Honour erred in holding that a body could not meet the statutory description if 'there was a secular component of the services that it offered'. This was, once again, a finding of fact, based on her Honour's examination of the purposes and activities of CYC. No issue of construction arises.

243 For these reasons, I would reject the grounds, articulated for the first time in the 2013 notice, which attack her Honour's interpretation of s 75(2). It remains to deal with the original grounds, which contended that her Honour erred in concluding that CYC was not established for religious purposes.

Finding of fact not open?

244 Senior counsel for the applicants contended that no other conclusion was open on the evidence but that CYC *was* established for religious purposes. Counsel submitted that, on a fair reading of CYC's constitution, the objectives of the company were 'suffused with religious purposes'. Acknowledging that some of the stated objects were secular in their terms, counsel submitted that, when those provisions were read in the context of the full statement of objects, it was clear that this was 'an enterprise established for Christian purposes'. Its purpose was 'to establish campsites in a Christian milieu'. In the alternative, counsel submitted, if the 'directly and immediately religious' test was applicable, then the purposes of CYC satisfied that (more stringent) requirement.

245 In my opinion, these submissions must be rejected. It was well open to her Honour on the evidence to conclude that CYC was not established for religious purposes. Moreover, in my respectful opinion, her Honour's conclusion was plainly right.

246 The present case stands in sharp contrast to *Word Investments*, where the

[152] *Lawlor* (1934) 51 CLR 1, 30–1; *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 178 [18] n 28.

commercial activity was ancillary to, and supportive of, the company's religious purposes. Here, the commercial activity of making campsite accommodation available to the public for hire is the very purpose for which CYC exists. That is an activity which is 'in itself secular'. It is not 'intrinsically' religious, as the purposes of *Word Investments* were.

247 The first of CYC's objects is 'to conduct ... camping, conferencing and similar facilities for the benefit of the community'. Almost all of the other objects likewise speak of the provision of such facilities, with different paragraphs identifying different target groups. Thus, accommodation will be made available:

> (d) ... for all age groups but in particular ... for primary and secondary school children;
>
> ...
>
> (f) ... for holidays for disadvantaged persons;
>
> (g) ... for other compatible charitable groups ... to develop and implement their own programs of care.

248 I do not, of course, overlook the fact that the objects require the facilities to be conducted 'in accordance with the fundamental beliefs and doctrines of the Christian Brethren', and in a way which will 'create an atmosphere throughout the facilities that is obviously Christian'. But those requirements do not, in my view, convert a secular purpose into a religious purpose. Nor does the fact that the objects contemplate that, by providing camping and conference facilities, CYC will create 'an environment and the opportunity to communicate the Christian faith in a way which is culturally relevant'.

249 The position might have been different if CYC existed for the sole purpose of providing facilities for camps and conferences which were avowedly religious in character — that is, which were held for the purpose of religious instruction, discussion or inquiry. That might properly have been described as a religious purpose, that is, a purpose of propagating or advancing the religion.

250 But, as appears from her Honour's unchallenged findings of fact, that is not, and has apparently never been, the character of CYC's activities. Unsurprisingly, having set itself up as a commercial accommodation provider, CYC has sought to secure such competitive advantage as its facilities and location may afford it. It has sought to engage in the kind of strategic planning and marketing which is characteristic of such a provider.

251 In *Word Investments*,[153] the High Court majority discussed the decision of the New South Wales Court of Appeal in *Glebe Administration Board v Commissioner of Pay-roll Tax (NSW)*.[154] The entity there under consideration was a body corporate constituted under the *Church of England (Bodies Corporate) Act 1938* (NSW). The Court of Appeal held that the entity could not rely

[153] (2008) 236 CLR 204, 223 [30].
[154] (1987) 10 NSWLR 352.

on a statutory exemption applicable to wages paid by 'a religious institution'. Properly characterised, the Court held, the entity was 'a statutory corporation doing commercial work within limitations fixed by reference to religious principles'.[155] MAXWELL P

252 That was, of course, a decision made about the interpretation and application of a quite different statute. But here, as in *Word Investments*, the contrast between the two cases is instructive. It cannot even be said of the commercial work which CYC undertakes in providing camping facilities that it takes place 'within limitations fixed by reference to religious principles'. There are no limits imposed, either by CYC's founding documents, or by its promotional material, or by its booking practices, on who may hire the facilities or for what purpose.

253 CYC's camps are open to all comers. The only religious aspect of the business resides in CYC's *aspiration* that the facilities should be managed in a Christian spirit, and that those who use the facilities — from wherever they may come, and whatever their purpose — will be made 'aware that the facilities are a place where God is honoured' and will have 'an opportunity of experiencing the truth of God's love'.

254 If (contrary to my view) the Tribunal was bound to conclude, on the evidence, that CYC was 'a body established for religious purposes', it would be necessary to go on and consider whether the conduct in question — the refusing of the application for accommodation — was within the scope of the subsection. First, however, it is necessary to deal with the question of expert evidence.

The expert evidence

255 CYC and Mr Rowe called a number of witnesses before the Tribunal to give expert evidence as to what constituted the doctrines of the Christian Brethren religion, and as to the beliefs of people of the religion with respect to homosexual sexual relationships. Those witnesses were, respectively:

- Ms Vicki Mustafa, the senior Pastor of a Christian Brethren church;
- Mr Peter Keep, the senior Pastor of a different Christian Brethren church;
- Mr George Buchanan, the Director of Ministries of the Association of Christian Brethren Fellowships of Victoria, and a director of CYC since its establishment in 2001; and
- Rev Canon Peter Adam, an Anglican Minister and theological scholar, and Principal of Ridley College in Melbourne.

256 Each of these witnesses had prepared a written statement which was filed

[155] Ibid 365.

in the proceeding. Objection was taken by Cobaw to parts of each of those statements. Having heard argument, the Tribunal ruled on the objections to admissibility and delivered short reasons for each ruling, except for the ruling on the Buchanan statement. The failure to give those reasons is now said to constitute an error of law. More broadly, the grounds of appeal contend that the exclusion of the relevant parts of the evidence was itself an error of law.[156]

257 I have read each of the statements in full, including the passages in respect of which the Tribunal upheld objections to admissibility, together with the oral evidence of each of the expert witnesses. I have also read her Honour's rulings and the reasons she gave.

258 Decisions about whether particular parts of the evidence should be admitted — and, if so, for what purpose — were matters for the judgment of the Tribunal.[157] After all, the Tribunal is not bound by the rules of evidence and may inform itself in any way it sees fit, subject always to its obligation to act fairly and 'according to the substantial merits of the case'.[158] Breaches of natural justice aside, appellate intervention in relation to an evidentiary ruling would only ever be warranted if it could be shown that the Tribunal's discretion had wholly miscarried — for example, because of a misapprehension of the matters in issue.[159]

259 It is sufficient for present purposes to say that her Honour's rulings disclose no error of that kind. On the contrary, in my respectful opinion, her Honour's evaluation of the relevance and utility of the evidence was entirely appropriate. Her Honour was properly concerned to confine the expert evidence of the respective witnesses to matters within their expertise. The ruling with respect to the Buchanan statement was self-evidently of the same character.

260 Most importantly, as the Tribunal's reasons make clear, the evidence given by these witnesses was more than adequate to enable the Tribunal to discharge its function of deciding whether one or more of the exemptions was made out. Counsel for the applicants accepted in argument on the appeal that this was so. These grounds must be rejected.

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156 2013 Notice of Appeal: Grounds (n) and (p) (ii), (iv).

157 Cf *Wong v Carter* [2000] VSCA 53 [18].

158 VCAT Act ss 97, 98.

159 *Kostas v HIH Insurance Services Pty Ltd* (2010) 241 CLR 390, 395–6 [15]; *Collection House Ltd v Taylor* (2004) 21 VAR 333, 341 [25]; *XYZ v State Trustees Ltd* [2006] 25 VAR 402, 424–5 [59].

The scope and purpose of s 75(2) MAXWELL P

261 As noted earlier, the Tribunal held that refusing the application for accommodation was not conduct which:

- 'conform[ed] with the doctrines of the religion', within the meaning of s 75(2)(a); or
- was 'necessary to avoid injury to the religious sensitivities of people of the religion', within the meaning of s 75(2)(b).

262 The applicants contended that each of these conclusions involved error of law. I would reject those contentions. As these matters were the subject of extensive argument on the application for leave to appeal, both in writing and orally, it is appropriate that I explain my conclusions.

263 As noted earlier, s 75(2) must be construed as a whole. The phrase 'anything done by a body established for religious purposes' must be taken, therefore, to mean any act or omission by the body in the course of its pursuit of the religious purposes for which it was established. Paragraphs (a) and (b) reinforce that interpretation. Unless the conduct in question is connected with the religious purposes, no relevant question of conformity with doctrine could arise.

264 The exemption is intended to ensure that religious institutions are free to act in ways which accord with their guiding doctrines. This can be seen as a reflection of the 'manifestation' right, that is, the right to 'manifest religion or belief in worship, observance, practice and teaching'. The notion of injury to religious sensitivities is complementary. As suggested earlier, any inhibition on religious institutions acting in accordance with doctrine would be likely to offend the sensibilities of members of the religion.

265 Quite different questions arise if the body in question engages in an activity which is wholly secular. There may, of course, be a religious motivation for the activity but, if the activity does not have an intrinsically religious character, it is difficult to see how questions of doctrinal conformity or offence to religious sensitivities can meaningfully arise.[160]

266 For the purposes of the present analysis, I am assuming that (contrary to my own view) CYC is properly to be viewed as 'a body established for religious purposes'. That assumption does not, however, alter any of the findings of fact which the Tribunal made about the nature of CYC's business or the manner in which it participates in the market for camping accommodation services. For the reasons given earlier, CYC's conduct of its camps business

160 The European Court of Human Rights (**ECHR**) has recently held that, in order for an act to constitute a 'manifestation' of religious belief for the purposes of art 9 of the *European Convention on Human Rights*, 'the act in question must be intimately linked to the religion or belief' and 'the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case': *Eweida v The United Kingdom* [2013] ECHR 37 [82]. See also *Ladele v London Borough of Islington* [2010] 1 WLR 955 [52].

is not, in any relevant sense, a 'religious' activity. At best, on the argument of the applicants, it is a commercial activity intended to raise money to enable the trustees of the Trust to advance charitable purposes consistent with the doctrines of the religion.

267 As the Tribunal found, the association of CYC with the Christian Brethren Church is, for practical purposes, invisible to members of the public seeking to hire camp accommodation. Those administering CYC's activities impose no restriction of any kind on those who may use the camps or the nature of the camps which may be conducted using the facilities. The fact that the facilities may be used for church camps merely draws attention to the fact that such users are but a small part of CYC's customer base.

268 In other words, what CYC does is not in any relevant sense controlled or dictated by 'the doctrines of the religion'. It is, of course, informed by the Christian beliefs of those who established CYC, and of those who manage its accommodation business. But nothing in the evidence suggested that the doctrines of the Christian Brethren prescribed what must, or must not, be done in the administration of CYC's business. The evidence was all the other way.

269 The conduct in issue here was an act of refusal in the ordinary course of the conduct of a secular accommodation business. It is not, in my view, conduct of a kind which Parliament intended would attract the attention of s 75(2). Put simply, CYC has chosen voluntarily to enter the market for accommodation services, and participates in that market in an avowedly commercial way. In all relevant respects, CYC's activities are indistinguishable from those of the other participants in that market. In those circumstances, the fact that CYC was a religious body could not justify its being exempt from the prohibitions on discrimination to which all other such accommodation providers are subject. That step — of moving from the field of religious activity to the field of secular activity — has the consequence, in my opinion, that in relation to decisions made in the course of the secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise.

'Doctrines of the religion'

270 Again, if I were wrong about that, it would be necessary to examine the Tribunal's conclusion that the refusal of the booking did not conform with the doctrines of the Christian Brethren religion. Extensive expert evidence was given about what constitutes a 'doctrine' of a religion. It was common ground that one of the doctrines of the Christian Brethren was the doctrine of 'plenary inspiration'. As noted earlier, this was one of the doctrines specified in the Trust Deed,[161] and it was the doctrine to which each of the expert witnesses referred.

[161] See [203] above.

271 As it was explained to the Tribunal, this doctrine holds that the very words of the Bible are divinely inspired and that, accordingly, what the Bible says about how a Christian life should be led is to be strictly and literally interpreted and adhered to. As the Tribunal recorded in its reasons, Mr Rowe gave the following evidence about his understanding of plenary inspiration: MAXWELL P

> I understand this expression to mean that the inspiration extends to the very words used in the Bible, not just the concepts or ideas and the inspiration in the Bible extends to all parts of the Bible and all subject matter of the Bible.[162]

272 In argument on the appeal, however, the applicants sought to rely on more specific 'doctrines', to the effect that:

- sexual activity must be confined to marriage; and
- sexual activity between members of the same sex is against God's will.

Counsel for Cobaw objected, submitting that this was a new case advanced for the first time on appeal. In a supplementary submission, they pointed out that the expert evidence called by CYC had dealt with only one doctrine, that of plenary inspiration, and that counsel then representing CYC had confirmed to the Tribunal that the only doctrines relied on were plenary inspiration and 'the quickening, indwelling and sanctifying power of the Holy Spirit'.

273 In my opinion, the objection was well-founded. The expert evidence called by CYC leaves no room for doubt that plenary inspiration was the only doctrine relied on to establish the defence under s 75(2)(a). The course of evidence may well have been different had these more specific propositions being said to constitute 'doctrines' in themselves.[163] In the end, however, the point is of little importance, as I have found it necessary to examine each of the specific propositions in any event.[164]

274 As the Tribunal noted, the expert witnesses called on behalf of CYC and Mr Rowe acknowledged in their evidence that there were passages in various parts of the Bible which they did not interpret literally or view as requiring strict compliance. These included passages:

> in Leviticus, and other parts of the scriptures calling for the stoning of mediums, wizards and blasphemers, the killing of adulterers, permitting slavery, requiring women to obey their husbands and cover their heads when worshipping, and prohibiting the sowing of mixed crops or wearing mixed fabrics.[165]

275 Importantly, her Honour noted that there was a variety of reasons for passages of the Bible not being taken literally:

> Some were the result of the countermanding of an Old Testament prohibition or requirement by the New Testament. Some were said to be reflective of the

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162 Reasons [301].
163 *Coulton v Holcombe* (1986) 162 CLR 1.
164 See [281]–[285] below.
165 Reasons [302].

culture or times, and were no longer relevant. Some were said to be a reflection of a reconsideration of a meaning previously ascribed to a passage. An example of this last was the reversal in the 18th and 19th Centuries of the Christian churches previous support for slavery.[166]

276 Her Honour's conclusions were expressed as follows:

> The effect of this evidence was to demonstrate that, despite the meaning ascribed to the doctrine of plenary inspiration by Mr Rowe, Ms Mustafa, Mr Buchanan and Mr Keep, and Dr Adam, the doctrine of plenary inspiration is not interpreted by adherents of the Christian Brethren religion as requiring a literal reading of all passages in the scriptures. Whilst they differ from some other Christian denominations in which matters in the scriptures they consider require a literal interpretation, the Christian Brethren too interpret some passages from the scriptures in the light of their understanding of the historical and cultural conditions prevailing at the time.
>
> I accept Dr Black's evidence that although scripture is the source of doctrine, not all that is said in scripture is doctrine. I accept his evidence about the content of the fundamental doctrines of Christian religions, and the consistency of doctrines in the creeds and the statement of fundamental beliefs and doctrines in the 1921 Trust Deed. I consider compelling his conclusion that the absence of any reference to marriage, sexual relationships or homosexuality in the creeds or declarations of faith which Christians including the Christian Brethren are asked to affirm as a fundamental article of their faith demonstrates the Christian Brethren beliefs about marriage, sexual relationships or homosexuality are not fundamental doctrines of the religion.
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> In my view, when proper regard and deference is had to the evidence of Mr Rowe and Ms Mustafa, Mr Buchanan and Mr Keep on this issue, it is not the doctrine of plenary inspiration itself, but the manner in which it is interpreted and applied to particular passages from the scriptures by the Christian Brethren which gives rise to their beliefs about marriage, sexual relationships or homosexuality. In particular, it is their application of the doctrine of plenary inspiration that informs their belief that it was God's will that sexual activity should be expressed only within the boundaries of a marriage between a man and a woman, and that God disapproved of all sexual activity outside marriage, whether heterosexual or homosexual.
>
> I am satisfied that Mr Rowe believes that homosexuality, or homosexual activity is prohibited by the scriptures, and so is against God's will. I am satisfied that his belief is based on the manner in which he interprets or applies the doctrine of plenary inspiration. I am satisfied Mr Rowe, Ms Mustafa, Mr Buchanan and Mr Keep's evidence is representative of the range of beliefs held by members of the Christian Brethren in Victoria about marriage, sexual relationships and homosexuality. However, I am not satisfied those beliefs constitute a doctrine of the religion of the Christian Brethren, as I have defined that term.[167]

277 The appeal submission for the applicants was that her Honour erred in viewing particular teachings and beliefs as applications of doctrine, rather than as doctrine in themselves. This conclusion was said not to be open

166 Reasons [303].
167 Reasons [304]–[307].

on the evidence. In my opinion, this submission must be rejected. On the evidence before her Honour, the distinction was inescapable. MAXWELL P

278 Mr Keep said that the doctrines listed in the Trust Deed were 'the fundamental beliefs and doctrines of Christian Brethren'. They were 'the core doctrines'. Plenary inspiration was the only one of those doctrines which was said to have any bearing on the present issue. According to each of the experts called by CYC, it was by virtue of that doctrine, as it applied to the relevant passages from the Bible, that members of the Christian Brethren believed that homosexuality was contrary to God's will.

279 As noted earlier, the applicability of that doctrine to individual passages in the Bible was shown by the evidence to be quite variable, and to have changed over time. Mr Keep acknowledged, moreover, that there was even some diversity between Christian Brethren congregations as to which parts of the Bible were to be applied literally. These were properly to be regarded as applications of doctrine, as her Honour found.

'Conforms with the doctrines'

280 But there is an even more fundamental point. Even if it were accepted that the wrongfulness of homosexual sexual activity *was* a doctrine of the Christian Brethren, it would not follow that a refusal to provide accommodation in circumstances such as these 'conformed' with that doctrine. Put shortly, what is said to be the Biblical injunction that sexual activity should take place only between a man and a woman in a lawful marriage is an instruction about how an adherent of the religion should live his or her life.

281 That this was a rule of private morality was made unambiguously clear by the evidence. One of the attachments to Mr Rowe's statement was a document entitled 'Practical Christian Living', written by Mr Ian McDowell, formerly the principal of the Christian Brethren Bible School known as Emmaus Bible College in Sydney. The introduction to that document states:

> The Christian who masters the material in this book at a spiritual rather than at a mere mental level has laid a firm foundation for a Godly effective Christian life in the years ahead.

282 The sections of the document dealing with love, sex and marriage make clear that 'the path to practical Godliness' involves accepting that sexual activity can take place only in a 'Christian marriage', between a man and a woman. It followed, as the expert witnesses explained, that sex outside marriage was prohibited. Ms Mustafa said that, because she was unmarried, she could not fulfil her sexual desires 'outside of God's way'.

283 The 'doctrine' concerning homosexuality is likewise a prohibition. An adherent of the Christian Brethren religion must not engage in sexual activity with a person of the same sex. The doctrine calls for no active conduct. On the contrary, it is a rule about *abstention* from particular conduct.

284 It was not suggested by any of the expert witnesses that the prohibition on homosexual sexual activity carried with it an obligation to interfere with, or obstruct, or discourage, the expression by other persons of their sexual preferences.[168] Her Honour correctly so found.[169] On the contrary, as each of the expert witnesses acknowledged under cross-examination, conformity with Scripture — in this case, the New Testament — would require adherents of the Christian Brethren religion to be tolerant of difference and, in particular, of people whom they might regard as sinners.

285 Dr Adam, for example, agreed that 'tolerance and welcoming and inclusivity' was one of the fundamental messages of the New Testament. He agreed that Christians should not turn away a person who was in a same sex relationship. Rather, it would be in conformity with Christian doctrines and beliefs for such a person to be welcomed. Likewise, Mr Keep said that a person living in such a relationship would be welcome to attend a Christian Brethren Church, although that person would not be permitted to become a member of the Church. Relevantly to the conduct in issue here, both Dr Adam and Mr Keep agreed that to raise awareness about the adverse effects of homophobia on SSAYP was not incompatible with the beliefs of the Christian Brethren.

286 The Tribunal concluded that, in order to establish that the conduct in question 'conformed with' the doctrines of the religion within the meaning of s 75(2)(a), it was necessary to show that:

> the doctrine requires, obliges or dictates that the person act in a particular way when confronted by the circumstances which resulted in their acting in the way they did.[170]

The applicants contended that there was no warrant for reading into the statutory language words like 'requires' or 'obliges'. It was said that the phrase 'conforms with' meant no more than 'complies with, or is in accord or harmony with'.

287 I disagree. As I have said, the purpose of the exemptions is to permit conduct which would otherwise be unlawful, where it can be shown that engaging in the conduct is necessary for the exercise of the right to religious freedom. It is wholly consistent with that legislative purpose to read s 75(2)(a) as the Tribunal did, that is, as requiring it to be shown that conformity with the relevant doctrine(s) of the religion gave the person no alternative but to act (or refrain from acting) in the particular way.

288 The point may be tested by considering the implications of an alternative, less stringent, reading. Let it be supposed that the particular religious doctrine gave the person in question a choice whether or not to engage in the relevant conduct. On that assumption, a person would be acting in

168 Senior counsel for the applicants conceded that this was so.
169 Reasons [343].
170 Reasons [315].

conformity with the doctrine whether she engaged in the (discriminatory) conduct or did not engage in the conduct. Parliament could hardly have intended that discriminatory conduct be exempted from the scope of the EO Act in circumstances where it would have been equally open to the person, consistently with doctrine, *not* to engage in it. MAXWELL P

289 The Tribunal went on to explain why, on the facts of the case, the discriminatory refusal of accommodation did not 'conform with' either the doctrines or the beliefs of the Christian Brethren. Her Honour said:

> For the Christian Brethren, conformity with their beliefs about sex and marriage required them to restrict their own sexual activity to sex within marriage. Their beliefs permitted same sex attracted people to participate in worship, although they would not permit people who were in sexual relationships outside marriage (whether same sex attracted or heterosexual) to participate in worship. There was no evidence to suggest that conformity with their beliefs about marriage and sexuality required them to avoid contact with people who were not of their faith and who did not subscribe to their beliefs about God's will in respect of sex and marriage. There was no evidence that Mr Rowe's beliefs, or CYC's practices, based on Christian Brethren beliefs about God's will in respect of sex and marriage, played any part in deciding who would be permitted to make bookings at, or stay at the adventure resort.
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> In particular, no inquiry was made at the time of booking about the marital status of attendees, their sexual orientation or whether they were involved in sexual relationships outside marriage. There was only one instance, remarkable because it was clearly an isolated instance, where Mr Rowe said he had told a university group he was showing to their accommodation that the males and females should sleep in separate accommodation. The evidence from all the respondents' witnesses involved in taking bookings and attending to groups who stayed at the adventure resort established that no attempt was made on booking or arrival to ascertain the sexual orientation or marital status of attendees, to segregate accommodation to prevent anyone other than married couples from engaging in sexual activity, or to impose any requirement on attendees to conform with Christian Brethren beliefs about God's will in respect of sex and marriage whilst at the adventure resort.[171]

290 For the reasons already given, these findings were clearly open on the evidence before the Tribunal. As senior counsel for Cobaw submitted, conduct by a religious body said to 'conform with doctrine' in this sense would be expected to be a consistent feature of the body's activities. In the present case, it would be expected that if the 'doctrine' prohibiting homosexual sexual activity did govern the conduct of CYC's accommodation business at the Resort, this would be reflected in rules and procedures — and clear warnings in the booking information — to ensure that such activity did not take place there. As already discussed, that was not how the business was conducted.

171 Reasons [321]–[322].

Injury to religious sensitivities

291 A similar analysis informs the approach to interpretation of s 75(2)(b). Here, the word 'necessary' expresses the clear legislative intention that, for conduct to be exempted, there must have been no alternative to engaging in the conduct if 'injury to religious sensitivities' was to be avoided. Her Honour correctly so held.[172]

292 It is clear, in my view, that the question of necessity was intended to be judged objectively. None of the submissions on the appeal suggested otherwise. Quite different language would have been required had Parliament intended that conduct would be exempt provided only that some relevant person — for example, an officer of the religious body — held the subjective view that the conduct was necessary in order to avoid injury to religious sensitivities. Couching the exemption in those terms would, of course, have substantially broadened its scope.

293 Her Honour made these findings:

> Mr Rowe, Ms Mustafa, Mr Buchanan and Mr Keep said they and other Christian Brethren would be offended, horrified or greatly or very upset, if WayOut conducted its proposed forum at the adventure resort. Each of them expressed that view based on the premise, which I have rejected, that the purpose of the forum was to 'promote homosexuality'. That diminishes significantly the weight to be given to their opinions. Even if I considered the opinions were no more than strong expressions of disapproval of same sex attraction, they would go no higher in my view than asserting the opinion givers disapprove of, or are offended by, same sex attraction.
>
> Each of these witnesses expressed compassion for same sex attracted people, because of their belief that homosexuality is against God's will for humans. Because of that, they did not consider same sex attracted people could be openly so, and remain as members of the Christian Brethren. They differed in their attitudes to same sex attracted people. Some were prepared to welcome them to worship, provided they did not express their homosexuality in a relationship or sexual activity. Some considered that once they acknowledged their sexual orientation, they should not be permitted to be a member of a Christian Brethren congregation if they were not prepared to change. All appeared to accept that same sex attracted people, if not members of the Christian Brethren, were legally entitled to live openly as such, and to make their own decisions about their own relationships and sexual activity. I accept that their views are reflective of the views held generally by Christian Brethren.[173]

294 Her Honour concluded:

> However strongly Mr Rowe, Ms Mustafa, Mr Buchanan and Mr Keep expressed themselves about their views of accepting same sex attracted people, about sex and marriage, and about whether they would accept same sex attracted people, celibate or not, into their congregations, it was abundantly clear the religious sensitivities of the Christian Brethren had not been injured by CYC's conduct

172 Reasons [332].
173 Ibid [333]–[334].

MAXWELL P

> in permitting same sex attracted people other than the WayOut group to stay at the adventure resort. They had not sought to prevent injury to their religious sensitivities by taking any steps to prevent people other than married couples who engaged in sexual activity from staying at the adventure resort, or engaging in sexual activity at the adventure resort. Their conduct consistently demonstrated that it was not necessary to avoid injury to the religious sensitivities of the Christian Brethren in respect of sex and marriage to refuse bookings to same sex attracted people, or people who engaged in sexual activity outside marriage. If it was not necessary to exclude other same sex attracted people, or people who had, or might, while at the adventure resort, engage in sex outside marriage to avoid injury to the religious sensitivities of the Christian Brethren, then it was not necessary to exclude the WayOut group on that ground. The respondents have not made out their claim for excuse under s 75(2)(b).[174]

295 It was submitted for the applicants that it was the proposed 'promotion' of the acceptability of same sex sexual relations which distinguished this application for accommodation from others made by persons in same sex relationships. On the evidence of the Christian Brethren witnesses, it was contended, acceptance of this booking would 'inevitably' have injured the religious sensitivities of people of the Christian Brethren.

Consideration

296 The phrase 'injury to religious sensitivities' presents obvious difficulties of interpretation. It is not a phrase in ordinary parlance and what might constitute a 'religious sensitivity', or what might constitute 'injury' to such a sensitivity, is not self-evident. As the Solicitor-General pointed out, however, a conception of this kind has a long history in Victorian equal opportunity law. Section 32(c) of the *Equal Opportunity Act 1977* (Vic) relevantly exempted:

> any other practice of a body established to propagate religion ... that is necessary to avoid injury to the religious *susceptibilities* of the adherence of that religion.

297 There was debate before the Tribunal, and again on the appeal, as to whether the word 'injury' meant more than 'mere offence'. Recourse to standard dictionaries makes clear that the words 'injure' and 'injury' have a range of meanings which include the causing of offence. But, as the Tribunal correctly noted, the task of interpretation involves identifying the meaning to be attributed to the word — and the phrase — in this particular statutory context.

298 The starting-point is that s 75(2) exempts conduct of a body established for religious purposes. Paragraph (b) is engaged only where the prohibitions against discrimination otherwise applicable to such a body would require it to act — or refrain from acting — in such a way as to cause injury of the relevant kind. It is to be borne in mind, moreover, that the purpose of s 75(2)(b) is to protect the freedom of adherents of the religion to practise their religion.

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174 Ibid [344].

299 The Tribunal reached the following conclusion about the interpretation of s 75(2)(b):

> In my view, avoiding injury to sensitivities involves a respect for, or not treating with disrespect, those matters which are intimately or closely connected with beliefs or practices a person values. When the sensitivity is the religious sensitivities of adherents of a religion, avoiding injury to those sensitivities must involve respect for, or not treating with disrespect, those matters intimately or closely connected with, or of real significance to, the beliefs or practices of the adherents of the religion. To satisfy the need for the sensitivities to be religious sensitivities, the beliefs or practices must be based on the doctrines of the religion or the religious beliefs of the adherents of the religion.
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> ...
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> ... in order for it to be necessary to engage in discriminatory conduct to avoid injury to the religious sensitivities of members of a religion, the injury which would be caused if the discriminatory conduct were not permitted must be significant, and unavoidable. The persons engaging in the discriminatory conduct must have been required or compelled by the doctrines of their religion or their religious beliefs to act in the way they did, or had no option other than to act in the way they did to avoid injuring, or causing real harm to the religious sensitivities of people of the religion. The religious sensitivities of people of the religion would be injured if matters intimately or closely connected with, or of real significance to the doctrines, beliefs or practices of the adherents of the religion are not respected, or are treated with disrespect.[175]

300 The applicants submitted that her Honour's construction was erroneous. It was said that to use words such as 'significant' and 'unavoidable', and to require the harm caused to be 'real harm', was to 'recast the words of the statute'. I would reject that submission. In my respectful opinion, the interpretation which her Honour gave accurately captures what Parliament intended by the language of this exemption, as used in this statutory context for the purpose of protecting religious freedom.

301 In my view, Parliament did not intend to exempt the actions of such a body from the general prohibitions against discrimination unless obedience to the prohibitions could be seen to have a real and direct impact on the *religious* sensitivities of the members of the relevant religion. Put another way, it would need to be shown that for the body to be required to act in a non-discriminatory fashion — by not doing the act in question — would be an affront to the reasonable expectation of adherents that the body be able to conduct itself in accordance with the doctrines to which they subscribed and the beliefs which they held.

302 There being no error of construction, it remains only to examine the Tribunal's finding that the refusal of the application for accommodation was not necessary 'to avoid injury to the religious sensitivities' of people of the Christian Brethren religion. This was a finding of fact. Accordingly, the applicants' challenge to it could only succeed if they established that it was

175 Reasons [330], [332].

not reasonably open to the Tribunal, on the evidence, to make that finding. MAXWELL P

303 Her Honour's reasoning was as follows:

> However strongly Mr Rowe, Ms Mustafa, Mr Buchanan and Mr Keep expressed themselves about their views of accepting same sex attracted people, about sex and marriage, and about whether they would accept same sex attracted people, celibate or not, into their congregations, it was abundantly clear the religious sensitivities of the Christian Brethren had not been injured by CYC's conduct in permitting same sex attracted people other than the WayOut group to stay at the adventure resort. They had not sought to prevent injury to their religious sensitivities by taking any steps to prevent people other than married couples who engaged in sexual activity from staying at the adventure resort, or engaging in sexual activity at the adventure resort. Their conduct consistently demonstrated that it was not necessary to avoid injury to the religious sensitivities of the Christian Brethren in respect of sex and marriage to refuse bookings to same sex attracted people, or people who engaged in sexual activity outside marriage. If it was not necessary to exclude other same sex attracted people, or people who had, or might, while at the adventure resort, engage in sex outside marriage to avoid injury to the religious sensitivities of the Christian Brethren, then it was not necessary to exclude the WayOut group on that ground. The respondents have not made out their claim for excuse under s 75(2)(b).[176]

304 In my respectful opinion, this conclusion was well open on the evidence. What her Honour's analysis highlights, once again, is the lack of any relevant connection between the Christian Brethren religion and the activities of CYC's accommodation business. As suggested earlier, the exemption in s 75(2) — in both its aspects — is intended to protect *religious* activity from an interference which would be contrary to doctrine or an affront to belief.

305 In essence, what was said by Mr Rowe and the CYC witnesses to be offensive about the proposed camp was the notion of church premises being used to affirm same sex sexual orientation and sexual activity, that being — in the view of the church — contrary to God's law. If it were true that these were in any real sense 'church premises', s 75(2)(b) might very well have been engaged. Adherents to a religion must be able to insist that their place(s) of religious observance be used for — and only for — the propagation of doctrines and principles to which they subscribe.

306 The Resort does not, however, have the character of church premises. It is not a place of religious observance. Nor is the accommodation business a religious activity in any relevant sense. There was no evidence to suggest that any members of the Christian Brethren were aware of, less still participated in, the activities of CYC — apart, of course, from the individual staff members employed to conduct the business.

307 It is wholly unsurprising, in these circumstances, that no steps have ever been taken by CYC to prevent its camps being attended by persons who are in same sex sexual relationships or who might engage in same sex sexual

176 Reasons [344].

activity while attending a camp. Clearly enough, those in charge of CYC's activities have never conceived of the camps, or the conduct of the business more generally, as either:

(a) needing to be governed by the kinds of strictures which individual adherents apply to their own personal lives; or

(b) having any bearing on the freedom of adherents to hold or manifest their religious beliefs.

The s 77 exemption: Necessary to comply with genuine religious beliefs or principles

308 In view of my earlier conclusion that it was CYC, not Mr Rowe, which committed the act of discrimination, the first question for consideration is whether CYC can avail itself of the exemption under s 77. This is, once again, a question of statutory interpretation.

309 In my opinion, it is clear from the language of s 77, and from the relationship between the exemption provisions in ss 75–7, that Parliament did not intend a corporation to be able to invoke the exemption under s 77. My reasons may be summarised shortly as follows:

(a) insofar as Parliament intended to exempt conduct engaged in by religious bodies (including corporations), such exemption was intended to be available to — and only to — bodies 'established for religious purposes' within the meaning of s 75(2) and (3);

(b) s 77 would only be capable of applying to a corporation if Parliament had intended to establish a rule of attribution under which, by a legal fiction, a corporation could be said to hold religious beliefs;

(c) there being no such rule of attribution in the EO Act, the only basis for the attribution of a religious belief to a corporation would be as a matter of necessary implication, that is, if it could be shown that Parliament must have intended that there be such attribution in order for the exemption provisions to operate effectively; and

(d) particularly in view of the exemption already available to religious institutions under s 75(2), there is no basis for imputing to Parliament an intention either:

(i) to create the legislative fiction of a corporation having a religious belief; or

(ii) to make the exemption under s 77 available to a corporation without its having to establish — as a body does under s 75(2) — that it was established for religious purposes.

310 Read together, the exemption provisions directed at preserving religious freedom — ss 75–7 — draw what seem to be perfectly sensible distinctions

between bodies and individuals. Thus, s 75(2) and (3) are concerned with bodies established for religious purposes; s 76 is expressed to apply both to 'a person' and to a 'body (other than a body established for religious purposes)'; and s 77 is expressed to apply to discrimination by 'a person', the exemption being defined by reference to that person's 'genuine religious beliefs or principles'. MAXWELL P

311 The scheme is structurally coherent. The provisions are complementary of each other. Clearly, the legislature wished to ensure that the protection of religious freedom extended to the activities of both bodies and individuals.[177] The protection afforded to bodies was limited in the ways already discussed in relation to s 75(2), namely, that the body must be established for religious purposes and that the conduct in question must either conform with doctrine or be necessary to avoid injury to religious sensitivities.

312 Ordinarily, of course, the word 'person' includes a body corporate. So much is accepted for the purposes of the application of the substantive discrimination provisions. But the use in s 76 of the phrase 'a person or body' suggests that, at least in this part of the Act, the word 'person' was used to connote a natural person. For the reasons already given, the distinction between a natural person and a body was a necessary and appropriate one to draw for the purpose of defining the categories of conduct which would be exempted. Nor is it surprising that Parliament has sought to express in different terms the respective protections conferred on bodies and individuals.

313 Had s 77 been intended to apply to bodies as well as to natural persons, it must be assumed that language similar to that used in s 76(1) would have been used. That is, s 77 would have been expressed to apply to a 'body (other than a body established for religious purposes)'. Couching the provision in those terms would at least have ensured that ss 75 and 77 did not have overlapping coverage, although it would still have produced the seemingly absurd result of providing a broader exemption for a non-religious body (under s 77) than for a body established for religious purposes (under s 75(2)).

314 Section 77 does not, of course, contain any such qualification. According to the submission advanced by the applicants, and by the Attorney-General, s 77 was intended to be available to any body corporate, whether established for religious purposes or not. As the Commission pointed out, such a reading of s 77 would effectively render both ss 75 and 76 redundant. In particular, it would mean that conduct of a body established for religious purposes which did not satisfy the exemption conditions specified in s 75(2) would nevertheless be exempted by s 77, provided only that the conduct was necessary to comply with the 'genuine religious beliefs or principles' of the body.

315 The submission is unsustainable. Having carefully defined the conditions

177 By contrast, the UK scheme contains no exemption for individuals. There is an exemption for religious organisations: *Preddy* [2013] 1 WLR 3741, 3746 [8], 3752 [38].

of exemption for religious bodies in s 75(2), it is hardly likely that Parliament intended to enable the conduct of such bodies to be exempted under a different provision, free of such conditions. Moreover, since this reading of s 77 would rob s 75(2) of practical utility, it offends the cardinal principle of statutory interpretation that Parliament is taken to have intended every provision in a statute to have its own work to do.[178]

316 In my opinion, Parliament's intention is clear. Sections 75 and 76 were intended to define the scope — and limits — of the religious freedom exemptions available to bodies (including corporations). Those sections provide appropriately targeted protection for activities of relevant kinds engaged in by bodies corporate. As I have said, there is no policy rationale which would explain an intention to confer on such bodies a separate, broader, protection, without limit as to the types of activities engaged in.

317 Finally, for a body corporate to avail itself of the protection under s 77, it would have to demonstrate that it had 'genuine religious beliefs or principles' and that the relevant conduct was 'necessary ... to comply with' those beliefs or principles. A corporation, of course, has 'neither soul nor body'.[179] The state of mind of a corporation being a legal fiction,[180] it would be necessary — for the provision to operate intelligibly — for the Court to identify a rule of attribution for the purposes of s 77. This would only be justified if the express provisions of the statutory scheme required for their effective operation the attribution to a corporation of a particular state of mind — in this case, the holding of genuine religious beliefs or principles.

318 As senior counsel for the applicants pointed out, where the legislature wishes to attribute a belief to a corporation, it typically does so by enacting a special rule of attribution appropriate to the purpose. In such a case, the statute itself identifies the officers or employees of the corporation whose beliefs are to be attributed to the corporation for this purpose.[181] The EO Act contains no such provision.

319 Nothing in this legislative scheme, or in the framework of religious freedom exemptions in ss 75–7, depends for its effectiveness on the creation of such a rule of attribution in s 77. As I have said, statutory protection is already provided for the activities of bodies corporate, provided that they are established for religious purposes (s 75(2)) or are engaged in relevant educational activities within the scope of s 76. Nor is there anything intrinsic to the notion of religious freedom which would suggest that Parliament must — as a matter of necessary implication — have intended to confer on bodies corporate, by s 77, a protection which went beyond the scope of ss 75 and

178 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71].
179 *Motel Marine Pty Ltd v IAC (Finance) Pty Ltd* (1963) 110 CLR 9, 14.
180 *Tesco* [1972] AC 153, 170E.
181 In the *Corporations Act 2001* (Cth) ss 629(1)(a), 731(1)(b), (2)(b) and 792B(2)(c)(iii) all refer to a person's belief. Where the person is a company, the rule of attribution is provided by s 769B of the Act. See also *Criminal Code Act 1995* (Cth) s 12.3(2); *Defamation Act 2005* (Vic) ss 30 and 31.

76. MAXWELL P

320 On the contrary, it seems to me, Parliament intended the words of s 77 to mean what they say. After all, as the Commission pointed out, the right to religious freedom recognised by the Covenant, and by the Charter, is the right of an *individual* to believe as he or she chooses to do. The Attorney-General used similar language in 1995 to explain the purpose of s 77.[182] As the European Court of Human Rights observed in *Hasan v Bulgaria*:[183]

> While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares.

321 It has never been suggested that corporations can meaningfully be said to have religious beliefs, let alone that they should be entitled to enjoy a freedom of religious belief. The Attorney-General drew attention to the statement of Latham CJ, that it was 'obvious that a company cannot exercise a religion',[184] but submitted that the 'generality' of this statement could no longer be regarded as correct in the light of a series of decisions of the European Commission of Human Rights concerning art 9 of the European Convention. Those decisions, which cover the period 1979–1996, hold that:

(a) when a church body makes a complaint of discrimination under the Convention, 'it does so in reality, on behalf of its members'; and

(b) it should therefore be accepted that a church body is capable of possessing and exercising the Convention rights of religious freedom 'in its own capacity as a representative of its members'.[185]

322 With respect, it seems to me that what the Commission has decided is entirely cogent. These propositions are properly reflective of the unique function of 'church bodies' as institutions in which, and through which, individuals exercise their freedom of religion. But — precisely because of the special character of such bodies — these decisions have no bearing on the present question. Indeed, as the Minister properly pointed out, the Commission has been quite clear in saying that 'a profit-making corporate body ... can neither enjoy nor rely on the [Convention] rights'.[186] And the Supreme Court of Canada has been equally clear in saying that 'a business corporation cannot possess religious beliefs'.[187]

323 As I have said, the legislative scheme is logical and coherent. Corporations

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182 See [160] above: '... not acceptable to compel a person to act in a way that would compromise his or her genuinely held religious beliefs'.

183 (2002) 34 EHRR 55 [60].

184 *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 147.

185 *X and Church of Scientology v Sweden* (1979) 16 DR 68, 70; *Omkarananda v Switzerland* (1981) 25 DR 105, 117; *Chappell v United Kingdom* (1987) 53 DR 241; *Kustannus v Finland* (Application 20471/92) (1996) 85–A DR 29.

186 *Company X v Switzerland* (1981) 16 DR 86, 87.

187 *Edwards Books and Art Ltd v The Queen* [1986] 2 SCR 713, 784.

have protection under ss 75 and 76, and individuals have protection under s 77.

324 That was Cobaw's submission before the Tribunal, and it maintained that position in response to the Court's supplementary questions. As noted earlier, however, Cobaw's submission to that effect was rejected by the Tribunal.[188] Importantly, Cobaw did not seek to agitate the point in this appeal proceeding. At the hearing on 2 August 2013, which dealt with the supplementary questions, senior counsel for Cobaw informed the Court that a deliberate decision had been made to refrain from seeking to amend the notice of contention to raise this point. That decision was said to have been made, at least in part, because 'it was time to treat the list of matters/issues/questions before the Court as closed'. Pressed by the Court, counsel indicated that, for this reason, Cobaw objected to the Court deciding the point.

325 It is, of course, unusual for a court of its own motion to raise a question of law not raised by the parties, all the more so to proceed to decide the question over the opposition of a party which stands to benefit from a finding of error. But, for similar reasons to those given earlier in relation to the question of law concerning the 'person' who committed the act of discrimination,[189] I consider that this is an issue which the Court should decide.

326 It is not an academic or hypothetical question. On the contrary, it was the subject of a ruling by the Tribunal. It is, moreover, fundamental to the operation of the religious freedom exemptions. Finally — and decisively, in my view — it is both appropriate and necessary to correct what seems to me to be a clear error in the Tribunal's construction of the EO Act. As Redlich JA pointed out in the course of argument, to fail to do so would be to run the risk of perpetuating the error.

'Necessary to comply with genuine religious beliefs or principles'?

327 In this concluding section, I proceed on the assumption that, contrary to my view:

(a) Mr Rowe was the contravenor;

(b) CYC is vicariously liable; and

(c) s 77 is available to both CYC and Mr Rowe.

328 For similar reasons to those I have given in relation to s 75(2), I do not consider that refusing the application for accommodation was 'necessary to comply with the genuine religious beliefs or principles' of either Mr Rowe or CYC. I proceed on the basis of the Tribunal's finding that Mr Rowe genuinely

188 See [161] above.
189 See [148]–[151] above.

believed that homosexual sexual activity was wrong because it was contrary to the literal words of the Bible, and that his belief in this respect was representative of the beliefs of adherents of the Christian Brethren religion. I also assume that — if the rule of attribution existed — the same belief could be attributed to CYC. MAXWELL P

329 Once again, the word 'necessary' is crucial. As when the same word is used in s 75(2)(b), the test of necessity is objective.[190] It was common ground that this was so.

330 For the reasons given earlier, there was nothing about Mr Rowe's belief which compelled him to refuse the application. The relevant belief required Mr Rowe, and adherents of the Christian Brethren religion, to refrain from sexual activity except in a relationship of marriage between husband and wife. As discussed above,[191] this is a rule of private morality, adherence to which is no doubt of great importance to Mr Rowe and to members of the Christian Brethren. But it carried with it no obligation to try to convince others to adopt the same rule, less still to prevent other people expressing to each other the view that — contrary to Mr Rowe's belief — sexual activity between same sex attracted persons was not immoral but was part of the normal range of human sexualities.

331 The phrase 'comply with' in s 77 is also instructive. It reinforces the notion of compulsion. The very notion of compliance suggests that there is a rule, or a prohibition, which the religious believer must obey. As I have said, nothing in the evidence suggested that the prohibition on homosexual sexual activity involved, or even implied, any rule of conduct which must be complied with in relation to the sexual activities of other persons.

PART 3 — PROCEDURAL HISTORY

332 The application for leave to appeal from the Tribunal's decision was filed on 4 November 2010. The application was not accompanied by a draft notice of appeal. On 16 November 2010, Cobaw filed a summons seeking to have the application for leave to appeal dismissed as incompetent because of the failure to file a draft notice of appeal. Before that application could be heard, however, the applicants on 23 November 2010 filed a draft notice of appeal. A further draft notice was filed on 9 December 2010 (the **2010 notice**)). On 13 December 2010, this Court dismissed the application filed by Cobaw.

333 On 11 March 2011, the solicitors for the applicants advised Cobaw's solicitors that a further notice of appeal had been filed, containing additional proposed grounds of appeal (the **2011 notice**)). Cobaw's solicitors objected to the filing of the 2011 notice and Cobaw subsequently made application to the Acting Registrar of the Court of Appeal, Associate Justice Lansdowne, for an order that the applicants be confined to the 2010 notice. That application

190 See [292] above.
191 See [281]–[282] above.

was refused, but Lansdowne AsJ ordered the applicants to pay Cobaw's costs thrown away by reason of the addition of new grounds of appeal.

334 Her Honour's order of 24 May 2011 records an undertaking, given by senior counsel then appearing for the applicants, in the following terms:

> The applicants will not advance a proposed notice of appeal in any form other than the proposed notice of appeal dated and filed 11 March 2011 at the hearing of the application for leave to appeal and appeal if leave is granted.

335 On 21 June 2011, the applicants' solicitors wrote to Cobaw's solicitors, seeking Cobaw's agreement to an amendment of that order, so as to qualify the undertaking by the addition of the words 'without obtaining the leave of the Court'. The request was rejected. In their response, Cobaw's solicitors expressed the view that no such qualification had been intended. The letter said:

> Your letter suggests that the fact that the undertaking does not include the phrase 'without obtaining the leave of the Court' was a slip on the part of Associate Justice Lansdowne. We disagree. It was a conscious decision by her Honour. So much was obvious because part of the argument about the first respondent's application to confine your client to the earlier iteration of its proposed notice of appeal concerned the fact that no leave was required to file an amended **proposed** notice of appeal (as opposed to an amended notice of appeal). It was that issue which in part [led] to her Honour refusing the first respondent's application, but taking the view that your client should pay our client's costs of and occasioned by the amendment. Her Honour clearly intended that the version of the notice of appeal that had caused the costs order to be made would be the final version.[192]

336 That is where the matter rested. The applicants' solicitors did not respond to that letter. Nor was any application ever made by the applicants to have the undertaking varied, or to be relieved of compliance with it. Accordingly, between June 2011 and the commencement of the appeal hearing on 20 February 2013, those representing Cobaw prepared the appeal on the basis that the 2011 notice contained an exhaustive statement of the applicants' grounds of appeal, and that the applicants would not under any circumstances seek to raise a further ground.

337 Between March 2012 and 30 January 2013, the parties to the appeal filed submissions and other documents based on the 2011 notice. On 19 February 2013, the day before the hearing, the Court sent an email to the solicitors for the respective parties in the following terms:

> On the basis of their reading of the written submissions, the members of the Bench wish to advise the participants as follows:
>
> As this proceeding concerns a claim of discrimination contrary to the *Equal Opportunity Act 1995* (Vic) (EO Act), the two central questions appear to be:
>
> (a) how the relevant provisions of the EO Act are to be construed; and
>
> (b) how the provisions as properly construed are to be applied to the facts as found.

192 Emphasis in original.

MAXWELL P

...

> The applicants will be expected to identify, with some precision and by reference to the grounds of appeal, what are said to be the Tribunal's errors in construction of the EO Act.
>
> As to the second question, the applicants will be expected to state, with some precision and by reference to the grounds of appeal, how and to what extent any question of law arises. (See proposition 2 in *S v Crimes Compensation Tribunal;* see also *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* [2003] VSC 285 [4]–[5]; *Victorian WorkCover Authority v Michaels* (2009) 26 VR 88, 91–2 [8]–[9].)
>
> As to the third question, the applicants will be expected to state, with some precision and by reference to the grounds of appeal, which (if any) of the factual findings of the Tribunal are said not to have been open on the evidence.

338 At the end of the first day of the appeal hearing, senior counsel for the applicants (who had not appeared at the trial) informed the Court that the oral submissions he had made covered all of the grounds on which the applicants wished to rely to establish error of law. Grounds not adverted to in argument were to be taken as abandoned. The written submissions were relied on to the extent that they supported the oral submissions.

339 After the first day of hearing, the Court sent a further email, this time to counsel for the applicants, in these terms:

> In light of the applicants' position as clearly stated by Senior Counsel at the conclusion of today's hearing — that the errors of law referred to in oral argument are the only errors of law relied upon by the applicants — the Court, and other participants in this matter, would be assisted if the applicants could provide, by 10 am tomorrow, a document outlining the following:
>
> 1. Which grounds of appeal are abandoned and any additional grounds of appeal that the applicants seek leave to add; and
> 2. Which sections of the applicants' written submissions are no longer relied upon by the applicants.

340 Late on the second morning of the appeal hearing, senior counsel for the applicants provided to the Court and the other participants a document listing those grounds of appeal, and those parts of the written submissions, which were no longer relied on. The Court gave the applicants leave to file an amended notice of appeal, and directed that the revised grounds distinguish clearly between errors in the construction of applicable provisions, and errors of law said to be constituted by the making of findings of fact which were not open on the evidence.

341 On 12 March 2013, the applicants filed and served a new proposed notice of appeal, said to embody the grounds on which they now wished to rely (the **2013 notice**)). On 29 April 2013, Cobaw's solicitors filed a written response to the 2013 notice, submitting that the Court should revoke the leave granted to file the amended notice. The response was supported by an affidavit from the solicitor with conduct of the appeal on behalf of Cobaw, setting out the

procedural history of the matter. In my view, the 2013 notice served a useful purpose and was not productive of injustice. I would not revoke the grant of leave.

The Court's questions and the supplementary submissions

342 In the course of the Court's consideration of the grounds of appeal and the reasons of the Tribunal, a number of questions emerged which had not been raised or addressed by the parties to the appeal. On 17 June 2013, the Court provided to the parties a paper identifying those questions by reference to the relevant parts of the Tribunal's reasons and the relevant provisions of the Act.

343 Each of the parties was asked to provide further submissions addressing the following questions:

(a) Given that Cobaw was the applicant for accommodation, and given that Ms Hackney was acting in her capacity as manager of Cobaw, was it open to conclude that any of the named individuals was refused accommodation and — hence — was discriminated against?

(b) If that finding was not open, what are the implications for the appeal?

(c) Given that CYC was the accommodation provider, and Mr Rowe was found to have been acting in his capacity as agent for CYC, how could he have committed an act of discrimination in his own right? As a matter of law, was he not acting under the authority of his principal, CYC, such that the refusal of accommodation was in law the refusal of CYC, it being the accommodation provider?

(d) In relation to questions (a) and (c), to what extent are common law agency principles applicable under the Act?

(e) If the alleged act of discrimination was committed by CYC in its own right, and not by Mr Rowe, what are the implications for this appeal (given the Tribunal's conclusion that Mr Rowe committed the act of discrimination)?

(f) If the alleged act of discrimination was committed by CYC as the provider, can CYC avail itself of the exemption in s 77, or is the application of s 77 confined to natural persons? What would be the legislative rationale for creating for the purposes of s 77 a legal fiction that a corporation can have a religious belief?

344 The Court's paper stated:

> The purpose of this paper is to invite submissions from the parties as to whether — and if so how — the Court should answer these questions. The threshold question to be addressed in these submissions is whether any (and if so which) of these questions falls for decision in this proceeding, given that they have not been raised by the parties.

345 Written submissions were subsequently received from the parties and from the Attorney-General. A further hearing was convened on 2 August 2013, to enable counsel to address the written submissions. The applicants and Cobaw were each represented by senior counsel who had not appeared at the substantive appeal hearing.

346 At the conclusion of the hearing, counsel for the applicants foreshadowed an application for leave to make a further amendment to the notice of appeal, to advance the point raised by question (a). Counsel for Cobaw also foreshadowed a possible application for leave to amend its notice of contention, to advance the point raised by question (c). MAXWELL P

Proposed additional ground: Were the individuals refused accommodation?

347 On 16 August 2013, the applicants filed a summons seeking leave to file and serve a further amended draft notice of appeal, with an additional question of law and ground of appeal, as follows:

> **4.(q) Question of law**
>
> Was it open to the Tribunal to find that the applicants discriminated against any of the named persons contrary to s 42 or s 49 of the *Equal Opportunity Act* by refusing a request for accommodation by Ms Hackney on 7 June 2007 on behalf of an indeterminate group of people?
>
> **5.(q) Ground of Appeal**
>
> The Tribunal erred in law in finding that the applicants discriminated against any of the named persons contrary to s 42 or s 49 of the *Equal Opportunity Act* as there was no evidence that any of the named person was, as at 7 June 2007, a member of the group on whose behalf Ms Hackney sought on that day to make a booking for accommodation with the first applicant.

348 In an accompanying written submission, the applicants explained that they wished:

> to raise squarely the issue whether there could have been a contravention of the EO Act by the refusal of accommodation (assuming that this occurred) to an indeterminate group of people. Though the point has not been put in these terms before, it has been directly in issue both at VCAT below and in the application for leave to appeal.

349 As noted earlier,[193] this was an issue squarely raised before the Tribunal. What is relevant, however, is the course taken by the applicants in the present proceeding. The 2011 notice — as it stood when the appeal hearing commenced —identified the following question of law:

> (c) (i) Whether a person can be found to have discriminated in contravention of ss 42 and 49 of the EO Act against a person in circumstances where the first person had no:
>
> a. personal knowledge of that person;
> b. conversation, contact or dealing with that person;
> c. knowledge of any attribute possessed by that person;
> d. knowledge of any other person associated with that person; or
> e. application or request for accommodation or services from or on behalf of that person.

350 The corresponding ground of appeal was expressed in these terms:

> (c) The Tribunal erred in considering that the first respondent or the ten named

[193] See [36]–[37] above.

persons in the proceeding below or any of them could have been unlawfully refused accommodation or services by the appellants contrary to ss 42(1) and 49(1) of the EO Act, when on the facts as found by the Tribunal;

(i) they had no:

a. personal knowledge of any of the named persons other than Ms Hackney;

b. conversation, contact or dealing with any of the named persons other than Ms Hackney;

c. knowledge of any attribute possessed by any of the named persons;

d. knowledge of any other person associated with any of the named persons; and

e. application or request for accommodation, or services from any of the named persons.

351 As can be seen, neither that question of law nor that ground of appeal was addressing the question now sought to be raised — whether Ms Hackney was acting on behalf of the named individuals. They address a quite different issue, concerning Mr Rowe's lack of knowledge of who the individuals were.

352 As was made clear by the applicants' principal appeal submission, the contention sought to be advanced was that the (alleged) refusal of accommodation could not have been 'on the basis' of the sexual orientation of the individuals, since nothing was known to Mr Rowe or CYC about who they were or what their sexual orientation was. The relevant part of the appeal submission was in these terms:

8. To constitute direct discrimination under ss 7 and 8 of the EO Act, the act of discrimination must be directed against a person or persons possessing one of the attributes listed in s 6 or characteristics of an attribute. Cobaw's case was that certain 'named persons' represented by it were persons who possessed the attribute of same sex sexual orientation or association with a person with that attribute. *Sections 7 and 8 require that the alleged discriminator have knowledge of the person (even if not by name) and of the attribute or characteristic that person is said to possess.*

9. *When he took the telephone call on 7 June 2007 and was informed of the proposed forum, Mr Rowe had no knowledge of the identity or sexual orientation of any person proposing to attend the forum, let alone the identity and sexual orientation of any of the named persons*. It is common ground that Ms Hackney did not refer to anyone's identity or sexual orientation. She was acting as an employee of Cobaw in initiating possible forum dates and arrangements. She did not act in consequence of any authority from any person possessing the attribute or characteristic at the relevant time or any of the named persons. The arrangements for a forum were at an embryonic stage. The identity and attributes of potential attendees were not determined or known — certainly not to Mr Rowe who only knew what Ms Hackney told him.

10. The substantial reason why Mr Rowe responded as he did was because of his concern from what he was told that the forum was to be used to propagate or encourage the notion that homosexuality was part of the normal range of human sexualities to young people.

353 In any case, the applicants expressly abandoned this question of law, and this ground of appeal, on the first day of the hearing. This was confirmed by the written document provided to the Court on the second morning, which also expressly abandoned paragraph 9 of the written submission (set out above). MAXWELL P

354 The August 2013 submission maintained, however, that the applicants should have leave to add the new ground. According to that submission:

> 12. Nor can [Cobaw] have been in any doubt that they would have to defend in this application for leave to appeal the Tribunal's finding in their favour on this issue. It was raised in the original draft notice of appeal and in the applicants' written outline.
>
> 13. If the deletion of question 4(c)(i)e and the ground 5(c)(i)e from the draft notice of appeal are taken as an abandonment of this point, the applicants should be permitted to withdraw the abandonment. There would be no prejudice to the respondents to permit the applicants to revive the point, as it would merely restore the basis on which the respondents entered into the trial and the application for leave to appeal.
>
> 14. That could be achieved simply by restoring the original question and ground of appeal. However, it is submitted that the proposed new question and ground of appeal do raise the issue more succinctly.

355 Unsurprisingly, the application for leave to amend is opposed by Cobaw. Its written submission in opposition contends that:

a. the amendment application is too late;
b. the proposed amendment raises a new issue in a new way; and
c. the amendment application is in breach of the undertaking given on 24 May 2011.

356 In my opinion, Cobaw's submission should be upheld. Given the history of the proceeding as I have set it out, it would work a serious injustice if the applicants were allowed to add this ground at this very late stage.[194]

357 As long ago as May 2011, representatives of Cobaw were — quite properly —insisting that the scope and limits of the application for leave to appeal be defined clearly, and with finality. The terms of the undertaking given to the Court by senior counsel for the applicants on that occasion are unusual, but the undertaking was unambiguous. The applicants were evidently prepared — as the price of being permitted to rely on the expanded grounds in the 2011 notice — to commit themselves to conducting the application for leave on the basis of that notice. The giving of the undertaking amounted, in my view, to a waiver of the right which a party to a proceeding otherwise has, namely, to seek leave to amend at any time.

358 The communication from the Court on the eve of the appeal hearing was likewise directed to having identified, with clarity and precision, precisely which questions of law the applicants sought to agitate. In that context, what was said and done by the applicants in response was, in my view, of

194 *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

equal significance with the undertaking given in 2011. In the light of the Court's inquiry, certain of the grounds were abandoned. The application for leave to appeal was to be viewed, and considered, on the basis that the abandoned grounds were not before the Court.

359 Finally, and in any event, this is properly to be viewed as a new issue, not previously raised by the applicants. As I have explained, even the abandoned ground was not addressing the question which the new ground seeks to address, being the question first raised by the Court in June 2013. Once that is understood, it is abundantly clear that the amendment must be refused.

NEAVE JA

360 I have had the advantage of reading the draft reasons of Maxwell P. I would grant leave to appeal and dismiss both CYC and Mr Rowe's appeal for substantially the same reasons as those given by the President. On one issue, however, I take a different view. Unlike the President, I would dismiss Mr Rowe's appeals because, in my view, a complaint could be made against both CYC and Mr Rowe under the EO Act because of the discriminatory refusal of accommodation to the persons named in the complaint. My reasons for that conclusion follow.

361 I agree with Maxwell P that a corporation cannot rely on the religious belief exemption in s 77 and will make some additional comments on that issue. Like the President, I also consider that, assuming that Mr Rowe was a discriminator under s 49(a) of the EO Act, he was not exempted from liability by s 77.

Who was the discriminator?

362 As the President explains, the parties were asked to make submissions on a number of questions. In response to questions about whether both CYC and Mr Rowe were discriminators, the applicants argued the following.

1. The prohibition against discrimination in s 49(a) applied only to the person providing the accommodation. It did not apply to Mr Rowe, because it was CYC, not Mr Rowe, who was the accommodation provider.
2. CYC was directly liable for discrimination. A company can only act through an agent or servant. As the company's agent in managing the camp, Mr Rowe's refusal of accommodation was the company's refusal.
3. The judge wrongly treated CYC as vicariously liable for the act of Mr Rowe.
4. Section 102 did not make Mr Rowe liable for the refusal of accommodation. Section 102(a) was inapplicable because Mr Rowe did not 'contravene a provision' of Part 3 — only the company contravened the provision. Nor did section 102(b) apply, because that provision applies only when the discriminator is vicariously liable for the act of a servant or agent.

363 I will deal with each of these arguments in turn.

Does s 49 only apply to the accommodation provider? NEAVE JA

364 First, I consider that the language of s 49(a) is sufficient, of itself, to cover a person who refuses accommodation on a discriminatory ground, even though he or she is not the accommodation provider. Section 49 prohibits 'a person' from discriminating. The clear words of the section should be given effect. Mr Rowe 'refused, or failed to accept, the other person's application for accommodation' on a prohibited ground.

365 The conclusion that s 49(a) covered a person in the position of Mr Rowe is reinforced by comparison with other sections in pt 3 of the EO Act, which identify the areas of activity in which discrimination is prohibited, and designate the capacity of the person who is prohibited from discriminating. For example, ss 13–15 prohibit discrimination by an employer, ss 30–2 prohibit discrimination by a person who intends to establish a firm and by a firm, s 37 prohibits discrimination by 'an educational authority' and s 59 prohibits discrimination by a club or a member of committee of management or other governing body of the club. Unlike these provisions, both ss 49 and 42 (which prohibits discrimination in the provision of goods and services) do not describe the particular persons who are prohibited from discriminating, although they could easily have been drafted in the same form as the other provisions.

366 There is a sound policy reason for prohibiting a broad range of people from discriminating in the areas of accommodation and goods and services. Accommodation providers frequently operate through servants or agents who act as gatekeepers in accepting or refusing applications. Landlords usually rent properties by using an estate agent, hotel bookings are often made through travel agents and those who offer goods for sale employ salespeople. The use of the word 'person' in s 49(a) would apply the prohibition against discrimination to an estate agent who refuses to accept an application for rental from an indigenous person who wants to rent a property,[195] or a clerk in a hotel who refuses to allow a person to stay there, because of their disability. Prohibiting discrimination by individuals who are 'in the front-line' in providing access to accommodation or goods and services is consistent with the legislative objective of promoting recognition of everyone's right to equality of opportunity and providing redress for people who have been harmed by discrimination.[196]

367 For the reasons explained below, I consider that both CYC and Mr Rowe were discriminators for the purposes of s 49(a).

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195 The estate agent might also be regarded as discriminating by refusing to provide goods and services.

196 *Equal Opportunity Act 1995* (Vic) s 3(a), (d).

Was the company directly liable for Mr Rowe's refusal of accommodation?

368 A company or a natural person is vicariously liable for the actions of an employee acting within the course of employment, or an agent acting within the scope of authority.[197] For example an employer may be vicariously liable in tort for an employee's negligent acts in performing employment tasks, which result in the injury of a third party. An employer or principal may avoid legal responsibility for the tortious acts of a servant or agent by showing that the act done was outside the employee's course of employment or the agent's scope of authority.

369 A breach of a statutory provision may give rise to criminal liability. This is usually the case for statutes imposing penalties for breaches of occupational health and safety,[198] food safety and consumer protection laws.[199] Alternatively the relevant legislation may create tortious liability[200] or impose some form of civil penalty. In this case the EO Act provides various remedies, including payment of compensation for discriminatory acts, but does not create tortious liability[201] and only provides for criminal penalties in very limited circumstances.[202]

370 In many cases the wrongful act which is a statutory breach attracting criminal or other sanctions[203] will not be done by the person whom the authorities may seek to make responsible, but by an employee, agent or other third party. In such cases the courts have had to resolve the question whether the employer or principal of the person who commits the wrongful act can disclaim responsibility for that breach.

371 Sometimes that question is resolved by relying on an analogy between the general principles of vicarious liability, which apply in the area of tort and contract. This is not a true example of vicarious liability.[204]

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197 The principles governing the liability of a principal for the acts of an agent are more complex than this statement suggests. For example a principal may sometimes be liable for criminal acts done by an agent in the scope of the agent's ostensible authority. For discussion see S Fisher, *Agency Law* (Butterworths, 2000) 10.5.1–10.5.3; G E Dal Pont, *Law of Agency*, (Butterworths, 3rd, 2014) 555–6 [22.46]–[22.41].

198 See, eg, *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321.

199 See, eg, *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (***Tesco***).

200 Liability for breach of statutory duty.

201 *Pinecot Pty Ltd v Anti-Discrimination Commissioner* (2001) 165 FLR 25, 34–8 (***Pinecot***) dealing with the *Anti-Discrimination Act 1992* (NT). In *Commissioner of Police v Estate of Russell* (2002) 55 NSWLR 232, 245–7, Spigelman CJ (Davis AJA agreeing and Stein JA not expressing a view) held that the *Anti-Discrimination Act 1977* (NSW), did not create tortious liability for the purposes of applying the *Law Reform (Vicarious Liability) Act 1983* (NSW). A different view was expressed by McHugh JA in *Australian Postal Commission v Dao* (1985) 3 NSWLR 565, 604.

202 Although the Victorian Civil and Administrative Tribunal (**VCAT**) may order payment of compensation for discrimination, the Act does not create liability in tort and only imposes criminal liability in very limited circumstances; *Equal Opportunity Act 1995* (Vic) s 209.

203 Referred to hereafter as 'a wrongful act'.

204 In the context of criminal liability imposed by statute Professor Fisse refers to courts 'borrowing' the concept of vicarious liability from civil law. See B Fisse, *Howard's Criminal Law*, (Thompson Reuters, 5th Ed, Australia, 1990), 599.

372 An employer or principal[205] may also be directly liable for a wrongful act performed by a third party at common law,[206] or under legislative provisions to this effect.[207] If direct liability applies, the employer will be liable for the wrongful act, even if the employer could not have been held vicariously liable because the act fell outside the scope of the employee's course of employment or within the scope of an agency arrangement. In such cases, however, the statute will often contain provisions exculpating an employer who takes reasonable steps to avoid the breach.[208] The question whether an employer is directly liable, or is only liable where the employee did the acts in the course of employment, depends on the terms of the relevant legislation.[209] NEAVE JA

373 An additional complication arises where the employer who is directly liable for the wrongful act is a company, so that the wrongful act can only be done by an employee or an agent. Difficulties have arisen in deciding 'what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business'.[210] In the context of criminal liability, courts initially tended to take the view that the wrongful act could only be regarded as that of the company, if it was done by a person who could be described as personifying 'the mind or will of the company' for example, a managing director.[211] If that was not the case, then the act was not regarded as that of the company. However this did not prevent the wrongful act being attributed to the company by analogy to vicarious liability, if the act was done in the course of employment or within the scope of an agent's authority.

374 More recently, courts have held that a company may be liable for statutory breaches, even when the person doing the wrongful act does not embody the company's mind or will. This was the case in *Meridian* where the question was whether the company, Meridian, had breached a provision requiring a person who became a substantial security holder in another stock-exchange listed company to notify that company and the stock exchange. A number

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205 Hereafter I will refer to an employer only, for the sake of convenience.

206 For example a hospital may be liable for the negligent acts of a surgeon, even if the surgeon is not an employee but is employed under a contract of service. The basis for this principle can be found in the reasons of Denning LJ in *Cassidy v Minister of Health* [1951] 2 KB 343, 363–5.

207 Such provisions have existed for many years; for some early examples see *Mousell Brothers Ltd v London & North-Western Railway Co* [1917] 2 KB 836, 844 (Viscount Reading CJ).

208 See *Tesco* [1972] AC 153, where the company was directly liable, but was held to have taken appropriate precautions to avoid the wrongful act.

209 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] AC 500, 507 (***Meridian***).

210 *Tesco* [1972] AC 153, 199. Although Lord Diplock's comment related to the criminal liability of a company it does not appear to be limited to that context.

211 See *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713 (Viscount Haldane LC); *HL Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159, 172 where Denning LJ differentiated between people who were 'mere servants or agents who are nothing more than hands to do the work and [who] cannot be said to represent the mind or will' and others who 'are directors or managers who represent the directing mind or will of the company, and control what it does'.

of people, including two employees of Meridian, had acquired stocks in a company, ENC, in an attempt to gain control of it, using the authority given to them by Meridian to buy and sell shares. These employees knew that Meridian had become a substantial security holder. The Privy Council, on appeal from the New Zealand Court of Appeal, held that the knowledge of the employees should be attributed to Meridian, although the company was unaware of the relevant facts. Lord Hoffman said the following:

> [T]here would be little sense [in deeming a corporation to be a legal person] unless there were also rules to tell one what acts are to count as the acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called 'the rules of attribution'.
>
> The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as 'for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company' or 'the decisions of the board in managing the company's business shall be the decisions of the company'. There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as
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> > the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company: see *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd*.[212]
>
> These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.
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> ...
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> The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person 'himself,' as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the *actus reus* and *mens rea* of the defendant himself. How is such a rule to be applied to a company?
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> One possibility is that the court may come to the conclusion that the rule was not

[212] [1983] Ch 258.

NEAVE JA

> intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, ie if the act giving rise to liability was specifically authorised by a resolution of the board or an unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.[213]

375 His Lordship said that because the policy of the legislation could only be given effect by taking account of the knowledge of the employees, that knowledge could be attributed to the company. However he continued:

> But their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company. Sometimes, as in *Re Supply of Ready Mixed Concrete (No 2)*[214] and this case, it will be appropriate. Likewise in a case in which a company was required to make a return for revenue purposes and the statute made it an offence to make a false return with intent to deceive, the Divisional Court held A that the *mens rea* of the servant authorised to discharge the duty to make the return should be attributed to the company: see *Moore v I Bresler Ltd.*[215] On the other hand, the fact that a company's employee is authorised to drive a lorry does not in itself lead to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaughter. There is no inconsistency. Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule.[216]

376 The principle was applied in *R v Commercial Industrial Construction Group*[217] where the *Occupational Health and Safety Act 1985* (Vic) required employers to, so far as practicable, provide safe systems of work. The company was prosecuted for breach of the requirement after a worker was killed as a consequence of the negligence of the company's site manager, and the company pleaded guilty to the breach. In an appeal against the sentence imposed, this Court held that the question whether the company was vicariously liable for the act of the site manager was entirely irrelevant, because the company was

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213 *Meridian* [1995] AC 500, 506–7.
214 [1995] 1 AC 456.
215 [1944] 2 All ER 515.
216 *Meridian* [1995] AC 500, 511–2.
217 (2006) 14 VR 321.

directly liable.[218]

377 The case law suggests that legislation may treat the act of an employee or agent as the act of the company, both for the purposes of criminal liability and in determining whether the company is responsible for a statutory breach which creates neither tortious or criminal liability. However the boundaries of the doctrine are not entirely clear. In *Linework v Department of Labour*[219] the plurality commented that the doctrine clearly permitted acts at management level to be treated as the acts of the company, but left open the question whether 'the employer is liable [under the particular legislation] where the only negligence or failure to take reasonable precautions' takes place at a junior level.[220] This question was regarded as a matter of statutory interpretation. In this case it was not argued that Mr Rowe's acts could not be attributed to the company for the purpose of imposing direct liability on it. Thus that issue does not arise here.

378 On balance I would accept CYC's submission that pt 3 of the Act, including s 49(a), was intended to make employers, including corporations, directly liable for discriminatory acts committed by their employees or agents. In *Tesco* Lord Diplock observed that the deterrent effect of legislation which protects people from harmful behaviour would be defeated, if an employer could escape liability simply by showing that the prohibited act was done by an employee or agent acting outside the course of their employment or scope of authority.[221] Although the legislation in *Tesco* imposed criminal liability on the employer, the same observation applies to this Act, which is intended to protect individuals against discrimination and secure equality of opportunity for all. Making employers directly responsible condemns discrimination and deters other employers from behaving in the same way.[222] However, if I am wrong in that view, I consider that, in any case, s 102 of the EO Act makes CYC liable for the discriminatory acts of Mr Rowe. My reasons for that view are explained below.

Could Mr Rowe be held personally responsible for discrimination if his act was attributable to the company?

379 The question then arises whether the fact that the company was directly liable under s 49(a) for Mr Rowe's refusal of accommodation, meant that Mr Rowe could be held to have breached the section, because his act in refusing accommodation was an act of the company alone. (At this point I do not consider the effect of s 102.) The question whether the attribution of liability to a company for acts done by an employee or agent necessarily excludes the employee from being personally responsible for the breach

218 Ibid 328 [30].
219 [2001] 2 NZLR 639.
220 Ibid 646–7 [31] (Blanchard J), quoting *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78, 84.
221 *Tesco* [1972] AC 153 194.
222 *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No 2)* (2009) 178 FCR 199, 210–11 [35]–[39] (Rares J).

has not been explored in the authorities. This is not surprising, because a person who claims to have suffered discrimination will often want to sheet responsibility home to the employer, rather than the individual who has actually done the wrongful act. NEAVE JA

380 *TZ Ltd v ZMS Investments Pty Ltd*[223] is not directly relevant to the question whether both a company which is held to be directly liable for the statutory breach and the person who actually did the wrongful act can be prosecuted. That decision concerned whether a managing director whose acts were attributed to the company, for the purposes of deciding whether the company had breached an injunction, could also be held liable as an accessory for the breach of the injunction.[224]

381 The answer to the question whether both the company and Mr Rowe could be held responsible for breaching the EO Act depends on the terms of the particular legislation. I have already explained why Mr Rowe is caught by s 49(a). I note also that s 11 of the EO Act contemplates that discrimination may occur by a person acting 'in association with another person'. Although making the company directly liable may help to deter discriminatory behaviour, it does not follow that Mr Rowe should not also be regarded as legally responsible. As Spigelman CJ remarked in *Commissioner of Police v Estate of Russell*[225] (in the context of the *Anti-Discrimination Act 1977* (NSW)) the objectives of punishment and deterrence may be better served by imposing joint and several liability on the employer and the employee personally, than by making the employer solely responsible for the discriminatory act.[226]

382 For the reasons explained below my conclusion that **both** Mr Rowe and CYC contravened the EO Act is reinforced by s 102 of the EO Act.

Did the judge err in finding CYC vicariously, rather than directly liable for the act of Mr Rowe?

383 I have concluded that both the company and Mr Rowe breached the prohibition against discrimination. The applicants submitted that the judge below erred in finding that CYC was vicariously liable, because Mr Rowe's refusal of access to the camp was done in his capacity as CYC's servant or agent. As Maxwell P has pointed out, the submissions made to the judge below did not explore the relevance, if any, of a distinction between the direct liability of the company and any vicarious liability which arose because Mr Rowe acted in the course of his employment. Nor was it argued that Mr Rowe was acting as the company when he refused accommodation to the named

223 [2009] NSWSC 1465 (***TZ***).

224 It might be assumed that the case implicitly supports the proposition that he could not be liable other than as an accessory, but this issue did not arise because the injunction applied only to the company.

225 (2002) 55 NSWLR 232, 247 [76].

226 In *Jubber v Revival Centres International* [1998] VADT 62 (7 April 1998), it was assumed that both the employer and employee would be liable for acts of discrimination, though the point was not argued.

persons. Because it was not contended that Mr Rowe was 'on a frolic of his own' or that his position was not such as to permit attribution, the failure to identify the precise basis of CYC's liability is not surprising. In these circumstances any error in characterising the basis of the company's liability has no significance, except to the extent that it may be relevant in deciding whether her Honour misapplied s 102. I now discuss the meaning of s 102.

What was the effect of s 102?

384 Before turning to s 102, some general observations can be made about the use of the expression 'vicarious liability'. First, where it is sought to make a company liable for wrongful acts, the distinction between vicarious liability and liability attributed to the company because the employee was, in effect, acting as the company, is often a moot point.[227] It is only where it is argued that the company is not liable because the employee was 'on a frolic' of his or her own or the agent was acting outside the scope of his or her actual or apparent authority, that the precise basis of liability matters. Further, if the legislation provides a defence to an employer who has taken reasonable precautions to avoid the breach,[228] the characterisation of that liability will not matter either. For the reasons discussed below, I consider that s 103 of the EO Act provides a general 'reasonable precautions' defence, to employers, although it is not necessary to decide the effect of that section for the purposes of this appeal.

385 Secondly, the term 'vicarious liability' is often used loosely, as a shorthand expression to describe various forms of attributed liability. In their book on *Australian Anti-Discrimination Law*, Rees, Lindsay and Rice observe that:

> Australian anti-discrimination statutes generally provide that an employer is liable for the conduct of an employee which is performed in connection with employment, and that a principal is liable for the conduct of an agent done in connection with the person's duties as an agent, unless the employer or principal can prove that it took reasonable action to prevent the employee, or agent, from performing the conduct which amounted to a breach of the statute. While these statutory provisions are similar to the common law rules concerning vicarious liability, they are not the same. For this reason, and in order to avoid confusion, we consider it advisable to use a different shorthand term — *attributed liability* — when describing the provisions which make an employer liable for the acts of an employee and a principal liable for the acts of an agent, in some circumstances.[229]

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227 *Pinecot* (2001) 165 FLR 25, 33 [23] (Mildren J).

228 As was the case in *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321, the Court considered that it was unnecessary to consider whether the acts of the employee could be attributed to the company, because the only issue was whether the company had done everything necessary to ensure the safety of its employees. In that case the Court of Appeal considered that absolute liability was imposed on the employer for failing to maintain a safe working environment.

229 Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law* (Federation Press, 2008) 514 [8.5.1] (citations omitted) (emphasis in original). Although this quote deals specifically with sexual harassment, similar remarks are made by the authors about attributed liability for other forms of prohibited conduct: 648–53 [10.8.4]–[10.8.19].

386 The authors explain that while the purpose of vicarious liability in tort is to impose liability on a person who has greater capacity than the actual wrongdoer to compensate a person who has suffered harm and to distribute the costs of the harm, 'the attributed liability provisions in anti-discrimination legislation ... are primarily concerned with the allocation of responsibility for wrongdoing'.[230] NEAVE JA

387 The blurring of the distinction between vicarious liability in the sense in which it is used in the law of torts, and statutory responsibility for an act done by an employee or agent, is particularly likely to occur when the employer is a company. That is because a company can only do an act which breaches a statutory prohibition through the acts of an employee or agent.[231] At a time when the case law required the person doing the act to be the 'directing mind or will' of the company the distinction may have been relatively clear. Once the wrongful acts of a broader range of employees or agents could be attributed to the company for the purposes of imposing criminal or civil liability this conceptual distinction became less apparent. Case law illustrates the extent to which attributed liability based on the *Meridian* principle and vicarious liability have been run together.[232] This is apparent in Lord Hoffman's observation in *Meridian*, that a company will appoint servants and agents —

> whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.[233]

388 Thirdly, there are legislative provisions attributing liability to employers or principals in Commonwealth, State and anti-discrimination laws, although these provisions are not expressed in identical terms. Rees, Lindsay and Rice explain that these provisions are intended to deem the acts of the employee or agent to be the acts of the employer, when determining responsibility

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230 Ibid 648 [10.8.6]. It may be noted that similar provisions are contained in many other pieces of legislation, see, eg, *Racial and Religious Tolerance Act 2001* (Vic) s 17, *Gambling Regulation Act 2003* (Vic) s 2.6.7.

231 *Tesco* [1972] AC 153, 171 (Lord Reid), quoting Denning LJ in *HL Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159, 172.

232 See, eg, the discussion of *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163 in *Pinecot* (2001) 165 FLR 25, 31–2 [17]–[18], where Mildren J identified this confusion. Arguably, however, Mildren J also blurred these concepts at 33 [21]. See also *Director-General of Fair Trading v Pioneer Concrete (UK) v Anor* [1995] 1 AC 456 where the issue was whether a company was in contempt of court for breaching an injunction against enforcing a price fixing arrangement entered into by its employees in breach of a prohibition in trade practices legislation. Although Lord Templeman, at 465, appeared to consider that the legislation was intended to make the company directly liable, he also referred to the employee acting within the scope of employment, (the requirement for vicarious liability). Lord Nolan at 472–3, said that the words of the legislation could impose liability on an employer for acts done in the course of employment, even though the acts were prohibited by the employer. He held that the company was liable for acts amounting to contempt if they were done in the course of employment.

233 *Meridian* [1995] AC 500, 506.

for the statutory wrong of unlawful discrimination, whilst providing 'a defence of reasonable preventative action'.[234] Some jurisdictions have enacted provisions dealing specifically with the attributed liability of corporations. In *Pinecot,* Mildren J described such provisions as making the 'principal primarily liable for the acts of servants or agents (notwithstanding such section headings such as "vicarious liability")'.[235]

389 Fourthly, it is clear that the term 'vicarious liability', has been used in Victoria and elsewhere in contexts other than equal opportunity law to describe various forms of attributed legal liability. For example, there are statutory provisions which deem a director or a person in a position of authority to be guilty of an offence committed by an organisation, including a company.[236] Other provisions attribute liability to a person who has derived a financial benefit from a contract made in breach of legislation as well as to the supplier or dealer who made the contract.[237] Another group of provisions makes a worker and an employer jointly and severally liable for statutory breaches.[238] Some provisions come closer to the common law conception of vicarious liability by providing that an employer or principal is responsible for an unlawful act done by a worker or agent.[239] All of these provisions appear in sections headed by the words 'vicarious liability'.

390 The different legal bases for these attribution provisions support the view that the term 'vicarious liability' has been commonly used by drafters in Victoria and other states to impose liability on employers, including corporations and/or employees and agents, regardless of whether the provision is accurately described as creating vicarious liability within the common law concept.

391 With these matters in mind, I turn to consider the effect of s 102 of the Act. Sections 102 and 103 provide as follows:

> 102. Vicarious liability of employers and principals
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> If a person in the course of employment or while acting as an agent—
>
> (a) contravenes a provision of Part 3, 5 or 6; or
>
> (b) engages in any conduct that would, if engaged in by the person's employer or principal, contravene a provision of Part 3, 5 or 6—
>
> both the person and the employer or principal must be taken to have contravened the provision, and a complaint about the contravention may be lodged against either or both of them.
>
> 103. Exception to vicarious liability
>
> An employer or principal is not vicariously liable for a contravention of a provision of Part 3, 5 or 6 by an employee or agent if the employer or principal proves, on the balance of probabilities, that the employer or principal took

234 Rees, Lindsay and Rice, above n 229, 649–51 [10.8.7]–[10.8.14].
235 *Pinecot* (2001) 165 FLR 25,39 [41].
236 See, eg, *Boxing Control Act 1987* (WA) s 56.
237 See, eg, *Door To Door Trading Act 1987* (WA) s 20.
238 See, eg, *Forest Practices Act 1985* (Tas) s 47C; *Protected Disclosure Act 2012* (Vic) s 48.
239 See, eg, *Racing Regulation Act 2004* (Tas) s 101.

reasonable precautions to prevent the employee or agent contravening the Act. NEAVE JA

392 In my view her Honour correctly held that s 102 made both CYC and Mr Rowe liable for their discriminatory acts. The *Equal Opportunity Act 1984* (Vic) was the predecessor to the 1995 Act. Section 34 of the 1984 Act provides that:

> (1) Subject to sub-section (2), where a person acts in contravention of this Act on behalf of another person either as his agent or employee, the person by whom the act is committed and the person on whose behalf the act is committed shall be jointly and severally liable under this Act in respect thereof.
>
> (2) In proceedings brought under this Act against any person in respect of an act alleged to have been committed by a person acting on his behalf it shall be a defence for that person to prove that he took reasonable precautions to ensure that the person acting on his behalf would not act in contravention of this Act.[240]

393 Section 34 was considered in *Box Hill College of Technical and Further Education v Fares*.[241] In that case it was argued that s 21 of the 1984 Act, which prohibited discrimination in employment, applied only to employers, and that in these circumstances s 34 was inapplicable. Smith J held that only the employer had breached the prohibition against discrimination, but rejected the argument that s 34 was irrelevant in these circumstances. He said:

> I am not persuaded that the section should be construed in the way contended for by the appellants. It is significant that the words 'acts in contravention' are used and not the word 'contravenes'. This suggests to me that parliament was seeking to bring s 34 into operation whenever the acts of an employee or agent would have contravened the Act if committed by the employer or principal. The words would, of course, also include the case where the employee or agent actually contravenes a provision. It seems to me that this construction would promote the purposes and objects of the legislation (s 35 *Interpretation of Legislation Act 1984*).
>
> ... If s 34 of the Act is not available to make the employer vicariously liable and the employee liable, then s 21 of the Act would be confined in its operation to situations where the employer is the person in the position to discriminate in relation to the employment — for example, a sole trader who employs a number of people. Section 21 would have little or no operation in the public sector (although the Act (s 5) expressly binds the Crown) or in the private sector in relation to large corporations. In essence, the interpretation argued for by the appellants would have the effect of relieving employers of any liability for discrimination against staff in their employment where an employee had the responsibility to make the employment decisions. Further, that employee would not be liable for any discrimination against other employees on grounds of race, sex, religion or politics because, on the interpretation of the appellant, such an employee would not be in breach of s 21 of the Act. Such an interpretation would severely limit the operation of legislation and deprive it of any significant impact in the community. It is true, as counsel for the General Manager argued, that this interpretation

240 *Equal Opportunity Act 1984* (Vic), s 34.

241 (1992) EOC ¶92-464, 79 311.

> of s 34 would not prevent it operating in relation to s 20, dealing with sexual harassment, and sections where the individual whose conduct is proscribed is referred to as a 'person'. But it is difficult to point to any reason why an employer and employee should be capable of being liable in those situations and not under s 21 of the Act.
>
> The alternative interpretation, ... will enable the Board to enforce s 21 against all employers and employees and compel both to address discriminatory behaviour in the work place. It is, accordingly, the interpretation to be preferred.[242]

394 There are, of course, significant differences between the language of s 34 of the 1984 Act and s 102 of the 1995 Act. As well as specifically providing for joint and several liability, s 34 refers to 'acts in contravention' whereas s 102 uses the word 'contravenes', a distinction which Smith J regarded as significant. Although it is arguable that the different language of s 102 shows an intention to limit the section to true vicarious liability situations, I would reject that argument. Smith J's reasons in support of his interpretation of s 34 are equally applicable to s 102. If a change of this significance had been intended it is surprising that it was not mentioned in the Second Reading Speech introducing the bill for the 1995 Act. I note also that Smith J described the section as one dealing with 'vicarious liability' even though the employer was directly liable for the breach and despite the lack of a heading such as appears in the 1995 Act.

395 The headings to the part and to ss 102 and 103 which refer to 'Vicarious Liability', do not require a different conclusion. Sections 36 (1A) and (2A) of the *Interpretation of Legislation Act 1984* (Vic) (**ILA Act**) provide that headings to parts and sections and clauses only form part of an Act which was passed on or after 1 January 2001, or where the heading itself has been inserted into an Act passed before 1 January 2001, on or after that date. Accordingly these headings are not part of the Act, do not control the scope of its substantive provisions and 'cannot properly be used to impose an unnaturally constricted meaning upon the words of those substantive provisions'.[243] They can however be taken into account as part of the context within which ss 102 and 103 are construed.[244]

396 In my opinion both the words of s 102 and its statutory context indicate that it is intended to cover **both** the situation where liability is imposed on an employer by analogy to the tortious principle of vicarious liability **and** the situation where the legislation makes a company directly liable for a wrongful act and the employee or agent's act is attributed to the company.[245] Prior to the 1995 decision in *Meridian* there was a lack of clarity about the

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242 (1992) EOC ¶92-464, 79 320–1.

243 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 601 (Mason CJ, Deane, Dawson and Gaudron JJ), citing, among others, *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd* (1978) 140 CLR 216, 225; see also *Tran v Commonwealth* (2010) 187 FCR 54, 70 [63] (Rares J).

244 *Tran v Commonwealth* (2010) 187 FCR 54, 70 [63] (Rares J).

245 Rees expresses the view that s 102 is intended to make the employer liable in cases of both direct and vicarious liability; see Rees, Lindsay and Rice, above, n 229, 655 [10.8.27].

circumstances in which the act of an employee or agent could be regarded as that of a company. The distinction between the various ways in which a corporate employer could be held responsible for a statutory breach was not clear when the EO Act was passed. This supports the view that the words 'vicarious liability' do not mean 'vicarious liability' in the common law sense, but simply refer to situations where liability for the acts of one person is attributed to another. NEAVE JA

397 It was argued that CYC was not liable under s 102(a) because Mr Rowe did not 'contravene' s 49(a). I have held that s 49(a) imposed personal liability on Mr Rowe as well as liability on CYC because of his conduct.

398 However, even if I am wrong in that view, I consider that the word 'contravened' should be construed broadly to cover conduct amounting to prohibited discrimination within pt 3 of the Act, for which Mr Rowe was not legally responsible.

399 In *Tran v Commonwealth*[246] the Federal Court considered the meaning of 'contravene' for the purposes of legislation relied upon by the Commonwealth to justify the forfeiture of a ship allegedly used to contravene the *Migration Act 1958* (Cth). The master of the ship was subsequently acquitted of relevant criminal offences. Rares J observed that 'contravention' was not a word which 'signifies one single discrete legal concept' and that it 'is used variously in legislation to signify both the commission of an offence as well as a non-compliance with some provision or norm' set out in the legislation.[247] As both he and Besanko J observed, the word should be construed in light of the mischief the legislation was intended to address and in the context of the other provisions of the relevant Act.[248]

400 In this case, interpreting the word 'contravenes' as applying only in cases where the employee was personally liable would unduly confine the operation of s 102(a). It would mean that the provision applied only in cases where the EO Act explicitly makes an employee or agent responsible for the wrongful act, as in the case of liability for sexual harassment under pt 5 and victimisation under pt 6. However that would be contrary to the clear words of s 102(a), which specifically refers to a contravention of pt 3. If employees and agents are not personally liable under pt 3 because the provisions in that Part impose direct liability on the employer, the provision in s 102 allowing a complaint under pt 3 to be lodged against **both** the employer and the employee could never apply to s 102(a).

401 It was also contended that s 102(b) did not apply because it incorrectly assumed that the conduct of Mr Rowe would, if done by the employer, amount to a contravention of pt 3, and the breach was in fact and not hypothetically

246 (2010) 187 FCR 54.

247 *Tran v Commonwealth* (2010) 187 FCR 54, 72 [72] (Rares J). See also Besanko J 97 [182]–[185]. It was held that in its context the word 'contravention' did not extend to cover a civil breach.

248 Ibid 96 [178] (Besanko J).

that of CYC. To my mind this construction is contrary to the clear words of s 102(b). Moreover it would mean that a complaint of a breach under pt 3 could be lodged against an employer of a natural person but not against a corporate employer.

402 As Maxwell P indicates, Commonwealth legislation now contains provisions attributing liability to corporations for the conduct of directors, employees or agents acting within the scope of their actual or apparent authority, subject to some qualifications.[249] It would have been better for the 1995 Act to contain specific provisions attributing liability to corporations. But the absence of such a provision in the 1995 Act, at a time when the basis for corporate liability was not clearly established, does not reflect a legislative intention to apply different rules to corporate employers to those which apply when the employer is a natural person.[250]

403 To summarise, both Mr Rowe and CYC were liable under s 49(a) for refusing accommodation to Cobaw on behalf of the named persons. However, even if s 49(a) did not make Mr Rowe personally responsible for refusing accommodation at the youth camp, s 102 permitted a complaint to be made against either or both of Mr Rowe and CYC.

404 Since CYC did not take any precautions against discrimination based on sexual orientation, it is unnecessary to decide whether, if it had done so, it could have relied on s 103 to exempt itself from liability. On its face, the language of the section confines its operation to cases of vicarious liability. Without formally deciding the question, I consider that it was intended to apply to cases where the legislation imposes direct liability on an employer, as well as to cases where the liability is vicarious in the tortious sense. Parliament could have made employers liable for discrimination by employees or agents, regardless of the steps taken by the employer to prevent this from occurring. Once it was decided that an employer should have a defence if reasonable precautions were taken against discrimination, there is no rational reason for holding that a reasonable precautions defence applies in the case of vicarious liability (where in any case the employer would not be liable if the employee was acting outside the course of employment) but not where the employer was directly liable. There is no reason to consider that the legislature intended to make such an irrelevant distinction. To my mind both ss 102 and 103 deal with attributed liability in the broad sense.

405 The interpretation I favour means that companies are responsible for discriminatory acts of employees in the same way as natural persons and that all employers have the benefit of the exception in s 103. This is consistent with the approach taken in other Australian jurisdictions, despite differences in the wording of the particular legislation.

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249 *Disability Discrimination Act 1992* (Cth) s 123; *Age Discrimination Act 2004* (Cth) s 57.

250 The *Equal Opportunity Act 1995* (Vic) commenced on 14 June 1995 and the reasons in *Meridian* were delivered on 26 June 1995.

Did Mr Rowe assist the company to discriminate? NEAVE JA

406 Finally, could Mr Rowe have been held liable for discrimination under s 98 of the Act, which provides that:

> A person must not request, instruct, induce, encourage, authorise or assist another person to contravene a provision of Part 3, 5 or 6.

407 In my view the fact that Mr Rowe's refusal of accommodation was to be treated as the refusal of the company, did not preclude him from being regarded as 'authorising' or 'assisting' the breach. A similar issue was considered by Austin J in *TZ*[251] where the question was whether it was permissible to treat the same conduct as constituting a primary contravention of an injunction against the company and also as imposing accessory liability for breach of the injunction on the director who actually did the acts breaching it. Austin J said the following:

> In some contexts, particularly in the criminal sphere, it is not permissible to 'make the person actually committing the forbidden acts an accessory to the offence consisting in the vicarious responsibility for his acts', to use the words of Dixon J in *Mallan v Lee*.[252] However, the High Court distinguished *Mallan v Lee* in *Hamilton v Whitehead*.[253] There a company was convicted of offering interests in a managed investment scheme to the public in contravention of statutory company law. Its managing director, Mr Whitehead, who placed an advertisement relating the scheme and made contact with potential investors, was charged with involvement in the company's contravention. The trial judge noted that the prosecution had relied on the 'directing mind and will' theory and had contended that Mr Whitehead's actions were the actions of the company, and in those circumstances he said it would be wrong and oppressive to prosecute Mr Whitehead personally for the identical acts and decisions that were relied upon as acts of the company. But the High Court (Mason CJ, Wilson and Toohey JJ) held that Mr Whitehead had been properly charged with involvement in his company's contravention and should have been convicted. The statutory provisions under which the company had been convicted prohibited 'a person' from issuing or offering interests. In the High Court's view, those provisions were directed to the company, which was the person who issued and offered the interests. In contrast with *Mallan v Lee*, the company's liability was not vicarious liability for acts performed by a servant, but was direct liability. Mr Whitehead was the embodiment of the company, and the company was directly rather than vicariously liable as a principal by virtue of his conduct. Consistently with that conclusion, Mr Whitehead's conduct made him liable as an accessory, under statutory provisions defining liability for involvement in the contravention. The High Court said there was nothing conceptually wrong with treating the managing director as having acted in two capacities, first as the embodiment of the company and second as an individual knowingly concerned in the company's acts.[254]

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251 [2009] NSWSC 1465.

252 (1949) 80 CLR 198, 216.

253 (1988) 166 CLR 121. See also *Houghton v Arms* (2006) 225 CLR 553, 567–8 [45]–[46]. Cf the view of French J, in *Wright v Wheeler, Grace and Pierucci Ltd* [1988] ATPR 40-865, where the liability was criminal liability.

254 [2009] NSWSC 1465 [46].

408 In *TZ* the central issue was whether the managing director, as well as the company, could be punished for contempt. However similar reasoning to that of Austin J would permit Mr Rowe to be held liable for assisting or authorising CYC's refusal of accommodation, even though his acts were the acts of the company.

409 As Maxwell P has said, it is not necessary to decide the question, because this argument was never made to support Mr Rowe's liability.

Could CYC or Mr Rowe rely on the exception in s 77?

410 CYC can only rely on s 77 of the EO Act if the section applies to corporations. Assuming that corporations can claim the benefit of that exception, we must decide whether the denial of accommodation was 'necessary to comply with the genuine religious belief or principles' of CYC or, if Mr Rowe was a discriminator, necessary to comply with Mr Rowe's religious beliefs or principles.

411 The meaning of s 77 must be ascertained by reading it in the context of the other provisions in the Act, and by reference to its legislative history and any extrinsic material which casts light on its intended scope. In interpreting the section the Court can also take account of international jurisprudence on the right to freedom of religion,[255] which is protected by art 18 of the *International Covenant on Civil and Political Rights* (**ICCPR**),[256] by art 9 of the *European Convention on Human Rights*,[257] (the **European Convention**)) and/or by constitutional provisions or legislation in force in many countries.[258] art 9 of the European Convention and art 18 of the ICCPR are expressed in similar terms. The latter provides that:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually with others or in community with others and in public or private, to manifest his belief in religion or belief in worship, observance, practice or teaching.

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255 That is the case even if s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), does not apply in interpreting the legislation, as is the case here; see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Plaintiffs 157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 88–9 [134]; *Royal Women's Hospital v Medical Practitioners Board* (2006) 15 VR 22, 39 [74]–[77] (Maxwell P); Michael Kirby, 'Australia's Growing Debt to the European Court of Human Rights' (2008) 34(2) *Monash University Law Review* 239, 242.

256 Australia is a party to the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 28 March 1976), having ratified it on 13 August 1980.

257 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

258 For constitutional provisions see *Canada Act 1982* (UK) c 11, sch B, pt 1 (**Canadian Charter of Rights and Freedoms**); *United States Constitution* amend 1; *Constitution of the Republic of South Africa 1996* (South Africa) ch 2, s 15. Legislative human rights protections are found in *Human Rights Act 1998* (UK) c 42, s 13; *New Zealand Bill of Rights Act 1990* (NZ) s 13.

412 Although international case law is relevant in deciding the meaning of s 77, freedom of religion provisions such as art 18 are expressed differently from s 77 and arise in a different constitutional context.[259] Some of the cases which the parties cited were challenges to the validity of legislation alleged to infringe the right to religious freedom. Often they were decided in the context of constitutional provisions or human rights legislation which explicitly require the relevant court to balance freedom of religion with the protection of other human rights, such as the right to be free from various forms of discrimination.[260] However, as Maxwell P observes in his reasons, the question before us also requires a balance to be struck between competing rights. In her Second Reading Speech on the introduction of the Bill, the Attorney-General said that s 77 aimed— NEAVE JA

> to strike a balance between two very important and sometimes conflicting rights – the right of freedom of religion and the right to be free from discrimination.[261]

Does s 77 Apply to corporations?

413 In my view, s 77 does not apply to corporations. Like other human rights, the right to freedom of religious belief can only be enjoyed by natural persons. Because a corporation is not a natural person and has 'neither soul nor body',[262] it cannot have a conscious state of mind amounting to a religious belief or principle. It follows that applying the s 77 exception to a corporation would require the adoption of a legal fiction which attributes the beliefs of a person or persons to the corporation.

414 In *News Corporation Ltd v National Companies and Securities Commission*[263] the Full Court of the Federal Court considered whether s 12(2)(a) of the *Freedom of Information Act 1982* (Cth), which gave people extended access to documents relating to their 'personal affairs', was applicable to a corporation. The Court held that a corporation did not have 'personal affairs' within the meaning of the section, noting the absence of any explicit provision to this effect.[264] St John J remarked that although the use of the word 'person' in legislation included a corporation, '[t]his does not mean that the adjective "personal" can be likewise translated'. A corporation, like a natural person could have business affairs, but in addition —

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259 Both art 18 of the ICCPR and art 9 of the European Convention qualify the right to freedom of religion. For example, in art 18 of the ICCPR the freedom to manifest religion 'may be subject only to such limitations as are prescribed by law and are necessary to protect the public order, safety, health or morals or the fundamental rights and freedoms of others.'

260 Constitutional provisions are often restricted by 'reasonable limits' provisions. For example sch B, pt 1, s 1 of the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. See also the *Constitution of the Republic of South Africa 1996* (South Africa) ch 2, s 36.

261 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995 (Jan Wade, Attorney-General), 1254.

262 *Motel Marine Pty Ltd v IAC (Finance) Pty Ltd* (1964) 110 CLR 9, 14 (Kitto, Taylor and Owen JJ).

263 (1984) 1 FCR 64.

264 Ibid 71 (Bowen CJ and Fisher J).

> real persons could have affairs relating to family and marital relationships, health or ill health, relationships with and emotional ties with other real people.[265]

Like 'personal affairs' religious beliefs are personal matters, involving individual judgment on questions of faith and ethics.

415 In *ABC v Lenah Game Meats Pty Ltd*[266] Gleeson CJ discussed whether a corporation could have a right of privacy. Whilst recognising that 'some forms of corporate activity may be private' for example in the sense that shareholders may be excluded from attending directors' meetings, Gleeson CJ said that the foundation of rights of privacy is, to a large extent 'human dignity' and that this concept 'may be incongruous when applied to a corporation'.[267] Attributing a religious belief to a corporation is equally incongruous.

416 There are numerous legislative provisions which impose criminal or civil liability on a corporation and attribute the intention or belief of an agent of the corporation to it, for the purposes of proving the corporation has the required intention or other state of mind,[268] or has a defence to liability. The existence of these provisions does not require the conclusion that a corporation is to be deemed to hold beliefs on matters such as the existence of a deity or deities, the presence of an afterlife, or in the case of Christianity, the centrality of the death and resurrection of Jesus Christ, in the absence of a specific legislative provision which requires such 'deeming' to occur.[269]

417 An individual can give evidence on their religious beliefs and a court can make a factual decision as to whether those beliefs are genuinely held. But there would be practical difficulties in attributing a particular religious belief or principle to a corporation. The memorandum and articles of a company may show that it was established for religious purposes, but even if such documents contain statements of purposes or 'principles' they are unlikely to set out the 'beliefs' of the corporation. There are difficulties in attributing the religious beliefs of members of the board to a corporation, because board members may not have the same beliefs, or their beliefs may change over time. In *Khaira v Shergill*[270] the United Kingdom Court of Appeal held that because religious beliefs are 'subjective inward matters' they were incapable of proof and not justiciable as a legal question:

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265 Ibid 78–9 (St John J).

266 (2001) 208 CLR 199.

267 Ibid 226.

268 For discussion of the common law approach to negligence committed by a corporation see the discussion by Fisher J in *News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64,79. For examples of statutory attributions of intention or belief see *Corporations Act 2001* (Cth) s 769B and *Competition and Consumer Act 2010* (Cth) s 84.

269 Provisions which do attribute intentions or beliefs to companies often provide for how that intention or belief is to be ascertained; see the comments on this by Bright J in *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270, 279. An example is the defence of honest opinion provided by s 31 of the *Defamation Act 2005* (Vic).

270 [2012] EWCA Civ 983. The question in that case related to the identification of the spiritual successor of 'the second Holy Saint', which was relevant to the trusteeship and administration of two Sikh temples. Two factions of the Sikh community disagreed about that question.

NEAVE JA

> Religious doctrine and practice are faith matters: such beliefs and practices may be open to different interpretations by different adherents at different times and in different places.[271]

418 If s 77 applied to corporations a court could be required to decide which, among a number of competing beliefs or practices, were to be regarded as the 'genuine religious belief' of the corporation. In the absence of clear legislation requiring this to be done, s 77 should not be interpreted to require a court to adjudicate on the particular belief (among possibly competing claims) held by a corporation.

419 The European Court of Human Rights has held that the human right to manifest a religious belief can be exercised either individually or collectively, for example through a corporation. In *Hasan v Bulgaria*[272] the European Court of Human Rights explained why interfering with a religious organisation could impede the capacity of individuals to practise their religion:

> Religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of divine origin.... Participation in the life of the community is thus a manifestation of one's religion protected by art 9 of the Convention. Where the organisation of the religious community is at issue, art 9 must be interpreted in the light of art 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which art 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by art 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[273]

420 It follows that legislation applicable to corporations formed for religious purposes could, in some circumstances, interfere with the freedom of religious belief. But the exceptions in ss 75(2), (3) and s 76 of the EO Act deal with that situation. It does not mean that the right to religious freedom requires protection by holding that a corporation can **itself** hold a religious belief, for the purposes of s 77.

421 CYC relied on the fact that definition of the word 'person' in s 4 of the ILA Act[274] includes a body corporate as well as an individual. CYC also submitted

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271 Ibid [17] (Lord Justice Mummery).

272 (2002) 34 EHRR 55.

273 Ibid [62]. See also *Church of Scientology Moscow v Russia* [2007] ECHR 258 [72], which also referred to the right of individuals to form a legal entity in order to act together in an area of common interest, which is protected by the right of freedom of association in art 11 of the European Convention.

274 'Person' is defined in s 4 of the *Equal Opportunity Act 1995* (Vic) as including an unincorporated association as well as a natural person.

that since prohibitions against discrimination in the EO Act apply to corporations as well as individuals, the s 77 exception must apply to them as well. Neither of these submissions is persuasive. The ILA Act definition applies only in the absence of words showing a contrary intention. Logically the fact that corporations are prohibited from discriminating, does not determine the scope of any exceptions to that prohibition. Bodies established for a religious purpose and educational organisations conducted in accordance with religious principles receive the benefit of the exceptions in ss 75 and 76. Like Maxwell P, I consider that the use of the word 'body' in ss 75 and 76 and the absence of a similar provision in s 77 is clear indication of an intention that s 77 did not apply to corporations. If religious corporations were protected by s 77 there would be no need for the more specific exceptions provided to those bodies.

422 For these reasons I agree with Maxwell P that a corporation cannot rely on the s 77 exception.

Was it necessary for Mr Rowe to refuse accommodation at the youth camp in order to comply with his genuine religious beliefs or principles

423 Whether a person genuinely holds a religious belief is a question of fact.[275] The judge below held that Mr Rowe genuinely held the beliefs he expressed about sexual activity and orientation.[276] However s 77 does not apply simply because an individual subjectively holds a religious belief, which in his or her own mind justifies the act of discrimination.

424 The section requires that the discriminatory action be necessary to comply with the person's genuine religious belief. In my view, the question whether the person's genuine religious belief made it necessary for them to discriminate must be determined objectively. If necessity were determined subjectively, genuinely held religious beliefs would always trump the right of individuals to be free from discrimination on prohibited grounds. This would ignore the balance which the EO Act seeks to strike between protecting religious freedom and protecting equality. As Lady Hale remarked in *Preddy*:[277]

> To permit someone to discriminate on the ground that he did not believe that persons of homosexual orientation should be treated equally to persons of heterosexual orientation would be to create a class of people who were exempt from the discrimination legislation. We do not normally allow a person to behave in a way which the law prohibits because they disagree with the law.[278]

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275 *R v Secretary of State for Education and Employment; Ex parte Williamson* [2005] 2 AC 246, 258 [22] Lord Nicholls of Birkenhead (***Williamson***).

276 Reasons [355].

277 [2013] 1 WLR 3741.

278 Ibid 3752 [37]. See the similar remarks made by Sachs J delivering the judgment of the Constitutional Court of South Africa in *Christian Education South Africa v Minister of Education* (1999) 2 SA 83 [35] (Constitutional Court) and the observations of the Ontario Superior Court of Justice in *Ontario Human Rights Commission v Brockie* [2002] 222 DLR (4^{th}) 174 [42].

425 Applying an objective concept of 'necessity' is consistent with the use of the same phrase elsewhere in the legislation. Sections 69 and 70 make an exception for discrimination which is 'necessary to comply' with another Act[279] or with the order of a court or tribunal. Both sections deal with matters which can be objectively determined. I consider that the words 'necessary to comply' in s 77 mean what a reasonable person would consider necessary for Mr Rowe to comply with his genuine religious belief. NEAVE JA

426 An objective approach is consistent with the case law on the scope of the right to freedom of religion protected by the ICCPR and the European Convention. In that context it has been held that the subjectively held religious beliefs of one individual do not always override the human rights of others. As Lord Walker of Gestingthorpe observed in *Williamson*:[280]

> not every act which is in some way motivated or inspired by religious belief is to be regarded as the manifestation of religious belief; see *Hasan v Bulgaria*.[281]

427 The addition of the words 'reasonably necessary' in s 84 of the *Equal Opportunity Act 2010* (Vic) does not require the conclusion that s 77 of the previous Act imposed a subjective test for the purposes of determining whether 'the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles'.

428 Lord Walker's remarks refer to the distinction between the freedom to hold a belief and the freedom to manifest that belief, which has played an important part in the European and United Kingdom cases. His Lordship suggested that the distinction serves as a 'necessary filter' to prevent art 9 of the European Convention becoming unmanageably diffuse and unpredictable in its operation.[282]

429 Unlike the ICCPR or the European Convention, s 77 does not differentiate between holding a belief and manifesting it. However an objective interpretation of the words 'necessary to comply' provides a similar filter. When read together with the exceptions in ss 75 and 76, an objective approach enables a balance to be struck between 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.

430 International cases have taken a number of factors into account in deciding whether particular prohibitions infringe the right to hold and manifest a religious belief. Where the act claimed to be discriminatory arises out of a commercial activity, it is less likely to be regarded as an interference with the right to hold or manifest a religious belief than where the act prevents

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279 This is subject to *Equal Opportunity Act 1995* (Vic) ss 47(3) and 58(1).

280 *Williamson* [2005] 2 AC 246, 269 [63]; see also *Arrowsmith* v *United Kingdom* (1978) 3 EHRR 218.

281 (2002) 34 EHRR 1339, 1358 [60].

282 The other 'filter' to which he referred was the qualification to art 9 in European Convention art 9(2).

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. In *Ontario Human Rights Commission v Brockie*[283] the Superior Court of Ontario observed that:

> The further the activity is from the core elements of [freedom of religion] the more likely the activity is to impact on others and the less deserving the activity is of protection. Service of the public in the commercial sphere must be considered at the periphery of activities protected by the freedom of religion.[284]

431 Courts have taken a similar view where a person who has been employed to undertake a secular role, relies on their religious belief to justify infringing the human rights of others.[285] Where a person has voluntarily undertaken responsibilities that he or she knows may affect their ability to manifest their religious belief, this may be taken into account in deciding whether an appropriate balance has been struck between the right to freedom of religion and the right to be free from discrimination.[286]

432 By analogy, discrimination practised in the commercial sphere or outside a religious contest may not satisfy the words of s 77, because in such cases the discrimination is not 'necessary to comply with the discriminator's genuine religious belief'. Enforcing the prohibition against discrimination on the grounds of sexual orientation does not prevent the alleged discriminator from maintaining their belief (in the instant case the belief that homosexuality is sinful) or from practising that belief in his or her own life, by refraining from sexual acts with a person of the same gender.

433 The European Court of Human Rights has also said that in deciding whether an act is a 'manifestation' of a religious belief, 'the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case'.[287] If the discriminatory act does not arise from a core feature of the discriminator's religious beliefs,[288] it is less

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283 [2002] 222 DLR (4th) [174].

284 Ibid [51].

285 See, eg, *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, 112–3 [23] (Lord Bingham); *Islington London Borough Council v Ladele* [2010] WLR 955. In that case a civil registrar who had refused to register civil partnerships entered into between same sex couples claimed she had been discriminated against on religious grounds. It was held that the registration of civil partnerships was a secular task which was not protected by the right to religious freedom, that it would have been discrimination for the woman to refuse to register civil partnerships and that the local authority was entitled to insist on the woman registering such partnerships; for a useful discussion of relevant cases see 970–2 [54]–[61] (Lord Neuberger MR). Leave to appeal from that decision was refused by the UK Supreme Court and the decision was upheld by the European Court in *Eweida v United Kingdom* [2013] ECHR 37 [102]–[106]. The national authorities (the Court of Appeal and the council) were acting within the margin of appreciation available to them.

286 In *McFarlane* v *Relate Avon* [2010] EWCA Civ 880, Mr McFarlane was refused leave to appeal by the Court of Appeal of England and Wales. His complaint was also rejected by the European Court of Human Rights, in *Eweida v United Kingdom* [2013] ECHR 37 [109]–[110].

287 *Eweida v United Kingdom* [2013] ECHR 37 [82].

288 In *Williamson* [2005] 2 AC 246, 259 [23] Lord Bingham remarked that 'the belief must relate to

likely that it will be held to infringe his or her right to religious freedom. NEAVE JA

434 By analogy this reasoning supports the view that discrimination may be necessary to comply with a religious belief, where the prohibition against discrimination compels the alleged discriminator to refrain from conduct which is required by their religion (for example participation in religious ceremonies or observance of dietary laws) or to actively participate in an act prohibited by their religion, for example celebrating a marriage between a same sex couple.[289] However, the appropriate balance between religious freedom and freedom from discrimination would be struck by holding that the exemption does not apply in situations where it is not necessary for a person to impose their own religious beliefs upon others, in order to maintain their own religious freedom. This would mean that if a same sex couple refused to provide accommodation to Mr Rowe because of his or her lawful religious belief, that couple would be in breach of the Act. Each party would have 'the same right to be protected against discrimination by the other'.[290]

435 Mr Rowe's act in refusing Cobaw was clearly motivated by his religious beliefs. But that does not mean that the refusal was 'necessary' for him to comply with those beliefs. It was 'necessary' for Mr Rowe to abstain from homosexual relationships in order 'to comply' with his belief that homosexuality is a sin. However, peripheral behaviour in relation to this belief — for example, refusing to allow young people who believed that they might be homosexual to attend a youth camp — was not 'necessary ... to comply' with his beliefs.

436 Moreover even if the words 'necessary to comply' in s 77 required the Victorian Civil and Administrative Tribunal (**VCAT**) to take account of Mr Rowe's subjective beliefs, his admission that he would not have refused accommodation to lesbian parents, contradicts his assertion that he regarded this act of discrimination as necessary to comply with his beliefs. It follows that, if, contrary to my view, s 77 applies to corporations, Mr Rowe's genuine religious belief would not protect CYC either.

437 As I have said, this case is not on all fours with the issues which arise in the United Kingdom cases. However, I am reassured that this interpretation of s 77 achieves an appropriate balance between the right to hold a religious

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matters more than trivial. It must possess an adequate degree of seriousness and importance. As has been said it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied'. See also 267 [57] where Lord Walker appears to take a different view and *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, 304 [36] which supports the view of Lord Bingham.

289 Note, however, that in Canada an advisory opinion of the Saskatchewan Court of Appeal suggests that provisions permitting persons who celebrate civil marriages to refuse to do so for same sex couples on religious grounds may breach constitutional guarantee of equality in the *Canadian Charter of Rights and Freedoms*; see *In the Matter of Marriage Commissioners appointed under the Marriage Act* [2011] SKCA 3.

290 Cf *Preddy v Bull* [2013] 1 WLR 3741, 3744 [4] (Lady Hale) (***Preddy***).

belief, and the right to be free of discrimination on the grounds of discrimination, by the fact that the United Kingdom Supreme Court reached the same conclusion in *Preddy*.[291] In that case the Court held that although the Christian hotel proprietors believed that only heterosexual married couples should have sexual relations they had unlawfully discriminated by refusing a double bedded room to a homosexual couple in a civil partnership.[292]

If Mr Rowe can rely on the exception under s 77 can CYC also rely on that exception?

438 Finally, if, contrary to my view, Mr Rowe was entitled to rely on s 77, I do not consider that CYC could rely on Mr Rowe's belief to exclude it from the direct liability imposed on it by s 49(a). Moreover, even if s 102 was the sole basis on which CYC could be held to have discriminated, I do not understand how CYC could assert that in its corporate capacity it was entitled to claim the benefit of the personal beliefs of Mr Rowe, to avoid being found liable for discrimination itself. Such conduct would, if engaged in by CYC, have amounted to a contravention of the Act, for which CYC would be liable, since as a corporation it could not claim the benefit of the exception.

439 For these reasons her Honour correctly held that neither CYC, nor Mr Rowe, were entitled to rely on the s 77 exception.

REDLICH JA

440 I have had the considerable benefit of reading in draft the reasons of both Maxwell P and Neave JA. As I have concluded, contrary to their views, that the Tribunal erred in its construction of the religious exemption provided for in s 77 of the EO Act and in its application to the facts, I would allow the appeals of both applicants.

Summary of conclusions on the issues raised by the appeal

(1) At trial, Cobaw asserted that it was bringing its complaint as a 'representative body' within the meaning of s 104(1B) of the EO Act and that it was doing so on behalf of specified individuals. I agree with Maxwell P for the reasons he gives that the applicants should be refused leave to amend their notice of appeal in order to challenge the finding of the Tribunal as to the individuals entitled to make a complaint of discrimination.

(2) For the reasons given by Maxwell P and the further reasons that follow, I agree that it was open to the Tribunal to find that the individuals were discriminated against 'on the basis of their sexual orientation'.

[291] [2013] 1 WLR 3741. There was a difference in view as to whether the act of Mr and Mrs Hall amounted to direct or indirect discrimination, which in turn affected the scope of the exception. All members of the Court held that the discrimination could not be justified by their religious belief.

[292] *Black v Wilkinson* [2013] 1 WLR 249.

REDLICH JA

(3) (a) In answering the question 'who is the discriminator?', Maxwell P agrees with the submissions advanced by the applicants and the Victorian Equal Opportunity and Human Rights Commission (**the Commission**) that the refusal of accommodation was a refusal by Christian Youth Camps (**CYC**) and not by Mr Rowe. Neave JA accepts the submissions of Cobaw and the Attorney-General that Mr Rowe refused the provision of a service to the applicants. In my view s 102 governs both parties' liability.

(b) Where an employee in the course of employment or as an agent engages in conduct which is discriminatory, s 102 of the EO Act applies. Section 102 imposes liability upon the employer or principal for what would at common law be either primary or derivative liability, as well as liability upon the employee or agent. For the reasons given by Neave JA and the reasons that follow, I consider s 102 to govern the issues of liability for both CYC and Mr Rowe. Both CYC and Mr Rowe contravened the Act. It is therefore not strictly necessary to decide whether Mr Rowe, in performing an act authorised by his employer, contravened the Act, but having regard to the purposes of the Act, the better view of the statutory regime and the ordinary meaning of the language of ss 42 and 49 is that he did.

(4) Largely for the reasons given by Maxwell P and Neave JA, I agree that the exemption set out in s 75 of the EO Act cannot be relied upon by either applicant. CYC was not a religious body established for religious purposes. Further, the beliefs or principles upon which CYC relied were not 'doctrines' of the religion.

(5) On the issues relating to the religious belief exemption in s 77 of the Act, my conclusions are as follows:

(a) The Tribunal was right to conclude that the religious belief exemption under s 77 could apply to a corporation.

(b) The Tribunal erred in its approach to the construction of s 77, in the following ways:

i. By adopting a narrow construction of the exemption in light of the purposes of the Act;

ii. By applying an objective standard to the question of whether the applicants' actions were necessary for them to comply with their religious beliefs; and

iii. By narrowing the scope of the exemption in light of the applicants' participation in the commercial sphere.

(c) The Tribunal erred in its finding that the applicants' conduct

was not necessary in order for them to comply with their genuine religious beliefs or principles.

(d) If the religious exemption is available to either employer or employee, the other may rely upon the exemption.

The human right not to be discriminated against on the ground of sexual orientation — a liberal and purposive construction of the Act

441 A liberal and purposive approach should be adopted in interpreting and applying the provisions of the EO Act which prohibit discriminatory behaviour in order to advance the broad policy of non-discrimination and equality underlying it. Amongst those persons whom the EO Act protects from discrimination are those who have the attribute of same sex orientation. The aims of Cobaw, realised through its WayOut programme, are to raise awareness of homophobia in rural areas, and create connections with isolated, at risk young people. These are critically important objectives which advance recognition of the right of the individual not to be discriminated against on the grounds of his or her sexual orientation. The intrinsic value of these objectives includes recognition that such discrimination has the effect of diminishing the self-worth and personal dignity of those with such an attribute, and that adverse psychological effects and social and economic disadvantage are an inevitable consequence of such discrimination.

442 Redressing discrimination must extend to reasonable efforts made by persons possessing the characteristic in question, and to organisations they form or which seek to assist them in advancing the objectives under the Act, of promoting recognition and acceptance of the right to equality and opportunity, and the elimination of discrimination because of the attribute of 'sexual orientation'[293] or because of association with a person identified by reference to that attribute.[294]

Was there discrimination on the basis of sexual orientation?

443 In order to deny that their conduct was discriminatory, the applicants sought to draw a distinction between the sexual orientation of those attending the camp and their objection to the syllabus of what would be said to the attendees about their sexual orientation. That purported distinction was misconceived. Sexual orientation being inextricably interwoven with a person's identity, the Tribunal was right to reject the asserted distinction between what was to be discussed at the forum and the attribute of those who might attend.

444 The submission which had been advanced for the applicants before the Tribunal was that it was not the attribute of homosexuality of some of the attendees or association with them which was objected to but, rather, that

293 Section 6(l).
294 Section 6(m).

the focus of the forum was the promotion of homosexuality as a 'natural and healthy lifestyle'. In rejecting that distinction, the Tribunal made the following important finding: REDLICH JA

> I am satisfied that the effect of Mr Rowe's evidence is that, to him, promotion of homosexuality or a homosexual lifestyle involved any conduct, whether engaged in by same sex attracted people, or those with a personal association with people identified by their (same sex) sexual orientation, which accepted or condoned same sex attraction, or encouraged people to view same sex attraction as normal, or a natural and healthy part of the range of human sexualities.
>
> So understood, [CYC's] attempts to distinguish between homosexuality and promoting homosexuality failed. Mr Rowe's objection to promotion of homosexuality is, in truth, an objection to the same sex attraction, or as [CYC] characterised it, homosexuality.....[295]

445 I will return to these findings, which are also relevant to the application of the religious freedom exemption under s 77 of the Act.

446 International human rights law on the nature of the human right to religious freedom or the right to freedom from discrimination can play little part in the construction of s 77. I shall explain why that is so when dealing with that issue. The decision in *Ontario (Human Rights Commission) v Brockie,*[296] addressed the antecedent and narrower question germane to the present issue — whether there is a meaningful distinction between discrimination because of an attribute possessed by a person and discrimination because of conduct which advances an understanding and respect for those possessing that attribute. In *Brockie*, a printing company (**Imaging**) and its president (Mr Brockie) appealed against findings by the Commission that they had discriminated against the Canadian Lesbian and Gay Archives (**Archives**), a corporation registered as a charity with a mandate to acquire, preserve, organise and give public access to information about homosexuals in Canada and their contributions to society in order to educate the public. The directors of Archives were required to be homosexual. The President of Archives (Mr Brillinger) requested that Imaging print letterheads, envelopes and some business cards for the organisation. The material presented to Imaging showed that Archives represented the interests of 'gays' and 'lesbians' but said nothing of Archives' objects, activities or membership. Mr Brockie, on behalf of Imaging, without enquiring into Archives' activities or membership, refused to provide the requested printing services.

447 Much like the applicants in this appeal, Imaging and Mr Brockie sought to distinguish between discrimination because of the presence of or association with a human characteristic protected under the *Ontario Human Rights Code* (**the Code**) and discrimination because a person is engaged in the political act of promoting the causes of those who have such a characteristic. This distinction was rejected by the court. Efforts to promote an understanding and respect for those possessing such a characteristic should not be regarded

295 Reasons [189]–[190].

296 (2003) 222 DLR (4th) 174 (***Brockie***).

as separate from the characteristic itself. To draw such a distinction was inconsistent with the prohibition against discrimination under the Code.

448 For these and the reasons advanced by Maxwell P, the criticism of the Tribunal's approach is misconceived. Its reasons accord with those in *Brockie*. They accord with a liberal and purposive construction of the Act. The applicants' argument must be rejected.

Who committed the act of discrimination?

449 It was the respondent Cobaw's case at trial that Mr Rowe contravened the EO Act 'in the course of employment'.[297] That contention was upheld by the trial Tribunal who found that Mr Rowe in the course of his employment refused Cobaw's request, and that both he and CYC were liable under s 102 of the Act.

450 The applicants now advance a number of supplementary submissions. First, they submit that common law agency principles applied to determine whether CYC had contravened the provision of the Act. Second, they submit that as the accommodation was that of CYC, the conduct of Mr Rowe as the manager responsible for deciding whether to accept applications for accommodation was the conduct of CYC. As CYC was directly liable under common law principles, s 102 of the EO Act had no application, as CYC could not be vicariously liable and Mr Rowe had not himself contravened the Act. None of these submissions were raised before the Tribunal. They are not sustainable.

451 Lord Reid stated in *Tesco Supermarkets Ltd v Nattrass,*[298] that a distinction is to be drawn between a person who is 'the embodiment of the company', sometimes expressed as its 'directing mind and will,'[299] and a person who is a servant, agent or delegate of the body corporate. Where the person's mind is the mind of the company, the company's liability is direct but otherwise, 'any liability of the company can only be a statutory or vicarious liability.'[300]

452 In *Meridian Global Funds Management (Asia) Ltd v Securities Commission,*[301] Lord Hoffman examined 'the rules of attribution' which inform the question as to what acts are to count as the acts of the company. Since *Meridian,* decisions of both this Court and the New South Wales Court of Appeal have sought to identify 'the rules of attribution' appropriate within a particular statutory context.[302] But the company's rules of attribution, together with

297 See particulars of complaint [36]–[38].
298 [1972] AC 153, 170 (***Tesco***).
299 *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159, 172 (Lord Denning), *Tesco* [1972] AC 153, 171.
300 *Tesco* [1972] AC 153, 170 (Lord Reid).
301 [1995] AC 500 (***Meridian***).
302 *Director-General, Department of Education and Training v MT* (2006) 67 NSWLR 237, 242 [17] (Spigelman CJ); *DPP Reference No 1 of 1996* [1998] 3 VR 352, 354–5 (Callaway JA); *Bunnings Group Ltd v Chep Australia Ltd* (2011) 82 NSWLR 420, 453 [109]; *North Sydney Council v Roman* (2007)

general principles of agency and vicarious liability must, as Lord Hoffman observed in *Meridian*, give way 'when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability.'[303] In such circumstances, the usual canons of interpretation must be applied, taking into account the language of the statutory rule and its content and policy.[304] It is therefore necessary to construe the EO Act in order to determine whether common law principles of direct and vicarious liability and agency apply.[305] REDLICH JA

453 Sections 98 and 99 of the EO Act provide a form of direct liability where a person requests, instructs, induces, encourages, authorises or assists another person to contravene a provision of Part 3, 5 or 6. In such circumstances, a person committing the contravening act and the person who has requested or authorised its commission are jointly and severally liable for that contravention.

454 Section 102 of the EO Act provides:

> **102 Vicarious liability of employers and principals**
>
> If a person in the course of employment or while acting as an agent —
>
> (a) contravenes a provision of Part 3, 5 or 6; or
>
> (b) engages in any conduct that would, if engaged in by the person's employer or principal, contravene a provision of Part 3, 5 or 6 —
>
> both the person and the employer or principal must be taken to have contravened the provision, and a complaint about the contravention may be lodged against either or both of them.

455 Section 103 provides for an exception to this liability by providing that:

> An employer or principal is not vicariously liable for a contravention of a provision of Part 3, 5 or 6 by an employee or agent if the employer or principal proves, on the balance of probabilities, that the employer or principal took reasonable precautions to prevent the employee or agent contravening the Act.

456 The Solicitor-General submitted that it was incorrect to approach the question of liability by asking whether the act performed was in law the act of the employee or agent, or of the employer or principal. He submitted that s 102 provided the answer in law to that question, as both the employee or agent and employer or principal may be liable when a provision is contravened. It is s 102 that determines how the law treats the act performed. It imposes liability upon the employer or principal for what would at common law be either primary or derivative liability.

457 I accept those submissions. For the reasons expressed by Neave JA, and for the additional reasons which follow, s 102 is intended to cover both direct or primary liability and what at common law is the vicarious liability

69 NSWLR 240, 252–3 [43] (McColl JA).

303 *Meridian* [1995] AC 500, 507.

304 Ibid 506–7.

305 See *Pinecoat Pty Ltd v Anti-Discrimination Commissioner* (2001) 165 FLR 25, 38 [38] (Mildren J).

of an employer or principal.[306] It creates a form of statutory, vicarious or attributed liability. The authors of *Australian Anti-Discrimination Law* suggest that it would be better to use the latter term rather than 'vicarious' to describe the effect of the provisions which make an employer liable for the acts of an employee and a principal liable for the acts of an agent.[307]

458 Whether or not Mr Rowe was to be viewed as one who had complete authority from CYC to conduct its business at the resort and might even be said to be 'the mind and will' of CYC in relation to that business, such rules of attribution have no application where the EO Act provides the basis upon which liability of the employer is established. By necessary implication common law principles of direct and derivative liability have been excluded under the Act.

459 An examination of the *Equal Opportunity Act 1984*, which preceded the present Act and was repealed in 2006, supports this conclusion. Section 34 was in these terms:

> **Liability of Employers and Principals**
>
> (1) Subject to sub-section (2), where a person acts in contravention of this Act on behalf of another person either as his agent or employee, the person by whom the act is committed and the person on whose behalf the act is committed shall be jointly and severally liable under this Act in respect thereof.
>
> (2) In proceedings brought under this Act against any person in respect of an act alleged to have been committed by a person acting on the first-mentioned person's behalf it shall be a defence for that first-mentioned person to prove that that person took reasonable precautions to ensure that the person acting on that first-mentioned person's behalf would not act in contravention of this Act.

460 In *Box Hill College of Technical and Further Education v Fares,*[308] Smith J considered the effect of s 34 in these terms:

> A further argument was raised by the General Manager concerning the interpretation of the words 'where a person acts in contravention of this Act on behalf of another person either as his agent or employee'. It was argued that the words and in particular the phrase 'acts in contravention of this Act' refer to a situation where the employee or agent has contravened the legislation and is himself or herself personally guilty of a contravention of the legislation. It was further argued that an employee cannot contravene s 21 of the Act. Only an employer can breach that section. Thus an employee and his or her employer would not be liable for acts of the employee which discriminate against another employee in the ways described in s 21.
>
> I am not persuaded that the section should be construed in the way contended for by the appellants. It is significant that the words 'acts in contravention' are used and not the word 'contravenes'. *This suggests to me that Parliament was seeking to bring s 34 into operation whenever the acts of an employee or agent would have*

306 See Rees, Lindsay and Rice, above n 229, 655 [10.8.27].
307 Ibid 648–53 [10.8.4]–[10.8.19].
308 [1992] EOC ¶92-464, 79 311.

REDLICH JA

> *contravened the Act if committed by the employer or principal.* The words would, of course, also include the case where the employee or agent actually contravenes a provision. It seems to me that this construction would promote the purposes and objects of the legislation (s 35 *Interpretation of Legislation Act 1984*). I also bear in mind statements of the members of the High Court in *Waters v Public Transport Corporation* (1991) 103 ALR 513 referred to above.[309]

Smith J went on to observe that upon the appellant's construction of s 34, s 21, which dealt with discrimination in employment, would have very little scope for operation. He said:

> As pointed out by Kaye J in *SEC v Equal Opportunity Board* [1989] VR 480, 482, an employer would probably not be responsible for the discriminatory actions of employees on common law principles because vicarious liability would not operate (citing *Tesco Supermarkets Ltd v Nattras*).[310]

461 The language of s 34 and the construction given to it by Smith J fixed the employer or principal with liability, whether its source was primary or derived.

462 The terms of s 102 are very similar to those of s 53 of the *Anti-Discrimination Act 1977* (NSW). Under s 53 of the New South Wales Act, an act done by an agent or employee, which if done by the principal or employer would be in contravention of the Act, is 'taken to have been done' by the principal or employer. That section was amended in 1994 as a result of judicial confusion surrounding its interpretation. In its original form, s 53 provided that 'an act done in contravention of this Act' by an agent or employee was 'deemed' to be done by the principal or employer for the purposes of liability under the Act. As there were provisions in that Act which did not attach liability for discriminatory conduct in employment to anyone but the employer, an argument was thought available that only an employer could act in 'contravention' of the EO Act and that an employee would not relevantly 'contravene' the statute so that an employer could not be vicariously liable for the discriminatory act of the employee. As such, in 1994 s 53 was amended to place the vicarious liability of employers beyond doubt — hence the language that an act done by the agent or employee

> which *if done* by the principal or employer *would be* a contravention of the Act is taken to have been done by the principal or employer also.[311]

463 It is the provisions of the EO Act which govern the liability of employers and principals for the acts of their servants or agents. That is the manner in which s 34 of the *Equal Opportunity Act 1984* was construed — a construction which in part explains the form of s 102(b) of the Act. It is consistent with the view taken by the New South Wales Court of Appeal in *Commissioner of Police v Estate of Russell*[312] concerning s 53 of the *Anti-Discrimination Act 1977 (NSW)*, which provided:

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309 Ibid 79 320–1 (emphasis added).
310 Ibid 79 320 (citation removed).
311 Emphasis added.
312 (2002) 55 NSWLR 232 (***Russell***).

Section 53

(1) An act done by a person as the agent or employee of the person's principal or employer which if done by the principal or employer *would be* a contravention of this Act is taken to have been done by the principal or employer also unless the principal or employer did not, either before or after the doing of the Act, authorise the agent or employee either expressly or by implication, to do the Act.[313]

(2) If both the principal or employer and the agent or employee who did the act are subject to any liability arising under this Act in respect of the doing of the act, are jointly and severally subject to that liability.

...

464 Spigelman CJ, with whom the other members of the Court agreed, observed of s 53 and the NSW statutory regime that '[s]ave in so far as s 53 can be so described, there is not in my opinion any room in this scheme for the application of principles of vicarious liability whether at common law or by statute'.[314] Despite the use of the heading to s 102 of 'vicarious liability', the same must be said of the *Equal Opportunity Act 1995*. In *Russell*, the Chief Justice also stated that the purposes of the NSW Act were best served by focusing the burden on the actual perpetrators of the unlawful conduct, as loss distribution was not a purpose of the *Anti-Discrimination Act*.

465 When s 102(b) was introduced, it employed language very similar to the terms of s 53 of the NSW Act and the language used by Smith J in *Fares* in the italicised portion of the above quote. His Honour's conclusion regarding the legislative intent as to the scope of s 34 of the previous Act is now reflected in the new provision.

466 The statutory form of liability under ss 102 and 103 is fundamentally different to common law vicarious liability. Section 102(a) expressly contemplates that a person acting as employee or agent may contravene a provision of Part 3 in that capacity. Section 102(b) makes the principal/employer and the agent/employee jointly and severally liable, even where the employee or agent has not contravened the Act. The employer or principal will be liable whenever it would have contravened the Act had it performed the relevant act. The employee or agent will then also be liable even though they may not have contravened the Act. In addition, s 103 provides a defence to vicarious liability that is unavailable at common law.

467 If the Act were to be construed so that Mr Rowe did not contravene the Act and his employer was 'directly' liable for his act, an entire class of employed persons and agents would be excluded from the operation of the Act. As the first respondent submits, no person providing goods or services to the public on behalf of a company would be held liable for discrimination in the manner in which those goods or services were provided. Where the employee or agent's conduct is prohibited by Part 3, both employee/agent and

313 Emphasis added.

314 *Russell* (2002) 55 NSWLR 232, 245 [66].

REDLICH JA

employer/principal are responsible for contravening Part 3 and the question whether the refusal was, in law, that of the employer/principal does not arise. The statutory regime poses a different question and does not seek to attribute liability solely to the employer/principal.

468 It has not been suggested that Mr Rowe performed an unauthorised act in responding to Cobaw's request. He was acting in the course of his employment. It is difficult to envisage circumstances in which an employee or agent performing authorised acts or even unauthorised acts sufficiently connected to their employment or agency will not attract the operation of s 98, 99 or 102 of the Act. In such circumstances, the present being one, the regime of the Act operates to make employer or principal on the one hand, and employee or agent on the other, jointly and severally liable. In the present case, joint and several liability of Mr Rowe and CYC would arise through the application of sub-ss 102(a) or 102(b) and it is strictly unnecessary to decide whether the refusal of accommodation in this case was that of CYC or Mr Rowe. That said, having regard to the purposes of the Act, the better view of the statutory regime and the ordinary meaning of the language of s 42 and s 49 is that Mr Rowe, though performing an act authorised by his employer, by his conduct contravened the Act.

469 Section 102 is not to be viewed as limited to derivative or vicarious liability as it is understood at common law. Section 102(b) deems the conduct of the employee or agent to be that of the employer or principal and imposes liability where the conduct would constitute a contravention of the Act by the employer or principal.

Section 77: Was the discriminatory Act necessary in order to comply with genuine religious beliefs or principles?

470 Discrimination on the basis of an attribute is only prohibited if it falls within an area of activity covered by the Act. Section 42 of pt 3 prohibits discrimination in the provision of goods and services and s 49 prohibits discrimination in the provision of accommodation. CYC and Mr Rowe sought to rely upon the exemptions from discriminatory conduct contained in ss 75(2) and 77 of pt 4 of the Act. That Part is headed 'General Exceptions to and Exemptions from the Prohibition of Discrimination'.

471 Section 12 provides:

> **Exceptions and Exemptions**
>
> This Act does not prohibit discrimination if an exception in Part 3 (whether or not in the same Division as the provision prohibiting discrimination) or Part 4 or an exemption under Part 4 applies.

472 Section 75(2) provides:

> Nothing in Part 3 applies to anything done by a body established for religious purposes that —
>
> (a) conforms with the doctrines of that religion; or

(b) is necessary to avoid injury to the religious sensitivities of people of that religion.

473 Section 77 provides that:

> 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.

474 There are a number of grounds of appeal that challenge the Tribunal's approach to and findings concerning the exemption in s 77. First, it is alleged that the Tribunal erred in holding that the *Charter of Human Rights and Responsibilities Act 2006* (the **Charter**) required the Tribunal to narrowly and strictly construe the exemptions (Grounds 5(a) and 5(m)(i)); that it failed to give sufficient weight to the freedoms contained in ss 14 and 15 of the Charter (Ground 5(b)); and that it approached the exemption on the basis that freedom from discrimination must not be curtailed unless manifested by unambiguous and unmistakeable language (Ground 5m(ii)). The second complaint is that the Tribunal erred in holding that the conduct of Mr Rowe or CYC, on the facts found by the Tribunal, was not 'necessary ... to comply with [their] genuine religious beliefs or principles' within the meaning of s 77 of the Act (Ground 5 (l)).

475 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.

Can s 77 apply to CYC as a corporate body?

476 It is necessary to first address the argument of Cobaw that the Tribunal erred in concluding that it was open to CYC, a corporation, to rely upon the exemption in s 77. It found that CYC was a 'person' within the meaning of s 77. The Tribunal having resolved this issue in favour of CYC, the parties were invited to provide supplementary submissions on this question. Cobaw contended that 'person' in s 77 did not include a corporation. For the reasons that follow the Tribunal was correct, in my view, in reaching the conclusion that a corporation could seek to rely upon that exemption.

477 Although a corporation is a distinct legal entity with legal rights, obligations, powers and privileges different from those of the natural persons who created it, own it, or whom it employs, there is ample legal basis to impute to it the religious beliefs of its directors and others who the law may regard as its mind or will. The Tribunal observed that subjective intentions may be attributed to corporations, including the necessary mental element for

a crime.[315] The corporation may make and express moral, ethical, environmental or other judgments in the discourse of the public square and participate in the defining of social norms. As this case shows, it will not necessarily be difficult to identify the corporation's state of mind. There is no principled reason for treating a corporation as capable of forming and acting upon its views in any of these areas but incapable of forming and acting upon religious ones. REDLICH JA

478 Cobaw argued before this Court that the exception in s 77 applied only to natural persons. It relied, in summary, upon the fact that the wording of s 75 was more obviously directed at corporate bodies, and the suggestion that s 77, with its reference to 'a person', therefore excluded them; and upon the alleged uncertainty and 'unnatural use of language' which would result from ascribing a 'genuine religious belief' to a corporation.

479 These arguments are unpersuasive and should be rejected.

480 Cobaw contends that there is no belief or principle to be found in the constitutive documents of CYC that would have made it necessary for CYC to engage in the discriminatory conduct. The Tribunal found that there was a consistent uniform expression of belief by all of the members of the Christian Brethren who testified before the Tribunal, including those who occupied positions within CYC, which permitted the conclusion that their beliefs were those of CYC. The conclusion of the Tribunal that the beliefs of the corporation's directors, all of whom were required to be members of the Christian Brethren and to subscribe to a declaration of faith, were properly to be characterized as the beliefs of CYC itself, has not been challenged.

481 Corporations have a long history of association with religious activity. Blackstone, in his *Commentaries on the Law of England,*[316] lists 'advancement of religion' first in the list of purposes that corporations might pursue. Religious institutions have long been organised as corporations at common law and under the King's charter.[317] It has been repeatedly held by European courts, applying art 9 of the *European Convention on Human Rights*, that entities and associations including corporations, unincorporated associations, institutions and societies are capable of possessing and exercising the right to freedom of religious beliefs and principles.[318]

482 Section 77 has been described as a 'catch-all exception for religious bodies' as well as for natural persons.[319] The attribution of legal personhood to CYC for

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315 Reasons [351].

316 See W Blackstone, *Commentaries on the Laws of England,* Chapter 18, 'Of Corporations'.

317 Ibid 455–73; see also *Citizens United v FEC* 558 US 310, 388 (2010).

318 See, for example, *X and Church of Scientology v Sweden* (*Application No 7805/77)* (1979) 16 DR 68, 70; *Omkarananda and the Divine Light Zentrum v Switzerland* (*Application No 8118/77)* (1981) 25 DR 105, 117; *Chappell v United Kingdom* (*Application No 12587/86)* (1987) 53 DR 241; *Kustannus v Finland* (*Application No 20471/92)* (1996) 85–A DR 29.

319 John Tobin, 'Should discrimination in Victoria's religious schools be protected? Using the Victorian Charter of Human Rights and Responsibilities Act to achieve the right balance' (2010)

these purposes is no more incongruous than the imputation of an intention to defraud to a corporation. In those circumstances, it is understood that the attribution of a belief or state of mind to a corporation derives from the state of mind or belief of a natural person so closely connected with that corporation that their belief is to be properly regarded as that of the corporation.

483 Furthermore, the word 'person' is used many times in the Act without limitation and its definition extends to that given by the *Acts Interpretation Act 1901*. The purposes of the Act, expressed in its terms, dictate a purposive as opposed to a restrictive definition wherever the term is used.

484 Such an interpretation is compatible with the right to freedom of religion in the Charter and the purpose of s 77. Although the right to religious freedom in s 14 of the Charter Act is a right held only by individuals, individuals have the freedom to demonstrate their religion under s 14(1)(b) of the Charter Act 'either individually or as part of the community'.

485 The definition of 'person' in s 4(1) of the Act 'includes an unincorporated association and, in relation to a natural person, means a person of any age'. The definition, which is inclusive, makes no provisions for a contrary intention. It is highly unlikely that Parliament would have intended the section to encompass an unincorporated, but not an incorporated, association, particularly given that the *Interpretation of Legislation Act 1984* (Vic) states that the term 'person' includes a 'body politic or corporate as well as an individual'. The definition determines the issue, as the context and the statutory scheme do not dictate otherwise.

486 Under Part 2, the circumstances in which a person will directly discriminate (s 8) or indirectly discriminate (s 9) are set out. It can be seen that the language of s 77 employs the same language as the provisions that define discrimination in Part 2 and those provisions of the Act which prohibit discrimination by a person in Part 3. The word 'person' is extensively employed in Part 4 and is plainly intended to exempt bodies corporate from the prohibitions in Part 3 to which they would otherwise be subject. There is no reason to give one meaning to a 'person' who engages in direct or indirect discrimination in ss 8 or 9 of the Act as expressly prohibited by the various provisions of the Act, and a different meaning to a 'person' who engages in discrimination for the purposes of s 77. In order for s 75(2) to have any scope of operation, a 'body' established for religious purposes must be a 'person' able to contravene Part 3. So must a 'person or body' under s 76(1). The use of the disjunctive 'or' does not establish that 'person' excludes a body corporate.

487 In *Jubber v Revival Centres International,*[320] the Victorian Anti-Discrimination Tribunal described the purposes of s 75 in these terms:

36(2) *Monash University Law Review* 16, 21.

320 [1998] VADT 62.

REDLICH JA

> First, it operates in the context of activities having a religious purpose, dimension or connection. It relates to officials of religious organisations — Priests, Ministers and members of orders and people who perform functions in relation to religious observance or practice. It relates to participants in religious observance or practice. It relates to things done by a body established for religious purposes in conformity with a doctrine of a religion or to avoid injuring the religious sensitivities of people 'of' that religion — that is, of people who profess or belong to, or identify themselves as professing or belonging to that religion. Second, the section is generally directed to action taken by, or in some way related to, body [sic] or organised structure. Section 75(1) is directed to the training, ordination and appointment of those who officiate in a religion and the selection or appointment of those who participate in religious practices or observances. Section 75(2) specifically relates to a body established for religious purposes...
>
> On a reading of the section as a whole, it seems to us that it is not intended to cover activities by an individual that are unrelated to any religious organisation or structure. It also seems to us that it is not intended to permit discrimination in some secular activity, unrelated to religious observance or practice or the activities, personnel or structures of a religious body.

488 The fact that s 75(2) refers to a 'body' whilst s 77 does not is not indicative of any contrary intention. The two sections are directed at quite different persons and circumstances. Section 75(2) provides an exemption for a body 'established for religious purposes'. The exemption is for acts 'done' by such a body where the act is in conformity with 'doctrines' of the religion or is necessary 'to avoid injury' to the 'religious sensitivities of people of the religion'. Section 77 provides a broad exemption for acts of discrimination that are necessary for compliance with that person's 'genuine religious beliefs'. Religious 'beliefs or principles' and religious 'doctrines' are different concepts. Section 75(2)(b) is concerned with the necessity for the body established for religious purposes to do something to avoid injury to the 'people' of the religion. Section 77 is focussed upon the obligation of the person to do something because of their own religious belief or principles. The Tribunal rightly recognised that 'religious sensitivities' in s 75(2)(b) must involve something linked to but different from 'religious beliefs or principles' in s 77 or 'doctrines' if each provision is to have a meaningful operation.

489 The freedom of religion exemption in the Act continued to prevail over the right to non-discrimination and equality after the introduction of the Charter, which tied the meaning of discrimination to discrimination on the basis of an attribute set out in s 6 of the Act. The intention to preserve the protection of religious schools from any impact of the Charter could also be seen in s 38(4) of that instrument, which provides that the general obligation that the public authority act consistently with human rights does not require it to act in a way that has the effect of impeding or preventing a religious body from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates. Significantly, this provision extends to 'belief or principles' — which further supports the contention that corporations that do not fall within the other

exemptions may rely upon s 77.

490 Under the *Equal Opportunity Act 2010*, the exception to discriminating against a person on the basis of a protected attribute was restricted to certain attributes, and the discrimination had to be not only necessary but reasonable so as to avoid injury to the religious sensitivities of adherents of the religion.[321] In the context of employment by religious schools, the discrimination on the basis of attributes would only be lawful where conformity with the doctrines, beliefs or principles of the religion was an inherent requirement of a particular position.[322]

491 It would be anomalous were s 75(2) alone to apply to corporate bodies. It would follow that wherever a corporation engages in commercial activity but the corporation was not established for religious purposes, s 77 would not enable the exemption to apply to both the corporation and those particular individuals whose acts are to be treated as those of a corporation. That interpretation would produce the unintended result that individuals who operate a business would have different levels of religious freedom, depending upon whether the business was incorporated or not. It would force individuals of faith to choose between forfeiting the benefits of incorporation or abandoning the precepts of their religion.

492 The Tribunal found that although the relevant religious beliefs about marriage, homosexuality and sexual orientation held by Mr Rowe and CYC were genuine, it was not 'necessary' that either of them refuse the booking in order to comply with those beliefs or principles.[323] In coming to this conclusion the Tribunal referred to its earlier reasons regarding s 75(2), as follows:

> I am not satisfied, having regard to the evidence I have canvassed at length, and the findings I have already made concerning the conduct of Mr Rowe, and CYC in respect of the manner in which the adventure resort is operated, that it was necessary to refuse the WayOut booking in order to comply with Mr Rowe's or CYC's genuine religious beliefs.[324]

493 It is therefore necessary to refer to the evidence and the Tribunal's findings concerning 75(2). The 'findings concerning the conduct of Mr Rowe' refers in part to the evidence of the conversation between Mr Rowe and Ms Hackney which formed the basis of Cobaw's original complaint, and the conclusions drawn therefrom. The conversation in question occurred during a phone call from Ms Hackney to Mr Rowe, in which the former attempted to book CYC's facilities for the use of the WayOut forum. For the purposes of the present issue it is only necessary to recite the substance of Ms Hackney's account of the phone call, which the Tribunal accepted. She said that she told Mr Rowe that the WayOut forum sought to bring a group

321 Section 83(2).
322 Section 83(3).
323 Reasons [355]–[356].
324 Reasons [356].

of young people aged from 16 years through to their early twenties together, and that they targeted same sex attracted young people; that the aims and beliefs of the project were that same sex attraction or homosexuality was a normal and natural part of the range of human sexualities; and that the project aimed to raise community awareness as to the effect of homophobia in rural communities, the needs of these young people and the effect of discrimination on young people. The Tribunal also accepted Ms Hackney's evidence 'that the effect of telling young people homosexuality was part of the normal and healthy range of human sexualities was to tell them it was okay to be homosexual'.[325] REDLICH JA

494 Mr Rowe claimed he had been told that Cobaw targeted same sex attracted young people of 13 years and above and took the kids away on camp to say it was okay to be same sex attracted, and that the group was about 'promoting a homosexual lifestyle'. In cross-examination, Mr Rowe conceded that he had not been told that the group was 'promoting' a homosexual lifestyle, that he was no longer sure whether Ms Hackney had described homosexuality as a 'choice', and that he had not been told that attendees could include children as young as 13 but only assumed that it could.

495 The Tribunal said each of the witnesses (including Mr Rowe) who had given evidence as to the insult or upset that would be caused to members of the Christian Brethren if WayOut were permitted to use CYC's facilities for their stated purpose, had expressed that view 'based on the premise, which I have rejected, that the purpose of the forum was to "promote homosexuality" '. The Tribunal stated that '[t]hat diminishes significantly the weight to be given to their opinions'.[326]

496 First it is necessary to understand precisely what it was that the Tribunal rejected. In order to determine whether the act of refusal was discriminatory, the Tribunal had rejected the distinction which CYC and Mr Rowe sought to draw between the identity or attribute of the individuals who would attend the forum and the encouragement of people at the forum to see the attribute of same sex orientation as natural and healthy. Maxwell P has referred to the Tribunal's findings in this regard in dealing with the question whether there was discrimination. As I have said, in concluding that Mr Rowe's refusal was discriminatory, the Tribunal was right to reject the distinction between 'an aspect of a person's identity, and conduct which accepts that aspect of identity, or encourages people to see that identity as normal, or part of the natural and healthy range of human identities'. It was in that context that the Tribunal rejected Mr Rowe's view that the forum was 'promoting homosexuality' by 'telling young people that homosexuality was part of a range of normal and healthy human sexualities and that it was 'okay' to be homosexual'. The Tribunal further said in the same context:

> In effect, promotion of homosexuality, or a homosexual lifestyle, as [Mr Rowe]

[325] Reasons [183].
[326] Reasons [333].

> used those terms, meant encouraging or persuading a group of people he regarded as impressionable by reason of their youth to do something abnormal and wrong, namely to choose to be homosexual.
>
> ...
>
> I am satisfied that the effect of Mr Rowe's evidence is that, to him, promotion of homosexuality or a homosexual lifestyle involved any conduct, whether engaged in by same sex attracted people, or those with a personal association with people identified by their (same sex) sexual orientation, which accepted or condoned same sex attraction, or encouraged people to view same sex attraction as normal, or a natural and healthy part of the range of human sexualities.
>
> So understood, the attempts by CYC and Mr Rowe to distinguish between homosexuality and promoting homosexuality fail. Mr Rowe's objection to promotion of homosexuality is in truth, an objection to same sex attraction or as the respondents characterised it, homosexuality.[327]

497 In conclusion, in relation to the question whether CYC and Mr Rowe's conduct was discriminatory, the Tribunal stated as follows:

> In my view, what [CYC] characterised as promotion of homosexuality and which I have characterised as engagement in conduct which accepts or condones same sex attraction, or encourages people to view same sex attraction as part of the range of normal, or natural and healthy human sexualities is, in truth, no more than affording people of (same sex) sexual orientation the same right as heterosexuals in respect of their sexual orientation...
>
> There is, in my view, no meaningful distinction which can be drawn between conduct based on a person's sexual orientation and conduct based upon an objection to telling a person their sexual orientation was part of the range of normal, natural or healthy human sexualities. An objection to telling a person (same sex) sexual orientation is part of the range of normal natural or healthy human sexualities is in truth, an objection to (same sex) sexual orientation. .....
>
> In my view, the effect of Mr Rowe's evidence is that the reason for his refusal to accept the booking was because of his general objection to homosexuality, applied, in the circumstances with which he was presented in the telephone conversation with Ms Hackney, to this group.[328]

498 These earlier findings left untouched the critical parts of Ms Hackney's account as to the aims of the forum and the purpose and content of the discussions at the forum. Thus the applicants maintained on appeal that a forum to be held at their facility which engaged in what the Tribunal characterised as 'conduct which accepts or condones same sex attraction' or 'encourages people to view same sex attraction as part of the range of normal or natural and healthy human sexualities' was highly relevant, and critical to the application of the religious exemptions. Having concluded that the conduct of CYC and Mr Rowe was discriminatory, the findings as to the purpose of the forum and the views that would there be expressed and encouraged assumed a relevance and significance in answering the question arising under the exemption. Once CYC and Mr Rowe were informed as to

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327 Reasons [187], [189]–[190].

328 Reasons [198]–[199], [202].

the views that would be expressed and encouraged at the forum, the Tribunal was required to determine whether their religious beliefs or principles necessitated that they refuse the booking. REDLICH JA

499 Section 77 defines the areas in which a person's religious belief and principles may operate free of constraint and where they may not. The section requires the court to enquire as to the content of the religious belief in question, and what is required of the adherents of the religion by way of compliance with that belief. The Tribunal first considered the exemption under s 75(2) of the Act. Having found that the 'religion' in question was the Christian Brethren, the Tribunal made the following findings about Mr Rowe and the Christian Brethren's religious beliefs and principles:

> I am satisfied that Mr Rowe believes that homosexuality, or homosexual activity is prohibited by the scriptures, and so is against God's will. I am satisfied that his belief is based on the manner in which he interprets or applies the doctrine of plenary inspiration. I am satisfied Mr Rowe, Ms Mustafa, Mr Buchanan and Mr Keep's evidence is representative of the range of beliefs held by members of the Christian Brethren in Victoria about marriage, sexual relationships and homosexuality.[329]

500 The Tribunal considered the following aspects of the manner in which the adventure resort was operated to be significant. The adventure resort had advertised its services in relation to both secular camping activities and camps with an overtly religious component; its website made no reference to the Christian Brethren or any religious purpose, or religious connection as a pre-condition for booking; it was possible to navigate the website without coming across any such reference; most of the camping business actually conducted by CYC at the adventure resort was secular; and, finally, the adventure resort was operated as a commercial venture, with a turnover of approximately $6 million in the preceding financial year, of which approximately $1.5 million was returned to the Christian Brethren Trustees under the terms of its constitution.[330] None of the ten factors identified in CYC's strategic planning document as giving them a competitive advantage in the market were related to religion.[331]

501 The Tribunal rejected the contentions of CYC and Mr Rowe that they could rely upon s 75(2):

> It is not part of the doctrines, beliefs or practices of the Christian Brethren that they avoid contact with people who do not share their religious beliefs. Nor is it part of their doctrines or beliefs that they must avoid contact with same sex attracted people who do not share their religious beliefs. Nor is it a doctrine or belief of their religion that they are required to openly express their disapproval of same sex attraction when in contact with same sex attracted people. This is borne out in practice by the evidence about CYC's general booking policies, namely that Christian Brethren beliefs about God's will in respect of sex and marriage played

329 Reasons [307].
330 Reasons [243]–[245].
331 Reasons [242].

> no part in deciding who would be permitted to make a booking at, or stay at, the adventure resort.[332]

502 The Tribunal accepted that CYC and Mr Rowe had genuine religious beliefs and principles concerning homosexuality, but rejected their contention that they could bring themselves within the exemption under s 77, as the refusal to allow Cobaw use of the Resort was not necessary for compliance with their religious beliefs.

503 Upon proper analysis, the ultimate conclusion of the Tribunal rested upon the combined effect of four interrelated matters, each of which were resolved adversely to the applicants. The first was the narrow construction given to the exemptions. The second was the Tribunal's objective assessment of whether the applicants' religious principles or beliefs compelled them to act as they did. The third was the view that there was only limited scope for religious freedom in the commercial sphere. The fourth was the inference which the Tribunal drew from the applicants' engagement in and the manner in which they conducted the Resort in the commercial marketplace. The inference the Tribunal drew from that activity was that their religious beliefs or principles did not compel them to refuse to allow Cobaw use of the Resort. For the reasons that follow, I consider that the Tribunal's conclusions on each of those matters was, with respect, in error, each contributing to the erroneous conclusion that the exemption was not available to Mr Rowe or CYC.

504 These errors in the reasoning by the Tribunal, discussed below, provide a conclusive argument against Cobaw's contention that the grounds of appeal relating to s 77 represent an attempt to re-litigate factual matters — namely, the Tribunal's finding that the appellant's refusal of the booking was not 'necessary' — which cannot be impugned on appeal under s 148 of the *VCAT Act*.[333] The applicants allege that the Tribunal's errors arose from the narrow approach that was taken to the construction of s 77, from unsound inferential reasoning as to the obligations arising from their religious beliefs and from the attribution of a particular legal character to the facts.[334]

Ground 5(a), (b), (m)(i) and (ii) — the tribunal's narrow interpretation of the exemption provisions

505 The applicants submit that the Tribunal erred by adopting a narrow interpretation of the section which did not promote the purpose of the exemption but gave primacy to the anti-discriminatory purposes of the Act. By construing s 77 in a manner inconsistent with its terms and purpose, the applicants submit that the protection afforded to them to act in accordance with their religious beliefs was undermined. I would uphold that argument.

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332 Reasons [343].

333 Section 148 allows for an appeal from a VCAT decision to the Court of Appeal, on a question of law only.

334 See *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 89–90 (Phillips JA).

In my opinion the Tribunal did err in giving s 77 a narrow construction. REDLICH JA

506 It is desirable to commence with some consideration of the setting in which s 77 was introduced. Sub-sections 38(a) and (b) of the *Equal Opportunity Act 1984* were identical to sub-ss 75(1)(a) and (b) of the Act. Section 38(c) of the 1984 Act was expressed in very similar terms to s 75(2) of the Act. Section 38(c) provided:

> This Act does not apply to —
>
> (c) any other practice of a body established to propagate religion or the employment of persons in any school, college or institution under the direction or control of such a body being a practice or employment that conforms with the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

507 On the Second Reading of the Act in May 1995, the Attorney-General referred to the fact that religious bodies were exempted under the 1984 Act and then referred to the exemption proposed in s 75. The Attorney then referred to the exemption to be provided by s 76 in these terms:

> A growing development is the establishment by individuals or bodies of educational institutions which are to be conducted in accordance with particular religious beliefs or principles. The body which establishes such an educational institution is often not a body established for religious purposes and may not be covered by the exemption for religious bodies. Therefore, the bill provides a limited exemption for educational institutions established in this manner.
>
> The exemption from Part 3 of the bill is mainly in relation to anything done by the individual or body in the course of establishing, directing, controlling or administering the educational institution, including in relation to the employment of people in the institution, that is in accordance with the relevant religious beliefs or principles.[335]

508 The Attorney then turned to s 77, which had no counterpart in the 1984 Act, and explained the exemption in these terms:

> **Religious beliefs or principles**
>
> The bill provides an exemption for discrimination which is necessary to comply with a person's genuine religious beliefs or principles. It aims to strike a balance between two very important and sometimes conflicting rights — the right of freedom of religion and the right to be free from discrimination.
>
> Equal opportunity legislation may *sometimes compel individuals to change their conduct and practice in order to ensure that discrimination which may be harmful to others does not occur. However, the government recognises that it is not acceptable to compel a person to act in a way that would compromise his or her genuinely held religious beliefs.* I wish to emphasise that religious beliefs must be absolutely genuine in order to qualify for the exemption and if a complaint is made that quality will have to be proven to the commission and/or tribunal.[336]

509 The Tribunal said that the exemptions in ss 75 and 77 must be interpreted,

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335 Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 1995, 1253 (Jan Wade, Attorney-General).

336 Ibid 1254 (emphasis added).

> in a way that gives effect, as far as possible *consistently with the purposes of the EO Act,* to the realisation of the right of freedom of religion and expression in ss 14 and 15 of the Charter, and of the right of equality and freedom from discrimination in s 8 of the Charter.[337]

510 I agree with Maxwell P, for the reasons that he has given, that s 32(1) of the Charter had no application to the task before the Tribunal, as the provisions in the Charter were not yet in force at the date of the conduct in question. But as the applicants submit, the question remains whether recourse to the Charter contributed to the Tribunal's view that the exemption was to be construed narrowly. They contend that the Tribunal placed particular weight upon s 8 of the Charter — the right to be free from discrimination — in order to give the objectives of the Act prominence when determining the scope of s 77.

511 An examination of the Tribunal's reasons supports the applicants' contention. It approached the question of construction as though some balance was to be struck between competing rights. The Tribunal stated that 'the exceptions limit the freedom from discrimination conferred by pt 3 [of the Act] or impair the full enjoyment of the rights afforded by ss 42 and 49 and enshrined in s 8 of the Charter':

> I must therefore interpret sections 75(2) and 77, having regard to the purpose of those exceptions, namely to protect religious freedoms, and in a manner consistent with the rights to freedom of thought, conscience, religion and belief in s 14 of the *Charter,* and freedom of expression in s 15 of the *Charter* but also, as far as is possible, in a manner which is compatible with the rights to equality and freedom from discrimination in s 8 of the *Charter.* I must do so in a way which does not privilege one right over another, but recognises their co-existence.[338]

512 The applicants submit that this was an impermissible interpretive approach which clashed with that taken by this Court in *R v Momcilovic.*[339] It is unnecessary to enter into this field of discussion as the Charter, had it been applicable, should not have affected the construction of the provision or the balance which the provision struck between competing human rights.

513 Ultimately, the Tribunal adopted a narrow interpretation of both 'exceptions'. The reasoning behind the Tribunal's construction was that as the Act constituted remedial legislation, only those provisions which served to give effect to the Act's objects and purposes ought to be given a 'broad or fair, large and liberal interpretation.' The Tribunal later explained that its earlier reference to an approach 'consistent with the purposes of the EO Act' meant one which 'advances the purposes and objects of the EO Act', and noted that such a construction

> favours a narrow, not broad, large or liberal interpretation of the exceptions.... In construing the exceptions the right to freedom from discrimination must not be

337 Reasons [41] (emphasis added).
338 Reasons [225].
339 (2010) 25 VR 436.

curtailed unless '*clearly manifested by unmistakeable and unambiguous language*.'[340] REDLICH JA

514 The Act as a whole is directed towards the goals of eradicating inequality of opportunity and upholding the right to be free from discrimination. Like all general principles of statutory interpretation, the notion that beneficial or remedial legislation is to be interpreted broadly or generously — and that provisions which do not promote the beneficial purpose of the statute must therefore be construed narrowly — cannot be applied without regard to the specific provisions of the legislation in question. The place of the provision within the statutory scheme and its text does not support a reading down of the exemption. By definition, ss 75 and 77 — two of many exemptions or exceptions in the Act — cut across the nominated purposes of the Act. The exemptions in ss 75 and 77 perform a protective function with respect to another basic human right — religious freedom. They are directed at *protecting* persons and the rights they seek to exercise. Parliament has sought to strike a balance between these rights. In striking that balance it has sought to identify the ambit and limits of each right when they come into conflict.

515 Further, it must be kept in mind that when legislation seeks to strike a balance between competing considerations and interests, a search for legislative purpose needs to take account of the fact that legislatures rarely engage in the pursuit of a single purpose at all costs. The general rule that a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object will be of little assistance where a statutory provision strikes a balance between competing interests. Where the general purpose of a statutory provision clearly reflects a compromise of competing interests or principles, the question will no longer be: What is the purpose or object underlying the legislation as a whole? Stating the primary purpose of the legislation is unlikely to solve any question of construction.[341] For a court to construe the legislation as though it pursued the purposes or objectives to the fullest extent will then be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.

516 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.[342] 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.[343]

517 Section 77 may be seen as either defining religious beliefs or principles that are not to be subject to discriminatory conduct in pt 3 or as an area of

340 Reasons [221] (emphasis in original).
341 *Carr v Western Australia* (2007) 232 CLR 138, 143 [5]–[7] (Gleeson CJ).
342 *Kelly v The Queen* (2004) 218 CLR 216, 235 [48] (Gleeson CJ, Hayne and Heydon JJ).
343 *Nicholls v The Queen* (2005) 219 CLR 196, 207 [8] (Gleeson CJ).

discriminatory conduct that is not caught by the Act. To read down the scope of the exemptions to give, in effect, primacy to the purposes of the Act was to do the very thing the Tribunal cautioned against — that is, privileging one right over the other. It was to disturb the balance between the two rights which the legislature intended, by imposing a greater level of restriction on a person's religious beliefs and principles than the exemption allowed. In the absence of clear and unmistakeable language, a construction was not to be preferred which gave one right a broader ambit and the other a narrower sphere of operation than the ordinary and plain words of the provision required.

518 In the result, the Tribunal's interpretive approach led to the adoption of a broad interpretation of ss 42 and 49 of the Act, and an unworkably narrow interpretation of the exemption in s 77, calculated to frustrate the very purpose of the exemption. That construction contributed to the Tribunal's ultimate conclusion that the applicants' religious beliefs or principles could not necessitate their discriminatory acts.

The tribunal's objective assessment of the religious belief or principle and whether it necessitated the discriminatory act

519 The Tribunal adopted the same definition of 'necessary' which it had applied when considering s 75(2) — that 'necessary' means 'more then convenient or reasonable'. This definition was consistent with the view that had been expressed by the Tribunal in *Jubber v Revival Centres International*[344] that the requirement in s 75(2) that the conduct was 'necessary' to conform with the religious doctrine was a higher test than convenience or reasonableness. Ordinary meanings of the word 'necessary', which the Tribunal considered consistent with this interpretive approach, included indispensible, vital, essential, requisite, acting from compulsion, not free, and involuntary. The Tribunal went on to say (in relation to the concept's applicability to s 75(2)):

> [I]t follows that, in order for it to be necessary to engage in discriminatory conduct to avoid injury to the religious sensitivities of members of a religion, the injury which would be caused if the discriminatory conduct were not permitted must be significant, and unavoidable. The persons engaging in the discriminatory conduct must have been required or compelled by the doctrines of their religion or their religious beliefs to act in the way they did, or had no option other than to act in the way they did to avoid injuring, or causing real harm to the religious sensitivities of people of the religion.[345]

520 The Commission, in its submissions on this interpretive point, drew upon interpretations of the phrase 'necessary to comply' in other anti-discrimination legislation, citing as an example *Waters v Public Transport Corporation*.[346] *Waters* concerned the discriminatory acts of the Corporation in removing conductors from some trams and making alterations to

344 [1998] VADT 62.
345 Reasons [332].
346 (1991) 173 CLR 349 (***Waters***).

their ticketing system. The question arose whether the express provision of s 39(e)(ii) of the *Equal Opportunity Act 1984* (Vic) exempted the Corporation from any act which it was necessary to do in order to comply with a provision of an instrument. McHugh J said of the Corporation's reliance upon the statutory exemption of necessity that the conduct in question had to be 'mandatory and specific'.[347] In the different context of religiously motivated action, what is 'necessary' will not require that degree of stringency. REDLICH JA

521 The Tribunal's approach to the concept of necessity in the context of religiously motivated action was, with respect, misguided. The content of a specific religious doctrine, principle or belief will not commonly include guidance, let alone direction, as to how it is to be applied in practice. The adherent to the faith must look beyond the bare statement of those principles as to the circumstances in which the principle requires uncompromising obedience. For reasons that will be elaborated upon, 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.

522 The question as to when a religion requires that a person behave in a certain way is a vast and contentious one. Religions vary widely in the degree to which they prescribe certain behaviours, the vigour with which such prescriptions are enforced, and the consequences which are supposed to flow from the believer's failure to comply with religious precepts. As Mason ACJ and Brennan J expressed it in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)*:[348]

> [The canons of conduct adopted to give effect to religious belief] may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents of a religion.[349]

523 The requirements of religious belief will necessarily remain to some degree obscure to those who do not subscribe to the relevant system of beliefs themselves. The international jurisprudence on freedom of religion has attracted a great deal of commentary on the degree to which a court will be in a position to determine the content of a person's beliefs, and the actions which they necessitate. As the authors of *Religious Freedom in the Liberal State* note:

> The outcome [of a court's investigation of what a person's religious beliefs require] may be particularly controversial where a court reaches a different conclusion to that of the applicant concerning what his or her professed beliefs require. An applicant may leave court either implicitly labelled a hypocrite (for having made a false claim under cover of religion), or as having an inferior understanding of what he or she holds most dear (compared to the learned, amateur theologian-

347 Ibid 413.
348 (1983) 154 CLR 120.
349 Ibid 136.

cum-Tribunal).[350]

524 The adverse consequences — to borrow a legalistic term which is problematic in its application to religious faith — which believers perceive as attaching to breach of religious precepts are not in the nature of a legal sanction, but can refer to metaphysical concepts such as eternal damnation of the soul. The language of statute — and the Tribunal's emphasis upon compulsion and involuntariness — is ill-equipped to deal with such concepts. Furthermore, individual believers vary widely in the degree to which they implement the teachings of their faith, and the interpretations that they give to doctrine.

525 Most persons of faith do not subscribe to an exhaustive list of explicitly stated moral commandments which can be consulted in the manner of a dictionary or a comprehensive index; rather, they are required to behave in a manner which is consistent with religious principles. It is true that in certain instances one can find a religious prescription as to how the adherent should conduct themselves. However, doctrines and broad principles are unlikely to provide such instances. The principle or belief upon which the applicants rely falls into that broad category. The exception in s 77 should be interpreted in a way that enables its application to both categories.

526 Inevitably, the spectre of the validity of the religious belief lingers, particularly when acting in accordance with that belief results in limitations on the rights of others. Although the international jurisprudence deals with legislative instruments that are framed in very different terms to the exemptions in the Act, this point has particular poignancy in the context of s 77. Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety.[351] The Tribunal was neither equipped nor required to evaluate the applicants' moral calculus.

527 The terms of s 77 at the time the relevant cause of action accrued demanded some consideration of the *subjective* nature of the person's beliefs — whether they regarded the particular belief or principle which they genuinely held as obliging them to act in the relevantly discriminatory manner.

528 It is implicit from the inferences which the Tribunal drew from Mr Rowe's and CYC's conduct in the marketplace — a matter to which I shall return — that the question of the necessity of the applicants' actions was determined by an objective assessment of what was necessary if a person ventured into commercial activity. No regard was had to the applicants' perceived obligations. This is an interpretation to which the legislation does not lend itself.

529 Such an approach was inconsistent with the general understanding of the reach of the provision. The Scrutiny of Acts and Regulations Commit-

350 Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State,* Oxford University Press (2005) 164.

351 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, 220 [36] (Nettle JA).

tee's 1995 report on proposed amendments to the Act proposed changes to the exemption provisions which were adopted when the provisions were amended. The Committee noted that the exemptions were broadly drafted, which '[i]n essence … allow[ed] freedom of religion to automatically prevail over any other rights involved'.[352] It stated as follows: REDLICH JA

> Section 77 allows religious adherents to follow their religious beliefs even if it involves discrimination against others on any attribute in an area of activity. As currently drafted section 77 requires that discrimination must be necessary, but *excludes consideration of either the weight or seriousness of either the religious belief involved or the other rights that may be overridden by it* (emphasis added).[353]

530 As such, the Committee considered that the deference to freedom of religion was not tempered by any requirement to consider whether the discrimination was 'reasonably necessary' to achieve the protection of religious belief or principles so that it was unlikely to be compatible with the 'reasonable limitations' test in s 7(2) of the Charter. Thus the Committee recommended that if it were retained it ought to include a reasonable limitations test, such as that which the Charter contains.

531 The subsequent amendment of s 77 introduced a requirement that the act be 'reasonably necessary'. Section 84 of the *Equal Opportunity Act 2010* is now in this form:

> **Religious beliefs or principles**
>
> Nothing in Part 4 [Part 3, as it previously was] 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.

532 The addition of the word 'reasonably' and the removal of the word 'genuine', with its overtones of subjectivity, supports the view that the provision as amended now contains an objective component that was not present in its original form. The new section provides a narrower scope for exemption — a conclusion supported by the Attorney-General's comments in the Second Reading Speech, to the effect that 'the [Equal Opportunity Bill] retains, *but tightens*, the religious exceptions'.[354] A subsequent amendment does not necessarily control the construction to be given to a provision in its pre-amendment terms, but the articulated and perceived need for those amendments reinforces the construction, to be derived from the pre-amended form of s 77, that the necessity to act did not involve an objective component.[355]

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352 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995 — Final Report* (2009) 60.

353 Ibid 66. On this construction of the provision, Parliament has made its judgment as to the right balance or proportionality between rights.

354 Victoria, *Parliamentary Debates,* Legislative Assembly, 10 March 2010, 787 (Rob Hulls, Attorney-General) (emphasis added).

355 *Commissioner of State Revenue (Vic) v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651, 670 (Callinan J); *Cook v Benson* (2003) 214 CLR 370, 394 (Kirby J); *Grain Elevators Board (Vic) v*

533 In accordance with the current drafting of the section, a Tribunal must now determine whether such belief as is found to exist is 'reasonably necessary,' a requirement that was not present at the time of the applicants' conduct. This test of necessity still falls short of the more demanding, and narrower, view of the Tribunal.

534 Even if the concept of 'necessity' was to be objectively assessed, it relates to the obligations flowing from a person's religious belief and not to the decision of a person to participate in a commercial or public area of discourse. A person's involvement in the commercial sphere is relevant and sometimes critical under human rights law when seeking to balance competing rights but the terms of s 77 do not call for consideration of that question. The area of activity to which the exemption may relate is not confined.

Religious freedom in the commercial sphere

The use of human rights jurisprudence and the charter to read down the scope of the exemption

535 On appeal, the Commission and the International Commission of Jurists (**ICJ**) in its capacity as *amicus curiae* drew upon international human rights jurisprudence concerned with the balancing of human rights against one another as relevant to the construction of s 77. That jurisprudence, and the parties' use of the Charter, were obviously influential in the Tribunal's reasoning and were the subject of substantial submissions on appeal.

536 The Commission contended that the task for the Tribunal was to 'strike a balance' between the two sets of rights which by their nature and the operation of s 7(2) of the Charter can be reasonably limited. Its contentions as to the construction of s 77, which were accepted by the Tribunal and were repeated on appeal, drew extensively upon international human rights law as to the breadth of the right of equality and freedom from discrimination and the limitations which have been attached to religious freedom. The ICJ on appeal also drew extensively upon international human rights and comparative jurisprudence to submit that the Tribunal was right to have embarked upon a balancing and reconciling of the two rights.

537 International legal instruments regulating rights such as that of religious freedom tend to be drafted in such a manner as to first enshrine the rights and then to provide for general means by which the right may be circumscribed where they conflict with other rights.[356] In the area of religious

Dunmunkle Corporation (1946) 73 CLR 70, 85–6 (Dixon J); *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492, 539 (McHugh J); *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 [212]–[217].

[356] See for example art 9 of the *European Convention on Human Rights,* which reads as follows:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

freedom, when interpreting and applying such instruments, international courts have adopted a framework which draws a conceptual distinction between the possession of a religious belief and the manifestation of that belief. The former is regarded as 'inviolate' while the latter may be liable to circumscription.[357] The task of circumscription in those jurisdictions requires those applying the law to balance competing human rights against one another. REDLICH JA

538 Those that pressed for a narrow construction of s 77 argued that, as it gives effect to the right to religious freedom, it should be interpreted so as to give full effect to that right but only as it has been recognised under international human rights law. Under human rights law and international instruments, the right to freedom of religion includes the right to believe, the right to declare the belief openly and the right to manifest that belief by worship, practice and teaching without coercion or constraint. The right is not unlimited. It is subjected to limitations necessary to protect public safety, order, health, morals and the fundamental rights and freedoms of others.[358] Thus, the freedom to hold beliefs is broader than the freedom to act upon them. Reliance was placed upon the limitation on the right to manifest one's religious belief where such manifestation encroaches on the rights of others. The argument proceeds upon the assumption that art 18 of the *International Covenant on Civil and Political Rights* to which Australia is a party, the very similar art 9 of the *European Convention on Human Rights* and the jurisprudence concerning these arts affect the interpretation of ss 75(2) and 77.

539 The Strasbourg institutions, in dealing with the interpretation of the right to religious freedom and its limitations, have held that interference with a manifestation of religious beliefs is justifiable as legitimate and proportionate where it is necessary to protect the rights and freedoms of others.[359] They have been unwilling to find an interference with the right to manifest religious belief in practice or observance where a person chooses to pursue a secular activity in the market place, such as in employment, which does not readily accommodate that practice or observance and where there are other

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Sections 7 and 14 of the Victorian Charter follow a similar model, as do the *American Convention on Human Rights*, the *International Covenant on Civil and Political Rights*, and the *Universal Declaration of Human Rights*.

357 See, eg, *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, and *Eweida v United Kingdom* [2013] ECHR 37. The latter decision represents the European Court of Human Rights' most comprehensive consideration of freedom of religion under the Convention so far.

358 *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (***Big M***); *Ross v New Brunswick School District No 15* (1996) 1 SCR 825, 133 DLR (4th) 1.

359 See, eg, *Preddy v Bull* [2012] 1 WLR 2514, sub nom *Hall v Bull* [2012] 2 All ER 1017; *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880; *Chaplin v Royal Devon & Exeter Hospitals NHS Foundation Trust* [2010] ET 1702886/2009 and *Eweida v British Airways* [2010] EWCA Civ 80.

means open to the person to practise or observe his or her religion without undue inconvenience.[360] Lord Justice Laws stated in *McFarlane v Relate Avon* that these limitations rest upon the notion that legal protection founded in a moral position espoused by the adherents of a particular faith is deeply unprincipled, irrational, divisive, capricious and arbitrary and preferring the subjective over the objective.[361]

540 The Strasbourg court in *Pichon and Sajous v France*[362] had observed that the 'main sphere protected by art 9 is that of personal conviction and religious beliefs', although it 'also protects acts that are closely linked to these matters such as acts of worship or devotion forming part of the practice of religion or a belief'. Similarly, in *C v United Kingdom,*[363] the Commission indicated that art 9 'primarily protects the sphere of personal beliefs and religious creeds — the area which is sometimes called the "forum internum" '. The reasoning of Lord Neuberger MR in *Ladele v London Borough of Islington*,[364] to the effect that Ms Ladele had no cause for complaint as her employer's policy did not impinge on her religious beliefs since she remained free to hold them and free to worship as she wished, relegated her religion to the world of the private and was consistent with the European jurisprudence. It was to take a narrow view of religious faith confining it to the freedom to believe certain things and to worship.

541 In summary, in balancing rights human rights law has in general given less precedence to religious belief in the marketplace. Interference with a person's activities in the commercial sphere is regarded as having a less substantial impact upon freedom of religion than interference with it in other areas of life, as individuals are 'free to manifest [their] religion in many ways outside the commercial sector'.[365] But under human rights law, even in the commercial sphere, it may be necessary in some circumstances for religious belief to prevail over other rights. *Brockie,*[366] to which I have earlier referred, is a decision in point which has a particular relevance as it discussed how the Canadian Code was to be applied to hypothetical facts most similar to the present case. The court on appeal adopted a rights approach consistent with the balance struck in s 77, that would permit the refusal of the commercial service on grounds of religious belief where its use would reasonably be seen to be in conflict with core elements of the belief.

542 The Board of Enquiry had directed Mr Brockie to provide a printing service to lesbians and gays and to organisations in existence for their benefit. There was no specific exemption under the Code entitling Mr Brockie to refuse to print the material requested. Mr Brockie relied upon his fundamental

360 *R (SB) v Governors of Denbigh High Schools* [2007] 1 AC 100, 112 [22]–[23] (Lord Bingham).
361 *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 [24].
362 Application No 49853/99 (2 October 2000).
363 (1983) 37 DR 142, 147.
364 [2009] EWCA Civ 1357.
365 *Pichon and Sajous v France* Application No 49853/99 (2 October 2000).
366 (2003) 222 DLR (4th) 174.

freedom of conscience and religion and his right to equal protection and benefit of the law without discrimination based on religion under the Canadian Charter. It was in that context that the Court considered whether any aspect of the Board's order was beyond the limits of what was reasonable and demonstrably justifiable in a free and democratic society. The Court referred to the reasons of Dickson J in *Big M,*[367] in which he had discussed some of the elements of freedom of religion and the necessary limits on it. Thus the further the activity is from the core elements of the freedom, the more likely the activity is to impact on others and the less deserving the activity is of protection. The Court concluded that the Board's order directed to the activity which gave rise to the offensive conduct, namely the provision of printing services for ordinary materials such as letterheads, envelopes and business cards, was correct. Such an order gave effect to the Code's values which include the right of homosexuals to participate openly and equally in society free of discrimination because of their sexual orientation in the supply of goods, services and facilities. The following reasons of the Court are pertinent: REDLICH JA

> Mr Brockie's exercise of his right of freedom of religion in the commercial market place is, at best, at the fringes of that right. The exercise of his right in this case impacts adversely on the rights of homosexuals in private commercial transactions under s 1 of the Code to participate fully in the community and the province free of discrimination in the marketplace because of sexual orientation. Their rights are similar to those protected by s 15 of the [Canadian] Charter from discrimination by the conduct of state actors because of sexual orientation.
>
> Accordingly, limits on Mr Brockie's right to freedom of religion in the peripheral area of the commercial marketplace are justified where the exercise of that freedom causes harm to others; in the present case, by infringing the Code right to be free from discrimination based on sexual orientation in obtaining commercial services.[368]

543 The Court, however, noted that —

> The order would also extend to other materials such as brochures or posters with editorial content espousing causes or activities clearly repugnant to the fundamental religious tenets of the printer. The Code prohibits discrimination arising from denial of services because of certain characteristics of the person requesting the services, thereby encouraging equality of treatment in the market place. It encourages nothing more. If the order goes beyond this, the order may cease to be rationally connected to the objective of removing discrimination.

Thus, the Court held:

> The objectives under the anti-discrimination provisions of the Code must be balanced against Mr Brockie's right to freedom of religion and conscience. A few hypothetical situations may serve to illustrate the tensions between competing rights. If any particular printing project ordered by Mr Brillinger (or any gay or lesbian person, or organisation/entity comprising gay or lesbian persons) contained material that conveyed a message proselytising and promoting the gay and

367 (1985) 18 DLR (4th) 321.
368 Ibid [54]–[55].

> lesbian lifestyle or ridiculed his religious beliefs, such material might reasonably be held to be in direct conflict with the core elements of Mr Brockie's religious beliefs. On the other hand, if the particular printing object contained a directory of goods and services that might be of interest to the gay and lesbian community, that material might reasonably be held not to be in direct conflict with the core elements of Mr Brockie's religious beliefs. These examples are but illustrations of the balancing process that is indicated in this case. There can be no appropriate balance if the protection of one right means the total disregard of another.
>
> In the result, we are of the opinion that the impact of the Board's order could be so broad as to extend beyond what is reasonably necessary to assure the rights of Mr Brillinger and his organisation to freedom from discrimination but may require Mr Brockie to provide services which could strike at the core elements of his religious beliefs and conscience.
>
> In order to balance the conflicting rights, we would add to the Board's order:
>
> > Provided that this order shall not require Mr Brockie or Imaging Excellence to print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed.[369]

544 The Court in *Brockie* struck a balance between competing human rights in the absence of a statutory exemption that sought to do so. The ambit of the right to religious freedom in the marketplace there recognised did not depend upon Mr Brockie or Imaging having advertised or informed the public as to their religious beliefs or principles, or their fundamental objection to same sex orientation. Moreover, the scope of the right did not depend upon the extent to which Mr Brockie or Imaging made enquiries of those who wished to utilise their service to determine whether those services would be contrary to their core beliefs. The relevant part of the order turned upon the prospect that some of the material that he might be requested to print could espouse causes or activities which promoted the gay and lesbian lifestyle. In that event, the right to refuse the provision of the service because it was repugnant to the provider's religious beliefs would become necessary in order to comply with those religious beliefs. For the following reasons, s 77 protects such an obligation when it arises in similar circumstances.

545 On the appeal, various parties continued to rely upon the emphasis human rights law places upon the choice a person makes to enter the commercial sphere and manifest their religious beliefs in that area of activity. There is an unfortunate irony in the argument of Cobaw and the Commission seeking to distinguish between freedom to believe something and the manifestation of those beliefs. It is redolent of the same problematic and unfair differentiations between identity and conduct, and between public and private that have been used in the past to oppress those with same sex orientation.[370]

546 The Commission, the ICJ and Cobaw contended that as the Act enshrined

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369 Ibid [56]–[57].

370 See Karl F Stychin 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29 *Oxford Journal of Legal Studies* 729, 733; Chai R Feldblum 'Moral Conflict and Liberty: Gay Rights and Religion' (2006) 72 *Brooklyn Law Review* 61.

and protected human rights in the same manner as various international human rights instruments, the approach of the courts to international instruments should inform the interpretation and application of the exemptions in the Act. They submitted that the Tribunal had rightly undertaken a balancing task and in doing so was obliged to take account of human rights law under which the right to freedom of religious belief has been curtailed in the commercial arena so that it does not interfere with the rights of others. The Tribunal adopted the submissions that human rights jurisprudence dictated that its task involved the weighing of the competing rights and the striking of a balance between them, and that the right to religious freedom was to be limited in a commercial setting. The Tribunal was, with respect, wrongly encouraged to undertake a balancing exercise of the competing rights or to confine the ambit of the exemption in a commercial setting. REDLICH JA

547 In formulating the religious exemptions in the Act, the legislature has weighed the competing interests and made a judgment as to the correct balance. As the Attorney-General said in her Second Reading Speech, referring to s 77:

> It aims to strike a balance between two very important and sometimes conflicting rights — the right to freedom of religion and the right to be free from discrimination.[371]

548 The exemption in the Act seeks to give effect to the manifestation of religious belief as a fundamental right subject only to the limitation that the belief must necessitate the discriminatory act. The manner in which freedom of religion and freedom from discrimination are to interact is provided for by the exemptions and the specific discriminatory conduct prohibited in Part 3 of the Act to which the exemptions relate. The extent to which religious freedom may impinge upon the right not to be discriminated against has been addressed by the legislature. Parliament has made its judgment as to how these potentially conflicting rights are to be balanced.

549 Most of the prohibited discriminatory conduct set out in Part 3 of the Act is directed to the commercial sphere of human relations,[372] not to matters in the private and personal domain of individuals. Division 1 of Part 3 deals with discrimination in employment and prohibits discriminatory acts of an employer or principal. Division 2 is also concerned with discrimination in employment and addresses discrimination by a person, a firm, an industrial organisation, and a qualifying body. Division 3 is concerned with discrimination in education by an educational authority. Division 4 prohibits a person from discriminating in the provision of goods and services (s 42) and in the disposal of land (s 47). Division 5 prohibits a person from discrim-

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371 Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 1995 (Jan Wade, Attorney-General) 1254. At [221] of the Tribunal's Reasons the Tribunal acknowledges this fact: 'The including of the exceptions in the *EO Act* evidences Parliament's intention to strike a balance between the right to be free from discrimination, and the right to freedom of religious belief, and *the point at which the balance is struck*' (emphasis added).

372 I include here the prohibitions against discrimination in employment.

inating in various ways with respect to accommodation (ss 49, 50, 51 and 52). Division 6 prohibits discrimination by a club, member of a committee or management or other governing body (ss 59–60). Division 7 prohibits a person from discriminating in sport.

550 Terms such as 'freedom from discriminatory acts' and 'religious freedom' are terms apt to bring with them the conceptual constraints which have been developed in these other jurisdictional contexts. They cannot be accommodated within the statutory regime of the Act and the language of s 77. The human rights law's limitation of religious freedom to those areas where it can be shown that the religious belief can be complied with in a non-discriminatory way can have no application to s 77. The language is clear as to when the proscribed conduct in Part 3 will not apply. The section does not confine the right to manifest religious beliefs to those areas of activity intimately linked to private religious worship and practice. The legislature intended that it operate in the commercial sphere. The approach of the Strasbourg institutions confining freedom of religion to freedom to believe and to worship is not reflected in the legislative policy of the Act, or in the text of the exemption, which permits a person's faith to influence them in their conduct in both private and secular and public life.[373]

551 Once it is recognised that the legislature intended by the exemption to afford protection against discriminatory conduct in Part 3 — conduct most likely to occur in the public domain and in a commercial setting — a construction of the exemption which excludes conduct which the person chooses to pursue in the commercial field denies the exemption its intended scope of operation.

552 The concept of proportionality — the identification and weighting of the conflicting interests and the evaluation of the extent to which the conflict may be minimized by careful choice of means[374] — finds its form in part in s 7(2) of the Charter, which states that rights are subject 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Those who advocate a narrow construction contended that proportionality and Charter principles illuminated the proper construction of s 77.[375] Proportionality involves a 'balancing' — the making of a judgment — as to the importance of competing interests, but that task has been performed by the legislature. In enacting s 77 the legislature has expressed its judgment as to how the interests should be balanced. The concept of proportionality and the Charter could have no role in the construction of s 77 without trespassing beyond the principled boundaries of statutory interpretation. The Tribunal was bound to construe and apply the provision

373 See Professor Patrick Parkinson, 'Accommodating Religious Belief in a Secular Age: The Issue of Conscientious Objection in the Workplace' 34(1) *UNSW Law Journal* 281. See his criticisms of *Ladele* and *McFarlane,* and the jurisprudence on religious freedom under the ECHR that has shown little recognition of conscience-based claims in the workplace.

374 David Law 'Generic Constitutional Law' (2005) 89 *Minnesota Law Review* 652, 698.

375 See, eg, the ICJ submission p 13.

faithful to Parliament's intent. REDLICH JA

553 The principle that a statute is to be interpreted and applied so that it is in conformity and not in conflict with established rules of international law is a canon of statutory construction which applies only where a statutory regime and the text permits such an interpretation.[376] Where the terms of the text are clear and the legislative intent plain from the regime of the Act, international human rights norms, and comparative judicial decisions interpreting and applying them in quite a different setting, have no role in interpreting the provision or in its application to the facts.[377]

554 The transplanting of human rights law conceptions concerning religious freedom, or its expression in the Charter, produced a narrow construction of the exemption by the Tribunal which is contrary to the clear legislative intent. Section 77 and the other exemptions on religious grounds are legislative measures intended to preserve the right to manifest a religious belief or principle in the circumstances which are described in each provision. The ambit of religious freedom is defined and so is the limitation on the freedom from discrimination. There is no basis for an implication that s 77 is intended to burden a sincere religious believer by requiring the person to forgo or violate a religious belief or principle. Unlike international human rights instruments, the legislature has stipulated the degree to which the manifestation of the one right may produce a restriction on the other. The legislative intent of the statutory regime being clear, the task of the Tribunal was to construe the particular language used in its own statutory context without regard to international instruments and their jurisprudence.[378]

555 Whether s 77 is to be characterised as giving effect to the right to religious freedom or as confining the right against discrimination, s 77 does define the limits of a person's right to rely upon their religious belief or principles when committing a discriminatory act. It does not exclude a person's ability to manifest religious beliefs in any particular sphere of activity because the person could choose to manifest those religious beliefs or principles in other non-discriminatory ways. If it is construed with fidelity, without preconception and giving full recognition to the legislative intent, discriminatory conduct proscribed in Part 3 which occurs in the commercial sphere will not apply to persons who are able to bring themselves within the exemption. To construe 'necessary to comply' as subject to an implicit limitation that reflects the scope of the right to religious freedom under international human rights law would severely curtail, if not remove, the right to manifest one's

376 *Al-Kateb v Godwin* (2004) 219 CLR 562, 589–91 (McHugh J); *Polites v Commonwealth* (1945) 70 CLR 60, 68–9 (Latham CJ), 77 (Dixon J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287–8 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 [97] (Gummow and Hayne JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 234 [247] (Kiefel J); *Coleman v Power* (2004) 220 CLR 1, 27–8 [19] (Gleeson CJ); *Maloney v The Queen* (2013) 252 CLR 168, 221–2 [134] (Crennan J).

377 See, eg, *Minister for Immigration, Multicultural & Indigenous Affairs v B* (2004) 219 CLR 365; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545.

378 *Carr v Western Australia* (2007) 232 CLR 138, 143 [5].

religious belief in the commercial or public sphere. The person's freedom to believe would be impaired by a restriction upon their conduct which they engaged in to give effect to their belief. Such a construction is inimical to the legislative intent that where it is necessary for a person to comply with their religious belief, they may be protected from liability in respect of discriminatory conduct in the commercial sphere.

The conclusion to be drawn from the manner of activity in the commercial sphere

556 As noted above, the Tribunal undertook an objective evaluation of whether the applicants' particular beliefs or principles necessitated their discriminatory act. The Tribunal found that the fact that CYC conducted the Resort in the marketplace as a commercial activity, and did not advertise its religious connections to potential customers, supported the conclusion that the applicants' 'genuine religious beliefs or principles' did not necessitate the refusal of the WayOut booking. In my opinion, the manner in which the applicants conducted the camp site could not support the conclusion as to their religious belief or principles.

557 Engagement in a commercial activity will not ordinarily support an imputation that the person does not in that setting rely upon their religious beliefs or principles or has abandoned their obligation of obedience to them. For the following reasons the Tribunal was, in my view, in error in reaching that conclusion.

558 There may be a case in which involvement in a commercial activity can support an inference that it is not necessary for those who engage in that activity to act in accordance with a particular religious belief in the same way as they would in the private sphere. The nature of the commercial activity may found an inference that the person places no reliance upon a particular religious belief or principle in that area of activity.[379] But in most circumstances the nature of the activity or the manner in which it is conducted will simply not permit the drawing of such an inference. This was such a case.

559 Some submissions before the Tribunal and in this Court drew upon international human rights jurisprudence to suggest that the exemption should be confined to 'worship, teaching, practice and observance'. Those arguments are reflected in the Tribunal's conclusion, which presupposes that a person and their religious identity are somehow separable; that their beliefs can be separated within their day-to-day activities, with their influence being confined to certain activities. In the context of international law instruments, the writer of *Legal Protection of Religious Freedom in Australia* referred to the difficulty of identifying to what parts of a person's life the protection of their religious beliefs or principle may be applied:

> [O]ne of the most complex issues in defining the scope of religious freedom is

379 For example, if a person had a religious belief that there should be no sex before marriage became the proprietor of a brothel.

REDLICH JA

> determining what actions are manifestations of religion or belief that are protected in international law and what actions are merely motivated by religion or belief and are thus not protected. For some religious believers or those who hold a comprehensive philosophical view of the world, their religion or belief is part of almost every decision and action that they take.[380]

560 The precepts and standards which a religious adherent accepts as binding in order to give effect to his or her beliefs are as much part of their religion as the belief itself. The obligation of a person to give effect to religious principles in everyday life is derived from their overarching personal responsibility to act in obedience to the Divine's will as it is reflected in those principles. 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. The person must, within the limits prescribed by the exemptions, be free to give effect to that faith.

561 In the *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*[381] Mason ACJ and Brennan J said:

> Religious belief is more than a cosmology; it is a belief in a supernatural Being, Thing or Principle ... Religion is also concerned, at least to some extent, with a relationship between man and the supernatural order and with supernatural influence upon his life and conduct ... What man feels constrained to do or to abstain from doing because of his faith in the supernatural is prima facie within the area of his legal immunity, for his freedom to believe would be impaired by restriction upon conduct to which he engages in giving effect to that belief. The canons of conduct which he accepts as valid for himself in order to give effect to his belief in the supernatural are no less a part of his religion than the belief itself.[382]

Wilson and Deane JJ also identified as one of the indicia of religion that the ideas about the supernatural are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct.[383]

562 The authors of *Religious Freedom in the Liberal State* emphasise the width of activities to which the religious belief may extend and the sense of obligation or obedience that accompanies such belief:

> [T]he broad right to 'practice' or 'manifest' (to use the wording of the European Convention on Human Rights) one's religion or belief would seem to embrace a huge variety of activity if one takes the view — as many religions do — that all life is inspired by or generated by faith and belief. The most mundane of human behaviours can be 'spiritualized' and take on a religious connotation. One is practising one's religion when one eats, drinks, works, plays and gardens, as much as when one reads scripture, prays or meditates. In Christianity, 'the

380 Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia,* Sydney: Federation Press (2012) 36.
381 (1983) 154 CLR 120.
382 Ibid 134–5.
383 Ibid 174.

> righteous will live by faith',[384] 'everything that does not come from faith is sin',[385] and 'whether you eat or drink or whatever you do, do it for the glory of God'.[386] On this view there is no activity which is not generated by one's obedience (or disobedience) to God. Countless schools, hospitals, orphanages and shelters have been run by religious organizations as part of their religious mission. Running a café, gymnasium or bookshop could equally be part of one's religious calling.[387]

563 Each of the major religions rejects any notion of separation of religious duty by insisting that activity in the marketplace carries with it moral responsibility for the manner in which the business is conducted. For example, the vocation of the business person is regarded as 'a genuine human and Christian calling'.[388] Engagement in commerce, in the Christian context, 'actively enhance[s] the dignity of employees and the development of virtues such as solidarity, practical wisdom, justice and many others.'[389] In the United States, religious discrimination laws recognise that persons or entities engaged in commercial activities for profit can have a religious identity when discriminated against or when discriminating against others on religious grounds.[390] These laws do not reflect any incompatibility between commercial activity for profit and religious pursuits.

564 The balance which the legislature has struck in s 77 does not seek to limit the area of activity in which the protection may be applied. There is nothing in the text of the exemption or any implication that can be drawn from the Act from which it may be said that the relevant religious belief or principle may not give rise to an obligation of obedience to that principle in the commercial sphere.

565 The manner in which CYC conducted the Resort is said to support the Tribunal's conclusion that the applicants were not obliged to comply with their religious principles. Attention was drawn to the absence of any information published by CYC concerning its religious beliefs or any restriction on who may book the Resort. Those matters were plainly relevant to and inform the question whether CYC was a body established for religious purposes under s 75(2). The fact that CYC did not advertise its Christian faith or any particular belief or principle to potential customers, or consistently make specific enquiries of each customer as to their intended use of the camping facilities, cannot however support the conclusion that it was not necessary to refuse Cobaw's application to use the camp site once the purpose of the forum was disclosed.

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384 *Galatians* 3:11.
385 *Romans* 14:23.
386 1 *Corinthians* 10:31.
387 Adhar and Leigh, above n 350, 155.
388 Pontifical Council for Justice and Peace, *Vocation of the Business Leader: A Reflection* (3rd ed) (2012) Vatican City: Pontifical Council 5.
389 Ibid 4.
390 Mark Rienzi, 'God and the Profits: Is there religious liberty for money makers?' 21 *George Mason Law Review* (2013) 59, 94.

566 The Tribunal treated these matters as buttressing its findings that CYC was not a 'body established for religious purposes' for the purposes of s 75(2). In its relatively brief consideration of s 77, it drew upon those matters, without any further elaboration, as matters which supported the conclusion that the applicants' religious beliefs did not make it 'necessary' that the booking be refused. That conclusion presumed to determine the place of their particular belief in the religion, and presumed that it did not dictate their response. The exemption does not contemplate as part of the judicial function that there be an inquiry into whether the applicants have properly interpreted the belief or principle on which they rely, or whether compliance with it was unreasonable. REDLICH JA

567 The absence of advertising of their religious position and the absence of enquiry about the use of the camp site only support a conclusion that the applicants had no objection to a person possessing any particular attribute using the facility. The Tribunal had found that the belief of the applicants and other adherents to the faith of the Christian Brethren did not require them to avoid contact with persons who were not of their faith or did not subscribe to their beliefs about the Divine's will in respect of sex and marriage. The Tribunal found that none of those who testified as to the religious principles or beliefs of the Christian Brethren suggested that there was an obligation to interfere with or obstruct the expression by another person of their sexual preference. The Tribunal found there to be a consistency of acknowledgement that an adherent to the Christian Brethren religion should be tolerant of differences and, in particular, of people who might be regarded as sinners. That belief explained why CYC did not make inquiry as to the sexual orientation of every person wishing to use the camp site. None of these matters bore upon the necessity of the applicants to refuse the booking. 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. How they would have perceived their complicity, had they not refused the booking, was central to the issue. This consideration was not addressed by the Tribunal because of its conclusion that their religious belief did not necessitate discriminatory conduct in pursuing their commercial activity.

568 There is no expectation that persons running a commercial enterprise make enquiries of every potential customer in order to establish precisely how they intend to make use of the business's services. The absence of general inquiry about those who would use CYC's campsite, or its use, did not inform the question of whether an obligation to refuse the booking arose

once the matters that would be discussed at the forum were disclosed to the applicants. It cannot be in doubt that religious freedom and obedience to belief will often involve 'abstention' from particular acts.[391]

569 It is trite to say that the absence of advertising as to the provision of a service or inquiry as to the purpose for which the service is required would not mean, for instance, that the person had abandoned a right to refuse to allow persons to use the service to commit a crime. It is recognised that *knowledge* of the use to which goods or services may be put carries with it legal, moral and ethical obligations to act. The obligation to act when knowledge is acquired is not a novel concept to the law. It resides in a strong moral and ethical foundation.

570 Religious faith is a matter of personal conscience and of consistency with the canons of conduct derived from the person's religious belief. To knowingly provide a forum for the purpose of discussing, developing and disseminating a particular message can be seen as condoning, if not encouraging, that message. But the submissions of the applicants are not confined to moral argument. They rely upon their obligation of obedience to the will of the Divine. Once they became aware that the particular purpose for which the campsite was to be used was contrary to their religious beliefs or principles, they were compelled by those beliefs to refuse to allow their camp site to facilitate such a purpose.

571 For example, assume that the applicants had been informed that the purpose of the proposed forum was to gather together for the purpose of discussing the contentions that the Divine does not exist and that Christ does not save, and of how the community might be made aware of those views. Once the applicants became appraised of that purpose, I do not doubt that it would have been necessary for them to refuse the use of their facility for such purposes. That their beliefs necessitated such a course flows from the findings made by the Tribunal under s 75(2) as to the content of the Christian Brethren's beliefs and principles. The same must hold true for other religious beliefs or principles which the adherents of their faith genuinely believed reflected the wills of the Divine and commanded obedience.

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

391 See, eg, *Employment Division of the Department of Human Resources of Oregon v Smith* 494 US 872 (1990).

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. REDLICH JA

573 Because of the narrow construction given to the exemption, which effectively removed its intended scope of protection for discriminatory acts in the market place, and because of the erroneous consequential findings which the Tribunal said flowed from the fact that the applicants were engaged in a commercial activity, the applicants were denied the benefit of the exemption. The Tribunal erred in its finding that the applicants' conduct was not necessary in order for them to comply with their genuine religious beliefs or principles.

Whether the religious belief of the employee or agent may provide an exemption for the body corporate

574 It remains to consider the question whether if, contrary to my opinion, CYC could not hold a religious belief, it may rely upon the belief of its employee or agent. As s 102 provides that the employer or principal and employee or agent may be jointly and severally liable for a contravention of Part 3 of the Act, each of them may avail themselves of the exemptions in Part 4 of the Act in response to such a complaint.

575 If the body corporate may have a religious belief, then having regard to the Constitution and Memorandum and Articles of Association that belief will be that of the persons who are the 'embodiment of the company' or its 'directing mind and will'. They will ordinarily include the board of directors.

576 Where the conduct of an employee or agent satisfies the criteria in ss 75(2) or 77 of the Act, their terms make plain that the employee or agent and the employer or principal are relieved of liability for the contravention. That is because both provisions attach to *the action done* rather than to the person who performed the act. Section 75(2) states that 'nothing in Part 3 applies to anything done' etcetera. Although s 75(2) refers only to religious bodies, in *Jubber v Revival Centres International*[392] the Anti-Discrimination Tribunal found that the provision also protects a person who acts on behalf of the religious body or at its direction. Section 77 similarly provides that 'nothing in Part 3 applies to discrimination by a person'.

577 The terms of each provision refer to the conduct which, by operation of s 102, is taken to have been conduct of both parties contravening Part 3 of the Act. Just as s 102, for the purpose of liability, treats employee or agent the same as employer or principal, so ss 75(2) and 77 treat them identically. The Solicitor-General's contention that there is no reason why Parliament would have provided an exemption for conduct done by a person directly but not when done through an employee or agent should be accepted. That must

[392] [1998] VADT 62.

be so whether the employer or principal is a body corporate, an individual or another entity within the scope of the Act.

578 Even if the religious beliefs or principles of the employee or agent cannot be attributed to the employer or principal, once s 77 applies to the conduct of the employee or agent, neither party is liable.

Conclusion as to application of religious freedom exemption

579 As Part 3 of the Act does not apply to the discrimination by CYC and Mr Rowe by virtue of s 77, the appeal by both applicants should be allowed and the orders of the Tribunal set aside.

Application of first applicant dismissed.
Leave to appeal granted to second applicant and appeal allowed.

Solicitors for the applicants: *McCracken & McCracken*.

Solicitors for the first respondent: *King & Wood Mallesons*.

Solicitors for the second respondent: *Victorian Equal Opportunity and Human Rights Commission*.

Solicitor for the intervener: Peter Stewart, *Victorian Government Solicitor*.

Solicitors for the amici curiae: *Ashurst; Rocco Mimmo*.

L W MAHER
BARRISTER-AT-LAW

[On 6 June 2014, the Court made costs orders [2014] VSCA 112, and gave reasons for overruling the objection of the first applicant to the grant to the International Commission of Jurists of leave to intervene [2014] VSCA 113 – Ed, VR.]

[On 12 December 2014, the High Court of Australia refused an application by CYC for special leave to appeal: [2014] HCATrans 289– Ed, VR.]