

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M40 of 2014

BETWEEN:

CHRISTIAN YOUTH CAMPS LIMITED

Applicant

and

COBAW COMMUNITY HEALTH SERVICES LIMITED

First Respondent

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Second Respondent



ATTORNEY-GENERAL FOR THE STATE OF VICTORIA

Third Respondent

MARK ROWE

Fourth Respondent

SECOND RESPONDENTS' SUMMARY OF ARGUMENT

Part I: Reasons why special leave should not be granted

1. The Second Respondent submits leave to appeal should not be granted. The matter is concerned with the interpretation of discrete provisions of the repealed *Equal Opportunity Act 1995 (Vic)* (**EO Act**), which while touching on similar subject matter, are not in the same terms as the statutes identified in footnote 40 of the Applicant's Summary of Argument. The application for special leave to appeal does not involve a question of law of public importance or in respect of which the High Court is required to resolve differences of opinion between different courts.¹ Nor do the interests of the administration of justice, either generally or in this particular case,

¹ *Judiciary Act 1903* (Cth), s 35A(a).

require consideration by the High Court of the judgment to which the application relates.²

Part II: Factual issues in contention

2. Given the nature of the Second Respondent's role in the proceeding before the Victorian Civil and Administrative Tribunal (**Tribunal**),³ it does not contest nor seek to add to the factual issues in contention or the matters addressed in paragraphs 5 – 9 of the Applicant's Summary of Argument dated 11 June 2014.

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Part III: Second Respondent's argument

3. The Second Respondent refers to the Applicant's Application for Special Leave dated 14 May 2014 (**Application**), the Applicant's Summary of Argument dated 11 June 2014 (**Summary of Argument**) and Draft Notice of Appeal dated 11 June 2014 (**Notice of Appeal**). The Second Respondent notes that the special leave questions identified in paragraph 3 of the Summary of Argument pose a number of hypothetical questions that were not addressed by the Court of Appeal and cannot be answered in the absence of a specific set of facts. The Second Respondent respectfully submits that the parties should not be required to address abstract and hypothetical questions in the context of this application. To the extent that the Second Respondent replies to paragraph 3 in the Summary of Argument, it does so in addressing the construction of s 75(2) of the EO Act.

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Section 77 of the Equal Opportunity Act 1995 (Vic) and application to corporations

4. The Applicant contends at paragraph 10 of the Summary of Argument that the reference to 'person' in s 77 of the EO Act should apply to it, because the expression 'person' where used in the EO Act includes a corporation. This conclusion is reached by reference to the definition of person as defined in s 38 of the *Interpretation of Legislation Act 1984 (Vic)*, which includes a corporation. Further, the Applicant observes that the expression 'person' is used to describe those protected from discrimination under the EO Act and also those who bear a

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² *Judiciary Act 1903 (Cth)*, s 35A(b).

³ *Cobaw Community Health Services v Christian Youth Camps Ltd and Anor* [2010] VCAT 1613.

duty or obligation not to discriminate. This includes a duty on a corporation not to engage in conduct contrary to Part 3 of the EO Act.

5. Section 77 of the EO Act provides a shield to a person who engages in discrimination contrary to Part 3 of the EO Act only if it is necessary for that person to comply with the person's 'genuine religious beliefs or principles'. Section 77 provides the shield if:

- a. the person who engages in discrimination contrary to Part 3 has religious beliefs or principles; and
- b. it is necessary for that person to discriminate because of a requirement to comply with the person's genuine religious beliefs or principles.

6. Having regard to the elements of s 77, the Second Respondent submits that on its proper construction, the expression 'person' in s 77 of the EO Act can only apply to natural persons. In this respect, the conclusion reached by the majority (Maxwell P and Neave JA)⁴ was correct. As artificial legal persons, a corporation, body politic or unincorporated association cannot have religious beliefs or principles.⁵

7. The Second Respondent submits that the approach taken by his Honour Maxwell P at [309] – [322] was correct. Section 77 should be construed in the context of the suite of exceptions available to religious bodies and in relation to religious activities in ss 75, 76 and 77 of the EO Act. Further, the interpretation of these provisions should be informed by the objects of the EO Act. Because the objects of the EO Act seek to give effect in part to fundamental international human rights, it is appropriate for a court to favour a construction that accords with relevant international obligations with respect to human rights.⁶

⁴ *Christian Youth Camps Ltd and Anor v Cobaw Community Health Services* [2014] VSCA 75 [307] – [322] (Maxwell P); [359], [411] – [420] (Neave JA).

⁵ Compare *Motel Marine Pty. Ltd. v I.A.C. (Finance) Pty. Ltd* (1963) 110 CLR 9 at 11- 12 and *News Corporation Limited; Mirror Newspapers Limited; Nationwide News Pty Limited and Control Investments Pty Limited v National Companies and Securities Commission* (1984) 1 FCR 64.

⁶ See [2014] VSCA 75 [179], [188] – [191] per Maxwell P; [409] per Neave JA.

8. The tenor of the Applicant's submission is that unless s 77 of the EO Act applies to it as a corporation, it will be left without a 'defence'. The Second Respondent submits there is no substance to this submission. Limiting s 77 of the EO Act to natural persons does not leave a corporation such as the Applicant without a shield in circumstances if a corporation engages in discrimination contrary to Part 3 of the EO Act. Relevantly, s 75 of the EO Act provides a range of exceptions for a '*body established for religious purposes*'. Section 75 applies to a 'body', which clearly includes a corporation but by definition could not apply to an individual, as an individual is not 'established for religious purposes'.⁷

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9. With respect to s 75, the Parliament did not exempt *all* bodies engaged in *any* type of religious activity from the operation of the EO Act. Rather it confined the exception in s 75 to bodies *established for a religious purpose*. Parliament designated certain activities engaged in by such a body to be exempt from the operation of the EO Act. Accordingly, if s 75 of the EO Act has any operation independent of s 77 of the EO Act, then the only proper interpretation of the expression 'person' in s 77 is to confine the section to natural persons.

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10. Given the beneficial nature of the EO Act, which supports defences or exceptions being construed narrowly and consistently with the objectives of the EO Act,⁸ Parliament would not have intended s 77 to provide:

- a. an exception in circumstances where s 75 did not apply to the religious body; and
- b. a broader exemption to bodies *not* established for a religious purpose and engaged in a wider range of activities than those identified in s 75 by permitting those bodies to rely on s 77 of the EO Act.

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11. It would be contrary to the objectives of the EO Act to provide a broader exception for bodies established for non-religious purposes than for those bodies specifically established for a religious purpose and engaged in the specific types of activities identified in s 75 of the EO Act.

⁷ See [2014] VSCA 75 [157] – [158] per Maxwell P.

⁸ *X v Commonwealth* (1999) 200 CLR 177, 223 (Kirby J) and *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 333 and footnotes 168-169 (Kirby J).

12. Further, if s 77 of the EO Act applies to *any* body (incorporated associations and/or corporations including a corporation formed for a religious purpose), then ss 75 and 76 would be redundant as s 77 would provide a broader basis for exempting the body's activities from the EO Act. There would be no circumstances in which a body would need to resort to s 75(2), as s 77 would provide a complete exception.

Interpretation and application of s 75(2) of the Equal Opportunity Act 1995 (Vic)

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13. There are two parts to this question. First, the Applicant contends that the Tribunal should have made a finding that it was a body established for religious purposes within the meaning of s 75(2) of the EO Act. The Applicant contends that engagement in commercial activities should not disqualify the body being characterised as a body established for religious purposes. Secondly, the Applicant contends that the majority erred in the finding that the refusal of accommodation did not conform with the doctrines of the Christian Brethren and were not necessary to avoid injury to the sensitivities of members of the Christian Brethren.

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14. As to the first issue, the Second Respondent submits that whether a body is established for religious purposes is a question of fact and the Applicant here appears to contest a factual finding.
15. On appeal, it was conceded that the word 'established' had an ambulatory meaning and that the Court would need to examine the character and purpose of the activities of CYC at the relevant time.⁹

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16. The majority of the Court of Appeal was correct in following the approach discussed by Dixon J in *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1 at 32 in drawing a distinction between an activity '*actuated or inspired by a religious motive*' and an activity that has an *essentially religious character*. The former activity is secular and not done *for* a 'religious purpose'.¹⁰ It is not enough that the activity arise out of or have a connection with a faith, a church, or a denomination, or that the activity is considered to have a tendency beneficial to

⁹ See [2014] VSCA 75 [221] per Maxwell P.

¹⁰ See [2014] VSCA 75 [231] – [233] per Maxwell P.

religion, or to a particular form of religion for the purpose to be religious. In this respect the issue is not whether the activity is commercial or not, rather the focus is directed to the purpose. In this matter, the Tribunal found that the Applicant was not established for religious purposes and the Second Respondent submits that this factual finding should not be open to review on appeal.

- 10 17. As to the second issue, the Applicant contends that the Court of Appeal erred by holding that conformity with the doctrines of a religion required the doctrine to be a fundamental one: see paragraph 20 of the Summary of Argument. This question only arises if the Applicant succeeds on its contention that it was a body established for religious purposes. Otherwise, the question is moot.
- 20 18. On the premise that the second issue arises, the Second Respondent submits that the question of 'doctrine' is a question of fact. This is plain in paragraph 22 of the Summary of Argument. The Second Respondent does not seek to be heard on any matters concerning factual findings. However, it is respectfully submitted that the Applicant's reference to *OV and OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606 is not correct.¹¹ There Basten JA and Handley AJA (Allsop P agreeing) at [46] said that the identification of 'doctrine' was a question of fact. Their Honours did not say that the expression 'doctrine' where used in a context similar to s 75(2) means that which is 'held out' by the relevant religion as being true.
19. The Applicant also contends that the majority erred in the finding that the refusal of accommodation was not necessary to avoid injury to the sensitivities of members of the Christian Brethren. The Court of Appeal was unanimous in finding that the *religious* beliefs or principles upon which CYC relied were not 'doctrines' of the religion: likewise a finding of fact.¹²
- 30 20. Finally, as to both ss 75 and 77 of the EO Act, the Second Respondent submits that the approach taken by the majority was correct. Any exception to conduct that contravenes the right to be free from discrimination should be construed narrowly and in a manner that seeks to give effect to the objects of the EO Act.

¹¹ There the New South Wales Court of Appeal was concerned with s 56 of the *Anti-Discrimination Act 1977* (NSW) which provided an exception in similar terms to s 75(2) of the EO Act.

¹² See [2014] VSCA 75 [300] per Maxwell P, Neave concurring; [437] per Redlich JA.

Sections 42 and 49 the Equal Opportunity Act 1995 (Vic).

21. The Applicant challenges the Court of Appeal's findings with respect to ss 42 and 49 of the EO Act. The Applicant's challenge appears to be directed to factual findings and the question of standing. The Applicant does not raise any questions of the construction of ss 42 and 49 of the EO Act. Given the Second Respondent's role in the Tribunal and in the Court of Appeal, it does not seek to address the challenges to the factual matters raised by the Applicant.

Part IV: Costs

22. The Third Respondent does not seek any special order as to costs.

Part V: Authorities and legislation

Equal Opportunity Act 1995 (Vic): ss 75, 76, 77

Roman Catholic Archbishop of Melbourne v Lawlor (1934) 51 CLR 1 at 32

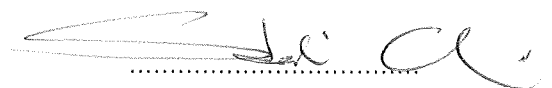
- 20 *OV and OW v Members of the Board of the Wesley Mission Council (2010) 79 NSWLR 606 at [46]*

Part VI: Oral argument

23. The Second Respondent will supplement this summary with oral argument, only if required by the Court and if the matters raised in paragraph 3 of the Summary of Argument need to be addressed.

- 30 The Second Respondent's Summary of Argument was prepared by Kate Eastman SC and Stephanie Cauchi, solicitor for the Second Respondent.

Dated: 2 July 2014



Stephanie Cauchi
Solicitor for the Second Respondent