



Are your activities discriminatory?

Clarification of Discrimination Exemption for Religious Organisations

In this issue...

Clarification of Discrimination Exemption for Religious Organisations	1
Important Reminders with Impending FBT Return Lodgements	5
Children's Corner	6



Clarification of Discrimination Exemption for Religious Organisations

The Court of Appeal clarified “the circumstances under which a religious organisation ... can rely on section 56 of the Act as a defence to a claim for unlawful discrimination”

Background

New South Wales courts and tribunals have recently handed down decisions providing guidance to religious organisations in relation to exemptions from anti-discrimination laws.

In 2002, OV and OW, partners in a same sex relationship, sought to be authorised as foster carers by an agency of the Wesley Mission. They were informed that an application from them would not be accepted because of their relationship as a homosexual couple. The claimants sought to challenge that refusal claiming that it contravened the prohibition against discrimination on the grounds of homosexuality and marital status under the *Anti-Discrimination Act 1977* (NSW) (the Act).

The Wesley Mission sought to rely on the general exemption for religious bodies in section 56 of the Act.

In 2008, the Equal Opportunity Division of the Administrative Decisions Tribunal upheld the complaint on the ground of sexuality but not on the ground of marital status. The Wesley Mission appealed from this decision to the Appeal Panel of the Administrative Decisions Tribunal. The Appeal Panel set aside the decision and remitted a number of questions to be heard and decided again by the Equal Opportunity Division.

OV and OW appealed against the decision of the Appeal Panel. In the course of its judgment, the Court of Appeal was called upon to clarify the circumstances under which a religious organisation such as Wesley Mission can rely on section 56 of the Act as a defence to a claim for unlawful discrimination.

In summary, section 56(d) provides that nothing in the Act affects any other act or practice by a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the

(Continued on page 2)

(Continued from page 1)

religious susceptibilities of the adherents of that religion.

Court of Appeal Decision

In the course of considering the operation of these exemptions, the Court of Appeal made the following observations:

- Section 56(d) does not permit the doctrines of part of the relevant religion to be examined rather than the doctrine of that religion taken as a whole.
- It is not necessary for a religious body to prove that all the adherents of that religion may have their religious susceptibilities infringed – although the Court stated that it is a mistake to try and identify quantity or number, beyond saying that the adherence must be a significant proportion of the group, such that the phrase as a matter of fact is satisfied.
- The correct approach to the construction of section 56(d) is not to take individuals words in isolation and ask whether each is used in its ordinary meaning but to address the structure of the provision as a whole.
- In the first limb of section 56(d) “*established*” is not used strictly in the past tense but is used to ascertain whether the acts or practices conformed to the doctrines being adhered to by

their religious body at that time, even if those doctrines have evolved or changed since the body was first established.

- There is no basis in section 56 for an inference that Parliament intended to exempt from the operation of the Act only those acts or practices which formed part of the religion common to all Christian churches, or all branches of a particular Christian church, to the exclusion of variance adopted by some elements within a



particular church.

- The correct approach is the identification of the religion that the subject body, in this case Wesley Mission, was established to propagate. It is then necessary to ascertain whether the act of that religious body for which exemption is sought, conforms with the doctrines of that religion. If that is the case, then the religious body must go on to establish that the religious susceptibilities of adherents of that religion might be infringed if the particular act called in to question (that is in this case to allow a homosexual couple to be approved as foster parents) might be infringed.

- There was a lack of procedural fairness by the Equal Opportunity Division to Wesley Mission by relying on the definition of “*doctrine*” in the Pocket Catholic Dictionary which was of uncertain origin and reliability.

The Court of Appeal did not finally determine whether or not Wesley

“The decision has wider ramifications for religious institutions than merely its arrangements in relation to foster carers.”

Mission was protected by the exemption in section 56(d). The reason was that this was a factual matter which must be determined by the Equal Opportunity Division of the Administrative Decisions Tribunal. Accordingly, the matter was remitted back to that division for determination taking in to account the observations made by the Court of Appeal to guide the division in that process.

(Continued on page 3)

(Continued from page 2)

Administrative Decisions Tribunal

Following the guiding principles enunciated by the Court of Appeal, the matter was considered afresh by the Administrative Decisions Tribunal.

The Tribunal considered detailed evidence put forward by the Chief Executive Officer and in-house lawyer of Wesley Mission amongst others.

In summary, that evidence set out the history of Wesley Mission; the relationship between Wesley Mission and the Uniting Church; the way in which Wesley Mission theology was implemented in practice; Wesley Mission's approach to homosexuality generally; and Wesley Mission's approach to homosexual foster carers.

Tribunal was satisfied that the refusal to consider an application to authorise a same sex couple to foster a child conformed at that time to the doctrines of the religion which Wesley Mission was established to propagate.

Further, the Tribunal found that the act of not providing an application to become foster carers by Wesley Mission was necessary to avoid injury to the religious susceptibilities of the adherents of the faith.

That being the case, the defence set out in section 56(d) was satisfied and the complaint was dismissed.

The Tribunal made no order as to costs. That meant that after seven years of litigation, the parties were put to enormous expense in seeking to

, having ultimately succeeded, Wesley Mission was not



Having considered that evidence, the

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(Continued from page 3)

justify their respective positions and having ultimately succeeded, Wesley Mission was not granted an order in its favour.

Implications for Religious Organisations

The decision of the Court of Appeal provides further clarification in relation to the proper interpretation of section 56 of the Act.

It is apparent that the proper construction of that section will vary from case to case depending on the particular circumstances. It is also apparent that the section is not as straightforward as might appear at first blush in assisting religious organisations seeking exemption from discriminatory acts.

“Having considered the evidence, the Tribunal was satisfied ... and the complaint was dismissed”

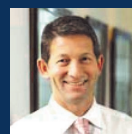
The Court of Appeal has made it clear in the Wesley Mission case that whether or not a religious organisation can avail itself of the exemption in section 56(d) is a complex factual question which must be thoroughly examined by the particular court or tribunal.



It is necessary in such proceedings for a religious organisation to lead evidence and establish the following:

- That it propagates a particular religion.
- What its particular doctrines might be.
- What the religious susceptibilities of adherents of that religion might be.
- That the particular act in question which is otherwise discriminatory is exempt because it has satisfied the above elements.
- The history and structure of that religious organisation.
- The aims and objects of that religious organisation.

The decision has wider ramifications for religious institutions than merely its arrangements in relation to foster carers. In particular, the decision of the Court of Appeal is sufficiently wide as to provide guidance for all religious institutions seeking to utilise the exemption under section 56(d) of the Act.



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Important Reminders with Impending FBT Return Lodgments

Fringe Benefits Tax (FBT) return preparation season is now upon us and this is a timely reminder of potential traps for FBT-exempt and rebatable employers when completing the FBT return.

The issues below may affect both exempt benefits (whether the capping threshold is \$17,000 or \$30,000 per employee) and rebatable employers (such as religious institutions).

Trap 1: Disclosure requirements for FBT-exempt employers

These are different to those for most employers, specifically:

- Where the relevant capping threshold has been exceeded for an employee, only item 13C (aggregate non-exempt amount - hospitals, ambulances, public benevolent institutions and health promotion charities only) must be completed with the aggregate grossed-up value of benefits in excess of capping amounts. Many exempt entities incorrectly disclose figures in items 13A and/or 13B (aggregate amount).
- Where a capping threshold has been exceeded for an employee, item 22 (aggregate non-exempt amount - hospitals, ambulances, public benevolent institutions and health promotion charities only) requires the disclosure of the total value of taxable benefits provided (with the exception of benefits to be excluded from the capping amounts noted above, including meal entertainment, entertainment facility leasing expenses and car parking benefits).

[The references above are to the 2010 FBT return as the 2011 FBT return is yet to be released by the ATO.]

Trap 2: The payment or reimbursement of an employee's car parking expenses and grocery bills are not excluded from the concessional caps.

The payment or reimbursement of an employee's car parking expenses is an expense payment fringe benefit

and is to be distinguished from an employer providing a car parking benefit. The taxable value of car parking benefits are excluded from the concessional cap.

Similarly, the payment or reimbursement of an employee's grocery bill is an expense payment fringe benefit and is to be distinguished from the provision of meal entertainment. The taxable value of meal entertainment is also excluded from the concessional cap.

Trap 3: Reportable Fringe Benefit Amount requirements mutually exclusive to lodging requirements for FBT returns

All employers (including FBT exempt and rebatable employers) are required to include a value for reportable fringe benefits on the employee's payment summary where the notional taxable value of reportable fringe benefits received by an employee during the FBT year is more than \$2,000. Accordingly, it is possible to have reportable fringe benefit amounts without having to complete a FBT return.

We hope the above will be of assistance to you in preparing your 2011 FBT returns.

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Children's Corner

Three significant bills have passed through the New South Wales Parliament recently which will affect regulation of early childhood education in New South Wales. Some of the changes that the legislation brings will affect early education providers and others will affect teachers of children over the age of six and after school care.

New National Law

The *Children (Education and Care Services National Law Application) Act 2010* will adopt the Education and Care Services National Law which is set out in the Schedule to the *Education and Care Services National Law Act 2010* of Victoria. The National Law gives effect to the agreement endorsed by the Council of Australian Governments in December 2009 to establish a jointly governed, uniform national quality framework and facilitate the introduction of a national quality standard.

The new law will provide a national approach to regulation, assessment and quality improvement for early childhood education and care and outside school hours care. It will replace existing separate licensing and quality assurance processes for pre-school, family day care and outside school hours care. It will also establish a public rating system for education and care

services. As the law is part of a uniform law strategy across Australia, the other states and territories participating in the national licensing scheme need to enact their legislation before this Act will entirely commence in New South Wales. Affected schools should therefore contact their lawyers to ascertain whether the provisions about which they may be concerned have yet commenced.

The National Law will be known as the *Children (Education and Care Services) National Law* (referred to in



this Article as the National Law).

The Victorian Act states that the principal objective of the legislation is to establish the National Quality Framework and the Australian Children's Education and Care Quality Authority to oversee its administration. It provides a role for regulatory authorities in approving persons and services that provide education and care, monitoring compliance with the National Law and assessing and publically rating services against a new national quality standard. Some new

offences are created by the legislation which are intended to ensure the health, safety and wellbeing of children and the operation of the National Approval System. The legislation provides for the tools that the regulatory authority may use to ensure compliance with the National Law and is intended to ensure the safety, health and wellbeing of children attending education and care services. The legislation also establishes the Australian Children's Education and Care Quality Authority Fund, reporting requirements, legal proceedings and providing for the development and commencement of national regulations.

“changes will affect early education providers and teachers of children over the age of six”

(Continued on page 7)

(Continued from page 6)

Voluntary Out-of-Home Care

The *Children and Young Persons (Care and Protection) Act 2010*, which has fully commenced, makes provision in respect of voluntary out-of-home care. Out-of-home care does not include private arrangements between parents for care of their children after school. This new Act clarifies that financial assistance is available to certain carers and provides for probity checks on persons involved in the provision of children services, clarifies the power to take photographs and other recordings during the removal of a child or young person from any premises or place, provides that certain decisions about permanency plans for children and young persons are not reviewable by the Administrative Decisions Tribunal and other minor amendments.

“...financial assistance is available to certain carers”

Report to the Department of Community Services

The Act also provides that the report that a teacher makes in

relation to a child’s health or wellbeing, which may result in a report to the Department of Community Services, can be admissible only in the following proceedings:

- care proceedings in the Children’s Court;
- proceedings in relation to the child or young person under the *Family Law Act 1975* (such as those related to divorce proceedings);



- proceedings in relation to the child or young person before the Supreme Court of the Administrative Decisions Tribunal;
- proceedings before the Victims Compensation Tribunal or the Guardianship Tribunal; and
- proceedings under the *Coroners Act 2009*.

The disclosure of the identity of a person who makes a report (such as a teacher) will not be prevented if it is disclosed in connection with

the investigation of a serious indictable offence or reportable conduct alleged to have been committed or done against a child or young person. Unfortunately, this may have the effect of causing teachers not to report serious incidents reported by children.

Licensing Regime Change

The *Children and Young Person (Care and Protection) Amendment (Children’s Services) Act 2010*, which is also fully enforced, replaces the previous licensing system for children’s services, provides for a more extensive range of investigation and enforcement powers in connection with the regulation of children’s services and improves access to information about children’s services.

Children’s services are services that provide education or care (or both) for one or more children under the age of six years who do not ordinarily attend school.

Under the new provisions, the Director General of the Department of Human Services will be able to issue service provider licences, children service approvals and supervisor approval. A service provider licence will authorise licensees to provide children services, no longer being tied to the premises at which services are

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to be provided or the authorised supervisor. Children service approvals will authorise the operation of a particular children service. Supervisor approvals will authorise a person to supervise the operation of any specific children service. No doubt this will have impacts on documents that schools require their licensed providers of care for children under the age of six years to provide before leasing premises to them.



Investigation and Enforcement Powers

The Director General will be able to require persons who are providing children's services to provide records kept in connection with those children's services to the Director General and to answer questions. New offences are also created by this Act.

Children's Services Register

The Director General will be

required to keep a children's services register to record the following information about children's services:

- particulars of the children's service approval;
- the name and address of the licensed service provider;
- particulars of the service provider licence;
- the name of any person who is an authorised supervisor;
- particulars of the supervisor approval; and
- particulars of any enforcement action taken against the licensee or an authorised supervisor.

For more information on the changes to the legislation governing childhood education, please contact our office.

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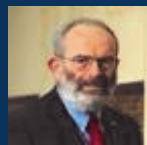
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Issue 8

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April 2011

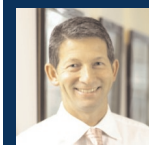
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Back issues

All issues of *Administry* are available online at www.makdap.com.au. Articles in the last two issues include:

Issue 7, November 2010

- New Australian Credit Licence Laws
- Are you collecting all your bequests?
- Changes to the Retirement Villages Act
- Uncertainty as to the Future Financial Reporting Framework for

Issue 6, March 2010

- Are we a charity? A PBI? A DGR?
- Business names or trade marks—which has more legal weight?
- Public ancillary funds crackdown!
- Aid/Watch case - restricting the definition of "charitable"

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Disclaimer: This publication is a non-comprehensive general outline of the law as at 7 April 2011. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

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