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The Ethics of Freedom: Religious Freedom in the Workplace (Ethics and Professional Responsibility)

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Thanks for the opportunity to speak to you today on this fascinating area. As someone who teaches on "law and religion" issues, I want to speak today about the intersection between a lawyer's professional responsibility and ethical obligations, and the idea of religious freedom in the workplace. After a fairly brief overview of religious freedom in Australia generally, I want to speak in particular about how the religious freedom of employees works in an employment situation, and then spend a bit of time discussing how the religious freedom of lawyers operates in the context of professional ethical obligations to employers and clients.

Religious Freedom in Australia- overview

How is religious freedom protected generally by the law in Australia?

The short answer is, not terribly well, but there are some laws that help. One thing we don't have in Australia, which most other Western countries have, is a general protection of religious freedom which will over-ride other laws. In the USA of course there is protection provided by the First Amendment to their Constitution for "free exercise" of religion. In Canada their constitution contains general human rights protections, which include religious freedom, and similar laws are in place in the UK and in Europe.

Here we have one general provision in our Federal Constitution, s 116, but it is quite limited.

> **Commonwealth not to legislate in respect of religion**
> 116 The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

This provision doesn't apply to State and Territory Parliaments, only to the Commonwealth Parliament, and it has been interpreted fairly narrowly by the courts on the few occasions when it has been relied on.

Perhaps surprisingly, a key aspect of protection of religious freedom in Australia comes from laws governing discrimination. Laws around Australia are in place to prohibit detrimental decisions in various areas of life being made on irrelevant grounds against people who share particular characteristics. The most obvious one, and historically the first set of laws of this sort,

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deal with race discrimination. But there are laws forbidding discrimination on other grounds, including sex, and sexual orientation, and gender identity, and in some jurisdictions, religion.

Let's take a hypothetical: a Christian lawyer who is an employee of a law firm or company, who makes a comment about a controversial issue and is threatened with consequences? Are there laws which might protect this person?

(a) Discrimination on grounds of religion

There are two ways discrimination laws have an impact on religious freedom. One is that many such laws around the country **prohibit discrimination against someone on the grounds of their religious belief**. Those can be helpful in allowing Christians to express their faith without being subjected to being fired or refused service or otherwise being subjected to some form of detriment. Again, I want to stress that we do know that persecution will often follow the godly person, the Bible tells us that. But that doesn't mean we rejoice in it or go looking for it! If there is a law which will make our employer think twice before sacking us for organising a bible study group at lunchtime, I think that is a good thing.

(i) Andrew Thorburn

We can take as an example of discrimination on the basis of religion, in the workplace, the case of Mr Andrew Thorburn, which no doubt many of you will have heard of.

Mr Thorburn was recruited as someone with top managerial experience in the banking sector, and a long-time Essendon fan. But as soon as the announcement was made, it was apparently discovered that he was a member of the board of management of a church called "City on a Hill". The main congregation of this church is in Melbourne, though it oversees other congregations around Victoria and elsewhere in Australia. It is linked with the Anglican Church but has its own corporate governance.

It is reported that comments made in sermons linked on the church website included remarks about abortion and homosexuality. (They no doubt included remarks about a lot of other issues concerned with proclaiming the gospel of Jesus Christ, but these are the ones that have been flagged as upsetting by critics.) It is crucial to see what was actually said. The "media story" here has been to repeat that the church "equated abortion with concentration camps and claims "practising homosexuality is a sin"".

Here is what (to its credit) the *Guardian* reports on the topics with more detail:

> A City on a Hill article from 2013, titled Surviving Same Sex Attraction as a Christian, advises those who "struggle with same-sex attraction" to "speak to a mature Christian whom you trust, so you can receive the support and accountability you will need in the long term to survive these temptations".
> Those views were reiterated in a 2016 sermon stating "practising homosexuality is a sin, but same-sex attraction is not a sin"….
> Another sermon, published in 2013 and titled What Should Christians Think About Abortion, said: "Whereas today we look back at sadness and disgust over concentration camps, future generations will look back with sadness at the legal murder of hundreds of thousands of human beings every day through medicine and in the name of freedom."

So yes, the church believes that engaging in homosexual activity is wrong- a view that until recently was common among all the mainstream religious faiths. And yes, the church believes that unrestricted abortion at any time up to birth is the killing of innocent human beings. This again is a view common to many religions (notably the Roman Catholic Church.) Of course, if one were to take the time to review the whole of these sermons one would no doubt find nuances in the way this was presented, and compassion for those impacted by these issues. But it seems that nuance is not what is needed when someone is to be hounded out of

their job. It is also worth stressing that these were not even comments made by Mr Thorburn himself! They were comments made by the pastor of his church,

These comments were brought to public notice, and the high profile nature of AFL in Victoria is such that the Victorian Premier, Daniel Andrews, was asked to provide his opinion on the appointment at a news conference. He was blunt:

> "Those views are absolutely appalling," Mr Andrews said about the church's stance. "I don't support those views, that kind of intolerance, that kind of hatred, bigotry. It is just wrong.
> "To dress that up as anything other than bigotry is just obviously false."
> *Australian Financial Review, Oct 4, 2022*

The next day Mr Thorburn tendered his resignation, but it seems clear that he did so because of pressure from the Board. From the President of the Club:

> "As soon as the comments relating to a 2013 sermon from a pastor, at the City on the Hill church came to light this morning, we acted immediately to clarify the publicly espoused views on the organisation's official website, which are in direct contradiction to our values as a club," Mr Barham said.
> "The board made clear that, despite these not being views that Andrew Thorburn has expressed personally and that were also made prior to him taking up his role as chairman, he couldn't continue to serve in his dual roles at the Essendon Football Club and as chairman of City on the Hill."
> *Australian Financial Review, Oct 4, 2022*

Mr Thorburn later released a comment on LinkedIn, in part of which he said:

> [T]oday it became clear to me that my personal Christian faith is not tolerated or permitted in the public square, at least by some and perhaps by many. I was being required to compromise beyond a level that my conscience allowed. People should be able to hold different views on complex personal and moral matters, and be able to live and work together, even with those differences, and always with respect. Behaviour is the key. This is all an important part of a tolerant and diverse society.

To complete the story, there was some discussion about legal action, but in December 2022 it was announced that Mr Thorburn and the club had reached a settlement.[2] Nevertheless, it seems arguable that there had been unlawful discrimination here.

The Victorian *Equal Opportunity Act* 2010 (the "EOA") makes it unlawful to discriminate against someone in employment (s 18) "by dismissing the employee or otherwise terminating his or her employment", where that decision is on the basis of the attribute of "religious belief or activity" (s 6(n)), or "personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes" (s 6(q)).

It seems fairly clear, as noted already, that while formally Mr Thorburn resigned, he was in effect forced to do so, and that would seem to be dismissal or termination. It seems clear from what has been said that a significant reason for this dismissal was either his own personal faith, or else his "association" with an organisation (City on a Hill church) with particular religious beliefs.

The Essendon Board said:

> "This is not about vilifying anyone for their personal religious beliefs, but about a clear conflict of interest with an organisation whose views do not align at all with our values as a safe, inclusive, diverse and welcoming club for our staff, our players, our members, our fans, our partners and the wider community," Barham said on behalf of the football club.

[2] See https://www.hrla.org.au/andrew_thorburn_reaches_settlement_with_essendon_football_club . For the club statement in December 2022 see https://www.essendonfc.com.au/news/1259720/joint-statement .

It is unclear what "personal" means here. If it means that Mr Thorburn was entitled to his views so long as he did not act on them, that is now how religion works! It may be an attempt to argue that the decision was not based on Mr Thorburn's own views, but those of the church he was a part of. But in that case, of course, it will be an example of "association" discrimination, which is also unlawful.

It seems likely that what has happened here is "direct discrimination". This is defined as follows in s 8 of the EOA, which provides:

> (1) Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.
> (2) In determining whether a person directly discriminates it is irrelevant— …
> (b) whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason.

It seems that there has been unfavourable treatment (dismissal) "because of" either Mr Thorburn's own religious views, or else those of his church. And even if this was said to only be one of the reasons for the action, it will be unlawful.

One response might be that moral views on abortion or homosexual activity are not "religious". But this would be to adopt a very narrow definition of a term which receives strong human rights protection under international law (such as under art 18 of the International Covenant on Civil and Political Rights). The word "religious" here cannot mean simply "relating to how one worships" or "connected with the identity of God". Under art 18(1) of the ICCPR what is protected includes "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" (emphasis added).

However, an argument might be made that what has been applied is a policy that would be applicable to anyone, regardless of religious belief. The club may say: "we have decided that no person who does not support unlimited abortion rights, and no person who believes that homosexual activity is wrong, can work for our club, whether their views come from religious belief or not. Nor can they work for us if they are in a leadership role with an association which espouses those views."

If that argument was accepted (and to be clear, in this case it would be quite weak, especially as the decision has been very directly linked to the specific church)- but if it were accepted, then arguably what has been done might count as **indirect discrimination**. Under s 9 of the EOA:

> 9 (1) Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice—
> (a) that has, or is likely to have, the effect of disadvantaging persons with an attribute; and
> (b) that is not reasonable.
> (2) The person who imposes, or proposes to impose, the requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable.
> (3) Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including the following—
> (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice;
> (b) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice;
> (c) the cost of any alternative requirement, condition or practice;
> (d) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice;
> (e) whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an

> alternative requirement, condition or practice that would achieve the result sought by the person imposing, or proposing to impose, the requirement, condition or practice but would result in less disadvantage.

Here, if the above requirement was imposed, it seems clear that it would disadvantage persons with the attribute of a religious belief about abortion or homosexual practice (over and above others in the community who did not hold such a belief.) The onus would then be on the club to show that such a condition was "reasonable". It would seem that there are a number of proportionate ways of dealing with this situation short of terminating the employment of a recently hired executive. While it would be reasonable to impose conditions of this sort for employment in a "pro-choice" advocacy group, or a "Gay Pride" organisation, is it really essential to delve into the moral positions of senior executives in a football club?

It is also possible that this action could be seen as unlawful under the *Fair Work Act* 2009 (Cth.) Under s 351 of that Act it is unlawful to take "adverse action" against an employee on the basis of their religion, unless it can be shown that the action was taken "because of the inherent requirements of the particular position concerned" (s 351(2)(b)). Similar issues to those noted above would arise in an action based on this provision.

Indeed, it is important to note that, for those of us located in NSW or South Australia (or working for the Commonwealth), which jurisdictions do not currently have a prohibition on religious discrimination, the FWA provides one of the few clear avenues of protection in employment. As it turns out, we cannot rely on s 351 (as it does not operate unless the relevant State or Territory also forbids religious discrimination.) But there is another provision, s 772, which will provide some relief to a person whose job has been terminated because of their religion.

(ii) Israel Folau

To illustrate this, it may be helpful to be reminded of the events of a few years ago now relating to the football player, Mr Israel Folau.

A specific area of clash between rights which has generated a lot of press and public interest in the last year is that which arises where a term of an employment contract purports to prevent an employee from expressing views which others may be offended by; but the employee's views are based on his or her religious beliefs. The issue arises most sharply when the views are expressed outside working hours and in a context which seems to be "personal" rather than "official".

The primary example, of course, is the Israel Folau case.[3] In brief, Mr Folau, a well-known footballer who was at the time contracted to the Australian Rugby Union (ARU), made some controversial comments on social media reflecting his religious views.

The text of his "meme" (a picture apparently taken from another website) was: "Warning: Drunks, Homosexuals, Adulterers, Liars, Fornicators, Thieves, Atheists, Idolators: Hell Awaits You- Repent! Only Jesus Saves." To this he added his own personal comment: "Those that are living in Sin will end up in Hell unless you repent. Jesus Christ loves you and is giving you time to turn away from your sin and come to him." (The comment was similar to many other pictures shared on his account, many of which were Bible verses or exhortations to nominal Christians to follow Jesus Christ in deed as well as word.)

Rugby Australia then announced that it (and the NSW Rugby Union) would terminate his contract unless he could offer some explanation for the comments which they were satisfied with (any "compelling mitigating factors"). They alleged that his comments breached a "code of conduct" which formed part of his contract of employment: "He cannot share material on social media that condemns, vilifies or discriminates against people on the basis of their

[3] For an excellent overview of the facts and the legal issues see Helen Dale, "A Fair Go" https://www.lawliberty.org/2019/11/13/a-fair-go-israel-folau-rugby-labor-law-religious-liberty/ (Nov 13, 2019).

sexuality." They also alleged that being "disrespectful to people because of their sexuality" would justify disciplinary action. After an internal tribunal finding that he was guilty of a high-level breach of the RA "code of conduct", he was formally dismissed on 17 May 2019.[4]

It might have at first been thought that Mr Folau's post was unlawful under NSW law. Under s 49ZT of the *Anti-Discrimination Act* 1977 (NSW) it is unlawful to "incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group". But s 49ZT(2)(c) exempts from that prohibition any act "done reasonably and in good faith, for… religious instruction", and the overall theme of Mr Folau's Instagram account could well be said to be "religious instruction".

The fundamental questions concerning the dismissal are these: (1) were the comments "vilifying" or any of the other negative epithets applied in the contractual codes? And (2) was it relevant that these comments were made by way of presenting the teaching of the Bible to an audience who had chosen to voluntarily "follow" Mr Folau in order to find out what he would say? A significant further question is (3) can a private contractual clause over-ride rights given under discrimination laws?

(a) Was there "vilification" under the code of conduct?

On the first point of "**vilification**" under the code of conduct, the question seems to boil down to this: can a statement that "homosexuals" (along with "drunks" and "thieves" and others) are destined for eternal punishment unless they repent, be said to be "hateful" or "vilifying"?

Mr Folau, it seems, shared this message because he wanted to warn those who followed him on Instagram that, from his perspective as someone who takes the Bible seriously, life contains serious choices, and consequences for eternity. In doing so he argued that he did not express any hatred for homosexual persons, or for others caught up in what he (and the Bible) sees as sinful behaviour. He did not express any contempt for them, or ridicule of them. Far from automatically "condemning" them (to use one of the Rugby Australia "code of conduct" words), he said that they were loved by Jesus, could be saved, and receive eternal life if they chose to "turn away from your sin and come to him".

Of course, the majority view in our society now is that homosexual activity is a normal and natural part of human life and should be accepted and, indeed, celebrated. So, Mr Folau's view (shared by many who take the Bible seriously) is one that is now in the minority. But, to repeat, he did not call for those who choose to disregard God's purposes for humanity to be hated, or stoned, or treated with contempt. He offered the love of Jesus and a way out of eternal judgment.

(b) Use of social media to present religious views

Second, did it make a difference that this was presented on a **personal social media** account? He was presenting his views on the teaching of the Bible to a group of persons (large as that group is- he had at one point some 332,000 "followers" on Instagram) who had voluntarily chosen to find out his views on various issues and to see what photographs he posted. The only reason his post became more widely known, of course, is because it was publicised in the wider media.

There is an increasing unease in the community over attempts by employers to protect a "brand" by controlling the activity of employees on social media. A high-profile example

[4] Interestingly, the day before the electors of Australia voted in a Federal election, the surprising result of which (the unexpected return of a conservative LNP government) was attributed by some commentators, in part, to concerns of religious Australians about the events of the Folau case.

with some similarities to the Folau case, was the decision of the High Court in *Comcare v Banerji* [2019] HCA 23. There a Commonwealth public servant in the Immigration Department had been "tweeting" views critical of the government under an online pseudonym; and when her identity was discovered, she was dismissed. The court stressed that the doctrine of public service "neutrality" on political issues was a central part of our Westminster system of government and concluded that protection of this doctrine outweighed the value of free speech in this context.

But the similarities between the two cases are more apparent than real. Ms Banerji was a decision-maker in the Department whose views on various matters would directly affect her decisions. Mr Folau was employed to play rugby; he did not purport to "represent" the organisation in any sense, and his comments had no connection with his ability to do the job he was being paid to do.

Nor is it irrelevant that his views are clearly based on his religious convictions. Agree or disagree with them (and not even all Christians will agree), they are an expression of his religion. His lawyers argued that for him to be summarily dismissed on the basis of his religious beliefs was unlawful under s 772 of the *FWA*. That section provides:

> An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:..(f)…religion.

Of course, it can be argued that the reason for the dismissal was not merely because Mr Folau was a Christian, but because he chose to *express* his Christian beliefs publicly. (Note of course, though, that it could still be unlawful if "religion" is *one* of the reasons for dismissal.) But if that is the response, then it can be seen what a bad outcome that would be. "Freedom of religion", under international law (which Australian courts can refer to, especially in the context of s 772, which is explicitly said in s 771 to be implementing various international agreements), is held to include not just a right to "believe" but also a right to "manifest" one's belief. Article 18 of the *International Covenant on Civil and Political Rights* notes that such manifestation may be seen in "worship, observance, practice and **teaching**".

In fact, of course, there was (and is) no right under the current law of NSW for Mr Folau to argue that his proposed dismissal on account of sharing his religious beliefs, was unlawful discrimination on the grounds of religion. But the application of the Commonwealth law was important.

There was no evidence that Mr Folau was in any way seeking to "impose" his views on others, whether members of the public or other team members. It must be seriously doubted that someone is harmed merely by knowing that there are others in the community who regard their sexual activity as inappropriate. At any rate, this is the point at where much of the debate is focussed: what sort of "harm" cannot be tolerated? Is it so harmful to find out that others disagree with your sexual activity, that expression of such views should be made unlawful?

After a previous episode in 2018 where similar views were expressed, it can have come as no surprise to anyone following Mr Folau on social media that he held these views. Anyone following him on social media did so, presumably, because they wanted to know his views. If they were simply interested in football and did not want to hear about the Bible, they could either have chosen to "unfollow" him when comments from the Bible were posted, or to scroll past them and ignore them. It is arguable that if our society is to be serious about recognising the values of "diversity", it needs to make place for people to have different views, even on serious moral issues.

In the context of religious freedom, Latham CJ, when discussing the protection of religious freedom under s 116 of our Constitution, said in the important High Court of Australia decision *Adelaide Company of Jehovah's Witnesses v Commonwealth* that:

> The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities.[5]

Biblical Christianity seems in many quarters to have attained the status of an "unpopular minority". But for that reason alone, protecting the religious freedom of those who adhere to it, to speak to those who want to listen to them, about the doctrines of the Bible, is all the more important. As a tolerant and diverse multi-cultural community, we cannot shut down the voices of the minority simply because they disagree with the orthodoxy of the majority.

What were Mr Folau's legal options? Having been dismissed on 17 May 2019, he participated in a mediation process at the Fair Work Commission, which did not resolve the dispute. He then filed claims in the Federal Court. But in the end the dispute was announced to have been settled.[6] Still, let's consider what the options were.

(c) Possible contractual breach by RA

One possibility is that he may could have sued RA for a breach of their contractual obligations to him. That is, while they claimed that his post amounted to a breach of their "code of conduct", he could argue that what he did, did not amount to a breach of this provision, and that by terminating his employment *they* had breached *their* obligations.

(It is worth noting that, despite claims to the contrary at an early stage of the controversy, Mr Folau's contract apparently did *not* contain a specific clause forbidding him from social media comments on the topic of homosexuality. He had been engaged in a previous controversy with RA over similar comments in April 2018, but the available public evidence seems to be that this did not result in him agreeing to additional contract clauses over and above the "standard" player contract, incorporating the general code of conduct.)

A claim that RA were in breach would depend, of course, on whether a court concluded that the terms quoted above, referring to "vilification" or "discrimination", were apt to describe what he said. In my view those terms are not apt to describe his comments.

It is worth noting a somewhat similar case arising in the UK where a court ruled that comments which expressed opposition to same-sex marriage did not fall into the category of punishable "hate speech". In ***Smith v Trafford Housing Trust*** [2012] EWHC 3221 (Ch) Mr Smith, a council officer, had expressed some concern on Facebook about same-sex marriage being conducted in churches. A colleague, who had asked him to explain his views further, took offence at what he said. The result was, as the court said at para [5]:

> For making those two comments Mr Smith was suspended from work, on full pay, on 17 February, made the subject of a disciplinary investigation and then disciplinary proceedings leading to a hearing on 8 March, at the end of which he was told that he had been guilty of gross misconduct for which he deserved to be dismissed. Due to his long record of loyal service he was told that he was with immediate effect only to be demoted to a non-managerial position with the Trust, with a consequential 40 per cent reduction in his pay, phased over 12 months.

The result of this case was that Justice Briggs found that the Council had breached their contract with Mr Smith by imposing these penalties. Contrary to what had been alleged, he had not "brought the Council into disrepute", because his Facebook comments were made on his private social media site, where while he was identified as an employee of the Council, it was clear he was not "speaking on behalf of" the Council (paras [57]-[59]). An explicit ban on his "promoting" his beliefs to colleagues was not intended to apply to the sort of remarks he made on his private social media account- see para [79].

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[5] See above, n **Error! Bookmark not defined.**, at 124.

[6] See https://www.theguardian.com/sport/2019/dec/04/israel-folau-and-rugby-australia-settle-unfair-dismissal-claim-over-social-media-post (4 Dec 2019).

The final ground on which the Council had relied was that his contract said that he ought not to engage in "any conduct which may make another person feel uncomfortable, embarrassed or upset". But here Briggs J ruled that again, in the context, this was mainly intended to apply to direct workplace interactions. As he said at [82]:

> The frank but lawful expression of religious or political views may frequently cause a degree of upset, and even offence, to those with deeply held contrary views, even where none is intended by the speaker. This is a necessary price to be paid for freedom of speech. To construe this provision as having application to every situation outside work where an employee comes into contact with one or more work colleagues would be to impose a fetter on the employee's freedom of speech in circumstances beyond those to which a reasonable reader of the Code and Policy would think they applied. On any view their main application is to circumstances where the employee is working for the Trust.

The circumstances of the two cases, of course, are not identical. Mr Smith did not have thousands of Facebook friends. His comments may be said to be much "milder". But there are similarities, and the case is a reminder that an employer may breach their contractual obligations by penalising an employee unfairly for an alleged breach of "code of conduct" obligations which has not been properly established.

While the decision was not one that involved workplace interactions, it may be worth noting here that last week the Queensland Civil and Administrative Tribunal exonerated Lyle Shelton from an accusation of "vilification" on the grounds of sexual orientation or gender identity. The action was based on comments had made criticising a "drag queen" reading held at a public library for children.[7] One of the reasons for dismissing the claim was that Mr Shelton was criticising the activities involved, rather than basing his comments on the "protected attributes" of the persons concerned.[8] This is an important distinction.

(d) Possible FWA claim

To return to the Folau case, as well as a possible breach of contract claim, there may have been a possible remedy for dismissal under the *FWA*.

It is worth noting some of the complexities and limits around this claim.

One obvious question is whether the termination here had been for the "reason" of Mr Folau's religion. His exhortation was a paraphrase of a Bible verse and accompanied by an encouragement to repent and seek salvation in Jesus Christ. But it might be claimed that the termination was not on the basis of his religion, but rather on the basis of his choosing to express his religion in a way which insulted or offended homosexual persons.

Under the FWA, as noted, it only needs to be shown that "one" of the reasons for the termination of employment was religion. The question that may need to be resolved is the extent to which a religious employee should be allowed (on their own platform, and on their own time) to make comments motivated by their religious beliefs, without suffering the extreme penalty of termination. Note also that under FWA s 783, once it is alleged that religion was a reason for termination, the onus of proof that it was *not* lies on the employer.

However, it is worth noting some other apparent issues with relying on s 772. One is that, within the same Part of the Act (Part 6) we read:

> **723 Unlawful termination applications**
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> A person must not make an unlawful termination application in relation to conduct if the person is entitled to make a general protections court application in relation to the conduct.

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[7] See *Valkyrie and Hill v Shelton* [2023] QCAT 302 (18 August 2023), discussed on my blog at https://lawandreligionaustralia.blog/2023/08/19/vilification-claims-based-on-critique-of-drag-queens-event-dismissed/ .

[8] Ibid, *Valkyrie v Shelton*, see eg paras [302], [347].

Section 772, which we have been discussing, is an "unlawful termination" provision. There is a presumption, then, that, if some *other* remedy is available under the FWA, that should be used. One obvious possible "general protections" application would be a claim of adverse action based on personal characteristics (including religion) under s 351 of the Act.

But there is an important qualification to s 351 in sub-section 351(2), which in effect precludes any "adverse action" claim unless it would amount to unlawful discrimination in the State or Territory where the action took place. It would then be futile to require an employee dismissed on account of their religion to make a "general protection" claim under s 351, only for it to be rejected because of s 351(2).

This precise problem arose in the decision of the Fair Work Commission in *McIntyre v Special Broadcasting Services Corporation* [2015] FWC 6768. In this litigation, an SBS employee had posted a number of social media remarks attacking the celebration of Anzac Day. When dismissed, he claimed that his dismissal was on the basis of his "political opinion", one of the other "prohibited grounds" of termination listed in s 772(1)(g) (along with "religion"). His claim that s 351 had been breached would be rejected on the basis of the lack of such a ground of discrimination in NSW. But the Commission allowed a (late) claim under s 772 to be made, since in the circumstances Mr McIntyre was precluded from his s 351 claim. The Commissioner commented, interestingly, as follows:

> [29] Unfortunately, but not unsurprisingly, those who advised the applicant were unaware that the anti-discrimination law in New South Wales does not make it unlawful to discriminate against a person on the basis of their political opinion. In passing, I note that discrimination on the basis of **religion** may also not be specifically established to be unlawful under the Anti-Discrimination Act 1977 (NSW)… (emphasis added)

The Commissioner's comment here is support for the availability of a s 772 claim in a case like that of Mr Folau, where no action under NSW law would be available, and hence the "general protections" provisions such as s 351 could not be utilised.[9]

(e) Does contract law always trump religious freedom?

It is worth commenting, finally, on the wider question whether a contractual obligation can "trump" religious freedom rights. It was interesting to see several responses to the initial events around Mr Folau's dismissal along the lines of, "this is not a religious freedom issue, it is simply a matter of contract law". The fact is, of course, that both issues can be involved, and on general principles contract law does **not** always prevail.

There is a broad general principle that a contract which is contrary to public policy may be void. So, for example, in the High Court in *Westfield Management Limited v AMP Capital Property Nominees Limited* [2012] HCA 54 per French CJ, Crennan, Kiefel and Bell JJ:

> [46] It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void, even in the absence of a breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text.

Later their Honours added:

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[9] It was later reported that the litigation between Mr McIntyre and SBS was settled on confidential terms- see "Sacked reporter Scott McIntyre and SBS resolve dispute over Anzac Day tweets" *Sydney Morning Herald*, April 11, 2016; https://www.smh.com.au/business/companies/sacked-reporter-scott-mcintyre-and-sbs-resolve-dispute-over--anzac-day-tweets-20160411-go37vt.html .

> [50] … Some statutes may, by their nature and purpose, more readily suggest inconsistency with an individual's liberty to forego statutory rights. Some statutes which have a regulatory and protective purpose may fall into this category.

And earlier, Gleeson CJ and Handley JA in *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26 had said that

> It is clear that persons affected by discriminatory practices prohibited by the Act are not free to bargain away in advance their rights to seek relief under the Act. The Act forbids those practices and seeks to eradicate them from the life of the State. The evident policy of the statute is that such practices should cease. Contracting out of the statute in advance would be directly contrary to this policy (at 31)

So simply intoning "the contract, the contract" does not resolve the issue. There is a question whether the contract itself did indeed really forbid this sort of comment on a personal social media site. In light of the above principles, however, it may also be possible that a contract which purported to "bargain away" Mr Folau's right to free exercise of religion under a 772 would not be enforceable anyway.

(f) Race discrimination as religious discrimination (in some cases)

Before leaving the possible options available to an employee arguably dismissed on religious grounds, we should mention one other avenue which is available to a limited class of religious adherents under Commonwealth law. The *Race Discrimination Act* 1975 (Cth) ("RDA") deals with discrimination on the grounds of race. But it has long been established (since the decision of the UK House of Lord in *Mandla v Dowell Lee* [1983] 2 AC 548) that there are some religious groups whose membership is virtually identical to a racial group. The two groups commonly recognised as falling within this category are Jewish believers and Sikhs. Under the NSW *Anti-Discrimination Act* 1975 (NSW), the s 4 definition of "race" recognises this by including "ethno-religious … origin".

This means that some forms of religious discrimination may be able to be sued on as racial discrimination. This is what has happened in the recent decision of the Queensland Court of Appeal in *Athwal v State of Queensland* [2023] QCA 156 (1 August 2023). To summarise, a law passed by the Queensland Parliament directly impacted Sikh students and teachers at public schools by explicitly providing that religious requirements were not a reason to take a knife onto school property. (Observant Sikhs are meant to carry the ceremonial "kirpan" with them at all times.) The Queensland Court of Appeal held that this law was contrary to the provision of s 10 of the Commonwealth RDA which prohibited racially discriminatory laws, and as a result was inoperative under s 109 of the Constitution.

The decision is interesting in that the issue seems to have been a combination of "racial" and "religious" discrimination. It will only apply to a small group of religious persons. But one thing it does illustrate, in my view, is that where Commonwealth law provides protection for believers that is broader than that provided by State law, the Commonwealth law will prevail.[10]

(b) Balancing clauses in other discrimination laws

The second way that discrimination laws can impact religious freedom is where such laws **forbid behaviour that religious beliefs might support**. To take one obvious example, many Christians believe that the import of the Bible's teaching is that women ought not to be priests or pastors. Yet we have a general law forbidding sex discrimination. The way this is dealt

[10] See my discussion of these issues in a recent article, N Foster "Religious Freedom, Section 109 of the Constitution, and Anti-discrimination Laws" (2022) 1 *Aust Journal of Law and Religion* 36-56 (available for download at https://works.bepress.com/neil_foster/144/ .)

with is that both in federal and state laws there are what I like to call **"balancing clauses",** which provide that a religious group such as the Roman Catholic Church does not commit unlawful discrimination when it refuses to ordain a woman as a priest.[11]

How would these clauses operate if an lawyer were to face a civil action under discrimination law based on comments they had made about an issue such as same-sex marriage or gender transition? Here we are not talking about employment consequences, but being sued for breaching a law on discrimination or vilification.

In fact the law of Australia does not usually allow for an exemption from the operation of discrimination laws for individual believers (as opposed to churches or religious groups). However, one area where some exemption is allowed is in the laws forbidding "vilification", sometimes referred to as "hate speech".

There are a number of laws around Australia prohibiting vilification based on, for example, sexual orientation or gender identity. One example is the law mentioned previously, s 49ZT of the *Anti-Discrimination Act* 1977 (NSW), under which it is unlawful to "incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group". But s 49ZT(2)(c) exempts from that prohibition

> (c) a public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

While a comment made in the workplace would usually not be "religious instruction" (although perhaps it might be such if made in a small group lunchtime Bible study), general discussion of issues with colleagues might fall into "discussion or debate". There would still be a requirement that the comment be made "reasonably and in good faith" and in some sense "in the public interest".

Each of these matters are of course debatable, and we don't have space here to explore them in detail. But I mention again the recent decision of QCAT exonerating Lyle Shelton of an accusation of vilification, which contains detailed comment on a number of these issues.[12] There the criterion of "good faith" was satisfied (that is, he did not have other ulterior motives, he was genuinely intending to comment on a matter of interest)- see [268].

There was also an important comment about the "public interest" criterion:

> It is clear from this I think, that it is not necessary for the debate to be in the 'public interest' in the sense that it must be 'for the good of the public'. It is sufficient for the debate to be about something which is legitimately the subject matter of public discussion or debate. (Member Gordon, para [183])

This is significant, because it means that the court or tribunal itself does not need to test the *content* of what was said as to whether they think it is true or helpful; they simply need to be satisfied that the issue is one that is a legitimate matter for discussion.

Religious Freedom for practising lawyers

Finally, in this brief overview, we should mention the questions in this area that are unique to lawyers, in addition to those applying to workers in general. A key feature of legal ethics is that a lawyer should act in the best interests of the client, and not have any conflicts of interest.

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[11] See *Sex Discrimination Act* 1984 (Cth) s 37; *Anti-Discrimination Act* 1977 (NSW) s 56. See my comment on these type of clauses in N Foster "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385-430.

[12] See *Valkyrie and Hill v Shelton* [2023] QCAT 302 (18 August 2023).

A solicitor must "act in the best interests of a client in any matter in which the solicitor represents the client".[13] They must also "follow a client's lawful, proper and competent instructions."[14] However, there may come a point where a client instructs a lawyer to do something which the lawyer strongly believes is wrong.

While it is from the US context, this article provides some good issues for careful consideration if someone is faced with the dilemma of a client who asks them to do something to which they have a religious objection: Zacharias, Fred C., "The Lawyer as Conscientious Objector" (2001).[15] But I would just like to mention some Biblical injunctions which may also need to be taken into account.

Arguably, all employees have a general duty to provide honest service to their employers.

> Slaves, obey your earthly masters with respect and fear, and with sincerity of heart, **just as you would obey Christ**. (Eph 6:5)

> 22 Slaves, obey your earthly masters in everything; and do it, not only when their eye is on you and to curry their favor, but with sincerity of heart and reverence for the Lord. 23 Whatever you do, work at it with all your heart, **as working for the Lord**, not for human masters, 24 since you know that you will receive an inheritance from the Lord as a reward. **It is the Lord Christ you are serving**. 25 Anyone who does wrong will be repaid for their wrongs, and there is no favoritism. (Col 3:22-25)

I think these verses can also be generally applied to lawyers. Lawyers should serve their clients, put in honest work for their fees, not only when the client or someone else is watching but because the Lord is watching and ultimately, we serve the Lord when we serve our clients well. However, each of those passages implies that our duty to obey the client's instructions must stop when those instructions would mean we would disobey Christ.

I think at this point the same logic would apply as Peter and John applied when told to stop preaching about Jesus in public by the leaders of the Jerusalem Jewish community.

> 18 Then they called them in again and commanded them not to speak or teach at all in the name of Jesus. 19 But Peter and John replied, "Which is right in God's eyes: to listen to you, or to him? You be the judges! 20 As for us, we cannot help speaking about what we have seen and heard." (Acts 4:18-20)

To be clear, they could say this because they had a direct command from the Lord Jesus to preach. And I am not saying that we should all be preaching the gospel from a soap-box in the morning tea room! But it does seem to me that where a client instructs us to do something which will implicate us in disobeying a clear command from the Lord, we may be morally justified in declining to do so.

Whether we would be legally justified (under ethical rules) is another matter. In many cases there may be ways to avoid the brief or instruction which don't breach the rules. But I do not think the option of lying to the client is the right one! In some cases, we may have to accept that there could be contractual or disciplinary consequences. In some situations, we may be protected by the law. But if not, the Bible encourages us, acting after prayer and seeking wisdom, to do the right thing and trust the consequences to the Lord.

> 15 If you suffer, it should not be as a murderer or thief or any other kind of criminal, or even as a meddler. 16 However, if you suffer as a Christian, do not be ashamed, but praise God that you bear that name. 17 For it is time for judgment to begin with God's household; and if it begins with us, what will the

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[13] *Australian Solicitors Conduct Rules* (2015) r 4.1.1.
[14] Ibid, r 8.1.
[15] Available at SSRN: https://ssrn.com/abstract=265450 or http://dx.doi.org/10.2139/ssrn.265450 .

outcome be for those who do not obey the gospel of God? 18 And,“If it is hard for the righteous to be saved, what will become of the ungodly and the sinner?”
19 So then, those who suffer according to God’s will should commit themselves to their faithful Creator and continue to do good. (1 Peter 4:15-19)