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Abstract

Australian and United States courts have recently been faced with the question whether corporations may hold the right to freedom of religion. In Christian Youth Camps Ltd v Cobaw Community Health Services Ltd, the Victorian Court of Appeal concluded that a corporation could not rely on a religious exemption applicable to ‘persons’. In Burwell v Hobby Lobby Stores Inc, the United States Supreme Court held that two corporations were able to rely on statutory protection of religious freedom, also applicable to ‘persons’, to avoid an obligation to provide employees with certain contraceptives. In this article, we address the question whether corporations should be able to rely on the right to freedom of religion. We conclude that corporations should not be able to hold religious rights, although a limited group of religious corporations may sometimes be appropriate vehicles for bringing a claim on behalf of people whose religious freedom has been constrained.

[T]he 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’, it cannot have a conscious state of mind amounting to a religious belief or principle.1

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights … are extended to corporations, the purpose is to protect the rights of these people.2

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1 Christian Youth Camps Ltd v Cobaw Community Health Services Ltd (2014) 308 ALR 615, 706 [411] (Neave JA), quoting Motel Marine Pty Ltd v IAC (Finance) Pty Ltd (1964) 110 CLR 9, 14 (Kitto, Taylor and Owen JJ).
I Introduction

Freedom of religion is a well-accepted human right in Western democracies. It is protected by international treaties such as the International Covenant on Civil and Political Rights (‘ICCPR’), as well as by domestic constitutions and legislation. It has been recognised by courts of the highest authority as a ‘bastion of freedom’ and ‘a basic part of our heritage’.

Religious freedom rights are generally exercised by individuals or groups and have generally not intersected substantially with corporations law. In recent times, however, there has arisen a tension between religious freedom and one of the fundamental postulates of corporate law — namely, that a corporation is a separate legal entity from the natural persons or other corporations that comprise its shareholders. This legal device provides shareholders with many benefits, the most notable of which is the principle of limited liability; shareholders generally cannot be held personally liable for the corporation’s debts in the event that it becomes insolvent. In particular, the tension arises in situations where the shareholders of a corporation seek to assert that the corporation may avail itself of the right to freedom of religion — a claim, in effect, that the shareholders’ religious beliefs may be attributed to the corporation by way of a legal fiction. Would accepting the shareholders’ argument unduly undermine the logic of the separate legal entity doctrine? Conversely, would rejecting the argument mean that the right to freedom of religion is afforded inadequate protection?

Courts in Australia and the United States have recently grappled with this very tension and arrived at opposite conclusions. In Christian Youth Camps Ltd v Cobaw Community Health Services Ltd (‘Cobaw’), the Victorian Court of Appeal was asked to adjudicate, inter alia, whether Christian Youth Camps Ltd (‘CYC’), a corporation established by the Christian Brethren, could rely upon a religious exemption applicable to ‘persons’ to excuse conduct that would otherwise have constituted a breach of the Equal Opportunity Act 1995 (Vic) (‘EO Act’). In Burwell v Hobby Lobby Stores Inc (‘Hobby Lobby’), the United States Supreme Court had to determine whether the employers’ mandate, imposed by the Patient Protection and Affordable Care Act of 2010 (‘ACA’), to provide certain health insurance coverage, including ‘preventive care’ (contraceptives) for women...
applied in the face of a claim that the law breached the religious freedom of certain corporations. Two closely-held corporations, Hobby Lobby Stores Inc and Conestoga Wood Specialties Corporation, challenged this mandate, arguing that it was contrary to the First Amendment\(^\text{12}\) and the Religious Freedom Restoration Act of 1993 (‘RFRA’).\(^\text{13}\)

The two courts came to opposite conclusions. A 2:1 majority of the Victorian Court of Appeal in *Cobaw* held that CYC was not able to avail itself of the religious exemption in the EO Act applicable to ‘persons’. In *Hobby Lobby*, a 5:2 majority\(^\text{14}\) of the Supreme Court held that the two applicants were able to rely on the right to freedom of religion, also applicable to ‘persons’, established by the RFRA.

The two decisions are of significant public importance. The extent to which human rights may be held by corporations is a matter of significant controversy and raises important matters of principle that extend beyond the specific reasoning in these cases. While a relatively sophisticated jurisprudence with respect to the impact of the corporate form on religious freedom (and other rights claims) has developed in the European context,\(^\text{15}\) the same cannot be said of either Australia or the United States.

In the United States, the Supreme Court’s decision in *Citizens United v Federal Election Commission* (‘Citizens United’)\(^\text{16}\) has been the subject of much debate. It was seen by some as opening the door for corporations seeking to bring rights-based claims in the United States.\(^\text{17}\) The decision in *Hobby Lobby* brings us closer to the conclusion that corporations in the United States can, at least in some circumstances, hold rights, including religious rights. Meanwhile, in Australia there has been virtually no consideration of the issue of corporations’ capacity to hold human rights. This is at least partly because Australia lacks a national bill of

\(^\text{12}\) United States Constitution amend I.

\(^\text{13}\) 42 USC § 2000bb (2012).

\(^\text{14}\) Ginsburg J’s dissenting opinion was joined in by Sotomayor, Breyer and Kagan JJ. However, Breyer and Kagan JJ did not join in Part III(C)(1) of Ginsburg J’s dissenting opinion, which dealt with the application of the RFRA protections to corporations, as their Honours felt it was unnecessary to decide that question: *Hobby Lobby*, 134 S Ct 2751, 2806 (Breyer and Kagan JJ) (2014).

\(^\text{15}\) See generally Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press, 2006). The relevance of the European jurisprudence to the subject of this article is discussed in Part III(B)(1) below.

\(^\text{16}\) 558 US 310 (2010). *Citizens United* concerned whether the First Amendment could be invoked by a not-for-profit corporation to render unconstitutional a statute that prohibited corporations from funding ‘electioneering communications’. The Supreme Court held 5:4 that Citizens United was entitled to rely on the First Amendment and that the impugned law contravened it and was therefore invalid.

\(^\text{17}\) We do not intend to suggest that *Citizens United* was the first case to recognise that corporate speech is protected by the First Amendment; corporate speech was protected by the Supreme Court more than half a century ago in *New York Times Co v Sullivan*, 376 US 254 (1964). Rather, *Citizens United* is more accurately described as standing for the proposition that an entity takes the corporate form is no reason to restrict its capacity to rely on the protection afforded by the First Amendment.
rights and therefore rights claims are usually litigated only indirectly or in the context of other rights-protective legislation such as anti-discrimination legislation. Moreover, while the Australian Constitution does expressly protect aspects of religious freedom through s 116, that provision has been interpreted narrowly and the issues we consider in this article have not arisen in the s 116 context. Thus, while the decisions in Cobaw and Hobby Lobby were made in different legal contexts — one concerned a religious exemption in anti-discrimination law, the other concerned a “super-statute” with “quasi-constitutional” status — they share significant similarities.

Moreover, the two decisions raise questions that resonate beyond Australian and United States law. As we explain below, the key issue in both cases cannot be compartmentalised to the statutory context in which the cases were decided. Rather, the ultimate question — whether corporations can, consistently with the separate legal entity doctrine, exercise religious rights — is one that is relevant to legal systems across the world. Therefore, the question that we address and the answers that we propose are of significance to any legal system with commitments to protecting religious freedom and allowing corporations to exist separately from their members.

Our central argument is that corporations should not be understood to have the right to freedom of religion. We make that argument for a number of reasons, the most important of which lies in a proper understanding of the nature and incidents of the corporate form under both Australian and United States law. We also show that the comparative authority on the exercise of freedom of religion by corporations from the European courts weighs in favour of denying them that right and that such a rule would not unduly burden most religiously motivated individuals or exclude religious bodies from bringing cases on behalf of their members. Such a conclusion may be changed by a legislature expressly stipulating a rule by which the beliefs of the shareholders may be attributed to the corporation, but in the absence of such a rule, it is not appropriate to treat a corporation as having religious freedom rights.

There are, however, some circumstances in which a corporation may be the appropriate party in a case that seeks to defend the religious freedom rights of individuals. Such cases will usually involve a religious body that has chosen the non-profit corporate form as a convenient and useful legal form, and in which the corporation is bringing a case on behalf of the individual members whose rights have been interfered with. A church, for example, which has incorporated might

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18 Although two sub-national jurisdictions, the Australian Capital Territory and Victoria, do have legislative bills of rights: see Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic).
bring an action on behalf of its congregants if restrictions on the church lead to restrictions on their rights to exercise their religion freely.

The article is structured as follows. Part II explains the decisions in Cobaw and Hobby Lobby respectively, noting the points of similarity, but also highlighting where the similarities between the two cases end. Part III first outlines the positions put forward in the two decisions and the nascent academic literature and then makes the argument as to why the corporations should not be able to rely upon the right to freedom of religion. Part IV concludes with some brief reference to the implications of these arguments for other rights.

II  The Judgments in Cobaw and Hobby Lobby

A  Cobaw

On 7 June 2007, Sue Hackney, an employee of Cobaw, called the Phillip Island Adventure Resort. She spoke to Mark Rowe, the site manager of the resort, and stated that she wanted to book the resort for a weekend forum for 60 youths and 12 Cobaw employees. Hackney explained that the booking was for the purposes of Cobaw’s WayOut program, ‘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’.22 Rowe told her that the resort was operated by the Christian Brethren, a group of Protestant Christian churches, and suggested that Cobaw ought to investigate alternative resorts as the board of CYC ‘would have difficulties’ accepting Cobaw as a client.23

Some background is necessary on the corporate structure of CYC, as well as the ownership and operation of the Phillip Island Adventure Resort. The judgment of Maxwell P states that ‘CYC was established by the trustees of the Christian Brethren Trust, itself established for purposes connected with the Christian Brethren Church’.24 As the judgment later details, the deed that created the Christian Brethren Trust states that ‘preaching contrary to certain Christian Brethren “doctrines” was not permitted on its land. A supplemental trust deed permitted the trustees to acquire real property and apply it to “charitable purposes … [deemed] likely to be of benefit for, or for the furtherance of, the objects and purposes of the Christian Brethren”.’25 It was this power that the Trust used to buy

23 Ibid 623 [29]. This factual finding was based on Hackney’s account of the conversation, which was preferred to Rowe’s in the Victorian Civil and Administrative Tribunal (‘VCAT’) and not challenged in the Court of Appeal: ibid 623 [24].
24 Ibid 619 [4].
25 The term appears in inverted commas in Maxwell P’s judgment as one of the legal issues in the case was whether CYC’s refusal to accept Cobaw’s request for services was a matter of religious doctrine, or was merely an application of doctrine: see ibid 658 [202], 673 [275]–[276].
26 Ibid 658 [203]. The trustees recorded their view in CYC’s constitution that the conduct of camping on the land was likely to benefit the objects and purposes of the Brethren. While the omission of any reference to charitable purposes is interesting, it was not discussed in any of the Court of Appeal judgments.
the land on which the resort is situated. CYC, a company incorporated and controlled by the trustees of the Christian Brethren Trust, leased the land from the trustees. Clause 1.8 of CYC’s constitution, which states its objects, is replete with references to CYC conducting its business in a manner that furthers the fundamental beliefs of the Christian Brethren.27

Cobaw then instituted proceedings against Rowe and CYC in the Victorian Civil and Administrative Tribunal (‘VCAT’), claiming that CYC’s refusal to rent the campsite to Cobaw constituted unlawful discrimination under the EO Act. Rowe and CYC claimed, inter alia, that even if the conduct were prima facie proscribed by the EO Act, they were exempted from the EO Act’s operation pursuant to the religious exemptions in ss 75(2) and 77. Judge Hampel held that CYC had discriminated against Cobaw — or more specifically, the putative participants in the WayOut camp28 — in a manner contrary to ss 42(1) and 49(1) of the EO Act, and that neither CYC nor Rowe was able to avail themselves of any relevant exemptions.29

The Victorian Court of Appeal granted leave to appeal the VCAT decision. While the Court of Appeal did consider whether Cobaw was able to establish an act of discrimination that was prima facie contrary to the EO Act,30 the bulk of its focus was on the operation of the religious exemptions.

As the Attorney-General stated in her second reading speech, the EO Act was intended to strike a balance between the right to freedom from discrimination and other rights, such as the right to religious freedom.31 To this end, it includes exemptions from the general rule that discrimination on the basis of certain prescribed characteristics is unlawful. Two such exemptions were of interest in Cobaw: ss 75(2) and 77. Section 75(2) provides an exemption for ‘religious bodies’:

(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.

Section 77, meanwhile, provides as follows:

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.

27 Ibid 658–9 [204].
28 This was also a matter of controversy in the Court of Appeal decision, although in the end all three judges were content to assume that this was the case: see, eg, ibid 624–6 [31]–[41].
29 Cobaw Community Health Services Ltd v Christian Youth Camps Ltd [2010] VCAT 1613 (8 October 2010).
31 Victoria, Parliamentary Debates, Legislative Assembly, 4 May 1995, 1254 (Jan Wade).
It was claimed that s 75(2) exempted CYC’s conduct from being wrongful under the *EO Act* and that s 77 exempted both CYC and Rowe.

As can be seen from the foregoing, the case was very complex; so much was recognised by Maxwell P, who in his judgment said:

> 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.32

While the judgments of the Court of Appeal traversed a range of issues, of particular interest for present purposes is how the judges dealt with the application of s 77 to CYC — that is, whether a corporation could invoke a religious exemption applicable to ‘persons’. The Victorian Court of Appeal held by 2:1 (Redlich JA dissenting) that s 77 of the *EO Act* did not apply to exempt CYC’s conduct from being wrongful.

President Maxwell took the view that s 77 did not apply to corporations. His Honour’s reasons were heavily influenced by the negative implication he said could be drawn from the fact that the other religious exemptions in the *EO Act* could be invoked by corporations.33 As there was a separate exemption for religious bodies under the *EO Act* in s 75, his Honour held that s 77 would only apply to religious bodies if Parliament expressly established a rule of attribution under which a corporation could be said to hold religious beliefs34 or if such an interpretation were a matter of necessary implication.35 His Honour relied on decisions from the European human rights system in which it was held that religious institutions only had the right to bring religious freedom claims on behalf of their members36 and that profit-making corporate enterprises could not enjoy religious rights under the *Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention*).37

Justice of Appeal Neave agreed with Maxwell P that s 77 did not apply to corporations. This was because a corporation, having “‘neither soul nor body’”,38 could not hold religious beliefs. Her Honour agreed with Maxwell P that if the

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32 Cobaw (2014) 308 ALR 615, 621 [14].
33 Ibid 680–2 [308]–[316].
34 Ibid 682 [316].
35 Ibid 682 [318].
38 Cobaw (2014) 308 ALR 615, 706 [411], quoting *Motel Marine Pty Ltd v IAC (Finance) Pty Ltd* (1964) 110 CLR 9, 14 (Kitto, Taylor and Owen JJ).
subjective beliefs of individuals were to be attributed to a corporation, the *EO Act* should have specified a rule of attribution.\(^{39}\) Since ss 75 and 76 provided exemptions for bodies established for religious purposes, it could be inferred that s 77 was not intended to apply to corporations.\(^{40}\)

Justice of Appeal Redlich issued a strong dissenting opinion, holding that s 77 could apply to corporations. As authority for this conclusion, his Honour drew on European human rights decisions, including some of the same decisions that were cited by Maxwell P in reaching the contrary conclusion where it had been held that the right to religious freedom could be exercised by entities other than natural persons.\(^{41}\) Justice of Appeal Redlich then turned to the definition of ‘person’ in s 4(1) of the *EO Act*, noting that the definition is inclusive and ‘makes no provisions for a contrary intention’.\(^{42}\) This was bolstered by the fact that s 38 of the *Interpretation of Legislation Act 1984* (Vic) also defined ‘person’ to include bodies corporate (assuming the absence of a contrary intention).\(^{43}\) His Honour also noted that the word ‘person’ is used throughout the *EO Act* to include entities other than natural persons, such that Maxwell P’s and Neave JA’s drawing of implications on the basis of ss 75 and 76 was unsound.\(^{44}\) Finally, his Honour argued that if s 77 did not apply to corporations it would produce arbitrary results: ‘individuals who operate a business would have different levels of religious freedom, depending upon whether the business was incorporated or not’.\(^{45}\)

In the result, then, it was held that s 77 could not be invoked to exempt a for-profit corporation from the operation of equal opportunity legislation on the basis of the shareholders’ religious beliefs. Section 77 of the *EO Act* is unique in Australian law. Generally, Australian anti-discrimination statutes do not contain exceptions on the basis of religion for ‘persons’;\(^{46}\) rather, the exceptions are expressed, like s 75, to apply to ‘bodies established for religious purposes’.\(^{47}\) Nonetheless, by virtue of its rejection of the proposition that corporations may avail themselves of human rights in the absence of an express rule of attribution, the decision is clearly very important and may have ramifications beyond the anti-discrimination law context.

B Hobby Lobby

The *ACA* was intended to increase the availability of publicly subsidised health services. Relevantly, it requires employers with 50 or more full-time employees to offer group health insurance coverage. One plank of group health insurance coverage is the provision of ‘preventive care and screenings’ for women.\(^{48}\)

\(^{39}\) *Cobaw* (2014) 308 ALR 615, 707 [416].
\(^{40}\) Ibid 708 [419].
\(^{41}\) Ibid 722 [478].
\(^{42}\) Ibid 722 [482].
\(^{43}\) Ibid.
\(^{44}\) Ibid 722 [482]–[483].
\(^{45}\) Ibid 724 [488].
\(^{46}\) Evans, above n 19, 151.
The types of preventive care that employers were required to provide were stipulated in regulations promulgated by the Health Resources and Services Administration (‘HRSA’), a Federal Government instrumentality. The HRSA’s guidelines required the provision of contraceptives approved by the Food and Drug Administration. Some of these contraceptives had the effect of preventing an already inseminated egg from developing by hindering the egg’s ability to attach to the uterus. The contraceptive mandate — in particular, the fact that certain contraceptives inhibited the ability of already fertilised eggs to develop — was, of course, contrary to the tenets of some religions. Two corporations decided to test the mandate’s legality by bringing proceedings in United States federal courts.

Conestoga Wood Specialties Corporation (‘Conestoga Wood’), a Pennsylvanian for-profit corporation, was wholly owned and controlled by the Hahn family, all of whom were devout Mennonites. The Hahns were of the view that Conestoga Wood ought to be operated on the basis of their religious beliefs and had taken steps to require that this was so. For instance, they had passed a board resolution stating that human life begins at the date of conception.

The Green family owned and operated Hobby Lobby Stores Inc (‘Hobby Lobby’), a for-profit corporation created under the law of Oklahoma. Hobby Lobby’s statement of purpose commits the Greens to ‘[h]onoring the Lord … by operating the company in a manner consistent with Biblical principles’. Each of the Greens signed a pledge to run the business and use their assets in accordance with their religious beliefs. As with the Hahns, the Greens believed that life begins at conception. As such, the provision of contraceptives that operate to prevent the development of a fertilised egg was contrary to their genuinely held religious beliefs.

Both families brought claims in federal courts alleging that both the ACA and the HRSA’s regulations were invalid to the extent that they purported to require Conestoga Wood and Hobby Lobby to provide healthcare that was inconsistent with their religious beliefs. The claims were brought on two distinct grounds: first, that the legislation was contrary to the First Amendment; and second, that it was contrary to the requirements of the RFRA. The Supreme Court did not discuss the First Amendment claim in any great detail, so our focus will be on its analysis of the RFRA claim.

The RFRA was enacted as a response to the Supreme Court’s decision in Employment Division v Smith. There, the Court held that the First Amendment did not provide protection against legislation of general application that did not, on its face, discriminate against religious groups. The decision in Employment

49 Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed Reg 8725 (15 February 2012).
51 Ibid 2764.
52 Ibid.
53 Ibid 2766.
54 Ibid 2765–6.
Division v Smith ‘largely repudiated’\textsuperscript{56} the approach taken in the earlier authorities of Sherbert v Verner\textsuperscript{57} and Wisconsin v Yoder.\textsuperscript{58} A detailed explanation of the legislative context need not be given here.\textsuperscript{59} Put briefly, the RFRA overrules Employment Division v Smith — or, on Laycock’s more nuanced analysis, ‘create[s] a statutory right where the Court declined to create a constitutional right’\textsuperscript{60} — and enacts a robust protection of freedom of religion that restores the ‘compelling interest’ test articulated in Sherbert v Verner and Wisconsin v Yoder.\textsuperscript{61} The RFRA provides that government may not ‘substantially burden a person’s exercise of religion’ unless it demonstrates that the application of that substantial burden ‘is in furtherance of a compelling governmental interest’ and ‘is the least restrictive means of furthering that compelling governmental interest’.\textsuperscript{62} Before dealing with the compelling interest and least restrictive means issues, the Supreme Court had to decide whether corporations like Conestoga Wood and Hobby Lobby could exercise the religious right conferred by the RFRA.

The majority judgment was delivered by Alito J, who was joined by Roberts CJ, Scalia, Kennedy and Thomas JJ. The Government’s arguments were focused on the question whether corporations could avail themselves of religious freedom protections. The Court of Appeals for the Third Circuit held that Hobby Lobby’s claims under the RFRA failed because ‘business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion’.\textsuperscript{63} The Supreme Court majority’s response to this was simple: ‘All of this is true — but quite beside the point. Corporations, “separate and apart from” the human beings who own, run, and are employed by them, cannot do anything at all.’\textsuperscript{64} They proceeded to explain this conclusion in four parts.

The first element of the argument was that the RFRA applied to ‘persons’, and that the Dictionary Act defined ‘person’ to include corporations.\textsuperscript{65} For their Honours, there was nothing in the text, structure or context of the Dictionary Act that compelled the contrary conclusion. The majority noted that the Court had entertained RFRA claims from not-for-profits before, as well as the Government’s concession that not-for-profit entities could be ‘persons’ within the meaning of the

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\textsuperscript{56} Hobby Lobby, 134 S Ct 2751, 2760 (Alito J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2014).
\textsuperscript{57} 374 US 398 (1963).
\textsuperscript{58} 406 US 205 (1972).
\textsuperscript{59} The majority opinion in Hobby Lobby provides a useful précis: 134 S Ct 2751, 2760–2 (Alito J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2014). See also Laycock, above n 21.
\textsuperscript{60} Laycock, above n 21, 246.
\textsuperscript{61} 42 USC § 2000bb(b)(1) (2012).
\textsuperscript{62} 42 USC § 2000bb–1(b) (2012).
\textsuperscript{64} Hobby Lobby, 134 S Ct 2751, 2768 (2014).
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RFRA.66 This concession was crucial: the majority took the view that ‘[n]o known understanding of the term “person” includes some but not all corporations’.67

The judgment then continued to dismantle the Government’s argument that corporations could not exercise religion. In the first instance, this was because the Government accepted that not-for-profit corporations could hold the right to freedom of religion and no meaningful distinction could be drawn between these entities and for-profit corporations.68 Nor could corporations’ objective of profit maximisation supply the answer. Their Honours noted that for-profit corporations need not pursue profit at the expense of all other objectives, and that a bright line distinction on this basis between corporations and not-for-profits was overly simplistic and operated arbitrarily.69

The majority then briefly considered and rejected an argument concerning the construction of RFRA in light of the First Amendment that need not be detailed here.70 Finally, the Court rejected the view that it is difficult to ascertain the beliefs of a corporation. Their Honours noted that religious freedom claims are unlikely to be brought by large corporations71 for practical and legal reasons. In other words, their Honours took the view that these sorts of factual disputes were no bar to accepting that there was no reason in principle to exclude corporations from the protection afforded by the RFRA. These disputes could, their Honours said, be settled by the ordinary curial processes of applying the law to the facts.72

Having thus decided the threshold question in the respondents’ favour, the Court went on to find that the contraceptive mandate was inconsistent with the RFRA and therefore invalid.

Justice Ginsburg dissented. She was joined by Sotomayor J in full, and by Breyer and Kagan JJ in part, both of whom held that it was not necessary to decide whether for-profit corporations could bring RFRA claims.73 Justice Ginsburg held that context indicated that ‘person’, in the context of the RFRA, did not include for-profit corporations. This determination had to be undertaken in light of First Amendment case law and, for Ginsburg J, ‘[t]here is in that case law no support for the notion that free exercise rights pertain to for-profit corporations’.74 She explained the potential incongruity with respect to not-for-profits by arguing that religious organisations of this kind were central to advancing individual religious freedom and that their raison d’être is the furtherance of religious purposes; not so for limited liability companies.75 Like Maxwell P and Neave JA in Cobaw,
Ginsburg J appeared to suggest that if the Act in question (the RFRA) were intended to cover corporations, it should have done so expressly, whether by stipulating a rule of attribution or otherwise. Finally, the attempts of the majority to ‘cabin its language’ and restrict the breadth of its holding failed as the logic of its holding extends to all corporations.

Even more so than Cobaw, the decision in Hobby Lobby may have important ramifications. In the immediate sense, it appears to open up free exercise claims to a broad range of entities and expands the ambit of that right in the commercial sphere. It may also be seen as a logical extension of the decision in Citizens United, thus bringing us closer to breaking down the barriers between the corporation and its shareholders. Having explained the holdings in Cobaw and Hobby Lobby in some detail, we turn now to analyse the question whether corporations are, or should be, able to exercise religious rights.

### III Corporations’ Exercise of Religious Rights

Before embarking on our analysis, it is necessary to note the limitations in the comparative analysis we undertake here. The most important one is the very different legal contexts in which the decisions are situated. Cobaw is a decision on the provisions of an anti-discrimination statute. By contrast, Hobby Lobby is a quasi-constitutional decision whose reach is, at least on its face, much broader; the RFRA applies to all federal legislation. Moreover, the courts in both cases were at pains to demonstrate that their decisions were limited in scope and based on the interpretation of very context-specific statutory provisions. Perhaps more profoundly, in the wider context, the United States Constitution provides substantial protection for individual religious freedom, whereas most protections of religious freedom in Australia come from giving religious organisations (rather than individuals) exemption from various laws, particularly in the area of discrimination. Nonetheless, as our analysis will show, while the legal contexts in which the cases are situated are undoubtedly relevant, there is a fundamental issue of principle that unites them: whether, and in what contexts, corporations should be acknowledged to have religious rights.

In Cobaw, the Court’s attempt to minimise the breadth of its decision was demonstrated by its relative hostility to Cobaw’s submissions on the relevance of international human rights law. President Maxwell gave short shrift to these submissions. In his Honour’s view, ‘all that could be said is that the provisions of the EO Act are in conformity, and not in conflict, with [Australia’s international human rights] obligations … [t]he task for this court is to construe the particular language used, in its own statutory context’.

76 Ibid 2795.
77 Ibid 2797.
79 See above nn 21–2 and accompanying text.
80 Cobaw (2014) 308 ALR 615, 657 [193], [196].
81 Ibid 704–5 [409].
emphasised that the Court’s interpretative task was an inherently contextual one: ‘[a]lthough international case law is relevant in deciding the meaning of s 77, freedom of religion provisions such as art 18 [of the ICCPR] are expressed differently from s 77 and arise in a different constitutional context’. While both points have merit, there are real advantages to thoughtful comparativism in contexts where there is little domestic guidance and in which issues of principle that touch on human rights are at stake.

In *Hobby Lobby*, Alito J similarly emphasised that the majority’s holding was ‘very specific’. In particular, the decision was said to be limited to closely-held corporations like Hobby Lobby and Conestoga Wood. This restricted view is likely a pre-emptive strike against the claim that the judgment opens the floodgates to corporations seeking to avoid legal obligations by clothing themselves as ‘religious’ in some more or less plausible fashion. The judgment also attached great significance to the *Dictionary Act* definition of ‘person’ in its interpretation of the *RFRA*, thus attempting to paint the case as primarily an ordinary matter of statutory interpretation. In both Australia and the United States, it is generally the case that the term ‘person’, as a matter of law, incorporates artificial as well as natural legal persons and so the argument that this is the most appropriate starting point of the analysis should not be dismissed lightly.

The attempts of both courts to emphasise the specific statutory context and to minimise the impact of their decisions, while understandable, tend to obscure the larger consideration at play in both cases: whether, as a matter of principle, corporations can exercise religious rights absent any express legislative permission or rule of attribution. By focusing on the linguistic considerations of the respective statutes, the decisions conceal — or at least attempt to minimise the importance of — the logically anterior question of whether corporations can hold and exercise human rights in any meaningful way. This is a question that is relevant to any legal system that recognises that a corporation is a separate legal entity from its shareholders, but that also seeks to protect the human right to religious freedom. It is this broader question — which we contend is not limited to the statutory contexts presented by *Cobaw* and *Hobby Lobby* — that we take up in this Part.

**A Piercing the Corporate Veil in Reverse**

It may immediately be observed that allowing corporations to hold rights based on their religious beliefs requires the application of a fiction; corporations cannot have ‘beliefs’ in any real sense. To allow corporations to rely upon their beliefs, it is necessary to attribute the beliefs of some individual or group of individuals to the corporation.

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82 Ibid 705 [410].
83 134 S Ct 2751, 2760 (2014).
84 Ibid 2768–9. The majority were not alone in trying to cast the case as one ultimately to be decided on arid statutory interpretation grounds. Barnet, in a note published a few weeks before the Court handed down its decision, emphasised its importance in terms of clarifying the application of the *Dictionary Act*: above n 65.
85 For example, in Australia and the United Kingdom liability may be attributed to a company through the application of the ‘directing mind and will’ doctrine: see generally *Lennard’s Carrying Co Ltd*
In a similar vein, whether or not a corporation is a ‘person’ in a given statutory context, or even from the point of view of human rights more generally, does not answer the question of what type of ‘person’ a corporation can be and what rights it holds as a consequence. Corporations by their very nature cannot hold or exercise certain types of rights (even quite fundamental ones, such as the right to life or the freedom from torture), while it makes more sense to think of corporations exercising other types of rights, even if through the medium of individuals (for example, some forms of speech are very much products of the corporation). Religious freedom may appear to inhabit a complex halfway house between these two ends of the spectrum, with some corporations quite entangled in religious practices. However, ultimately religious freedom is best understood as pertaining to individuals with the capacity to make moral, philosophical and political judgements (and to change those judgements) in a way that corporations cannot. If a corporation is going to be deemed to have a religion, therefore, it must be the religion of an individual — most likely the owner(s). Thus, to imbue a corporation with religious rights requires going beyond the intrinsic characteristics of the legal entity and equating the religious views of the owners with that of the corporation.

Yet, it is the cardinal principle of corporate law in both Australia and the United States that the corporation is a separate legal entity to its shareholders. It is precisely this issue that is at the heart of both Hobby Lobby and Conestoga Wood. To allow CYC, Hobby Lobby and Conestoga Wood to put forward religious freedom arguments would be at odds with the separate legal personality doctrine; it would allow the shareholders to pierce the corporate veil in reverse, attributing their own sincerely held beliefs to the corporation. The corporate veil doctrine — and the sometimes vague and arbitrary circumstances in which courts depart from it — is increasingly coming under challenge, both in Australia and the United States. Most commonly, however, these veil-piercing arguments are made in relation to

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87 There are two forms of veil piercing — ‘forward piercing’ and ‘reverse piercing’. Forward piercing is where the corporate veil is pierced to look through to the company’s members. Creditors of the company, for example, may seek to pierce the veil to obtain payment from shareholders in certain circumstances. By contrast, reverse piercing involves the opposite — the rights or liabilities of members are attributed to the company. In this case, the owners argue that their religious views become the religious views of the company.


traditional ‘forward piercing’ claims. Moreover, the vast majority of veil piercing cases involve forward piercing claims.\(^{90}\) The arguments in favour of forward piercing are not to be disregarded lightly. But care must be taken to distinguish between forward and reverse piercing; it is not sufficient merely to point to the arguments in favour of forward piercing to support reverse piercing claims. In contrast to forward piercing, there are far fewer advocates (and fewer studies) of reverse veil piercing,\(^{91}\) and the empirical data (at least from the United States) suggests that, in the overwhelming majority of cases, the courts’ view is that corporations arguing for reverse piercing are ‘stuck with [the corporate veil] in bad times as well as in good’.\(^{92}\) Given that in neither Australia nor the United States has reverse veil piercing been widely accepted (much less subject to some coherent legal test), it is necessary to closely scrutinise the leading cases and scholarly articles on reverse piercing.

In an influential article published before the decision of the Supreme Court in *Hobby Lobby* was handed down, Bainbridge argued that principles of reverse veil piercing had been recognised in American corporations law and would allow the plaintiffs in *Hobby Lobby* to successfully bring an RFRA claim.\(^{93}\) Bainbridge devoted particular attention to a Minnesota Supreme Court case, *Cargill Inc v Hedge*.\(^{94}\) As he explains, the Court identified three factors relevant to whether it ought to pierce the corporate veil in reverse: ‘the degree of identity between the individual and his or her corporation [and] the extent to which the corporation is an alter ego’,\(^{95}\) the extent to which piercing the corporate veil would injure third parties; and whether ‘strong policy reasons’ justify reverse veil piercing.\(^{96}\) Similarly, in *Wells v Firestone Tire & Rubber Co*, the Michigan Supreme Court noted that the courts of that state had previously pierced the corporate veil in

\(^{90}\) See Robert B Thompson, ‘Piercing the Corporate Veil: An Empirical Study’ (1991) 76(5) *Cornell Law Review* 1036, 1057–8, where the author found that just over 10% of veil-piercing claims that were included in his study involved insider reverse piercing (where it is the shareholders who are seeking to reverse pierce, rather than creditors of the corporation). In an Australian study, it was found that approximately 20% of veil-piercing claims involved insider reverse piercing and that the success rate was not materially different from that in forward piercing cases: Ian M Ramsay and David B Noakes, ‘Piercing the Corporate Veil in Australia’ (2001) 19(4) *Company and Securities Law Journal* 250, 271 (Table 12: Characteristics of Body Requesting the Court to Pierce the Veil).


\(^{92}\) Thompson, above n 90, 1058. In Australia, Ramsay and Noakes found that the success rate in reverse piercing cases was not materially different from that in forward piercing cases: Ramsay and Noakes, above n 90, 271 (Table 12: Characteristics of Body Requesting the Court to Pierce the Veil). However, given the small sample size (21 reverse piercing cases, compared to 164 in Thompson’s study), it is questionable whether these figures are statistically significant.

reverse in circumstances where ‘the equities [were] compelling’. On these authorities Bainbridge argued that the Supreme Court could, consistently with authority, employ the doctrine of reverse veil piercing to reach the outcome that Hobby Lobby and Conestoga Wood would be entitled to bring RFRA claims.

Meese and Oman took a slightly different line. They argued that there is nothing inconsistent about accepting the coherence of the separate legal entity doctrine while simultaneously allowing corporations to rely on the right to religious freedom. Limited liability is a default rule, they argued; since it can be redefined or done away with by contract, for instance (by directors giving personal guarantees to the company’s creditors), it cannot be said that attributing the values or beliefs of the corporation’s directing mind and will to the corporation is inconsistent with corporate law. Nor is it true to say that corporations cannot have any interest in matters of religion. Meese and Oman observed that a company can pursue religious objects through various means — CYC’s constitution is replete with references to the Christian Brethren religion, the directors of Hobby Lobby passed board resolutions affirming certain tenets of their faith and each of the directors of Conestoga Wood had signed a pledge to carry on the business in accordance with their religion. At no stage in either Cobaw or Hobby Lobby was it contended that these companies were being run in an unlawful manner. Thus, for Meese and Oman, the argument that for-profit corporations cannot exercise religious rights therefore ‘rests on an essentialist characterization of an institution [ie corporate law] defined by an immutable set of status relationships … that categorically distinguish every corporation from partnerships and other business entities’.

There is little scholarship on the issue of corporations and religious rights outside the United States; indeed, much of the United States scholarship was generated in the lead up to, and immediate aftermath of, Hobby Lobby. However, the courts of the United Kingdom have considered the question whether they ought to pierce the corporate veil in reverse in other contexts. English courts are much more unsympathetic to arguments for reverse veil piercing than their American counterparts; Cheng describes their response as one of ‘almost uniform hostility’. So in Macaura v Northern Assurance Co Ltd, the House of Lords

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98 Cf Gaertner, above n 91, 681.
100 Ibid 286.
103 Ibid 2766.
104 See Meese and Oman, above n 99, 282, 295.
105 Ibid 287.
refused to allow the plaintiff to reverse pierce the corporate veil so that he could avail himself of an insurance policy underwritten by the defendant in favour of his company rather than himself personally. The reason for the English courts’ antipathy to reverse veil piercing was explained by Browne-Wilkinson V-C in *Tate Access Floors Inc v Boswell*, where his Lordship said:

> If people choose to conduct their affairs through the medium of corporations, they are taking advantage of the fact that in law those corporations are separate entities, whose property and actions are in law not the property or actions of their incorporators or controlling shareholders. In my judgment controlling shareholders cannot, for all purposes beneficial to them, insist on the separate identity of such corporations but then be heard to say the contrary when discovery is sought against such corporations.  

Thus, the shareholders should not be allowed to rely upon the incidents of the corporate form to their benefit in one context (shielding themselves from personal liability), while eschewing its operation in another.  

The scant Australian authority generally supports the British view. So, for instance, in *D & J Constructions Pty Ltd v Head*, Bryson J of the New South Wales Supreme Court made the obiter statement that

> [w]hen the [corporate] veil is opaque it is opaque both ways; a shareholder cannot be himself when he consults a solicitor and uses his knowledge of its private affairs gained as director and shareholder of the company for the purpose of being advised in his own interests as shareholder but later adopt or impose the personality of the company on the relationship when it suits the company’s interest to have been a party to it.

In the previous year, Young J of the New South Wales Supreme Court made remarks to much the same effect when his Honour stated that ‘if a person elects to erect [a corporate] structure he must take the consequences of such erection for better, for worse, for richer or poorer, in commercial sickness or commercial health’.  

But in *Walker v Hungerfords*, the Full Court of the Supreme Court of South Australia took the opposite view. That case concerned a claim that the respondents, a firm of accountants, being sued by the appellants (operating under a partnership) had been negligent in the preparation of the appellants’ accounts. Some years after the negligent bookkeeping was alleged to have occurred, the appellants incorporated a proprietary company, Walker Stores Pty Ltd, which

veil piercing arguments are cited in *Walker v Hungerfords* (1987) 49 SASR 93, 103–4 (King CJ); see further below nn 112–18 and accompanying text.

109 See also *Tunstall v Steigmann* [1962] 2 QB 593, 607 (Danckwerts LJ).
assumed the assets and liabilities of the partnership.113 Walker Stores Pty Ltd was the trustee of a family trust, the beneficiaries of which were the partners of the partnership and their children.114 The respondents, invoking the principle in *Salomon*, argued that any losses that accrued to the appellants after the date of incorporation were not recoverable. Those losses were, so the argument went, properly construed as losses of the company, rather than the appellants. Chief Justice King, delivering the leading judgment, ruled that ‘the new legal structure made no practical difference to the conduct of the business’115 and that it would be ‘absurd and unjust’116 to deny recovery to the members. The argument based on practicality is, with respect, unsound — it is often the case that a business is, in reality, an avatar for its shareholders, but that does not justify piercing the corporate veil, as *Salomon* itself demonstrates.117 And the Chief Justice’s argument based on injustice seems to be little more than a restatement of the argument from practicality — the perceived injustice inhered in the ‘technicality’118 of incorporation. Again, this argument seems to be at odds with the reasoning in *Salomon*. So in summary, the Australian position, much like that in the United Kingdom, seems generally to be unreceptive to reverse veil piercing.

Finally, some scholars have also been critical of reverse piercing. Most notably, concerns with reverse piercing were put forward in an amicus brief filed in *Hobby Lobby* by a number of prominent corporate and criminal law professors. The amici argued that *Hobby Lobby* and Conestoga sought to make the separate legal entity doctrine ‘a one-way street’.119 They further suggested that Bainbridge’s arguments based on reverse veil piercing are fallacious, since ‘insider reverse piercing’ — where it is the shareholders who are seeking to reverse pierce, rather than creditors of the corporation — is a ‘discredited variation’ of reverse veil piercing.120 Justice Ginsburg’s dissent in *Hobby Lobby* also picked up this line of reasoning. Her Honour said:

> By incorporating a business … an individual separates herself from the entity and escapes personal responsibility for the entity’s obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation.121

Thus, while the literature is still in a relatively immature state, it does raise a number of key issues that must be addressed by any coherent theory of corporations and religious rights. We now put forward our own theory on this issue.

113 Ibid 103 (King CJ).
114 Ibid.
115 Ibid.
116 Ibid 104.
120 Ibid 17.
121 134 S Ct 2751, 2797 (2014).
B  Why Corporations Cannot Hold the Right to Freedom of Religion

We argue that corporations should not be entitled to hold the right to freedom of religion. We begin with an analysis of the jurisprudence of the European Court of Human Rights and argue that the balance that has been struck by that Court pays sufficient regard to the importance of religious freedom (including when religious freedom is exercised by groups), while generally not permitting corporations to rely on religious freedom arguments. With some slight modification, the approach taken by the European Court is an appropriate one for jurisdictions that seek to uphold the integrity of both the corporate form and religious freedom rights. We then examine the counterarguments to this position that have been outlined above and conclude that they are not sufficiently compelling to justify disregarding the legal separation between corporations and their members.

1  Comparative Authority

European human rights courts have taken the view that for-profit corporations cannot hold the right to freedom of religion under art 9 of the European Convention. There are three decisions of particular note. The first is Company X v Switzerland,122 decided in February 1979. That case concerned a company that ran a printing office and was obliged to pay ecclesiastical tax. The company complained to the European Commission that this constituted a breach of art 9. The Commission held that profit-making corporations could neither enjoy nor rely on art 9 rights.123 While the Commission’s reasons are very brief, it is important to note that whether the activity in question was actually profit-seeking was not considered relevant to whether the company could enjoy art 9 rights.124

The second decision is X and Church of Scientology v Sweden,124 decided a few months later. In that case the applicants argued that the Swedish Consumer Ombudsman’s request for an injunction to prohibit the use of certain passages in advertising a product that the Church of Scientology was selling infringed the Church’s art 9 rights. The European Commission held that a church could exercise art 9 rights.125 It said that ‘[w]hen a church body lodges an application under the Convention, it does so in reality, on behalf of its members’.126 As the quoted passage demonstrates, in reaching its conclusion the Commission attached great importance to the fact that the second applicant was a church, rather than another type of body corporate (like the limited liability company considered in Company X v Switzerland). The reasoning in this case has since been applied on numerous occasions, each time to a religious entity, including the Divine Light Centre

122 (1979) 16 DR 85.
123 Ibid 87.
124 (1979) 16 DR 68.
125 Ibid, cited in Iliafi v The Church of Jesus Christ of Latter-day Saints Australia (2014) 221 FCR 86, 108 [76] (Kenny J) (‘Iliafi’).
126 X and Church of Scientology v Sweden (1979) 16 DR 68, 70 (emphasis added). See also Emberland, above n 15, 54.
(a Swiss spiritual organisation); the Secular Order of Druids; and an orthodox Jewish liturgical association.

The final decision is *Kustannus v Finland*, which concerned a publishing company owned by Freethinkers that objected to paying ecclesiastical tax. The European Commission held that while the Freethinkers as an entity could in principle hold art 9 rights, their decision to choose the limited liability company for the purposes of carrying on their publishing activities excluded that company from being able to exercise art 9 rights. As Cismas has argued, crucial to this conclusion was the fact that the applicant could not show that it would be impossible for it to pursue profit-making activities.

Cismas suggests that reading the European decisions consistently produces two rules: first, that church bodies and similar entities — that is, entities which exist primarily (if not solely) for the purposes of advancing religious ends — may exercise religious rights because they exercise those rights for and on behalf of their members; and second, for-profit limited liability companies — or more precisely, companies that may be used for profit-making purposes — cannot exercise art 9 rights. The distinction that allows the former category to hold the right to religious freedom ‘derive[s] or extend[s] from the right of individuals to manifest religion collectively’.

More generally, as the European Court recognised in *Metropolitan Church of Bessarabia v Moldova*, ‘the autonomous existence of religious communities is indispensable for pluralism in a democratic society’. This approach would exclude CYC, Hobby Lobby and Conestoga Wood as companies that had a mixture of profit-making and religious purposes.

The European view should be accorded weight for a number of reasons. Article 9 is relatively similar in its terms to the RFRA and s 77 of the EO Act — it is expressed to apply to ‘everyone’, while the RFRA and the EO Act are said to apply to ‘persons’. While ‘everyone’ is not subjective to the same interpretive presumption to which ‘person’ is subject under the Dictionary Act and Interpretation of Legislation Act 1984 (Vic) respectively, both terms are capable of bearing a meaning that is not limited to natural persons, but the European courts have refused to extend art 9’s application to limited liability companies.

Further, the relevance of art 9 jurisprudence to Australian anti-discrimination statutes was recognised by the Full Court of the Federal Court of Australia in *Iliafi*, a case concerning the Racial Discrimination Act 1975 (Cth). In *Iliafi*, Kenny J

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129 See *Cha‘are Shalom Ve Tsedek v France* (European Court of Human Rights, Grand Chamber, Application No 27417/95, 27 June 2000) [3].
131 Ibid 43–4.
135 See Cobaw (2014) 308 ALR 615, 658–9 [204] (Maxwell P), where the clause of CYC’s constitution describing its objects is extracted.
(delivering a judgment with which Greenwood J\textsuperscript{136} and Logan J\textsuperscript{137} agreed) stated that the art 9 cases ‘provide a … nuanced and analytical account of the manner that [art 9] rights … operate’\textsuperscript{138} and used that jurisprudence to determine the content of the right to freedom of religion contained in art 18 of the ICCPR. While the question under consideration in \textit{Iliafi} is different to the issue in \textit{Cobaw} and \textit{Hobby Lobby}, the respect accorded to European case law on freedom of religion should, in our view, be replicated in relation to the question that this article addresses.

Finally, the other aspects of the legal context do not lessen the persuasive authority of the European case law as some of the most relevant and detailed consideration of the question of principle of whether corporations are able to exercise freedom of religion without clear statutory provision to that effect.

The European case law also strikes a sensible balance between the need to allow some entities to bring a case on behalf of groups of individuals, while limiting the capacity of for-profit corporations to do so. If religious groups were not able to bring cases on behalf of their members, the courts would lose a sensible and valuable vehicle to assist with the protection of individual rights. At the extreme end of the scale, for example, if a church were forced to shut down by a hostile government, it would be possible for a large number of individuals to bring a claim that their religious rights had been breached because they are no longer able to worship and practise their religion as they once could. However, it is more efficient for the courts, and beneficial for the impacted individuals, for the church to be able to bring a case itself — even if it has taken the corporate form. However, when a corporation has been established and taken on separate legal entity status, impositions on the corporation do not directly impact individual rights in the same way. While shareholders may be bitterly opposed to a company with which they are associated having to, for example, pay for contraception, the shareholders themselves have no such obligation. While this might appear to be a fiction, it is precisely the same fiction that those shareholders willingly embrace when it comes to avoiding liability.

The European Court’s position is therefore a generally sensible and workable balance between allowing entities that are religious organisations to defend the rights of their members and excluding corporations that are not religious organisations from doing the same.

It is important to note that the correct dividing line (which is sometimes fuzzy in the European cases) should not be based on a simple for-profit/not-for-profit dichotomy. Rather, the focus should be on whether it is essentially the religious organisation itself that is a party to the case, representing the interests of its members, or whether an entity with religious affiliations (but one whose principal reason for existence is profit maximisation, rather than the advancement of religious doctrine) is bringing a claim that should properly be brought by its members. If an entity belongs to the former category, it may hold religious freedom rights and if it belongs to the latter, it may not. This approach will exclude

\textsuperscript{136} (2014) 221 FCR 86, 117[115].
\textsuperscript{137} Ibid 117[116].
\textsuperscript{138} Ibid 107[70].
most, but not all, for-profit entities. There are sound reasons that religious groups may wish to incorporate in order to gain a legal identity that allows them to undertake activities such as contracting, owning property and employing people in a relatively straightforward way. There may be some social benefits to doing so as well: for example, the corporate form makes it simpler for those who are wronged by religious groups to seek legal redress against them. Allowing this limited class of for-profit corporations to hold and exercise religious rights does not place undue pressure on the concept of separate legal personality. The *raison d'être* of these corporations is the advancement of their individual adherents’ religious ends; this may be contrasted with CYC, Conestoga Wood and Hobby Lobby Stores, all of which advanced religious ends in a manner that was ancillary to their principal purpose of profit maximisation. As such, allowing these entities to avail themselves of religious rights is consistent with — perhaps even required by — the conditions on which they were brought into being.

Within common law countries, therefore, it makes better sense to consider a corporation’s right to bring an action to defend religious freedom to constitute the exercise of a right on behalf of the members of the religious group that the corporation represents, and not because the corporation has its own right to religious freedom. This approach is conceptually cleaner, as it maintains a consistency regarding corporations not having religious rights as such, and therefore does not offend the principle of separate legal personality. (Religious organisations may be granted particular rights or exemptions by the legislature, but that is a different matter.) In this way, religious organisations are recognised as playing a useful role in protecting the rights of their members, who undoubtedly do have religious freedom rights.

2 The Legal Vehicle Chosen and the Purpose of Incorporation

The European decisions implicate a second issue, touched on above — the question of how the legal vehicle chosen to conduct particular activities affects the availability of religious freedom claims. In the majority decision in *Hobby Lobby*, as well as much of the American scholarship, it was argued that to deny corporations recourse to freedom of religion would require an untenable bright line to be drawn between corporations and other legal entities (partnerships, sole traders, incorporated and unincorporated associations, and so on). It was said that the separate legal entity doctrine had already been broken down in a number of ways. For Meese and Oman, this was through legal constructs such as the personal guarantee; and for the majority in *Hobby Lobby*, this was evidenced by the fact that charitable groups might choose to organise as a limited liability company because of certain benefits that accrue to that kind of entity. None of these arguments is ultimately convincing.

With respect to Meese and Oman’s ‘limited liability as default rule’ argument, appealing to examples such as shareholders’ or directors’ personal guarantees is capable of misleading. The personal guarantee is a form of *outsider*

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139 See above n 101 and accompanying text.
140 134 S Ct 2751, 2771 (2014).
reverse veil piercing;\textsuperscript{141} that is, it is an instance of a company’s creditors seeking to reverse pierce the veil and look through from the members to the company, rather than those behind the company itself. Shareholders can only ‘redefine [the] extent’\textsuperscript{142} of the corporate veil in one direction — by allowing outsiders to impose liabilities on shareholders in their personal capacity. There is also a clear and agreed basis for the direct liability involving the implicated parties; shareholders choose to offer a guarantee, for example, in the hope that the benefit to the company will lead to a personal benefit. Properly understood, this is not a legal matter of veil piercing. Creditors exercise direct legal rights created by the individual shareholders or directors — such guarantees do not come into being simply by virtue of the ownership of the company.

Meese and Oman also make the related argument that the fact that corporations can be incorporated for, and can pursue, a variety of purposes and not merely profit maximisation alone means that corporators should be able to bring freedom-of-religion claims through the vehicle of the corporation.\textsuperscript{143} This line of reasoning appears to conflate two ideas: whether corporations can, as a matter of principle, exercise religious rights; and whether corporations pursuing religious ends would be contrary to principles of corporations law. It is not our argument that corporations would be in breach of the relevant statutory provision regulating how corporations carry on business if they sought to act in a manner consistent with certain religious principles (although some principles of corporate law may constrict their capacity to adopt a wholly religious worldview and mode of operation — corporations do not have the same degree of freedom of action as individuals).\textsuperscript{144} Rather, we contend that corporations cannot, consistently with the separate legal entity doctrine, be taken to hold the beliefs of their shareholders. The two concepts are analytically distinct.

We turn now to address the authorities that Bainbridge cites in support of reverse veil piercing and its application to religious freedom claims. The three factors identified in \textit{Cargill Inc v Hedge} as to whether courts should apply the reverse veil piercing doctrine are not particularly helpful. The first, ‘the degree of identity between the individual and the corporation’,\textsuperscript{145} goes to the sufficiency of evidence to prove that the corporators’ beliefs can be attributed to the corporation. The sufficiency of the evidence is useful only once it is accepted that the beliefs of the corporators are relevant because corporations can exercise religious rights. This principle therefore assumes the conclusion that it purports to prove. Of course, if the corporators’ individual rights to religious freedom are harmed, then they can assert those rights in their individual capacity without involving the corporation.

The second factor is the extent to which third parties would be harmed by veil piercing.\textsuperscript{146} In most cases of this kind, there is third party harm. \textit{Hobby Lobby}

\begin{thebibliography}{9}
\bibitem{141} Cf above n 121 and accompanying text.
\bibitem{142} Meese and Oman, above n 99, 286.
\bibitem{143} See above nn 104–7 and accompanying text. See also \textit{Hobby Lobby}, 134 S Ct 2751, 2771 (2014).
\bibitem{144} See, eg, Malone, Katz and Dyer, above n 119.
\bibitem{145} \textit{Cargill Inc v Hedge}, 375 NW 2d 477, 479 (Simonett J) (Minn, 1985).
\bibitem{146} Ibid.
\end{thebibliography}
is a substantial employer with more than 13 000 employees\textsuperscript{147} that sought to deny its female employees the full benefit of the medical entitlements to contraception that they would otherwise have under the law. In \textit{Cobaw}, CYC sought to discriminate against a group of people on the basis of their sexuality. In almost all cases where it would be legally relevant, at least some harm will be done to some third party. The question of the extent of third party harm then effectively becomes subsumed into the third criterion of public policy as these clashes of emotional and moral harms are difficult to assess objectively. Where one viewpoint might see it as a relatively trivial thing to ask a group to use a different venue for a camp, another will see it as discriminatory and hurtful.

The third factor, the existence of ‘strong policy reasons’ that justify reverse veil piercing,\textsuperscript{148} arrogates significant power to the individual judge without going on to articulate what sorts of policy reasons might count in this context. In \textit{Cargill Inc v Hedge}, the strong policy reason was the principle of Minnesotan law that ‘a debtor’s home [is] a “sanctuary”’.\textsuperscript{149} While judges are often called upon to decide matters of public policy, this is an area in which a bright line can and should be drawn. Given the level of social contestation around religion and religious beliefs, resort to ill-defined notions of ‘public policy’ to decide when the veil should be pierced would lead to incoherent and unpredictable results. As \textit{Cargill Inc v Hedge} demonstrates, giving judges open-ended instruction to look to public policy can result in appeals to vague ideas like common humanity and suggests unprovable causal links between policies and their purported effects.\textsuperscript{150} Rather than relying on vague and contestable policy justifications, transparent decision-making is promoted by imposing a requirement that if a corporation is to be taken to hold the religious beliefs of its shareholders, it is incumbent upon the legislature to expressly provide a rule by which the shareholders’ beliefs may be attributed to the company.

We turn finally to the question of why there should be a blanket ban on business corporations bringing freedom-of-religion claims. It was suggested by Redlich JA in \textit{Cobaw} and the majority in \textit{Hobby Lobby} that this bright line rule, were it adopted, would operate unfairly and arbitrarily by making the availability of religious freedom protections contingent upon the happenstance of what form a business chooses to take.\textsuperscript{151} So, in effect, a business would be penalised for running its activities through a corporation, rather than as a sole trader or a partnership.

With respect, the arguments of Redlich JA and the majority in \textit{Hobby Lobby} miss the point. Under the general law in both Australia and the United States, sole traders\textsuperscript{152} and the partners in a partnership are each personally liable for any

\textsuperscript{147} \textit{Hobby Lobby}, 134 S Ct 2751, 2765 (Alito J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2014).

\textsuperscript{148} \textit{Cargill Inc v Hedge}, 375 NW 2d 477, 479 (Simonett J) (Minn, 1985).

\textsuperscript{149} Ibid, quoting \textit{Denzer v Prendergast}, 267 Min 212, 216 (Sheran J) (1964).

\textsuperscript{150} Even Crespi, himself in favour of allowing reverse veil piercing in some instances, acknowledges that the test ‘provides little practical guidance’: Crespi, above n 91, 35.


\textsuperscript{152} Known in the United States as ‘sole proprietors’: see \textit{Hobby Lobby}, 134 S Ct 2751, 2797 (Ginsburg J) (2014).
obligations that the business accrues through its activities.  

If the sole trader or the partnership breached an obligation (for instance, an obligation to pay money to the counterparty), creditors would be able to recover their losses from the sole trader or the partners (assuming they had sufficient assets to discharge the obligation); or, as Ginsburg J put it, ‘[i]n a sole proprietorship, the business and its owner are one and the same’. This is not true of corporations. The corporators are not, unless they have consented to it or the court takes the unusual step of piercing the corporate veil, subjected to any personal liabilities. So, it seems reasonable to allow the corporators to also invoke the protection of a legal provision intended to protect the rights of individuals — given that, in the case of sole proprietorships and partnerships, the sole proprietor or the partners must accept personal responsibility for any liabilities that they incur. This balance is not present in the case of the corporation. The shareholders, by seeking to both rely on the liability shield that is effected by corporations law and ascribe their own views to a corporation to allow the corporation to bring a legal claim, are trying to have their cake and eat it too.

Our arguments in this section are illustrated and supported by the European decisions. As we have discussed, those decisions stand for the proposition that choosing the limited liability corporation as a vehicle to carry on activities means that those behind the corporation are precluded from bringing religious freedom claims. It is noteworthy that neither plaintiff in Company X v Switzerland and Kustannus v Finland carried on a business the sole aim of which was profit maximisation. In both cases, however, the European Commission denied the entities standing to bring art 9 claims on the ground that the corporation could be used for principally profit-making purposes.

If the argument that we outline above that religious bodies should only be permitted to bring religious freedom claims on behalf of their members and not on their own behalf is accepted, this also undermines the argument that it is unjust that other types of religious organisations, such as churches, are able to bring freedom-of-religion claims when for-profit companies cannot. Churches are organised as not-for-profit organisations and so are precluded from carrying on activities with a view to creating financial gains for their constituent members. It therefore makes sense that these entities may bring freedom-of-religion claims as, in order to retain not-for-profit status, their sole purpose must be the promotion of the religious beliefs that they espouse. Moreover, and perhaps more importantly, churches do not promote religious ends purely for their own purposes: as the decision in X and Church of Scientology v Sweden demonstrates, the ability of churches and like bodies to promote their beliefs is necessary to secure the religious freedom of individual adherents.

153 Austin and Ramsay, above n 117, 10 [1.200], [1.220]; James D Cox and Thomas Lee Hazen, Corporations (Aspen Publishers, 2nd ed, 2002) 31–2. Even limited partnerships, which allow some partners to limit their liability to the capital that they have contributed, require that at least one partner take on unlimited liability: see Austin and Ramsay, above n 117, 12 [1.230].

154 Hobby Lobby, 134 S Ct 2751, 2797 (2014).


157 Cf Hobby Lobby, 134 S Ct 2751, 2797 (Ginsburg J) (2014).

3  An Express Rule of Attribution

For the reasons we have given, we consider that if a court is to attribute the religious beliefs of shareholders to a corporation, it is incumbent on the legislature to specify a rule of attribution by which the court is permitted to pierce the corporate veil in reverse. This was the solution put forward by Maxwell P and Neave JA in Cobaw.\textsuperscript{159} That is, in essence, what has occurred in Canada, where the Canadian Charter of Rights and Freedoms distinguishes between rights held by ‘everyone’ — which has been interpreted to include artificial legal persons — and rights held by ‘individuals’.\textsuperscript{160} The opposite course has been taken in Victoria under the Charter of Human Rights and Responsibilities Act 2006 (Vic), which only confers rights on natural persons.\textsuperscript{161}

This view also finds support in principles of Australian and United States corporate law. Section 124(1) of the Corporations Act 2001 (Cth) provides that a company has the ‘legal capacity and powers of an individual’. Despite its apparent breadth, this provision has not been interpreted to mean that a company is for all purposes to be equated with an individual. For instance, Australian courts have decided that some common law rights — namely, the privilege against self-incrimination and the privilege against exposure to a penalty — may not be invoked by corporations.\textsuperscript{162} Similarly, in the United States, where the privilege against self-incrimination is elevated to the status of a constitutional right,\textsuperscript{163} it has been held that corporations are excluded from the ambit of its protection.\textsuperscript{164}

Ultimately, corporations cannot be taken to be imbued with the subjective views of their shareholders, even if we assume substantial identity between the corporation and those who are behind it. Therefore, if the view is taken that corporations ought to be able to bring freedom-of-religion claims under statute, Parliament must expressly signal that intention. However, for the reasons outlined above, it may well be sensible for Parliament not to do so. If individuals are directly harmed by laws, they will not ‘lose’ their rights. Rather, they will be able to pursue them, albeit they must pursue their claims personally or through a religious organisation, even if it might be more convenient to do so through a corporation. Yet if the legal harm only attaches to a corporation (no matter how the individuals attached to the corporation might have subjective feelings of hurt or harm), the law should not rush in to attribute religious rights to legal persons.

\textsuperscript{159} Cobaw (2014) 308 ALR 615, 682 [316], 707 [416].
\textsuperscript{160} Canada Act 1982 (UK) c 11, sch B pt I. While in Canada courts have taken the view that some rights in the Canadian Charter may be exercised by corporate entities, that conclusion appears to be heavily influenced by the distinction drawn in the Canadian Charter between rights held by ‘everyone’ and rights held by ‘individuals’: see Canada Act 1982 (UK) c 11, sch B pt I; A-G (Québec) v Irwin Toy Ltd [1989] 1 SCR 927, 1004 (Dickson CJ, Lamer and Wilson JJ).
\textsuperscript{161} Section 3 (definition of ‘person’).
\textsuperscript{163} United States Constitution amend V.
\textsuperscript{164} Hale v Henkel, 201 US 43 (1906); United States v Kordel, 397 US 1 (1970).
IV Conclusion

The application of the right to religious freedom is politically contentious at the best of times. So much is clear by the legislative activity in this field. The RFRA, the legislation on which the outcome in Hobby Lobby turned, was essentially a reaction to what some saw as an overly narrow interpretation of the freedom of religion protections provided by the United States Constitution First Amendment. The religious exemptions in the EO Act have also been the subject of significant public debate. The Victorian Parliament’s Scrutiny of Acts and Regulation Committee published a report that dealt, inter alia, with these exemptions. The Committee received well in excess of 1500 submissions and held two days of public hearings. After tabling its report, the Victorian Parliament took into account some of its suggestions and made amendments to the religious exemptions that were passed into law under the new Equal Opportunity Act 2010 (Vic). As the decisions in Cobaw and Hobby Lobby and the subsequent political furore surrounding them demonstrate, this level of controversy is only amplified in instances where limited liability corporations are the entities that are trying to bring the religious freedom claim.

In this article, we have sought to use the decisions in Cobaw and Hobby Lobby as a way of framing our discussion of the question whether corporations can bring freedom-of-religion claims. We have also explored the limited academic literature on the topic, much of which has been produced only recently in response to, or pre-empting, the Supreme Court’s decision in Hobby Lobby. We have argued that corporations should not be able to bring freedom-of-religion claims under the general law. To allow them to do so would be to undermine the authority of the separate legal entity doctrine, the fundamental principle of corporations law in Australia and the United States, to an impermissible degree.

We have also sought to show that applying this exclusionary rule does not unfairly prejudice shareholders. Principally, this is because the shareholders have chosen to organise the conduct of certain activities through the corporation, thereby accepting the significant benefits conferred by the separate legal entity doctrine (most notably, limited liability). Having conferred upon the shareholders the significant benefits of corporations law, it therefore seems inequitable to allow them to discard the separate legal entity doctrine merely because it suits their interests in a particular legal context. Authorities from other jurisdictions also support the application of the exclusionary rule. Most notably, the European regional human rights system has consistently denied corporations the right to bring freedom-of-religion claims for similar reasons to those that we have articulated here. These arguments may not apply with such force to all rights. Religious belief is inherently and quintessentially individual, even if the vast majority of individuals choose to exercise it in conjunction with others. The same may not be true to the same degree in areas such as freedom of speech. The question of what rights might be sensibly said to apply to legal as well as natural

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165 See generally Laycock, above n 21.
persons is a conceptually interesting and complex one. This analysis of religious freedom rights does not preclude the notion that a corporation might sensibly be considered to be the holder of other rights.

We conclude by returning to the two epigraphs. It is true, as the High Court of Australia stated in a passage quoted with approval by Neave JA in Cobaw, that corporations have ‘neither soul nor body’.167 It is equally true that, as the majority observed in Hobby Lobby, ‘[a] corporation is simply a form of organization used by human beings’.168 But while both of these statements are true, we have argued that only the first entails the conclusion that the judge who quoted it suggested: that corporations cannot exercise freedom of religion under the general law in the absence of a rule of attribution. For while a corporation may simply be a ‘form of organization used by human beings’, it is, as a matter of law, a form of organisation that is separate from those human beings. Allowing corporations to exercise freedom of religion would undermine this important principle of corporations law, and is therefore to be resisted. Those who live by the corporate form must, of necessity, sometimes die by it as well.

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168 Hobby Lobby, 134 S Ct 2751, 2768 (2014).
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