# May Australian States Impose Sexual Orientation and Gender Identity Non-Discrimination Obligations on Religious Schools? A Rejoinder to Foster

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*Section 38 of the* Sex Discrimination Act 1984 *(Cth) provides exceptions to various non-discrimination obligations of the* SDA *so that those obligations do not burden religious educational institutions. Legal controversy exists over whether, in light of section 38, a State law that imposes sexual orientation and/or gender identity non-discrimination obligations on religious schools is constitutionally valid under section 109 of the* Australian Constitution*. In Volume 1 of the* Australian Journal of Law and Religion, *Associate Professor Neil Foster argued that such a State law would not be valid. This article, a rejoinder to Foster, considers the jurisprudence of the High Court on section 109, as well as other relevant case law. After considering the case law, it concludes that State laws that impose sexual orientation and/or gender identity non-discrimination obligations on religious schools can be consistent with section 38 of the* SDA *and thus not rendered invalid due to section 109 of the* Australian Constitution*.*

## INTRODUCTION

The *Sex Discrimination Act 1984* (Cth) ('*SDA*') was amended in 2013 to expand the attributes on the basis of which discrimination was unlawful under the *SDA* to include sexual orientation, gender identity, and intersex status (along with other attributes).[1] The provisions of the *SDA* relevant to this article as a result of the amendments are ss 14(1)(a), 14(1)(b), 14(2)(c), 16(b), and 21.

Section 38 of the *SDA* stipulates that the non-discrimination obligations contained in those five provisions do not apply to religious educational institutions ('religious schools') in connection with discrimination in employment as a staff member of a religious school,[2] contract worker in a religious school,[3] and 'the provision of education or training'.[4] Because of s 38, ss 14(1)(a), 14(1)(b), 14(2)(c), 16(b), and 21, collectively, do not prohibit religious schools from discriminating on the ground of 'sex, sexual orientation, gender identity, marital or relationship status or pregnancy' in employment and contract work,[5] and on the ground of all of those attributes except sex in the provision of education and training.[6]

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[1] See eg, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) sch 1 items 1, 2, 3 amending *Sexual Discrimination Act 1984* (Cth) ss 1, 2, 3.

[2] *Sex Discrimination Act 1984* (Cth) s 38(1) ('*SDA*').

[3] Ibid s 38(2).

[4] Ibid s 38(3).

[5] Ibid ss 38(1)–(2).

[6] Ibid s 38(3).

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Although Commonwealth law[7] imposes few sexual orientation and gender identity ('SOGI') non-discrimination obligations on religious schools, various State laws impose obligations on religious schools that are not imposed by Commonwealth law. The validity of such State laws has been called into question due to s 109 of the *Australian Constitution*. Section 109 reads in full:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.[8]

Expounding a complete and comprehensive list of every different way in which s 109 operates has proven difficult, and the exact manners in which s 109 operates are disputed.[9] However, it is not in dispute that if a Commonwealth law confers a right that a State law limits, restricts, or denies, the State law is inconsistent with the Commonwealth law, and thus invalid to the extent of that inconsistency.[10] Inconsistency for this reason is considered a type of *direct* inconsistency.

This article will consider whether State laws that impose SOGI non-discrimination obligations on religious schools are, for this reason, directly inconsistent with s 38. Section 10(3) of the *SDA* states that the *SDA* 'is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with' the *SDA*. Therefore, a State law will not be invalid by reason of *indirect inconsistency* with the *SDA*. The conclusion will offer some thoughts on the correct interpretation of s 109; however, its contention will not depend on these points. In advancing its contention, the article assumes the existing precedent from the High Court of Australia on s 109 to be correct and reaches its conclusions within that framework.

## STATE LAWS IMPOSING SOGI NON-DISCRIMINATION OBLIGATIONS ON RELIGIOUS SCHOOLS PROBABLY IMPOSE OBLIGATIONS GREATER THAN THOSE IMPOSED BY COMMONWEALTH LAW

The test of inconsistency whereby a State law is said to detract from a right conferred by Commonwealth law was applied in the case of *Dickson v The Queen* ('*Dickson*').[11] In this case, a defendant in a criminal trial was convicted of breaching s 321(1) of the *Crimes Act 1958* (Vic) ('*Crimes Act*') which prohibited conspiracies to commit criminal offences. The defendant challenged s 321 as inconsistent with s 11.5 of the *Criminal Code Act 1995* (Cth) *('Criminal Code*') which also prohibited such conspiracies but was narrower than the Victorian law. The High Court upheld his challenge and struck down s 321. In providing its ratio, the Court observed the following:

[7] Except when quoting, this article will use the term 'Commonwealth law' and 'Commonwealth laws', although the terms 'federal law' and 'federal laws' are interchangeable here.
[8] *Australian Constitution* s 109.
[9] Allan Murray-Jones, 'The Tests for Inconsistency Under Section 109 of the Constitution' (1979) 10(1) *Federal Law Review* 25, 33–40.
[10] Conceptually speaking, a state law found inconsistent with a federal law under s 109 is best considered 'inoperable' rather than 'invalid' because if the conflicting federal law is repealed, the state law immediately resumes force. However, this article will follow the language of s 109 itself and use the term 'invalid' to describe the result of a finding of inconsistency.
[11] (2010) 241 CLR 491 ('*Dickson*').

> The direct inconsistency in the present case is presented by the circumstance that s 321 of the Victorian *Crimes Act* renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s 11.5 of the Commonwealth *Criminal Code*. In the absence of the operation of s 109 of the Constitution, the Victorian *Crimes Act* will alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in *Devondale Cream*, the case is one of 'direct collision' because the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law.[12]

This passage has been cited to justify the conclusion that s 38 prevents a State from enacting a law to prohibit religious schools from engaging in conduct in which, by virtue of s 38, they may engage without contravening the *SDA*.[13] It is argued that State laws which impose SOGI non-discrimination obligations on religious schools impose greater obligations than the *SDA*, rendering those State laws invalid. But one difficulty in invoking *Dickson* to justify a conclusion that State laws imposing SOGI non-discrimination obligations on religious schools necessarily impose greater obligations than the *SDA* is that s 38 does not fit the important description that the Court gave to s 11.5 of the Commonwealth *Criminal Code* in *Dickson*. In *Dickson*, the Court's basis for concluding that s 321 of the Victorian *Crimes Act* imposed obligations greater than those imposed by s 11.5 was expressed as the following: 'What is immediately important is the exclusion by the federal law of *significant aspects of conduct* to which the State offence attaches'.[14]

In identifying 'the exclusion by the federal law of significant aspects of conduct' as the factor suggestive of the conclusion that s 11.5 confers a right, the Court held that s 11.5 conferred a right by virtue of the *conduct* that the section prohibits, and the limits on that prohibition. Section 38, on the other hand, does not quite function the same way. It does not establish and limit liability for unlawful activity solely according to what is done or not done by the alleged wrongdoer. Instead, it limits liability according to circumstances in which the conduct is engaged, and/or who engages in the conduct. Liability is limited if the person (or body) engaging in the discrimination is a religious school, and if the circumstances surrounding the discrimination include 'employment', 'contract work' or 'the provision of education or training'.

Because ss 11.5 and 321 are not highly analogous to s 38 and State laws imposing SOGI non-discrimination obligations on religious schools, the possibility that the Court may rule that such State laws do *not* impose greater obligations than the Commonwealth law should be acknowledged. Nonetheless, it is likely the case that State laws imposing SOGI non-

[12] Ibid 504 [22] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) (citations omitted).
[13] Neil Foster, 'Religious Freedom, Section 109 of the Constitution, and Anti-discrimination Laws' (2022) 1 *Australian Journal of Law and Religion* 36 ('Religious Freedom').
[14] *Dickson* (n 11) 505 [25] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) (emphasis added).

discrimination obligations on religious schools do impose greater obligations than those imposed by Commonwealth law. To exclude certain conduct from attracting legal liability only in some circumstances, or only when that conduct is engaged in by some people or organisations, is still to exclude conduct from attracting legal liability. It seems unlikely that, when the Court refers to 'obligations greater than those provided by the federal law', it intended the word 'greater' to be interpreted so narrowly as to relate to only what the obligations actually are, and not how broadly or widely they apply. This is especially so given the Court's observation in *Dickson* that s 321 'would impose *upon the appellant* obligations greater than those provided by the federal law.'[15] The explicit reference to the appellant suggests that the individual circumstances of the person affected by the State law must be considered, and it is undeniable that religious schools have greater obligations under State laws imposing SOGI non-discrimination obligations than they do under the *SDA*.

## THE HIGH COURT'S SECTION 109 DECISIONS DO NOT JUSTIFY THE CONCLUSION THAT EVERY STATE LAW IMPOSING OBLIGATIONS GREATER THAN SIMILAR OBLIGATIONS IMPOSED BY COMMONWEALTH LAW IS INVALID

Academic commentators who argue that s 38 invalidates State laws imposing SOGI nondiscrimination obligations have invoked paragraph [22] of *Dickson*[16] to contend that certain provisions of Victorian and Tasmanian legislation are invalid. Neil Foster gives the example of a 'religious organisation adopt[ing] a policy that would involve not hiring a person advocating and living out a policy that favoured sex outside marriage', noting that such a policy would not be prohibited by the *SDA* but may be prohibited by Victorian legislation.[17] Foster concludes:

> It seems fairly clear that this would be a 'direct impairment' by a State law of a right given by a Commonwealth law through consideration of the operation of s 109. To adapt the language of the *Dickson* judgment, the Victorian law 'would alter, impair or detract from the operation of the federal law by proscribing conduct of the [organisation] which is left untouched by the federal law' and the State law, if allowed to operate, would impose upon the [organisation] obligations greater than those provided by the federal law.[18]

In isolation and removed from its context, the Court's holding in *Dickson* that s 321 was invalid because 'if allowed to operate, [it] would impose upon the appellant obligations greater than those provided by the federal law' does read as a declaration that *any* State law, including a SOGI non-discrimination law, which imposes obligations greater than similar obligations imposed by a Commonwealth law is invalid. However, the Court also made clear that there were other factors relevant to its conclusion that s 321 was inconsistent with s 11.5. These factors especially pertained to the extensive law reform history preceding the enactment of the Commonwealth *Criminal Code*, a history not replicated in the case of s 38. As per the Court:

> Section 11.5 of the Commonwealth *Criminal Code* received detailed consideration by this Court in *R v LK*. The extrinsic material considered in *R v LK* indicated that

[15] Ibid (emphasis added).
[16] See above n 12 and accompanying text.
[17] Foster (n 13) 49.
[18] Ibid.

> the narrower scope of s 11.5 reflects a deliberate legislative choice influenced by the work of what in *R v LK* were identified as the Gibbs Committee and the Model Criminal Code Officers Committee.
>
> What is immediately important is the exclusion by the federal law of significant aspects of conduct to which the State offence attaches. There are significant 'areas of liberty designedly left [and which] should not be closed up', to adapt remarks of Dixon J in *Wenn v Attorney-General (Vict)*.[19]

In noting that the limits on the criminal liability imposed by s 11.5 were 'designedly left' by the Commonwealth Parliament, and that the Commonwealth Parliament decided that 'significant… areas of liberty… should not be closed up', the Court construed s 11.5 of the *Criminal Code* not only as declaring what is illegal, but also as implicitly declaring what is positively permitted. In other words, the Court considered that s 11.5 confers on the Australian people a positive right to conduct themselves in a manner that falls short of constituting conspiracy according to s 11.5. This construction of s 11.5 is essential to the Court's holding that s 321 was invalid; indeed, the Court labelled it an 'immediately important' point.

The Court's interpretation of s 11.5 is supported by, and consistent with, how the Court contrasted s 11.5 in *Dickson* with the relevant Commonwealth law in *McWaters v Day* ('*McWaters*').[20] In *McWaters*, the Court upheld a State law imposing a stricter prohibition on driving under the influence of alcohol than that imposed by a Commonwealth law prohibiting such driving.[21] The Court distinguished *Dickson* from *McWaters* on the ground that in *McWaters*, it was 'difficult to construe [the State law] as conferring a liberty on a drunken defence member to drive a vehicle on service land provided he or she was still capable of controlling the vehicle.'[22] In declining to characterise the Commonwealth law in *McWaters* as one that confers a liberty, and distinguishing s 11.5 in *Dickson* on that basis, it is clear that the Court considers s 11.5 to be a law conferring a liberty.

A third case supports the view that a Commonwealth law must positively confer a liberty if a State law imposing greater obligations than that Commonwealth law is to be declared invalid. In *Blackley v Devondale Cream (Vic) Pty Ltd* ('*Devondale Cream*'),[23] the respondent faced legal proceedings for paying a wage to an employee lower than the minimum wage set out by a determination made by the Frozen Goods Board, which was set up by the *Labor and Industry Act 1958* (Vic). However, that minimum wage was higher than the applicable minimum wage set out in the Transport Workers (General) Award made by the Commonwealth Conciliation and Arbitration Commission.[24] The High Court ruled the relevant provisions of the Frozen Goods Board determination and the Victorian Act invalid. However, two important points must be made about the judgment.

The first is that although the decision that the Victorian provisions were invalid was 4:1, only a minority of the justices (two out of five) who decided the case subscribed to Barwick CJ's

[19] *Dickson* (n 11) 505 [24]-[25] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) (citations omitted).
[20] (1989) 168 CLR 289 ('*McWaters*').
[21] Ibid 299 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[22] *Dickson* (n 11) 506 [29] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
[23] (1968) 117 CLR 253 ('*Devondale Cream*').
[24] Ibid 255–6 (Barwick CJ).

ratio decidendi that the Victorian laws were directly inconsistent by virtue of imposing greater obligations than the Commonwealth laws.[25] The second is that Barwick CJ himself observed that the Commonwealth law confers a liberty on employers not to pay their employees more than the amount set out in the Commonwealth Award:

> Properly understood, the act and the award, in placing that obligation upon the employer, enacts, in my opinion, that the sum so to be paid is the only sum which by law the employer is obliged to pay.[26]

Thus, from *Dickson*, *McWaters*, and *Devondale Cream*, an inference can be drawn that only those Commonwealth laws which may be construed as conferring a liberty will invalidate a State law that imposes obligations greater than those imposed by the Commonwealth law. For present purposes, the relevant question thus becomes whether s 38 of the *SDA* can be said to affirmatively confer a liberty.

Not only does this inference explain the Court's various holdings in *Dickson* in a harmonious and coherent manner, it is also supported by well-established principles of statutory interpretation. Although the fulfilment of legislative intention is not the highest priority of statutory interpretation, the legislative intention behind a statutory provision is important. In *Project Blue Sky v Australian Broadcasting Authority* ('*Project Blue Sky*') the Court held that 'the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'.[27] And in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* ('*Alcan Alumina*') the Court held that the 'language which has actually been employed in the text of legislation is the surest guide to legislative intention'.[28]

All this said, it may not be necessary to identify *Dickson*'s broader context in order to distinguish s 11.5 from s 38. Section 11.5 creates, after all, an indictable offence under Commonwealth law, meaning that the trial must be by jury[29] where only a unanimous verdict can be accepted.[30] Victorian criminal law, on the other hand, allows for majority verdicts in some circumstances.[31] The Court identified this discrepancy as key to its conclusion that s 321 of the *Crimes Act* was invalid,[32] yet neither this discrepancy nor any materially similar discrepancy exists in the context of s 38 and State SOGI non-discrimination laws.

The nature of s 11.5 as a criminal law is relevant to limit *Dickson*'s applicability in the present matter as well: there is a rule of statutory interpretation that statutes creating criminal offences may have to be construed narrowly, although the rule is, admittedly, a 'last resort'.[33] To the extent that it does operate, however, it assists in limiting an accused person's criminal liability.

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[25] Ibid 258 (Barwick CJ and McTiernan J at 259).
[26] Ibid 258 (Barwick CJ).
[27] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').
[28] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ) ('*Alcan Alumina*').
[29] *Australian Constitution* s 80.
[30] *Cheatle v The Queen* (1993) 177 CLR 541, 552 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[31] *Juries Act 2000* (Vic) ss 44, 46.
[32] *Dickson* 499 [2] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
[33] *Aubrey v The Queen* (2017) 260 CLR 305, 325 [39] (Kiefel CJ, Keane, Nettle and Edelman JJ) citing *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J).

But non-discrimination legislation is construed very differently: because it is considered 'beneficial' or 'remedial' legislation, it is construed with a view to maximising the protections it provides.[34] Inevitably, this means it is construed with a view to maximising the obligations a person has *not* to discriminate against another person. In other words, although the tendency of the courts when dealing with criminal statutes is to limit the liability of the person said to have breached law, the tendency of the courts when dealing with non-discrimination legislation is to do the opposite. Quite clearly, this requires interpreting exceptions to non-discrimination legislation, such as s 38, narrowly. An interpretation of s 38 as limiting the application of State non-discrimination laws, rather than merely limiting the application of the laws it explicitly mentions, is anything but narrow.

## THE HIGH COURT HAS EXPLICITLY ACKNOWLEDGED THAT STATE LAWS IMPOSING OBLIGATIONS GREATER THAN SIMILAR OBLIGATIONS IMPOSED BY COMMONWEALTH LAWS ARE NOT NECESSARILY INVALID

Before this article proceeds to address the precise operation of s 38 — that is, whether or not it confers an affirmative liberty — it would be prudent to further substantiate the claim that a State law imposing obligations greater than similar obligations imposed by a Commonwealth law is not necessarily invalid. This claim is not merely inferential or implicit; the High Court has explicitly decided cases accordingly. To ascertain how it has done so, it is necessary to turn to one particular feature of the High Court's s 109 jurisprudence: the Court's identification of Commonwealth laws that are supplementary to or cumulative upon State laws. If a Commonwealth law falls into this category, a State law will not be held to invalidly exceed the obligations that the Commonwealth law imposes.

In *Telstra v Worthing* ('*Telstra*'), the Court unanimously made the following comments about the operation of s 109:

> [I]t is clearly established that there may be inconsistency within the meaning of s 109 although it is possible to obey both the Commonwealth law and the State law. Further, there will be what Barwick CJ identified as 'direct collision' where the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided. Thus, in *Australian Mutual Provident Society v Goulden*, in a joint judgment, the Court determined the issue before it by stating that the provision of the State law in question 'would qualify, impair and, in a significant respect, negate the essential legislative scheme of the Commonwealth *Life Insurance Act*'. *A different result obtains if the Commonwealth law operates within the setting of other laws so that it is supplementary to or cumulative upon the State law in question.* But that is not this case.[35]

The first observation that should be made about this distinction is that although in *Telstra*, it was drawn in the context of *direct* inconsistency (as made clear by the Court's usage of the term 'direct collision'), a review of the history of the Court's s 109 jurisprudence shows that the concept of a Commonwealth law being 'supplementary' to a State law was first identified

[34] *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ, McHugh J); *Owners Corporation OC1-POS539033E v Black* (2018) 56 VR 1, 18 [57] (Richards J) ('*Black*').
[35] (1999) 197 CLR 61, 76 [27] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) (emphasis added) (citations omitted) (*'Telstra'*).

in the context of *indirect* inconsistency. A State law on the same subject matter as a Commonwealth law will be indirectly inconsistent with that Commonwealth law if the Commonwealth Parliament intended the Commonwealth law to be the only law governing that particular subject matter.

In *Ex parte McLean*, Dixon J identified the existence of the category of supplementary Commonwealth laws in these remarks:

> If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed.[36]

Dixon J's reference to 'completely, exhaustively or exclusively' setting out what the law shall be confirms that he was referring to supplementary Commonwealth laws in the context of *indirect* inconsistency. In *Momcilovic v The Queen*, his remarks were described by Gummow J as one 'of the classical formulations by Dixon J of the operation of s 109'.[37]

Given this jurisprudential origin of supplementary Commonwealth laws, it is questionable whether, in order to survive a challenge on the grounds of *direct* inconsistency with a Commonwealth law, a State law should have to be found to be a law to or upon which the Commonwealth law is supplementary or cumulative. In adapting a distinction originally made in the context of indirect inconsistency to cases involving direct inconsistency, the holding in *Telstra* risks blurring the lines between the two categories. That said, there is no logical or conceptual impossibility in applying the distinction to cases of direct inconsistency; it would just apply for different reasons than it would to cases of indirect inconsistency. In cases of direct inconsistency, a Commonwealth law would supplement a State law if the Commonwealth law was not intended to prevent State laws from imposing extra obligations. In cases of indirect inconsistency, a Commonwealth law would supplement a State law if it wasn't intended to be the only law regulating the subject matter. It must also be borne in mind that whether a State law falls into a particular 'category' of inconsistency is not the question of ultimate importance when applying s 109; what is ultimately important is the 'true construction' of 'the particular laws in question'.[38]

The second and more immediately relevant observation that must be made about the category of supplementary Commonwealth laws is that if a Commonwealth law falls under this category, a State law will not be directly inconsistent with the Commonwealth law *even if* the State law imposes obligations broader or more burdensome than similar obligations imposed by the Commonwealth law. *McWaters* is a clear example of this. In that case, s 16(1)(a) of the *Traffic Act 1949* (Qld) made it an offence to drive a motor vehicle 'whilst… under the influence of liquor or a drug'. But ss 40(1)(a) and 40(1)(b) of the *Defence Force Discipline Act 1982* (Cth) only made it an offence to drive a 'service vehicle' in any place, or any vehicle on 'service

[36] (1930) 43 CLR 472, 483 (Dixon J).
[37] (2011) 245 CLR 1, 116 [262] (Gummow J).
[38] Ibid 112 [245].

land', 'while… under the influence of intoxicating liquor or a drug to such an extent as to be incapable of having proper control of the vehicle'. The Queensland law thus imposed broader and more burdensome obligations relating to drink driving than did the Commonwealth law in two separate ways: (1) the Queensland law applied to *all* motor vehicles, not just to service vehicles or vehicles on service land; and (2) the threshold in the Queensland law for unlawful intoxication was merely that the driver was 'under the influence' of alcohol, rather than the higher threshold in the Commonwealth law of the driver being 'incapable of having proper control of the vehicle'. Nevertheless, the Queensland law was upheld by the High Court. (It is immaterial that the Court considered the Queensland law in the context of *indirect* inconsistency; once it declared the law valid, it inevitably declined to declare the law directly inconsistent with the Commonwealth law despite its more burdensome obligations.)

The existence of the category of Commonwealth laws which are supplementary to or cumulative upon State laws allows, at a minimum, for the *possibility* that State laws imposing the SOGI non-discrimination obligations on religious schools covered by s 38 are valid. If s 38 positively confers a right, freedom or liberty on religious schools to engage in SOGI discrimination, then those State laws are clearly invalid. But if s 38 does not do this, then it is a law which is supplementary to or cumulative upon those State laws, and those State laws are valid.

## THE OPERATION OF SECTION 38 IS NOT TO CONFER AN ABSOLUTE RIGHT ON RELIGIOUS SCHOOLS TO ENGAGE IN SOGI NON-DISCRIMINATION

Although State laws imposing SOGI non-discrimination obligations on religious schools are valid according to the principles enunciated in *Dickson*, other cases use slightly different, and arguably broader language, in determining if a State law is invalid by reason of inconsistency with a Commonwealth law.

In *Australian Mutual Provident Society v Goulden* ('*Goulden*'), the High Court invalidated s 49K(1) of the *Anti-Discrimination Act 1977* (NSW) ('*ADA*') 'to the extent that it purports to apply to the life insurance business of registered life insurance companies.'[39] The Court deemed s 49K(1) of the NSW *ADA* inconsistent with s 78 of the *Life Insurance Act 1945* (Cth). Section 49K(1) prevented discrimination on the grounds of physical handicap or impairment in the provision of goods and services, which the Court held was inconsistent with the right of a 'registered life insurance company to classify risks and fix rates of premium in its life insurance business in accordance with its own judgement founded upon the advice of actuaries and the practice of prudent insurers'.[40] The Court adopted the language of Dixon J in *Victoria v Commonwealth*,[41] holding that a State law will be invalid if 'it would alter, impair or detract from the Commonwealth scheme of regulation' on a particular issue.[42] Elsewhere in the judgment, the Court ruled s 49K(1) invalid because it 'would qualify, impair and, in a significant respect, negate the essential legislative scheme of the Commonwealth Life Insurance Act …'.[43]

[39] (1986) 160 CLR 330, 340–1 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ) ('*Goulden*').
[40] Ibid 337.
[41] (1937) 58 CLR 618, 630 (Dixon J).
[42] *Goulden* (n 39) 337.
[43] Ibid 339.

Like the holding in *Dickson*, this holding has been relied on to justify the conclusion that s 38 of the *SDA* invalidates State laws imposing SOGI non-discrimination obligations on religious schools that are covered by s 38. Neil Foster writes:

> In the circumstances being considered here, it seems clear that the area of law being considered is the question whether a religious body will be liable for discrimination on, say, grounds of sexual orientation. The policy implemented by the Commonwealth law is that in general it will, *but not* where its action is in accordance with its genuine religious commitments (to summarise the effect of ss 37 and 38.) If a state law conditions enjoyment of this privilege on satisfaction of additional requirements, or by removing the privilege altogether, as is done under Tasmanian and Victorian laws, then in doing so it has *qualified*, *impaired*, and to a significant respect *negated*, the scheme set up by the Commonwealth.[44]

Foster is not alone in holding to this view of s 38. Neil Rees, Simon Rice, and Dominique Allen write:

> Conversely, a s 109 inconsistency might exist when State and Territory anti-discrimination legislation *removes or diminishes an exception that a Commonwealth law makes*, so that the State or Territory anti-discrimination [law] prohibits conduct that the Commonwealth legislation would allow[;] [f]or example, s 38 of the *SDA* …[45]

Though not arguing in the specific context of non-discrimination laws, Mark Leeming writes:

> [C]onstitutional inconsistency may be engaged merely by a purported alteration, impairment or detraction from a right, obligation, power, privilege or immunity conferred by federal statute …[46]

Whether a State law imposing SOGI non-discrimination obligations covered by s 38 on religious schools does indeed alter, detract from, qualify, impair, or negate the operation of s 38 depends on what the correctly understood operation of s 38 is. If the correctly understood operation of s 38 is to create an affirmative right, liberty, power, privilege, or immunity for religious schools to engage in the SOGI discrimination addressed by that section, then a State law imposing an obligation on religious schools not to so discriminate is clearly invalid.

However, there are many reasons for considering this *not* to be the actual operation of s 38, and to consider s 38 to have a more limited operation, one that permits the operation of State laws which impose SOGI non-discrimination obligations on religious schools covered by s 38. Perhaps the most obvious of these is the context of s 38 in the broader *SDA*. In *McWaters*, the Court held that 'common sense and principles of statutory construction demand that the provisions be read in their context'.[47] And as noted in *Project Blue Sky* and *Alcan Alumina*, the legislative intention behind s 38 in the *SDA* is important.

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[44] Foster (n 13) 50.
[45] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 81 [2.14.24].
[46] Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 149.
[47] *McWaters* (n 19) 297 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

The context of s 38 is that other provisions in the *SDA* contain obligations that would, but for the existence of s 38, and contrary to the Commonwealth Parliament's wishes, burden religious schools. When understood in this context, the legislative intention behind s 38 is clear: to ensure that specifically identified statutory provisions have a more limited application than they would have without s 38. This limited and specific intention falls far short of an intention to prohibit *the States* from imposing the obligations that the Commonwealth Parliament did not wish its own law to impose.

At this point it might be argued that if the Commonwealth Parliament decided not to impose the obligations covered by s 38 on religious schools, its intention was that such obligations would not be imposed on religious schools *by any law or legislature*, including State laws and State Parliaments. More likely, however, is that the Commonwealth Parliament's intention to limit the application of the *SDA* was borne of a view that the Commonwealth should not itself impose the relevant SOGI non-discrimination obligations on religious schools, an intention that supports a view of s 38 of the *SDA* as a law supplementary to State law. That the Commonwealth Parliament singled out ss 14(1)(a), 14(1)(b), 14(2)(c), 16(b), and 21 (but no State laws) as not applying to religious schools indicates that it had turned its mind to the question of which statutory provisions should not apply to religious schools, and decided that only those five should not. It would be plausible to suggest, for example, that Parliament acknowledged different States may face different circumstances and should be afforded discretion in the delicate balancing this area requires.

In interpreting statutes, courts frequently consider the issues to which a Parliament can be taken to have turned its mind. But they also commonly hold that where a Parliament has turned its mind to an issue, it should be taken to have intended to take no more action on that issue than the action it did take, and that any action it has not taken on that issue is the result of deliberate choice, rather than an oversight that a court might correct. An example of this interpretative process is found in the Victorian case of *Owners Corporation OC1-POS539033E v Black*.[48]

In this case, a handicapped resident in an apartment sued the owners corporations in charge of the apartment's plan of subdivision, seeking that they improve the building's disability access. The resident relied on ss 44 and 45 of the *Equal Opportunity Act 2010* (Vic) ('*EOA*'), under which she alleged indirect disability discrimination and a failure to make reasonable adjustments for her disability in the provision of services, as well as s 56 of the *EOA*, 'which requires an owners corporation to make alterations to common property in certain circumstances.'[49] The owners' corporations submitted that s 56 exclusively codified 'the circumstances in which an owners corporation might be required to make alterations to common property to accommodate a lot owner's disability', thus excluding any obligations imposed by ss 44 and 45.[50] Justice Richards of the Supreme Court of Victoria rejected this submission, ruling that the 'services' referred to in ss 44 and 45 included disability access to the apartment building. She gave the following reason for this ruling:

> [T]he express exclusion of 'education or training in an educational institution' from the definition of 'services' in s 4 [of the Vic *EOA*]. This exclusion first appeared in the definition of 'services' in the 1995 Act, which was re-enacted in the EO Act in

[48] (2018) 56 VR 1 ('*Black*').
[49] Ibid 2–3 [1]–[4] (Richards J).
[50] Ibid 15 [44]-[45].

> 2010. This indicates that *Parliament turned its mind* to whether any area of activity should be excluded from the wide and inclusive definition of 'services' and, having done so, confined itself to excluding education or training'[51]

Just as the Victorian Parliament turned its mind to the question of which activities should be excluded from the definition of 'services' in the Victorian *EOA*, so too has the Commonwealth Parliament turned its mind to which statutory provisions should be excluded from imposing SOGI non-discrimination obligations on religious schools. And just as the Victorian Parliament confined its exclusion from the definition of services to education and training, so too has the Commonwealth Parliament confined its exclusion from imposing SOGI non-discrimination obligations on religious schools to ss 14(1)(a), 14(1)(b), 14(2)(c), 16(b), and 21 of the *SDA*. The Commonwealth Parliament very easily could have added words to the effect of 'any State or Territory law' to the list incorporating the aforementioned five subsections, yet chose not to do so.

Of course, an explicit reference in the Commonwealth law to State laws is not, generally, a prerequisite for inconsistency. The High Court has invalidated many State laws for inconsistency with a Commonwealth law, despite those State laws not being explicitly mentioned by the Commonwealth law. But the calculation is different in those cases where the Commonwealth Parliament has considered that, in order to give certain statutory provisions a more limited application, it is necessary to explicitly and specifically identify those provisions. Here, it is unlikely that an intention to limit a statute's application extends to statutory provisions which have not been so identified.

One important canon of statutory interpretation — *expressio unius est exclusio alterius* ('*expressio*') — also supports a construction of the *SDA* that is supplementary to State law. The phrase is a Latin maxim meaning 'the expression of one thing excludes others'. If applicable in this case, it would mean that statutory provisions *not* listed in s 38 are excluded from non-application to religious schools, by virtue of s 38 expressly listing some provisions. For example, State laws imposing SOGI non-discrimination obligations on religious schools would continue to apply, despite s 38.

It must be noted that *expressio* does not apply to every scenario in which a number of specific items are explicitly listed. There are scenarios in which a particular condition, circumstance, or result that applies to a list of items will also apply to items not on that list. The High Court explained the circumstances in which the maxim applies in *Houssein v Under Secretary, Department of Industrial Relations & Technology (NSW).*[52]

In this case, the applicants had applied to the Industrial Commission of New South Wales to have certain shops registered under s 76A of the *Factories, Shops and Industries Act 1962* (NSW) as shops that could operate under extended shopping hours. When the Commission refused registration, the applicants sought to appeal the refusal. The difficulty for the applicants was that s 84(1)(a) of the *Industrial Arbitration Act 1940* (NSW) ('*IAA*') appeared to prohibit an appeal against the refusal. But s 84(1)(b) of the *IAA* prohibited the issue of writs of prohibition and certiorari in relation to determinations of 'industrial' matters made by the Commission. The applicants argued that the express mention of *industrial* matters excluded

[51] Ibid 20 [65] (emphasis added).
[52] (1982) 148 CLR 88.

*non-industrial* matters from the prohibition on review of a decision.[53] The Court ruled that *expressio* did not apply in this situation, holding:

> In these circumstances there is no room for the application of the maxim expressio unius. That maxim must always be applied with care, for it is not of universal application and applies only when the intention it expresses is discoverable upon the face of the instrument …[54]

However, the intention behind s 38 is discoverable upon its face alone. As aforementioned, the intention behind it is to ensure that specifically identified statutory provisions have a more limited application than they would have without s 38. This intention is discoverable from the mere text of s 38; the mere text is sufficient to alert a reader to the existence of these statutory provisions and the fact that they would, but for s 38, have broader application. No further inquiries are needed to discover the intention.

The reality of this intention may very well be sufficient on its own to conclude that s 38 is supplementary to State laws, rather than a law that imposes a final standard of obligations on religious schools that no State law may exceed. But if the intention is not sufficient to so conclude, then the matters that to which the Commonwealth Parliament turned its mind, as well as *expressio*, operate to confirm that no State law imposing SOGI non-discrimination obligations on religious schools is nullified by s 38, and that s 38 operates supplementary to State laws.

One final matter may serve to further demonstrate these points. When the Commonwealth Parliament has sought to confer a positive right to religious freedom on a person or body, it has used clear and unequivocal language to do so. For example, s 47B(1) of the *Marriage Act 1961* (Cth) states:

> A body established for religious purposes may refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage…

The use of the word 'may' in this subsection confirms that religious bodies have a positive right not to engage in the described conduct, and therefore, that no State may deny this right via non-discrimination law. The language used is considerably stronger and broader than the limited language of s 38, which merely identifies a small number of statutory provisions which do not apply in specific contexts. It seems unlikely that such divergent language can perform the same function when used for the same subject matter.

## THE CASES CITED TO SUPPORT THE PROPOSITION THAT SECTION 38 INVALIDATES STATE LAWS IMPOSING SOGI NON-DISCRIMINATION OBLIGATIONS ON RELIGIOUS SCHOOLS ARE INAPPOSITE

This article has placed much importance on s 38's identification of specific statutory provisions that are to have a more limited application than they otherwise would. Not only does this reality support the view that s 38 is supplementary to or cumulative upon State laws, it also serves to

[53] Ibid 90–2 (Stephen, Mason, Aickin, Wilson and Brennan JJ).
[54] Ibid 94.

distinguish s 38 from the Commonwealth laws in other cases where the impugned State law has been invalidated. Cases that have been cited to argue that s 38 invalidates certain State laws imposing SOGI non-discrimination obligations include *Viskauskas v Niland* ('*Viskauskas*'), *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* ('*Bitannia*') and *Clyde Engineering Co Ltd v Cowburn* ('*Clyde Engineering*').[55]

In *Viskauskas*, the High Court ruled s 19 of the NSW *ADA* was indirectly inconsistent with s 9 of the *Racial Discrimination Act 1975* (Cth) ('*RDA*').[56] In *Bitannia*, the New South Wales Court of Appeal held that s 15(4)(b)(i) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) was directly inconsistent with s 52 of the *Trade Practices Act 1974* (Cth) ('*TPA*').[57] And in *Clyde Engineering*, the High Court invalidated ss 6, 12, and 13 of the *Forty-four Hours Week Act 1925* (NSW) on the ground that they were directly inconsistent with an award made pursuant to the *Commonwealth Conciliation and Arbitration Act 1904-1921* (Cth) ('*CCAA*').[58]

Yet neither ss 9(1) or 9(2) of the *RDA*,[59] nor s 52 of the *TPA*, nor the award made pursuant to the *CCAA* identified any specific statutory provisions which, by virtue of the Commonwealth law said to give rise to an inconsistency, were not to apply or were to have their application limited. This fact is of high importance; if the Commonwealth Parliament, when passing a law, declines to create a distinction between laws specifically identified as having a more limited application by virtue of the first law, and laws not so identified, then it appears to intend that all State laws imposing obligations greater than those imposed by the first law are to be treated in the same manner. If the Commonwealth law confers a positive liberty, then it is clear that all State laws which impose obligations greater than similar obligations imposed by the Commonwealth law are invalid. However, if the Commonwealth Parliament *does* choose to create two categories of laws — one being the laws specifically identified as of a more limited application, and the other being the laws not so identified — then there appears to be an intention that this distinction be of some consequence. In other words, the Commonwealth Parliament intends that the specifically identified laws are to have a different operation to the other laws. Quite obviously, there is no point in the Commonwealth Parliament creating these two categories of laws if they are nevertheless to be treated the same way. To treat the two categories of laws the same way would render the explicit inclusion of ss 14(1)(a), 14(1)(b), 14(2)(c), 16(b), and 21 superfluous, contrary to basic principles of statutory interpretation.[60] The consequences of drawing this distinction, as opposed to not drawing it, are meaningful,

[55] Foster (n 13) 47.
[56] *Viskauskas v Niland* (1983) 153 CLR 280, 292–3 (Gibbs CJ, Mason, Murphy, Wilson, and Brennan JJ) ('*Viskauskas*'). Whether the Court ruled s 19 *directly* inconsistent with the RDA is debatable. At 292–3, the Court strongly alluded to direct inconsistency; however, at 291, the Court held that '[t]here is no direct inconsistency between the Commonwealth Act and the New South Wales Act' because 'it is obviously possible for a person to obey both laws by refraining from committing any act of racial discrimination.'
[57] *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238 [115]-[119], [124] (Basten JA, Hodgson and Tobias JJA agreeing) ('*Bitannia*').
[58] *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 467 (Knox CJ, Isaacs, Gavan Duffy, Rich and Starke JJ) ('*Clyde Engineering'*).
[59] Section 9(3) of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') does identify s 9(1) of the *RDA* as having no application 'in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia'; however, s 9(3) was not relevant in *Viskauskas*.
[60] *Project Blue Sky* 382 [71] (McHugh, Gummow, Kirby and Hayne JJ).

and cases involving Commonwealth laws that do *not* make the distinction thus have little bearing on Commonwealth laws that *do* make it — such as *SDA* s 38.

There is another case — *Central Northern Adelaide Health Service v Atkinson* ('*Atkinson*')[61] — which has been suggested to support the view that s 38 invalidates SOGI non-discrimination obligations imposed on religious schools by State laws. Importantly, it does involve a law identifying certain specific statutory provisions as having a more limited application than they otherwise would — s 8(1) of the *RDA*. Section 8(1) is thus more analogous to s 38 than the laws considered in other cases, which, given one of *Atkinson*'s holdings, assists the argument that s 38 invalidates certain State non-discrimination laws. Nevertheless, *Atkinson* still does not ultimately support this conclusion, for reasons which will be explained.

In *Atkinson*, the Supreme Court of South Australia considered whether s 65 of South Australia's *Equal Opportunity Act 1984* ('SA *EOA*') was directly inconsistent with *RDA* s 8(1). Section 65 read:

> This Part [Part 4 of the SA *EOA*] does not render unlawful an act done for the purpose of carrying out a scheme or undertaking for the benefit of persons of a particular race.

Section 8(1) read:

> This Part [Part 2 of the *RDA*] does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

The court upheld s 65, but only on a narrow ground. It held that the reference in the section to a 'scheme or undertaking' was limited only to a scheme or undertaking which 'addresses the objects of the *Equal Opportunity Act*.'[62] However, a majority of the court ruled that were s 65 to be interpreted literally, without the term 'scheme or undertaking' being given a narrow meaning, then the section would be invalid. The majority was unpersuaded by the submission of South Australia's Solicitor-General (who argued the case for the health service) that s 65 was valid because, even if it was read literally, it only curbed the application of the SA *EOA*, and not the application of the *RDA*. The majority ruled that '[o]n its face, s 65 could permit and authorise racial discrimination in circumstances that would directly conflict with the Convention and the *Racial Discrimination Act*.'[63]

Given *Atkinson*'s holding that the exception contained within s 65, if construed literally, would not merely affect the scope of the SA *EOA*, but would also challenge Commonwealth law, it is argued that *Atkinson* supports a construction of s 38 as not merely affecting the scope of the *SDA*, but as also challenging State law. Neil Foster writes:

> The *Atkinson* case is formally the reverse of the situation we are considering; in that case there was a defence under state law which was absent in Commonwealth

[61] (2008) 103 SASR 89 ('*Atkinson*').
[62] Ibid 116 [113] (Gray J, Kelly J agreeing).
[63] Ibid 117 [116]-[118].

> law. But the logic leads to the conclusion that if there is a defence under Commonwealth law, in a law dealing with discrimination on the basis of sexual orientation, but that defence is missing from a state law on the same topic, then the state law will be inoperative under s 109 to the extent of the clash.[64]

Facially, it does appear that *Atkinson* supports a construction of s 38 as *authorising*, rather than merely *not prohibiting*, such discrimination. If this is the correct construction of s 38, then State laws imposing SOGI non-discrimination obligations on religious schools are clearly invalid.

However, *Atkinson* involves a Commonwealth law *prohibiting* conduct that a State law provided was *not* prohibited. The situation regarding s 38 is the reverse: the Commonwealth law provides that certain conduct is not prohibited, while the State law does prohibit it. Where the Commonwealth Parliament *prohibits* certain conduct, it clearly intends the prohibition to apply to every State. But where it does not do so, it does not necessarily intend that the conduct be *permitted* in every State. This principle is a natural function of the reality that for a parliament to simply not legislate on a particular type of conduct — one way or another — is not the same as affirmatively authorising the conduct. But for this principle, the States could never prohibit any conduct absent a Commonwealth law explicitly authorising them to do so. Such a law has never been a requirement for a State law prohibiting certain conduct to be valid.

It is for this reason that, *despite* s 8(1) of the *RDA* limiting the application of specific statutory provisions — as does s 38 — *Atkinson* still does not support the proposition that s 38 invalidates certain State laws. In *Atkinson*, the Commonwealth exception created by limiting the *RDA*'s application was *narrower* than the exception in the SA *EOA*. But the exception in s 38 is *broader* than the exceptions available in State law. For the reasons set out in the previous paragraph, the logic supporting the former scenario does not apply to the latter scenario.

Of course, the majority's logic in *Atkinson* is far from the only logic on which courts have relied when invalidating State laws for direct inconsistency with Commonwealth law. The inability to apply *Atkinson*'s logic to s 38 does not conclusively prove that s 38 is valid. Rather, it leaves open the *possibility* that, even if *Atkinson* is assumed to be good law, s 38 is a mere absence of prohibition, rather than a law that affirmatively confers a liberty. For the reasons previously outlined in this article, s 38 falls into the former category, even if *Atkinson* is good law.

There are, however, compelling reasons *not* to consider *Atkinson* good law. Justice Bleby dissented from the majority's finding that s 65 would have been directly inconsistent with s 8(1) but for the narrow construction it was given. He justified this conclusion by noting that s 65 'does not excuse or render lawful an act which is prohibited under the *Racial Discrimination Act*' and that 'an act which may come within the exception described in s 65 might nevertheless be prohibited under the *Racial Discrimination Act*.'[65]

Furthermore, the logic applied by the majority of the court in *Atkinson* was rejected in a comparable case. In *Cawthorn v Citta Hobart Pty Ltd* ('*Cawthorn*')[66] the Supreme Court of Tasmania considered whether the disability access requirements that building developers were

[64] Foster (n 13) 53.
[65] *Atkinson* (n 60) 95 [17] (Bleby J).
[66] (2020) 364 FLR 110 ('*Cawthorn*').

required to meet by Tasmanian law were directly inconsistent with the *Disability (Access to Premises - Buildings) Standards 2010* ('Commonwealth Standards') and/or s 34 of the *Disability Discrimination Act 1992* (Cth) ('*DDA*').

Importantly, s 34 (similarly to s 38) states that if a person acts in accordance with a disability standard, such as the Commonwealth Standards, then Part 2 of the *DDA* (except for Division 2A) does not apply to that action. A majority of the court ruled that despite s 34, the Tasmanian laws were *not* directly inconsistent with the *DDA* or the Commonwealth Standards. The majority considered it 'significant' that 'when a person complies with a disability standard, *the DD Act does not declare that person's conduct to be lawful, but renders inapplicable provisions that would make it unlawful*'[67] thus placing great importance on s 34 identifying certain statutory provisions as of a more limited application.

The majority's decision was later reversed by the High Court, though only on procedural, not substantive, grounds. The Supreme Court had heard the case as an appeal from Tasmania's Anti-Discrimination Tribunal, but on appeal from the Supreme Court, the High Court ruled that the Tribunal had correctly determined that it did not have jurisdiction to hear the complaint and reinstated its decision not to do so.[68] Nevertheless, even though it is not binding on any court, the Supreme Court of Tasmania's holding in *Cawthorn* provides persuasive judicial support for the proposition that Commonwealth laws providing exceptions to other Commonwealth laws which prohibit certain conduct are not necessarily directly inconsistent with State laws that prohibit that same conduct.

### STATE LAWS IMPOSING SOGI NON-DISCRIMINATION OBLIGATIONS ON RELIGIOUS SCHOOLS DO NOT ALTER, IMPAIR OR DETRACT FROM THE OPERATION OF SECTION 38

In order to determine whether a State law detracts from the operation of a Commonwealth law, it is necessary to determine what the operation of that Commonwealth law is — in this case, s 38. If the operation of s 38 is to confer a right on religious schools to engage in SOGI discrimination of the kind prohibited by ss 14(1)(a), 14(1)(b), 14(2)(c), 16(b), and 21, then State laws that prohibit such discrimination by religious schools are invalid. However, it has already been demonstrated that the Commonwealth Parliament enacted s 38 with the intention of ensuring that the five aforementioned provisions of the *SDA* did not have an effect that the Commonwealth Parliament did not intend them to have, but which the provisions would have had but for s 38. This conclusion is likely sufficient to determine that such State laws do not 'alter, impair or detract from' the operation of s 38. In the event, however, that more is needed to reach this conclusion, the following further observations are made.

Even where a State law imposes SOGI non-discrimination obligations on religious schools, the State law does not have the effect of undermining the operation of s 38. Because the intention behind s 38's operation is to avoid the unintended consequence of SOGI non-discrimination obligations being imposed on religious schools *via the SDA*, the intended operation of s 38 thus appears to be to ensure that no complaint may be made alleging unlawful SOGI discrimination by a religious school that relies on the aforementioned five provisions of the *SDA*, and that no judicial finding of unlawful SOGI discrimination by a religious school may rely on those five

[67] Ibid 117 [16]-[17] (Blow CJ, Wood J agreeing) (emphasis added).
[68] *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476, 496 [86] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

provisions. In other words, s 38's intended operation is to give effect to the Commonwealth's view that the Commonwealth should not impose the relevant SOGI non-discrimination obligations on religious schools. The inability to rely on the five provisions of the *SDA* for a discrimination complaint against a religious school is just as strong in a State that imposes SOGI non-discrimination obligations on religious schools as it in a State that does not impose such obligations. The operation of s 38 thus remains unchanged, irrespective of State laws. If s 38 is said to create a right, liberty, power, privilege, or immunity for religious schools, that is limited to the right not to face legal proceedings *under the SDA* for SOGI discrimination.

It is true that religious schools in States that impose the SOGI non-discrimination obligations addressed by s 38 would, assuming they wish to engage in SOGI discrimination, find s 38 a cold comfort. But the intended operation of s 38 is not to guarantee that such schools can do as they please when it comes to SOGI discrimination, but instead to ensure that the *SDA* does not overreach in a way the Commonwealth Parliament does not desire. There are multiple rational explanations as to why the Commonwealth Parliament may have chosen this operation of s 38, a relatively limited operation in comparison to conferring on religious schools a positive right to engage in SOGI discrimination. It may have done so as a necessary political compromise to successfully amend the *SDA* to add sexual orientation and gender identity as protected attributes. It may have done so to ensure that Commonwealth investigative and judicial resources were not tied up deciding claims against religious schools and could instead be deployed to claims that the Commonwealth Parliament considered a higher priority. Yet even if the Commonwealth Parliament wished to not impose the *SDA*'s obligations on religious schools for fear of violating those schools' religious freedom, it does not necessarily follow from this that it intended to prevent *the States* from imposing identical obligations on religious schools. The Commonwealth Parliament can form a view that a particular right should not be infringed in a particular way, and yet also *not* seek to impose its view of that right on State Parliaments. It is true that in *Dickson*, it decided to impose its view of the right in question on State Parliaments by enacting s 11.5. However, the text of s 38, discussed in the previous section of this article, and the differences between s 38 and s 11.5, strongly indicate that even if s 38 reflects the Commonwealth Parliament's view of the right to freedom of religion, it did not intend to enforce its view of that right against the States.

The limited capacity of s 38 to deliver a *practical* benefit to religious schools located in States that impose SOGI non-discrimination obligations on religious schools does not indicate that the *legal* operation of s 38 has been undermined. Section 38 is not 'qualified', 'impaired', or 'negated' owing to its inability to better protect these schools, because even where it cannot deliver that specific practical benefit to religious schools, there are other things that it can and does do, things which point to an operation intended by the Commonwealth Parliament that remains intact.

## CONCLUSION

In the author's opinion, the Court's jurisprudence on direct inconsistency between State and Commonwealth laws would benefit from revision to reflect the following proposition: a Commonwealth law cannot *implicitly* confer a positive right on Australians that no State may deny; instead, such conferrals must be made *explicitly*. It does not logically and inevitably follow from the fact that, when prescribing certain conduct, the Commonwealth Parliament has left certain other conduct unprescribed, it intends to confer a right on Australians to engage in the unprescribed conduct that no State may deny. For example, the Parliament may have

intended that certain conduct concerning a particular subject matter be prohibited across the country, while leaving the decision on whether to prohibit other conduct concerning that subject matter to the States. Nor is it self-evident that a State law detracts from the operation of Commonwealth law merely because it imposes broader obligations than the Commonwealth law; a Commonwealth law does not do less merely because a State law does more. Put another way, no one is relieved of obligations under Commonwealth law merely because a State law imposes further obligations. Such a jurisprudential revision would not prevent the Commonwealth Parliament from overriding State laws that prohibit broader categories of conduct that the Commonwealth law; it would merely have to explicitly state this intention to do so.

It is important to state that such a jurisprudential revision would not limit the application of the principle of legality. That principle is an important protection of rights and freedoms in Australia, and is expressed as follows:

> Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.[69]

For the Court to revise its s 109 jurisprudence as suggested would not weaken the practice of not interpreting statutory provisions in a manner that restricts fundamental rights where possible. Nor would it limit the power of the Commonwealth Parliament to confer rights on Australians. It would simply mean, so that this important area of constitutional law be simplified, that a Commonwealth law would not be interpreted as conferring a right on Australians unless it explicitly states that it does so.

However the Court's direct inconsistency jurisprudence might be improved, it seems highly likely that State laws imposing SOGI non-discrimination obligations on religious schools are not necessarily inconsistent with s 38 of the *SDA*, and thus can be valid despite s 109 of the Constitution. Although such laws impose greater obligations than the *SDA*, the *SDA* is supplementary to State law, rather than a law that imposes a final set of obligations that no State law may exceed. Furthermore, such laws do not alter, impair, or detract from the operation of s 38.

[69] *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) quoting *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J).