

When will Australia have its own “same sex wedding cake” legal debacle?

Cases of bakers refusing to sell same-sex celebrating cakes have made it to the highest courts in the UK and US. When it occurs here, what will the judicial response be?

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Landing this week in the middle of Australia’s religious freedom wars was the latest “wedding cake case”: [a judgement by the Supreme Court of the United Kingdom](#), which found in favour of a bakery that refused to make a same-sex marriage cake. This was excitedly reported here as another big win for the Worldwide Congress of Homophobic Bakers.

Actually no, it wasn’t. But it is worth a look, coming as it does after the US Supreme Court had [its own wedding cake moment](#) a few months ago. It is surely a matter of time before we have ours.

What happened in the UK case?

The UK case involved Gareth Lee, a gay man who volunteers with LGBTQI organisation QueerSpace in Belfast. In 2014, he was going to a party to celebrate Northern Ireland’s anti-homophobia week, and decided to take a cake. He went into Ashers Bakery, run by Daniel and Amy McArthur, a devoutly Christian couple. He asked for his cake to be iced with a picture of Bert and Ernie ([whose sexuality is a whole other debate](#)) and the words “Support Gay Marriage”. The McArthurs refused, on the grounds that they were a Christian business and objected to the message. The law in Northern Ireland prohibits direct and indirect discrimination on the basis of sexual orientation. If the McArthurs had refused to bake Mr Lee’s cake because he was gay, or because anyone else was gay, that would be unquestionably illegal. The Supreme Court pointed out, however, that the McArthurs had made it clear that they did not refuse to bake for Mr Lee or the party he was attending. Their objection was to the message on the cake. They would have refused that request, they said, from anyone. If an extremely adorable eight year old girl had come into their shop

and asked them to bake a cake for her birthday with (the definitely straight) Barbie and Ken on it along with the words “Support Gay Marriage”, she would have received a polite rejection.

Fair enough too. There is a wide distinction between the appropriately illegal act of a business refusing service to a customer because of their gender, sexual orientation, race, etc, and the right of the business to say no to doing things which compromise its own values. The key point is that that scruple must be attached solely to the act — not the characteristics of the person asking.

What about the US?

The US situation is, of course, nowhere near so clear-cut. The recent “Colorado cake case” involved a straight-out refusal by baker Jack Phillips, owner of the Masterpiece Cakeshop, to bake any cake at all for a same-sex wedding. The Supreme Court held 7-2 that he was constitutionally entitled to do so.

The issue in the US is that the laws prohibiting discrimination must compete with the protected freedom of religion and, more potently, freedom of speech. The Court tied itself in several knots over this, but the result was confirmation of the curious notion that the baking of a cake is an act of free expression in itself. It didn’t matter that there were no words involved; Phillips cannot by law be prevented from refusing to bake for a gay wedding because, as Justice Neil Gorsuch explained:

To suggest that cakes with words convey a message but cakes without words do not ... is irrational ... Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding.

Although in fairness the word “irrational” has acquired a quite different meaning in America in recent years from how we would still tend to understand it here.

What would happen here?

What of Australia’s own inevitable wedding cake case, if and when it comes? The anti-discrimination law here is relevantly the same as in the UK and Colorado: a bakery may not refuse service to a same-sex couple or their same-sex wedding; to do so would be unlawful discrimination.

But the distinction between a cake with a message, and one without, will hold here. There is no prospect of our High Court following the US Supreme down their weirdo rabbit hole; it will, like their lordships in the UK, recognise that, sometimes, a cake is just a cake.

Obviously though, we must ask ourselves “What would Scott Morrison do?” Will he say, as he does each time he is asked whether religious schools should be able to expel gay kids, “it’s the existing law”? Or will he find that the existing law won’t do, when those gay kids grow up, get married, and want a cake?

Food for thought.