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The Australian Nonprofit Sector Legal Almanac 2008

Working Paper No. CPNS 46

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is a specialist research and teaching unit at the
Queensland University of Technology in Brisbane, Australia

It seeks to promote the understanding of philanthropy and nonprofit issues by drawing upon academics from many disciplines and working closely with nonprofit practitioners, intermediaries and government departments. CPNS's mission is "to bring to the community the benefits of teaching, research, technology and service relevant to philanthropic and nonprofit communities". Its theme is 'For the Common Good'.

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1.0 Introduction

There are a number of publications in Australia which summarise annual developments in the law for business or various industries, but little is available in accessible form for nonprofit staff, boards or volunteers. This publication seeks to fill that gap by bringing together in one place case reports and significant legislative initiatives.

Cases

For a number of years, Professor Myles McGregor-Lowndes, Rhonda Richards, Frances Hannah and Anne Overell have compiled one to two page summaries of cases involving nonprofit organisations and published them on The Australian Centre for Philanthropy and Nonprofit Studies' Developing Your Organisation (DYO) wiki (<https://wiki.qut.edu.au/display/CPNS/Legal+Case+Notes>). You can be alerted of new case summaries as they are posted to the DYO wiki by subscribing to the RSS feed which is found on the front page of the DYO wiki space (<https://wiki.qut.edu.au/display/CPNS/DYO+Home>).

One of the most important cases decided in 2008 was by the High Court in the *Word Investments Limited* case. It deals with the vexed issue of where the line is drawn between charity and non-charity status. At the time of writing, the nonprofit sector, the Australian Taxation Office (ATO) and the Federal Government were still coming to terms with the ramifications of the decision which bluntly appears to install the 'destination of income test'.

A number of other cases summarised are working their way through the appeals process and care should be taken with their application.

Legislation

The year 2008 has seen relatively little legislative reform apart from proposals in Victoria and Western Australia. There has been some reform of the regulations of fundraising in New South Wales, Victoria and Queensland.

Australian Taxation Office (ATO)

The highly regarded ATO nonprofit updates serve nonprofit organisations well in providing timely alerts to the ATO's compliance activities, changes in law and procedure, as well as new and revised ATO publications. The more significant updates are noted and can be readily accessed through the ATO website.

What does 2009 hold?

The final section moves from looking in the rear view mirror to peering out the front windscreen to discern the reform agenda. An unprecedented number of federal inquiries are afoot during 2009 which have the potential to shape the legislative and regulatory agenda for the next decade.

1.1 Index

1.0 Introduction	i
1.1 Index	ii
2.0 Cases by category	5
2.1 Taxation	5
2.1.1 TACT v Commissioner of Taxation [2008] AATA 275 (Administrative Appeals Tribunal of Australia, 7 April 2008).....	5
2.1.2 Re the Taxpayer and the Commissioner of Taxation [2008] AATA 325 (Administrative Appeals Tribunal of Australia, 18 April 2008).....	7
2.1.3 Faith Baptist Church Inc v Chief Commissioner of State Revenue (RD) [2008] NSWADTAP 31 (Administrative Decisions Tribunal Appeal Panel of New South Wales - 14 May 2008)	9
2.1.4 Victorian Women Lawyers' Association Inc v Commissioner of Taxation [2008] FCA 983 (Federal Court of Australia, 27 June 2008).....	12
2.1.5 AID/WATCH Incorporated v Commissioner of Taxation [2008] AATA 652 (Administrative Appeals Tribunal of Australia, 28 July 2008).....	14
2.1.6 Australian Tea Tree Oil Research Institute Ltd (in liq) v Commissioner of Taxation [2008] FCA 1653 (Federal Court of Australia, 14 November 2008) .	16
2.1.7 Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited [2008] HCA 55 (High Court of Australia, 3 December 2008) .	18
2.1.8 Social Ventures Australia Limited v Chief Commissioner of State Revenue [2008] NSWADT 331 (New South Wales Administrative Decisions Tribunal, 12 December 2008)	20
2.2 Insolvency and winding up	22
2.2.1 Re Bankstown Community Child Care Incorporated [2008] NSWSC 173 (Supreme Court of New South Wales, 5 March 2008).....	22
2.2.2 Hillig v Darkinjung Pty Ltd & Ors [2008] NSWSC 75 (Court of Appeal of New South Wales, 29 April 2008)	23
2.2.3 In the matter of Austinmer Bowling Club Ltd (in liq); Russell v Rodden [2008] NSWSC 730 (Supreme Court of New South Wales, 17 July 2008).....	26
2.2.4 Goodin, in the matter of the Grand United Order of Free Gardeners Friendly Society Ltd (in Liq) [2008] FCA 1537 (Federal Court of Australia, 17 October 2008)	28
2.2.5 Commissioner of Taxation v Bruton Holdings Pty Limited (in liq) [2008] FCAFC 184 (Federal Court of Australia (Full Court), 1 December 2008)	29
2.3 Nonprofit structure and governance	31
2.3.1 Islamic Assoc of Western Suburbs Sydney Inc v Dr H R K Survery [2008] NSWSC 77 (Supreme Court of New South Wales, 13 February 2008)...	31
2.3.2 Grigor-Scott v Jones [2008] FCAFC 14 (Federal Court of Australia Full Court, 28 February 2008).....	33
2.3.3 Christian Revival Crusade Inc v Milne (No 2) [2008] SADC 43 (District Court of South Australia, 18 April 2008)	35
2.3.4 Singh v Singh; Flora trading as Flora Constructions v Budget Demolition & Excavation Pty Ltd [2008] NSWSC 386 (Supreme Court of New South Wales, 1 May 2008).....	37
2.3.5 Hillman v Bankstown Handicapped Children's Centre Association Incorporated [2008] NSWIRComm 64 (Industrial Relations Commission of New South Wales, 16 September 2008).....	39
2.4 Membership and office	40
2.4.1 Goodwin v VVMC Club Australia (NSW Chapter) [2008] NSWSC 154 (Supreme Court of New South Wales, 15 February 2008)	40

2.4.2	Goyan v Motyka [2008] NSWCA 28 (New South Wales Court of Appeal, 12 March 2008).....	41
2.4.3	Countouris v Kallos [2008] NSWSC 840 (Supreme Court of New South Wales, 8 August 2008).....	43
2.4.4	Canterbury-Hurlstone Park RSL Club Ltd v Roberts [2008] NSWSC 845 (Supreme Court of New South Wales, 13 August 2008)	45
2.4.5	Al Hidayah Mosque Inc v Islamic Association of Wanneroo (Inc) [2008] WASCA 206 (Western Australian Supreme Court of Appeal, 9 October 2008)..	46
2.4.6	Leyonhjelm v Mateer [2008] NSWSC 1320 (Supreme Court of New South Wales, 8 December 2008).....	47
2.5	Discrimination	48
2.5.1	King v Gosewisch [2008] FMCA 1221 (Federal Magistrates Court of Australia, 29 August 2008).....	48
2.5.2	Walsh v St Vincent de Paul Society Queensland (No. 2) 2008 QADT 32 (Queensland Anti-Discrimination Tribunal, 12 December 2008).....	49
2.6	Employment and workplace relations	52
2.6.1	Shahid v Australasian College of Dermatologists [2008] FCAFC 72 (Federal Court of Australia Full Court, 9 May 2008)	52
2.6.2	Cahill v State of New South Wales (Department of Community Services) (No 3) [2008] NSWIRComm 123 (New South Swales Industrial Relations Commission, 27 June 2008)	54
2.6.3	Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2) [2008] WASCA 254 (Western Australian Industrial Court of Appeal, 10 December 2008)	57
2.7	Negligence	58
2.7.1	Green v Country Rugby Football League of NSW Inc [2008] NSWSC 26 (New South Wales Supreme Court, 31 January 2008).....	58
2.7.2	Chaina & Ors v The Presbyterian Church (NSW) Property Trust & Ors [2008] NSWSC 290 (Supreme Court of New South Wales, 7 April 2008)	59
2.7.3	The Uniting Church v Takacs [2008] NSWCA 141 (Supreme Court of New South Wales, 20 June 2008)	61
2.8	Trusts	62
2.8.1	Metropolitan Petar v Mitreski [2008] NSWSC 243 (Supreme Court of New South Wales, 25 March 2008)	62
2.8.2	Macedonian Orthodox Community Church St Petka Incorporated v Metropolitan Petar [2008] NSWCA 165 (New South Wales Court of Appeal, 11 July 2008)	64
2.8.3	Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand [2008] HCA 42 (High Court of Australia, 4 September 2008)	65
2.8.4	Metropolitan Petar v Mitreski [2008] NSWSC 1021 (New South Wales Supreme Court, 30 September 2008).....	67
2.8.5	Anglican Trusts Corporation v Attorney-General for the State of Victoria [2008] VSC 352 (Supreme Court of Victoria, 11 September 2008)	68
2.8.6	Northern Sydney and Central Coast Area Health v A-G (NSW) [2008] NSWSC 1223 (Supreme Court of New South Wales, 20 November 2008).....	69
2.9	Miscellaneous cases	70
2.9.1	De Quincey Company Ltd v Commissioner for Fair Trading, NSW Office of Fair Trading [2008] NSW ADT 152 (New South Wales Administrative Decisions Tribunal, 26 May 2008)	70
2.9.2	Llewellyn v Clyde Group Inc [2008] TASSC 25 (Tasmanian Supreme Court, 16 June 2008)	71

2.9.3	Western Australian Rural Counselling Association Inc v Minister for Agriculture, Fisheries and Forestry [2008] FCA 986 (Federal Court of Australia, 1 July 2008)	72
2.9.4	ANZ Trustees Limited v Attorney General of New South Wales [2008] NSWSC 1081 (Supreme Court of New South Wales, 16 October 2008)	73
2.9.5	Robert Paul Schneider and Anor v Sydney Jewish Museum Inc [2008] NSWSC 1331 (Supreme Court of New South Wales, 12 December 2008).....	75
3.0	State and Territory Legislation Review 2008	77
3.1	New South Wales.....	77
3.2	Victoria	77
3.3	Queensland.....	78
3.4	South Australia.....	79
3.5	Western Australia.....	79
3.6	Tasmania	80
3.7	Australian Capital Territory.....	80
3.8	Northern Territory.....	80
4.0	Australian Tax Office Updates	81
5.0	What does 2009 hold?	83
5.1	Victorian Government reviews in 2007	83
5.2	Treasury Review of Financial Reporting for Unlisted Companies 2007 ...	83
5.3	Disclosure Regimes for Charities and Not-For-Profit Organisations – Senate Economics Committee June 2008.....	84
5.4	Parliamentary Joint Committee on Corporations and Financial Services – Small Nonprofit Associations Reform – 23 June 2008.....	86
5.5	Australia's Future Tax System (The Henry Review)	87
5.6	National Compact.....	88
5.7	Improving the Integrity of Prescribed Private Funds (PPF) – November 2008	88
5.8	Government Grants – ATO and Department of Finance and Deregulation– 2009.....	88
5.9	Election Commitment – Productivity Commission Review	89

2.0 Cases by category

2.1 Taxation

2.1.1 TACT v Commissioner of Taxation [2008] AATA 275 (Administrative Appeals Tribunal of Australia, 7 April 2008)

Note that this decision may be subject to appeal

TACT was a trust created by a written trust deed. Clause two of the trust deed required the trustees (a husband and wife) to hold TACT's funds 'for such public charitable purposes as the trustees shall from time to time consider'. TACT applied to the ATO to be endorsed as a 'fund established in Australia after 1 July 1997 for public charitable purposes' and was refused for various reasons.

The wife's father, a partially retired accountant, administered TACT's accounting affairs, provided advice to the trustees, and had been the principal contributor since the creation of the trust. This was through a gift of \$160,000 and about \$500,000 by an arrangement by which TACT provided accounting and other services to a small airline company in which the trustee wife's father owned 25% of the issued share capital. The services for this arrangement were provided by the trustee wife's father at no cost to TACT.

The trustees had made some distributions, mainly to an incorporated Australian entity that conducts a program for orphaned and underprivileged children in Bangladesh, but had decided to accumulate the bulk of the funds until they reached \$1 million and then make distributions from its annual income.

The Commissioner contended that TACT was not entitled to income tax exemption for two reasons, being:

1. 'that TACT had not pursued its charitable purposes solely in Australia. It has made distributions to an Australian incorporated charitable organisation that pursues its activities in Bangladesh.' (para 10)
2. that TACT's funds were not applied for the purposes for which it was established. The 'misapplication was evidenced by:
 - a. an excessive accumulation of trust income;
 - b. part of the trust funds being held in an accountant's trust account where it does not accrue interest;
 - c. part of the trust funds being used for the benefit of the accountant or his clients – as a result of "debit balances" within the accountant's trust bank account ledger records;
 - d. the deposit of part of the trust funds in a bank account where it "offset" the trustees' interest obligations to their mortgagee;
 - e. the investment of trust funds in allegedly uncommercial loans;
 - f. distributions to individuals associated with the charitable organisation that operates in Bangladesh.' (para 10)

Were the Distributions by TACT wholly in Australia?

The Commissioner argued that by distributing funds to another entity that used the funds outside Australia, TACT had not 'pursued its charitable purposes solely in Australia' as required by s 50-60(a) *Income tax Assessment Act 1997*. After considering the Federal Court decisions in *Commissioner of Taxation v Word Investments Ltd* [2007] FCAFC 171 (Full Court) and [2006] FCA 1414 (first instance). Note that this was not the High Court decision which was not available at the time, but see below for a summary of that decision. The Tribunal found that all that was required was that TACT made the distribution to a body in Australia and it was unnecessary to inquire as to where the donee's activities were undertaken. Therefore, the Commissioner was not successful on this issue.

Were the funds applied for the purposes for which TACT was established?

The Commissioner conceded a charitable fund may accumulate some of its income, but 'the Commissioner relie[d] on paragraph 21 of Taxation Ruling TR 2000/11 to contend that, whilst distribution of capital is not required, and some accumulation of income is permissible, the "excessive accumulation of investment income" is impermissible' (para 35). The Tribunal found that the trustees' intentions were genuine, in good faith and that the desire to achieve an ultimate fund of \$1 million was not excessive or unreasonable in the circumstances. Further, the distributions of TACT (when income from the gift of services by the accountant were disregarded) actually exceeded its actual investment and interest income. Thus the accumulation was not fatal to TACT's claim for endorsement.

The Tribunal found no intentional wrongdoing in the irregularities claimed by the Commissioner in items (b) to (d) above and thus these matters did not amount to misapplication.

In relation to a loan made by TACT to a company to which the accountant was a consultant, the tribunal found that the loans were repaid with interest above the commercial rate at the time. Another loan was made on a possibly uncommercial basis to a company providing Christian music entertainment, but was eventually repaid by the accountant personally, lending the company a replacement loan. The Tribunal found that 'whilst objective assessment of the R Pty Ltd advance suggests that its commerciality was questionable and its favourable resolution perhaps fortuitous, the evidence does not warrant rejection of the accountant's evidence that he regarded it a proper investment in conformity with the trust purposes. The circumstances of the loan do not evidence that the TACT fund was applied other than for the purposes for which it was established' (para 115).

Finally, some distributions had been made to individuals associated with charitable institutions. For example, one gift was for repairs to a car used by a missionary's son in Australia. The tribunal agreed with TACT's submission that it was charitable to provide 'for the support, aid or relief of clergy and ministers or teachers of religion, the performance of whose duties will tend to the spiritual advantage of others by instruction and edification' (para 117).

The tribunal ordered that TACT should be endorsed as a fund established in Australia after 1 July 1997 for public charitable purposes.

This case may be viewed at: <http://www.austlii.edu.au/au/cases/cth/AATA/2008/275.html>

2.1.1a Implications of this case

This case may well be appealed and so should be read with caution. Several aspects of the trust's administration such as loans and close dealings of related parties are risky behaviours, and the matter may well have been decided differently if the Tribunal had not been convinced of the good faith and intentions of all parties concerned.

This case has a number of issues which have been contentious: ascertaining when accumulation is permissible; the conduct of business (accounting services) of a fund to generate income; and the extent of the condition that would have such funds 'pursue their charitable purposes solely in Australia'.

2.1.2 Re the Taxpayer and the Commissioner of Taxation [2008] AATA 325 (Administrative Appeals Tribunal of Australia, 18 April 2008)

Note that this case is subject to appeal

This case concerns an appeal lodged before the Administrative Appeals Tribunal by a taxpayer with respect to his assessable taxable income for the financial years from 30 June 2000 to 30 June 2002. The action became necessary after his previous objection to the respective assessments was disallowed by the Commissioner of Taxation. Two matters, in particular, were raised.

The first involved the deductibility of interest payments arising from the applicant's securing a loan to buy units in a trust. In addition, he sought that the penalties incurred for his infringement of the tax rules in this regard be set aside or varied. Both the applicant and his accountant believed the trust was a hybrid, containing elements of both a fixed and a discretionary trust. Therefore, any payments relating to the fixed element were deductible since they resulted from an attempt to generate assessable income for the applicant as permitted under section 8-1 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997). This view was not shared by the Commissioner of Taxation who maintained that Clause 12 of the Trust Deed gave the Trustee unfettered discretion to decide how trust income and profit were to be apportioned between the capital and income accounts. Since the trust was purely discretionary in its operation, there was no fixed entitlement to income by the applicant. Consequently, no deduction for interest expenses was allowable.

On the matter of the penalties imposed, the Deputy President of the Administrative Appeals Tribunal, the Honourable Robert Nicholson, decided that the applicant had exercised reasonable care in relying on advice concerning the tax deductibility of the interest payments. This information had been provided by his accountant, an experienced tax partner with the reputable firm, Ernst & Young. Although the tax accountant erred in his understanding of the underlying trust deed, he had approached the task with care. Allowance should be made for the fact he was not a lawyer. Therefore, the penalties incurred in relation to the ill-advised tax deductibility of the interest component were deemed excessive and set aside under section 14ZZK of the ITAA 1997. The penalties were reduced to nil.

Attention then turned to whether \$3.5 million paid to the taxpayer in question via a trust, the GHI Trust, should be regarded as an eligible termination payment and therefore subject to tax in the 2001-2002 financial year. Section 27A of the *Income Tax Assessment Act 1936* (ITAA 1936) requires a causal connection between a payment and the termination of a taxpayer's employment. The applicant claimed the payment was an attempt to settle a dispute among mining company ABC's shareholders. At the end of May 2001, in return for sizeable contributions to a private charitable trust, the applicant, the Chief Executive Officer of ABC, agreed to resign from his position by 18 November 2001, or earlier, should a replacement be appointed. When all the circumstances surrounding his resignation were evaluated, the Honourable Robert Nicholson found that there was a clear link between the CEO's resignation and the \$3.5 million payout, the former triggering the latter. Since this came about at the CEO's request and direction, section 27A(3)(a)(iii) was satisfied.

Despite this finding, the applicant maintained that the money was gifted to the GHI Trust and was allowable as a deduction under Division 30 of the ITAA 1997. This contention was disputed by the Commissioner of Taxation who argued that section 78A(2)(a) of the ITAA 1936 had been breached. The activity of purchasing shares in ABC Limited by DEF Pty Ltd, the trustee of the GHI Trust, was an 'act, transaction or circumstance occurring as part of, in connection with, or as a result of the making or receipt of a gift.' Further, the Commissioner of Taxation suggested that the applicant benefited from the share trading, thus contravening section 78A(2)(c) of the ITAA 1936 as well. Under section 78A(2)(d) of the ITAA 1936, the applicant's claim also failed as there was evidence of a scheme 'entered into ...in association with the making of the gift.' The applicant's suggestion that his actions were commercial in nature was rejected.

Once again, the applicant asked that the penalty associated with his failure to remit the required amount of tax be set aside or varied. This time, the response was unsympathetic. The Honourable Robert Nicholson viewed the applicant's behaviour as reckless, suggesting that he had not supplied his accountant with all the relevant information necessary to characterize the transaction. Hence, no change to the penalty was made.

This case may be viewed at: <http://www.austlii.edu.au/au/cases/cth/AATA/2008/325.html>

2.1.2a Implications of this case

This case serves as a timely reminder about the anti-avoidance provisions in respect of deductible gifts under the *Income Tax Assessment Act 1936* (Cth). In essence the anti-avoidance provisions strike at any understanding 'nod or wink' that the giver will receive some material benefit from the so-called gift. Immaterial benefits will not be caught by such provisions in the view of the ATO (e.g. trinkets and minor naming recognitions). Refer to [TR2005/13](#) "Income tax: tax deductible gifts – what is a gift" (available via <http://www.ato.gov.au/taxprofessionals/pathway.asp?pc=001/001/021>) on this issue. Also note the statutory references to the 1936 Act (not the 1997 Act) which is still in force in relation to these matters.

2.1.3 Faith Baptist Church Inc v Chief Commissioner of State Revenue (RD) [2008] NSWADTAP 31 (Administrative Decisions Tribunal Appeal Panel of New South Wales - 14 May 2008)

This was an appeal from a decision by Judicial Member Verick dated 30 August 2007. The subject matter of the original hearing was an application for exemption from duty under the *Duties Act 1997* (NSW) (the Act). This application was denied by the respondent, and this denial was affirmed by Judicial Member Verick in the original Administrative Decisions Tribunal finding.

The duty exemption in question related to the purchase of two adjacent blocks of land in Regents Park, New South Wales. The exemption was claimed under section 275 of the Act which applies to charitable and benevolent bodies. The appellant claimed that it was entitled to an exemption from duty under section 275(3)(a) of the Act, referred to in the decision as 'the general ground', which reads:

3) *In this section:*

exempt charitable or benevolent body means:

(a) any society or institution for the time being approved by the Chief Commissioner for the purposes of this paragraph whose resources are, in accordance with its rules or objects, used wholly or predominantly for:

(i) the relief of poverty in Australia, or

(ii) the promotion of education in Australia, or...

The appellant claimed that it was a society or institution whose resources were used in accordance with its rules and objects in 'the promotion of education in Australia'.

The exemption was also claimed on the basis on section 275(3)(b)(i), referred to in the decision as 'the transaction ground':

(b) any society or institution that, in the opinion of the Chief Commissioner, is of a charitable or benevolent nature, or has its primary object the promotion of the interests of Aborigines and if;

(i) (in the application of this definition for the purposes of sub-section (1) or (1A)) the dutiable transaction or instrument is for the purposes as the Chief Commissioner may approve in accordance with guidelines approved by the Treasurer, or...

It was conceded by the respondent that the appellant was a society or institution which fell within section 275(3) of the Act, and that 'education' as a purpose under the Act included religious education.

The appellant church is an incorporated association incorporated under the *Associations Incorporation Act 1984* (NSW). The Regents Park property was purchased on 14 December 2005, and an exemption claim was submitted to the respondent in February 2006. The application was accompanied by a proposal for an 'educational centre building' on the site. The proposal made it clear that the church had two distinct arms – an education arm and a church or 'worship' arm. The proposal referred to the use of the building for both arms, but predominately for the education arm.

The objects of the appellant, set out in clause 4 of its Constitution and Governing Rules, were relevant to the decision. These are:

1. 'To exalt and glorify the Lord Jesus Christ. (Colossians 1:16-19)
2. To edify the believers in the Church through the Ministry of the Word of God, the practice of New Testament Ordinances, Public Worship and Prayer, Fellowship of Believers, and any other ministries that the Church may be led of God to establish. (Hebrews 10:24-25; 1 Corinthians 11:2; Ephesians 4:11-16).
3. To evangelise the unsaved by the public proclaiming of the Gospel of the Lord Jesus Christ in accordance with the great commission. (Matthew 28:19-20)
4. To minister by serving others and community in deed and in trust (Matthew 22:39; 1 John 3:18)
5. To establish and maintain through Sunday and Weekday schools, Christian Education in a manner consistent with the Holy Scriptures. (Proverbs 22:6).'

The panel noted that the only relevant object was in clause 5 of the stated objects, and that this was the type of education normally associated with 'Sunday school'. As such it would be part of the worship arm of the church. The decision of Judicial Member Verick had made it clear that the proposal for an education centre went beyond the objects of the church as to education. Moreover, the application to Auburn Council for the building referred to it as an education/church facility, and the submitted plans showed clearly that the bulk of the facilities were to be devoted to church activities. Mr Verick noted that this was to be contrasted with the application to the ATO which referred merely to an 'educational centre proposal'.

'Charitable' has a technical legal meaning in the absence of a contrary intention. Mr Verick held that just such a contrary intention applied in section 275(3)(a) of the Act, in that a charitable or benevolent body is defined as one which is wholly or predominantly for the relief of poverty or promotion of education in Australia. Thus the advancement of religion (a usual head of charity) was excluded by intention. The Appeal Panel agreed that this finding was correct.

In addition, the respondent contended that the relevant ruling was set out in ruling DUT 034 which contains the following rulings:

(a) pursuant to clause 11 the exemption is available only to an applicant whose objects include the relief of poverty or the promotion of education in Australia and whose resources are predominantly used for that purpose.

(b) clause 17 of Ruling 034 provides (in part) that:

The following are purposes, which may be approved in accordance with guidelines approved by the Treasurer:

- the relief of poverty
- the relief and prevention of sickness and disability
- the relief of suffering and distress caused by old age
- the promotion of education
- the establishment of organisations to assist sections of the community with special needs
- the relief of distress caused by natural disasters or sudden catastrophes,

(c) clause 18(d) provides that: "Property acquired by religious organisations must be used for approved charitable and benevolent purposes of the organisation and not for predominantly religious purposes.

(d) clause 25(a) provides that: "Although most religious bodies are charitable Institutions, property used for churches, residences or religious activities (including religious instruction or religious education) are not used for approved purposes.'

Clause 25(a) of DUT 034 is clearly relevant to the claim for exemption. It was the respondent's contention in this appeal that religious education purposes are proscribed under this ruling. The appeal panel agreed with this contention. However, DUT 034 was issued on 9 March 2007, after the purchase of the land at Regents Park. Prior rulings (DUT 006 and 007) were in force at the time of the purchase. The appellant contended that the prior rulings applied in its case, and that DUT 034 should not have been applied retrospectively. The panel disagreed with this, finding no grounds to prevent retrospective effect, which it found to be only 'of academic interest'. The panel found that although not exactly the same, 'the thrust' of the prior rulings was equivalent in any event, so that the outcome would have been the same.

The appellant's final contention was that the ruling as to exemption was *ultra vires* the Act, on the ground that the Treasurer could not have intended to approve the proscription of religious purposes so entirely. This was rejected by the panel, stating that the contention was 'misconceived and must fail'. There was accordingly no error of law and the appeal was dismissed on the following grounds:

'The Appellant cannot succeed under the general ground because it could not demonstrate that its resources would be used predominantly for the promotion of education. The Appellant could not succeed under the transaction ground regardless of whether Ruling 034 or the prior rulings applied because if Ruling 034 applied religious education was proscribed and if the prior rulings applied the property was acquired predominantly for religious purposes. None of the rulings were ultra vires the Act.'

The case may be viewed at:

<http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2008/31.html>

2.1.3a Implications of this case

This case demonstrates that attention to drafting of objects of an association is essential to obtain exemption from taxation. Clashes in meaning between the drafting of internal constitutions and rules and the relevant legislation can have far-reaching effects.

2.1.4 Victorian Women Lawyers' Association Inc v Commissioner of Taxation [2008] FCA 983 (Federal Court of Australia, 27 June 2008)

The Victorian Women Lawyers' Association (VWL) was an incorporated association that at various times claimed it was exempt from income tax as either a charitable institution, an association established for community service purposes, or (but not argued at trial) a public educational institution. The ATO disagreed.

VWL's constitution had a nonprofit distribution constraint and appropriate tax exempt winding up clause. Its constitutional objects were:

OBJECTS

3.1 The general objects of the Association are:

- (a) to provide a common meeting ground for women lawyers;
- (b) to foster the continuing education and development of women lawyers in all matters of legal interest;
- (c) to encourage and provide for the entry of women into the legal profession and their advancement within the legal profession;
- (d) to work towards the reform of the law;
- (e) to participate as a body in matters of interest to the legal profession;
- (f) to promote the understanding and support of women's legal and human rights; and
- (g) such other objects as the Association may in General Meeting decide.

3.2 The Association also adopts and endorses the following purposes of the Australian Women Lawyers Association of which the Association shall seek to become a Recognised Organisation:

- (a) achieve justice and equality for all women;
- (b) further understanding of and support for the legal rights of all women;
- (c) identify, highlight and eradicate discrimination against women in law and in the legal system;
- (d) advance equality for women in the legal profession;
- (e) create and enhance awareness of women's contribution to the practice and development of the law; and
- (f) provide a professional and social network for women lawyers.

The court found after substantial discussion that the activities of VWL were broadly in accordance with its objects set out above. The Commissioner questioned whether the activities of VWL were of 'benefit' or 'service' in relation to the association's concerns with gender-based discrimination and the need to take positive steps to overcome it. After examining the legislation in the various States and International Conventions that Australia was party to, the court decided that advancement of women on an equal basis with men was of benefit and service to the community.

The Commissioner's objection to the 'law reform' objects of the VWL constitution were dismissed, as it was not a significant element of VWL's purposes. A further contention was that either the association was for the advancement of VWL's members directly, and only indirectly for women lawyers as a whole, or a social / networking group. The court found that the principal purpose of the VWL 'was to remove barriers and increase opportunities for participation by and advancement of women in the legal profession in Victoria' (para 147), and that any other activities were only incidental or ancillary. Thus, VWL was a charitable institution for the purposes of the *Income Tax Assessment Act 1997* (Cth).

Although it was then not necessary to decide whether VWL was a community service organisation, the court made the following observation which suggests there might have been some difficulty with VWL falling within this exemption as:

'The concept of "community service" does seem to import the notion of the delivery of some practical "help, benefit or advantage" in the sense used by Jessup J. That criterion is not necessarily met by an organisation whose purpose is to change

practices and attitudes in such a way as to facilitate the entry and advancement of women within the profession generally.' (para 163)

This case may be viewed at: <http://www.austlii.edu.au/au/cases/cth/FCA/2008/983.html>

2.1.4a Implications of this case

This case is marked by having an organisation with clear and well written constitutional objects with an eye to charitable status and well-supported evidence of the organisation's activities. The VWL was able to demonstrate that any 'social or professional' activities or 'political advocacy' were incidental or ancillary to the main charitable purpose clearly expressed in the constitutional objects.

It also marks the growing line of cases (*Royal North Shore Hospital of Sydney v Attorney-General (NSW)* (1938) 60 CLR 396; *Public Trustee v Attorney-General* (1997) 42 NSWLR 600; and *National Council of Women of Tasmania v Federal Commissioner of Taxation* (1998) 38 ATR 1174); *AID/WATCH Incorporated v Commissioner of Taxation* [2008] AATA 662 (under appeal) about the charitable political purposes limitation which indicates the contemporary judicial boundary in this area. The boundary appears to extend further than the ATO is willing to accept.

2.1.5 AID/WATCH Incorporated v Commissioner of Taxation [2008] AATA 652 (Administrative Appeals Tribunal of Australia, 28 July 2008)

NB: On 29 August 2008, the ATO announced that it is appealing this decision. The ATO will continue to apply its long held view of what is a charity, consistent with Taxation Ruling TR 2005/21 (Income tax and fringe benefits tax: charities), pending the outcome of the appeal.

AID/WATCH is an incorporated association which researches, monitors and campaigns about the delivery of overseas aid. It sought exemption from income tax as a charitable institution pursuant to s 50-5 *Income Tax Assessment Act 1997*. The objection of the Commissioner was that first it was an institution which did not itself distribute aid and thus was not charitable and second, it achieved its objects through campaigning which amounted to a political purpose.

The constitutional objectives of AID/WATCH are as follows:

2. Objectives

AID/WATCH monitors, researches, campaigns and undertakes activities on the environmental impact of Australian and multinational aid and investment programs, projects and policies.

The main objectives of the Association are to seek to ensure that:

- Aid projects and development programs and projects are designed to protect the environment and associated human rights of local communities in countries that receive Australian aid.
- There is increased aid funding for environment programs with specific attention to renewable energy, end-use efficiency and energy conservation, small scale irrigation schemes and sustainable agriculture, land rehabilitation programs, waste management, and protection of biodiversity.
- There are complete environmental impact assessment (sic) according to the highest standards for all projects, incorporating meaningful public/community participation.
- Aid and development projects and programs incorporate the principles of ecologically sustainable development.
- There is respect for the rights of indigenous people and a recognition of their expertise in ecological management.
- Aid agencies, development banks and export credit agencies conduct full and regular consultations with community organisations, regarding the identification, planning, implementation, *monitoring and evaluation of* projects.
- There is accountability and transparency in the Australian aid and export credit programs including freedom of information on all aspects of projects and programs of development agencies and multilateral development banks.
- There is greater recognition of women's needs and greater involvement of women on development projects, and greater gender equity at all levels of the development process, including in consultancy firms contracted to implement aid programs and projects.
- There is a halt to structural adjustment programs that contribute to environmental degradation and dislocate or damage the poorest populations.
- There is an increased proportion of appropriate professional staff in Australia's official overseas development agency (currently AusAID), official Export Credit Agency (currently EFIC) and multilateral development agencies and consultancy firms contracted for aid programs and projects and the development banks.
- There is increased funding of development education activities within Australia and an increased public awareness of the environmental and social impact of the Australian Overseas Development Assistance Program and related private investment, including input into environmental and developmental studies.

- There is a public fund to which gifts of money or property are to be made which will be used only to support AID/WATCH's key purposes. This fund will be named the AID/WATCH fund.

The tribunal found that there was evidence that the activities of AID/WATCH were in accord with its formal objectives. However, the activities were characterised as "at the edges of appropriate conduct", but not "so extreme that it loses its charitable quality" (para 35). The Tribunal considered that the objects came within the first head of charity being the relief of poverty, even though no direct aid was given. Further the body could also fall under the education head of charity and the fourth head in promoting the most advantageous delivery of aid.

After examining some of the leading cases on charity and political purposes and noting that times have changed in respect of openness and accountability of government and that governments at all levels support the grant of overseas aid and protection of the environment, the tribunal found that AID/WATCH's objects and activities did not breach the political boundary. The tribunal concluded:

Because Aid/Watch does not have changes to the law as a main object it is not disqualified from charitable status by direct application of the principles enunciated in the Secular Society or National Anti-Vivisection Society cases. It may be disqualified if its objects and activities, although not overtly political, still place undue emphasis on attempts to influence government, particularly with respect to priorities and methods. The argument against charitable status may be enhanced because of its activist approaches and confrontational methods. However, I consider that Aid/Watch's objectives and activities, as I have found them to be, fall short of disqualifying it from being a charity. (para 49)

The tribunal concluded that Aid/Watch was a charitable institution.

This case may be viewed at: <http://www.austlii.edu.au/au/cases/cth/AATA/2008/652.html>

2.1.5a Implications of this case

This case should be used with caution until the appeal process is concluded. The tribunal has placed the boundary between charity and political activity quite differently from where the ATO believes that it is situated. Further, the finding that the charitable head of 'relief of poverty' does not necessarily have to involve direct provision of relief to those in need appears to allow more room for 'advocacy' organisations to fall within the charity definition.

2.1.6 Australian Tea Tree Oil Research Institute Ltd (in liq) v Commissioner of Taxation [2008] FCA 1653 (Federal Court of Australia, 14 November 2008)

This dispute arose in 2004 between the Commissioner of Taxation (the Commissioner) and two companies limited by guarantee, the Australian Tea Tree Oil Research Institute Limited (in liquidation) (ATTORI) and the Australian Agriculture Research Institute Limited (in liquidation) (AARI). It related to non-payment of income tax by both companies for the 1997-1999 financial years and, in the case of ATTORI, for the 1996 tax year as well. For their part, the companies maintained they were tax-exempt since they were scientific institutions as described in section 23(e) of the *Income Tax Assessment Act 1936* (Cth) and sections 50-1 and 50-5 of the *Income Tax Assessment Act 1997* (Cth). The Commissioner argued that, because their focus was commercial gain rather than public benefit, such an exemption did not apply.

When the matter came before the Federal Court, both companies relied on their respective Memoranda of Association to establish their scientific research credentials, claiming this to be their underlying purpose. ATTORI concentrated on research into plant species, whereas AARI was established to further animal as well as plant research. In addition, they cited the requirement in the two memoranda that, upon dissolution, any assets be distributed to a like-minded body and not to company members, as evidence of their genuine commitment to a scientific research ideal.

In reply, the Commissioner critically analysed the actual activities of both companies. Upon examination of ATTORI's business affairs, it was obvious that its incorporation was closely linked to being hired to carry out circumscribed tea tree oil research as set out in the Personal Syndicate Deed for Budplan Personal Syndicate, an enterprise whose sole aim, under the management of Business and Research Management Pty Limited (in liquidation) (BARM), was to turn a timely profit. Furthermore, the only source of the tea tree oil was to be the Main Camp Tea Tree Oil Group, five of whose directors were also directors of ATTORI. Any research results were to remain the intellectual property of the syndicate participants. In other situations where ATTORI out-sourced research, a confidentiality clause was included in the contract. There was little evidence of scientific papers being either presented or published.

By contrast, AARI through BARM as agent for two Budplan syndicates, conducted some highly successful table grape research which enjoyed international acclaim in the areas of disease resistant genetic engineering as well as the development of new grape varieties. Although scientific papers were published and delivered, the Commissioner pointed out that the confidentiality of the information was highly guarded and, apart from one conference held in 1999, the remainder were held outside the 1997-1999 time frame. Continuing on, he declared that both companies were formed not for pure scientific advancement, nor for altruistic purposes, but for commercial gain for BARM and those induced to invest. Once again, he commented on the involvement of common directors in AARI and BARM as well as in Mainstar One Funds Management Pty Ltd which owned BARM.

Justice Edmonds considered the Commissioner's submissions when he discussed the notion of a 'scientific institution' for tax exemption purposes, particularly the notion of 'institution'. He stated that mere consideration of a company's memorandum of understanding was not determinative of whether it was a scientific institution. All the surrounding circumstances had to be taken into account to ascertain if there was any public benefit. Since any public benefit here was purely secondary to maximizing the participants' financial gain, His Honour determined that ATTORI and AARI were business ventures designed to commercialise scientific research rather than vehicles created to promote scientific progress. Therefore, neither ATTORI nor AARI were scientific institutions under the relevant income tax statutes. As a consequence, the amount of research fee income needed to be assessed.

This case may be viewed at: <http://www.austlii.edu.au/au/cases/cth/FCA/2008/1653.html>

2.16a Implications of this case

This case demonstrates that mere correct 'form' of legal structures is not enough for taxation exemption. The court will also critically examine the actual activities and surrounding circumstances such as interlocking boards of directors and measurable outputs.

2.1.7 Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited [2008] HCA 55 (High Court of Australia, 3 December 2008)

This was a 4/1 (per Gummow, Hayne, Heydon and Crennan JJ) decision of the High Court of Australia which found that Word Investments Limited was entitled to be regarded as a 'charitable institution' under Australian income tax legislation. Kirby J found for the Commissioner of Taxation and decided that Word was not entitled to be regarded as a charitable institution.

Word Investments Ltd (Word), a nonprofit company limited by guarantee, was founded by members closely associated with Wycliffe Bible Translators International, which had an Australian arm, Wycliffe Bible Translators Australia (Wycliffe). Wycliffe was a religious charity which wanted to use Word to raise money within Australia and give it to Wycliffe for the carrying out of its purposes, which, at least to some degree, were fulfilled overseas.

From about 1986 Word began to accept deposits from members of the public. The depositors received little or no interest from Word, but Word invested the money at commercial rates of interest. In the period 1996-2002, Word operated a business of conducting funerals, not all for Christians, for profit. The profits generated from the investment business and the funeral business were used to support Christian activities in the form of Bible translation and missionary work largely carried out by Wycliffe and other bodies to whom the non-retained profits were given.

Word applied to the Commissioner for endorsement as exempt from income tax. The Commissioner refused that application by letter of 2 May 2001. The letter said:

'Commercial enterprise entities are not considered to be charities. This is the case irrespective of whether charitable consequences flow from the entity's activities.'

The **first issue** posed by the Commissioner was whether Word is prevented from being a 'charitable institution' by reason of the fact that its objects are not confined to charitable purposes.

The majority found that Word's company constitutional objectives, although containing 'powers', were still charitable, being those of advancing religious charitable purposes. Both the intention at the time Word was formed and its activities since indicated that it was charitable. The Court noted that this test had to be applied and assessed for each income tax year.

The **second issue** posed by the Commissioner was whether:

'an entity, which does not itself engage in any significant charitable activities but, rather, is established to conduct, and conducts, an investment, trading or other commercial activity for profit (albeit not for distribution to its members) is a charitable institution because it was established for the purpose of distributing, and distributes, its profits, wholly or mainly to charitable institutions.'

The court endorsed the decision in *Inland Revenue Commissioners v Helen Slater Charitable Trust Ltd* [1982] Ch 49 at 52:

'The Crown's wide submission that money subject to charitable trusts is not 'applied for charitable purposes' unless actually expended in the field, is revolutionary, unworkable and unacceptable in practice. There are innumerable charities, both large and small, in this country which operate on the basis of raising funds and choosing other suitable charitable bodies to donate those funds to. ... If the Crown's wide argument is correct, many charitable bodies would be losing a recognised entitlement to tax relief and may, moreover, cease to be regarded as charitable.'

The majority specifically stated that 'it is likely that the position in Australia is similar'.

The **third issue** was whether Word was prevented from being a 'charitable institution' by reason of the fact that the institutions to which it gave its profits 'were not confined as to the use to which they may put the funds distributed to them'.

The majority decided that the evidence did not support this conclusion. The best interpretation that could be put on the issue was that 'Wycliffe was at liberty to select any method it chose for the purpose of effectuating translations of the Christian Scriptures' and this was not sufficient to imperil its charitable status.

The **fourth issue** posed by the Commissioner was whether Word was prevented from being a 'charitable institution' which is entitled to be endorsed as exempt from income tax on the ground that it does not comply with s 50-50(a) of the *Income Tax Assessment Act 1997* (Cth) in that it cannot be said that it 'has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia.'

The majority decided after an exhaustive examination of the statute and explanatory material described as 'intractable language' that:

'The Commissioner's contention that the revenue authorities would have great difficulty in monitoring the use of funds generated by a body in Australia and given to another body active overseas is exaggerated.'

This case may be viewed at:

<http://www.austlii.edu.au/au/cases/cth/HCA/2008/55.html>

2.1.7a Implications of this case

This case was taken by the Australian Taxation Office (ATO) as a test case and has important implications for nonprofit organisations. The decision by the High Court means that large parts of the two public rulings on charitable institutions are clearly not good statements of the law (Public rulings TR2005/21 "Income Tax and Fringe Benefits Tax: charities" and TR2005/22, "Income tax: companies controlled by exempt entities", available via <http://www.ato.gov.au/taxprofessionals/pathway.asp?pc=001/001/021>)

At the time of writing the ATO and Treasury were still considering the implications of the decision and whether legislative amendments might be appropriate.

For organisations considering 'new' fundraising activities, the risk of legislative intervention should be taken into account. Whether the principles of the judgement extend to nonprofit organisations other than charities (e.g. sporting and certain tax exempt trade associations) is yet to be seen. There are several passages in the judgement which indicate that a decision could be different if bold 'tax abuse' was involved.

2.1.8 Social Ventures Australia Limited v Chief Commissioner of State Revenue [2008] NSWADT 331 (New South Wales Administrative Decisions Tribunal, 12 December 2008)

Social Ventures Australia Limited (SVA) is a company limited by guarantee with public charities as its founding members. The constitution of the company restricted it to pursuing charitable purposes only and applying its income to those purposes. The main constitutional object was 'to improve the management of operational performance and to enhance the long term financial viability of charitable organisations by, without limitation, providing educational, mentoring and support services to charitable organisations.' In 2008 SVA was assisting 15 charitable organisations and had received \$6.15 million in donations in the year ending 30 June 2007.

At the time SVA was a Deductible Gift Recipient (DGR), income tax exempt and Fringe Benefit Tax (FBT) exempt. It also applied for exemption from payroll tax in New South Wales pursuant to Clause 12 of Schedule 2 to the *Payroll Tax Act 2007* (NSW).¹ Payroll tax exempt wages included wages paid by a nonprofit organisation having as one of its objects a 'charitable, benevolent, philanthropic purpose'.

SVA argued that it had charitable purposes under the *Payroll Tax Act*. It made various submissions as to why this was so, including reference to the *Word Investments* decision (see Case 2.1.1 above). The Payroll Commissioner argued that SVA activities were 'indirect and focused on promoting the wellbeing of the community generally, thus not qualifying as a charitable activity'.

It was found that SVA was charitable under the fourth head of charity, 'trusts for other purposes beneficial to the community, not falling under any of the preceding heads.' The activity of assisting 'public charities' by way of management, education, advice and funding was found to be charitable. The tribunal relied on a number of recent cases such as *FCT v The Triton Foundation* [2005] ATC 4715, *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] ATC 44219 and *Ziliani v Sydney City Council* [1985] 56 LGRA58, which have a broader view of charitable activities. In a postscript it also mentioned the *Word Investment* decision of the High Court. The tribunal distinguished cases which were more narrow in their view of the law including the *ACOSS* case (85 ATC 4235) and the *Glebe Administration Board Case* ([1987] 10 NSWLR 352) which could have resulted in a different decision.

The judgment noted at several places that the bodies that SVA assisted were all 'public charities' and that it did not carry out any 'commercial activities' and no private individuals or enterprises were beneficiaries. If there had been non-charitable organisations amongst its clients, then this issue would have had to be considered further.

This case may be viewed at:

<http://www.lawlink.nsw.gov.au/adtjudgments/2008nswadt.nsf/f1a6baff573a075dca256862002912ec/d7af528f3c8c46f2ca25751c00054876?OpenDocument>

2.1.8a Implications of this case

This case is the first to endorse the *Word Investments* decision (see Case note 2.1.1) and it adds to a line of authority well-recognised in the English jurisdiction that assisting charities as an intermediary organisation is in itself charitable under the fourth head of *Pemsel*. A different result may occur where the objects of charity are themselves not charitable. It also remains to be resolved how direct the assistance needs to be. In this case actual funding and individual provision of various consulting services were clearly sufficient, but less direct assistance or services may be more difficult. For example, advocating for political and policy change to benefit nonprofit organisations or the clients whom they represent or provide services to, and

¹ This provision retained exemptions for organisations which were exempt under the 1971 *Pay-roll Tax Act* immediately prior to its repeal. The equivalent for the 2007 Act is section 48 which has operated from 1 July 2007 and is in a different form.

providing insurance, banking and financial services to nonprofit organisations may not be considered direct assistance.

2.2 *Insolvency and winding up*

2.2.1 *Re Bankstown Community Child Care Incorporated [2008] NSWSC 173 (Supreme Court of New South Wales, 5 March 2008)*

Mr. Morgan Lane was appointed by the Court on 19th June, 2006, as liquidator of Bankstown Community Child Care Incorporated (the Bankstown Association) under the relevant section, section 51(1)(j), of the *Associations Incorporation Act 1984* (NSW).

The liquidation was carried out in accordance with the requirements of Part 5.7 of the *Corporations Act 2001* (Cth). After the creditors were repaid in full, a surplus of \$600,000 remained. Therefore, Mr. Lane approached the New South Wales Supreme Court under section 53(3) of the *Associations Incorporation Act 1984* (NSW) for direction as to how the surplus should be distributed.

Such a step was necessary because of the impossibility of undertaking the process outlined in section 53(2) of that Act that any surplus be allocated by a special resolution of the Bankstown Association. Rule 4 of the Association made it clear that, once a person's child or children stopped attending the centre, that person was no longer a member of the Association. Since the Association itself had folded, there were no Association members as defined in the Act to pass a resolution of any kind.

Fortunately, section 53(3) of the *Associations Incorporation Act 1984* (NSW) allows 'a person aggrieved by the operation of this section' to apply to the court for guidance in distributing the surplus. In the absence of Association members, Mr. Lane was clearly a aggrieved person who had a duty to the court to ensure that any surplus funds were shared out in a legally acceptable manner.

Mr. Lane's suggestion was that the surplus funds be apportioned equally between the Bankstown Community Resources Group Incorporated (the BCRG) and Milperra Community & Children's Services Limited (MCCS). Both of these organizations provided local community services for children and, under both their constitutions, members were disqualified from receiving any property distribution. The BCRG and MCCS embraced the proposal.

Justice Barrett approved the proposed distribution on the basis that they were involved in similar activities to the now defunct Bankstown Association with a non-profit orientation.

This case may be viewed at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/173.html

2.2.1a *Implications of this case*

The full ramifications of liquidation cannot always be foreseen, particularly where there are particular rules of an association to be taken into account. In this case, the liquidator correctly applied to the Court for assistance in implementing the proposed scheme of distribution. The distribution to like-minded associations was typical of outcomes in these situations, but could have been provided for in the constitution and rules of the defunct association.

2.2.2 Hillig v Darkinjung Pty Ltd & Ors [2008] NSWSC 75 (Court of Appeal of New South Wales, 29 April 2008)

The Darkinjung Local Aboriginal Land Council (DLALC) owned valuable waterfront land in New South Wales which it contracted to sell to Mirvac Projects Pty Ltd for \$42 million, to be paid in stages. The contract date was 24 September 2002. DLALC set up a trust to receive the proceeds of the sale. The trustee was Darkinjung Pty Ltd (DPL) set up on 9 March 2004. The trust was purportedly a charitable trust established on very broadly expressed terms which mirrored the structure and powers of the DLALC. DLALC was the sole shareholder in DPL. At the same time, DLALC set up so-called 'enterprise companies' to be financed by proceeds from the trust, and established to be of benefit to DLALC.

On 2 May 2006, the minister for Aboriginal Affairs appointed the appellant, Peter Hillig (H), as administrator of DLALC 'with all the functions of' the DLALC. On 19 May, H applied to the Supreme Court of New South Wales for *ex parte* orders because of his concern that the assets of DLALC were being stripped. H sought to be appointed as receiver of the property of DPL. Alternatively, he sought orders restraining the directors of DPL from dealing with the assets of DPL, or orders appointing a provisional liquidator to DPL. These applications were refused, with an order that the action be returned before the primary judge on 23 May 2006.

On 22 May, H took a number of steps to gain effective control of DPL. These were referred to as 'the resolutions' by the primary judge and their effect was to remove the directors of DPL, and replace them with H as sole director and secretary. This resulted in three applications before the primary judge on 6 June 2006.

In the first, H sought to challenge the retainer of DPL's solicitor because of alleged conflict of interest. This application was not dealt with by the primary judge because he did not believe it was ready for determination, and because he thought that the form of the application was inappropriate for raising allegations of conflict of interest.

The second application was from the directors of DPL. It was for declaratory and injunctive relief in relation to the governance of DPL and for interlocutory relief to restrain H from purporting to hold himself out as the sole director of DPL. A declaration was also sought that H was not and had never been a director of DPL, and that the resolutions taken by him were invalid and of no effect.

The third application was by H seeking a declaration that he was the sole director of DPL.

On 19 June 2006, the primary judge, Austin J, held that the resolutions were invalid and of no effect because the *Aboriginal Land Rights Act 1983* (NSW) (the ALR Act) and provisos to clauses of DPL's constitution required a resolution of 66% of DLALC's members to approve such resolutions (see *Hillig v Darkinjung Pty Ltd* [2006] NSWSC 594).

At the time of this appeal, some \$25 million of the sale price of the land had been received and mostly transferred from DLALC to DPL. DPL had transferred the bulk of those funds to related companies. It had been declared by Barrett J in separate proceedings (*Darkinjung Pty Ltd v Darkinjung Local Aboriginal Council & Ors; Hillig v Darkinjung Pty Ltd & Ors; Darkinjung Local Aboriginal Council v Warner & Ors* [2006] NSWSC 1008) that these moneys were held on trust for DLALC by DPL. On 12 December 2006, Barrett J ordered that DPL be wound up on the application of DLALC pursuant to section 461(a) of the *Corporations Act 2001* (Cth) and appointed a liquidator.

Given the appointment of a liquidator, it would be possible to argue that this appeal was moot, since the appointment of a liquidator superseded all powers and functions of the directors of DPL, whoever they may be. However, the appeal court considered whether the appeal was necessary by having regard to the provisions of the ALR Act. The ALR Act was amended on 4 December 2006, but the reasons in the appeal were based on the ALR Act as it was when considered by the primary judge.

Local Aboriginal Land Councils (LALC) in New South Wales are bodies corporate pursuant to section 50 of the ALR Act. The members of each Council are the adult aboriginal persons listed on the LALC roll for the area: section 53. Members have voting rights for only one LALC of which they are a member: section 55. Each LALC had a Chairperson, a Secretary and a Treasurer, who were the officers of the Council: sections 4, 61. Section 222 provided for the appointment of an administrator. During the period of his or her appointment the administrator had all the functions of the Council, to the exclusion of the Council: section 222(4). On the appointment of an administrator, the officers were removed from office and fresh elections were to be held for the positions: section 226(1).

Also taken into account was the constitution of DPL which required five directors at clause 6.1(a). However, resolutions could be passed by the single member (i.e. DLALC) of the company under clause 5.10. Directors could be removed under clause 6.1(e) and (f), and their number could be reduced under clause 6.1(d). Amendment of the company Constitution was allowed for in clause 14.4 which required that the DLALC, as sole shareholder, had to pass the necessary resolution by a majority of 66% of the members present and voting.

In the winding up proceedings, Barrett J had held that the trust set up by the DLALC was a charitable trust, in the sense that at least part of its sole purpose was charitable. The lending of moneys by DPL as trustee to the enterprise companies was not for a charitable purpose or permissible under the trust deed. The DLALC was a statutory corporation and had only those powers permitted by the enabling statute. The setting up of the trust and of DPL as trustee was not in contravention of the ALR Act. However, the payment of moneys to DPL was beyond DLALC's powers, and an impermissible abandonment of its statutory duties and responsibilities with respect to a large part of its property.

DPL was wound up under section 461(a) of *the Corporations Act 2001* (Cth). This allows winding up in situations where a resolution has been passed by the company to wind up the company. The company is not insolvent in such a situation. In this case, the 'resolution' appears to have been passed by the appellant, H, in the exercise of his DLALC functions, and under DLALC's power as sole member of DPL.

The main issue under appeal was the status of those resolutions taken by H. Local land councils in New South Wales are single organ bodies, i.e. they have only one decision-making body, being the members assembled at a meeting convened in accordance with the ALR Act – there is no board. H, being appointed as administrator, took over all the decision-making powers of the single organ. The members of the DLALC had no residual function after that appointment (note: this model has been changed in the 2006 amendments, which provide for a board structure).

The appeal court pointed out that, although corporations have a separate legal personality apart from their members in general, this was not the model adopted by the ALR Act, because of the single organ organisation. Since the DLALC had only one decision-making body, the appointment of the administrator conferred all its powers on the administrator, including that of making all decisions in lieu of the members, subject to section 230. However, the function H sought to exercise by passing the resolutions was not caught by section 230. The resolutions were valid and effective.

The appeal was therefore allowed, and the primary judge's orders and declarations set aside. However, there was no need to make the declarations sought by H because DPL had been wound up, and the relief sought by H no longer related to a 'real question'.

The case may be viewed at: <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2008/75.html>

2.2.2a Implications of this case

This case illustrates the effect of appointment of an administrator when a company is dysfunctional. It also illustrates the absolute power of a liquidator, if appointed subsequently to an administration. The actions of the administrator in this situation were ultimately held to be the correct ones, since the duty of an administrator, and even more so a liquidator, is to

preserve the assets of the company. Directors need to be aware of their duties and responsibilities in the event of an administration or a liquidation. Directors cannot be obstructive but must render all assistance necessary for the administrator to do his or her work. Of course, in the case of a liquidation, directors effectively lose all their powers, and have no say in the winding up of the company, while still having to be cooperative in all matters requested by the liquidator.

2.2.3 In the matter of Austinmer Bowling Club Ltd (in liq); Russell v Rodden [2008] NSWSC 730 (Supreme Court of New South Wales, 17 July 2008)

On the 22 October 2007, Austinmer Bowling Club Ltd (the Club), a company limited by guarantee, was placed under the voluntary administration of Mr. Gregory Russell as administrator. Membership by then had fallen from 553 members at the end of the financial year (31 May 2007) to 384. Of this 384, 6 were Life Members, 52 were Bowling Members and 326 were Social Members. After Mr. Russell's efforts to effect an amalgamation with another club failed, liquidation became the only option. Appointed liquidator on the 11 December 2007, he was aware there would be a surplus of approximately \$850,000 after he realized the Club's assets and met the Club's financial commitments, including his fees. A letter setting out possible options for distributing the surplus was circulated to all members on the 6 February 2008. One of these involved a proposal by Mr. Ian Rodden and others to set up a sports trust to support bowls along with other local sporting activities. Eventually, on 23 April 2008, advice was sought from the Court as to how this surplus should be distributed. More particularly, there was concern as to the procedure to be adopted and whether the Social Members, who were clearly in the majority, should be permitted to be included in the decision-making procedure.

First, Justice Austin consulted clause 6 of the memorandum of association of the Club, the clause which dealt with the distribution of any surplus in the event of the Club's winding up or dissolution. He decided that, since the memorandum of association failed to explain the term, the reference to 'members' in the last sentence of the clause should be interpreted to mean all the members of the Club in the sense set down in section 231 of the *Corporations Act 2001* (Cth). However, he was unwilling to accept the view of counsel for Mr. Rodden, representing the Social Members of the Club, that the clause conferred on every member of the Club the right to be involved in the distribution of any surplus. Justice Austin was similarly unimpressed with Mr. Rodden's counsel's attempts to draw on the *Registered Clubs Act 1976* (NSW) to prove Social Members could be regarded as Full Members with voting entitlements.

To clarify the procedural matters, His Honour felt justified in examining the articles of association because the Club's memorandum of association provided no guidance as to how the distribution was to be effected. Counsel for Mr. Rodden once again objected on the grounds that the articles of association related only to meetings which the Social Members were not permitted to attend. Justice Austin did not view their exclusion as unfair since the sporting members contributed more financially to the Club. It was clear that any decision about a surplus had to be taken at a meeting of members. As stated in article 1, Full Members encompassed both Ordinary Members and Life Members. Article 5 defined Ordinary Members as Bowling Members, Social Members and Junior Members. According to article 6, only the first of these groups was eligible to attend Club meetings and vote. Article 7 also permitted a Life Member to enjoy these privileges, a fact which Article 20(a) reiterated.

Therefore, Justice Austin was willing to allow the declaratory relief sought by Mr. Russell. Any decision regarding the distribution of the anticipated surplus had to be taken at a meeting arranged and managed to reflect the Club's Articles of Association. Only Bowling Members and Life Members had the right to attend the meeting as well as to vote. His Honour deferred a decision on exactly how any surplus should be distributed. He also requested further written submissions to determine whether binding declarations of the various members' rights could be made.

This case may be viewed at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/730.html

2.2.3a Implications of this case

This case points to the issue of having a well drawn constitution, and that office bearers and members are bound to follow that constitution. The court can be accessed (at expense) to settle the meaning of disputed clauses. Some relief can sometimes be given through a clause which allows the board to make binding statements on the meaning of disputed clauses.

However, where liquidations are involved, they will seek the view of the court to put matters beyond doubt and usually be paid out of any surplus funds of the company.

2.2.4 Goodin, in the matter of the Grand United Order of Free Gardeners Friendly Society Ltd (in Liq) [2008] FCA 1537 (Federal Court of Australia, 17 October 2008)

The Grand United Order of Free Gardeners Friendly Society Ltd (in liq) (the Society), a company limited by guarantee, was voluntarily wound up on the resolution of its members. After paying all known debts, the liquidator had \$124,350 that he was unable to distribute. The Society had maintained a funeral fund under which \$5,500 was payable on the death of a member, and \$2,750 on the death of a spouse, widow or widower of a member.

However, the Society had lost contact with some of its members and despite extensive searches and advertisements by the liquidator, 16 members still could not be found. The Australian Prudential Regulation Authority advised that a provision for the remaining \$118,250 should be made in the Society's accounts for 'untraceable members' funeral entitlements', in relation to those 16 members.

The Court noted that it was impossible to know whether any untraceable member had died before the transfer date (the date at which the Society came under the jurisdiction of the *Corporations Act 2001* (Cth)) and hence it could not be said that there was an actual obligation to pay any part of the fund to any member. This affected the way the money should be dealt with under the legislation.

The Society had operated under the authority of the *Life Insurance Act 1995* (Cth) and later subject to Schedule 4 of the *Corporations Act 2001* (Cth), but the provisions did not apply to the present circumstances as the 'claimant' did not have a present entitlement to the money.

As neither Schedule 4 of the *Corporations Act 2001* (Cth) nor section 216 of the *Life Insurance Act 1995* (Cth) applied to the fund held by the liquidator, the only provision that dealt with the fund was section 544(1) of the *Corporations Act 2001* (Cth). That applied because the liquidator had in his hands an 'unclaimed or undistributed amount of money'. According to the section the liquidator was required to pay the fund to the Australian Securities and Investments Commission (ASIC) to be dealt with under Pt 9.7 of the *Corporations Act 2001* (Cth).

This case may be viewed at: <http://www.austlii.edu.au/au/cases/cth/FCA/2008/1537.html>

2.2.4a Implications of this case

Distributions of surplus can often be problematical for a liquidator, especially in the absence of clearly drawn constitutional clauses on the matter. This case was slightly different in that the distribution could not really be made in a physical sense. Part 9.7 of the *Corporations Act 2001* (Cth) deals with unclaimed property. The money is paid by ASIC in the first instance to the Companies and Unclaimed Monies Special Account, an account of Consolidated Revenue, on behalf of the Commonwealth. After six years, any amount still unclaimed is debited from that account and subsumed into the general revenue.

2.2.5 Commissioner of Taxation v Bruton Holdings Pty Limited (in liq) [2008] FCAFC 184 (Federal Court of Australia (Full Court), 1 December 2008)

Bruton (B) was incorporated on 27 May 1997 as a trustee of the Bruton Educational Trust (the Trust). It had an amount of money settled on it by, Mr Michael Aitken (the settlor). The deed of settlement stated that the settlor was establishing the trust to facilitate the promotion, advancement and encouragement of purposes which were charitable within the meaning of the law of Australia. B derived substantial income from three business ventures, but its sole director, Mr Neil Scott, took no active part in those ventures.

Since 1 July 2000 a charity could only qualify for beneficial tax treatment if endorsed as an income tax exempt charity by the Commissioner of Taxation (CT). B had applied to have its charitable status confirmed prior to 1 July 2000, but was told that this was not possible. During a tax audit in 2004, Mr Scott became aware of the need for endorsement, and applied for it. The application was unsuccessful. B appealed to the Federal Court, and the matter (the endorsement appeal) was to be heard in 2007. Before that, on 28 February 2007, B went into voluntary administration, primarily because of the possibility of a substantial tax debt arising. It was common ground that at this date B ceased to be a trustee of the charitable trust. No other trustee was appointed. On 30 April 2007, B went into liquidation.

On 26 March 2007, the CT issued a notice of assessment for tax of \$7,715,873.73 (the tax debt) to the trustee of the Bruton Educational Trust. In the event of the liquidation, the CT had lodged proof of debt in the same amount. B's solicitors, Piper Alderman (Piper), the second respondent in this appeal, had issued a lien over moneys paid to them by B for professional services, which amounted to more than \$470,000. Shortly thereafter, Piper had been issued three notices for an assessment of tax, as a third party owing money to B. The tax assessed was \$447,420.20. The court below considered only the first of these three notices as correctly addressed to B. The other notices issued to Piper were found to be void.

At first instance, the CT was unsuccessful and had to pay costs. This is an appeal from that decision. At the time of this hearing, Piper and the CT had compromised the issue arising from the conflict between Piper's lien and the claimed tax moneys owing by Piper as a third party.

A trustee is personally liable for any debts incurred in the course of business. However, a trustee is generally entitled to indemnity out of the assets of the trust for debts incurred in the course of performing its duties as trustee. A trustee has a lien over the trust assets for this indemnity: *Octavo Investments v Knight* (1979) 144 CLR 360; *Chief Commissioner of Stamp Duties for New South Wales v Buckle* (1998) 192 CLR 226.

The Full Court stated that the case primarily turned on the respective rights of the CT and the liquidators to apply trust assets in paying B's tax liability or the liquidators' costs, expenses and remuneration. There are conflicting authorities on the ability of liquidators to claim costs, expenses and remuneration from trust assets. However, in this case the liquidators were winding up a former trustee, not a 'serving' trustee. This is because B ceased to be a trustee when it went into voluntary administration. As such, the liquidators could not claim to have been performing B's duties as a trustee in the course of the winding up.

In its current circumstances, B can only be, at best, a bare trustee, with its duties and powers and rights limited to protecting the trust assets. The liquidators can claim no greater duties, powers and rights than those of B. The liquidators can also claim B's right of indemnity. But this right is 'intimately connected to' the payment of all relevant debts of B. This includes the tax debt, which the liquidators had resisted paying. Given the limited role of B, the liquidators' costs, expenses and remuneration could not all be attributable to its role as bare trustee. In particular, the liquidators pursued this litigation, while not paying the tax debt which would be a prerequisite to B's indemnity operating.

The court expressed the opinion that a new trustee should be appointed to resolve conflicting claims still outstanding, and possibly, in consultation with the liquidators, to pursue the endorsement appeal.

The appeal was allowed, with all orders of the court below being set aside.

This case may be viewed at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/184.html>

2.2.5a Implications of this case

The complex interactions between trust law and tax law can be difficult to unwind. Trustees normally lose their powers upon voluntary administration. When a company is in administration, the administrator has control of the company's 'business, property and affairs' (section 437A of the *Corporations Act 2001* (Cth)). The powers of all other officers are suspended (section 437C).

2.3 Nonprofit structure and governance

2.3.1 Islamic Assoc of Western Suburbs Sydney Inc v Dr H R K Survery [2008] NSWSC 77 (Supreme Court of New South Wales, 13 February 2008)

The Islamic Association of Western Suburbs Sydney Incorporated (the Association) was incorporated in 1991 under the *Associations Incorporation Act 1984* (NSW) (the Act). Although it fosters Islamic interests, its chief function involves running a mosque. It also owns land upon which the Australian Islamic College of Sydney operates an Islamic school. Issues relating to the Association's constitution have continued throughout its history. On 31 January 2008, the Association was ordered by the New South Wales Supreme Court to investigate whether rule 3(6) of the Constitution and Rules of the Association was inconsistent with any of the provisions of the Act and therefore invalid or, alternatively, void for uncertainty.

Within rule 3(6), the responsibilities of foundation members of the Association are addressed. According to rule 3(1), a foundation member is one who is 'a full member who participated in the first general meeting of the Association on 23 January 1983.' Provision was also made under rule 3(2)-(3) for full financial members and adult children of foundation members to be elected to the foundation members college.

The Association contended that the intention of rule 3(6) was to delegate power to the foundation members whereas the Act specified governance by committee. In addition, the Association maintained that the language of the rule was uncertain. No appropriate mechanisms were provided to achieve the aims outlined. These claims were disputed by the defendants who argued that governance could be shared, citing section 5(2) of the *Interpretation Act 1987* (NSW) as authority. They insisted too that there was no uncertainty evident in the rule itself.

When the matter came before Justice Hamilton in the New South Wales Supreme Court, he considered first whether the rule was void for uncertainty. On closer examination of rule 3(6)(a)-(c), he decided that the statements concerning the foundation members being responsible for 'the development of central projects, administrative and financial control and real estate management' were void for uncertainty. For example, how could the administrative and financial roles of the foundation members be reconciled with the committee members' mandate 'to control and manage the affairs of the Association' as set out in rule 12 of the Constitution and Rules of the Association?

Rule 3(6)(d) was challenged on the grounds that the expression, 'to appoint a trustee by majority vote' lacked clarity as well as any provision of the machinery for the execution of such a vote. However, his Honour interpreted the word, 'majority' to mean a majority of those foundation members present at the particular meeting where the vote was taken. Provided that 'majority' was defined, he foresaw no difficulty in applying the common law rules as to the relevant meeting procedure. Since there was no inconsistency, in his opinion, between the Act and the scope of rule 3(6)(d), the provision was valid.

In Justice Hamilton's view, conflict with the Act was at issue in rule 3(6)(e) which permitted the foundation members, soon after the annual general meeting, to remove the elected committee and substitute a caretaker who could then conceivably remain in office until the next annual general meeting. Section 3 of the Act in defining a committee envisages a 'body' governing the Association, not an individual. As a result of the inconsistency, he pronounced rule 3(6)(e) invalid without determining its certainty.

Therefore, only paragraph (d) of rule 3(6) was valid and had legal effect.

This case may be viewed at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/77.html

2.3.1a Implications of this case

This case again serves as a salient lesson to those associations which do not take care with their formal constitutions and further do not conduct their governance in accord with the relevant provisions of those constitutions. Difficulties are often created when the constitutional provisions seek to guard the power and influence of a 'special group' over the general meeting of members. Our corporate and association legal frameworks do not work easily with other than 'democratic governance' structures and specialist legal advice and adherence to it is necessary to avoid costly disputes and litigation in respect of these matters.

2.3.2 Grigor-Scott v Jones [2008] FCAFC 14 (Federal Court of Australia Full Court, 28 February 2008)

Mr Jones was the President of the Executive Council of Australian Jewry. There was no legal entity known as the 'Executive Council of Australian Jewry'; it was merely a body of persons, or an unincorporated association. The Bible Believers' Church was in a similar position with no legal form. A Bible Believers' Newsletter published on a website made some claims about the holocaust and Jewish people which were alleged to be unlawful under the *Racial Discrimination Act 1975* (Cth) (the RD Act).

A complaint about the Bible Believers' Newsletter was made to the Human Rights and Equal Opportunity Commission (HREOC) under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act). The letter of complaint was signed by Mr Jones, but the complainant was identified as the Executive Council of Australian Jewry. The complaint referred to the website of The Bible Believers' Church but did not nominate any entity as respondent.

HREOC attempted to conciliate the matter, during which it dealt with Mr Grigor-Scott of the Bible Believers' Church. Conciliation was unsuccessful resulting in dismissal of the complaint by the President. Under the HREOC Act, that meant the matter could be taken to the Federal Court, against "one or more of the original respondents". In his Notice of Termination letter to Mr Jones, the President named the matter as *Between Mr Jeremy Jones, and On behalf of the Executive Council of Australian Jewry, Complainant AND The Bible Believers' Church, Respondent*. This then is how it was brought to the Federal Court.

The application was served by leaving it with Mr Grigor-Scott. Subsequently Mr Jones was given leave to join Mr Grigor-Scott as respondent. At the hearing Mr Grigor-Scott submitted that the Church was not a justiciable body and said he did not seek to appear for it. There was evidence that he had responsibility for the content of the website. Subsequently an amended application was filed naming both the Church and Mr Grigor-Scott as respondents.

The primary judge found that Mr Jones had established his case for unlawful conduct under the RD Act.

An appeal was lodged in the Full Court of the Federal Court, naming the Bible Believers' Church and Anthony Grigor-Scott as appellants and Mr Jones as respondent. The Full Court subsequently ordered that Bible Believers' Church be removed as an appellant, since there is no legal entity of that name.

On the appeal, the Full Court initially considered the question of whether Mr Grigor-Scott was a respondent to the original complaint in the HREOC, since, if he was not, he could not have been a respondent to the application in the Court.

The Full Court found that Mr Grigor-Scott should not have been made a respondent to the proceedings in the Court – the original complaint to the HREOC was made in respect of the website; it was always treated as having been made against Bible Believers' Church and Mr Grigor-Scott was never a respondent to it. The result was that:

The proceeding has never been competent either against Bible Believers' Church or Mr Grigor-Scott. The proceeding must be dismissed as incompetent because Bible Believers' Church is not and never has been capable of being sued. There was no basis for the joinder of Mr Grigor-Scott as a respondent in the proceeding in the Federal Court. (para 89)

The status of Mr Jones was not discussed by the court, as the issue was not raised. An individual may bring a complaint of discrimination to the HREOC under the HREOC Act. However, Mr Jones did not name himself as complainant, but lodged it on behalf of the Executive Council of Australian Jewry which, as indicated above, is not a legal person.

This case may be viewed at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/14.html>

2.3.2a Implications of this case

Unincorporated associations or bodies of persons are not recognised as being able to sue or be sued. Individuals who are members of such a group may be sued, but not usually as a representative of the group without some legislative intervention. In some cases the rules of court or a particular statute will allow a representative action.

2.3.3 Christian Revival Crusade Inc v Milne (No 2) [2008] SADC 43 (District Court of South Australia, 18 April 2008)

The principal proceedings in this litigation had been dealt with on 27 November 2007. In those proceedings, the action by the plaintiff had been dismissed as incompetent. Third party proceedings were adjourned. This judgement deals with the third party proceedings.

The principal proceedings resulted in the following orders:

1. That the action of the plaintiff, Christian Revival Crusade Gawler (CRCG), be dismissed as incompetent.
2. That the public officer of the CRCG for the time being to be Neil Stuart Milne (a pastor of the defendant Church).
3. That in his capacity as public officer, Mr Milne be entitled to retain custody of the common seal of the CRCG and the certificate of title of the Hillier Road, Evanston property.
4. That the purported general meeting of the CRCG of 22 October 2006 was invalid.
5. That all resolutions passed at that meeting were invalid.

The matter came on for hearing on 18 January 2008 when the third party proceedings were adjourned again. Further orders were made on that day:

1. That the evidence of the principal proceedings was to stand as evidence in the third party proceedings.
2. That third parties Mr Streeter and Tracey Stevens were to deliver any keys to the church buildings remaining in their possession to the court by 4pm on 24 January 2008.

Keys were accordingly delivered, and the defendant Church, CRC Churches SA International Incorporated (CRCSA), gained possession of the church building and changed the locks. As at the date of this judgement, the CRCSA has not been able to gain access to the manse which is occupied by third party Tracey Stevens.

The defendant, CRCSA, drafted proposed orders for the consideration of the court in this proceeding. These included *inter alia*:

1. That the governing body of the CRCG be the advisory council appointed by the CRCSA state executive. This body was to oust the governing board of the CRCG until resolution of the impasse created by the resignation of the senior pastor and the CRCG board in December 2001 (effectively indefinitely).
2. That the advisory council and the state executive, in right of the CRCG, be entitled to sell the land of the CRCG, and apply the proceeds in a manner to be disclosed to the CRCG at an extraordinary general meeting.
3. That there are only two members of the CRCG, Mr Shane Streeter and Mr Terry Stevens, meaning that notice of the extraordinary general meeting need only be given to them.
4. That other purported members of the CRCG deliver up their keys within 7 days and that Tracey Stevens vacate the manse within 7 days.

The litigation turned on an attempt by the CRCSA to sell the land and buildings of the CRCG, which had effectively imploded into internecine strife. The property is owned and registered under the name CRCG, which as an incorporated association under the *Associations Incorporation Act 1985* (SA), section 25(1), has the power to deal with the property to the exclusion of all others. Therefore, the advisory council or state executive of the CRCSA had no power to deal with the property, despite their attempts to oust the CRCG board indefinitely.

The other matters raised by CRCSA in their requested draft orders in this proceeding were ones which should be dealt with internally by the CRCG, while ensuring that natural justice was observed. The Court was not able to determine matters such as membership of the Church Assembly, which was determined on religious criteria of a highly subjective nature,

including whether the member had been 'saved by grace through faith in the Lord Jesus Christ', had been 'baptised in water by immersion subsequent to a responsible and personal confession of faith in Christ' and who had accepted and supported 'the ministry and senior leadership of the Assembly': *Cameron v Hogan* (1934) 51 CLR 358; *Johnco Nominees Pty Ltd v Albury-Wodonga* [1977] 1 NSWLR 43 at 61. This was a matter beyond the jurisdiction of the court.

Matters relating to the tenancy of the manse by Tracey Stevens were within the exclusive jurisdiction of the Residential Tenancy Tribunal, and so the District Court lacked jurisdiction in that matter. In the alternative, if this was a real property matter, the CRCSA was not the registered proprietor, and thus had no standing for ejection proceedings under the *Real Property Act 1886* (SA).

Overall, the court found that the proposed orders of the CRCSA were 'misconceived in point of fact and inappropriate in point of principle'. The third party proceedings were dismissed, and costs were awarded against the CRCSA.

The principle in this case is that internal matters of an incorporated association should be dealt with internally, and are not matters to be resolved by the courts in expensive and protracted litigation. As His Honour said at [43]:

'It is quite obvious this long standing dispute has been wasteful of time and resources, unproductive in the sense that the impasse of several years duration has not yet been broken, and highly divisive. It is to be hoped the third parties and any prospective member recognise the tail cannot wag the dog indefinitely. For its part CRC Churches International South Australia Inc in general, and the Advisory Council in particular, should now fully realise decision making must come within the four walls of the CRC (Gawler) Constitution, as interpreted in this and the earlier judgment of the court. They should appreciate that whilst the tail remains, it can only be wagged by them...in a legal manner.'

This case may be viewed at: <http://www.austlii.edu.au/au/cases/sa/SADC/2008/43.html>

2.3.3a Implications of this case

This case is another example of internecine strife within an association resulting in prolonged and expensive litigation. Dispute resolution is important in any association, and should always be dealt with internally in the first instance, or by alternative dispute resolution methods if internal resolution is not possible. Pointless litigation wastes not only the court's time but can dissipate the entire assets of an association for little or no effect. In this case, clear lines of authority between and among the various branches of the church, with accompanying rules, would have assisted the resolution of the dispute.

2.3.4 Singh v Singh; Flora trading as Flora Constructions v Budget Demolition & Excavation Pty Ltd [2008] NSWSC 386 (Supreme Court of New South Wales, 1 May 2008)

The North Shore Sikh Association of Sydney Incorporated, whose gurdwara or temple is located at Turramurra, has two classes of members, ordinary members and trustees. Trustees are donor members who have supplied interest free loans of at least \$2,000 to the Association. From these trustees, the Board of Trustees, the governing body of the Association, is elected. Management of the affairs of the Association is entrusted to another body, the Executive Committee. Unfortunately, there was dissension within this religious community. As early as 2001, action was taken to discharge the Executive Committee of the Association as well as to admit a further 47 members. When the matter proceeded to court, consensus was reached that, from the nominations in hand, a Board of Trustees and an Executive Committee be elected in November 2001 to act as caretakers until an annual general meeting in March 2002.

Later, on 8 December 2002, a meeting ostensibly of the Board of Trustees, but including most of the Executive Committee, addressed the issue of the admission of the extra 47 members. It was agreed that the prospective members would be investigated further. Concerns were raised subsequently about financial irregularities associated with the admission of some of them. In February, 2003, a further meeting involving members of the Board of Trustees and many of the Executive Council failed to resolve the issue. Finally, it was decided to accept the disputed members at a meeting on 4 June, 2003.

However, when the matter was brought before Justice Barrett in the Supreme Court of New South Wales, he found that notice of this meeting was not given to the first plaintiff, Shaunjit Singh, a member of the Board of Trustees, despite assurances from the other five attendees that he was present at the meeting. Justice Barrett doubted the veracity of this evidence. Apart from his disquiet over whether the meeting was validly convened, his Honour stated that there was no prior recommendation by the Executive Committee that the 47 proposed members be admitted. Such a step was necessary under Article 7 of the Association's constitution. In the absence of such a recommendation, the Board of Trustees lacked the competency to admit the prospective members. Nevertheless, all 47 people had continued to behave as if they were members or trustees of the Association, as their situation warranted.

By 22 August 2003, Shaunjit Singh was the only member of the Board of Trustees. Model rule 20(5) states that a quorum comprises any three committee members whilst model rule 20(6) requires a quorum to carry out business at a committee meeting. Due to section 19(3) of the *Associations Incorporation Act 1984* (NSW), these rules apply to the Board of Trustees. Clearly, their application rendered Shaunjit Singh powerless. Matters worsened for the Association on 27 September 2003, when a general meeting was convened by Ex-President Harmit Pal Singh, supposedly relying on subrules (2) to (5) of model rule 25 for justification. None of the relevant criteria were addressed. His actions on the 29 August 2003, giving notice of the meeting were motivated by a requisition from three purported members of the already defunct Executive Committee, not duly appointed committee members as required. Thus, the general meeting was unable to carry out its normal functions as it was not validly convened.

Elections of members to the Board of Trustees and the Executive Committee were of no effect. Despite this, both groups continued to operate as normal. An extraordinary general meeting of the Association was called on 11 December 2004, by officials improperly elected in the preceding September, to discuss the proposed construction of a new building on the Turramurra site. Eventually, tenders were called. In April 2005, a joint meeting of the two groups approved the tender of Flora Constructions and work commenced. It was not until 31 October 2005, that legal proceedings were commenced for relief in the form of declarations that all the Association's actions since the September 2003, meeting were invalid, void and of no effect.

However, Justice Barrett was not willing to grant the declarations sought in respect of the Association's activities since 8 December 2002. This included not making a pronouncement

as to whether the 47 members had been rightfully admitted. Likewise, he refused to affirm the current 'office bearers' of the Board of Trustees and the Executive Committee as being validly appointed. His Honour also refused to award damages against some of the people associated with the unauthorized destruction of the Sikh Temple for the new building's construction. In explaining his decision, he cited the discretionary nature of declaratory relief, the plaintiffs' long delay in bringing the action and their acceptance of the irregular state of affairs.

Contemporaneously with seeking this declaratory relief, a cross-claim was launched by the Association for declarations concerning Shaunjit Singh's and the cross-defendants' lack of official status within the Association and injunctions to restrain their maintaining otherwise. In addition, \$61,200.59 was claimed from Shaunjit Singh along with the certificate of title to the Turramurra property. A demand was also made for all of the Association's books and records held by any of them. Justice Barrett granted the injunctive relief as well as the delivery up of the title and records. Instead of the money sought, he ordered that Shaunjit Singh account for any Association money held and transfer it to the Association.

The final matter dealt with by Justice Barrett involved determining whether there had been wrongful interference, particularly by Shaunjit Singh, with the contract signed between the Association and D. S. Flora, trading as Flora Constructions. His Honour found that, from 8 August 2005, D.S. Flora had entered into a contract with the Association and was entitled to assume the contract had been properly executed. Although Shaunjit Singh did not actually view the contract until the Association's lender, the Commonwealth Bank, corresponded with him on 26 September 2005, he was aware of its existence as, in April 2005, he had lodged complaints with the builder and the Master Builders Association. However, in Justice Barrett's opinion, Shaunjit Singh did not intentionally effect a breach of the Association's contract with Flora Constructions through his communication with the Commonwealth Bank. It was the bank's responsibility to make independent inquiries and its right to refuse further funding for the Sikh venture. Therefore, the Association's claim in this regard failed.

This case may be viewed at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/386.html

2.3.4a Implications of the case

This case sadly illustrates the difficulties resulting from a governance process that is out of step with the formal constitution of the association. It also illustrates that contractual processes should be dealt with carefully. Under the common law, a person holding himself out as an officer of an association, as was the case here, can bind an association to a contract such that the association cannot later claim that he had no authority to enter into the contract in question.

2.3.5 Hillman v Bankstown Handicapped Children's Centre Association Incorporated [2008] NSWIRComm 64 (Industrial Relations Commission of New South Wales, 16 September 2008)

This was an application under section 106 of the *Industrial Relations Act 1996* (NSW). The argument was that as the respondent was a constitutional corporation, the Industrial Relations Commission did not have jurisdiction in the matter, but rather section 16(1) of the *Workplace Relations Act 1996* (Cth) operated. The Commonwealth Act could only apply if the respondent was a 'trading corporation' as defined in the Commonwealth Constitution

The respondent (the Centre) is incorporated under the *Associations Incorporations Act 1984* (NSW). It provides disability accommodation and support services for both adults and children. Specifically, it operates an adult disability accommodation program, and out-of-home care service, and occasional care centre, a day program, respite programs and clinical support services. It is registered as an authority to fundraise for charitable purposes under the *Charitable Fundraising Act 1991* (NSW) (now referred to as the *Fundraising Act 1991*).

The court held that the Centre is a public welfare corporation. This is not determinative of whether it is also 'trading corporation' for the purposes of section 51(xx) of the Commonwealth Constitution. A public welfare corporation can engage in trading, which if sufficiently substantial, will result in its being a trading corporation for the purposes of section 16(1) of the *Workplace Relations Act 1996* (Cth). Trading activities are not limited to mainstream commercial activities, nor are they inconsistent with the altruistic or charitable purposes of a corporation.

However, this corporation did not show the necessary indicia of trade to be characterised as engaged in trading activities. Its activities are largely funded by government grants, or by pension payments to residents of its group homes, and some fee-for-service activities, and one-off payments made by parents. It does not operate for profit, but merely covers costs, and the activities are not bought and sold. The Centre does not operate in a commercial market, and there are no market conditions present. The Centre engages in social welfare activities provided to target groups.

Therefore, the court held that the respondent was not engaged in trading activities and was not a trading corporation within the meaning of section 51(xx) of the Commonwealth Constitution.

The case may be viewed at:

<http://www.austlii.edu.au/au/cases/nsw/NSWIRComm/2008/64.html>

2.3.5a Implications of this case

This case considers an important question – what constitutes 'trading activities' for the purposes of section 51(xx) of the Commonwealth Constitution. Only trading corporations are affected by commonwealth legislation relating to corporations. Other types of corporations may be affected by state legislation, but will not be affected by commonwealth legislation, because of the structure of the Commonwealth Constitution. In this case, the New South Wales legislation would apply, but not the commonwealth legislation, so that the New South Wales Industrial Relations Commission had jurisdiction in the case.

Also refer to:

- *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No. 2)* [2008] WASCA 254
- *Harmer v Shoalhaven Community Housing Scheme Limited* [2006] NSWIR Comm 1165
- *Educang Ltd v QIRC & QIEU* [2006] QIC 43

2.4 Membership and office

2.4.1 Goodwin v VVMC Club Australia (NSW Chapter) [2008] NSWSC 154 (Supreme Court of New South Wales, 15 February 2008)

John Goodwin was a member of the Vietnam Veterans' Motorcycle Club (the VVMC). At the association's annual general meeting on 23 July 2005, he criticised the incumbent President and the Secretary in a prepared statement, accusing the President of defaming him. Subsequently, several items of correspondence passed between the Management Committee and Mr. Goodwin, culminating in the Secretary sending three letters to him on 1 September 2005. According to paragraph 17, one of these required that 'he state his intention towards the VVMC and his perception of his future within the chapter.' No reply from Mr. Goodwin was forthcoming.

Without any formal charges being laid, the secretary then informed Mr. Goodwin on 9 January 2006, that the Committee was offering him a retirement package. An annual general meeting was set down for 3 February 2006. In fact, a special general meeting preceded a general meeting. Although unable to attend because of illness, Mr. Goodwin made it clear he had not accepted the retirement option. Nevertheless, a unanimous resolution was passed under 'General Business' that, if he failed to take up the proffered retirement, dismissal from the VVMC would follow. He was given until 3 March 2006 to accept the retirement offer. When he refused to comply, the Secretary informed him on 2 May 2006 that he was dismissed from the New South Wales Chapter of the VVMC. Mr. Goodwin disputed the decision in the New South Wales Supreme Court.

Initially, Justice White investigated whether the matter was one for Court intervention. He referred to section 11(2) of the *Associations Incorporation Act 1984* (New South Wales) under which the VVMC was registered. His reading of this section was that the rules of an incorporated association were binding as if members had made mutual covenants under seal. Therefore, John Goodwin was contractually linked to the VVMC and all its members. On this basis, the matter was justiciable without any need to consider the alternative legal avenue of any apparent decrease in Mr. Goodwin's property rights or the effect on his livelihood, trade or reputation.

Justice White then turned his attention to the VVMC's relevant rules and by-laws. Dealing with the disciplining of members and their rights to appeal respectively, Rules 11 and 12 seemed the most pertinent in this instance. He dismissed the applicability of by-law 1023 as being inconsistent with these rules since it envisaged merely a decision by the association at a general meeting with no subsequent right of appeal. He also pointed out that the rules of natural justice had not been followed in that Mr. Goodwin had no notice of the offending conduct or any opportunity to respond to the charge.

Therefore, a declaration was made that Mr. Goodwin remain an ordinary member of the VVMC and that his alleged expulsion be viewed as invalid. In addition, \$1,000 damages were awarded in contract for the loss of social contact and the attendant depression suffered by Mr. Goodwin when his VVMC membership rights were terminated in May 2006.

This case may be viewed at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/154.html

2.4.1a Implications of the case

What is interesting in this case is the award of damages for the breach of an association's rules in regard to the rights of the member. In company law generally, such a breach would not support a claim in damages, just an injunction or declaration by the court about the behaviour. This follows the case of *Rose v Boxing NSW Inc & Anor* [2007] NSWSC 20.

2.4.2 Goyan v Motyka [2008] NSWCA 28 (New South Wales Court of Appeal, 12 March 2008)

In 1971, Dr Motyka helped found an organisation in Adelaide called the Ukrainian Studies Foundation of Australia (the USFA), a company limited by guarantee. Its charter was to promote Ukrainian studies as an academic discipline at a tertiary level. Dr Motyka was one of the original directors of the USFA and served as its chairman from 1990 to 2002. He and his wife moved to Newcastle in about 1979 when he took up an academic position in Accounting at the University of Newcastle.

The Goyans were members of USFA from 1971 and served on its board in the late eighties and early nineties. Mr Goyan and other USFA members in Adelaide believed they had formed the South Australian 'branch' of that organisation. They organised themselves accordingly, conducted annual general meetings of the 'branch' and elected representatives to act as their chairman, treasurer and so forth. At the times relevant to the litigation, Mr Goyan was serving as the elected chairman of the 'branch'.

South Australian members of the USFA, led by Mr Goyan, sought control over the funds which those members had raised. However, Dr Motyka and the board of USFA did not consider there to be 'branches' and did not recognise the South Australian office bearers other than as members without power to control funds.

After some correspondence between the USFA board and Mr Goyan, the board informed Mr Goyan that he had been expelled as a member of the USFA. In the course of the internal disputes, the Goyans had written letters and also published a book which a jury found contained defamatory material. The trial judge assessed damages in favour of Dr Motyka in the sum of \$60,000, dismissing any defence of qualified privilege, and found that some defamatory publications were actuated by malice. The Goyans appealed on the point that the damages were excessive and that there was a defence of qualified privilege.

The trial judge referred to the judgment of Parke B in *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193; 149 ER 1044 at 1049-1050, where his Lordship observed:

'In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.'

The Goyans' case on appeal was that they had an interest to expose the perceived conduct of the respondents as prominent members of the Ukrainian community and there was an interest in the recipients, all of whom were members of that community, to receive information relating to that conduct whether or not they were members of USFA. As the material concerned the affairs and conduct of two leaders of the Ukrainian community in Australia, that constituted a sufficient relationship to give rise to the necessary element of reciprocity of interest.

Tobias J (with whom the others of the court agreed) wrote:

'I would not shrink from describing the attacks on the respondents as being vituperative, irrational, intemperate and splenetic. As they submitted, the language of the matters complained of was properly described as grossly excessive. This was exacerbated by the fact that, except for the letters in the book, the other letters sued upon did not purport to be a reply by the Goyans to an attack, public or otherwise, upon them by the respondents. Although the primary judge held that the two letters

published in the book, had they been separately sued upon, would have attracted the privilege, their publication in the book to the general Ukrainian community was not a privileged occasion due to the lapse of time between their original and subsequent publication.'

This indicated actual malice and thus the defence of qualified privilege was not available. Further, the damages awarded were not excessive.

This case may be viewed at:

<http://www.lawlink.nsw.gov.au/scjudgments/2008nswca.nsf/32a6f466fc42eb68ca256739000a724d/97409c4ec880587aca2574080001006f?OpenDocument>

2.4.2a Implications of this case

Another example of a serious internal dispute – these often resist attempts at mediation or compromise. Unlike many commercial disputes there is no agreeable monetary compromise between the parties as it is a matter of principle.

2.4.3 **Countouris v Kallos [2008] NSWSC 840 (Supreme Court of New South Wales, 8 August 2008)**

This case involved a dispute over the control of a Parish of the Greek Orthodox Church (a company limited by guarantee) which had been litigated and unsuccessfully mediated over a period of time. The present interlocutory application involved those who claimed to be the present directors proposing to hold an annual general meeting on 10 August 2008, at which elections would be conducted for the committee members. The plaintiffs were seeking an injunction to prevent the meeting. The substantive matter was scheduled to be heard in the Court on 18 August.

The notice of the AGM had been sent out on 14 July 2008. On 29 July 2008, 95 applications for membership were submitted to the company. The plaintiffs claimed that most of the membership applicants were opposed to the current directors. The plaintiffs argued that under section 232 of the *Corporations Act 2001* (Cth) calling the election in such circumstances was oppressive (since new membership applicants, who supported the plaintiffs, would not have had their applications processed and therefore would not be entitled to vote) and that an injunction should be issued to prevent the abuse.

There was insufficient evidence to determine whether the 95 membership applicants would have supported the plaintiffs (although the court was prepared to infer that they would), or even whether they would have been eligible for membership. The defendants' solicitor submitted an affidavit 'to the effect that at least a preliminary survey of the 95 would disclose that only about six appear[ed] to meet all the criteria and would be forwarded to the committee without further explanation'. However, the secretary's illness and personal problems meant the applications had not got that far.

The plaintiffs argued the meeting could be postponed and that it was scheduled in order to deprive them of the support of the additional members. The court thought that argument 'a little hard to uphold, particularly as the 95 applications were submitted on 29 July 2008, 15 days after the notice convening the meeting'. And unless it had acted in an exceptionally capricious way, any decision by the committee on the applications would be final: 'ordinarily it is extremely difficult to challenge the decision of a board of directors which has a right to reject a membership application without giving any reason...'.

The court did not issue an injunction. It was not completely satisfied that an injunction was possible under section 232 or that it would be proper. Further the judge explained:

'Generally speaking, courts are very loath to prevent meetings of members or people casting votes at meetings of members. Experience shows especially with public companies, that members get tremendously upset if they go to a function all prepared to discuss matters and to vote to find that there is some court order preventing them from exercising their democratic rights. As a general rule, the court will not prevent meetings and discussions and voting, and a fortiori that is the situation where if subsequently it is shown that there was equitable fraud or breach of duty or operative maliciousness that the election would be set aside. In the present case not only would that be a possibility if the matter was proved in due course but the company being a public company if ever the plaintiffs' faction did get the majority there could be removal of the directors under s 203D of the Corporations Act by the proper procedure.' (para 14)

This case may be viewed at:

<http://www.lawlink.nsw.gov.au/scjudgments/2008nswsc.nsf/aef73009028d6777ca25673900081e8d/57392103c40d59d4ca2574a50082252c?OpenDocument>

2.4.3a *Implications of this case*

This case illustrates the robust approach of the court to internal disputes with a firm eye on the possible outcomes of any judicial intervention.

2.4.4 Canterbury-Hurlstone Park RSL Club Ltd v Roberts [2008] NSWSC 845 (Supreme Court of New South Wales, 13 August 2008)

From 2004 until his resignation on 29 May 2008, Mr. Roberts was a director of the Canterbury-Hurlstone Park RSL Club Ltd (the Club), a company limited by guarantee. In his letter of resignation, he was very critical of the Board of that Club. As well as sending this letter to the Club, he also provided a copy of his resignation to Mr. Birdsall, the President of the Canterbury-Hurlstone Park RSL Sub-Branch, (the Sub-Branch), an independent legal entity. From there, the copy of the resignation was circulated to the Executive Committee of that organization.

It was the Club's contention that Mr. Roberts's letter included confidential material concerning Board discussions. Mr. Thomas, the Club's Chief Executive Officer, replied to Mr. Roberts on the 30th May, 2008, detailing his responsibilities under section 183 of the *Corporations Act 2001* (Cth) not to use information obtained in a Board setting improperly to damage the Club's standing in the community. An undertaking was sought from Mr. Roberts to desist from such behaviour.

Mr. Roberts's reply on 5 June 2008 stated that it was his intention 'to comply with any legal obligations that may exist upon me.' Despite this, the Club was embroiled in further communication with Mr. Roberts on 12, 13 and 20 June 2008, to the effect that injunctive relief would be pursued if the required undertaking was not produced and publication of the defamatory material halted. In addition, in the last letter, the return of financial documentation distributed during his time as director was demanded or delivery up proceedings would be instigated. On 23 June, Mr. Roberts's solicitors reiterated his earlier intention and queried the basis for returning the requested financial material. Further correspondence ensued with Mr. Roberts's legal team suggesting that on 24 June 2008 the Club 'take such action as it sees fit'. Finally, on 26 June 2008, the Club's solicitors wrote a letter summarizing the position to date and foreshadowing the commencement of legal proceedings on 28 June 2008.

Justice Palmer in the New South Wales Supreme Court found that Mr. Roberts's resignation letter contained significant, confidential information, the disclosure of which to Mr. Birdsall failed to benefit the Club. This benefit must be satisfied for the test of proper use of confidential information. Such a breach of his fiduciary duty of confidence demonstrated a conflict of interest on Mr. Roberts's part as he was involved with both the Club and the Sub-Branch. His Honour also decided that, since the Club had suffered detriment as a result of Mr. Roberts's unauthorized disclosure of Board deliberations, he had violated section 183 of the *Corporations Act 2001* (Cth).

Further, Justice Palmer criticized Mr. Roberts's glib response to the Club's request for an undertaking from him although he was sympathetic to Mr. Roberts's refusal to return the confidential documents he held. Therefore, delivery up of the Board's financial documents was not ordered, but an injunction was granted to prevent Mr. Roberts making any additional, confidential admissions. Alternatively, he was given the option of providing the desired undertaking.

This case may be viewed at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/845.html

2.4.4a Implications of the case

This case is a timely reminder about the fiduciary duties of a director. It is worth noting that a director's duties are primarily owed to the **company** and not to other related organisations. The case also illustrates the principle about conflict of interest, as here there was a conflict between the club and the sub-branch which were both different legal organisations. Some companies have separate legal agreements with each director about access to board documents, particularly where they have ceased to be directors.

2.4.5 Al Hidayah Mosque Inc v Islamic Association of Wanneroo (Inc) [2008] WASCA 206 (Western Australian Supreme Court of Appeal, 9 October 2008)

This was an appeal from an order of Martin CJ dismissing the appellant's application for an interlocutory injunction.

The underlying dispute had begun in 2005 and was between two Islamic groups, both of which prayed at the same mosque. The respondent was the registered proprietor of the land on which the mosque stands, and claimed *inter alia* that the appellant association had wrongfully occupied and used the land since 2001 without the consent of the respondent. The respondent had sent a written notice to the appellant on 7 January 2005 requiring that its use and occupation of the land was unauthorised and requiring it to vacate within 21 days. The dispute continued from that date.

On 8 January 2008, the appellant filed an application for an interlocutory injunction which, if granted would have had the effect of giving possession of the mosque to the appellant. The application was heard on 4 March 2008 by Martin CJ. His Honour referred to the applicant's case as 'very weak', and found that the respondent had dealt with the mosque affairs correctly. The application was dismissed.

Many of the grounds of appeal from that decision were unnecessary, but the primary ground became that the mosque was built on land which was held in trust for charitable purposes, namely for the purposes of the Muslim religion. The appellant contended that a meeting held on 1 April 2002 had conferred on it management of the mosque and that it had a right to enforce that conferral by injunction.

The Court of Appeal found that there were two difficulties with this argument. Firstly, there was no counterclaim by the appellant to the respondent's claim that it could restrain the appellant from entering upon, and or occupying the land, and for damages. Without a counterclaim, there was no foundation for an interlocutory injunction. Secondly, the claim by the appellants as to the meeting held on 1 April 2002 was not correct. It was not a meeting held by members of the local Muslim community who pray at the mosque, but by those persons and others. Therefore, there was no prima facie case, although the Chief Justice at first instance had generously described the case as merely 'very weak'. The respondent's case was on the contrary, very strong, and the balance of convenience would greatly favour the respondent. Moreover, the respondent did not seek to prevent members of the Muslim community from praying at the mosque, and this should be a consideration when the relief sought by the respondent in the lower court is granted.

The Court of Appeal held that there were no grounds for an interlocutory injunction on the facts, and therefore the appeal was dismissed.

The case may be viewed at: <http://www.austlii.edu.au/au/cases/wa/WASCA/2008/206.html>

2.4.5a Implications of the case

Associations should consider putting arrangements and understandings about land on a formal basis. This will prevent disputes or make their resolution quicker and cheaper. Again this case illustrates the ability of the courts to seek to do justice between the parties.

2.4.6 Leyonhjelm v Mateer [2008] NSWSC 1320 (Supreme Court of New South Wales, 8 December 2008)

The Inner West Hunters Club Inc (the club) is an incorporated association incorporated under the *Associations Incorporation Act 1984* (NSW) (the Act). The plaintiff claimed to be a member of the club. The defendants were individuals whose status within the club was questioned by the plaintiff.

The dispute in this case centred on the question of who were the office bearers of the club and who had authority within the club.

The application for incorporation of the club was accompanied by a copy of rules that are the rules, as amended, of the club under section 19(2)(a) of the Act. Where the model rules are not adopted, as in this case, section 19(3) makes any rules which are in the model rules but not in the club rules deemed to be included in the club rules.

The adopted rules of the club did not make provision for the resolution of disputes between members, or between members and the club. Therefore, rule 10 of the model rules, as to dispute resolution, was deemed to be included in the club rules.

The members of an incorporated association are bound contractually by the rules under section 11 (2) of the Act. Rule 10 of the model rules provides that any disputes are to be submitted to mediation (a form of alternative dispute resolution) at a community justice centre established under the *Community Justice Centres Act 1983* (NSW).

Therefore, it was held that the proceedings should not proceed until the parties had submitted to mediation as required under the Act. The proceedings were stayed.

This case may be viewed at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/1320.html

2.4.6a Implications of this case

This case illustrates how statutory devices common in incorporated association legislation are often overlooked or misunderstood by members of associations. First, if the rules of the association do not exclude the model rules in the legislation or do not have a similar rule, then the model rule provision will apply.

Second, where the rules set out a procedure for the determination of internal disputes (e.g. mediation), then the court will require this procedure to be followed before intervention.

2.5 *Discrimination*

2.5.1 **King v Gosewisch [2008] FMCA 1221 (Federal Magistrates Court of Australia, 29 August 2008)**

Mr Gosewisch was the local real estate agent and President of the Burrum Chamber of Commerce in Howard, Queensland. The Burrum Chamber of Commerce (an unincorporated association) published an open invitation to the community to meet local council candidates one evening in the local golf club. There were 15 wooden steps at the entry to the golf club meeting room.

As the magistrate noted:

'As it turned out the events and meeting were anything but quiet. These reasons relate to that evening, and the claim made by the Applicants (who have a physical disability) that they were unlawfully the subject of discrimination and harassment.'
(para 2)

The applicants could not access the meeting room easily and made a claim against the committee of the Chamber of Commerce for unlawful discrimination and harassment pursuant to the *Disability Discrimination Act 1992* (Cth) (the Act). Although the evidence given was conflicting, the key claims were that they were unable to access the meeting, that inappropriate remarks were made to the applicants when they complained about being unable to reasonably access the meeting, and also when the meeting was moved to the bottom of the steps and during the meeting.

Section 24 of the Act makes it unlawful to discriminate on the grounds of a person's disability when providing 'goods or services' or making 'facilities available'. The magistrate found under the Act that 'organising a meeting' was a 'service'. However, it was found that the meeting did not start until it was moved to the bottom of the steps (although pre-meeting socialising and introductions had taken place upstairs) and hence there was no refusal to provide a service.

As to the harassment of the applicants through the remarks made at the meeting, the Magistrate found that the evidence did not establish that the respondents themselves had made or incited such remarks that could be regarded as offensive. Although he found that others at the meeting had made such remarks, Mr Gosewisch did his best in a difficult situation to enforce proper meeting procedure and conduct 'whilst allowing people to have their say'. As a result there was no unlawful conduct by the committee of the association.

This case may be viewed at: <http://www.austlii.edu.au/au/cases/cth/FMCA/2008/1221.html>

2.5.1a *Implications of this case*

Organisations need to ensure that meeting facilities are appropriately accessible for those with physical disabilities and that meetings are appropriately controlled to avoid unlawful remarks to persons with a physical disability. The magistrate hinted that had the chair not directed that the meeting be begun downstairs, the result may have been different.

2.5.2 Walsh v St Vincent de Paul Society Queensland (No. 2) 2008 QADT 32 (Queensland Anti-Discrimination Tribunal, 12 December 2008)

This case concerned an allegation of discrimination on the grounds of religious belief under the *Anti-Discrimination Act 1991* (Qld) (the Act). The complainant was a volunteer working for the St Vincent de Paul Society Queensland (the Society) between 1997 and 2004. The complainant commenced work as a volunteer in August 1997, initially working nine hours weekly over two days. This was gradually expanded until eventually volunteering for the Society was taking up most of 'her waking hours'. The complainant was a Christian but not a Catholic, a fact which was disclosed by her at initial interview and was widely known in the Society.

In 2003, the complainant was elected to be president of a 'Conference' (similar to a branch) of the Society and subsequently to two other president positions. (She was later advised that she could only have one position as president and resigned from two of those positions, maintaining one president position and one secretary position.) In early 2004, she was told that such a leadership position could only be held by a Catholic. She was given the choice of becoming a Catholic; resigning her position of president and staying in the Society as a member; or leaving the Society. The complainant stopped participating in the affairs of the Society (although did not resign her membership) and claimed compensation for pain, suffering, humiliation and disillusionment. She claimed that her depression, two episodes of attempted suicide and the ending of a significant personal relationship were related to the discrimination. The tribunal found for the complainant and ordered the respondent to pay her the sum of \$27,500 plus costs.

The definition of 'work' in the Act includes 'work on a voluntary or unpaid basis'. Section 7(1)(i) of the Act prohibits discrimination on the basis of the attribute of religious belief or religious activity. Further, section 10 provides that direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different. Section 15 requires that no discrimination can occur by variation of work terms, denying or limiting access to promotion, training or benefits and by treating a worker unfavourably in any way in connection with work. However, section 25 allows that a person may impose genuine occupational requirements for a position.

The respondent had earlier made application to have the matter dismissed on the grounds that it was trivial, frivolous, vexatious and lacking in substance and that in any case, the alleged discriminating conduct was exempt under section 25 of the Act as a genuine occupational requirement. That application was dismissed with costs.

In the substantive proceedings, the respondent raised two main defences being:

- that under section 25 of the Act it can impose genuine occupational requirements for a position (such as being a Catholic); and
- that under section 109(1)(c) of the Act it was a religious body and the Act did not apply to it in 'the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice'.

The respondent had difficulty establishing that it did have a requirement at the relevant time that a Conference president be a Catholic. There was no such requirement communicated to the complainant at her initial interview as a volunteer or on her election to the position of president. The Tribunal accepted as a matter of fact that the complainant was advised at her interview that 'it was not a prerequisite that she be a Catholic in order to work for the Society'.

The respondent had two editions of its rules which were relevant in argument, one in 1991 and another in 2005. There was no requirement for a Conference president to be a Catholic under the 1991 rules. In 1999 an International Plenary resolution made such a requirement, which was adopted by the National Council of the Society in Australia in 2003 and finally reflected in the 2005 rules.

The complainant argued that the requirement for a president to be Catholic was not part of the rules during the period of her volunteering and that the 1991 rules applied in early 2004. The respondent argued that although the 1999 plenary resolution was not published in the local rules until 2005, it took effect from 1999 because the Society is a single indivisible unincorporated association of which the respondent is merely a part. To this, the complainant replied that the respondent was not the Society but the Society of St Vincent de Paul State Council in Queensland, an incorporated Queensland body in its own right, and that it had not been demonstrated that the national and international rules or decisions could as a matter of law bind the Queensland incorporated body. The Tribunal did find the existence of a society which was 'an unincorporated world-wide association', but this was separate from the Queensland body and the Tribunal did not explicitly discuss this issue further, probably as the respondent abandoned this line of argument during the hearing.

The respondent argued that there was no action amounting to discriminatory conduct under section 15 and no direct discrimination under section 10. The Tribunal did not accept the respondent's arguments and found that the complainant had been discriminated against because she was required to change her position if she wanted to stay on as president, which amounted to unfavourable treatment in connection with her work as president. 'The clear threat was that if she did not adopt one of the ultimatums presented to her, the Society would take whatever steps were necessary (and available to it) to have her dismissed from the presidency if she did not become a Catholic or resign her presidency or leave the Society.' (para 67)

On the issue of section 109 providing a defence, the Tribunal decided that section 109 was not available to the Society on two grounds. First, it was not a 'religious body' such as a church, but rather a society of lay faithful closely associated with the Catholic Church. Its spiritual objectives were not enough to make the Society a religious body within the exemptions provided by section 109. The section is meant to apply to bodies where they are established essentially for religious observance or practice. Second, the Tribunal suggested that a president of a Conference does not perform any religious observance or practice.

In the hearing, the Society abandoned its reliance on the rules and resolutions and argued that the 'genuine occupational requirement' was to be drawn from the nature of the organisation and the general import of its aims and objectives. The Tribunal did not accept that this was the case. On the issue of genuine occupational requirement, the Tribunal stated that this was a question of fact – whether it was objectively necessary for the president to be a Catholic in order to be able to discharge the obligations of the position; whether a non-Catholic president would have difficulty in undertaking the position; and whether it was essential and indispensable for the president to be a Catholic, which leads to the question whether the position would be essentially the same if it was not required to be filled by a Catholic. The question then had to be asked whether the requirement was 'genuine'.

The Tribunal found that it was clear that at material times, conference presidents in Queensland had significant duties in respect of spiritual matters and the Society is undoubtedly Catholic in character, and that presidents (assisted by their boards) have responsibility to ensure that the spirit and the rule of the Society are observed in all the activities of their conference. However, the fact that spiritual advisors are appointed (by the president) with a particular role in helping to develop the spiritual lives of members, individually and as a group, indicates that a conference president does not have primary responsibility in this regard.

The Tribunal concluded that the respondent had not established, objectively, that it was necessary for a president to be Catholic, although ignorance of the spiritual aspects of the president's obligations, in the context of the Society being a lay Catholic organisation, would render it more difficult for a non-Catholic, as opposed to a Catholic, to carry out particular duties relating to Catholic principles and beliefs. Further, being a Catholic was not essential and indispensable to carrying out the duties of president, and that the position would be essentially the same if there were no requirement that a president be Catholic, especially given the status and the role of the Spiritual Advisor.

The Tribunal also pointed out that the respondent knew that the claimant was not a Catholic, welcomed her as a member and saw her elected as president of three of its conferences, saw her inducted as a president of a conference by a priest of the church and allowed her to work without challenge for years as a conference president.

This case may be viewed at:

<http://www.austlii.edu.au/au/cases/qld/QADT/2008/32.html>

2.5.2a Implications of this case

This is a significant case for Queensland organisations and may surprise many in the general public. The result might have been different if the constitution of the organisation had been clearer on the matters under dispute and its relationship with its Australian and international bodies were different. At the time of writing it was unclear whether the decision might be appealed.

2.6 Employment and workplace relations

2.6.1 Shahid v Australasian College of Dermatologists [2008] FCAFC 72 (Federal Court of Australia Full Court, 9 May 2008)

Kiran Shahid, a Perth general practitioner, attempted to specialize in dermatology. This necessitated becoming a Fellow of the Australian College of Dermatologists (the College). One of the fellowship requirements was a four/five year period of supervised training in a recognized dermatological position. She applied each year from 2000 until 2004 for a trainee registrar's job to commence at the Royal Perth Hospital in the following year, but failed to obtain the necessary recommendation from the College. Using the College's Appeal Process, she appealed the decisions in 2002, 2003 and 2004. However, no hearing eventuated.

Dr. Shahid then applied to the Federal Court for relief, claiming the College had flouted the sections of the *Trade Practices Act 1974* (Cth) concerning false and misleading representations and conduct, sections 52, 53(aa), 53(g) and 55A, or alternatively, the corresponding sections of the *Fair Trading Act 1987* (WA), sections 10, 12(b), 12(l) and 18. These claims related to misleading representations, allegedly made with the authority of the College, regarding the qualities required by a dermatologist, the selection procedures followed for choosing such a trainee specialist and the appeal process in place should an applicant be unsuccessful. Of particular concern was the record-keeping representation contained in the College's *Training Program Handbook – Information and Curriculum* (the Handbook) from 2001 to 2004 that records would be kept for at least six years in a safe manner. The trial judge cast doubt on the truth of this statement. Another contentious representation in the handbook from 2002 to 2004 was the so-called 'meaningful appeal' representation whereby an appeal would be dealt with in a timely fashion.

In addition, the doctor maintained that the College's failure to address her appeal constituted a breach of its contract with her since all her interactions with the College took place within a legal framework. All her claims were dismissed. Eventually, the matter came before the Full Court of the Federal Court.

Justice Jessop provided the leading judgment. He agreed with the original trial judge's conclusion that, although some of the College's educational training activities were commercial or trading in nature, such actions were not significant enough to classify it as operating within the bounds of 'in trade and commerce', as required by the *Trade Practices Act 1974* (Cth) for the purposes of the disputed representations. However, his fellow judges, Branson and Stone, maintained that, as the connection between the College and the trainee dermatologists did have a commercial basis, the *Trade Practices Act 1974* (Cth) was applicable. Therefore, they were prepared to award damages under sections 82 and 87 of the Act for the misrepresentations in question.

Although Justice Jessop disagreed with the award of damages on this basis, he nevertheless found that it was justified under section 79 of the *Fair Trading Act 1987* (WA) which provides remedies for breaches of the consumer protection provisions. Section 10 of the Western Australian Act corresponds to section 52 of the *Trade Practices Act 1974* (Cth), but the definition of 'trade or commerce' is broader, including any 'business or professional activity'. His Honour determined that, at the time the College made the misleading representations, it was involved in professional activity. The record-keeping representation, for example, related to the selection and interviewing of candidates, obviously a professional task. Not only was section 10 violated, but sections 12(b) and (l) as well, since they concerned the misleading provision of services and the availability of remedies, including the right of appeal. With respect to the meaningful appeal representation, section 10 had clearly been contravened.

It was then necessary for His Honour to consider section 18, the Western Australian Act's equivalent of section 55A of the *Trade Practices Act 1974* (Cth). Whereas conduct misleading the public as to services is a crime under the *Fair Trading Act 1987* (WA), it was only so in 2001 in relation to section 55A of the Commonwealth Act. Thus, the civil standard applied to the contents of the Handbook from 2002-2004. Apart from the trial judge's confusion on this

point, Justice Jessop failed to be convinced that the public were privy to the representations at all, an important element in establishing whether the relevant sections had been breached.

Finally, His Honour turned his attention to the alleged contractual nature of the dealings between Dr. Shahid and the College. It was his opinion that the trial judge erred in finding no evidence of an intention to create legal relations when Dr. Shahid lodged her appeal from the selection committee's decision. Not only was the requisite fee involved substantial, but also information in the Handbook concerning the appeal process was worded in legal terms. Legal representation was an option for the aggrieved party. Justice Jessop in paragraph 214 described it as 'improbable' that the College did not intend to enter into a legally binding relationship with the doctor. A case in contract was therefore made out.

His Honour duly awarded \$2,500 damages for injury under section 79 of the *Fair Trading Act 1987* (WA) to Dr. Shahid for the anxiety and distress caused to her as a result of her reliance on the meaningful appeal representation. He pointed out that a similar result would have followed from application of the relevant sections of the *Trade Practices Act 1974* (Cth). Relying on the same sections, he reimbursed her the \$10,684.92 involved in the appeals, a cost the College admitted. Substantiated, out-of-pocket legal expenses of \$2,200 were allowed as well as the interest on the sum. Costs were also awarded to Dr. Shahid.

This case may be viewed at:

<http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/72.html>

2.6.1a Implications of this case

This case illustrates that courts will act where the procedures of the body are not followed. In this case the aggrieved person was not a member and so was required to use the law of contract and consumer protection acts to pursue her claim.

2.6.2 Cahill v State of New South Wales (Department of Community Services) (No 3) [2008] NSWIRComm 123 (New South Swales Industrial Relations Commission, 27 June 2008)

On 24 May 2004 a Department of Community Services' (DOCS) caseworker, Ms Kylie Philps, was stabbed by a client, Ms Cheryl Cooper, at the Ballina Community Service Centre (the CSC). As a result of the incident, on 23 May 2006 Mr. John Cahill, the General Secretary of the Public Service Association and Professional Officers Association Amalgamated Union of New South Wales (the Union), was granted authority under section 106(1)(d) of the *Occupational Health and Safety Act 2000* (NSW) to commence legal action against DOCS. A requirement of section 8(1) of the Act is that DOCS, as an employer, 'must ensure the health, safety and welfare at work of all its employees', an obligation the Union believed had been ignored. More particularly, Mr. Cahill maintained that DOCS was in breach of section 8(1)(c) since it had a duty 'to ensure that systems of work and the working environment of the employees were safe and without risks to health'. His prosecution team argued that this was an offence of absolute liability, one where liability is imposed without regard to fault.

Given that clients were sometimes interviewed at the Ballina CSC, the risk of violent behaviour with its attendant physical and psychological consequences for those involved, whether directly or indirectly, was real. In this case, Ms Cooper, upset at being denied access to her three children, not only stabbed Ms Philps, a caseworker, but also menaced other staff, including a fellow caseworker, causing them considerable distress.

Mr. Cahill, in mounting the Union's action against DOCS as the relevant employer, drew attention to the following work procedures as being unsafe: permitting Ms Cooper to be interviewed at the Ballina CSC in an unsuitable interview facility; failing to assess the extent of the risk posed by her and not holding a precautionary Protection Planning Meeting nor providing a staff alert; neglecting to have security guards or police officers on standby; and not having in place emergency back-up procedures.

In attempting to refute the Union's claim of absolute liability attaching to Section 8 of the Act, DOCS argued that the Union was required to prove *mens rea* – intent, knowledge or reckless conduct – underlying DOCS's actions. Unless such conscious behaviour could be shown, then DOCS should not be held culpable. Justice Boland, the President of the Industrial Relations Commission of New South Wales, adjudicated on the matter. He pointed out that the words 'must ensure' in section 8(1) of the Act signified an intent to impose absolute liability. Such an intention was consistent with the overarching objects of the Act relating to the provision and promotion of safe working environments, as set out in section 3. Further, since the words of section 8(1) contained no specific reference to prior knowledge, any presumption of *mens rea* in the offence must necessarily be discarded. The section should be given its plain meaning.

Justice Boland also commented on the tension between the fact the Act was both beneficial in its objects and penal in nature. Whereas a beneficial piece of legislation warrants a liberal interpretation, a penal statute should be construed strictly. He felt the apparent contradiction should be addressed by an examination of Parliamentary historical records. In the second reading speech of the *Occupational Health and Safety Bill 2000*, the Minister, quoted at paragraph 235 of the judgment, made it clear that 'the obligation to provide a safe workplace is absolute'. His Honour argued that, since the statute highlighted employee work and safety, a matter of public concern, any presumption of *mens rea* could be displaced, provided the wording to this effect was clear.

At a practical level, Justice Boland dealt with the implications of *mens rea* being regarded as an element of the offence described in section 8(1). Since the offenders would, in the main, be corporations, the criminal burden of proof required would make it very difficult to prove whose was the 'directing mind'. Thus, the legislation's effectiveness would be compromised.

Another issue canvassed was whether it was possible for DOCS to argue that an honest and reasonable mistake of fact had been made concerning the risk of an attack by Ms Cooper. Such a defence is possible where the offence does not need actual knowledge. Given that

there was considerable evidence relating to Ms Cooper's volatile behaviour available to DOCS, Justice Boland determined that this defence was untenable.

Therefore, the Union's task was to prove beyond reasonable doubt the following elements: DOCS was an employer as specified in the Act; the people concerned were employees of DOCS at its place of work; DOCS had not ensured all employees' health, safety or welfare, particularly those directly involved; and there was a causal link between the facts behind the vicious assault and DOCS's ineffectual handling of the matter.

After readily establishing the first two elements, His Honour considered the risk Ms Cooper's behaviour posed to the safety of DOCS's employees at the Ballina CSC, as well as the issue of causation. He determined that, given her erratic actions prior to the attack, including the deliberate ramming of another vehicle, DOCS allowing Ms Cooper to present at the Ballina CSC entailed, beyond reasonable doubt, a significant risk to staff. Likewise, the absence of police officers and the failure to employ security guards on the premises placed the employees' safety at risk. Justice Boland established to the criminal standard of proof that, had an adequate risk assessment of Ms Cooper's behaviour been conducted, suitable control measures could have been implemented to remove the element of risk. One such measure not applied was an alert to all staff regarding Ms Cooper's attendance at the Ballina CSC, a criminal dereliction of DOCS's duty under section 8(1) in His Honour's view. He stated further that, if modifications designed to improve the security of the interview room had been introduced prior to the incident, it was clear beyond reasonable doubt that the risk of assault would have been lessened. Finally, His Honour criticised the lack of provision of an appropriate emergency system and found this element of the charge made out.

Thus, all elements of the charge were proved with the exception of the failure to hold a Protection Planning Meeting which Justice Boland felt was subsumed under the umbrella of risk assessment.

In its defence, DOCS raised both limbs of section 28 of the *Occupational Health and Safety Act 2000* (NSW). The onus to make out the defences to the civil standard on the balance of probabilities rested with DOCS. Section 28(a) proffers the defence that 'it was not reasonably practicable for the person to comply with the provision'. Justice Boland decided this argument was not tenable as DOCS had not demonstrated that the assault was neither reasonably foreseeable nor reasonably practicable to guard against. Plainly, precautions should have been taken in what was potentially a risky situation, any costs being more than offset by the attendant risk.

His Honour was similarly dismissive of DOCS's reliance on section 28(b) which outlines the following defence: 'The commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable to make provision'. He pointed out that a 'Request for Mental State Examination' for Ms Cooper was completed the day before the incident with a written notation that she be re-assessed within twenty four hours. DOCS clearly had control over whether the re-assessment took place and such a course of action was practicable. Similarly, in relation to the assault, he rejected poor communication stemming from 'office politics' as being a causal factor which was outside of DOCS's control.

Since neither statutory defence was satisfied on the balance of probabilities, DOCS was found guilty of the charges laid under section 8(1) of the *Occupational Health and Safety Act 2000* (NSW).

This case may be viewed at:

<http://www.austlii.edu.au/au/cases/nsw/NSWIRComm/2008/123.html>

2.6.2a Implications of this case

This case serves as a general cautionary tale about the width of workplace health and safety legislation and the reach of strict liability that usually flows from such legislative provisions. Such provisions usually apply equally to all nonprofit organisations, large and small,

incorporated or unincorporated. Often the provisions can be enforced, not only against organisations, but also the board/committee members and/or senior managers.

2.6.3 Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2) [2008] WASCA 254 (Western Australian Industrial Court of Appeal, 10 December 2008)

Mark Lawrence claimed to have been unfairly dismissed on 21 July 2006, by his employer, the Aboriginal Legal Service of Western Australia (Inc) (the Legal Service). As a consequence, he brought the matter before the Western Australian Industrial Relations Commission (the Commission) where both the original Commissioner and the Full Bench of the Commission decided that, since the legal service was not a trading corporation for the purposes of section 51(xx) of the Federal Constitution, Mr. Lawrence's claim fell within its ambit.

This conclusion was disputed by the Legal Service on the grounds that, if the Full Bench of the Commission was willing to view its entry into a contract with the Commonwealth Attorney General's Department to provide legal services to indigenous Western Australians as a trading activity, surely the Legal Service should be regarded as a trading corporation. Therefore, the Commission had no jurisdiction to determine the issue as such a corporation was termed constitutional under section 51(xx) and subject to Federal law. Eventually, relying on these arguments, the Legal Service appealed to the Western Australian Supreme Court.

After satisfying himself that there was a genuine ground for appeal under section 90(1)(a) of the *Industrial Relations Act 1979 (WA)* because 'the subject of the decision was not an industrial matter', Honorary President Steytler addressed the existing High Court law relating to trading corporations. He pointed out that the Legal Service was essentially involved in public welfare activities for indigenous people. Establishment for such a purpose coupled with the Legal Service's classification as a public benevolent institution and its associated tax concessions suggested a not-for-profit focus on a strictly defined group of clients, rather than a competitive business arrangement. This position was not modified by the requirement since 2005 that the Legal Service tender for the Commonwealth Government contract with respect to the provision of aboriginal legal assistance in Western Australia. The fundamental operation of the Legal Service remained unchanged from when it was funded by government grants, any changes reflecting an emphasis on increased efficiency of service delivery.

Considering all these points made him decide that the Legal Service was not a trading corporation due to the absence of typical for-profit business indicators. Since it was therefore not subject to section 51(xx), the Commission was acting within its jurisdiction. Justice Pullin supported his colleague's judgment and the appeal was dismissed.

A dissenting judgment was handed down by Justice le Miere. After an examination of the Legal Service's activities, he found it to be a trading corporation on the basis that the contractual relationship established between the Commonwealth Government and the Legal Service clearly envisaged a trading arrangement.

This case may be viewed at: <http://www.austlii.edu.au/au/cases/wa/WASCA/2008/254.html>

2.6.3a Implications of the case

Refer also to:

- *Harmer v Shoalhaven Community Housing Scheme Limited* [2006] NSWIRComm 1165
- *Hillman v Bankstown Handicapped Children's Centre Association Incorporated* [2008] NSWIRComm 64 (Industrial Relations Commission of New South Wales, 16 September 2008)
- *Educang Ltd v QIRC & QIEU* [2006] QIC 43

2.7 Negligence

2.7.1 Green v Country Rugby Football League of NSW Inc [2008] NSWSC 26 (New South Wales Supreme Court, 31 January 2008)

The issue to be determined in this case was whether the Country Football league of NSW Inc (CRL) was liable in negligence to a 16 year old football player who suffered a fracture of his cervical spine resulting in tetraplegia. The plaintiff, Green, was of slight build, low weight and had a long thin neck. He alleged that the CRL was solely responsible for the organisation and control of rugby league in country NSW, including at his own club, and as such, should not have permitted players with his physical characteristics to play in the front row, especially in the absence of special neck-strengthening exercises. His own club's knowledge of his physical characteristics was to be imputed to CRL by the principles of agency.

Green argued further that the CRL should have taken steps to ensure that players with his physical characteristics were aware of the risk of injury when playing in the front row. Alternatively, at the time of his mother's consent to his playing in March 1994, CRL should have made her aware of the risk, which would have caused her to refuse permission. Further and alternatively, Green was never advised to have neck strengthening exercises which he argued would have made him less vulnerable to spinal injury.

The CRL denied any duty of care. There were two corporate entities between it and Green and it was unaware of his existence or circumstances. Its role was as a conduit between the New South Wales Rugby League (NSWRL) and the Australian Rugby League (ARL). As such, any rule it had made that clubs should not permit players with Green's physical characteristics to play in the front row would have been unenforceable because it would have been only a CRL rule and out of step with the NSWRL and the ARL. Even if it could have made such a rule, it would have required that each player be assessed for suitability, an impossible task with the resources available to the CRL. There was a voluntary assumption of risk by the plaintiff in a known high-risk game, and the plaintiff's team had done the appropriate exercises in its training.

Green's club was an incorporated association, but although nominally a party to the proceedings, had, at the time of this hearing been wound up, and the claim against it abandoned. The relevant open age country games were organised by another incorporated association, called Group Three. The latter party was not sued. Claims against the coach and the referee had been settled. Thus CRL, also an incorporated association, remained as a party to be pursued.

His Honour found for the CRL on the following bases:

1. The CRL did not have a non-delegable duty of care to the plaintiff
2. The CRL did owe a duty to the plaintiff to take reasonable care (a general duty of reasonable foreseeability)
3. However, none of the bases of negligence claimed could be demonstrated on the facts, mainly because of voluntary assumption of risk.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/26.html

2.7.1a Implications of this case

This case illustrates the difficult issues of civil liability which arise upon serious injury. Often everyone 'in sight' is named in the proceedings and drawn into the litigation. In such contact sport, a current risk management plan is essential, together with adequate insurance. Insurances, such as player insurance, directors' and officers' liability insurance and litigation cost insurance, should all be considered.

2.7.2 Chaina & Ors v The Presbyterian Church (NSW) Property Trust & Ors [2008] NSWSC 290 (Supreme Court of New South Wales, 7 April 2008)

On 23 October 1999, one of the Chaina family's sons drowned whilst on a school camp associated with the Presbyterian Church. The parents plus two remaining sons launched an action for nervous shock against sixteen defendants associated with the camp or the school. In addition, two family companies of which the parents were the only shareholders and directors claimed for past and future economic loss. Following the tragic loss of their son, it was claimed the directors suffered psychiatric trauma which affected their ability to operate the business effectively. A planned relaunch of industrial cleaning products featuring advanced enzyme technology failed to eventuate, whilst a campaign to promote domestic enzyme products was abandoned, resulting in an estimated commercial loss of between \$100 and \$300 million.

To assess the validity of the claim, the Presbyterian Church (NSW) Property Trust (the Church) requested details of the Chainas' formulae for the recently developed products. However, Mr. Chaina was unwilling to provide them as he had not patented the enzyme technology involved. To disclose them would be to lose his competitive advantage. He offered instead to provide samples of ten products to the Church for analysis and comparison with existing products.

Dr. Wynn-Hatton, an industrial chemist with considerable expertise in the area, was chosen by the Church to investigate the respective merits of the new laundry products. Fifteen professed qualities, such as superior stain-removing ability and full biodegradability, were examined. In the doctor's opinion, many of the claims made could not be decided purely by comparative assessment. Without the appropriate formula and knowledge of manufacturing technique, it was impossible to determine whether the wash test performance reflected the product's make up. Similarly, no conclusions as to the presence and stability of enzyme activity could be drawn from such testing. As for Mr. Chaina's assertion that the formulae could be obtained through reverse engineering, Dr. Wynn-Hatton discounted such product deconstruction and reconstruction as costly, problematic and inaccurate.

Lack of access to the precise formulae made it impossible to explore whether patents already existed over the intellectual property rights involved. More importantly, Dr. Wynn-Hatton raised the issue of the need to be able to verify any claims concerning the products' composition under the *Trade Practices Act 1974* (Cth) or similar legislation. Such verification clearly required knowledge of the formulae. Finally, he pointed out the cost savings if the formulae were to be provided since this would obviate the need for reverse engineering and comprehensive testing.

Although these claims were countered by Professor Pailthorpe and Dr. Crank, the experts appearing for the Chaina family companies, Justice Hoeben failed to be convinced that the process of reverse engineering was a viable option, an opinion shared by Professor Pailthorpe. His Honour was also concerned about the onerous burden reverse engineering of some one hundred products would impose on the Church and the other defendants. Since the presence of enzyme activity was crucial to product performance and ultimately market reception, Justice Hoeben declared it only reasonable that the formulae be provided, to enable speedy, cost-effective analysis of the qualities claimed for the products. Questions surrounding the state of development of the domestic products in October 1999, as well as the reformulations of the industrial products would also best be resolved through access to the appropriate formulae and the relevant manufacturing techniques.

According to the judge, the confidentiality of the Chainas' formulations was assured because of the integrity of the legal teams involved. Such integrity, in his opinion, extended to the expert witnesses. As a fallback position, he suggested entering into undertakings dealing with the leaking of confidential information. On this basis, he granted orders for disclosure of the Chainas' formulae relating to the new domestic, and reformulated industrial products along with the manufacturing techniques involved, to the Church and the accompanying defendants.

Final orders were delayed to give the parties time to reach agreement over the confidentiality issues.

This case may be viewed at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/290.html

2.7.2a Implications of the case

An example of the complexity of legal proceedings that could be expected by many nonprofit organisations. Insurance policies which cover the cost of such litigation should be considered as part of an organisation's risk management review.

2.7.3 The Uniting Church v Takacs [2008] NSWCA 141 (Supreme Court of New South Wales, 20 June 2008)

Thirty-two year old Mr. Takacs, an experienced painter, was requested by Mr. Bagnara, the buildings' maintenance manager at the Northhaven Retirement Village operated by the Uniting Church in Australia Property Trust (NSW) (the Trust) to measure and quote on painting an old profile, kliplok roof. Despite his experience, Mr Takacs had no firsthand knowledge of roofing and was seriously injured when he fell nine metres, after tripping on the roof while undertaking the task. He successfully sued in the New South Wales Supreme Court for damages for a breach of statutory duty as outlined in Regulations 73 and 74 of the *Construction Safety Regulations 1950* (NSW) as well as in negligence. The judge decided Mr. Takacs's contribution to the negligent conduct was 20%, but this determination did not alter the statutory damages awarded.

On appeal, the Trust raised whether Mr. Bagnara should have been called as a witness. Although Justice Hodgson accepted that Mr. Bagnara was involved in maintenance of the Trust's buildings, he rejected the notion that he was employed solely on this basis. Therefore, His Honour saw no reason why he should necessarily have appeared before the Court. His fellow judges declined to comment on this issue.

The appeal also focused on defining 'construction work' for the purpose of the *Construction Safety Regulations 1950* (NSW). In particular, the emphasis was on the meanings of 'carrying on construction work' in Regulation 73 and 'in charge of construction work' in Regulation 74. Section 3(1) of the *Construction Safety Act 1912* (NSW) defines 'construction work' to involve 'building work' which includes 'work...in painting... done in relation to a building or structure at or adjacent to the site thereof'. Justice Hodgson determined that a quote for a painting job which, barring the accident, would have gone ahead was 'building work'. However, since the proposed painting work was not linked to any larger project under the Trust's supervision, he argued it was not involved in construction work at all as set out in Regulation 73. Justice McColl pointed out that there was no automatic link between the Trust's ownership of the property and construction work carried out on it. Justice Basten disagreed, arguing that Mr. Takacs by quoting was acting as an agent for the Trust in carrying out preliminary construction work.

Similar dissension was evident with respect to whether the Trust was 'in charge of construction work'. According to Justice Hodgson, the Trust didn't breach Regulation 74 since Mr. Bagnara's actions in providing Mr. Takacs with access to the roof to quote on painting didn't signify that either he or the Trust were 'in charge of construction work'. Justice McColl thought likewise. Mr. Takacs was in charge of taking the requisite measurements, not the Trust. Following his earlier reasoning, Justice Basten maintained that, since the Trust was in breach of Regulation 73, it was clearly 'in charge of construction work' and had also flouted Regulation 74.

The negligence finding was challenged as well, but judgment was given for the Trust. Justice Hodgson stated that, although the Trust did owe a duty of care to Mr Takacs to protect him from foreseeable harm, the perceived risk in his accessing the roof was minimal and did not warrant elaborate protective measures. Because the Trust had not breached its duty of care, the matter of apportionment for contributory negligence did not need to be addressed.

Consequently, the appeal was allowed, the earlier Supreme Court judgment being set aside.

This case may be viewed at:

<http://www.austlii.edu.au/au/cases/nsw/NWCA/2008/141.html>

2.7.3a Implications of the case

An example of the limits of duty of care. Again, an example of why a current risk management plan and adequate insurance should be considered.

2.8 Trusts

2.8.1 Metropolitan Petar v Mitreski [2008] NSWSC 243 (Supreme Court of New South Wales, 25 March 2008)

This was a hearing for a variation of an injunction. The proceedings of which this hearing was a part were commenced in 1997 by the presiding Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand. Young CJ expressed the purpose of the proceedings as a whole as being 'in order to ensure that [Metropolitan Petar] had control of part of what he claims to be the Macedonian Orthodox Church, namely, the ministry being conducted by the persons on the defendants' side of the record as the Macedonian Orthodox Community Church of St Petka at Rockdale.'

The primary issue in this case was whether the 6th defendant in these proceedings, the Macedonian Orthodox Community Church St Petka Inc, holds the property vested in it absolutely, or as trustee for the purposes of the Macedonian Orthodox Church, or otherwise on trust. The 6th defendant sought to use these assets to pay legal costs.

The parish of St Petka is a parish of the Macedonian Orthodox Church. It was set up as an unincorporated association in about October 1977. In the same month, ownership of church property was transferred to trustees of this association, and later the trustees acquired other properties. The 6th defendant was incorporated under the *Associations Incorporation Act 1984* (Cth). Under that Act, the assets held by an unincorporated association vest in the replacement incorporated association automatically.

In earlier proceedings (2003), the property held by the incorporated association was divided into two parts, Schedule A property, for church purposes, and non-Schedule A property which included investment property. Hamilton J found that the 6th defendant held the Schedule A property on trust (as had its predecessor unincorporated association) and that the trust was a valid charitable trust. There was no determination of the status of the non-Schedule A property. It was decided at subsequent proceedings (2006) that an injunction would be issued restraining the use of Schedule A property for the purpose of paying legal costs.

This decision went on appeal and the Court of Appeal varied the injunction. This variation was the subject of an application for special leave in the High Court, but special leave was refused.

Palmer J was then asked to give judicial advice to the 6th defendant in 2007. His Honour indicated that he was of the view that funds should be made available to the 6th defendant to defend the proceedings, by giving access to the association's property to raise those funds.

This decision was overturned on appeal to the Court of Appeal, on the basis that the 6th defendant was not a neutral party, but was abusing the right to ask for judicial advice to protect its own interests. The High Court granted special leave against the Court of Appeal's decision on 7 March 2008, and that appeal was yet to be heard at the date of this proceeding.

In these proceedings, argument was presented as to the proper dealing with interlocutory injunctions. The Attorney-General, as protector of charities, intervened. The Attorney-General's view was that the proceedings as a whole should be concluded as soon as possible. This would require that the 6th defendant be funded out of the trust assets. Even though this may mean that there would be hardly any assets left, 'in a very real sense the assets will have been used to protect the charity'.

His Honour did not agree with this view. He said that the Court of Appeal had made it clear that the 6th defendant was not to be permitted to use the properties vested in it for the purpose of defending these proceedings. The circumstances of the 6th defendant had barely changed at all since the Court of Appeal's decision in 2006, except that costs had increased. Whilst small variations had been made to the injunction against use of the trust assets to pay legal costs in prior proceedings, no major variation should be made. Nor indeed should a

series of variations be made which might nullify the effect of the Court of Appeal's injunction against the use of trust assets by the 6th defendant.

The motions were dismissed with costs against the 6th defendant.

The case may be viewed at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/243.html

See http://www.austlii.edu.au/au/cases/nsw/supreme_ct/toc-M.html to view the listing for the multiple proceedings so far in this litigation.

2.8.1a Implications of this case

Refer to a subsequent High Court decision on this very complex matter at page 65 of this Working Paper – *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42 (High Court of Australia, 4 September 2008)

2.8.2 Macedonian Orthodox Community Church St Petka Incorporated v Metropolitan Petar [2008] NSWCA 165 (New South Wales Court of Appeal, 11 July 2008)

This application for leave to appeal was part of ongoing litigation between the Metropolitan (Bishop) of the Macedonian Orthodox Church for the area of Australia in question and a parish of the church in Sydney. The applicant parish is incorporated as an incorporated association, and in previous litigation had been held by Hamilton J to hold certain property on a charitable trust. This property was designated the Schedule A property, which was primarily for church purposes. There was other property, designated the non-Schedule A property for which the status was undecided.

After this decision by Hamilton J, the Metropolitan applied for an interlocutory injunction to restrain the applicant from using trust property to finance the continuing litigation. This injunction was granted – see *Metropolitan Petar v Macedonian Orthodox Community Church of St Petka Incorporated* [2006] NSWCA 277. Special leave to appeal this decision was refused by the High Court of Australia.

This appeal is from a decision of Young CJ in Equity in *Metropolitan Petar v Mitreski* [2008] NSWSC 243 which refused an application for variation to the injunction mentioned above to allow certain costs to be paid from the trust property. The Attorney-General, in his role as protector of charities in New South Wales, had argued that the injunction should be varied within a monetary cap to allow the expenditure sought. This represented a different view from that taken by the Attorney-General in the 2006 case referenced above. While Young CJ weighed the changed view of the Attorney-General in his consideration of the various relevant factors, he decided that this change was not enough to bring about an alteration in the injunction.

The Court of appeal upheld this finding as being within ‘the range of a proper discretionary judgement’. There had not been sufficient change in circumstances to warrant a change in the injunction. Nor were there any other errors in law in Young CJ’s finding.

Therefore, the proposed appeal had insufficient prospects of success and leave to appeal was refused. Costs were ordered against the applicant.

The case may be viewed at: <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2008/165.html>

2.8.2a Implications of the case

Refer to a subsequent High Court decision on this very complex matter at page 65 of this Working Paper – *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42 (High Court of Australia, 4 September 2008)

2.8.3 Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand [2008] HCA 42 (High Court of Australia, 4 September 2008)

This appeal to the High Court of Australia arose from proceedings commenced in the Equity Division of the New South Wales Supreme Court by two plaintiffs. One was His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand, and the other, Very Reverend Father Mitko Mitrev, a former priest at St Petka Parish in Rockdale, Sydney, who, it was claimed, was wrongfully dismissed by the Macedonian Orthodox Community Church St Petka Incorporated (“the Association”) on the 14th July, 1997. For reasons of convenience, these plaintiffs are still referred to as “the plaintiffs” in the High Court judgment although this is no longer the case. The original proceedings were termed “the Main Proceedings”.

The other parties to the litigation are the newly appointed priest in place of the dismissed plaintiff and the Attorney General of New South Wales. As the majority of the High Court observed “The background to the litigation as a whole is complex. It is desirable to resist any infection from the parties’ fascinated obsession with the minutiae of their innumerable litigious battles since 1997, and the prospect of more to come” (at para 9).

The Association is the registered owner of land previously held upon trust by trustees appointed under a Deed of Trust pursuant to a constitution adopted by the parishioners of the St Petka Parish in 1977. The Association was incorporated in 1992, and the land was transferred to it. The Association is alleged to hold that land, and property acquired since 1992, upon trust for the purposes of the Macedonian Orthodox Church. It is alleged that the Association has contravened the doctrine and law of the Macedonian Orthodox Church in dismissing the second plaintiff, appointing other persons in his place, making changes to the building used as the parish church and in other ways. It is also alleged that the Association has broken its trust in various respects, and ought to be removed as trustee.

In a separate action in the Equity Division, the Association sought judicial advice about the conduct of the Main Proceedings as was permitted under section 63 of the *Trustee Act 1925* (NSW) (“the Act”). The first of Justice Palmer’s orders stated the Association’s defence of the terms of the trust in the Main Proceedings was justified. A second order determined that this defence was to be funded from the Association’s Schedule A Property, property acquired prior to 1992, before the Association was incorporated. This property consisted largely of the church premises, an Arncliffe child-care centre and a few investment units. (The Non-Schedule A Property obtained after 1992 included further investment units, investment funds and sacred objects.) Justice Palmer stipulated that \$78,666.01 could be withdrawn to cover litigation expenses from the 9th July, 2004, to the 9th February, 2007, and allowed up to \$216,295.00 for future legal costs. In arriving at these figures, he took into account that the Association needed recourse to the Schedule A Property to mount its defence.

Underlying his desire to facilitate the litigation was his belief that there was public benefit in exploring the charitable purpose of the trust, namely the promotion of religion.

The plaintiffs successfully appealed to the New South Wales Court of Appeal to have the orders set aside. By so doing, the Association’s summons requesting judicial advice was dismissed by a majority of the Court as an exercise outside Justice Palmer’s discretion. Finally, the Association was granted leave to take the matter to the High Court of Australia. In a joint judgment, Acting Chief Justice Gummow, along with Justices Kirby, Hayne and Heydon, considered whether Justice Palmer had exceeded his discretionary power under section 63. They applauded Justice Palmer’s desire to accord fairness to the trustees as well as to consider the public benefit by providing a practical financial avenue for the Association’s defence.

In the Court of Appeal of New South Wales, the issue of Justice Palmer’s sixth order was also raised. This notion of making all the other orders revocable from the outset was interpreted by the plaintiffs to apply to all the existing orders, including order 2 with its funding arrangements, and was not just for future reference. Since the majority of the High Court

bench felt this interpretation was incorrect, they saw no reason to comment on the correctness or otherwise of the Court of Appeal's analysis of section 63 in this regard.

Another matter canvassed on initial appeal was the assumption, on the judges' reading of the pertinent authorities, that, because the Main Proceedings could be classified as adversarial, the giving of discretionary judicial advice under section 63 should be curtailed, a supposition they believed Justice Palmer failed to appreciate. This suggestion was negated in the majority High Court judgment which cited Justice Palmer's awareness of the Association's position with respect to the plaintiffs and his understanding of its potentially successful reliance on the terms of the trust to refute any allegations of a breach of trust.

Apart from considerations of breach of trust, the Court of Appeal was also concerned about whether Justice Palmer had balanced the advantages of authorizing the Association to have recourse to funding from the Schedule A Property with the possible adverse consequences of his decision. Should the Association prove unsuccessful in its attempt to defend the terms of the trust, there would be the loss not only of the costs involved in running the action, but also any costs awarded to the plaintiffs. A serious depletion of the value of the Schedule A Property was regarded as a real possibility. This view was not shared by the majority judges in the High Court who argued it was not for Justice Palmer to predict the award of costs in the Main Proceedings. In the absence of any fraud, misrepresentation or wilful concealment by the Association in its quest for judicial advice, his Honour's original decision with respect to the funding of its action should stand.

Finally, the majority High Court judgment addressed the matters of procedural fairness which were brought up in the Court of Appeal. With respect to the plaintiffs being denied access to the opinions of opposing counsel, the High Court judges re-iterated that Justice Palmer had acted appropriately as such material was the subject of legal privilege. Similarly, they failed to find that Justice Palmer should have waited until the Association's defence was filed before he offered his judicial advice.

After rejecting an application by the plaintiffs for special leave to cross-appeal on the basis of lack of legal merit and the delay involved in raising this course of action, the majority judges of the High Court supported Justice Palmer by allowing the appeal. They pointed out that issues arising out of legislation dealing with the powers of trustees rarely reach the High Court. Nevertheless, their Honours stressed the importance of all appellate courts not undermining the conclusions of a trial judge as, by doing so, not only were litigation and its attendant costs escalated, but also a speedy resolution was forestalled.

Justice Kiefel, in a separate judgment, agreed that Justice Palmer's advice to the Association was within the power conferred by section 63 since it related to whether and how the Main Proceedings should be pursued and was not determinative of the matters to be canvassed in those proceedings. She upheld his determination to progress a resolution of the uncertainty inherent in the trust, especially since the trust was charitable in nature.

This case may be viewed at:

<http://www.austlii.edu.au/au/cases/cth/HCA/2008/42.html>

2.8.3a Implications of the case

This case appears to be another illustration of a protracted faith based dispute with many hearings. This one is unusual as it went all the way to the High Court on a procedural issue. The proceedings are still being conducted in early 2009. See the decision of His Honour Young CJ on 4 March 2009 for a history and decision on the essential issue of whether the defendants had breached their trust: *Metropolitan Petar v Mitreski* [2009] NSWSC 106 (available at http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2009/106.html).

2.8.4 Metropolitan Petar v Mitreski [2008] NSWSC 1021 (New South Wales Supreme Court, 30 September 2008)

Hamilton J had earlier dealt with aspects of this application. It had been established at that point that there was a trust in respect of the church property in question, and that it was a charitable trust. In addition, when the unincorporated church incorporated as an incorporated association, the charitable trust was not extinguished, and the trust property continued as before.

This motion was to strike out paragraphs of the defendants' defence. As to that issue, the principles had been laid down by the High Court in *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125. Material is only struck out where it is abundantly clear that it is material which, even if true, could not lead to the success of the party pleading it.

The church in question, the Macedonian Orthodox Church of St Petka Rockdale was established on 8 March 1977. The issue here was whether there had been a variation of the trust from the time it was established, or whether the trust must be taken to be as it was in 1977. Trusts laid down in the founding deed continue in force and the members for the time being of the Church have no power to change the objects. This is subject to the proviso that the trust deed itself does not provide for methods of changing the trusts. If it does, and the methods are followed, then the trusts may be altered.

The Court said that, in general, when construing a document, it may be possible to look at the surrounding circumstances, though this would be circumscribed in the case of a charitable trust, which is a semi-public document. What is clear is that subsequent conduct cannot be used to construe the document. If the deed is silent on a matter, such as the qualifications needed to be a minister, then that can be resolved by looking at practice over a long period, but that would be a matter of what the contract was, rather than what the contract meant.

That was not the case here. The pleading was that the trusts had been changed by church practices. This was not a proper answer to the claim.

The Court had to consider whether it could be argued, as it had been in this motion, that the trust deed had been varied. In this trust deed, there was a provision for the alteration of the trusts, and they may be altered in accordance with that provision. In this case, the trusts had not been altered.

In relation to estoppels, the Court said that bishops of churches are not corporations sole in Australia, and estoppel does not operate against them. Thus the paragraphs of the pleading relating to estoppels were also struck out.

Therefore, the pleadings relating to alteration of the trusts by church practice and to estoppels of the Metropolitan (bishop) were struck out. Leave was given to replead.

This case may be viewed at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/1021.html

2.8.4a Implications of this case

Refer to related decisions on this matter in this Working Paper, in particular the previous High Court decision (page 65 above); and to the decision on 4 March 2009 in *Metropolitan Petar v Mitreski* [2009] NSWSC 106 (http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2009/106.html).

2.8.5 Anglican Trusts Corporation v Attorney-General for the State of Victoria [2008] VSC 352 (Supreme Court of Victoria, 11 September 2008)

A testator who died on 23 December 1938 left land on trust to the use of her husband during his life, and after his death to the Church of England Trusts Corporation for the Diocese of Gippsland (the Corporation). The relevant clause in her will was clause 9, which provided *inter alia* that the land was left upon trust to the Corporation 'for the use as a camp for girls of the Gippsland Diocese of the Church of England and for such other purposes as the Council of the Diocese shall think fit provided that it must not be used as a camp for the Boy Scouts or Girl Guides.' In 1943, the Corporation began using the land, which was a park, as Church of England girls' club campsite.

However, the site was eventually not viable, as the costs of keeping it as a campsite exceeded the income generated. Some of the land was sold to maintain the remainder, and by September 2006, operations by the Corporation ceased on the land. The land was then leased out at \$1000 per month. As at the date of this hearing, the land was valued at \$1.2 million.

The question for this hearing was whether clause 9 of the deceased's will created a valid charitable trust, and if not, what was to become of the land. If the land was not a charitable trust in favour of the Corporation under clause 9, the Corporation sought to present a cy pres scheme to the court for approval.

It was common ground that the will created two trusts: one for the use as a camp for girls and another investing the Council of the Diocese with a discretion to apply the land 'for such other purposes as [it] shall see fit'. The Corporation submitted that the first purpose was not a charitable purpose, though the second was, and that they should be read independently. The severance of purposes was said to be permitted by section 7M of the *Charities Act 1978* (Vic).

Section 7M(1) of the *Charities Act 1978* provides that a trust is not to be held invalid because it contains both charitable and non-charitable purposes. The Corporation argued that the charitable trust would not wholly fail if the second purpose was a valid purpose. Further, that would mean that there was no need to present a cy pres scheme to the court because the second purpose remained capable of implementation.

The Attorney-General submitted that the first purpose was a valid charitable purpose, while the second would permit a non-charitable use.

The judge held that the first purpose was not a charitable purpose. It was not for the advancement of religion. The use of the land as a camp for girls was more a secular purpose, although the fellowship aspect of the use may incidentally advance the girls' religious faith.

As to whether the second purpose was ancillary to or cumulative upon the first, the judge held that it was not. There were two purposes.

The second purpose was held not to be charitable *per se*. It was a charitable purpose only because of the operation of section 7M of the *Charities Act 1978*. This section permits the second purpose to be severed and saved as a charitable gift. The second part of clause 19 of the will constitutes a charitable gift for which an overriding charitable intention was evidenced in the will. If the Corporation cannot use the land for any purpose which is charitable in law, it should be sold. This was permitted by clause 14 of the will.

This case may be found at: <http://www.austlii.edu.au/au/cases/vic/VSC/2008/352.html>

2.8.5a Implications of this case

This case illustrates the care needed in drafting gift clauses in wills and the recipient organisation examining the will terms. Many might be surprised that a 'camp for girls' was not charitable in the first place – in its own right and not just under the head of 'advancing religion'.

2.8.6 Northern Sydney and Central Coast Area Health v A-G (NSW) [2008] NSWSC 1223 (Supreme Court of New South Wales, 20 November 2008)

On 14 August 2007, Windeyer J had determined that the trust in question had failed and ordered that a cy pres scheme be settled. This judgement deals with the cy pres scheme.

The trust had related to provision for sick and wounded soldiers and sailors returned from World War 1. Windeyer J had determined that the trust had come to an end when there were no more such persons remaining. The wording which was pertinent to the cy pres scheme was that one of the trust purposes had been to provide a 'convalescent home in perpetuity for distressed subjects of the British empire'. Windeyer J had determined that rehabilitation treatment was the appropriate modern replacement for convalescence, and that a scheme for rehabilitation care would be a scheme as close as possible to the original trust purpose.

Two schemes were put forward – one by the State of New South Wales (the State scheme) and another by the RSL (New South Wales Branch) (the RSL scheme). The RSL scheme was supported by the North Sydney Council, the Commonwealth of Australia, St Vincent's and Mater Health and Sisters of Charity Australia.

Under the State scheme, the State would be trustee, the original trust property would be sold and a new rehabilitation centre built. This would be free of charge to the public, but because beds would be transferred from elsewhere, there would be no overall increase in rehabilitation bed places.

Under the RSL scheme, the trust property would be restored and preserved, and a new rehabilitation facility built on the site. This would be primarily for fee-paying patients, with a large part of the site licensed to North Sydney Council as open space. This scheme would result in an overall increase in rehabilitation bed places.

Windeyer J ultimately decided that the State scheme was closer to the original objects of the trust. Although, the RSL scheme would retain the site, there was no objection to sale. The land was worth \$16, 800,000 and there was an able and willing buyer in the Sydney Church of England Grammar School. Although the State scheme would not result in more rehabilitation bed places, there was evidence taken that extra beds were not needed in the North Sydney region.

The most telling point though was the requirement of the original trust that the places were for 'distressed' persons. The RSL scheme was for mostly fee-paying patients, who would pay \$560 per day for the services. The State scheme was for public patients, and all costs would fall on the State. Windeyer J interpreted the word 'distressed' as embracing 'financially distressed', in line with previous case law, and held that it was more likely that public patients would be financially distressed than private patients with private health insurance.

Thus the State scheme was preferred because its objects (the persons benefited) were closer to those originally benefited under the failed scheme. There were two conditions: that the State should transfer to the trust without delay the land at Ryde for the proposed new rehabilitation hospital, and that Treasury approval for the proposal be given without delay, so that moneys should be forthcoming. If these conditions could not be met, the RSL scheme would be approved at a subsequent hearing.

This case may be viewed at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/1223.html

2.8.6a Implications of this case

Refer to the previous case of *Northern Sydney and Central Coast Area Health Service v The Attorney-General for New South Wales* [2007] NSWSC 881.

2.9 Miscellaneous cases

2.9.1 De Quincey Company Ltd v Commissioner for Fair Trading, NSW Office of Fair Trading [2008] NSW ADT 152 (New South Wales Administrative Decisions Tribunal, 26 May 2008)

The De Quincey Company Ltd (the Company) is a company limited by guarantee, which attracts financial support from both Commonwealth and State bodies. It is a dance performance company based in Sydney whose work is founded in the 'Body Weather' contemporary dance discipline first developed in Japan.

The Company applied to the Commissioner for Fair Trading for registration of the business name 'The Weather Bureau' (the name). It was refused on the ground that the name was capable of suggesting a connection with the Commonwealth or State Government. A further application to the Minister by Ms De Quincey, a director of the Company, was declined, but also treated as an application for internal review, following which the original decision was affirmed. The Company applied to the Tribunal for review of the decision and in its submissions pointed out that the Australian Securities and Investments Commission places no restrictions on use of the terms 'Weather Bureau' or 'Bureau'.

The Tribunal had first to determine its jurisdiction in the matter. It found that it had jurisdiction to hear the matter as it was reviewing the decision of the Commissioner, not the decision of a Minister.

Secondly the Tribunal had to determine whether the proposed business name was prohibited by Clause 10 of an order under the *Business Names Act 2002* (NSW), which states:

10. Names which, in the context in which they are proposed to be used, are capable of suggesting connection with a department, authority or instrumentality of the Government of the Commonwealth of Australia or of a State or Territory or with a municipal or other local authority.

The Tribunal found that the proposed name would suggest a 'connection with' the Commonwealth Bureau of Meteorology, notwithstanding that the context was that of the performing arts. It did not matter that the Company did not intend to mislead or that the context of any promotional material would have a clear 'dance' focus.

This decision may be found at:

<http://www.lawlink.nsw.gov.au/adtjudgments/2008nswadt.nsf/1410fb8ca7f756c5ca25684e0041e60e/fd2ac6c84b705b0aca2574510022ed1c?OpenDocument>

2.9.1a Implications of this case

The formal and trading names of nonprofit organisations often are important and valuable intellectual property. Before adopting a name, checks should be made not only of the ASIC register of business names, but also State business name registers and the register of trade marks and designs. Checks should also be made of the general usage of the name in the community (e.g. telephone book, internet etc.).

2.9.2 Llewellyn v Clyde Group Inc [2008] TASSC 25 (Tasmanian Supreme Court, 16 June 2008)

On 17 October 2005, the appellant, the then Minister for Primary Industries and Water in Tasmania, made a decision under the *Water Management Act 1999* (Tas). About 17 months later, on 14 March 2007, the respondent was incorporated under the *Associations Incorporation Act 1964* (Tas). The respondent association was formed to represent the interests of farmers and others who were adversely affected by the decision made by the Minister referred to above. As individuals, the farmers and others may have qualified as persons aggrieved by the decision for the purposes of the *Judicial Review Act 2000* (Tas) (the Act).

As the respondent association was not formed at the time the decision was made, the appellant contended that the association could not have been aggrieved, and had no standing to make an application under the Act in respect of the decision in question. The respondent association contended that it was sufficient that an applicant for review be aggrieved by the decision at the time of making the application under the Act.

At first instance, the judge held that the latter view was correct. On appeal, the Court said this view was supported by section 17(1) of the Act which states that 'a person who is aggrieved by a decision to which this Act applies may apply to the Court for an order of review relating to the decision.' This wording implies that the person must be aggrieved at the time of the application for review. However, although precedent also supports this interpretation, the question should be determined by reference to the subject, scope and purpose of the statute under which the decision was made.

Nevertheless, the Court said the trial judge was correct to say that the question of whether a person was a 'person aggrieved' under the Act would usually be determined by reference to the facts as they existed at the date the application was made.

Therefore, the appeal was dismissed unanimously.

This case may be viewed at: <http://www.austlii.edu.au/au/cases/tas/TASSC/2008/25.html>

2.9.2a Implications of this case

This case illustrates that an incorporated body is a 'legal person' in its own right, separate and distinct from its members and controllers. There are limited situations where the court will depart from this principle, such as where fraud is involved.

2.9.3 Western Australian Rural Counselling Association Inc v Minister for Agriculture, Fisheries and Forestry [2008] FCA 986 (Federal Court of Australia, 1 July 2008)

In 2006, the Western Australian Rural Counselling Association Inc (the Association) was granted some Commonwealth Government funds under its Rural Financial Counselling Services Program (the Program) to provide free financial counselling to needy primary producers as well as rural businesses until 30 June 2008. The agreement was that any funds remaining at the end of the agreed time frame would be returned to the Government. Late in 2007, when grants under the Program for the period from 1 July 2008 to 30 June 2011 were advertised, the Association submitted an application which proved unsuccessful. Subsequently, the Association sought an injunction to deny funding to the successful applicant, the North East Farming Futures Group, on the grounds that it had not been accorded natural justice.

For an interlocutory injunction to be imposed, the Association had to demonstrate a *prima facie* case, namely, a sufficient likelihood of success. Justice Siopsis in the Federal Court of Australia maintained that this could not be done as the funding arrangements were purely administrative in nature and not tied to a statutory or regulatory regime. Such discretionary funding involved no enforceable legal obligation. Therefore, it was futile for the Association to suggest an entitlement to natural justice on the basis of its being the incumbent recipient of the funding.

When the other test for an interlocutory injunction, the balance of convenience, was applied, His Honour failed to find for the Association. This test involved weighing up the inconvenience suffered by the Association if the injunction was disallowed against that experienced by the Minister for Agriculture, Fisheries and Forestry, the relevant Commonwealth department head, if it was allowed. He pointed out that granting such an injunction would not allow the Association's financial counselling to continue beyond the original contract's expiry date. Further, he maintained that any adverse financial effects suffered as a result of the Association's leasing of premises and vehicles beyond the stipulated 30 June 2008 were of its own volition.

Consequently, the Association's request for an interlocutory injunction was rejected. Its application to have access to the reasons for the Commonwealth Government's decision was denied as the Association had already been permitted to view the relevant documentation.

This case may be viewed at: <http://www.austlii.edu.au/au/cases/cth/FCA/2008/986.html>

2.9.3a Implications of this case

Governments usually have the upper hand in their funding relationship with nonprofit grantees. The result may have been different if the funding arrangements were not purely contractual, but relied upon statutory or regulatory regimes.

2.9.4 ANZ Trustees Limited v Attorney General of New South Wales [2008] NSWSC 1081 (Supreme Court of New South Wales, 16 October 2008)

Father Michael Treacy, a Roman Catholic priest, died on the 20th May, 1938. His will was dated the 26 August 1936, with a codicil added on 12 February 1938. A number of bequests were to be made from the estate which, at the time, was valued at approximately \$20,622. The principal beneficiary was to be the priest's sister, Mrs Bridget Ireland.

Probate was granted on 13 April 1939 to one of Father Treacy's executors, Mr. John Johnston. Unfortunately, Mrs Ireland died on the 20th August 1939, and Mr Johnston also died in 1939. As a result, the intended distribution of the \$6,000 and any resultant interest to Mrs Ireland did not take place. Matters were further complicated by the fact that Father Treacy was also executor for another of his sisters, Mrs Kathleen Edmunds, whose estate was yet to be finalized according to her directions and his judgment.

Although on 13 September 1940, the Court appointed the Trustees Executors and Agency Company Limited (TEA) to carry out Father Treacy's wishes, little progress resulted until, in 2005, ANZ Trustees Limited, the successor of TEA, instructed new solicitors to investigate how far the will's implementation had advanced over the preceding 65 years.

Under the terms of his will (set out in paragraph 5 of the judgment) Father Treacy determined that, in the event of his sister's death, any moneys remaining in trust for her 'would be distributed on the various charities ... mentioned in this will.' The question as to which of the various charities cited in the will would qualify as beneficiaries finally came before Justice Windeyer in the New South Wales Supreme Court in 2008. By this time, the value of Father Treacy's assets was \$213,645.

On examination of the list of original beneficiaries, a bequest to Archbishop Duhig, now deceased, was an absolute personal gift and not a charitable gift. Therefore, it did not meet the description of 'charities mentioned in the will'. The remaining bequests were classified as charitable since they were for the advancement of religion or for the relief of poverty. The result was that:

- Included under the charitable umbrella was the gift via the 1938 codicil to the Fathers of Blessed Sacrament at St Francis' Church, Melbourne.
- The codicil's revocation of a bequest to the trustees of the Deniliquin Roman Catholic Cemetery was valid (although provision for maintenance of a cemetery was stated by the Court to be a valid charitable gift).
- Justice Windeyer amended the name of Father Treacy's Augustinian beneficiary in Dublin after deciding that the priest had erred in bestowing money on a non-existent monastery. His Honour found the nominated beneficiary was a misnomer for an Augustinian Order known as St. John's Priory.

Where charities existed at the time the bequests were made, but subsequently were disbanded, the gifts were applied to their successors. For example:

- gifts to the Foundling Home at Broadmeadows in Melbourne and St Augustin's Orphanage in Geelong were allocated to the corresponding charitable arms of Mackillop Family Services Limited, the successor of the original beneficiaries, to be used for child care for babies, infants and pregnant women; and for care and education of boys including residential care. (Section 5 of the *MacKillop Family Services Act 1998* (Vic) sanctions such actions).

- money left to St Anthony's Home for girl mothers was to be applied to St Anthony's Family Care, a charitable corporation limited by guarantee, to be used for purposes associated with the care and shelter of girl mothers and infant children.

His Honour resolved that all of the eligible charities should receive an equal share of Father Treacy's estate.

This case may be viewed at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2008/1081.html

2.9.4a Implications of this case

It is extraordinary that an estate granted probate in 1939 should have taken so long to finalise. One can only wonder at the reason for the delay.

Organisations which are well established and regularly receive bequests should note the private act mentioned in this case. It allows bequests and trusts made in an old name to be recognised as referring to the new body. The provision is:

MacKillop Family Services Act 1998 - SECT 5

Certain gifts, trusts, etc. not to fail

5. Certain gifts, trusts, etc. not to fail

If, before, on or after the commencement of this Act-

- (a) a gift, disposition or trust of property has been or is made or declared or is deemed to have been made or declared; or*
- (b) a trust fund has been or is created-*

(whether by deed, will or otherwise) to, in favour of, for the use of, or for a charitable purpose of, a Congregation or an agency of a Congregation, the gift, disposition or trust takes effect, or may take effect, or the trust fund may be applied, on or after that commencement as if made or declared to, or created in favour of, MacKillop for a charitable purpose of MacKillop that corresponds with, or is similar to, the charitable purposes of the Congregation or agency for which the gift, disposition or trust was made or declared or the trust fund was created.

2.9.5 Robert Paul Schneider and Anor v Sydney Jewish Museum Inc [2008] NSWSC 1331 (Supreme Court of New South Wales, 12 December 2008)

On Esther Blashild's death in May, 2007, it was found that the 95 year old had made several wills in Australia since 1996, all of which revoked any previous wills.

According to the terms of her 2007 Australian Will, a sizeable proportion of her \$5 million estate was left to charity. One of the residuary beneficiaries was the Sydney Jewish Museum Inc (the Museum). As well as the local wills, she had also executed three wills in Israel, the last in 1992, whereby her property in Switzerland and Israel was to be divided amongst relatives and a friend there. The Museum argued that any assets in Israel formed part of the residuary of Esther Blashild's Australian estate as any one of the subsequent nine Australian wills had overturned the foreign bequests.

Mr Schneider, representing the executors of her estate, sought a declaration to the contrary, that there was no intention on Esther Blashild's part to revoke the Israeli Will. In the event no such declaration could be made by Acting Justice Sackville, he relied on section 29A(1) of the *Wills Probate and Administration Act 1898* (NSW) as a means of protecting her intent. This section provides that 'if the Court is satisfied that a will fails to reflect the writer's intention, then it can rectify the document in an attempt to carry out her wishes.' It was the contention of the executors that Esther Blashild meant her Australian and Israeli wills to be regarded as separate, but equally valid documents. Despite the fact the 1992 Israeli Will was written earlier, Mr. Schneider maintained that, up to the time of her death, she expected her overseas estate to be dealt with as directed under her Israeli Will. In his view, she clearly recognized no revocation of this document.

Attempting to assess Esther Blashild's intent, His Honour explored the evidence given by Mr Mahemoff, a solicitor employed by the Jewish National Fund of Australia Inc as its Federal Bequests Director, who became acquainted with her when she was almost 90. Although he prepared a total of seven wills for her, it was not until the 17th February, 2005, that he became aware of the existence of a unit in Tel Aviv and the possibility of alternative legal arrangements. At this point in time, the judge accepted that Esther Blashild believed her Israeli Will to still be valid. However, His Honour stated the revocation clause in the 2005 Australian Will was broad enough to encompass overseas assets. By then, too, she had been informed by Mr Mahemoff that her 2005 Australian Will was preferred over her final Israeli Will. This caused the judge to believe that, on the balance of probabilities, Esther Blashild had a grasp of the true situation with respect to the existing wills and was not necessarily under any misapprehension regarding the validity of the Israeli Will. In the event the 2005 Australian Will did not revoke the Israeli Will, he decided the 2007 Australian Will would have. Therefore, Acting Justice Sackville refused to make the declaration sought by Mr. Schneider.

As far as His Honour was concerned, any order under section 29A(1) of the *Wills Probate and Administration Act 1898* (NSW) to rectify Esther Blashild's 2007 will would only be contemplated where there was clear evidence of a failure to carry out her intention. Since he was convinced as early as the 2005 Australian Will there was no such failure, no rectification was warranted. Distribution of her estate would proceed as set out under her most recent Australian will.

This case may be viewed at:

<http://www.lawlink.nsw.gov.au/scjudgments/2008nswsc.nsf/6ccf7431c546464bca2570e6001a45d2/056a7c5e6f85afd2ca25751c001ac803?OpenDocument>

2.9.5a Implications of this case

This case illustrates the complexities of a will where assets outside the jurisdiction are involved and where a will is constantly varied and remade.

3.0 State and Territory Legislation Review 2008

There was relatively little legislative activity specifically impacting upon legislation unique to nonprofit organisations in 2008. Victoria and Western Australia have significant proposed reforms.

3.1 New South Wales

The relevant Acts and Regulations in New South Wales are:

- Associations Incorporation Act 1984
- Associations Incorporation Regulation 1999
- Charitable Fundraising Act 1991
- Charitable Fundraising Regulation 2008
- Charitable Trusts Act 1993
- Lotteries and Art Unions Act 1901
- Lotteries and Art Unions Regulation 2007

The most significant development in relevant New South Wales law in 2008 was the new **Charitable Fundraising Regulation 2008**, which replaces the previous Charitable Fundraising Regulation 2003. The Charitable Fundraising Regulation 2008 has been operational since 1 September 2008 and deals with fundraising appeals for charity. It identifies that certain requests for money, such as payment of school fees, child-minding fees, payments of medical and nursing services, payments connected with disability employment services, and some other care services, are not appeals (clause 4). It also lists those religious bodies which are exempt from the requirements of the *Charitable Fundraising Act 1991* (clause 6). In addition, local councils, certain local council-connected trusts and universities are exempt from the necessity to seek an authority to hold a fund-raising appeal (clauses 7-8). The remaining clauses deal with financial requirements, transparency requirements (clauses 9, 10, 13-15), and identification of face-to face collectors (clause 11).

For details of legislation and regulations see:

<http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0>

3.2 Victoria

The relevant Acts and Regulations in Victoria are:

- Associations Incorporation Act 1981
- Associations Incorporation Regulations 1993
- Associations Incorporation Regulations 1998
- Charities Act 1978
- Charities Regulations 2005
- Fundraising Act 1998
- Fundraising Appeals Regulations 1999
- Lotteries Gaming and Betting Act 1966
- Gambling Regulation Act 2003

The Victorian government has proposed changes to the laws regulating the operation of incorporated associations in that state. There is one current Bill: the **Associations Incorporation Amendment Bill 2008** (introduced in December 2008, and currently at the second reading stage). The *Associations Incorporation Amendment Bill* contains technical and governance changes such as changing the name of the 'public officer' to 'secretary', and specifying additional matters to be include in the rules of an incorporated association.

The **Fundraising Appeals and Consumer Acts Amendment Act 2008** was passed on 3 February 2009, and received Royal assent on 10 February 2009. The Act came into operation on 11 February 2009, with the exception of sections 6(2), 7, 8, 10, and 11. The latter sections will come into operation on 1 November 2009, unless proclaimed earlier.

This amending Act has changed the name of the principal Act to the **Fundraising Act 1998**. The amending Act contains an objects clause which is now section 2A of the Fundraising Act 1998. The objects of the *Fundraising Act 1998* are now stated to be the facilitation of 'transparency and public confidence in the fundraising industry and in not-for-profit organisations that conduct fundraising; and the protection of members of the public from whom money or a benefit is solicited for beneficial or benevolent purposes in the course of fundraising; and the protection of the public interest in relation to fundraising.'

There is also a definition change to the meaning of fundraising appeal to recognise that an appeal can be an on-going activity, rather than just a one-off event (new section 5(2)(ca)).

New sections 12A and 12B of the *Fundraising Act 1998* increase the disclosure requirements for fundraisers who represent that a portion of money received in return for goods or services is to be applied for fundraising purposes. Section 12A requires the dollar or percentage amount of funds to be clearly disclosed to the donor. The disclosure must be made in writing to the person to whom the goods or services are to be supplied before the contract in relation to that supply is entered into. The section imposes a maximum penalty of 240 penalty units for a corporation and 120 penalty units in any other case. Section 12B provides that the Director may impose a condition on the fundraiser's registration specifying the manner in which a disclosure must be made for the purposes of section 12A. Other changes are also aimed at better transparency for the benefit of donors.

Full details of the amending legislation can be found at:

http://www.dms.dpc.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf?OpenDatabase

Details of all Acts and Regulations can be found at:

http://www.legislation.vic.gov.au/Domino%5CWeb_Notes%5CLDMS%5CPubLawToday.nsf

3.3 Queensland

The relevant Acts and Regulations in Queensland are:

- Associations Incorporation Act 1981
- Associations Incorporation Regulation 1999
- Collections Act 1966
- Collections Regulation 2008
- Charitable Funds Act 1958
- Charitable and Non-Profit Gaming Act 1999
- Charitable and Non-Profit Gaming Regulation 1999
- Charitable and Non-Profit Gaming Rule 1999
- Trusts Act 1973

The **Collections Regulation 2008** repeals the previous *Collections Regulation 1998*. The new Regulation commenced operation on 1 September 2008. The Regulation deals with applications by associations for registration as a charity, objections to registration, and the general machinery relating to registration. The identification rules for door-to door and street collections are also laid out, with additional requirements in Schedule 1 of the Regulation. The major part of the Regulation deals with accounting and financial requirements, inspections, penalties and fees.

An amendment which impinges on the law in this area was made to the *Trusts Act 1973* by the *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009*. This Act was assented to on 23 February 2009. Government-linked arts institutions had requested amendments to the *Trusts Act* so that Prescribed Private Funds (PPFs), which are generally family-controlled charitable funds, and ancillary funds could make donations to the institutions without jeopardising the donors' tax-exempt status. The *Income Tax Assessment Act 1997* (Cth) (the Tax Act) only allows charitable foundations to make grants to bodies that are both deductible gift recipients **and** charities at law for income tax purposes.

While the arts institutions are deductible gift recipients, they are not often regarded as charities under Australian Tax Office (ATO) rules because of their links with government, despite their pursuit of purposes that, if carried out by a non-government linked body, would be charitable.

However, following amendments by the Commonwealth to the Tax Act in 2005, PPFs and ancillary funds are now able to donate to government-linked bodies that are deductible gift recipients, regardless of whether the institution is a charity at law. For PPFs and ancillary funds with existing trust deeds, this required an amendment to the *Trusts Act* to enable trustees to complete a declaration stating the trust can give to deductible gift recipients that are not charities at law. Separately, the trustees must then make an application for re-endorsement with the ATO as an income tax-exempt fund rather than a charitable fund. The amendments are to be found in new Part 9 (sections 107-110) of the *Trusts Act 1973*.

Details of the latter amendment can be found at:

<http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2009/09AC002.pdf>

Details of all Acts and Regulations in Queensland can be found at:

http://www.legislation.qld.gov.au/Acts_SLs/Acts_SL.htm

3.4 South Australia

The relevant Acts and Regulations in South Australia are:

- Associations Incorporation Act 1985
- Associations Incorporation Regulations 2008
- Collections for Charitable Purposes Act 1939
- Public Charities Funds Act 1936
- Lottery and Gaming Act 1936

There were no relevant Bills introduced into the South Australian Parliament during 2008. The **Associations Incorporation Regulations 2008** were the most recent change, repealing the previous *Associations Incorporation Regulations 1993*. The new Regulations commenced operation on 1 September 2008. The Regulations contain the usual matters in relation to the incorporation of associations.

Details of all Acts and Regulations can be found at:

<http://www.legislation.sa.gov.au/index.aspx>

3.5 Western Australia

The relevant Acts and Regulations in Western Australia are:

- Associations Incorporation Act 1987
- Associations Incorporation Regulations 1988
- Charitable Collections Act 1946
- Gaming and Wagering Commission Act 1987

There were no relevant Bills or other material changes to the law in Western Australia during 2008. The former Minister for Consumer Protection, Hon Michelle Roberts, MLA, tabled the [Green Bill](#) – draft new legislation for consultation purposes – in the Legislative Assembly on 30 November 2006. In 2007 and 2008, Consumer Protection conducted community consultation on a set of draft Model Rules, which were aligned to the draft *Associations Incorporation Bill 2006* (the [Green Bill](#)). Community comments about the Green Bill have been collated. They have directly influenced the instructions given to Parliamentary Counsel to draft new legislation affecting incorporated associations before a final ‘white bill’ is presented to the State Parliament for their consideration.

Details may be found at:

http://www.commerce.wa.gov.au/ConsumerProtection/Content/Business/Associations/Act_Review/index.htm

Details of all Acts and Regulations for Western Australia can be found at:

<http://www.slp.wa.gov.au/legislation/statutes.nsf/default.html>

3.6 Tasmania

The relevant Acts and Regulations in Tasmania are:

- Associations Incorporation Act 1964
- Associations Incorporation Regulations 2007
- Associations Incorporation (Model Rules) Regulations 2007
- Collections for Charity Act 2001
- Gaming Control Act 1993

There were no relevant Bills or other material changes to the law in Tasmania during 2008.

Details of all Acts and Regulations can be found at: <http://www.thelaw.tas.gov.au/index.w3p>

3.7 Australian Capital Territory

The relevant Acts and Regulations in the ACT are:

- Associations Incorporation Act 1991
- Associations Incorporation Regulation 1991
- Charitable Collections Act 2003
- Lotteries Act 1964

There were no relevant Bills or other material changes to the law in ACT during 2008.

Details of all Acts and Regulations can be found at: <http://www.legislation.act.gov.au/>

3.8 Northern Territory

The Relevant Acts and Regulations in the Northern Territory are:

- Associations Act
- Associations Regulation
- Associations (Model Constitution) Regulation
- Gaming Control Act

There were no relevant Bills or other material changes to the law in the Northern Territory during 2008.

Details of all Acts and Regulations can be found at:

<http://www.nt.gov.au/dcm/legislation/current.html>

4.0 Australian Tax Office Updates

The Australia Tax Office (ATO) maintains a significant amount of material for nonprofit organisation which is available at <http://www.ato.gov.au/nonprofit>. You can view a streamed video of how to find your way around the site from the CPNS DY0 site <https://wiki.qut.edu.au/display/CPNS/DYO+Home>.

The ATO also has a nonprofit news service which is well worth subscribing to. Below are some of the more significant articles from 2008, which can be viewed at <http://www.ato.gov.au/nonprofit/pathway.asp?pc=001/004/020>.

- [Non-Profit News Service No. 0229 - Claiming GST credits on reimbursements to employees, officers, agents and volunteers](#) Dec 2008. Your organisation can claim a GST credit when it reimburses employees, officers, agents and volunteers for their out of pocket expenses when certain requirements are satisfied.
- [Non-Profit News Service no. 0228 - Sports players appeal to High Court to deduct management fees](#) Dec 2008. Two professional footballers have been granted special leave by the High Court to appeal a decision that management fees paid to negotiate their playing contracts with sporting clubs were not deductible.
- [Non-Profit News Service no. 0227 - Consider fringe benefits tax this festive season](#) Dec 2008. With Christmas just around the corner, the Tax Office is reminding employers to consider FBT obligations when organising office Christmas parties and gifts for employees.
- [Non-Profit News Service No. 0223 - Annual self review for endorsed charities](#) Nov 2008. We are reminding endorsed charities of the need to undertake regular self-reviews of their status. We also share findings from a recent exercise where we contacted a sample of endorsed charities to make sure they were aware of this obligation.
- [Non-Profit News Service No. 0222 - National Rental Affordability Scheme - participation by charities](#) Nov 2008. The Treasurer has announced that a transitional safety net will be introduced to cover charities looking to participate in the National Rental Affordability Scheme.
- [Non-Profit News Service No. 0221 - Luxury car tax changes](#) Oct 2008. From 1 July 2008, a 33% luxury car tax (LCT) rate applies to most vehicles over the luxury car tax threshold of \$57,180.
- [Non-Profit News Service No. 0220 - Time limits on GST refunds](#) Oct 2008. A GST budget announcement has recently been enacted which means as of 1 July 2008, a four year time limit will apply to the recovery or refund of certain indirect taxes, including the refund of GST credits.
- [Non-Profit News Service No. 0219 - New version of Fundraising guide](#) Oct 2008. We have released a new version of our Fundraising guide for non-profit organisations. The guide explains the tax treatment of fundraising activities and concessions available. It also outlines state, territory and local government requirements
- [Non-Profit News Service No. 0217 - Superannuation standard choice form has been revised](#) Sep 2008. A revised version of Choosing a super fund - How to complete your Standard choice form (NAT 13080) is now available.
- [Non-Profit News Service No. 0216 - GST tips for non-profit organisations](#) Sep 2008. The Tax Office has released a new guide to provide non-profit organisations, charities and gift-deductible entities with information to help them meet their GST obligations.
- [Non-Profit News Service No. 0210 - Fuel tax credits - Get money back for your organisation](#) Aug 2008. Information about fuel tax credits including eligibility and registration.
- [Non-Profit News Service No. 0209 - Non-profit organisations not registered for GST operating emergency vehicles or vessels](#) Aug 2008. Information for non-profit organisations operating emergency vehicles or vessels who are not registered for GST.
- [Non-Profit News Service No. 0208 - Helping employees understand the reportable fringe benefits amount on their payment summaries](#) Jul 2008. Reportable fringe benefits - facts for employees (NAT 2836) has recently been updated. It helps employers explain what reportable fringe benefits amounts are, and what they mean for their employees.

- [Non-Profit News Service No. 0206 - Superannuation publications](#) Jul 2008. The Tax Office has a range of publications to help employers and employees understand their superannuation obligations and rights.
- [Non-Profit News Service No. 0203 - Employer super funds must offer life insurance](#) Jun 2008. From 1 July 2008, non-profit organisations with employer-nominated super funds (also known as default funds) must offer minimum levels of life insurance death cover to members. This article sets out the requirements employers must comply with.
- [Non-Profit News Service No. 0202 - Check that your payroll systems are calculating superannuation guarantee correctly](#) Jun 2008. Changes to super from 1 July 2008 may affect the way non-profit organisations calculate the superannuation guarantee contributions they make for their employees. Organisations are urged to check they have the correct systems to handle the requirement changes and to plan for any additional costs.
- [Non-Profit News Service No. 0200 - 2008-09 Budget: measures relevant to non-profit organisations](#) May 2008. The Government has announced several measures that are relevant or of interest to non-profit organisations in the 2008-09 Budget.
- [Non-Profit News Service No. 0199 - Donations to assist cyclone victims in Burma](#) May 2008. Information for individuals and organisations wanting to collect funds or make donations to assist victims of cyclone Nargis in Burma.
- [Non-Profit News Service No. 0198 - New version of Volunteers and tax guide](#) May 2008. We have updated our guide, Volunteers and tax, for changes to the tax law since the guide last issued in March 2005. The guide explains the tax treatment of transactions that commonly occur between non-profit organisations and their volunteers.
- [Non-Profit News Service No. 0197 - Legislation tabled: removal of tax deductions for political contributions and gifts](#) Apr 2008. Legislation recently tabled in Parliament has been referred to the Joint Standing Committee on Electoral Matters for inquiry and report. The Bill removes tax deductibility for contributions and gifts to political parties, members and candidates.
- [Non-Profit News Service No. 0196 - New insurance requirements for employer nominated super funds](#) Mar 2008. From 1 July 2008, employer nominated super funds (also known as default funds) must offer minimum levels of life insurance death cover to members. This article outlines the minimum level of life insurance cover your employer nominated super fund must provide to members.
- [Non-Profit News Service No. 0195 - Calculation of super guarantee is changing from 1 July](#) Mar 2008. The Tax Office is reminding employers that from 1 July 2008 ordinary time earnings, as defined in the super guarantee law, must be used to calculate super contributions for their employees. This article contains a preparation checklist for employers.
- [Non-Profit News Service No. 0194 - Donations to assist victims of the Emerald and Mackay floods](#) Feb 2008. The Queensland Government has declared flood-affected Emerald and Mackay to be disaster situations. This article provides information for individuals and organisations that want to collect funds or make donations to assist flood victims.
- [Non-Profit News Service No. 0193 - New version of GiftPack for deductible gift recipients and donors](#) Feb 2008. We have updated our guide, GiftPack, for changes to the tax law since the guide last issued in July 2006. GiftPack provides comprehensive information on tax deductible gifts for organisations and donors.
- [Non-Profit News Service No. 0192 - Translated fact sheet released helping non-profit organisations with income tax](#) Jan 2008. The Tax Office has released translated versions of the fact sheet Does your organisation have to pay income tax? which help non-profits work out their income tax status. The fact sheet is available in English and 17 other languages.

5.0 What does 2009 hold?

There are a number of cases under appeal as indicated earlier, and state legislation proposed. The Federal Government, by itself or through the Council of Australian Governments (COAG) process, has a significant reform agenda. We have summarised some of the more important inquiries, reports or investigations in progress in 2009, drawing upon Appendix 5 of the Senate Economics Committee Report 'Disclosure regimes for charities, not-for-profit organisations', December 2008.

5.1 Victorian Government reviews in 2007

Two reviews were commissioned by the Victorian Government: the Stronger Community Organisations project,² led by Professor Allan Fels, AO, and the Review of Not-for-Profit Regulation, led by the State Services Authority.³ Both reports contain recommendations to improve the regulatory framework of the nonprofit sector and are the most recent government work available in this area. These were well resourced and are considered to be reports which both map many of the issues and point to the directions of feasible reforms. They were preceded by The Allen Consulting Group's report (2005) *Improving Not-For-Profit Law and Regulations*.⁴

The Victorian Government has sought to inject these concerns into state-federal consultation bodies such as the Council of Australian Governments (COAG).⁵

5.2 Treasury Review of Financial Reporting for Unlisted Companies 2007⁶

On 6 June 2007, the Parliamentary Secretary to the Treasurer released a discussion paper on financial reporting by unlisted public companies which had been prepared by the Treasury. The discussion paper analyses the current financial reporting requirements of unlisted public companies under the *Corporations Act 2001*. The paper aims to promote public debate on the appropriate financial reporting requirements for these companies given their unique nature. It seeks comments on the financial reporting requirements for unlisted public companies in the *Corporations Act 2001*. Currently, these companies are subject to similar annual reporting requirements to listed public companies. The paper examines the issue of whether some type of differential reporting framework should be introduced for these companies based on the existing differential requirements for proprietary companies.

The paper highlights the unique nature of many unlisted public companies due to their not-for-profit focus. This focus differentiates these companies from both proprietary companies and listed public companies. In general, members in these companies are not seeking a direct financial return on their investment in the company. This changes the demand from members for comprehensive financial statements. However, these companies are also likely to have a broader range of stakeholders interested in their operations relative to for-profit companies. In addition, financial reporting assists in promoting transparency and good governance in these companies. These issues must be taken into account when determining the appropriate financial reporting requirements.

² Available at [Hhttp://www.dpcd.vic.gov.au/Web14/dvc/rwpgslib.nsf/GraphicFiles/Final+SCOP+report/\\$file/FINAL+S COP+report.pdf](http://www.dpcd.vic.gov.au/Web14/dvc/rwpgslib.nsf/GraphicFiles/Final+SCOP+report/$file/FINAL+S COP+report.pdf)

³ Available at [Hhttp://www.ssa.vic.gov.au/CA2571410025903D/0/046CA73142149CCACA25735C000E5D5B?Open Document](http://www.ssa.vic.gov.au/CA2571410025903D/0/046CA73142149CCACA25735C000E5D5B?Open Document)

⁴ Melbourne: Department for Victorian Communities, State Government of Victoria, available at [Hhttp://www.allenconsult.com.au/publications/view.php?id=314](http://www.allenconsult.com.au/publications/view.php?id=314)

⁵ Refer to [Hhttp://www.coag.gov.au/H](http://www.coag.gov.au/H)

⁶ Australian Treasury, *Financial Reporting by Unlisted Public Companies – Discussion Paper*, [Hhttp://www.treasury.gov.au/documents/1269/PDF/Discussion_paper_Financial_Reporting_by_Unlisted_Public_Companies.pdf](http://www.treasury.gov.au/documents/1269/PDF/Discussion_paper_Financial_Reporting_by_Unlisted_Public_Companies.pdf) (accessed 19 November 2008).

Submissions on the Discussion Paper⁷ closed on 3 August 2007 and there has been no formal report released.

5.3 Disclosure Regimes for Charities and Not-For-Profit Organisations – Senate Economics Committee June 2008⁸

On 18 June 2008, Senator Allison (Democrats) moved that the Senate note the report by CHOICE on charities, published online in March 2008. The report highlights the wide variability and inconsistency in the way that charities disclose information to the public and acknowledges that the 27 recommendations from the Inquiry into the Definition of Charities and Related Organisations, which reported in 2001, have not been implemented. The Senate agreed to send the matter to the Senate Standing Committee on Economics for report by the last sitting day of November 2008. The Inquiry's terms of reference were:

1. the relevance and appropriateness of current disclosure regimes for charities and all other not-for-profit organisations;
2. models of regulation and legal forms that would improve governance and management of charities and not-for-profit organisations and cater for emerging social enterprises; and
3. other measures that can be taken by government and the not-for-profit sector to assist the sector to improve governance, standards, accountability, and transparency in its use of public and government funds.

The Committee received 174 submissions and there were several days of hearings, resulting in over 1,390 pages of publicly available material. A final report was issued in mid-December 2008 and the Government has yet to respond to the recommendations.

The recommendations were:

Recommendation 1

The committee recommends that all Australian Governments agree on common terminology for referring to organisations within the Sector. Governments should also develop a common meaning for terms referring to the size of these organisations, including 'micro', 'small', 'medium' and 'large'. This standard terminology should be adopted by all government departments.

Recommendation 2

The committee recommends that the Government establish a unit within the Department of Prime Minister and Cabinet specifically to manage issues arising for Not-For-Profit Organisations. The unit should report to a Minister for the Third Sector.

Recommendation 3

The committee recommends that there be a single independent national regulator for Not-For-Profit Organisations.

Recommendation 4

The committee recommends that the Australian National Regulator for Not-For-Profit Organisations should have similar functions to regulators overseas, and particularly in the UK, including a Register for Not-For-Profit Organisations with a compulsory sign-up requirement. The committee recommends consultation with the Sector to formulate the duties of the National Regulator.

As a minimum, the Regulator should:

⁷ Available at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1269>

⁸ Further information on the Senate Inquiry into Disclosure Regimes for Charities and Not-For-Profit Organisations, including the full report, is available via the Developing Your Organisation wiki: <https://wiki.qut.edu.au/display/CPNS/DYO+Home>

- a) Develop and maintain a Register of all Not-For-Profit Organisations in Australia. Once registered, the Commission should issue each organisation with a unique identifying number or allow organisations with an ABN to use that number as their Not-For-Profit identifier. This could be enabled using existing ASIC website resources.
- b) Develop and maintain an accessible, searchable public interface.
- c) Undertake either an annual descriptive analysis of the organisations that it regulates or provide the required information annually to the ABS for collation and analysis.
- d) Secure compliance with the relevant legislation.
- e) Develop best practice standards for the operation of Not-For-Profit Organisations.
- f) Educate / Advise Not-For-Profit Organisations on best practice standards.
- g) Investigate complaints relating to the operations of the organisations.
- h) Educate the public about the role of Not-For-Profit Organisations.

The voluntary codes of conduct developed by ACFID and FIA respectively should be considered by the Regulator when implementing its own code of conduct.

Recommendation 5

The committee recommends that the Commonwealth Government develop the legislation that will be required in order to establish a national regulator for Australia.

Recommendation 6

The committee recommends that, once a Register is established and populated, this information should be provided to the ABS, who should prepare and publish a comprehensive study to provide government with a clearer picture of the size and composition of the Third Sector.

Recommendation 7

The committee recommends that a single, mandatory, specialist legal structure be adopted for Not-For-Profit Organisations through a referral of state and territory powers. Given the degree of change such a legal structure would mean for some not-for-profit organisations, the legal structure must be developed in full consultation with these organisations.

Recommendation 8

The committee recommends that the Henry Review include an examination of taxation measures affecting Not-For-Profit Organisations with a view to simplifying these arrangements and reducing confusion and cost of compliance for these organisations.

Recommendation 9

The committee recommends that a National Fundraising Act be developed following a referral of powers from states and territories to the Commonwealth.

This Act should include the following minimum features:

- It should apply nationally.
- It should apply to all organisations.
- It should require accounts or records to be submitted following the fundraising period with the level of reporting commensurate with the size of the organisation or amount raised.
- It should include a provision for the granting of a licence.
- It should clearly regulate contemporary fundraising activities such as internet fundraising.

Recommendation 10

The committee recommends that a tiered reporting system be established under the legislation for a specialist legal structure.

Recommendation 11

The committee recommends that the tiers be assigned to organisations based on total annual revenue.

Recommendation 12

The committee recommends that the Commonwealth Government work with the Sector to implement a standard chart of accounts for use by all departments and Not-For-Profit Organisations as a priority.

Recommendation 13

The committee recommends that a new disclosure regime contain elements of narrative and numeric reporting as well as financial, in acknowledgement that the stakeholders of the Sector want different information from that of shareholders in the Business Sector. The financial reporting should be transparent and facilitate comparison across charities.

Recommendation 14

The committee recommends that the national regulator investigate the cost vs benefit of a GuideStar-type system (a website portal that publishes information on the aims and activities of Not-For-Profit Organisations) in Australia to encompass all Not-For-Profit Organisations.

Recommendation 15

The committee recommends that a Taskforce be established for the purposes of implementing the recommendations of this report. The Taskforce should report to COAG. Its membership should include:

- a government representative from the Commonwealth;
- a COAG-elected representative to speak for states and territories;
- one or more qualified legal experts with expertise with the major pieces of legislation affecting Not-For-Profit organisations;
- a representative from an organisation which manages private charitable foundations;
- an accountant with not-for-profit expertise; and
- a number of representatives from the peak bodies of Not-For-Profit Organisations, including a representative from a peak body for social enterprises.

The Taskforce should actively seek to ensure that the measures of reform that it implements do not impose an unreasonable reporting burden on small and micro Not-For-Profit Organisations.

5.4 Parliamentary Joint Committee on Corporations and Financial Services – Small Nonprofit Associations Reform – 23 June 2008

The Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) has released a parliamentary report *Better shareholders – Better company: Shareholder engagement and participation in Australia*.⁹ The report comes from left field, but probably picks up on the Victorian Government's report, *Strengthening Community Organisations*, which was released earlier in 2008.

One of the Parliamentary Joint Committee's recommendations picks up a nonprofit organisation reform issue:

"3.120 The committee is also of the view that the broader issue of the framework for regulating small, closely held companies needs to be reviewed. The one-size-fits-all approach of the Corporations Act may be appropriate for large publicly listed companies with a diverse shareholder base with a considerable equity investment, but it places a significant regulatory burden on small companies and not-for-profit organisations for which the protection offered to investors by the Corporations Act is not as appropriate. The government should therefore begin to investigate an alternative regulatory framework for small incorporated companies and not-for-profit organisations.

3.121 The government should investigate an alternative regulatory framework for small incorporated companies and not-for-profit organisations."

⁹ Available at

http://www.aph.gov.au/Senate/Committee/corporations_ctte/sharehold/report/index.htm

The Parliamentary Report appears to draw heavily on Senator Andrew Murray's April 2008 report entitled *A proposal for simplifying the legal form and regulation of small for-profit businesses and not-for-profit entities* and his earlier report *One Regulator One System One Law*.

5.5 Australia's Future Tax System (The Henry Review)¹⁰

On 13 May 2008 the Australian Government announced the review of Australia's tax system. The comprehensive review will examine the current tax system and make recommendations to position Australia to deal with the demographic, social, economic and environmental challenges of the 21st century and enhance Australia's economic and social outcomes.¹¹ It encompasses Australian Government and State taxes, except the GST, and interactions with the transfer system.

The review is being conducted in several stages:

- 6 August – first discussion paper released: *Architecture of Australia's tax and transfer system*
- 19 August – review panel released framing questions and called for submissions
- 19 August to 17 October – first round of public submissions
- December – consultation paper to outline emerging issues from the public submissions process and provide the basis for further submissions, public meetings and direct consultations.

The review is considering:

- The appropriate balance between taxation of the returns from work, investment and savings, consumption (excluding the GST) and the role to be played by environmental taxes;
- Improvements to the tax and transfer payment system for individuals and working families, including those for retirees;
- Enhancing the taxation of savings, assets and investments, including the role and structure of company taxation;
- Enhancing the taxation arrangements on consumption (including excise taxes), property (including housing), and other forms of taxation collected primarily by the States;
- Simplifying the tax system, including consideration of appropriate administrative arrangements across the Australian Federation; and
- The interrelationships between these systems as well as the proposed emissions trading system.

The review should make coherent recommendations to enhance overall economic, social and environmental wellbeing, with a particular focus on ensuring there are appropriate incentives for:

- workforce participation and skill formation;
- individuals to save and provide for their future, including access to affordable housing;
- investment and the promotion of efficient resource allocation to enhance productivity and international competitiveness; and
- reducing tax system complexity and compliance costs.

¹⁰ Australia's Future Tax System, *Timeline for the review*,

[H](http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/timeline.htm) (accessed 19 November 2008).

¹¹ Australia's Future Tax System, *Terms of reference*,

[H](http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/reference.htm) (accessed 19 November 2008).

In 2009 the review panel will invite further submissions and hold public meetings to inform its recommendations for reform. The final review report will be delivered to the Treasurer at the end of 2009.

5.6 National Compact¹²

As part of its social inclusion agenda, the Australian Government is exploring ways to develop a new and stronger relationship with the not-for-profit sector, based on partnership and respect. One way to do this is through a National Compact – an agreement between the Australian Government and the not-for-profit sector outlining how the two will work together to improve and strengthen their relationship, now and into the future. A National Compact could also provide a platform for discussion and agreement between the Australian Government and the sector about how to achieve objectives that will benefit the community. Similar agreements are in place in many Australian states and territories and have been used overseas.

The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) consulted widely seeking the initial views of community organisations and users of community services about the value of developing a compact and whether it could improve the lives of Australians. Submissions closed on 24 September 2008.

The Australian Council of Social Service (ACOSS) was also commissioned to consult and canvass initial views and principles with its members and other organisations. ACOSS distributed a discussion paper on the Compact and held a series of public fora across Australia. Senator Ursula Stephens, Parliamentary Secretary for Social Inclusion and the Voluntary Sector attended many of these fora and wrote to a range of peak bodies, state and territory governments and not-for-profit organisations seeking their comments.

FaHCSIA is currently reviewing all submissions and comments received as part of the initial phase of consultation. The next phase will be interesting and may involve the creation of a new ministry, a new national body for the whole of the nonprofit sector and a lot of discussion!

5.7 Improving the Integrity of Prescribed Private Funds (PPF) – November 2008

The Treasurer announced in the 2008 Budget that the Treasury Department would examine strategies to make improvements to the regulation of PPFs. In November 2008, it released a discussion paper and sought submission by early January.

Broadly it suggests:

- amending the PPF Guidelines, among other things to ensure regular valuation of assets at market rates and increase the size of compulsory distributions (15%);
- legislating the PPF Guidelines; and
- giving the ATO greater regulatory powers.

PPFs would be re-named 'Prescribed Ancillary Funds' and those PPFs which are more like ancillary funds would be migrated to public ancillary funds.

5.8 Government Grants – ATO and Department of Finance and Deregulation¹³ – 2009

The Department of Finance and Deregulation has very recently begun an examination of the grants arrangements with nonprofit organisations, in particular the red tape associated with grants from both sides of the fence. In July 2009 it will release for public comment a paper on the grants framework of the Commonwealth.

¹² Australian Government Social Inclusion, *A National Compact*, [Hhttp://www.socialinclusion.gov.au/A_National_Compact.htm](http://www.socialinclusion.gov.au/A_National_Compact.htm)H (accessed 19 November 2008).

¹³ Department of Finance and Deregulation: [Hhttp://www.finance.gov.au/](http://www.finance.gov.au/)

5.9 Election Commitment – Productivity Commission Review

In its 2007 election platform, the ALP stated:

Labor will...commission the Productivity Commission to construct a new tool to measure the contribution of third-sector organisations to our economy as the starting point for maximising the sector's contribution to social inclusion, employment and economic growth.¹⁴

It is expected that the formal terms of reference will be announced about March 2009.

¹⁴ Australian Labor Party, *An Australian Social Inclusion Agenda*, p. 11, [Hhttp://www.alp.org.au/download/now/071122_social_inclusion.pdf](http://www.alp.org.au/download/now/071122_social_inclusion.pdf)H (accessed 19 November 2008).