

The Australian Nonprofit Sector
Legal Almanac **2009**

WORKING PAPER NO. CPNS 49

MARCH 2010

EDITED BY MYLES MCGREGOR-LOWNDES

The Australian Centre for Philanthropy and Nonprofit Studies
Queensland University of Technology
Brisbane, Australia

TABLE OF CONTENTS

1.0	INTRODUCTION	IX
2.0	CASES BY CATEGORY	1
2.1	Discrimination	1
2.1.1	Devers v Kindilan Society [2009] FCA 1392 (Federal Court of Australia, 27 November 2009, Marshall J).	1
2.1.2	Campagnolo v Benalla and District Football Club Inc [2009] VSC 228 (11 June 2009)	3
2.1.3	O'Keefe v Sappho's Party Inc [2009] SAEOT 50 (Equal Opportunity Tribunal of South Australia, 24 April 2009)	5
2.1.4	Geddes v Australian Labor Party (Victorian Branch) (Anti-Discrimination) [2009] VCAT 409 (12 March 2009)	6
2.2	Employment and Workplace Relations	7
2.2.1	Bailey v Peakhurst Bowling & Recreation Club Ltd [2009] NSWDC 284 (NSW District Court, Levy SC DCJ, 3 November 2009)	7
2.2.2	Turner v Victorian Arts Centre Trust [2009] VSCA 224 (2 October 2009)	8
2.2.3	Gutnick v Bondi Mizrahi Synagogue [2009] NSWSC 257 (31 March 2009)	10
2.3	Insolvency and Winding Up	11
2.3.1	Whittingham, In the matter of The Spanish Club Ltd [2009] FCA 1158 (Federal Court of Australia, 19 October 2009)	11
2.3.2	Correa v Spanish Club Ltd and Ors [2009] NSWSC 1225 (Supreme Court of New South Wales, 30 September 2009)	12
2.3.3	Johnson v Commissioner of Consumer Affairs [2009] NTSC 4 (27 February 2009)	13
2.4	Membership and Office	15
2.4.1	Dairy Farmers Milk Co-operative v Co-operatives Council [2009] NSWSC 862 (27 August 2009)	15
2.4.2	In the matter of Dairy Farmers Milk Co-operative Ltd [2009] NSWSC 627 (3 July 2009)	16
2.4.3	Cummins v Australian Jockey Club Limited [2009] NSWSC 254 (6 April 2009)	17
2.4.4	Plenty & Anor v Seventh Day Adventist Church of Port Pirie [2009] SASC 10 (19 January 2009)	18
2.4.5	Kovacic v Australian Karting Association (QLD) Inc [2008] QSC 344 (22 December 2008)	19

2.5	Negligence	21
2.5.1	Matthew Chaina & Ors v The Presbyterian Church (NSW) Property Trust & Ors (No 3) [2009] NSWSC 1243 (Supreme Court of New South Wales, 23 November 2009)	21
2.5.2	The Quadriplegic Centre Board of Management v McMurtrie [2009] WASCA 173 (Western Australian Court Of Appeal, 13 October 2009)	22
2.5.3	Rooty Hill RSL Club Ltd v Karimi [2009] NSWCA 2 (30 January 2009)	23
2.6	Nonprofit Structure and Governance	24
2.6.1	Gould v Mosman Returned Servicemen's Club Ltd [2009] FCA 1592 (Federal Court of Australia, Lindgren J, 15 December 2009)	24
2.6.2	Andrews v Queensland Racing Ltd [2009] QSC 338 (23 October 2009)	25
2.6.3	Dykyj v Logan And District Services Club Inc [2009] QSC 108 (Supreme Court Of Queensland, De Jersey CJ, 11 May 2009)	27
2.6.4	Islamic Council ff South Australia Inc & Ors v Australian Federation of Islamic Councils Inc [2009] NSWSC 211 (Supreme Court of New South Wales, 16 February 2009)	28
2.6.5	Lai v Tiao (No 2) [2009] WASC 22 (12 February 2009)	31
2.6.6	Szencorp Pty Ltd v Clean Energy Council Limited [2009] FCA 40 (2 February 2009)	33
2.7	Taxation	34
2.7.1	Commissioner of Taxation v AID/WATCH Incorporated [2009] FCAFC 128 (Federal Court of Australia, Full Court, Kenny, Stone and Perram JJ, 23 September 2009)	34
2.7.2	Commissioner of Taxation v Bargwanna and Bargwanna as Trustees of the Kalos Metron Charitable Trust [2009] FCA 620 (Federal Court of Australia, Edmonds J, 12 June 2009)	36
2.7.3	Hein Persche v Finanzamt Ludenscheid [2009] EUJ C-318/07 (Court Of Justice Of The European Communities, Grand Chamber, 27 January 2009)	38
2.8	Trusts	40
2.8.1	Cunliffe v Attorney-General (NSW) [2009] NSWSC 1450 (Supreme Court of New South Wales, Nicholas J, 21 December 2009)	40
2.8.2	NSW Masonic Youth Property Trust V A-G (NSW) [2009] NSWSC 1301 (Supreme Court of NSW, 19 November 2009, Hall J)	41
2.8.3	The Public Trustee of Queensland as Executor of the Estate of Brian Edmund Monckton, also known as, Bryant Edward Monckton, Deceased v Attorney-General (QLD) [2009] QSC 353 (Supreme Court Of Queensland, A Lyons J, 7 October 2009)	44
2.8.4	Mitreski v His Eminence Metropolitan Petar The Diocesan Bishop of The Macedonian Orthodox Diocese Of Australia And New Zealand [2009] NSWCA 319 (New South Wales Court of Appeal, 10 September 2009)	46

2.8.5	The Public Trustee of Queensland as Executor of the Estate of Mary Agnes Ball, Deceased v State Of Queensland And OS [2009] QSC 174 Supreme Court of Queensland – Byrne SJA – 3 July 2009	47
2.8.6	NSW Masonic Youth Property Trust & ANOR v Her Majesty's Attorney-General in and for the State Of NSW & ANOR [2009] NSWSC 181 (24 March 2009)	48
2.8.7	Metropolitan Petar v Mitreski [2009] NSWSC 106 (Supreme Court of New South Wales, 4 March 2009)	49
2.8.8	The Estate of Dulcie Edna Rand (Deceased) [2009] NSWSC 48 (Supreme Court of New South Wales, 16 February 2009)	50
2.9	Miscellaneous	51
2.9.1	ACCC v Australian Karting Association (NSW) Inc [2009] FCA 1255 (Federal Court of Australia, Bennett J, 6 November 2009)	51
2.9.2	Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Minister for Mineral Resources [2009] NSWLEC 165 (Land and Environment Court NSW, Preston CJ, 24 September 2009)	53
2.9.3	Burrell Place Community Action Group Incorporated v Griffith City Council [2009] NSWLEC 120 (Land and Environment Court NSW, Lloyd J, 29 July 2009)	55
2.9.4	Calvo v Sweeney [2009] NSWSC 719 (29 July 2009)	56
2.9.5	Liberal Party of Australia and Australian Electoral Commission [2009] AATA 551 (Administrative Appeals Tribunal, 23 July 2009)	59
2.9.6	O'Hara V Sims [2009] QCA 186 (Queensland Court of Appeal, Keane, Muir and Fraser JJA, 10 July 2009)	60
2.9.7	Australian Barter Currency Exchange Pty Ltd v Uniting Church NSW Trust Association Limited [2009] NSWSC 607 (2 July 2009)	62
2.9.8	White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd and Anor [2009] NSWCA 114 (3 June 2009)	63
2.9.9	Ayan v Islamic Co-ordinating Council of Victoria Pty Ltd & Ors [2009] VSC 119 (3 April 2009)	65
2.9.10	The Architects (Aust) Pty Ltd t/as Architects Australia v Bethany Brisbane International Church Inc [2009] QDC 56 (District Court of Queensland, 11 March 2009)	66
2.9.11	Griffiths & Ors v John Fairfax Publications & Anor [2009] NSWSC 100 (3 March 2009)	68

3.0	STATE AND TERRITORY LEGISLATION	69
3.1	Commonwealth	69
3.2	New South Wales	70
3.3	Victoria	71
3.4	Queensland	74
3.5	Western Australia	75
3.6	South Australia	76
3.7	Tasmania	77
3.8	Northern Territory	77
3.9	Australian Capital Territory	78
4.0	ATO UPDATES	81
5.0	SPECIAL ISSUES FOR 2009	85
5.1	Private Ancillary Funds	85
5.2	National Rental Affordability Scheme	86
5.3	Money Laundering	90
5.4	Workplace Health and Safety	91
5.5	Changes to the Workplace Relations Regime	92
5.6	Companies Limited by Guarantee	94
5.7	Right to Information and Information Privacy	97
5.8	Disclosure of Expenditure on Political Campaigning	101

6.0	WHAT DOES 2010 HOLD?	107
6.1	Council of Australian Governments (COAG)	107
6.2	Treasury Review of Financial Reporting for Unlisted Companies 2007	108
6.3	Disclosure Regimes for Charities and Not-For-Profit Organisations – Senate Economics Committee June 2008	108
6.4	Co-operatives National Law	109
6.5	Australia’s Future Tax System (the Henry Review)	109
6.6	National Compact	110
6.7	Counter-Terrorism Financing	110
6.8	The Productivity Commission’s Research Study of the Contribution of the Not-For-Profit Sector	110
6.9	Disability Care and Support	120
7.0	GLOSSARY	121
8.0	INFORMATION ON CONTRIBUTING ORGANISATIONS	125
	The Australian Centre for Philanthropy and Nonprofit Studies	125
	PilchConnect	125
	The Australian Charity Lawyers Association	127

This is the second year that we have summarised annual developments in the law for nonprofit staff, boards and volunteers. We were encouraged by the interest shown in last year's publication and the use made of the digital copy on our web site, so here is the almanac for the Jan 2009–Dec 2009 period. This year we are delighted that the newly formed Australian Charity Law Association and PilchConnect (Victoria) agreed to contribute and promote the publication as well. These two organisations are beginning to fill the void of professional legal development and assistance to small nonprofit organisations that has characterised Australia for too many years.

Cases

For a number of years, Professor Myles McGregor-Lowndes, Rhonda Richards, Frances Hannah, Linda Lavarch 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.¹ 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 wiki space or the ACPNS twitter service.²

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

Legislation

The year 2009 saw federal legislative reform with amendments to Prescribed Private Funds – now Private Ancillary Funds. The regulation of trustee companies who are responsible for a significant proportion of charitable trusts was also reformed and brought under a single federal licensing and reporting regime. There are also proposals for amendments to the regime applying to companies limited by guarantee and co-operatives. Significant incorporated association and fundraising reforms worked their way further along in Victoria, New South Wales and Western Australia. A common theme in incorporated association reform is tiered or proportional reporting reforms.

Special thanks must go to Claire Jones (Prolegis) and Sue Woodward (PilchConnect) for providing legislative updates for New South Wales and Victoria, respectively.

Special Issues for 2009

A number of specialist legal practitioners have contributed succinct summaries of significant legal issues facing nonprofit organisations this year. This collection of summaries serves as a ready first reference to some of the more significant legal transactions and issues that contemporary nonprofit organisations are facing. Thanks to John Emerson (Freehills), Brendan Leighton, Tim Longwill and Heather Watson (McCullough Roberston – Lawyers), Mark Fowler, Matthew Turnour and Nathan Reich (Neuman Turnour Lawyers) and Nathan MacDonald (PilchConnect) for cheerful contributions of outstanding quality within the tight deadlines.

1 <https://wiki.qut.edu.au/display/CPNS/Legal+Case+Notes>

2 <http://twitter.com/CPNSinsides>

Australian Taxation Office (ATO)

In 2009, the ATO released its views on the Word Investment and the Victorian Women's Lawyers Association cases and prepared material following the legislation establishing Private Ancillary Funds (formerly Private Prescribed Funds). The ATO also succeeded in the Barganna case (see case 2.7.2, below) and the Aidwatch Case (see case 2.7.1, below). Appeals may be pending.

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

The ATO website³ for the nonprofit sector continues to improve dramatically in its clarity, usefulness and depth of content. The Australian Centre for Philanthropy and Nonprofit Studies (ACPNS) now provides a streamed 24/7 online video tutorial on finding your way around the ATO web materials. This tutorial is available at <https://wiki.qut.edu.au/display/CPNS/ATO+Nonprofit+Website+Tour>.

What does 2010 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 being considered during 2010 which have the potential to shape the legislative and regulatory agenda for the next decade and beyond.

Download

This publication is also available for download in PDF format at www.bus.qut.edu.au/research/cpns/publications

3 www.ato.gov.au/nonprofit/

2.0 CASES BY CATEGORY

2

Cases in this section are presented according to alphabetical category and in reverse chronological order.

Any cases which do not fit the within a category are presented in the 'Miscellaneous' category which appears at the end of this section.

2.1 DISCRIMINATION

2.1.1 **DEVERS V KINDILAN SOCIETY [2009] FCA 1392 (FEDERAL COURT OF AUSTRALIA, 27 NOVEMBER 2009, MARSHALL J)**

The plaintiff, Jane Devers, was a hearing-impaired employee of the Kindilan Society, which trades as Focus. Focus is a nonprofit organisation and a registered charity in Victoria, and provides residential care for disabled people in the Mornington Peninsula region. Ms Devers worked as a disability support worker at one of the residential premises (referred to as a Community Residential Unit or CRU) which was operated by Focus in Mornington. This CRU is no longer in operation.

She alleged that Focus discriminated against her in her employment by reason of her disability from September 2003 to October 2008, in contravention of sections 5, 6 and 15 of the *Disability Discrimination Act 1992* (Cth) (the Act).

Devers also relied on the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Convention on the Rights of Persons with Disabilities*, an international convention to which Australia is a party. Neither of these documents was relevant to this case. The Act is a Commonwealth Act and its interpretation is not affected by the Victorian *Charter of Human Rights and Responsibilities Act 2006*, a state Act. Nor was the international charter relevant since although Australia is a party, ratification of an international treaty does not automatically import any rights or obligations into domestic law (see *Minister for Immigration and Ethnic Affairs v Teoh* (1994) 183 CLR 273 at 286–7 and *Nulyarimma v Thompson* (1999) 96 FCR 153 at [20]). This principle applied in this case.

Devers, whose deafness is profound, had commenced work on a volunteer basis in August 2003, after representations by another organisation, SensWide, an employment service for people with hearing and sight disabilities. This volunteer work later progressed to casual work, starting with fortnightly shifts from September 2003.

Devers alleged that her work was impeded by a lack of services and equipment provided by Focus, in particular a telephone typewriter (TTY), qualified Australian sign language (Auslan) interpreters for staff meetings and training sessions, and warning lights to assist with answering the door.

Section 15 of the Act makes it unlawful to engage in conduct which constitutes discrimination on the ground of disability in the context of employment. The unlawfulness is encapsulated in the words 'on the ground' of the disability in question. Such discrimination may be either direct or indirect.

The Act does not provide that an employer is obliged to supply aids to disabled employees, but an employer must provide 'reasonable accommodations'. In hiring or dismissing an employee, an employer must also assess whether the disabled employee can carry out the 'inherent requirements' of the job, and whether additional 'services or facilities' would assist the disabled employee to meet the particular 'inherent requirements' of the employment (section 15(4)(a)). Discrimination is not unlawful if providing additional services or facilities would be 'an unjustifiable hardship on the employer' (section 15(4)(b)).

Justice Marshall determined the issues to be as follows:

1. Whether Focus engaged in direct discrimination against Devers;
2. Whether Focus engaged in indirect discrimination against Devers; and
3. If discrimination against Devers occurred within the meaning of sections 5 or 6 of the Act, whether this discrimination was contrary to section 15(1) or (2) of the Act, and thus unlawful.

As to direct discrimination, Devers alleged various instances which amounted to denying her access to opportunities for promotion, training and other benefits under section 15(2) (a), (b), (c) and (d) of the Act. These were:

1. Not allowing her to attend doctors' appointments with residents on her own;
2. Not giving her access to the spare key and access code to the CRU;
3. Not allocating her so-called 'sleep-over' shifts;
4. Not allocating her sufficient hours on the roster of shifts; and
5. Denying her training and development opportunities, particularly by not providing an Auslan interpreter.

Direct discrimination is defined in section 15(1) of the Act as occurring where the 'discriminator treats or proposes to treat the aggrieved person less favourably than...a person without a disability.' This has been held to involve an objective assessment and comparison 'in circumstances that are the same or are not materially different': *Purvis v New South Wales* (2003) 217 CLR 92.

Justice Marshall observed that the correct comparator in this case was an employee of Focus, in a similar role, without Devers's disability, but who also has her attributes. In carefully considering each alleged direct discrimination, Justice Marshall found no such discrimination using the comparator test. In particular:

1. No other staff members were permitted to attend doctors' appointments on their own with a client.
2. All staff had knowledge of the access code to the CRU as it was not a secret – rather it was the first four digits of the CRU phone number. In addition, when Devers asked specifically for the code in 2008, it was given to her at that time.
3. Devers had always indicated that she did not want sleep-over shifts, and Justice Marshall could find no evidence that this had changed in 2008 as alleged by Devers.
4. The evidence did not point to any reduction in Devers's working hours between 2003 and 2008 – rather the rosters produced in evidence pointed to similar hours allocated in each year.
5. All staff had access to the training roster for each year, and knew that training sessions had to be applied for on the appropriate forms. The issue of interpreters was an important one, and was further considered by Justice Marshall in the context of indirect discrimination. In the case of direct discrimination, Devers had not indicated that she was not applying for or attending training because of the lack of interpreters.

Justice Marshall therefore found that there was no direct discrimination against Devers in her employment with Focus.

As to indirect discrimination under section 6 of the Act, the issues in this case revolved around the non-provision of TTY equipment, Auslan interpreters where needed and flashing lights to enable Devers to answer the door to the CRU. To establish indirect discrimination, Devers had to show that:

1. Focus imposed a requirement or condition on her
 - i. With which a substantially higher proportion of persons without her disability (a base group) are able to comply, and
 - ii. With which Devers is not able to comply, so that
 - iii. The requirement or condition is therefore not reasonable having regard to all the circumstances.

Whether a requirement or condition has been imposed is a question of fact. It can be implicit in the actions taken. Justice Marshall considered each allegation of indirect discrimination in turn.

Devers was not provided with a TTY until July 2008, some five years after her employment commenced. Devers alleged that she had repeatedly asked for a TTY, and had ultimately provided one or more of her own machines. However, Justice Marshall found that on the evidence Devers had not asked for a TTY at various times when she could have done so, such as when she was asked what Focus could do to assist her.

On the issue of flashing lights, Justice Marshall found that on the evidence there was no request for such lights, though they were ultimately installed at the request of the father of two residents who were also profoundly deaf.

On the issue of training sessions and the lack of Auslan interpreters, the evidence was that informal interpreters were provided for training sessions and staff meetings, but not on all occasions. In some cases, staff meetings had no interpreter present, and Devers could only access the material covered by consulting the minutes of the meeting. However, these were freely available to all staff. In addition, for some training sessions, written material was all that Devers had available to her as there was no interpreter. However, this applied to all staff members equally.

It was not unreasonable for Focus to avoid the provision of interpreters because this was a costly exercise (amounting to some \$20,000 per year for the benefit of one casual employee), and in the context of Devers's hours of work and earnings, it was not reasonable to expect such a cost to be borne by a nonprofit organisation with a limited budget.

Justice Marshall found that there was no indirect discrimination against Devers, since in the light of all the circumstances, the allegations did not support the contention that Devers had been discriminated against, or had suffered any particular detriment.

Therefore, there was neither direct nor indirect discrimination against Devers in the context of her employment. There being no discrimination found, there was no need to consider any illegality. The application was dismissed with costs.

The case may be found at: www.austlii.edu.au/au/cases/cth/FCA/2009/1392.html

2.1.2 CAMPAGNOLO V BENALLA AND DISTRICT FOOTBALL CLUB INC [2009] VSC 228 (11 JUNE 2009) FILE NO: 5329 OF 2009

This appeal had its origin in the decision of a senior member of the Victorian Civil and Administrative Tribunal on 9 February 2009, to strike out a complaint by Mr Campagnolo against the Benalla and District Football League Inc. (the League). An

attempt to seek leave to appeal this decision was denied by Associate Judge Daly of the Victorian Supreme Court. Eventually, this refusal to allow leave to appeal came before Justice Hansen in the same court.

Essentially, Mr Campagnolo claimed he had experienced discrimination on account of his bisexuality in that he had been dismissed from his position as sports trainer at the Bonnie Doon Football Club Inc. (Bonnie Doon), one of five clubs in the League. Although employed there since 1997 and open about his sexuality, publicity surrounding his involvement in a sexual discrimination matter with a government department in February 2007, brought his sexual status into the public arena. Subsequently, on 10 April 2007, the President of Bonnie Doon expressed reservations about continuing to employ him and gave him notice. According to Mr Campagnolo, this alleged direct discrimination as detailed in sections 7 and 8 of the *Equal Opportunity Act 1995* (Victoria) (the Act) would impact adversely on the provision of services to him under section 42(1)(c), particularly his free admission to, as well as travel expenses for club games. The matter was compounded by physical threats from Bonnie Doon's Senior Coach. In Mr Campagnolo's opinion, this victimisation was motivated by his remarks to the *Herald Sun* concerning the discriminatory treatment.

Mr Campagnolo included the League in his sights as a 'governing body' under section 60 of the Act which stated that, 'A governing body of a club must not discriminate against a member of the club'. He maintained that, although the President/Secretary of the League was aware of his predicament, the League was remiss in addressing the situation outlined in sections 11(b) and 65(b) of the Act. Therefore, he assumed complicity with Bonnie Doon, arguing that the League was vicariously liable by reason of section 102 of the Act for the club's decision, through its failure to put in place mechanisms to ensure these sections were not contravened.

Before looking at the issues raised, Justice Hansen determined whether the League's endeavour to strike out the complaint should have been brought under section 109 of the *Equal Opportunity Act 1995*, rather than section 75 of the *Victorian Civil and Administrative Tribunal Act 1998*. He decided that the latter option was appropriate because the complaint was already before the Victorian Civil and Administrative Tribunal at the time in question.

Whilst Justice Hansen agreed that section 4(1) of the Act regarded bisexuality as a subset of sexual orientation, an attribute that should not attract discrimination, there was no indication of any discrimination involving the services mentioned. With respect to Mr Campagnolo's notion that he was a member of a club of which the League was a governing body, Bonnie Doon is a club for the purposes of section 4(1). However, there was no evidence to support Mr Campagnolo's membership of Bonnie Doon, let alone its umbrella body. His Honour also rejected the notion that the term, 'governing body', referred to the provision of overarching direction, viewing the concept as denoting a more pedestrian committee of management for Bonnie Doon. Consequently, Mr Campagnolo's attempt to rely on section 60 proved unsuccessful. Establishing vicarious liability on the League's part was not possible.

His efforts to argue that the League discriminated against him by failing to use its available powers in relation to 'unbecoming conduct' were similarly fruitless. Under clause 22 of its Rules and Regulations, the League had the right to investigate any such behaviour which brought the game's reputation into disrepute. From the investigative stage, a serious matter would move to the League Tribunal for determination. Clause 22(a) also allows details of any allegations to be provided to the Board. Since no action

was instigated against Bonnie Doon, Mr Campagnolo asserted that he had been treated less favourably than a person without his sexual orientation in the same circumstances, thus satisfying section 11(b) of the Act as well as section 65(b) specifically pertaining to exclusion from sport. Justice Hansen concluded this argument was untenable because the League did not discriminate against Mr Campagnolo in terms of his sexuality to terminate his position as sports trainer at Bonnie Doon. Further, the League's inaction under clause 22(a) did not constitute less favourable treatment as any preliminary steps taken by the League would have been advanced through the other judicial mechanisms in place with an unpredictable outcome.

The appeal was dismissed.

This case may be viewed at: www.austlii.edu.au/au/cases/vic/VSC/2009/228.html

2.1.3 O'KEEFE V SAPPHO'S PARTY INC [2009] SAEOT 50 (EQUAL OPPORTUNITY TRIBUNAL OF SOUTH AUSTRALIA, 24 APRIL 2009)

Sappho's Party Inc (the Association) was an incorporated association established to hold a party in the Adelaide Hills in January 2006, for lesbian feminists raised as female. Although the party was designed to be a private function, the organizers were concerned to provide insurance cover for the attendees. Incorporation was the vehicle chosen to effect public liability insurance for what was referred to, in paragraph 28 of the judgment, as a 'not for profit community event'.

The complainant, Ms O'Keefe, received a flyer advertising the party from her partner, Katrina Fox. Ms O'Keefe had been born male in 1955 but had opted for gender reassignment surgery as an adult. After being involved in a lesbian relationship since 1993, she had legally married Ms Fox in England in 1998 with the aid of her male birth certificate. The couple settled in Australia in 2001. She explained her background when she sent away for tickets for them both to the party. However, the party organizers were unsympathetic and refused to allow Ms O'Keefe to attend. As a result, on 11 December 2005, she contacted the South Australian Commissioner of Equal Opportunity to lodge a complaint on the basis she had been discriminated against because of her transsexuality. Once conciliation efforts failed, the matter came before the Equal Opportunity Tribunal.

Three issues arose. The first entailed determining whether there was unlawful discrimination against Ms O'Keefe in the offer of entertainment services by the Association and its failure to supply them as set out under sections 39(1)(a), (b) and (c) respectively of the *Equal Opportunity Act 1984* (SA) (the Act). Should such unlawful discrimination under the Act be evident with respect to the Adelaide Hills party, it was then necessary to examine if it was permissible under section 47 because it was a measure designed to ensure that persons of one sex had equal opportunities with persons of the other sex. Finally, the unlawful discrimination, if established, had to be clearly related to Ms O'Keefe's transsexuality.

At the outset, His Honour Judge Barrett and the other two members of the Equal Opportunity Tribunal were faced with trying to decide whether the party was a private or a public affair. Despite the incorporation of the Association, the choice of a commercial venue for the party and the imposition of entry fees, His Honour and one other tribunal member Ms Jasinski opted for the former. Therefore, regardless of the sexual discrimination Ms O'Keefe suffered, the majority decision determined that the requirement of the offer of goods and services under section 39(1) of the Act was not met. The gathering was private and there was no breach of the Act since it did not cover private events.

Strictly speaking, there was no need to canvass the other issues. Nevertheless, they were addressed. Section 47 of the Act was found to be inapplicable in this particular situation as there were no opportunities available to men, and denied to women, which were made more equal by this event. However, Ms O'Keefe was not disentitled from claiming unlawful discrimination related to her transsexuality, despite the respondent's argument that her legal status in Australia was as a male since she could produce no gender reassignment certificate. To be transsexual, according to section 5 of the Act, 'A person of one sex assumes characteristics of the other sex.' Nevertheless, since the Act was found not to apply, the complaint was dismissed.

Mr Shetliffe, the dissenting member of the Tribunal, agreed with the majority about the lack of relevance of section 47 as well as Ms O'Keefe's experiencing unlawful discrimination because of her transsexuality. However, he decided differently as regards the applicability of section 39(1). Essentially, he maintained that a private function can still be caught by the Act where the process of selecting prospective attendees from the wider public is discriminatory. Here, he believed this was the case as the flyers were distributed Australia-wide as well as internationally. In his view, this coupled with the targeting of all lesbians raised as female, meant that the distribution process was sufficiently public to satisfy section 39(1) of the Act. Therefore in his (dissenting) opinion, Ms O'Keefe had indeed been unlawfully discriminated against by Sappho's Party.

This case may be viewed at: www.austlii.edu.au/au/cases/sa/SAEOT/2009/50.html

2.1.4 GEDDES V AUSTRALIAN LABOR PARTY (VICTORIAN BRANCH) (ANTI-DISCRIMINATION) [2009] VCAT 409 (12 MARCH 2009) VCAT REFERENCE NO: A239/2008

Merv Geddes, a longstanding member of the Australian Labor Party, complained under the *Equal Opportunity Act 1995* (Victoria) about his treatment by the Victorian branch of the party. In particular, he alleged he had experienced discrimination on the basis of political belief or activity. The complaint was lodged against the unincorporated association following disciplinary measures taken against Mr Geddes in 2006 when he handed out 'How to Vote' cards for a rival candidate in the Victorian seat of Morwell in a state election. As a result of his actions which clearly contravened the Victorian branch's rules, Mr Geddes was expelled from the party for five years. For his part, Mr Geddes maintained he was not accorded natural justice because he was not aligned with the dominant faction in his branch.

In return, the Victorian branch of the Australian Labor Party proceeded against him under section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* in an attempt to strike out the action. Sections 42 and 60 of the *Equal Opportunity Act 1995* (Victoria) (the Act) were identified as potential legitimate sources of grievance and subsequently eliminated.

Her Honour, Judge Harbison, dealt first with Mr Geddes's assertions under section 60 of the Act that his expulsion from the Victorian branch had denied him membership of a club or, alternatively, caused him to suffer 'any other detriment'. In section 4, the definitional section of the Act, a 'club' is regarded as, 'A social, recreational, sporting or community service club, or a community service organisation occupying any Crown land or receiving direct or indirect financial help from state or local government'. Even taking account of electoral assistance measures, Judge Harbison was hard-pressed to view a political party as a community service organisation with altruism at its core. She saw the omission of the word, 'political', as intentional. In reality, her analysis was unnecessary as Mr Geddes had failed to take the requisite steps for membership of the party in the year in question.

Next, she examined his allegations of discrimination relating to the provision of goods and services as discussed in section 42. Here, Mr Geddes was unable to tie his criticisms into the relevant section, merely re-iterating he was refused natural justice. Despite precedent suggesting the expression, 'services', should be defined broadly, Her Honour was unwilling to interpret either membership of a political organisation or the invoking of a disciplinary procedure as a service outlined in the Act. Neither could be categorized as being available to or necessarily conferring a benefit on the general public. From her perspective, no further enquiry would enhance his argument.

Although Judge Harbison was reluctant to accede to the Victorian branch of the ALP's request since evidence remained unheard, she struck out the application as fruitless. Because Mr Geddes's motivation centred on revisiting issues, such as the failure to accord him natural justice, which were not strictly anti-discriminatory, it was an abuse of the legislative regime to proceed under the equal opportunity legislation.

This case may be viewed at: www.austlii.edu.au/au/cases/vic/VCAT/2009/409.html

Implications of Discrimination Cases

The preceding cases demonstrate that not all discriminatory behaviour is unlawful. Unlawful discriminatory behaviour is that behaviour which is prescribed under the anti-discrimination legislation of either the Commonwealth or the States and Territories. Anti-discrimination law in Australia is based on the international human rights conventions and treaties which have been ratified by Australia. Federally there are five main anti-discrimination pieces of legislation, namely, *Age Discrimination Act 2004*; *Disability Discrimination Act 1992*; *Sex Discrimination Act 1984* and the *Racial Discrimination Act 1975*. Each of these Acts set out prohibited areas of discrimination, identifying types of discrimination and the grounds upon which an individual can bring an action and areas that are exempted from the operation of the legislation. Also, each State and Territory has enacted anti-discrimination legislation setting out areas of unlawful discrimination and grounds upon which a complaint can be made, as well as a process by which a complaint can be made. Anti-discrimination legislation is now widely used to seek redress when an individual considers they have not been treated with dignity and respect or that their self-worth has been violated. Many organisations have in place anti-discrimination policies and codes of conduct addressing situations that might give rise to direct or indirect unlawful discrimination.

2.2 EMPLOYMENT AND WORKPLACE RELATIONS

2.2.1 BAILEY V PEAKHURST BOWLING & RECREATION CLUB LTD [2009] NSWDC 284 (NSW DISTRICT COURT, LEVY SC DCJ, 3 NOVEMBER 2009)

The plaintiff Carol Anne Bailey was employed as a casual bar steward by the defendant, the Peakhurst Bowling & Recreation Club Ltd, a company limited by guarantee. Ms Bailey worked for the Club during 1998 and 1999; then from May 2000 worked an average of 30 hours per week, until mid-2006, when she had to cease work due to health reasons. At the time of the hearing she was 52 years old.

In mid-2004, Mr Tony Riley, a patron and a director of the Club, who also contracted services to the Club, was appointed club chairman. In this position he immediately became Ms Bailey's supervisor.

Ms Bailey gave evidence that from the time Mr Riley was appointed chairman he subjected her to a concerted campaign of workplace harassment, intimidation and bullying. This campaign consisted of: constant threats that she would lose her job; use of extremely vulgar language to Ms Bailey and in front of her; pressure on her to bend or break the liquor licensing rules regarding service of alcohol, gaming and accounting for sales; pressuring her to resign her union membership; changing her work classification so that she lost pay and seniority; falsely alleging there was a \$2000 shortfall in the cash float and implying she was responsible. There were also instances of underpayment of wages. This campaign occurred over a two year period (diaries kept by Ms Bailey corroborated her evidence). As a result of this treatment Ms Bailey's psychological health suffered and she was referred to a psychologist for counselling and treatment.

Medical evidence accepted by the court described Ms Bailey as having a serious and chronic generalised anxiety disorder with panic and agoraphobia together with a post-traumatic stress disorder and depression. The prognosis is that Ms Bailey is unlikely to recover fully and given her age it is unlikely she will ever return to paid employment.

During the course of the hearing the defendant Club admitted liability. Mr Riley did not give evidence. The Club conceded it owed Ms Bailey a duty of care that required it to provide a safe place and safe system of work, and that it had breached this duty of care. Further, the Club conceded that as a consequence of its breach of duty of care to Ms Bailey she suffered a psychological injury that resulted in a psychiatric disorder.

The court awarded Ms Bailey \$507,550 in total damages which included \$334,305 for future loss of earning capacity and \$36,773 for future loss of superannuation.

This case can be viewed at: www.austlii.edu.au/au/cases/nsw/NSWDC/2009/284.html

Implications of this case

This case reinforces the point that the courts will not countenance bullying and harassment of employees. The chairman's persistent abusive behaviour towards the plaintiff combined with the Club's lack of support for its employee combined to enable the court to find a serious case of bullying. As an employer, the Club has a duty of care to provide a safe place of employment and a safe system of work. It breached that duty by allowing the bullying to happen and to continue. The case once again highlights the need for organisations to understand their duty of care towards employees and ensure they have comprehensive HR policies and practices in place. It also highlights the need to have an early and effective complaint and intervention process in place, especially where an employee feels they are being bullied, intimidated or harassed.

2.2.2 TURNER V VICTORIAN ARTS CENTRE TRUST [2009] VSCA 224 (2 OCTOBER 2009) NO 3848 OF 2008

From August 1985 until 25 January 2001, Ms Adrienne Turner was employed by the Victorian Arts Centre Trust (the Arts Centre). She maintained that from 20 October 1999, onwards, she was bullied in her role as Senior Account Manager/Ticket Manager by the Arts Centre's Ticketing Services Manager, Mr Dominic Holden, as well as being subjected to psychosocial stressors. With respect to the former allegation, she referred to instances where Mr Holden untruthfully accused her of misconduct, of behaving violently towards

him and of enjoying unnecessary breaks from her work routine. Ms Turner contended his emails to her were aggressive in nature. In addition, she pointed out that being surrounded by fellow workers who were also adversely affected by Mr Holden's actions was also stressful. The imposition of an impractical, mandatory change in a meal break time was mentioned as an example of the unilateral nature of his decision-making.

Ms Turner alleged that as a result of Mr Holden's behaviour, her health seriously deteriorated. Negligence on the part of the Arts Centre was cited as a causal factor in her psychiatric condition which included major depressive, anxiety and panic disorders. In particular, she criticised the Arts Centre for failing to provide her and her colleagues with a safe environment in which to work as well as an awareness of the appropriate procedures should bullying occur. She also claimed the Arts Centre was derelict in its duty to direct and monitor the activities of Mr Holden and his offsider, Jenny Lacey, as to appropriate counselling to correct her perceived work deficiencies. The complaint extended to all levels of management for their inadequate response to her concerns, and their failure to recognise that strategies to deal with bullying and victimisation needed to be instigated. Eventually, Ms Turner took action in negligence and breach of contract in the Victorian County Court seeking damages for the psychiatric distress she had suffered. However, that application failed.

Ms Turner approached the Court of Appeal to have the County Court judgment set aside and the matter retried. The first ground of appeal related to a breach of the collateral evidence rule by the trial judge. This involved evidence given concerning the resignation of an Arts Centre staff member, Ms Ann O'Hanlon, who was, according to Ms Turner, another casualty of Mr Holden's bullying. The Arts Centre led other evidence implying that Ms O'Hanlon's departure was linked to a fraudulent claim for overtime exposed by Mr Holden. The Court of Appeal decided that this evidence was not collateral and was admissible, so the trial judge had made the correct decision to allow it, although based incorrectly on the bias exception to the collateral evidence rule. Specific comment was made that Ms Turner's legal counsel failed to direct the jury not to allow the evidence to reflect adversely on Ms O'Hanlon.

Next, the matter of whether the trial judge should have discharged the jury was considered. During Ms Turner's cross-examination, a statement was made that her complaint of bullying to the Arts Centre was investigated and found to be 'not substantiated'. While this comment was held to be prejudicial, His Honour's decision to direct the jury to ignore it rather than discharging the jury was regarded by the Court of Appeal as a satisfactory resolution, particularly since six days of the trial had already elapsed.

Ms Turner's final objection centred around whether the trial judge should have permitted the evidence of Mr Jim Bailey, a human resources expert, to be heard. The judges of the Court of Appeal backed the trial judge's decision to exclude his evidence as Mr Bailey lacked any specialist qualifications that would enable him to be considered an expert in his field. Well-reasoned conclusions could be arrived at by lay people, such as the jury, without his input as the matter was one within the grasp of their everyday experience.

The appeal was dismissed as none of the grounds raised on appeal were made out.

This case may be viewed at: www.austlii.edu.au/au/cases/vic/VSCA/2009/224.html

Implications of this case

The plaintiff was not successful in her claim for damages for breach of duty of care by her employer for not providing a safe place of employment. However, it is a timely reminder that organisations are in the same position as all other employers and need to ensure that employees are not exposed to an unnecessary risk of injury. Employers have a well established duty of care to employees to provide a safe workplace. Complaints about being bullied resulting in psychological distress are becoming more common. Employers should be aware of their potential liability for psychological related illnesses that are directly related to the conditions of the workplace and put in place effective grievance procedures which can be accessed at a very early stage.

2.2.3 GUTNICK V BONDI MIZRACHI SYNAGOGUE [2009] NSWSC 257 (31 MARCH 2009) FILE NUMBER: 2047/09

Since 1987, Rabbi Moshe Gutnick has been the Rabbi at the Bondi Mizrahi Synagogue (the Synagogue), a part-time position which he maintains is 'hazaka' or tenured for life. The Synagogue is a company limited by guarantee whose congregational members constitute its company membership.

At 8p.m. on the day of the Court hearing, an extraordinary general meeting of these general members had been convened to consider passing resolutions concerning the Synagogue's financial situation as well as terminating the Rabbi's employment on the grounds of redundancy. Rabbi Gutnick's response was to seek an interlocutory injunction to prevent the latter resolution being voted on or given effect to. Further, he sought to ensure the officers of the Synagogue would not be able to take alternative action to end his employment. If, however, the Synagogue was willing to place the matter for determination before a Din Torah, an Orthodox Jewish court whose judges dispense rabbinic law, Rabbi Gutnick would accept its decision regarding whether termination of his employment was justified. More particularly, he was adamant his contract with the Synagogue stipulated an arbitration process called zabla whereby the Synagogue and two arbitrators had the right to select a suitably qualified third arbitrator. Although the Synagogue was prepared to agree to a Din Torah, there was concern that a finding in Rabbi Gutnick's favour would have serious consequences financially.

Justice White determined that whether 'hazaka' was an express or implied term of the Rabbi's contract was a serious question to be tried. Contingent on this, another serious question to resolve was the type of remedy to be awarded – specific performance or an injunction to preserve the *status quo* until Jewish law was applied. With respect to 'hazaka', Rabbi Gutnick's original 1987 contract specifically excluded 'hazaka'. Once this contract expired in 1990, no fresh contract was entered into. Rabbi Gutnick claimed to be granted 'hazaka' at the 1990 general meeting as a prerequisite to his agreeing to remain in his role. Later, in the mid-nineties, an unsigned memorandum to that effect was drawn up. This memorandum was distributed in 2004 by a Board member as a copy of the Rabbi's contract. From the Rabbi's perspective, it formed the basis for the continued performance of his duties from 11 April 2004. His Honour doubted that 'hazaka' was an express term of the contract since no approval from the general members was evidenced, as required by article 87 of the Articles of Association. However, Rabbi Gutnick argued that under Jewish law, in the absence of express exclusion of 'hazaka', it was implied into a contract. Given the adoption of new Articles of Association on

28 April 1997, it was moot when 'hazaka' became an implied term. Nevertheless, Justice White suggested it was from 2004 because of the Board's tacit acceptance of Rabbi Gutnick's point of view. He found this was the case despite the new article 12.3.4 which dealt with events resulting in termination.

If 'hazaka' was shown to be part of the employment contract, the judge believed specific performance of the Rabbi's duties would be ordered by the Court, as enforcing the obligations of ecclesiastical offices is an exception to the general principle that contracts for personal services are not specifically enforceable. His Honour was not convinced that damages would prove a suitable remedy for this type of religious dispute. On the balance of convenience, he believed the matter should be dealt with by a Jewish tribunal with an intrinsic understanding of Jewish law. His Honour also pointed out the notice convening the meeting was defective according to article 6.3.5 of the Constitution since members were not adequately informed of the arguments underlying the rabbi's proposed redundancy, another matter relevant to the balance of convenience. By granting an injunction to maintain the *status quo*, even though this was not the relief sought, His Honour was confident that both parties' attitudes would ensure the matter was concluded speedily via a Din Torah.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/supreme_ct/2009/257.html

Implications of this case

Although this case has particular characteristics because it arises from employment of someone to perform a religious office, the dispute came about initially because the board was trying to address the desperate financial situation of the synagogue.

While it is possible that dwindling attendances at synagogue led to the argument that the Rabbi was redundant, particularly when the synagogue was threatened with insolvency, the lack of clear documentation of his employment contract could make it more difficult for the board to support the case for redundancy. (This was possibly compounded by minutes which were unclear and the memorandum which was not signed or approved.) The case underlines the importance of maintaining up to date employment contracts for employees, including dispute resolution procedures. (In some cases it will be appropriate for these to refer to or incorporate an industrial instrument like an award or a collective agreement.) It is important for all parties to know their rights and obligations – something which will become even more important in a crisis.

2.3 INSOLVENCY AND WINDING UP

2.3.1 WHITTINGHAM, IN THE MATTER OF THE SPANISH CLUB LTD [2009] FCA 1158 (FEDERAL COURT OF AUSTRALIA, 19 OCTOBER 2009) FILE NUMBER: NSD 1080/2009

On 9 November 1972, the Spanish Club Ltd (the company) was incorporated as a nonprofit company limited by guarantee. Many years later, on 17 November 2008, Mr Whittingham of PKF Chartered Accountants was appointed to administer the company under section 436A of the *Corporations Act 2001* (Cth) (the Act'). Subsequently, on 27 February 2009, the company's creditors decided that a deed of company arrangement (DOCA) should be entered into. This happened on 16 March 2009 and Mr Whittingham was duly appointed administrator of the scheme.

In this role, he was compelled by Clause 12.1 of the DOCA to convene a company annual general meeting, which he arranged to take place at Sydney's Star City Casino on 13 November 2009. A stipulation of section 249(1) of the Act is that at least twenty one days' notice must be given of such a meeting. To achieve this, under Clause 17 of the company's Articles of Association, service was deemed to be effected the day after the notice was posted. Therefore this could occur no later than 21 October 2009. A similar result was arrived at by applying section 29 of the *Acts Interpretation Act 1901* (Cth).

However, clause 34(a) of the company's Articles of Association stated that the nominations for election to committee positions must be received by the Secretary twenty one days before the annual general meeting. According to the Australian Electoral Commission, which was designated in Clause 12.2 of the DOCA to conduct the election, the final date for nominating was the 23 October 2009. Obviously, allowing the prescribed time for nominations would contravene the notice requirements. The situation was further complicated by Mr Whittingham's need to comply with Clause 12.1 of the DOCA because, as administrator, he was bound to do so under section 444G of the Act.

When the matter came before Justice Lindgren in the Federal Court, he pointed out that section 447D of the Act permitted an administrator to approach the Court for advice. There was scope under section 447A of the Act for the Court to make an appropriate order. In this case, His Honour decided to shorten the nomination period. Notification of the committee election was to be provided on or before 2 October with 12 noon on 19 October 2009, set as the closing date for the nominations.

This case may be viewed at: www.austlii.edu.au/au/cases/cth/FCA/2009/1158.html

Implications of this case

Voluntary administration is governed by Part 5.3A of the *Corporations Act 2001* (Cth). The objective of voluntary administration is to allow a company the maximum chance of continuing in existence, or if that proves to be impossible, to provide a better return to creditors and members than an immediate winding up. Voluntary administration is meant to encourage companies to use a cheaper, more flexible process in order to deal with their insolvency without any court involvement. The appointment of the administrator gives rise to a moratorium on debts of the company, and allows the administrator to review options to put before a meeting of the company's creditors. The creditors have the ultimate sanction in this method of external administration.

In this case, the creditors of the company voted to be bound by a deed of company arrangement, but technical difficulties arose. This is an example of the operation of section 447A(1) which allows the court to make any order it sees fit to promote the operation of Part 5.3A of the Act. Although Part 5.3A of the Act is highly technical in nature, and seems prescriptive, section 447A(1) has been liberally interpreted by the courts to give flexibility to administrators to achieve the policy purposes of voluntary administration. This case shows that such flexibility can assist the administrator to move the administration forward to the ultimate benefit of the company and the creditors.

2.3.2 CORREA V SPANISH CLUB LTD AND ORS [2009] NSWSC 1225 (SUPREME COURT OF NEW SOUTH WALES, 30 SEPTEMBER 2009) FILE NO: 4777/09

After the Spanish Club Ltd, a club registered under the *Registered Clubs Act 1976* (NSW) (the state Act), became insolvent, Kenneth Whittingham was appointed administrator of the deed of company arrangement that was subsequently drawn up. Although the chief creditor, Australian Unity, was owed approximately \$3.67 million of the \$4 million debt

outstanding, the Club's assets exceeded \$10 million. On 1 July 2009, G & J Drivas Pty Ltd entered into a contract with the administrator to purchase 86 and 88 Liverpool Street, Sydney, for \$9.25 million. According to the deed of company arrangement, the former property was described in Clause 1.1(14) as non-core whilst the latter was defined in Clause 1.1(7) as core property.

Under section 41J(3) of the state Act, the sale of core property required the approval of a majority of ordinary members of the Club obtained at a general meeting. The meeting was held on 31 July 2009, but the members rejected the proposed sale to Drivas. Regulation 19(1)(h) of the *Registered Clubs Regulation 2009* (NSW) allowed disposal of core property with approval of the New South Wales Director-General of Communities, so the administrator asked for the Director-General's assistance. Since the *Corporations Act 2001* (Cth) prevailed over state legislation, the advice was that the administrator was not bound by the requirements of section 41J(3) of the state Act.

However, section 444A(5) of the *Corporations Act 2001* (Cth) qualifies the administrator's broad power of sale under a deed of arrangement 'except so far as it provides otherwise'. Here, the deed specifically referred to the need to comply with the state Act. Delores Correa, a member of the Club, sought a permanent injunction to halt the intended sale. Justice Brereton in the Supreme Court of New South Wales agreed that there were strong grounds for her stance. He pointed out that the requirements of the state Act were incorporated into clauses 5.1 and 5.2 of the deed of arrangement – indicating an intention to protect the interests of club members as well as those of creditors. Otherwise, why include the clauses at all? Further, he did not view the Director-General's remarks under regulation 19(1)(h) as signifying approval to sell the property in question. To proceed could harm the interests of members who were eager to see the club return to profitability.

On the subject of whom the balance of convenience favoured, His Honour could see no prejudice to either party, particularly as the Club's assets were more than sufficient to cover its debts. Therefore, because Delores Correa's case on behalf of the members was so strong, a permanent injunction was granted, leaving open the possibility of the contract's being avoided in the future.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NSWSC/2009/1225.html

Implications of this case

This case is an illustration of the possible conflicts which can arise between state and federal legislation. Constitutionally, federal legislation will prevail over state legislation in many circumstances. However, in this case, provisions of a state Act were incorporated into the deed of company arrangement made under a federal Act. A deed of company arrangement is binding on the administrator as well as the creditors and members, and His Honour decided that in the particular circumstances of the case, this meant that the administrator had to comply with the state Act's provisions.

2.3.3 JOHNSON V COMMISSIONER OF CONSUMER AFFAIRS [2009] NTSC 4 (27 FEBRUARY 2009) FILE NO: 90 OF 2006 (20619538)

Using the power provided by section 65 of the *Associations Act (2003)* (NT) (the Act), the Commissioner of Consumer Affairs (the Commissioner) dissolved the Blonks Motorcycle Club Incorporated (the Association) on 12 July 2006. The dissolution was gazetted after the Association's operations became dormant and it was unclear whether its objects

were being pursued. Mr Johnson, the public officer of the Association at the relevant time, denied the latter criticisms. As an interested person under section 71(1) of the Act, he sought to prove that, when the Association was dissolved, it was in fact carrying out its objects or operation. By so doing, he could be granted an order declaring the Commissioner's action void.

Originally incorporated on 7 April 1986, the Association's objectives revolved around the restoration of British and American motorcycles and their safe use in touring and sporting pursuits. Both the Association's Constitution and its Rules were filed with the appropriate body. After the Association was incorporated, on 12 May 1989, it purchased a house at Howard Springs to use as a clubhouse. The Commissioner's evidence revealed it functioned as the Association's clubhouse until 1993 when the Hell's Angels Motorcycle Club (Hell's Angels) set up a Darwin chapter and effectively took control. In fact, this significant Association asset was gifted to Angel Investments (NT) Pty Ltd, a business entity controlled by Hell's Angels, on 27 July 2001.

Examination of the Association's financial affairs in subsequent years revealed problems. Unqualified, audited financial statements were submitted by the Association for the 2001/2002 financial year. None were lodged for the following financial year. The equivalent 2003/2004 statements were qualified. There was no indication that these reports had been placed before the Association's Annual General Meeting or that any members of the Management Committee had signed off on them. No lodgement was made for the year ended 30 June 2005. On 1 March 2006, although the Commissioner requested that the Association produce its books, no response was forthcoming.

By this time, Mr Johnson was the Association's notified public officer, despite the fact his membership of the Association clearly ended in 1993. A new Constitution for the motorcycle club was adopted on 13 June 2006, but the Commissioner later ruled it was non-compliant with the current legislation. The argument that Association records had been destroyed in a fire was rejected as a credible explanation for the underlying lack of documentation of meetings and other relevant data.

Therefore, Judge Southwood determined that most of the original Association members were now members of Hell's Angels. Any connection with the earlier Blonks Motorcycle Club Incorporated was limited to use of its former property and access to its bank accounts as required by Hell's Angels' members. The Association's former assets were being applied to Hell's Angels' pursuits. Mere possession of personal property such as a lawnmower and water tanks was not sufficient to prove the Association operational. Because of these factors and the absence of strict adherence to the accepted procedural guidelines for associations, His Honour declared the Association defunct at the time of its dissolution. In his view, it was inactive by 12 July 2006.

This case may be viewed at: www.austlii.edu.au/au/cases/nt/NTSC/2009/4.html

2.4 MEMBERSHIP AND OFFICE

2.4.1 DAIRY FARMERS MILK CO-OPERATIVE V CO-OPERATIVES COUNCIL [2009] NSWSC 862 (27 AUGUST 2009) FILE NUMBER: 11129/09

The Dairy Farmers Milk Co-operative (DFMC) operated as a co-operative of dairy farmers within a contractual framework. Until 2008, when it was taken over by National Foods Ltd, milk supplied was despatched to Australian Co-operative Foods Ltd (ACFL) for processing. As a result of the takeover, the co-operative became a corporation under the *Corporations Act 2001* (Cth). When ACFL's scheme of arrangement with its members was approved on 18 November 2008, DFMC's shareholding was 20% which was expected to be realised and distributed amongst its members. Out of the resulting \$91,589,000, a special dividend of \$1.6897 per share was declared on 10 December 2008, and announced at the DFMC annual general meeting. This special dividend was only available to current DFMC members.

Thirty-one former DFMC members who had cancelled their membership between 31 March 2008, and 31 October 2008, were waiting on payment for their share capital when the scheme of arrangement was effected. On 28 November their capital was repaid without interest, but more promptly than was usual. Although they had no entitlement to partake in the special dividend because they were no longer members when the special dividend was announced, on 9 December 2008 these past members requested the Co-operatives Council to restore their membership so that they could access the special dividend. Their application relied on section 129 of the *Co-operatives Act 1992* (NSW) (the Act) which permitted an order to reinstate membership together with its entitlements if its cancellation had occurred unreasonably. On 5 February the Co-operatives Council ordered that these shareholders have their membership reinstated from the relevant termination dates to make them eligible for the special dividend. Twenty four hours after the payment had taken place, their membership was to be cancelled again. Unhappy with the decision, the DFMC appealed as was its right under section 419 of the Act.

Acting Justice Bryson found that, as the thirty-one members had become inactive through failing to supply the requisite amount of milk within the required timeframe set out in section 64(1) of the Act, their membership was legitimately cancelled under section 127. Further, he determined that the power granted by section 129(1) should be interpreted widely to permit the alteration of members' rights with respect to the cancellation of their membership. An analysis of section 129 clearly indicated the Co-operatives Council was charged with this responsibility whilst the Co-operatives Board had no power in this regard. That said, His Honour could not fault the Co-operatives Board's handling of the original membership cancellations nor its premature return of shareholders' capital.

Next, Acting Justice Bryson considered in greater detail whether the Co-operatives Council's order was within its power. He pointed out the DFMC's correspondence with the former members was not misleading although there was no attempt to be proactive and outline the circumstances in which their membership could be revived. Despite the lawfulness of the DFMC's behaviour, the Co-operatives Council's decision as to the unreasonableness of the cancellation of the thirty-one memberships was valid. To support

his contention, His Honour cited the reference in two of the DFMC's letters to the affected members being 'entitled', an expression which suggested no further action on the part of the members was necessary. He also criticized the DFMC's failure to acquaint these members with their rights and responsibilities under the active membership rule. In his opinion, once the Co-operatives Council resolved that the cancellation of the thirty-one memberships was unreasonable, it was within its mandate to reinstate their memberships as set out in section 129(3) of the Act. Therefore, the appeal by the DFMC was dismissed.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NSWSC/2009/862.html

2.4.2 IN THE MATTER OF DAIRY FARMERS MILK CO-OPERATIVE LTD [2009] NSWSC 627 (3 JULY 2009) FILE NUMBER: 2929/09

After Dairy Farmers Milk Co-operative Ltd (DFMC) sold its twenty percent shareholding in Australian Co-operative Foods Ltd (ACF), it needed to apportion the net proceeds of the sale amongst its members. The initial step was to announce a special dividend of \$1.6879 per share at the 2008 Annual General Meeting, to be paid to DFMC members by December of that year. Some \$56.9 million was involved. Next, payment had to be effected for the compulsory share cancellation as the sale was brought about via a transfer of DFMC's shares to National Foods Ltd in exchange for cash. It was determined to pay \$1.00 per share for each of member's seven out of ten shares to be cancelled. A further complication concerned whether former members of the DFMC who applied successfully to the Co-operatives Council for reinstatement under section 129 of the Act to take advantage of the dividend, were eligible for this payment as well. A court-approved scheme of arrangement was required.

DFMC sought approval in the New South Wales Supreme Court for a scheme arranged with its members under section 344(1) of the *Co-operatives Act 1992* (NSW) (the Act). According to section 344(1)(b), such approval may only be granted if members have passed a special resolution by means of a special postal ballot. After the Court nominated 3 July 2009, as the date for hearing DFMC's application, the required ballot of active members was carried out in June. No anomalies were reported in the way the ballot was conducted. A special resolution for the purposes of a special postal ballot of co-operative members needs a three quarters majority as set out in section 189(1)(c) of the Act. To pass such a resolution, the specified majority must cast a formal vote in line with section 190(2). Here, 97.6% of the formal votes supported the scheme under discussion. Justice Austin was satisfied that all the procedural requirements relating to the ballot had been met.

His Honour also explored the issue of how the additional payment impacted on DFMC's capital position. He agreed with the DFMC Board that, although the scheme of arrangement resulted in a reduction in DFMC's capital, it was not designed to flout section 299(1) in Part 11 Division 2 of the Act which deals with purchasing shares in a co-operative. Retained earnings should be sufficient to continue the operation of its Milk Supply Agreement with ACF whilst DFMC's balance sheet should benefit from the removal of the possibility of negative net assets.

Therefore, he agreed that the Court should approve the scheme of arrangement. Although inactive members would benefit under the scheme, provided their shares had not already been paid out, reinstated members would not since they had been paid previously. Nevertheless, all members would be subject to the scheme's stipulations.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NSWSC/2009/627.html

2.4.3 CUMMINS V AUSTRALIAN JOCKEY CLUB LIMITED [2009] NSWSC 254 (6 APRIL 2009) FILE NUMBER: 2144/09

Established in 2008 as a company limited by guarantee, the Australian Jockey Club Limited (the AJC) leases the Randwick Racecourse in Sydney. In March 2009, Sarah Cummins, along with other members of the AJC, attempted to requisition a general meeting to discuss the replacement of the AJC's incumbent directors due to dissatisfaction with their performance. As part of the process, her group produced a proxy form to be used in the event a concerned member could not attend and wished to appoint a proxy. The meeting was duly scheduled for 9 April 2009. However, the proxy forms were prepared ahead of time and blanks were left in which 'the bearer' was authorised to insert the time and place of the meeting.

When the AJC sent out its notice calling the meeting with accompanying voting information around 11 March it stated that only the form of proxy provided by the AJC was valid. By this stage, many members had already handed their alternative proxy forms to one of Ms Cummins's group. Subsequently, just prior to 18 March after intervention by Computershare Investor Services Pty Ltd, a company employed by the AJC to assist with the logistics of the meeting, these proxies were returned with instructions to deposit them signed with either the AJC or Computershare.

Despite this action, legal discourse via their respective solicitors continued between the AJC and Mr Osburg, a representative from Ms Cummins's faction. Correspondence from the AJC's legal representatives on 27 March and 31 March citing a senior counsel's opinion, was ambiguous as to what constituted a valid proxy vote. This culminated in Ms Cummins commencing legal proceedings on 31 March to have the two forms of proxy declared to be valid. Meanwhile, by 2 April the day before the return of her originating process, the AJC admitted that any issues relating to the proxies were purely academic. None had been forwarded invalidly and no dispute over the actual proxies had arisen.

Therefore, when the matter reached the Supreme Court on 3 April Ms Cummins sought leave to discontinue the action. In addition, she applied for an order that the AJC pay her costs. This application was strenuously objected to by the AJC who maintained that the customary position as to costs should hold. According to regulations 42.19(1) and (2) of the New South Wales *Uniform Civil Procedure Rules 2005* which deal respectively with discontinuance of proceedings and the associated costs, any costs incurred by the AJC with respect to the discontinued matter would usually be borne by Ms Cummins.

However, Justice Barrett upheld both of Ms Cummins's requests on the basis that, since the AJC had failed to provide timely guidance as to the validity of the alternative proxies, forcing Ms Cummins to seek advice from the court, the AJC should be liable for her costs.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NSWSC/2009/254.html

2.4.4 PLENTY & ANOR V SEVENTH DAY ADVENTIST CHURCH OF PORT PIRIE [2009] SASC 10 (19 JANUARY 2009)

Graham and Deeanne Plenty originally attended the Seventh Day Adventist Church in Port Pirie (the Church) during the late 1950s before they moved to Western Australia. On their return to South Australia in the 1970s, they became active members of the congregation after their names were placed on the Port Pirie Church's roll. During this time, there was an ongoing dispute between the Plentys and fellow church members involving what the former perceived as the irregular election of people to Church positions. This disagreement culminated in Mr and Mrs Plenty's being disfellowshipped, that is, expelled from membership of the Church, on 1 December 1979. Although they reacted in June 1982, by instigating proceedings claiming a denial of natural justice, the matter didn't reach court until 2002. On 10 March 2003, judgment to this effect was given in the South Australian Supreme Court along with a declaration by Justice Duggan that the Church's actions were null and void. The Church refuted this declaration via a cross-appeal.

Subsequently, the Plentys amended their statement of claim to seek damages in both contract and tort. In November 2006, Justice Duggan denied both these remedies: the first, on the basis that no contract existed between the Church and the Plentys; the second, on the grounds of a failure to demonstrate the existence of a duty of care. On appeal, Mr and Mrs Plenty re-addressed these contractual and tortious issues as well as the consequences of the denial of natural justice. The matters of the loss of proprietary rights and the damage to their reputations were also raised.

In the South Australian Full Court, the leading judgment by Justice Gray dealt first with the Plentys' claim that they were denied natural justice. More particularly, their exposure to bias was examined, as the Church members not only set in train the disfellowshipping process, but also determined whether its implementation was necessary. His Honour commented that, as membership of such a Church would be relatively small, it would be unavoidable that members would be forced into potentially conflicting roles, a situation permitted by the Church rules. No evidence of malice was found to be apparent.

Next, Justice Gray's attention focused on whether the Church manual, produced in the United States of America, gave rise to contractual rights and obligations amongst its members. He didn't believe so as it was a standard American publication with a strong religious flavour. Legal proceedings were only incorporated as a default option. Commenting on the trial judge's examination of whether damages were available for the distress the disfellowshipping caused Mr and Mrs Plenty, Justice Gray also declined to find any resultant inconvenience, citing the three decades taken to have the matter concluded.

Turning to the question of whether damages were payable under tort law, His Honour agreed with the trial judge's view, based largely on the evidence of Dr Blakemore, a psychiatrist called by the Church, that it was not reasonably foreseeable that a recognizable psychiatric condition might develop as a result of being disfellowshipped. Similarly, Justice Gray rejected the notion that heart conditions suffered by both Mr and Mrs Plenty were attributable to their treatment by the Port Pirie congregation. Therefore, no damages were awarded in tort as no duty of care had been breached with respect to them.

With respect to their purported loss of proprietary rights, the Plentys were still able to utilise Church facilities despite their names being removed from the roll. However, as the relationship between the Church and its members had never been contractual in nature, no proprietary rights had ever been possessed by the Plentys. Since Mr and Mrs Plenty were not highly regarded by the congregation prior to the disfellowshipping, Justice Gray failed to find it caused damage to their reputations.

Finally, His Honour considered the declaration foreshadowed by Justice Duggan in 2003. It was not until the 23 October 2007, that this declaration came to fruition. By then, neither Mr nor Mrs Plenty had had any involvement with the Church for over 25 years. The Church argued that the protracted way in which the Plentys had pursued the matter suggested their lack of interest in the declaration which would not, in the final analysis, restore their Church membership. From a purely legal perspective, the situation was further complicated by confusion as to whether the decision, relating as it did to natural justice, was void or voidable. Therefore, Justice Gray allowed the cross-appeal, setting aside the declaration. His fellow judges concurred with his sentiments.

This case may be viewed at: www.austlii.edu.au/au/cases/sa/SASC/2009/10.html

Implications of this case

The principal point in this case is that the church is an unincorporated association, as opposed to one incorporated under state associations incorporation legislation or the corporations legislation. The unincorporated association is not traditionally regarded as a legal entity with rights and obligations. In effect, unincorporated associations do not exist in law. Therefore, damages for breach of an unincorporated association's rules cannot give rise to damages in the absence of a contract. Of course, this has meant that there is no basis for a member to bring an action against an association unless some proprietary right can be shown. In showing a true proprietary right, the existential problem of whether an unincorporated association is 'real' in any legal sense is an obstacle. An unincorporated association, which is not a legal entity under common law, cannot hold property in its own name. Therefore, a member could not participate in the rights attached to that property, and so there could never be a proprietary right demonstrated. There being no proprietary rights involved, then there is no cause of action in contract. However, the test for showing a proprietary right is rather flexible in Australia. It is whether a member derives a tangible or intangible benefit from being a member of the association in question. Tangible benefits can include the right to use and enjoy an association's social facilities, playing fields or equipment. Intangible benefits might apply to an association which has no actual facilities or equipment, such as a book club conducted in members' homes, or an environmental group which conducts all its activities 'on-site' at contested areas. Benefits which are merely collateral, however, may not be sufficient.

2.4.5 KOVACIC V AUSTRALIAN KARTING ASSOCIATION (QLD) INC [2008] QSC 344 (22 DECEMBER 2008) FILE NO: BS 8505 OF 2008

Fifteen year old James Kovacic, a proficient go-kart competitor from New South Wales, was barred from entering karting competitions in Queensland after the local arm of the Australian Karting Association Incorporated (the AKA) passed a resolution to that effect on 27 October 2007.

Although he had held a licence to compete since January 2002, his exclusion stemmed from his father's involvement in a number of unpleasant, sport-related incidents which included intimidatory behaviour. For his part, amongst other accusations, Valentino Kovacic alleged the Queensland officials were open to bribery and exhibited bias. The volume of litigious material from Mr Kovacic caused the AKA (Qld)'s prosecutor, Mr Lane, to refuse to deal with matters concerning Mr Kovacic in the future. As support for the prosecutor, the AKA (Qld) decided to deny James entry to the Queensland karting races. This was passed by resolution at a meeting of the AKA (Qld), in terms 'That the clubs of

Qld support the AKA (Qld) Prosecutor in that they will refuse to accept the race entry of James Kovacic'. Only when James nominated to enter a race in Rockhampton the following June and was refused, did he realise that he had been excluded on an ongoing basis.

In the Queensland Supreme Court, Mr Kovacic maintained on James's behalf that the AKA (Qld) did not possess the authority to implement such an action indefinitely statewide. Further, procedural fairness had not been observed in that notice requirements were ignored. Finally, he declared the decision to be so unreasonable that it could not be allowed to continue. AKA (Qld) argued that the decision was not taken at a disciplinary tribunal; it was a quasi-executive decision and natural justice did not apply; and that organisers of competitions had the right to exclude anyone.

Whilst Justice Wilson recognised Mr Kovacic's right to raise these issues, she failed to find any merit in his arguments. At the heart of her decision was the fact that the matter was not justiciable merely because the AKA (Qld) was incorporated. Her Honour stated that courts do not like to interfere in the internal matters of voluntary associations without good reason (for example breach of a proprietary or contractual right of a member). Incorporation under an act did not match the perceived public importance of legislation governing trade unions or political parties, for example. By exploring the avenues open under precedent, she found there was no evidence of breach of contract nor of infringement of a proprietary right. Finally, Her Honour considered whether James's livelihood or reputation was affected by the AKA (Qld)'s decision. Since he was still licensed at a national level and raced mainly in New South Wales, the chief effect was the loss of the ability to compete in a single Queensland event. Internationally, his go-karting was unaffected. As for Mr Kovacic's claim that James had lost sponsorship deals worth collectively about \$200,000 because of the AKA (Qld)'s resolution, Her Honour declared it to be unfounded. Therefore, she dismissed Mr Kovacic's case.

This case may be viewed at: www.austlii.edu.au/au/cases/qld/QSC/2008/344.html

Implications of this case

This case is important for its discussion about the policy of the law and courts in respect of interference in the affairs of a voluntary organisation. The decision reaffirms the long held position that in order for a court to be able to provide relief at law or in equity the applicant has to establish that there has either been a breach of contract or an interference with a proprietary right or interest or someone's livelihood or reputation is at stake. The plaintiff was not a member of the organization which placed the ban on him and it was held that this fact did not preclude him from seeking declaratory relief from the court. The court has a very wide jurisdiction to grant declaratory relief. The case turned on the facts not on a lack of standing to bring an action or on that the action couldn't be brought.

2.5 NEGLIGENCE

2.5.1 MATTHEW CHAINA & ORS V THE PRESBYTERIAN CHURCH (NSW) PROPERTY TRUST & ORS (NO 3) [2009] NSWSC 1243 (SUPREME COURT OF NEW SOUTH WALES, 23 NOVEMBER 2009) FILE NO: 20472/2002

Following the drowning of their son at a school camp in October 1999, Mr and Mrs Chaina launched negligence actions both as parents and as the directors and only shareholders of family companies. As discussed in an earlier legal case note (*Chaina & Ors v the Presbyterian Church (NSW) Property Trust & Ors* [2008] NSWSC 290), they insisted the nervous shock suffered as a result of their son's death adversely affected their ability to operate their business and triggered a loss of profits. Since, by October 1999, they were in the process of developing a collection of domestic cleaning products to be marketed as well as planning to re-launch an industrial product range, claims for past and future economic loss were made.

Of particular importance for assessing the qualities attributed to the cleaning products were the relevant formulae. However, while Mr and Mrs Chaina maintained the formulae existed, they were loath to divulge them, despite a court order requiring them to. Following the revelation in August 2009, that Mr Chaina did not possess the academic qualifications he professed to have, the couple sought to have expert testimony admitted as to the superior qualities of their products. Solicitors for the Chainas asserted that failure to present such testimony would seriously harm their case, particularly as Mr Chaina's previous evidence would now be discredited.

For its part, the Presbyterian Church (NSW) challenged this assumption as its case had been researched and resourced around Mr Chaina's earlier statements of his personal knowledge of and involvement in the development of the products. Referring to Mr and Mrs Chaina's delaying tactics over the course of the litigation, the Church contended it was too late for them to be allowed to alter their evidentiary foundations, pointing out that section 56(1) of the *Civil Procedure Act 2005* (NSW) advocated 'A just, quick and cheap resolution of the real issues in proceedings'. The Church also argued that the specialist advice of the preferred experts would be of limited assistance since some of the original ingredients in the 1999 formulae were no longer available, making exact replication of the cleaning products impossible.

Although Justice Hoeben in the New South Wales Supreme Court was sympathetic to the Church's arguments, particularly with respect to the protracted delays, unnecessary costs and uncertain case management, and recognised that awarding costs was not adequate recompense for the inconvenience caused, His Honour felt in this instance that the claim needed to be argued properly. If the application to admit the new testimony was rejected, Mr and Mrs Chaina's case might well collapse. Since case preparation was ongoing and no hearing date had been set, mindful of acting, 'In accordance with the dictates of justice', as set out in section 58(1) of the *Civil Procedure Act 2005* (NSW), Justice Hoeben granted the Chainas' application.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NWSC/2009/1243.html

2.5.2 THE QUADRIPLAGIC CENTRE BOARD OF MANAGEMENT V MCMURTRIE [2009] WASCA 173 (WESTERN AUSTRALIAN COURT OF APPEAL, 13 OCTOBER 2009) FILE NO: CACV 120 OF 2008

In the Western Australian District Court, \$510,840 was awarded in damages for negligence to Ms McMurtrie, a nurse's assistant, for a back injury sustained while turning a patient, Mr R.J., in his bed at the Quadriplegic Centre on 24 May 2001. She alleged that after swearing at her, Mr R.J. struck out towards her face while she was bending over him. To avoid his blow, she lurched backwards quickly, causing damage to her back as she did so. It transpired that Mr R. J. had previously been physically aggressive towards another staff member, Mr Siharath, a matter of which Ms McMurtrie was unaware. She claimed that, had she known prior to her injury, she would have approached Mr R. J. differently. Following Ms McMurtrie's experience, a registered nurse, Ms Wynne, also complained that Mr R. J. had hit out at her. Therefore, the trial judge decided that the Quadriplegic Centre was negligent by reason of its failure to notify Ms McMurtrie of Mr R.J.'s prior violent behaviour, a foreseeable consequence of which was that she could be harmed. The Quadriplegic Association appealed the decision.

It was argued that the trial judge had largely ignored the evidence of Ms Marshall, another nurse's assistant, who maintained that Ms McMurtrie was standing, not bending over, at the time in question, and did not lurch backwards. This argument was upheld by the Court of Appeal as an error in law by the trial judge.

The second ground of contention involved whether, in fact, there had been a breach of the Quadriplegic Association's duty of care. As the respondent's employer, the Quadriplegic Association owed her a duty to take reasonable care to avoid exposing her to unnecessary risk of injury. The issue here was the scope of that duty of care, specifically, whether it included a duty to warn of the prior incident with Mr Siharath, and whether the duty had been breached. Once again, the Court of Appeal found for the Quadriplegic Association. Justice Pullin, with whom Justice Newnes agreed, pointed out no such duty of care to warn was owed to Ms McMurtrie as she had been specifically requested not to look after Mr R.J. and, therefore, was not a member of the group assigned to look after him. In the event this reasoning was flawed, the judges pointed out that two minor instances of aggression from Mr R.J. were not sufficient to warrant a general warning to all nursing assistants. Justice Buss in a separate judgment highlighted this too, mentioning Mr R.J.'s limited physical ability to inflict an injury. Further, as he regarded breach of duty and causation as interlinked, he found it impossible to accept the trial judge's conclusion that the mere provision of a warning would have altered Ms McMurtrie's plight.

All the judges found no merit in the suggestion that the trial judge failed to supply adequate underlying reasons as to why a warning should have been given and his linkage of this state of affairs to the Quadriplegic Association's breach of its duty of care.

However, on the fourth ground of objection, namely, the trial judge's finding that Ms McMurtrie's injury was directly attributable to the lack of a warning, the majority of the Court of Appeal decided that there was no connection between the back injury and the suggested warning as the damage was not inflicted by Mr R.J., but by Ms McMurtrie's sudden movement in response to misreading his actions. Even if a duty of care could be shown to exist, failure to warn of a possible assault was not causal of the injury, given that it was not directly assault-related. Justice Buss also found the trial judge to have erred with respect to the matter of causation. He believed that a warning would not have

changed Ms McMurtrie's actions with respect to Mr R. J., as to turn him necessitated her bending. Any relevant warning given would have had to focus on the foreseeable risk of assault whereas the injury was not caused in this manner. Consideration of Ms Wynne's evidence didn't make a difference to the final decision.

Therefore, the appeal was allowed and the earlier judgment set aside.

This case may be viewed at: www.austlii.edu.au/au/cases/wa/WASCA/2009/173.html

2.5.3 ROOTY HILL RSL CLUB LTD V KARIMI [2009] NSWCA 2 (30 JANUARY 2009) FILE NUMBERS: 40623/07; 40626/07

As a result of being assaulted at approximately 11.30p.m. on Saturday, 19 April 2003, by a drunken Michael Smith in the car park of the Rooty Hill RSL Club (the Club), Tarique Karimi, a member of the Club, sustained serious injuries. After the assault, he was comatose for two months, being left with significant brain damage and no recollection of the night's events. This assault was related to an earlier incident in the Club that evening at about 11.10p.m., where, with no provocation on his part, Tarique Karimi, was set upon by the same intoxicated attacker. Security guards employed by the Allied Security Group (Allied) dealt with the previous attack by evicting both men, regardless of fault, in line with the Club's policy. Despite staggered departures, Michael Smith duped Allied by returning to one of the Club's car parks to further assault Tarique Karimi after Mr Smith's car had been observed leaving the other one.

In the New South Wales Supreme Court, a case in negligence was made out against both the Club and Allied, and a case of trespass to the person was made out against Michael Smith. The Club and Allied were considered negligent for not implementing measures to ensure the troublemakers had actually left the premises. Further, the Club was held to be negligent for failing to oversee Allied's strategies for handling such a situation. Not providing Tarique Karimi with an escort or alerting him to the danger of walking unaccompanied to his vehicle was regarded as negligent on Allied's part.

Both the Club and Allied disputed the findings in the Court of Appeal. They argued that their duty of care primarily involved goings-on in the clubhouse and did not include liability for the assault in the car park. If, in the alternative, it did, they had fulfilled their obligations and their behaviour was not causative of Mr Karimi's injuries. There was no actual or constructive knowledge of Mr Smith's later actions. Further, the Club maintained that sole responsibility for patron security had been delegated to Allied, a stance the court of Appeal rejected.

Nevertheless, Justice Bell in a judgment supported by her colleagues, upheld the Club's and Allied's grounds of appeal. She determined that the original judgment was arrived at by a reconstruction of events only possible in hindsight. At the time he was asked to leave, Mr Smith seemed calm. The original incident itself did not require back up security assistance. Mr Karimi was only permitted to walk to his vehicle after Mr Smith had driven off. Also, Justice Bell doubted whether the trial judge's suggested measure of a security guard's accompanying Mr Karimi would have warded off the mindless, pre-meditated attack. Therefore, she declined to find failure to employ such a procedure as being causal of Mr Karimi's injuries.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NSWCA/2009/2.html

2.6 NONPROFIT STRUCTURE AND GOVERNANCE

2.6.1 GOULD V MOSMAN RETURNED SERVICEMEN'S CLUB LTD [2009] FCA 1592 (FEDERAL COURT OF AUSTRALIA, LINDGREN J, 15 DECEMBER 2009)

This litigation began on 3 June 2009, and encompassed several hearings. Gould sought relief against the defendant, Mossman Returned Servicemen's Club Limited (the club) for numerous failures by the existing board of the club. Both Gould and the club were unrepresented. The club had originally been represented by a firm of solicitors, but had let this representation lapse because of legal costs. The club stated that it would submit to any order of the court, except as to costs.

Gould alleged that the board had engaged in various forms of improper conduct including:

- intimidation of club members who agreed with Gould;
- entrenching themselves as board members through an altered constitution;
- the deliberate running down of the business of the club so that the land could be developed as shops;
- a conflict of interest attached to this plan by one board member who is also a local councillor;
- failure to allow members to vote on resolutions proposed by members, and
- also made allegations about financial irregularities.

Gould originally sought an order to overturn his suspension as a member of the club, and in the course of the proceedings the club agreed to reinstate him to membership. This allowed Gould to attend the club's annual general meeting on 31 May 2009. Gould then amended his originating process to question the validity of the Annual General Meeting. At this meeting, there had been an attempt to remove the directors, which failed because of a procedural shortfall in the days necessary for such a motion to be presented. Gould then attacked the validity of the constitution which provided for the procedure which had caused the motion to fail. He alleged that the constitution had been adopted by the board to serve its own purposes.

Although the club is a company limited by guarantee, Justice Lindgren pointed out that these were internal matters for resolution by the club, rather than matters for the court or for resolution by reference to the *Corporations Act 2001* (Cth). The latter reference was to Gould's attempt to gather 100 signatures under section 249D of the *Corporations Act*, which allows for a requisition of a general meeting upon presentation to the board of the signatures of 100 members who are entitled to vote at a general meeting. Gould did obtain more than 100 signatures for his requisition, but again failed in having the resolutions accepted by the board for technical reasons.

Gould's final application was for an order removing certain named directors from office, and for new elections to be held. Justice Lindgren pointed out that the court does not have the general power to remove directors or to appoint directors. Gould then applied for a further adjournment until 2010 in order to investigate an alleged conflict of interest involving the board and the local Mosman Council.

Justice Lindgren pointed out that he had given several adjournments to allow Gould to consider and act upon guidance given to him by the court, but stated at the previous hearing on 13 November 2009 that the matter could not be allowed to continue indefinitely, and that this hearing on 15 December 2009 must be the conclusion of the matter. His Honour said:

‘I have no doubt that Mr Gould genuinely holds the views that the Club is mismanaged, and it may be that there is substance to his sense of grievance. It may be that, if he had been legally represented and could articulate and support his complaints in proper form, the course of events would have been different... Mr Gould has had ample opportunity, in the light of the numerous adjournments that have been granted at his request, to demonstrate a justiciable case, but, he has not done so...While I have had sympathy with Mr Gould in view of his undoubted sincerity, I will not allow the proceeding to be adjourned again in circumstances in which the past record clearly suggests that events will not improve with time.’

The proceeding was dismissed. There was no order as to costs.

The case may be found at: www.austlii.edu.au/au/cases/cth/FCA/2009/1592.html

Implications of this case

This case involved a self represented litigant who was aggrieved by the alleged actions of the board of the RSL Club but lacked sufficient understanding of the legal process to be able to articulate his case. The court had no alternative but to dismiss his proceedings. Whilst many fear seeking legal advice and engaging legal representation due to the cost, this case demonstrates that the court can only assist to a certain extent. The case also illustrates that the courts will not readily intervene in internal matters of an organisation.

2.6.2 ANDREWS V QUEENSLAND RACING LTD [2009] QSC 338 (23 OCTOBER 2009) FILE NO: 9471/09

Queensland Racing Ltd, a company limited by guarantee, oversees the thoroughbred racing industry in Queensland as directed by the *Racing Act 2002* (Qld) (the Act). Under its Constitution dating from 26 April 2006, there are two classes of members: Class A made up of racing clubs; and Class B, the Directors of the company from time to time. According to clause 15 of the Constitution, the Directors are to retire on a rotational basis. One of these, William Andrews, along with another Director, Mr Lambert, was due to step down on 17 November 2009 at the first Annual General Meeting (the AGM) after their initial three year terms conclude. However, Mr Andrews complained to the Supreme Court of Queensland of irregularities in the selection process for his and Mr Lambert’s successors and demanded compliance with the selection requirements under the Constitution.

Clause 17 of the Constitution provides a step-by-step approach to choosing Directors, culminating in their appointment, in this case taking effect at the end of the AGM in November 2009. In addition, Appendix A of the Constitution sets out five possible selection criteria for such positions, satisfaction of at least two of which is mandatory. Any prospective candidate must also comply with Section 9 of the Act which prescribes qualities for an eligible individual, including not being bankrupt or involved in racing management.

To facilitate the process, an independent recruitment specialist, Mr Mark Wilson of Northern Recruitment, was chosen by the Board on 6 March 2009. When applications for the positions closed on 29 May 2009, twenty six parties, including Mr Andrews, had registered their interest. Mr Andrews failed to make the shortlist for selection.

Mr Andrews's objections related mainly to the way Mr Wilson compiled the shortlist of only four people. When applications closed, the two ultimately successful Directors chosen from the shortlist, Mr Milner and Mr Stewart, were Chairmen of the Brisbane and Toowoomba Turf Clubs, respectively. Both subsequently resigned from their positions, the former on 17 June 2009, and the latter on 25 July 2009. Mr Andrews contended that holding these positions when applications closed for Directors' positions meant they were not eligible persons under the Act. On this point, Justice Wilson decided that, provided the resignations were effected before the day the Selection Committee convened (14 September 2009), they were eligible persons.

Upon consideration of the shortlist, Her Honour agreed with Mr Andrews that Mr Wilson had been instructed to put forward only four names rather than regarding four as the minimum number. Nevertheless, there was no evidence of his being influenced by Mr Bentley, the Chairman of Queensland Racing Ltd, in determining the final four although conversations between the two naturally canvassed the Board's requirements, such as members with financial acumen and racing expertise. Not only was his independence not in doubt, but Justice Wilson also maintained there was no evidence to support Mr Andrews's claim of partiality in Mr Wilson's behaviour. In her view, questions put to an applicant, Mr McGruther, concerning his schooling and religious persuasion did not reflect partiality in Mr Wilson's approach. Further, Her Honour found that there was nothing improper in the shortlisting of Mr Milner and Mr Stewart, as both the criteria for selection in Appendix A of the Constitution and for eligibility in section 9 of the Act had been met.

Despite these findings, she was not willing to sanction Queensland Racing Ltd's attempt to trivialize the irregularity in the selection process as a mere procedural deviation from the Constitution by making an order under section 1322(4) of the *Corporations Act 2001* (Cth). In Justice Wilson's opinion, Mr Andrews was entitled to have the Directors selected in the manner set down by the Constitution. What had occurred reflected seriously on the company's governance. Mr Andrews, as well as other potential shortlisted applicants, had suffered considerable injustice in being denied the right to have the shortlist prepared in line with clause 17 of the Constitution.

Therefore, Justice Wilson granted an injunction preventing the Chairman of Queensland Racing Ltd from declaring Mr Milner and Mr Stewart the duly elected Directors from the shortlist at the scheduled AGM on 17 November 2009. Another injunction was issued stipulating that the original twenty six applicants be reconsidered for the positions in strict compliance with the procedures outlined in clause 17 of the Constitution.

This case may be viewed at: www.austlii.edu.au/au/cases/qld/QSC/2009/338.html

Implications of this case

The case clearly illustrates that in all areas of board management attention to detail is required. In this instance the Constitution had detailed provisions in respect of the selection process and criteria for the shortlist of prospective board members which reinforced State legislative requirements but the board failed to follow the requirements of its own constitution. The board delegated the process to a private consultant without critically assessing that consultant's recommendations.

2.6.3 DYKYJ V LOGAN AND DISTRICT SERVICES CLUB INC [2009] QSC 108 (SUPREME COURT OF QUEENSLAND, DE JERSEY CJ – 11 MAY 2009)

The Logan and District Services Club is an incorporated association pursuant to the *Associations Incorporation Act 1981* (Qld). At its AGM on 5 November 2008 the Club sought to repeal and replace the existing constitution. Pursuant to clause 27 of the existing constitution a special resolution was required for the constitution to be amended. Pursuant to section 3(4) of the *Associations Incorporation Act* a special resolution must be passed by a three-quarters majority.

The applicant, Mr Dykyj, opposed the move to repeal and replace the existing constitution. He gathered 56 proxies from members, which he intended to exercise by voting against the motion. Prior to the AGM, the 56 members who were seeking a proxy vote collected their proxy forms in person from the Club. Mr Dykyj was given the duly completed proxies by those members and sought to lodge them. They were rejected by an employee of the Club on the basis that they would only be valid if lodged personally by the member seeking to allocate a proxy vote.

The motion to repeal and replace the constitution was passed 123 to 32. Had Mr Dykyj been able to exercise the 56 proxy votes the motion would have been defeated as there would not have been a three-quarters majority.

There were two issues placed before the court, firstly the validity of the rejection of the proxy votes and secondly the sufficiency of the notice of the meeting.

Proxy votes

In respect of the validity of the proxy votes the Chief Justice considered the terms of clause 25.2 of the constitution existing prior to the AGM which provided:

‘A proxy will be valid if:

- (a) The Member completes and lodges the proxy in the form approved by the Board with the Secretary not later than 24 hours before the time for the holding of the general meeting...’.

His Honour determined that a member’s right to cast a vote by proxy is established at the time of the issue of the proxy form to the member in person and it would seem unreasonable to then require the member to visit the club again in person to lodge the form. His Honour held

‘...in the absence of an express requirement for lodgement by the member in person the possibility of lodgement by an agent has not been excluded.’

Further clause 25.3 of the constitution provided ‘any issue of validity of a proxy will be determined by the Chairperson of the meeting acting on the advice of the Returning Officer’. There was no ruling by the Chairperson on the validity of the proxies and there was no evidence that the staff member who rejected the proxies was acting with the authority of the board or that the board made any ruling as to the validity of the proxies having been delivered by the members through their agent. His Honour concluded that the proxies were wrongly rejected.

Notice of the meeting

With respect to the question of the sufficiency of notice of the meeting His Honour considered section 3(2) of the *Associations Incorporation Act* and examined the notice requirements for a special resolution: that is, the need to give prior written notice of the date, time and place of the general meeting at which the special resolution is to be proposed, together with the terms of the proposed special resolution, to each member of the association. The notice given in this case stated that the existing constitution was to be replaced in the terms proposed, without giving any detail of the terms proposed.

Therefore His Honour determined that the notice did not comply with the Act.

The respondent Club then asked for a remedial order under section 133(3) of the Act on the basis *inter alia* of there being no evidence of any detriment or injustice having occurred to any member through the adoption of the new constitution.

His Honour disagreed with this assertion and found that there was a 'substantial injustice' suffered by those denied their vote by the rejection of the proxies and those denied adequate information about the proposal because of the uninformative notice of the meeting. Accordingly the provisions of section 133 of the Act could not remedy the invalid actions. It was held that the special resolution was invalid. Costs were ordered against the Club.

This case may be viewed at: www.sclqld.org.au/qjudgment/2009/QSC/108

Implications of this case

Sections 71 to 73 of the *Associations Incorporations Act 1981* (Qld) provide for the intervention of the Supreme Court. The general policy of the law is not to interfere in the internal decisions of an incorporated association. However, section 133 of the Act gives the court remedial power if it is satisfied no substantial injustice has or may be caused by the court validating the actions of the association or a member of the association. This case shows that the court is prepared to interfere in internal decisions in circumstances where members are denied the right to vote and the right to know what they are voting on.

2.6.4 ISLAMIC COUNCIL OF SOUTH AUSTRALIA INC & ORS V AUSTRALIAN FEDERATION OF ISLAMIC COUNCILS INC [2009] NSWSC 211 (SUPREME COURT OF NEW SOUTH WALES, 16 FEBRUARY 2009)

The plaintiffs in this case are Islamic councils in the states of South Australia (ICSA), Queensland (ICQ) and New South Wales (MCNSW). The defendant, The Australian Federation of Islamic Councils Inc (AFIC) is an umbrella body of Islamic associations in Australia, constituted as a federation of nine Islamic societies. AFIC operates a number of Islamic educational institutions and has assets of \$25 million.

The dispute in this case centred on the status of the ICQ and MCNSW, and their ability to participate in the affairs of AFIC. AFIC contended that the ICQ had been suspended from membership of AFIC, and there had been previous proceedings between AFIC and MCNSW as to its membership of AFIC, which was in effect suspended. In addition, AFIC had refused to call a Federal Council Meeting following requests from the plaintiffs and others to do so, so that the membership issues could be resolved.

AFIC's affairs are governed by three bodies:

- the Federal Congress which is comprised of members of the Executive Committee and two delegates from each state council. The powers of the Congress include to 'adjudicate in all matters of controversy' between the Federal Council, the Executive Committee and state councils;
- the Federal Council which comprises four members of the Executive Committee and the President or Chairman of each state council. The powers of the Council include 'to determine the time, place and agenda of the meetings of the Federal Congress' and to act for the Congress between its meetings;
- the Executive Committee which is responsible for the day to day running of AFIC and is subject to the 'control and scrutiny of both the Federal Congress and Federal Council'.

The convening of meetings of the Federal Council is governed by clauses 40 to 42 of its constitution. In particular, these clauses state that:

- 41. Subject to this Constitution, a Council meeting shall be called by the Secretary of the Federation as directed by the Federal Executive Committee or upon written requests from four (4) or more State Councils.
- 42. Notice of Federal Council together with its Agenda shall be given by the Secretary of the Federation to the members of the Council at least (4) weeks prior to the date of such meeting.

Requests for a meeting were received from six state councils (Western Australia, MCNSW, Victoria, ICSA, the Northern Territory, and ICQ) between 3 November 2008 and 18 December 2008. However, no meeting was convened and no reason was given for refusal.

The issues before the court were:

- Whether upon the proper construction of the constitution and in the events which had happened, there had been validly written requests from four or more State Councils for the calling of a meeting of the Federal Council. This, in turn, involved a number of subsidiary issues relating to the alleged requests made by some of the State Councils;
- If so, whether AFIC's failure to convene such a meeting was justiciable; and
- If so, whether relief should nonetheless be declined as a matter of discretion.

The requests for a meeting from South Australia and the Northern Territory were uncontroversial. The other requests were in dispute. Justice Brereton considered that the request from NSW was valid, despite there being some dispute as to the standing of the MCNSW to make such a request because of existing membership issues. All these requests were by letter.

The request from Victoria was in an email. Was this a written request within clause 41 of the constitution? Brereton J found that it was:

'The purpose of requiring that notices and the like be in writing is usually at least twofold. One is to ensure that there is a formal act, so that doubt does not attend the intent of the party giving the notice. A second is often to avoid later disputation by ensuring that there is a permanent record of the notice. That said, the concept of 'writing' is concerned with the form in which words are used, and not the surface on which they are written. The fundamental distinction is between

the written word and the spoken word. While 'writing' often contemplates writing on paper, it is nonetheless writing and not speech, if written in invisible ink. It is nonetheless writing, if written in the sky by an aircraft engaging in skywriting. To my mind, it is nonetheless writing, if it appears on a computer screen, as a result of the entry of data into a computer.'

Therefore, the Victorian request was in writing. The next issue was as to whether this request was 'signed'. Clause 41 did not explicitly require a signature, though other clauses in the constitution did. His Honour said that 'in any event, a typed name (as distinct from a holograph) can be a signature, and has been held to be so in many cases relating to the Statute of Frauds'.

The final issue relating to the Victorian email was whether in fact it was a 'request' for a meeting. His Honour held that it was not, but rather, by its wording, an expression of a wish or hope for such a meeting. Therefore, the Victorian email was not a valid request for a meeting under clause 41.

The request from Western Australia had purportedly been withdrawn on 15 December 2008. Was this a valid request? His Honour found that it was, and this meant that as at 25 November 2008, AFIC was in receipt of four valid requests for a meeting from Western Australia, South Australia, New South Wales and the Northern Territory. The purported withdrawal on 15 December did not affect the binding obligation of AFIC to hold the meeting that crystallised on 25 November 2008.

As to the request from ICQ, Justice Brereton held that it was also valid, so that even if one of the other requests was not valid, there were still four requests in operation. This was despite the purported suspension of the Queensland council from membership of AFIC. His Honour found that there was no power to suspend membership in this way. Therefore, there were at least four valid requests for a meeting within the constitution.

Was the failure to convene the meeting justiciable?

Courts do not generally intervene in the internal affairs of voluntary associations, whether unincorporated or incorporated (see *Cameron v Hogan* [1934] HCA 24). For a court to intervene there must be some interference with property rights or interests, some breach of contract, or some threat to livelihood or reputation involved. This case was not one of interference with members' property rights or interests, nor was it one of threat to livelihood or reputation. The question was whether there was any right in contract.

AFIC is incorporated as an association in Tasmania. In that state, the *Associations Incorporation Act 1964* does not import contractual relations into the relationship between members and an association, as happens in most other states. The question then becomes one of construction of the constitution. Was it intended to create contractual relations between members and the association? In *Cameron v Hogan*, the High Court did not find any such contract, but allowed that there could be enforceable legal relations created in an association's constitution if there was a clear enough intent. The case law since *Cameron v Hogan* has been more inclined to find evidence of contractual intent in association constitutions, but this is by no means a certainty (see *Plenty v Seventh Day Adventist Church of Port Pirie* [2009] SASC 10).

His Honour could not find any real contractual intent in the constitution of AFIC, particularly because of its mainly religious character and the provision of internal dispute resolution mechanisms. However, AFIC had previously been involved in an amount of litigation in which it had never claimed to be immune from the courts' rulings. Brereton J held that

it was 'just too late for it to do so now'. Therefore, by conduct, there was an intent that the Constitution created a legally binding and enforceable contract between AFIC and its member institutions. That being so, the matter before the court was justiciable.

Was relief available to the plaintiffs?

This was a matter of discretion for the court. AFIC argued that there should be no relief because of the internal nature of the dispute. His Honour was unpersuaded and relief was not to be declined on discretionary grounds. Therefore, the court ordered that the Federal Council should convene a meeting by 17 February 2009.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NSWSC/2009/211.html

2.6.5 LAI V TIAO (NO 2) [2009] WASC 22 (12 FEBRUARY 2009) FILE NO: CIV 1442 OF 2005

This case involves a dispute concerning mainly Taiwanese migrants who initially worshipped at a temple at the home of Ho Ming Wang, a reputed master of I-Kuan Tao. A recent religious development, I-Kuan Tao draws on Confucianism, Taoism and Chinese Buddhism.

Increasing interest in the religion necessitated a larger temple and amenities and the provision of these was one of the reasons why six of the original group established the Australian Chinese Confucius-Mencius Tao Centre Incorporated (the Association) on 22 December 1992, to raise funds. After incorporation, these six assumed a managerial role, in effect, forming a board of directors. Master Wang became the chairman, whilst Sheng Chin Lai (Lai) took on the vice-chairman's position. As a third signatory was required to operate the Centre's accounts, Cheng Chih Tiao (Tiao) was chosen for this purpose. Tiao subsequently acted as the Association's representative for both temple construction contracts which he signed under seal in 1995. After the temple was completed in March 1996, Master Wang virtually resided there until he died in December 2001.

Discord later developed between Lai and Tiao, particularly with respect to who were the actual members of the Association. There was also dissension about whether Mr Conal O'Toole, the Association's solicitor, had been validly appointed and whether Tiao had authority to enter into a contract with Level Holdings on 11 May 2004, for the subdivision and sale of land held by the Association at 42 Warton Road, Canning Vale, in Western Australia. Unlike the previous construction contracts, no Association seal was in evidence and the address given was Tiao's private one. Under the contract, the designated land was to be subdivided into ten lots by Level Holdings who would retain five as payment for the subdivision. The remainder were the Association's to be sold as necessary to fund its activities because of the dire state of the Association's finances. No resolution to this effect was ever placed before the Association's members although two of the original six, Song Tyan Kuo and Hui Ping Wang, allegedly authorised Tiao to act for the Association in this matter at a board meeting.

As Lai and the remaining member of the original six, Yung Sen Chou, were unaware of the Association's need for funds and the proposed land sale, Lai lodged a caveat over the Association's land on 6 January 2005. In addition, he sought details of the contract and the relevant Association minutes. By way of response, on 26 February 2005, Tiao and Hui Ping Wang held a meeting of the Association's members who retrospectively gave a blanket ratification to myriad dealings carried out by anyone acting or purporting to be acting on behalf of the Association since its inception in 1992. Lai, on 13 April 2005, requested that Tiao call another meeting of Association members. Upon his refusal, Lai gave notice of a members' meeting on 25 May 2005. However, an injunction to preserve

the *status quo* was subsequently granted. On 19 April 2005, Lai sought and finally obtained an injunction to prevent the sale and further subdivision of the land under the contract until 5p.m. on 13 June 2005. By then, the subdivision was 90% completed. An extension of the injunction was granted in June.

The task of unravelling the truth came before Justice Johnson of the Western Australian Supreme Court. First, Her Honour determined that the actual foundation members of the Association were the six original members who were involved in its incorporation. She agreed with Lai that the Association's ordinary members were those whose names appeared on the List of Contributors taken from the marble plaque commemorating the building of the temple.

Her focus shifted next to whether Tiao's entry into the contract with Level Holdings was authorised at the outset at board level or ratified retrospectively by the Association's members. She commented that the Association was managed in an *ad hoc* fashion. There were no meetings of any kind held between 1992 and 2005 and no register of members existed during that period. The Association blamed its lack of compliance with its statutory obligations on the fact that its members were unable to comprehend the incorporation documentation which was in English. As Her Honour pointed out, a Chinese translation of the relevant material would have solved the problem.

On the evidence, it seemed apparent that Lai had contributed the money to purchase the land in question. Although he had taken little active part in the management of the Association since a disagreement relating to finances on 8 April 1996, Justice Johnson stated that common courtesy required that Lai be informed about the subdivision. Lai's concern about the Association's financial mismanagement was shared by the Department of Consumer and Employment Protection which stressed the need for the clear delineation of Tiao's and the Association's funds as well as the necessity for an audit of its finances. Tiao's failure to affix the Association seal, the irregular use of his private address and the autocratic, haphazard way in which the Association's affairs were generally conducted, convinced Justice Johnson that no member of the board had authorised the signing of the Level Holdings contract. She would not give credence to Tiao's belief that the agreement of a majority of the board constituted valid authorization. Similarly, Her Honour failed to find any suggestion of consultation with the Association's members.

Concerning the members' meeting on 26 February 2005, it was found to be invalidly convened as there had been no prior board decision nor a request from twenty members, the requirements laid down under clause 11.2.1 of the Association's Constitution. According to clause 11.2.3 of this Constitution, notice of a general meeting must be provided to ordinary members at least fourteen days before it occurs, an impossible task in the absence of any records of membership, exacerbated by what Justice Johnson found was a broader membership than that recognised by Tiao. As well, insufficient information was presented about the Level Holdings contract for members to make an informed decision. Therefore, retrospective ratification of Tiao's actions was not possible. Because of the irregularities in the Association's operation, Her Honour also found that its solicitor, Conal O'Toole, was not validly appointed. With respect to the meeting called by Lai on 25 May 2005, Her Honour decided that, as long as the twenty four signatories to the draft notice of meeting were either foundation or original members, it was a valid request with which Tiao had failed to comply.

The way forward from the judge's perspective was to hold such a general meeting at which a new board of directors could be appointed. Technically, this should have happened at the first annual general meeting, had one ever been convened. Once

the board of directors was in place, members who satisfied the criteria laid down in clause 6.2 of the Constitution should be admitted. After any appropriate changes had been made to the Constitution, the board should thoroughly examine the Association's financial affairs before the issue of the Association's solvency was raised for discussion with the members.

This case may be viewed at: www.austlii.edu.au/au/cases/wa/WASC/2009/22.html

Implications of this case

This case is important not only as an object lesson in what can happen when boards don't inform themselves about their obligations and abide by them. The judge found that, from the outset, the chairman of the board had a dominant role, notwithstanding that a board is supposed to manage by consensus or by majority decision – and all board members are responsible for decisions. Board members have statutory obligations as well as obligations under their organisation's rules to hold meetings, keep records and make documents available. In addition, the relevant Act in this case makes it an offence for board members not to ensure the association complies with its statutory obligations.

No doubt the lack of proper meetings, lack of administrative and financial records, dominating role of the chair, and the other members' ignorance of their obligations contributed to the internal disputes and the possible collapse of the organisation.

2.6.6 SZENCORP PTY LTD V CLEAN ENERGY COUNCIL LIMITED [2009] FCA 40 (2 FEBRUARY 2009) VID 534 OF 2008

The Clean Energy Council Limited (the Council) is a nonprofit, public company limited by guarantee. Formed in August 2007, by the merger of two key sustainable energy organisations, the Australian Wind Energy Association (AusWind) and the Australian Business Council for Sustainable Energy Inc (BCSE), the Council is designed to be a unified peak body for the sustainable energy industry. Membership reflects both supply and demand energy technologies. Whilst the former focuses on the production of sustainable energy, the latter concentrates on ecologically sound energy reduction for commercial and domestic purposes. A Memorandum of Understanding outlined the responsibilities of the newly established company whilst its Constitution addressed matters such as membership criteria.

Szencorp Pty Ltd is a member of the Council. From his standpoint as Deputy Chair of the Council, Mr Peter Szental, a director of Szencorp Pty Ltd, approached the Federal Court for assistance with respect to a number of perceived grievances involving the Council's implementation of the Memorandum of Understanding. He argued that the conduct of the Council's affairs contravened section 232 of the *Corporations Act 2001* (Cth) (the Act) since it was, 'Contrary to the interests of the members as a whole or oppressive to, unfairly prejudicial to, or unfairly discriminatory against members of the Council.' In particular, he contended that the supply members of the industry had been advantaged at the expense of those involved in the demand side. A remedy from the orders available under section 233 of the Act was sought.

Although Justice Goldberg did not directly address all the complaints raised by Mr Szental, he thoroughly investigated the allegations surrounding the financial management of the Council in the period following the merger. It emerged that Mr Richard McIndoe, the Council's Chair, had requested an independent accounting report by Stones Management Services into the Council's financial affairs in January 2008.

However, no information was released to any board member other than the Chairman of the Finance and Compliance sub-committee until a supplementary report was produced in May 2008. Concerned about the Council's solvency and the apparent lack of transparency in its dealings, Mr Szentel wrote to his fellow directors on 17 June requesting discussion of these matters at the June 2008, meeting as well as the appointment of an insolvency expert to investigate the Council's true financial position.

When the Council's Board of Directors' meeting took place on 20 June 2008, not only were the issues not discussed, but 10 of the 13 directors demanded Mr Szentel's resignation as they no longer had faith in his judgment. Mr Szentel penned another letter seeking a special meeting of the Board to consider his concerns. The directors of the Council duly met on 27 June but Mr Szentel was excluded from the meeting. As a result, the matter was filed in the Federal Court on 11 July 2008. An audit of the Council by Ernst & Young was commissioned the same day. Later in July Mr Szentel was supplied with the requested financial details.

The Council maintained that Szencorp Pty Ltd's Federal Court action was an abuse of process, an opinion not shared by Justice Goldberg, who viewed it as an attempt to ensure good governance. However, he found no evidence that the supply members of the Council were given preferential treatment over their demand colleagues to the detriment of the interests of the members as a whole. With respect to the claim of oppression, His Honour stated that an essential element to be proven was that of commercial unfairness. He accepted there was substance to Mr Szentel's claims, but, by the time these came before the Court, many of the matters complained of had been addressed. Of itself, the absence at trial of demonstrable commercial unfairness didn't automatically mean that relief under section 233 could not be granted, provided such commercial unfairness existed at the time the original legal action was taken. However, in this case, Justice Goldberg suggested that, not only was Mr Szentel's demand for an independent accounting assessment impracticable, but also that such a request did not fit within the meaning of the section relied on. Section 233(j) stated that the Court can make an order, 'Requiring a person to do a specified act.' For these reasons, Szencorp Pty Ltd failed in its litigation.

This case may be viewed at: www.austlii.edu.au/au/cases/cth/FCA/2009/40.html

2.7 TAXATION

2.7.1 COMMISSIONER OF TAXATION V AID/WATCH INCORPORATED [2009] FCAFC 128 (FEDERAL COURT OF AUSTRALIA, FULL COURT, KENNY, STONE AND PERRAM JJ, 23 SEPTEMBER 2009)

AID/WATCH is an incorporated association which researches, monitors and campaigns about the delivery of overseas aid. It is an organisation concerned with promoting the effectiveness of Australian and multinational aid including investment programs, projects and policies. It does not deliver any aid directly to any person, but produces research reports about Australian aid effectiveness as well as other performing publicity events (such as sending derisory 60 birthday gifts to the World Bank suggesting it was time for the bank to retire). The court found some of its activities, for example, calls to action, somewhat aggressive.

AID/WATCH 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 organisation sought review of the Commissioner’s decision in the Administrative Appeals Tribunal (AAT) in the first instance. This case is an appeal from the AAT’s decision.

The AAT decision

The AAT reviewed the Commissioner’s decision⁴ and found that the organisation was entitled to status as a charitable institution. It decided that the major objective of AID/WATCH was the relief of poverty, even though these words were not mentioned specifically in the constitutional documents, as aid was clearly for the relief of poverty and the organisation’s purpose was centrally concerned with aid. The AAT also considered that there was an element of the advancement of education in the organisation’s activity which was also charitable. The final part of the AAT decision was to consider whether the activities were political and thus unable to be charitable. As AID/WATCH did not have changes to the law as a main object, the AAT determined that it was not disqualified from charitable status. The AAT also remarked (para 49) that:

‘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.’

The Commissioner appealed to the Federal Court

The Federal Court decision

On appeal, the Federal Court found that AID/WATCH’s purposes were not charitable as relief of poverty and education were not its primary purpose. However, the Court did not accept the Commissioner’s view that education involved ‘training or teaching through a system or syllabus in a structured manner, rather than simply a process of informing the public’. It did find that research and publications produced by AID/WATCH did have the necessary educational element and set it apart from those such as journalists who merely disseminated general information. In addition the Court found that AID/WATCH’s activities were directed towards purposes which would fall within relief from poverty, so that the purposes should be characterised as charitable in the legal sense unless disqualified because of their political nature.

Where the Appeal Court disagreed with the AAT was in respect of whether political purposes disqualified AID/WATCH from being a charity. It agreed between the Commissioner and AID/WATCH that AID/WATCH was not engaged in ‘lobbying’ or attempts to influence the government directly, but rather was ‘campaign focused’. However, the Court of Appeal stated (para 37) that:

4 See case note at <https://wiki.qut.edu.au/display/CPNS/AID-WATCH+Incorporated+v+Commissioner+of+Taxation>

'Aid/Watch's attempt to persuade the government (however indirectly) to its point of view necessarily involves criticism of, and an attempt to bring about change in, government activity and, in some cases, government policy. There can be little doubt that this is political activity and that behind this activity is a political purpose. Moreover the activity is Aid/Watch's main activity and the political purpose is its main purpose. Recognising Aid/Watch's ultimate concern to relieve poverty does diminish its political purpose.'

Therefore political purposes were its main purpose, rather than ancillary to a charitable purpose which would not have affected its status in the ordinary course.

The argument that AID/WATCH's objectives were not contrary to government policy but 'to influence government policy as to the nature and extent and means of delivery of overseas aid'(para 39) were not accepted. This was because 'the 'natural and probable consequence' of Aid/Watch's activities is an effect on public opinion and then on government opinion.' (para 47) It was thus considered political.

The Appeal Court also addressed another reference by the AAT to some of AID/WATCH's activities being thought to be at the edges of appropriate conduct, but not 'so extreme that it loses its charitable quality'. The Appeal Court thought the Tribunal had been unclear as to its meaning but stated: 'If it was merely intended to suggest that Aid/Watch might jeopardise its charitable status if it operated outside its stated objects, the comment is unobjectionable. Short of that, we do not accept that the charitable status of an institution can depend on the manner in which it implements its charitable purpose' (para 40).

The Court of Appeal unanimously found that AID/WATCH was not entitled to exemption from income tax as a charitable institution pursuant to s 50-5 Income Tax Assessment Act 1997.

This case may be viewed at www.austlii.edu.au/au/cases/cth/FCAFC/2009/128.html

Implications of this case

This is an important case which is currently being appealed to the High Court. So the current report should be used with caution. The boundaries of where advocacy and political activity are to be drawn have been a field of dispute between the ATO and parts of the sector for some time. The ATO has attempted to make its position clear in a series of examples given on its web site pages Charities – political, lobbying and advocacy activities available at www.ato.gov.au/nonprofit/content.asp?doc=/content/62779.htm. Most charities who investigate the issue are surprised at what activities are allowed provided that it does not become their 'main' purpose.

2.7.2 COMMISSIONER OF TAXATION V BARGWANNA AND BARGWANNA AS TRUSTEES OF THE KALOS METRON CHARITABLE TRUST [2009] FCA 620 (FEDERAL COURT OF AUSTRALIA, EDMONDS J, 12 JUNE 2009)

This was an appeal from a decision of the Administrative Appeals Tribunal (AAT), which had set aside the Commissioner's decision to refuse income tax exemption for Mr and Mrs Bargwanna as trustees for the Kalos Metron Charitable Trust (the trust fund).

The Commissioner's argument on appeal was that the AAT had erred in concluding that the trust fund was applied for the purposes for which it was established as required under section 50-60 of the *Income Tax Assessment Act 1997* (Cth) (ITAA), which states that 'A fund ... is not exempt from income tax unless the fund is applied for the purposes

for which it was established ...'. A main issue of the grounds of appeal was the test to be applied in determining whether the primary facts satisfied the requirement that the fund 'is applied' for the purposes for which it was established.

The main facts relating to the appeal centred around:

- money from the trust fund being placed in the Bargwannas' personal offset account, which reduced their interest on their home mortgage but paid no interest to the fund;
- some of the fund being held in the accountant's, Mr Craik's, trust account (he was also Mrs Bargwanna's father): interest on that trust account was retained by Mr Craik; and fund money appeared to have been used to offset debits in his other clients' trust accounts;
- an unsecured loan being made from the trust fund to a private company (the loan was stated to be at 7% interest but none was ever paid and the loan was not re-paid).

The Commissioner submitted that the AAT erred in law in finding that these were not applications of the trust fund otherwise than for a purpose for which it was established; it should have found that because of these uses of the fund the Bargwannas failed to satisfy the requirements of section 50–60.

The Commissioner also submitted that the AAT erred in law when it concluded that applying the trust fund 'substantially in accordance with its constituent terms' satisfied the requirements of section 50–60.

The Court considered the terms of section 50–60 to determine how it should be interpreted and whether these applications of the trust fund complied. The Court said that where legislation confers an exemption upon a body or fund if it meets certain requirements, it does not promote Parliament's purpose to construe the provision in a manner favourable to the body or fund referred to. '[T]he privileged status of exemption from income tax on the income of a fund which aspires to that status demands strict adherence to the requirements that must be met before that status is conferred' (para 28). The Court considered that the terms of section 50–60 were clear – i.e. it refers to funds established for certain purposes, 'and the legislation requires not merely that they be established at the outset for these purposes, but also that their assets be applied for those purposes from time to time thereafter' (para 29). Moreover, the section requires that the fund be applied for those purposes, not that it be substantially, or principally, applied for the purposes. 'If the legislature had intended that substantially applied ... was sufficient, it would have been easy enough to say so.' (The Court compared it to section 50–50(a) which referred to objectives being pursued 'principally in Australia'.) (para 30)

The Court concluded that the applications of the trust fund were intentional, were sometimes for significant portions of the fund, and brought significant benefits to persons who were not objects (beneficiaries) for which the trust fund was established. The Court found that the AAT had erred in the test it used to determine whether the trust fund was applied in accordance with section 50–60 and therefore allowed the Commissioner's appeal and set aside the AAT's decision.

This case may be found at www.austlii.edu.au/au/cases/cth/FCA/2009/620.html

Implications of this case

In order to claim income tax exemption for a charitable trust, the charitable purposes must comply with the Act at the outset. In addition, the trustees must be careful to comply with the Act in the way the fund is applied (as well as administering the fund in ways that adhere to the trust instrument). The Court in this case indicated that it will read provisions of legislation strictly where they confer privileged status on certain bodies in return for adherence to certain requirements.

The actions of the trustees in this case may have been in breach of trust as well as breaching the requirements of section 50–60. Trustees have an obligation to apply trust moneys for the purposes of the trust, and must not confuse their own purposes with trust purposes, or use trust funds for non-trust purposes.

2.7.3 HEIN PERSCHE V FINANZAMT LUDENSCHIED [2009] EUECJ C-318/07 (COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, GRAND CHAMBER, 27 JANUARY 2009)⁵

Basically, the case revolved around a dispute between Mr Persche and the Finanzamt Ludenscheid, the District Tax Office in Ludenscheid, Germany. In his 2003 tax return, Mr Persche claimed as an income tax deduction approximately \$34,285.00, for the value of bed linen and bath towels plus some ambulatory assistance devices he had given to the Centro Popular de Lagoa, a Portuguese nursing home. Some toys for a children's home, incorporated later, were included as well. The Centre's receipt of the items was acknowledged in the tax return. Also attached to the return was a declaration from the director of the local social security office in Faro, Portugal, dated 21 March 2001, asserting that the organisation in question was tax-exempt under Portuguese law because its aims were charitable.

The deduction was disallowed by the Ludenscheid District Tax Office both initially and when Mr Persche lodged an objection. His attempt to appeal to the District Tax Court in Munster also proved unsuccessful. Undeterred, he took his case to the Bundesfinanzhof (the Federal Finance Court) in Munich which upheld the District Tax Office's decision since the gift involved a recipient with no presence in Germany and a donation certificate regarded as unacceptable. Other concerns, however, saw the matter referred to the Grand Chamber of the European Court of Justice.

In particular, the Federal Finance Court sought advice on whether donations of consumer goods, such as those in question, by a donor to a recipient in another Member State where the goods are legally considered as charitable, are caught by Article 56 of the European Convention (EC) dealing with the free movement of capital. If so, does this necessitate that Member States be treated equally and that a tax benefit does not require a charitable recipient to be situated in the donor's Member State, in this instance, Germany. Finally, should equal treatment be required, where does the burden of proving the underlying facts rest. Does Directive 77/799 insist on the taxation authorities in the affected Member States liaising with each other to corroborate the information or is it procedurally acceptable for the taxpayer concerned to be responsible for substantiating claims involving another Member State?

5 On 14 October 2008, Mr Advocate General Mengozzi delivered his opinion on this novel matter (see *Hein Persche v Finanzamt Ludenscheid* [2008] ECJ C-318/07 <https://wiki.qut.edu.au/display/CPNS/Hein+Persche+v+Finanzamt+Ludenscheid>). As that was a non-binding, advisory assessment, the definitive version was not delivered by the European Court of Justice until 27 January 2009.

Does Article 56 EC apply?

Under Article 56(1) EC, restrictions on the movement of capital among member States are strictly prohibited. No precise definition of what constitutes 'movement of capital' is provided. There was dissension among the Member States as to what was covered by the expression, with Germany, Spain, France and Ireland insisting that investment or financial assignment was essential, a view shared by the German Tax Office. Greece maintained that transfers of ordinary consumer goods not linked to payment fell within the ambit of free movement of goods, rather than capital, an argument the Court rejected in the light of the relevant legislation. The Commission of the European Communities and the European Free Trade Association Surveillance Authority argued that Articles 56 EC – 58 EC did encompass gifts in kind to charitable bodies outside the taxpayer's Member State.

To resolve the issue, recourse was had to other European Union law. Heading XI in Annex 1 to Directive 88/361 deals with how inheritances and legacies should be taxed under the free movement of capital. No distinction is drawn between financial transactions and those in kind. Therefore, the Court determined that monetary gifts, as well as gifts in kind like Mr Persche's to organisations regarded as charities in other Member States, were movements of capital regulated by Article 56 EC.

Is equal treatment necessary?

Next, the Court had to decide whether limiting tax deductibility for donations to charitable organisations situated only in the donor's Member State was a violation of Article 56 EC. Not only the German Tax Office, but also the German Government along with the Governments of France, Spain, the United Kingdom and Ireland argued that unequal treatment was necessary for efficient fiscal monitoring. They also pointed out that what is perceived as charitable may vary among the various Member States. The Court was singularly unimpressed with the fiscal argument on the grounds that complaints about donations to other Member States making inroads into a particular Member State's level of public revenue and its resultant capacity to budget were not the responsibility of the Court.

Whilst the Court recognised that what constituted charitable status varied amongst the member States, where it could be demonstrated that the legislative requirements in one Member State were reflected in those of another Member State, Article 56 EC prohibited any taxation benefit being applied solely to a locally situated organisation. Mr Persche's Portuguese in-kind donation was clearly eligible for consideration as a tax deduction.

Where does the burden of proof lie?

Verifying the deductibility of a donation such as Mr Persche's was viewed potentially as a joint undertaking. At the simplest level, it was obviously possible for the donor to request a receipt from the charitable recipient in another Member State as well as information about its charitable activities and status. Although not normally cognisant of the fit between this Member State's legislative requirements with respect to charities and those of the donor's Member State, Directive 77/799 allows the appropriate taxation officials from the donor's Member State to elicit the data essential to assess the extent of the tax benefit or otherwise from another Member State. Once it is proven that the elements for tax deductibility in one Member State mirror the criteria set down in the legislation of another Member State, the donor's taxation position should be similar.

This case may be viewed at: www.bailii.org/eu/cases/EUECJ/2009/C31807.html

2.8 TRUSTS

2.8.1 CUNLIFFE V ATTORNEY-GENERAL (NSW) [2009] NSWSC 1450 (SUPREME COURT OF NEW SOUTH WALES, NICHOLAS J, 21 DECEMBER 2009)

The plaintiffs are the trustees of the St Vincent's Hospital at Darlinghurst in Sydney (the trustees). They hold lands upon trust for the purposes of the St Vincent's Hospital, pursuant to a statute, the *St Vincent's Hospital Act 1912* (NSW) (the SVH Act). The lands held on trust are those occupied by the hospital itself (which is a public hospital), the St Vincent's Private Hospital, the Sacred Heart Hospice, the St Vincent's Clinic, the Victor Chang Cardiac Research unit, the Garvan Institute of Medical Research (the Garvan), and the Sisters of Charity Outreach Service.

The overall governing entity of this grouping is a company limited by guarantee, the St Vincent's Hospital Sydney Limited (SVHS). The sole member of that company is St Vincent's Health Australia Limited (SVHA), also a company limited by guarantee. Another company limited by guarantee, St Vincent's and Mater Health Sydney Limited (SVMHS) provides management services, including finance and administration, to the group. Its sole member is also SVHA.

On 17 August 2009, the trustees, SVHS and the Garvan had executed a project agreement for the design and construction of a new cancer centre, the Garvan St Vincent's Cancer Centre (GSVCC). The land on which the GSVCC was to be built is held on trust for the benefit of the hospital under section 2 of the SVH Act. The project agreement included provision for a lease of 82 years to obtain joint tenancy occupation of the GSVCC building by both the SHVS and the Garvan.

A funding agreement had also been entered into with the Commonwealth government for provision of \$70 million towards the total cost of the project (\$90.6 million), with the remainder to come from private donations. Some donations had already been received. The funding agreement required that tenure of the land be settled within 20 business days of the date of the funding agreement on 17 August 2009.

The Attorney-General of New South Wales, as defendant, was acting in his role as protector of trust assets. The principle raised here was whether the new GSVCC served the purposes of the trust under which the hospital was established. The main issue for consideration was the power of the trustees to enter into the 82 year lease under section 6 of the SVH Act. This section gives specific power to the trustees to lease land, but section 6(1) provides for a maximum term of 21 years to a public authority, or a maximum of 10 years to any other person.

The judge accepted the trustees' contention that the only possible detriment arising from such a long lease term was that the land would not be available for any other purpose during this term. His Honour agreed that this detriment was outweighed by the advantages of the GSVCC for both the hospital and its patients. The Attorney-General was concerned that the termination rights under clause 15.5 of the project agreement were significantly less than those available to other parties, in that the events of default were very limited.

His Honour felt that this needed to be looked at in the light of the project as a whole and the evidence of the probable consequences of the trustees' participation in it. The project had considerable benefits for the treatment of cancer, offering synergies between

the leading research of the Garvan, and the already advanced treatment options offered at the SVH. The offering of multidisciplinary care to patients was a potent consideration within section 81 of the *Trustee Act 1925* (NSW) which allows for 'advantageous dealings' to be entered into despite lack of power vested in trustees. If the trustees' dealings were advantageous to the purposes of the trust within section 81, then the court could order matters as it thought fit.

Since the project and the lease offered 'advantageous dealings', the power sought by the trustees to enter into the project agreement and the lease was granted pursuant to section 81 of the *Trustee Act*. The plaintiffs were ordered to pay the defendant's costs.

The case may be found at: www.austlii.edu.au/au/cases/nsw/NSWSC/2009/1450.html

Implications of this case

This case showed that trust arrangements entered into in the past can be a significant obstacle to trustees in changing times. In this case, there was a specific statute dating from 1912 underlying the trust. However, the court was prepared to interpret the provisions of the underlying act to accommodate purposes which were in line with, but not exactly the same as, the trust's stated purposes. The action of the Attorney-General in this case were part of the Attorney's duty to protect trust assets in the public interest.

2.8.2 NSW MASONIC YOUTH PROPERTY TRUST V A-G (NSW) [2009] NSWSC 1301 (SUPREME COURT OF NSW, 19 NOVEMBER 2009, HALL J)

The plaintiffs in this case were two corporate trustees of the Masonic Welfare Fund of New South Wales and the Australian Capital Territory (the Fund'), the New South Wales Masonic Youth Property Trust and the New South Wales Masonic Welfare Property Trust. These corporate trustees were also the trustees of the Edith Boyd Memorial Trust Fund (the Edith Boyd Fund).

The Attorney-General of New South Wales was the first defendant representing all charitable interests in New South Wales, while the second defendant was a representative of all those who might take part of the corpus or income of the Fund if the court were to determine that no trust existed.

The questions before the court stemmed from a long and detailed history relating to the Fund. These were:

1. Whether the property of the Fund was held on trust for charitable purposes;
2. If so, what were the charitable purposes involved?
3. Whether the trustees were validly appointed as the trustees of the Edith Boyd Fund;
4. If the charitable purposes could not be executed, whether the trusts should be executed *cy-près*.

In a previous judgement on 24 March 2009 (see case 2.8.6, below), another question had been determined relating to the trusts. In this context, it is important to note that the trust was established on 28 March 1923 as a valid trust. The earlier question was whether the trustees of the trust established on 28 March 1923 were the members from time to time of the Fund or the members from time to time of the Executive of the Fund. Justice Hall determined that the trustees of the Fund were the members from time to time of the Executive of the Fund. Five individual personal trustees were later purportedly established as the trustees by a Deed executed on 14 January 1927. Subsequently, from about 27 November 1972, all the property of the Fund has been supposedly held and controlled by the two corporate trustees. As at June 2008, the Fund held net assets of \$10,844,000.

The history of the Fund was inextricably linked to the establishment of the William Thompson Masonic School and Hostels in NSW. William Thompson was the Grand Master of lodges in NSW in 1921 when he proposed the establishment of a Masonic school for children of deceased brethren. This was duly established and the Masonic Schools Welfare Fund was then created to fund various activities of the school which were outside the day to day operations of the school. The Fund was originally created as a committee of Masons from each lodge in NSW. The school and hostels were much used between 1923 and the 1960s but were gradually found to be unnecessary and ceased to exist in 2001. Since that time no child has fallen within the original description of the purpose of the Fund as stated in its 1923 constitution.

The constitution first drafted in 1923 stated that the Fund's objects were to assist the school and the children in the school by providing benefits outside the usual school functions, such as sports equipment, library books, prizes, entertainments, an annual picnic, vacation accommodation, railway fares, the provision of suitable positions in work after school was completed, financial assistance both during and after school, and where applicable, even university education. Justice Hall held this constitution was valid and that it established a trust with the objects stated in the minutes of the meeting held on 23 March 1923.

The most important aspect of this constitution was that it did not include a provision to amend the trust. This meant that the trust's charitable objects could not be amended, nor could a provision to amend the trust be inserted at a later date. Nevertheless, several sets of amendments to the trust had purportedly been made over the ensuing years. Particularly important amendments were made in 1926, 1927, 1936, 1956, 1965, 1972 and 1997. These were:

1. 1926: further clauses were added to the constitution to make the property of the trust vest in five trustees to be elected by members. A deed to this effect was signed on 14 January 1927.
2. 1927: amendments were made to the constitution to change the objects of the Fund to include the power to establish accommodation hostels for both children at the school and for those who were in work after finishing schooling, and to insert a power of amendment.
3. 1936: further amendments were made to the constitution and objects, though these reflected the original minutes of the 1923 meeting, and the 1927 decision about hostels.
4. 1956: amendments were made to establish 'auxiliaries' throughout NSW which were to collect or raise funds for the general purposes and objects of the Fund. In addition, the objects were further refined to reflect the increasing interest of the Fund in ex-students of the school who were in necessitous circumstances – provision was made to assist such ex-students by financial aid, provision of accommodation, purchasing textbooks, necessary clothes, tools of trade, professional instruments and equipment, and other items to further their chosen careers.
5. 1965: substantial amendments were made to the objects of the Fund to extend and broaden the coverage of the Fund beyond ex-students of the school (which was falling into decline in use) to children of deceased and incapacitated members of the NSW Lodge of Masons generally, and provide relief and assistance to Masonic youth in necessitous circumstances generally. In addition, the number of trustees was reduced from five to three.

-
6. 1972: after both legal and judicial advice was obtained in 1970 and 1971 to the effect that the Fund was not charitable in the legal sense, and could not qualify for exemption from income tax, the corporate trustees were appointed on 6 April 1972. The assets of the Fund had purportedly been controlled by the corporate trustees since about 21 November 1972. The 1972 amendments to the constitution of the Fund effected this change.
 7. 1997: on 8 December 1997, a special general meeting of the Fund resolved to adopt a new constitution. The objects were to 'relieve and assist Youth in necessitous circumstances in any one or more of the following ways, namely, by ensuring the provision of adequate primary, secondary, tertiary or other education, by encouraging scholastic attainments, vocational, professional ambitions or aptitudes, by assisting those showing promise or talent to proceed to University or engage in any other course of study or special course of training without regard to sex, race, colour or religion or a vocation or profession, by providing financial aid, medical, hospital and dental treatment, by obtaining suitable home accommodation or board and residence by providing necessary clothes, textbooks, tools-of-trade, professional equipment or any other essential requisite in the furtherance of the career chosen'.

The evidence presented was that the purpose of the trust no longer exists as the Masonic school and hostels no longer exist.

In discussing the purported amendments to the Fund, Justice Hall observed that it is settled law that once a charity has been founded and its trusts have been declared, these trusts cannot be revoked, varied or added to by the founder or founders unless a valid power of amendment or revocation was included at the time the trusts were declared. This rule binds the trustees as well as the founder or founders. At general law, a court's jurisdiction is merely directed to enforcement of purposes of the trust as it was originally created, and to avoid unnecessary departures from the terms of the trust.

Justice Hall found that there had been one continuous Fund operating over the years since 1923, and there was no basis for finding that the terms of the original trust had been altered by any of the purported amendments. In particular:

1. A valid express trust was created on 28 March 1923 with the constitution also created on that date.
2. The purported amendments to the 1923 trust were legally ineffective, and so did not vary the terms of the 1923 trust.
3. The purported appointment of corporate trustees in 1972 was not effective as it proceeded on an incorrect legal premise, namely that the deed executed in 1927 validly appointed five individual trustees.
4. Therefore, the trustees of the Fund since 1923 had been the members from time to time of the Executive of the Fund.
5. The plaintiffs, the corporate trustees, were trustees *de son tort* (operating incorrectly), and have been so since their purported appointment in 1972.
6. The money and property settled on the Fund in and after 1923 was impressed with the trust created in 1923.

Therefore, the only valid trust operating was that which established the Fund on 28 March 1923.

Was this a valid charitable trust?

To be a charitable trust, it must have been established for charitable purposes. Legally, a charitable trust must fall within one of the four classes recognised in the *Pemsel* case in 1891: a trust for the advancement of education, for the relief of poverty, for the advancement of religion, or for other purposes beneficial to the community. In addition, the trust must be of a public nature and for the public benefit. After considering the possibilities, Justice Hall agreed with the submission of the Attorney-General of NSW that the 1923 trust was one for the relief of poverty, and therefore for charitable purposes. Its purpose was to assist impoverished children, and although not expressly stated as such in the 1923 constitution, the relief of poverty could be inferred from or was implied in the objects of the trust. Thus, it was a valid charitable trust.

In respect of the Edith Boyd Fund, the plaintiffs could demonstrate a clear chain of title as trustees, and could be declared as the proper trustees of that Fund, which had a different history from the Welfare Fund.

As the charitable purposes of the Welfare Fund could no longer be executed, it was proper that a cy-près scheme be developed for the Fund. The hearing as to the nature of the cy-près scheme was held over to a later date.

This case may be found at: www.austlii.edu.au/au/cases/nsw/NSWSC/2009/1301.html

Implications of this case

This case illustrates the difficulties which can arise when a trust is established at a time in the past, and then is dealt with by trustees or other persons who have imperfect understanding of the trust or of trust law. In this case, over more than 70 years, trustees had purportedly been appointed, and amendments made to the purposes of the trust, without any proper reference to the original trust terms. Moreover, advice on trust matters had been sought from various professional persons who did not discern the actual terms of the trust, or the mode of proper operation of the trust. Meanwhile, the trust had operated quite successfully. It was only at its dissolution that the legal problems emerged, which resulted in this litigation. Trustees should not make any changes to a trust without proper legal advice as to the legitimacy of the proposed changes. The outcome here of a cy-près application of the substantial trust funds is the proper one in the circumstances.

2.8.3 THE PUBLIC TRUSTEE OF QUEENSLAND AS EXECUTOR OF THE ESTATE OF BRIAN EDMUND MONCKTON, ALSO KNOWN AS, BRYANT EDWARD MONCKTON, DECEASED V ATTORNEY-GENERAL (QLD) [2009] QSC 353 (SUPREME COURT OF QUEENSLAND, A LYONS J, 7 OCTOBER 2009)

Brian Monckton died in 2006. His last will, made in 1997, appointed the Public Trustee as administrator and left his entire estate to his wife if she survived him by 30 days and, if not, to the Queensland Children's Research Foundation (QCRF) 'for the charitable purposes of the foundation'.

The QCRF was formed in May 1973 with objectives principally to promote research into the treatment of illness and diseases affecting children. The QCRF was not particularly active and during 1993 all of its funds were donated to the Royal Children's Hospital Foundation. It was deregistered in 1994, three years before the deceased had made his will.

The Public Trustee applied to the court under section 134 of the *Public Trustee Act 1978* for directions as to how to apply the gift (the estate was worth about \$424,000). The question for the court was whether the gift to the QCRF was still valid and if so, how was it to be dealt with.

The traditional approach of the courts is that a testamentary gift lapses in cases where an entity ceased to exist during the testator's lifetime. Her Honour canvassed the three standard exceptions to this rule and noted (para 13) that courts have developed a fourth exception to the lapse rule. This was the approach used by the Supreme Court in the recent case of *Mary Agnes Ball* (see case 2.8.5, below). This looks at the circumstances surrounding a gift to an institution that has ceased to exist, to determine if it is a gift for a charitable purpose of that institution, rather than an outright gift. If that charitable purpose can be found, the fund can be applied to an institution which can carry out that purpose and fulfill the testator's intention.

Her Honour found that the gift had not lapsed as there was no failure of the general charitable purpose declared in the will. While the bequest did not state a particular purpose, by the fact that it was a gift to a Foundation which was formed to raise funds for medical research for children's illnesses it was interpreted as having a charitable purpose. Her Honour also noted that in Australia a gift to a charitable institution is prima facie a gift for a charitable purpose. (see *Montefiore Home v Howell & Co* (1984 2 NSWLR 406)).

Therefore the court directed the property the subject of the gift be paid to the Royal Children's Hospital Foundation as it had the capacity to fulfil the purpose of the gift.

The case may be found at <http://sclqld.org.au/qjudgment/2009/QSC/353>

Implications of this case

This case once again demonstrates the importance of keeping an up to date will and checking the correct title of a charity when naming it in a will. If an organisation no longer exists, the court will have to determine whether there is a successor organisation to accept the gift, or establish whether the testator had a general charitable intention. In that case the court needs to devise a cy-près scheme to give effect to the charitable purpose of the will. Such a scheme directs a bequest in a will to suitable charitable purpose when the one named in the will cannot be carried out. While a review of the case law shows the courts will, insofar as possible, infer a general charitable intention to prevent the lapse of a charitable gift, the process for a cy-près application can be long and involved with many competing organisations applying for the bequest. Also, as the costs associated with any court action are normally ordered against the estate, this decreases the amount of funds that will ultimately be gifted to the charity. Accordingly, best practice when drafting a will would involve contacting or checking the website of any charity to which a gift is to be given, to confirm its correct legal name. Most charities have a suitable bequest clause already drafted to be used in wills. Regular checks to ensure the charity still operates or has not changed its name and if so updating the will can prevent uncertainty and the possibility that an intended gift will lapse and revert to the estate.

2.8.4 MITRESKI V HIS EMINENCE METROPOLITAN PETAR THE DIOCESAN BISHOP OF THE MACEDONIAN ORTHODOX DIOCESE OF AUSTRALIA AND NEW ZEALAND [2009] NSWCA 319 (NEW SOUTH WALES COURT OF APPEAL, 10 SEPTEMBER 2009 FILE NO: 40202/09

This is a court case involving the long-running dispute among members of the Macedonian Orthodox Church concerning how its premises in Rockdale in Sydney should be utilized⁶. Complaints about the general conduct of the church's business had also been aired over the preceding twelve years of litigation. During an earlier attempt to bring the matter before the New South Wales Court of Appeal, *Metropolitan Petar v Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 263, the judges decided that only a single appeal would be permitted to deal with the issues raised previously in the Equity Division of the Supreme Court. Such an appeal was envisaged to occur sometime later, after the trial's conclusion.

These proceedings were an attempt to do just that on the legal basis that a further ruling by Chief Justice Young in the Equity Division, *Metropolitan Petar v Mitreski* [2009] NSWSC 106, had failed not only to ensure procedural fairness for the members of the Macedonian Orthodox Church, but also to determine all the questions at issue. Particular mention was made of the fact that His Honour had alluded to a breach which he was not required to address. In the Full Court of the Court of Appeal, Justice Tobias stated the reference was clearly to an alleged breach. Decisions as to any unresolved matters were regarded as still in the pipeline. After referring to the thrust of the 2007 judgment, all three Appeal Court judges concluded there was no substance to the claims advanced by the counsel for the members of the Macedonian Orthodox parish of St. Petka at Rockdale. Therefore, no leave was granted to appeal Chief Justice Young's decision.

The opportunity was also taken in this action to revisit the 2003 case, *Metropolitan Petar v Mitreski* [2003] NSWSC 262, with a view to again applying for leave to appeal Justice Hamilton's orders. In the interests of justice and ultimately of the parties, the Court of Appeal re-iterated its stance that there was still scope in the Equity Division of the Supreme Court, for handling such matters. Only when this avenue was exhausted, should they be brought before the Court of Appeal. Leave was once again refused.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NSWCA/2009/319.html

Implications of this case

This case was part of a very long running series of court applications concerning a branch of the Macedonian Orthodox Church in Australia. It illustrates that internecine disputes within associations can result in bitter litigation which is wasteful of both an association's resources and of the court's time. As the presiding judge said in one of the many applications in this litigation 'it had been in the lists far too long' (see 2.8.7 below).

⁶ Earlier hearings in the matter can be seen in case notes on Trusts and Wills at <https://wiki.qut.edu.au/display/CPNS/Trusts>

2.8.5 THE PUBLIC TRUSTEE OF QUEENSLAND AS EXECUTOR OF THE ESTATE OF MARY AGNES BALL, DECEASED V STATE OF QUEENSLAND AND ORS [2009] QSC 174 SUPREME COURT OF QUEENSLAND – BYRNE SJA – 3 JULY 2009

Mary Agnes Ball made a will in 1987 which left her entire estate to her husband if he survived her by 30 days, and if not, in equal shares to the Guide Dogs for the Blind Association of Queensland, the Queensland Deaf Society Incorporated, and the North Brisbane Hospitals Board for the purposes of the Royal Brisbane Children's Hospital. In all cases, the bequest was for the purchase of equipment for the charities in question.

Mrs Ball's husband predeceased her, and the question for the court was whether the gift to the North Brisbane Hospitals Board (the Board) was still valid and if so, how was it to be dealt with.

This question arose because the Board had ceased to exist at the date of Mrs Ball's death in 2007. The North Brisbane Hospitals Board was incorporated in 1959 to operate public hospitals on the northern side of the Brisbane River, including the then Brisbane Children's Hospital. In 1968, this hospital's name had changed to the Royal Children's Hospital, so that it was misdescribed in the will when the will was made in 1987. In 1982, a new board was created to operate the hospital, called the Royal Children's Hospitals Board. The Board continued to run other public hospitals until the *Health Services Act 1991* (Qld) abolished all Queensland hospital boards in 1991. There were also later reorganisations in management of the hospitals, and at the time of Mrs Ball's death, the hospital was managed directly by the Queensland government.

Was the charitable gift to the Board still valid?

How was it to be directed and used? A bequest to a public hospital is a recognised gift for a charitable purpose (*Re Sutherland, deceased; Queensland Trustees Limited v Attorney-General* [1954] St R Qd 99; *Le Cras v Perpetual Trustee Co Ltd; sub nom In Re Resch's Will Trusts* [1969] 1 AC 514). His Honour said at paragraph 6:

'The Hospital was, it seems, functioning in 2007 much as it had 20 years earlier when the will was made. It still is. So there is no practical impediment to applying the gift to the specific purpose. Nor is there a legal obstacle to giving effect to Mrs Ball's concern to benefit the Hospital.'

There was no question of the gift having lapsed because as His Honour said at paragraph 12:

'The identity of the designated donee was not of the essence of the gift. The declared charitable purpose is what mattered to Mrs Ball. There has been a failure of the particular means by which the charitable purpose was to be effected. But there is no failure of that purpose as such. The gift has not lapsed.'

Since the gift had not lapsed there was no need for a cy-près scheme. All that was required was for the gift to be paid to a suitable person or entity with the responsibility for buying equipment for the Royal Children's Hospital. All interested parties, including the Public Trustee and the Attorney-General, agreed that the suitable recipient in the circumstances was the Royal Children's Hospital Foundation (the Foundation), as opposed to the Queensland government.

Therefore, His Honour directed that the bequest be paid to the Treasurer or other appropriate officer of the Foundation, and that all costs be paid from the estate.

The case may be found at: <http://archive.sclqld.org.au/qjudgment/2009/QSC09-174.pdf>

Implications of this case

This case demonstrates the importance of keeping an up to date will, and of checking the correct name for a charity when naming a charity in a will. In some cases, the Court may need to devise a cy-près scheme to give effect to a charitable purpose in a will. Such a scheme directs a bequest in a will to a similar organisation with similar purposes to the one named in the will which has now ceased to exist. However, the process for a cy-près application can be long and involved, with many competing organisations applying for the bequest. Therefore, it is best to update a will regularly and to check that charities named still exist, and that the correct name has been used in the will. Correct names can be checked from a charity's website, which may also contain suitable bequest clauses to use in a will; or by contacting the charity directly for a bequest kit or other appropriate details.

2.8.6 NSW MASONIC YOUTH PROPERTY TRUST & ANOR V HER MAJESTY'S ATTORNEY-GENERAL IN AND FOR THE STATE OF NSW & ANOR [2009] NSWSC 181 (24 MARCH 2009) FILE NUMBER: NO 5534 OF 2007

A query arising out of a submission by the Attorney-General in a matter authorised under section 6 of the *Charitable Trust Act 1993* (NSW), saw the Supreme Court of New South Wales directed to address the issue of who the actual trustees of the *NSW Masonic School Welfare Fund* (the Fund) were. More particularly, accepting that the trust was validly constituted, the question for consideration was, were the members of the Fund from time to time the trustees or did the trustees only include the members of the Fund's Executive for the corresponding timeframe?

This Fund was established at a general meeting of representatives of various Lodges of Masons on 28 March 1923. Following some judicial advice from His Honour Mr Justice Street in 1971, corporate trustees, the New South Wales Masonic Youth Property Trust and the New South Wales Masonic Welfare Property Trust, were appointed on 21 November 1972, to oversee the Fund. These trustees hold all the Fund's property as well as administering bank accounts in the name of the *Masonic Youth Welfare Fund of NSW & ACT*.

It was recognised in the submission of counsel for the Attorney General that the establishment of the Fund in 1923, plus the monetary payments into it satisfied the requirements of an express trust. The trust property consisted of the financial donations which were to be held on trust to address the related needs, not necessarily educational in nature, of the nominated beneficiaries, children of the Masonic Schools of New South Wales. Such needs included matters involving medical and dental care as well as the provision of food, clothing and accommodation. While the Fund's Constitution was clear in this regard, it was not clear exactly who were to comprise its trustees.

Justice Hall sought guidance from the Minutes of the General Meeting of 28 March 1923, as to the representatives' intention concerning the appointment of trustees to manage the Fund. Not only did the Minutes evidence an intent for an Executive to direct the Fund's business operation, but also they sanctioned its involvement in fundraising whenever required. Scant mention was made of the rights and responsibilities of

individual members. From a practical perspective, His Honour discounted the possibility of the Fund's efficient administration by the entire membership of an unincorporated association. Nor did he accept the argument that a resolution passed at a special general meeting of the Fund on 20 December 1926, to the effect that the Fund's assets should vest in five elected trustees, illustrated that previously all members of the Fund had been trustees. The subsequent adoption of a Trust Deed to implement this, did not alter his stance. In fact, he interpreted the developments as indicating a desire for the Executive to facilitate its own renewal.

Therefore, His Honour decided that the trustees were the members of the Fund's executive from time to time.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NSWSC/2009/181.html

For a related case see 2.8.2, above.

2.8.7 METROPOLITAN PETAR V MITRESKI [2009] NSWSC 106 SUPREME COURT OF NEW SOUTH WALES – 4 MARCH 2009

This hearing was to finalise one issue of many in a case which His Honour stated 'has been in the lists far too long'. The proceedings commenced on 28 July 1997 when a dispute arose between the Bishop (Metropolitan Petar) and the governing body of the incorporated association which controlled the parish of St Petka in New South Wales. The dispute concerned the appointment of the parish priest and control over money and property within the parish⁷.

A Church trust has previously been held to exist in this case (see *Metropolitan Petar v Mitreski* [2003] NSWSC 262 (4 April 2003)). The issues here were to ascertain the terms of the Church trust which was alleged to have been breached by the defendants, and to determine whether any of those terms were fundamental terms.

The alleged breaches of trust were that the authority of the Bishop had been denied by:

- a. preventing the Diocesan Bishop from conducting services in the Church Building;
- b. preventing a priest appointed by the Diocesan Bishop as parish priest of the St Petka Parish from conducting religious services in the Church Building;
- c. preventing a priest licensed by the Diocesan Bishop to conduct religious services in the Church Building from doing so;
- d. (excluding the priest appointed by the Diocesan Bishop as parish priest of the St Petka Parish from the executive committee of the body responsible for the administration of the St Petka Parish;
- e. employing a priest not appointed by the Diocesan Bishop to act as the parish priest of the St Petka Parish;
- f. employing a priest under valid ecclesiastical discipline in accordance with Church Law to act as the parish priest of St Petka Parish;
- g. requiring or permitting a priest to conduct religious services upon the Church Land when:
 - i. that priest has not been authorised by the Diocesan Bishop to do so; or
 - ii. that priest is under valid ecclesiastical discipline in accordance with Church Law.

7 Earlier hearings in the matter can be seen in case notes on Trusts at <https://wiki.qut.edu.au/display/CPNS/Trusts>

-
- h. any or all of:
- i. closing the Church Building;
 - ii. removing the Holy Objects from the Church Building;
 - iii. installing Holy Objects;
 - iv. reinstalling Holy Objects;
 - v. carrying out of building works in and upon the Church Building without the authority and blessing of the Diocesan Bishop.
- i. refusing or failing to accept applications for membership from believers in the doctrines of the Macedonian Orthodox Church who have satisfied the criteria for eligibility specified in the Constitution, the Diocesan Statute and the By-Laws;
- j. failing to remit to the Diocesan Bishop the contribution from the income of the parish as specified in the Diocesan Statute.

In a comprehensive judgment, which included an in-depth consideration of the history of the Macedonian Orthodox Church (MOC) and relevant Canon Law, His Honour found that the MOC was founded both historically and in the present on absolute authority of its Bishopric. His Honour said that:

‘The doctrine of Apostolic Succession as accepted by the MOC heavily relies on the tradition from one set of bishops to the next of the faith of the Apostles. The direction of the church by a person whose orthodoxy is pure and accepted is vital to the framework of the whole church.’

Thus, the question of the terms of the trust in this case should be answered ‘by saying that the terms of the relevant trust do not justify the exclusion of the bishop from the parish Church of St Petka nor the employment of any priest not authorised by the bishop nor the closing, alteration, addition to the Church building or its ornaments without the Bishop’s approval’. Therefore, His Honour held that alleged breaches (a), (b) and (h) and their associated breaches were fundamental breaches of trust. He had doubts as to whether alleged breaches (d), (i) and (j) were fundamental, but stated that this was ‘of little moment as these matters will be subsumed in the more serious matters’.

This meant that the governing body of the incorporated association of the parish of St Petka was in breach of the Church trust.

The case may be found at: www.austlii.edu.au/au/cases/nsw/NSWSC/2009/106.html

Implications of this case

See implications for case 2.8.4 above

2.8.8 THE ESTATE OF DULCIE EDNA RAND (DEC'D) [2009] NSWSC 48 (SUPREME COURT OF NEW SOUTH WALES, 16 FEBRUARY 2009) FILE NUMBER: 4649 OF 2008

Dulcie Rand died on 21 February 2006. In her 1997 will, Ronald Carter was named executor of her estate, estimated to be worth \$1,898,243.08. Probate was granted on 22 April 2006. After Ronald Carter’s death in December 2007, his widow, Faye Carter was granted probate of his will. Mrs Carter sought direction as to how to distribute one of the six equal shares in Dulcie Rand’s will. Under clause 4(f), the share in question was left to, ‘The Philippines and Australia Episcopal Church of Glendinning, New South Wales,’ a non-existent body.

Investigation revealed that the St. Paul's Multicultural Filipino-Anglican Ministry, a congregation of the All Saints Anglican Church in North Parramatta, professed to be the current persona of the earlier unincorporated association. The previous designation reflected the church's status as an Area Mission of the Episcopal Church in the Philippines catering for the spiritual needs of Filipinos in Sydney. When the church became part of the Anglican Diocese of Sydney in October 2002, a new name was adopted to reflect this affiliation as well as to broaden its ethnic migrant base. Letters confirming this change of identity were received from representatives of both the Western Sydney Region of the Anglican Church Diocese of Sydney and the Episcopal Church in the Philippines. Representations were also made by the Legal Officer of the Anglican Church Diocese of Sydney who recommended the moneys be paid to the Anglican Church Property Trust Diocese (the Trust) of Sydney as trustee, to be used as Dulcie Rand wished.

Via submissions, the Trust contended that the name, the Philippines and Australia Episcopal Church of Glendinning, was a misnomer for the Fil-Aussie Christian Fellowship which operated at Rooty Hill in 1997. Ronald Carter had been mistaken as to the name when Max Rand enquired about it on Dulcie's behalf. Glendinning was, in fact, where the priest, the Reverend Gayagay, lived. Justice Harrison agreed that the Fil-Aussie Christian Fellowship was the intended beneficiary, but declared that the discrepancy in the name was not material since clearly the St. Paul's Multicultural Filipino-Anglican Ministry was its successor. This conclusion was reinforced by the continuing involvement of the Reverend Gayagay with the ethnic ministry and his historical account of its development.

Therefore, His Honour advised that the residuary one sixth of the estate should be distributed to the St. Paul's Multicultural Filipino-Anglican Ministry. As to the question of whether the Trust should administer the bequest on its behalf, Justice Harrison suggested the parties themselves work out an expeditious settlement.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NSWSC/2009/48.html

Implications of this case

This case shows yet again, the importance of keeping a current will. The named beneficiary in this case was an unincorporated association which had ceased to exist under that name at the time of the testator's death. This type of problem can be very difficult for executors to resolve, so these matters frequently end up in the Supreme Court.

Leaving a gift in a will to an unincorporated association can also cause problems because it is not a legal entity. Therefore it is always wise to find out the correct name of your intended beneficiary and its legal status. Many nonprofit organisations are able to suggest correct drafting of clauses if you wish to leave them a gift in your will.

2.9 MISCELLANEOUS

2.9.1 ACCC V AUSTRALIAN KARTING ASSOCIATION (NSW) INC [2009] FCA 1255 (FEDERAL COURT OF AUSTRALIA, BENNETT J, 6 NOVEMBER 2009)

The Australian Karting Association (AKA) is an incorporated association which was formed by various individual kart racing clubs in NSW and the ACT. At the time of the proceedings the AKA had 19 member clubs. Kart racing is a specialised motor sport and has its own licensing regime. The AKA acts to promote, co-ordinate and administer all

aspects of karting in NSW and the ACT. The AKA raises its revenue by issuing licences to individual drivers but does not own any kart circuits or supply any kart circuit hire services. There are 15 kart circuits which are managed by AKA member clubs in NSW and the ACT and 7 kart circuits owned or managed by non-AKA members. Each of the AKA member clubs is formed around a kart circuit in a particular location and manages that circuit. Each of the AKA member clubs is a sporting club run by volunteers and the club's activities include conducting kart racing events, organising sprint kart racing series and hiring out the kart circuit.

In NSW, in addition to the AKA, there are other bodies, such as, Prokart and Australian Bracket Racing Association (ABRA), who manage kart circuits or organise kart racing events. Prior to July 2008, Prokart had hired kart circuits from different AKA clubs by dealing directly with the clubs and had held races at each of those hired kart circuits.

On 19 July 2008 the AGM of AKA was held. All 19 clubs were represented at the meeting. During the course of this meeting two member club representatives led a discussion about setting a schedule of fees for circuits operated by AKA members and having the AKA office handle negotiations for circuit hire. The minutes of that meeting record that the following motion was carried unanimously:

'All applications/negotiations are to be handled by the State Office for any AKA NSW licensed circuit that is to be used for kart racing. The minimum fee is \$4,000 plus GST per day for country clubs and \$6000 plus GST per day for metropolitan clubs and Canberra Kart Racing Club.'

Between 31 July 2008 and 8 August 2008, Prokart rang the AKA on three different occasions to obtain quotes for hire fees for particular AKA club circuits and as a consequence of the request, written confirmation of the hire fee was provided to Prokart. On each of these three occasions the procedure undertaken and the hire fees quoted were in accordance with the resolution carried at the AGM thus giving effect to the provisions of the minimum hire fees understanding. The court referred to this understanding as the 'Kart Circuit Hire Understanding' for the purposes of applying the Competition Code of NSW. The court was satisfied that there was a market for kart circuit hire and that the AKA could exercise significant market power as its clubs manage and hire 15 of the possible 22 kart circuits in NSW.

While Prokart did not proceed with hiring any of the AKA club circuits, the actions of the AKA were sufficient for the ACCC to conduct an investigation and subsequently commence civil proceedings against the AKA and three of its members for engaging in conduct in contravention of sections 45(2)(a)(i) and 45(2)(a)(ii) of the Competition Code of NSW. These sections of the Code concern price fixing, controlling prices or maintaining or providing for price fixing to substantially lessen competition. Immediately upon learning that their actions were against the law, AKA ceased giving effect to the kart circuit hire understanding.

The AKA and its members co-operated fully with the ACCC including providing all documents and information required by the ACCC. The respondents made full admissions and reached agreement with the ACCC on the penalties that should be imposed. The question for the court centred on the appropriateness of the consent order agreed between the parties which proposed the nature of the penalties to be imposed. The proposed consent order provided for declarations identifying the contravening conduct, a \$10,000 fine, injunctions and a training and education program (compliance program) for the AKA and its members.

Justice Bennett noted that it is not sufficient for the court merely to give effect to a private agreement between the parties by consenting to the proposed order: 'The Court is not merely giving effect to the wishes of the parties. It is exercising a public function and must have regard to the public interest in doing so' (para 68). Her Honour considered at length the legal principles and relevant factors surrounding the contravention. She found it noteworthy that the respondents were totally ignorant that their actions constituted contraventions of the Code concluding that this showed they had no intention to contravene the Code. Her Honour also took into account the respondents' full co-operation with the ACCC and the nonprofit purpose of AKA and its member clubs. The fact that the participants of the clubs are volunteers was taken into consideration when assessing whether the proposed penalties were appropriate.

Despite the fact that the respondents unknowingly breached the Code and were unlikely to re-offend, Justice Bennett took the view that it was in the public interest to send a message to similar organisations that they need to be aware of the Competition Code. She was satisfied that injunctions against the AKA and the respondent clubs permanently restraining them from price fixing arrangements together with the proposed \$10,000 fine and the establishment of an education and trade practices compliance program for its officers and employees would have a significant deterrent effect upon the AKA and accordingly the proposed consent orders were appropriate in the circumstances.

Justice Bennett also placed a strong emphasis on general deterrence being a principal object of a penalty. Her Honour was mindful that it was in the public interest to make a clear statement to other sporting organisations in similar positions to the AKA.

This case may be viewed at: www.austlii.edu.au/au/cases/cth/FCA/2009/1255.html

Implications of this case

This case illustrates that all organisations need to be aware of the operation of the Trade Practices Act and State or Territory Competition Codes when engaging in commercial activities. Organisations engaged in price-fixing and other anti-competitive behaviour will be subject to severe penalties, even if the organisations involved are nonprofit and even if they are not aware of the law.

2.9.2 CAROONA COAL ACTION GROUP INC V COAL MINES AUSTRALIA PTY LTD AND MINISTER FOR MINERAL RESOURCES [2009] NSWLEC 165 (LAND AND ENVIRONMENT COURT NSW, PRESTON CJ, 24 SEPTEMBER 2009)

The applicant, Caroon Coal Action Group, is an incorporated association which was formed to oppose any exploration activities and/or mining in the Caroon District on the Liverpool Plains in NSW. Members of the Group comprise 80% of the landowners in the Caroon District whose properties are within the area of an exploration licence granted by the Minister for Mineral Resources to Coal Mines Australia Pty Ltd. The Group had brought proceedings to challenge the granting of the exploration licence and coal authorisation to undertake exploration activities in the Caroon District. This matter was an application by the Group for an order specifying that the maximum costs that any party could recover from any other party in the main proceeding would be \$34,000.

The Court has a number of sources of power to make a maximum costs order in advance of litigation. His Honour discussed the sources and the exercise of the power to make a maximum costs order in detail (paras 9 to 15) but the overriding purpose of maximum

costs orders is to facilitate access to justice. It is well understood access to justice is impeded where the cost of litigation is high. A maximum costs order is a way of achieving proportionality between the cost of litigation and the importance and complexity of the subject matter of the dispute. This can be particularly important in public interest litigation, but public interest is just one consideration in determining the access to justice question.

The Action Group argued that a maximum costs order should always be available 'whenever proceedings are brought in the public interest' but the Court rejected this (para 59). The Court looked at cases where an order was made on the basis that the public interest plaintiff would be deterred from continuing proceedings if a maximum costs order was not made, and as a consequence issues of some public significance would not be able to be heard and determined by a court (para 60).

However, the Court held that a maximum costs order should not be made in this case because access to justice would not be impeded by not making the order. The Action Group did not claim that it would not continue with the proceedings if a maximum costs order was not made. The Court found (para 61) that although the Action Group's assets were not significant, its membership was most of the landowners affected by the mining licence. Their properties were of high agricultural productivity, so their concern was the potential adverse effects on their productivity. However this also meant that there was a financial incentive for the landowners to provide financial resources to the Action Group to continue with the litigation regardless of whether a maximum costs order was made.

The Court also found that the estimated amount of costs would not be disproportionate to the importance and complexity of the subject matter of the proceedings.

In addition, the trial judge would have a discretion to refuse to make a costs order against the applicant even if they were unsuccessful at trial, on the basis of the public interest nature of the litigation.

This case may be viewed at: <http://austlii.edu.au/au/cases/nsw/NSWLEC/2009/165.html>

Implications of this case

The critical question in determining any application for a maximum costs order is whether access to justice will be promoted or impeded by making or not making the order. The particular circumstances of the litigation, including its nature as 'public interest' litigation, and of the plaintiff are relevant in answering this critical question, but these matters are not ends in themselves (para 58).

While maximum costs orders are an effective way for community groups pursuing public interest litigation to contain the legal costs that can be awarded against any party, the court will look to surrounding circumstances of the case when determining if the overriding purpose to ensure access to just required such an order. In this case, the financial incentive for the Action Group's members to continue the litigation regardless, combined with the fact that costs would not be disproportionate to the importance and complexity of the matter, were deciding factors.

2.9.3 BURRELL PLACE COMMUNITY ACTION GROUP INCORPORATED V GRIFFITH CITY COUNCIL [2009] NSWLEC 120 (LAND AND ENVIRONMENT COURT NSW, LLOYD J, 29 JULY 2009)

Burrell Place Community Action Group Inc (the Action Group) was incorporated under the *Associations Incorporation Act 1984* (NSW) on 4 March 2009. The principal activity of the Action Group is described as 'taking reasonable action with respect to planning issues at Burrell Place'. In September 2008 Duneba Investment Group Pty Ltd (Duneba) lodged a development application (DA) with the Council to build a supermarket at Burrell Place. In February 2009 the Council consented to the DA. In March 2009 the Action Group was formed to oppose the construction of a supermarket at that location. On 4 May 2009 the Action Group commenced proceedings in the Land and Environment Court seeking a declaration that the Council's consent to the DA was invalid and of no effect.

The Action Group had 22 members and at the time of the proceedings had \$5795.00 in its bank account and its solicitors were holding \$2560.40 on trust – clearly insufficient funds to pay a costs order should the Action Group's claim fail.

The Council and Duneba applied for security for costs pursuant to rule 42.21 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) which gives the court jurisdiction to make an order for costs and to stay proceedings until the security is given in any of the circumstances set out in the rule. In this particular instance rule 42.21(d) was relied upon, namely, '*that there is reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so...*'

The Action Group argued it was not a corporation within the meaning of the *Corporations Act 2001* (Cth) and therefore the defendants could not bring an application for security for costs under this rule. His Honour rejected this argument on the basis that the Group was a body corporate which is capable of suing and being sued and therefore must be treated like any other body corporate within the ordinary meaning of the word 'corporation' in rule 42.21 of the UCPR. The UCPR does not refer to 'a corporation' within the meaning of the *Corporations Act* and therefore the broader meaning is adopted. In any event, if this rule did not apply then rule 42.21(e) could be applied.

The purpose of the rule allowing security for costs is to protect defendants from unjust consequences of an unsuccessful claim against them. Although it is entirely within the court's discretion whether to order costs in an action the long established rule is that costs follow the event. There are a number of factors the Court takes into consideration in deciding whether to order security for costs including the strength and bona fides of the case.

His Honour also took into consideration that in proceedings such as the present an order for security for costs does not deprive the applicant plaintiff of any fundamental right where there are others who might prosecute the case under the provision.

Another issue in the case was that rule 4.2(2) of the *Land and Environment Court Rules 2007* (NSW) provides that a court may decide not to make an order to give security for costs if it is satisfied that the proceedings have been brought in the public interest. Relying on previous decisions of the New South Wales Law and Environment Court (NSWLEC), His Honour determined that a departure from the usual order for costs requires some other factor in addition to the public interest nature of the litigation, such as an important question of statutory interpretation or the breaking of new ground of legal principle.

Therefore His Honour ordered security for costs against the Action Group on the basis that its case was inherently weak; and that it did not raise any question of construction or new principle and therefore was not in the public interest. Security for costs for an amount of \$85,000 was ordered, in addition to an order for costs against the Group for this application. The proceedings were stayed until the security for costs was paid.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NSWLEC/2009/120.html

Implications of this case

Incorporated associations are not immune from an order for security for costs. However the likelihood of having such an order made is directly linked to the strength of the case if the association is pursuing a claim. Even if the litigation has a public interest nature this will not of itself be sufficient to resist an order for costs. There also needs to be an important or groundbreaking legal aspect to the case.

2.9.4 CALVO V SWEENEY [2009] NSWSC 719 (29 JULY 2009)

The Australian Institute of Music Ltd (AIM) is a nonprofit company with purely educational and cultural aims, underpinned by a charitable intent. Dr and Mrs Calvo were the owners and were also directors. Their son was the third director. From 1989, AIM offered private, tertiary music education as well as non-tertiary music studies and performance classes. It expanded in 2002 with the assistance of a \$2.4 million New South Wales Government grant, provided it retained its nonprofit status. With expansion, rental overheads increased significantly.

AIM's monetary position deteriorated, and in 2002/2003 the auditor qualified his opinion. In May 2003, the Commonwealth Government foreshadowed a Fee-Help scheme under a new Higher Education Loan Program, but, for its students to be eligible, AIM had to satisfy the requirements to be classified as a Higher Education Institute on the Australian Qualifications Framework Register. This would have been a source of increased profitability but AIM's financial situation meant it could not get recognition on this register. At the same time, Dr Calvo decided he wanted to retire and decided to put AIM on the market. He was introduced to Mr Sweeney, an accountant, to determine a realistic exit strategy.

Dr Calvo said he was willing to sell a 20% stake in AIM for \$2 million, which Mr Sweeney thought was an overly inflated figure. Following a meeting of stakeholders on 29 October 2003, it was decided to compile a detailed information memorandum for prospective investors. That was completed by 20 May 2004 but in the process it was discovered that the Calvos had had to sell their home in late November 2003, to discharge their overdraft with Westpac, their former financial controller, and free up some funds for AIM.

To reinforce the positive outlook for AIM, Mr Sweeney said it had to generate profits to attract investors and he recommended that it reposition itself as a 'for-profit' company. Discussions continued between the Calvos and Mr Sweeney about the amount and terms of payment to Dr Calvo and the holding that any investor would receive in return. In late June AIM sought accreditation as a Higher Education Institute under the *Higher Education Support Act 2003* (Cth) so that it could attract Fee-Help for its students.

On 2 July 2004 Dr Calvo was admitted to hospital after suffering a stroke. The day before, AIM's landlord (Ellimark) had taken a fixed and floating charge over all of AIM's assets to secure its obligations under its lease. Mr Sweeney was not aware of this until August. On 6 July Mr Sweeney expressed his interest in personally investing \$500,000 in AIM and assisting Dr Calvo to purchase a home, provided Dr Calvo's shareholding

was eventually reduced to 5%. No other prospective investors could be found. After discovering the fixed and floating charge and AIM's dire financial position, Mr Sweeney insisted on absolute control of its management as well as a concerted effort to qualify as a higher education provider. This would have improved the financial outlook because of the fee assistance, but the Commonwealth Department of Education, Science and Training (DEST) had serious concerns about AIM's long term financial viability.

On 2 September 2004, Mr Sweeney convinced Dr and Mrs Calvo that a demonstrable change in management style and governance were required to improve both Ellimark's and DEST's perceptions of AIM. So on 6 September 2004, the Calvos allotted 51% of the AIM shares to Mr Sweeney, leaving themselves with 24.5% each – which they believed was a purely temporary measure.

The court actions – Trade Practices Act claims

On 19 July 2007, the Calvos brought action in the New South Wales Supreme Court. Part of their claim was based on misleading and deceptive conduct under section 51 of the *Trade Practices Act 1974* (Cth) (TPA). Firstly they said they were induced to issue the new shares because of supposed misrepresentations by Mr Sweeney on 2 September 2004.

The claimed misrepresentations were:

- that Ellimark would not alter its stance on rental concessions in exchange for shares while the Calvos were managing AIM;
- the inference that DEST would prefer to conduct business dealings with Mr Sweeney.

The first statement was patently false, but the Calvos subsequently denied it was uttered – meaning that, by their own admission, they could not have relied on it. With respect to the second comment, His Honour pointed out it was not misleading as Mr Sweeney was merely stating his opinion based on DEST's lengthy statement of concerns about AIM's financial and commercial management.

A further claim was made that on 6 September 2004, Mr Sweeney allegedly offered the Calvos payment of \$1 million upfront with the promise of a further \$1 million in a year's time to induce the Calvos to give him a 51% stake in the company. Such funds would have come via AIM as repayment of Dr and Mrs Calvo's 2003 loan to the company. However, Justice White found this notion to be implausible since Mr Sweeney needed to gain a majority shareholding as well as to inject funds into AIM to improve the efficiency of its operation. There was also no evidence that the Calvos were influenced to part with their shares by any remark made by Mr Sweeney on that day. His Honour noted that Mr Sweeney had insisted that Dr and Mrs Calvo obtain legal advice.

Therefore, no claim of misleading and deceptive conduct under section 51 of the TPA could be substantiated.

The court actions – breach of fiduciary duty claim and undue influence

Throughout September 2004, negotiations continued regarding the amount and terms of Mr Sweeney's investment; the lease debt with Ellimark; an injection of funds to secure an unqualified audit; the holding to be retained by the Calvos; and accreditation as a higher education provider. It was agreed that Mr Sweeney would take 37.5% of AIM; Ellimark would write off the existing \$1.6 million debt in return for 37.5% of the business and reduce AIM's rent to June 2005; the Calvos would keep the remaining 25% of

AIM, but Mr Sweeney insisted on an option over their holding as well as an irrevocable proxy – effectively giving him control of the company. On 22 September he agreed to purchase 15% of AIM's shares from the Calvos provided the business made \$1.5 million for the 2005/2006 financial year. Dr Calvo asked for \$1.56 million when the shares were transferred.

The Calvos resigned as directors of AIM on 24 September to be replaced by Mr Sweeney and one other. The share allotment was effected that day. There was dispute as to whether the shareholders' agreement was concluded that day or on 27 September 2004. A so-called co-operation deed legitimised Mr Sweeney's proxy voting rights over the Calvos' shareholding. They were to continue as consultants on a salary until 30 June 2007.

When AIM finally achieved higher education provider status on 9 November 2004, Mr Sweeney and a related company made tax-deductible gifts of \$150,000 and \$250,000 respectively.

Dr and Mrs Calvo first sought legal advice regarding payment for their shares in December 2004. Justice White concluded that, since they had not sought legal advice at the time, they did not fully understand the documents they had signed. The problem was compounded by the effects of Dr Calvo's stroke which left him more amenable to Mr Sweeney's suggestions.

In June 2005, a demand for \$1.56 million was made for the transfer of the 37.5% shareholding to Mr Sweeney. Mr Sweeney suggested converting the company to a 'for-profit' venture. He made other suggestions for business schemes over subsequent months but no payment eventuated. On 2 April 2007, Dr Calvo was informed he would be finishing up at the end of the financial year.

In this court action the Calvos accused Mr Sweeney of compromising his fiduciary duty of loyalty to them through his AIM shareholding and active involvement as its Chief Executive Officer since 27 September 2004.

Mr Sweeney argued his role was that of financial advisor to AIM, and he had no fiduciary obligation to Dr and Mrs Calvo. However, Justice White disputed this argument because the Calvos were not only reliant on Mr Sweeney's negotiation skills, but also convinced only he could rescue AIM from its precarious financial state. In addition, he had unlimited access to confidential material concerning AIM. His Honour determined that a fiduciary relationship entailing loyalty did exist between the Calvos and Mr Sweeney. Since Mr Sweeney had been employed to oversee the Calvos' exit strategy, it was inappropriate for him to attempt to broker a sizeable personal shareholding in AIM, unless he had their fully informed consent.

Mr Sweeney argued his direct involvement was needed to safeguard the Calvos' business interests and this countered his apparent conflict. This was rejected. As Justice White pointed out, acquiring a 37.5% stake in and effective control of AIM while failing to remunerate the Calvos was inherently unfair. There was no evidence that his was the best deal; and Mr Sweeney used time pressures relating to AIM's accreditation to his advantage. The irrevocable proxy over the Calvos' shares was used to reinforce his dominant role.

According to Justice White, this action also demonstrated that the Calvos were subject to undue influence from Mr Sweeney. Although Dr Calvo and his wife had always trusted Mr Sweeney's judgment, following Dr Calvo's stroke, they became increasingly vulnerable to the abuse of that influence. Mr Sweeney could not rebut a finding of undue influence in the way he'd seized control.

The remedy

Justice White declared that Mr Sweeney held his shares in AIM on trust for the Calvos. These shares and any accompanying certificates were to be transferred to Dr and Mrs Calvo within twenty one days.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NSWSC/2009/719.html

Implications of this case

Regardless of any agreements made the court can look at the nature of the relationship between the parties and determine whether there is sufficient independence of action to place all parties on the same footing. Here the Calvos were at a distinct disadvantage and had placed their trust in Mr Sweeney who was in a superior position. Consequently the court determined they had been unduly influenced and found in their favour.

2.9.5 LIBERAL PARTY OF AUSTRALIA AND AUSTRALIAN ELECTORAL COMMISSION [2009] AATA 551 (ADMINISTRATIVE APPEALS TRIBUNAL, 23 JULY 2009) FILE NO: 2009/1311

The Liberal Party of Australia (the Liberal Party) approached the Australian Electoral Commission (the Commission) under the *Freedom of Information Act 1982* (Cth) (the Act) about accessing two legal advices on the subject of registering political parties. One of these came from the Legal Services Section of the Commission on 17 May 2007, and the other was given to the Commission by the Australian Government Solicitor on 3 August of the same year. Both sets of advice followed an attempt in February 2007, to register a political party called the Liberal Democratic Party, the name of which had obvious similarities to an existing Australian political party. In response, the Commission refused the request, maintaining that, because the documents would be subject to legal professional privilege in any legal proceedings, they were exempt under section 42 of the Act.

Although an unincorporated association, the Liberal Party had standing to apply for a review of this determination to the Administrative Appeals Tribunal (the AAT) as section 27(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) states that, 'An association of persons, whether incorporated or not,' qualifies as persons affected by this decision. Its grounds for the review were that the documents in question were not protected by legal professional privilege and that, with respect to the Australian Government Solicitor's advice, the Commission had waived its privilege.

Senior AAT Member, J.W. Constance, addressed this latter matter first. He found for the Liberal Party because the Commission's use of the Australian Government Solicitor's material underpinned its decision to deny the Liberal Party access to the material sought. It was agreed that such open reliance supported the waiving of the Commission's legal professional privilege. Therefore in the interests of fairness, the Liberal Party should be permitted to view the advice from the Australian Government Solicitor. No reduction in the charge for accessing the legal document was merited as, in the Senior Member's opinion, it failed the public interest test outlined in section 29(5)(b) of the Act.

Consideration of the advice from the Commission's own legal team warranted a different outcome. In this instance, the advice was regarded as a confidential, legal opinion supplied to a client, regardless of whether the solicitor was employed by that client, the Commission. There was no evidence of privilege being waived. Despite the Liberal Party's efforts to argue that the document was an exception to section 42(1) of the Act since it met

the criteria under section 9(1) suggesting it had been produced by the Commission for its officers' decision-making purposes, the AAT's ruling was that the Legal Services Section had compiled it for a particular case rather than for general application.

This case may be viewed at: www.austlii.edu.au/au/cases/cth/AATA/2009/551.html

2.9.6 O'HARA V SIMS [2009] QCA 186 (QUEENSLAND COURT OF APPEAL, KEANE, MUIR AND FRASER JJA, 10 JULY 2009)

This was an appeal from a Supreme Court civil jury trial (*O'Hara v Sims* [2008] QSC 301). The jury found there were no defamatory imputations about the plaintiff (O'Hara) in a letter the defendant (Sims) had sent to other members of the Gold Coast Turf Club. Mr O'Hara appealed the decision on the grounds that: each of the jury's findings was one that no reasonable jury could have reached; and the trial judge erred in determining that if the jury had found the imputations defamatory the defence of qualified privilege would have applied (section 30, *Defamation Act 2005* (Qld)).

Mr O'Hara, a member of the Gold Coast Turf Club Committee, was seeking re-election to the committee in the 2007 biennial election. In the lead-up to the election there was controversy over a suggested proposal that the race track be moved to a new location. Mr O'Hara gave an interview to the *Gold Coast Bulletin* newspaper in which he was reported as saying he was in favour of the move, although he later asserted the article misquoted him in respect of his support being unconditional. Mr Sims, a life member of the club, was opposed to any suggestion that the track should be relocated and wrote to club members urging them to examine the credentials of each candidate for election closely, before voting. In his letter he stated he had previously supported O'Hara but had changed his opinion and gave reasons; then concluded: 'In my view this man is now unworthy of a position on our committee. I will not be voting for Brian O'Hara'. Mr O'Hara considered the letter conveyed defamatory imputations and brought an action for damages for defamation.

The trial

At trial, the question for the jury was whether the letter conveyed imputations that were defamatory of Mr O'Hara, in that:

1. He had engaged in conduct making him unworthy to be a committee member of the Turf Club (imputation 1);
2. He had subordinated the due performance of his duty as a committee member of the Turf Club to his interest in self-promotion (imputation 2); and
3. He had acted rashly as a committee member of the Turf Club (imputation 3).

Mr Sims defended the action on the basis that the letter had not conveyed the imputations as alleged, and in any event if such imputations were conveyed they were not defamatory of Mr O'Hara. Alternatively if the purported imputations were found to be defamatory he relied on the defences of truth, honest expression of opinion and qualified privilege pursuant to sections 25, 30 and 31 of the *Defamation Act 2005* (Qld). The trial judge withdrew the defences of truth and honest expression of opinion from the jury's consideration and reserved his ruling on the availability of the qualified privilege defence until after the jury returned its verdict. The jury concluded that imputation 1 was not conveyed by the letter but imputations 2 and 3 were; however, they were not defamatory of Mr O'Hara. Judgment was entered for Mr Sims.

The trial judge addressed the question of the qualified privilege defence, which is available if the defendant proves that:

- a. The recipient has an interest or apparent interest in having information on some subject; and
- b. The matter is published to the recipient in the course of giving to the recipient information on that subject; and
- c. The conduct of the defendant in publishing that matter is reasonable in the circumstances.

The trial judge concluded there was ‘no doubt that Mr Sims’s letter was a communication of such a nature that he had an interest in making it and the members to whom he wrote had a corresponding interest in having it made to them. The communication was therefore privileged unless made maliciously or unreasonably’ ([2008] QSC 301 at paras 44 to 45). Malice was not asserted and on the question of reasonableness His Honour found that the circumstances of the election and the members’ common interest in the election of committee members were enough to establish its reasonableness. Therefore the defence of qualified privilege applied and judgment was entered for Mr Sims.

This Appeal

On an appeal from a civil jury trial, the role of the Court of Appeal is not to re-open the evidence and consider whether the jury’s conclusion is the most reasonable conclusion that could have been reached, but only to ensure the jury verdict is realistic in the circumstances. In order to determine whether the jury’s verdict could reasonably have been reached the Court considered the three imputations. Applying the test that an imputation is defamatory if the publication of it is likely to lead ordinary decent persons to think less of the plaintiff, Judge of Appeal Keane held that Mr O’Hara must show that the views taken by the jury were not rationally open to it (para 34).

Imputation 1

In relation to imputation 1 which concerned the appellant’s (Mr O’Hara’s) worthiness to be a committee member, Judge of Appeal Keane held it was open to the jury reasonably to conclude the letter did not convey the imputation that he was unworthy as a committee member but instead it went to the issue whether he was unworthy to be elected. His Honour noted the difference between O’Hara’s prospect of election being damaged by the letter and his reputation being damaged by the letter (para 39). Judge of Appeal Fraser had a similar view (para 81)

Imputation 2

In respect of imputation 2, Judge of Appeal Fraser thought the imputation was not as serious as the appellant contended but considered it would cause ordinary people to think less of the appellant and therefore was unable to see how the jury could not have found it defamatory (paras 89 to 90). Judge of Appeal Muir agreed. Judge of Appeal Keane was not persuaded the jury’s conclusion (the imputation was conveyed by the letter, but was not defamatory) was not reasonably open to it. However he considered that if the imputation did make people think less of Mr O’Hara it would only be to a minimal extent which is relevant to the issue of qualified privilege.

Imputation 3

The Court considered that the imputation of rashness against Mr O'Hara was not such as to cause ordinary and reasonable or right-minded people to think the less of him (paras 53, 91).

Defence of Qualified Privilege

The Court of Appeal had to determine whether the trial judge was right to reach the conclusion that the qualified privilege defence had been established. Keane JA considered that the criticisms of the trial judge's decision were without substance and Fraser JA was not persuaded the trial judge had erred in any respect in finding the imputations lacked seriousness and were reasonable in the circumstances. Muir JA concurred.

The appeal was dismissed unanimously, with costs against Mr O'Hara.

This case can be viewed at: www.sclqld.org.au/qjudgment/2009/QCA/186

Implications of this case.

The law of defamation in Queensland is governed by the *Defamation Act 2005*, part of national uniform legislation governing the law of defamation. This case demonstrates that the well-settled test on whether a publication is defamatory is that it is actionable as defamation if it causes ordinary and decent people to think less of a person. Just because a criticism of a person is published does not necessarily mean it is defamatory. But if found to be defamatory, statutory defences may apply, e.g. qualified privilege may apply if the publication is to a person with an interest in receiving the information and publication is reasonable in the circumstances.

2.9.7 AUSTRALIAN BARTER CURRENCY EXCHANGE PTY LTD V UNITING CHURCH NSW TRUST ASSOCIATION LIMITED [2009] NSWSC 607 (2 JULY 2009) FILE NUMBER: 11739/2009

Mr David Cassaniti who was involved with several companies, including Australian Barter Currency Exchange Pty Ltd, borrowed about \$14 million through the Uniting Church NSW Trust Association Limited (the Uniting Church NSW) in 2004. In exchange for the loans, mortgages to the value of \$27 million were taken over 29 properties. When payment became due in 2006, Mr Cassaniti was in jail where he was detained until July 2008. At that time, the companies were placed in provisional liquidation. During this time, the loans remained unpaid and interest demands were not met.

This state of affairs prompted the Uniting Church NSW to serve notices on Mr Cassaniti under section 57(2)(b) of the *Real Property Act 1900* (NSW). Sale of the properties as permitted by section 58 was an option if he failed to comply with the lender's legitimate demands. For his part, Mr Cassaniti was hampered in his quest to refinance the loans by the fact his companies were in the hands of a provisional liquidator, Mr Robert Moodie. Alternative lenders were understandably reluctant to advance funds. The situation was further complicated by the fact that Mr Moodie had lodged caveats over the provisionally liquidated companies to ensure payment of his professional fees. These caveats were not removed until 27 May 2009. In addition, the Australian Securities and Investments Commission (ASIC) saw fit not to note Mr Cassaniti as a director in the companies' records again before 2 June 2009.

After Mr Cassaniti suggested a number of unworkable schemes to the Uniting Church NSW, it was decided in late January 2009, to auction five of the 29 properties on 2 and 8 April 2009. At the end of March Mr Cassaniti unsuccessfully sought to prevent

this action being taken. However, the properties were duly sold, reducing the debt to \$7.061 million and leaving the Uniting Church NSW in possession of surplus funds.

When the public auction of a further four properties on 11 June 2009, was proposed by the Uniting Church NSW, Mr Cassaniti sought an injunction to halt the sale of the three in Bathurst Street, Liverpool, although he was agreeable to the auctioning of a Baulkham Hills property. He maintained that not only was refinancing underway, but also the security offered by the properties was well in excess of the debt owed to the Uniting Church NSW. From its perspective, the Uniting Church NSW objected to the interference with the mortgagee's power of sale as well as the financial costs incurred in finding out about Mr Cassaniti's actions twenty four hours before the proposed sale, especially when he had known about the auction since 24 May.

Despite sympathising with the Uniting Church NSW's position, Justice Hoeben granted the injunction because there was no prospect of its facing financial loss and the refinancing of Mr Cassaniti's loans seemed assured. Costs, however, were awarded in the Uniting Church NSW's favour because of the short notice given of Mr Cassaniti's intentions.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NWSC/2009/607.html

2.9.8 WHITE CITY TENNIS CLUB LTD V JOHN ALEXANDER'S CLUBS PTY LTD AND ANOR [2009] NSWCA 114 (3 JUNE 2009) FILE NUMBER: 40038/09

White City, situated at Paddington in Sydney, was Tennis NSW headquarters prior to its relocation to Homebush in about 2000. From its establishment in 1948, the White City Tennis Club Ltd (the Club) operated a tennis club there. Later, it leased part of a building erected under the Centre Court in 1970. The most recent lease for a period of twenty five years was entered into on 1 October 1995. When it was decided to redevelop the stadium, Tennis NSW and the Club endorsed a Heads of Agreement on 19 January 2004, indicating the Club would have an option to buy the piece of land on which its operations were centred. Subsequently, on the 23 April 2004, John Alexander, the renowned international tennis player, approached the Club through his commercial arm, John Alexander's Clubs Pty Ltd (JACS), with a proposition for a Joint Venture Agreement (a revised version of an earlier submission). Tennis NSW then rescinded the Heads of Agreement regarding the land, and on 26 August 2004, it was announced that the land in question would be sold by public tender.

Despite this development, a Memorandum of Understanding (the MOU) was signed between the Club and JACS on 28 February 2005, with the club promising to continue to run a tennis club and JACS agreeing to develop a first-class sporting amenity at White City. Clause 3.7 of the MOU related specifically to pursuing an option to acquire the necessary land. After two previous attempts, another White City Agreement (the Agreement) was negotiated on 29 June 2005. The signatories included: the successful tenderer, Sydney Grammar School; Sydney Maccabi Tennis Club Ltd (Maccabi); the Club; and JACS. Amongst other matters, the Agreement provided an option for JACS to acquire land other than Maccabi's south of the stormwater channel before the end of the 2007 financial year. If JACS passed up the option, the Club would have the chance to do so.

JACS served a Notice of Termination of the MOU on 12 April 2006, citing the Club's failure to meet its obligations. Such grounds were strenuously denied by the Club which re-iterated its commitment to the MOU in writing on 16 August 2006.

On 27 June 2007, Poplar Holdings Pty Ltd (Poplar), a company of which John Alexander was the sole shareholder, bought the land available under option. According to the evidence, the company was set up purely to implement the option. However, the Club argued that any interest in this land was held on constructive trust for it. On initial trial in the Supreme Court, the judge did not accept this argument, and viewed the parties' negotiating abilities as being equally balanced and voluntarily employed. No pre-existing fiduciary duty had been violated.

The Club took the issue on appeal to the New South Wales Court of Appeal along with a demand that, for the payment of \$6.73 million (the amount paid by Poplar in exercising the option), the title and interest in the disputed land be transferred to the Club.

Justice Macfarlan, with whom Justices Giles and Basten agreed, pointed out that the White City Agreement had no material effect on the scope of the MOU. In addition, he concluded that the existence of a constructive trust was not dependent on whether the MOU was still in force, nor did it require a pre-existing fiduciary relationship between the parties. What was crucial, in His Honour's opinion, was that the Club had relinquished its own rights with respect to the land, trusting JACS to take up the option for their joint venture, or alternatively permitting the Club to utilise the option. To allow JACS to bypass the Club for its own aggrandisement was clearly unconscionable.

Clause 3.7.1 of the MOU dealt with using the option to procure the land on behalf of White City Holdings Limited (WCH), a company set up for that express purpose. Under that clause, the Club relied on JACS to honour its promise or risk not being able to maintain its link with White City through being ineligible to purchase the property. The words, 'on behalf of WCH', expressly indicated the existence of a fiduciary relationship whereby JACS must act in the Club's interest in WCH in any land transaction with Tennis NSW. In Justice Macfarlan's view, it made no difference whether JACS or its nominee, Poplar, secured the land as both companies were Mr Alexander's puppets. Since there was no mandate for JACS to promote its own interests, exercising the option in this manner was similarly improper for Poplar. Therefore, Poplar must hold the property on constructive trust for the Club.

Although Justice Macfarlan examined section 42(1) of the *Real Property Act 1900* (NSW) in regard to the position of the Club's unregistered interest, he believed that the transaction did not involve 'fraud' in the criminal sense. Nevertheless, he found that the Club had grounds of personal equity for objecting to Poplar's actions since Mr Alexander, through his companies, was trying to evade his responsibilities to the Club. As such, registration of Poplar's interest under section 42(1) did not prevent a constructive trust being imposed.

After commenting briefly on the inconclusiveness of the material relating to the repudiation of the MOU in the earlier trial, His Honour declared the existence of a constructive trust and ordered that, in exchange for \$6.73 million, Poplar transfer the land in question to the Club. He refused to entertain payment of any legitimate allowance to JACS and Poplar where their actions could be shown to be honest, as their requests were tardy and the Club had the right to prompt settlement.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/NSWCA/2009/114.htm

Implications of this case

The case involved an intricate set of arrangements and understandings between the parties and associated bodies that had evolved over some period of time. These

arrangements and understandings were set out in a MOU which was then argued to have been repudiated. The case demonstrates the importance of having all paperwork in order to be able to assert the terms of the agreement. With inconclusive material relating to the terms of the agreement equitable remedies were able to be relied upon. This means the court can look to the conduct of both parties and determine what would be conscionable in the circumstances.

2.9.9 AYAN V ISLAMIC CO-ORDINATING COUNCIL OF VICTORIA PTY LTD & ORS [2009] VSC 119 (3 APRIL 2009)

This case involved the alleged defamation of Mr Abdul Ayan through his association with a business named 'Aus-Halal', which purported to certify Halal meat. Via a letter sent to a number of customers in March 2001, written on official letterhead, the then Islamic Co-ordinating Council of Victoria Inc (the ICCV) (now the Islamic Co-ordinating Council of Victoria Pty Ltd) claimed that neither Aus-Halal nor, more particularly, Mr Ayan was authorised by the Australian Quarantine and Inspection Service (AQIS) to issue such certification. The ICCV was also critical of the establishment of another organisation called the Islamic Co-ordinating Council of Australia (the ICCA) which professed AQIS approval, since the ICCV, an amalgam of eleven Muslim groups, was the AQIS-endorsed organisation to oversee the slaughter of animals in accordance with Islamic religious traditions. In addition, the ICCV assured their customers that it would make certain that business would return to normal and they would not be disadvantaged by Mr Ayan's actions. Mr Ayan took exception to the claims and sought damages for defamation from the ICCV as well as from its chairman, Mr Ibrahim Mohammed, its vice-chairman, Dr Mir Mohammed Habib, and its secretary, Mr Ibrahim Yalcin.

Because Mr Habib and Mr Yalcin denied any knowledge of the letter's publication and were not at the relevant time holding positions of responsibility within the ICCV, Justice Beach of the Victorian Supreme Court cleared them of publishing any defamatory matter. However, the use of the ICCV letterhead with the chairman's signature clearly involved the other defendants in the letter's publication. With respect to the implication that Mr Ayan lacked AQIS's authority to perform his business activities, His Honour determined that the thrust of the letter was defamatory in that it caused damage to Mr Ayan's reputation in the broader community as well as encouraging avoidance of his services by fair-minded people. He found this to be so although the ICCV was primarily concerned with ensuring compliance with Islamic slaughter rites rather than tarnishing Mr Ayan's standing in the community.

As a defence, Mr Mohammed and the ICCV attempted to argue justification under section 25 of the *Defamation Act 2005* (Victoria) (the Act) on the basis that the letter's contents were substantially true. This defence found no favour with the judge, who criticized the poor articulation of the supposedly justifiable imputations. He especially highlighted the defendants' failure in their written criticisms to distinguish among interim, transfer and final certificates. Whilst authorization from AQIS was needed for the final certificate for export purposes, it was perfectly valid for Aus-Halal to issue the other certificates, a fact the ICCV's letter conveniently skimmed over.

In like manner to his dismissal of the defence of justification, Justice Beach rejected the defendants' attempts to apply the defence of qualified privilege from section 30 of the Act. They relied on an ICCV report produced in February 2001, in response to concerns about whether the processing procedures employed by Aus-Halal were genuinely Halal compliant. According to His Honour, since this report neglected to address the topic

of whether Mr Ayan held AQIS accreditation, there was no nexus between any of the privileged matters in the report which could have been made available to the appropriate abattoirs and the letter's defamatory allegations. Further, claims by the ICCV that Aus-Halal supplied export certificates could not be substantiated.

Justice Beach then reflected on the question of malice. Express malice overrides qualified privilege, but its establishment is unnecessary where the defence of qualified privilege has not succeeded. Such malice arises where there is actually an underlying motive to the claim of qualified privilege which prompts the defamatory remarks. His Honour maintained that express malice was evident in the defendants' publication of the letter critical of Aus-Halal and Mr Ayan. The defamatory imputations were clearly directed at dissuading Mr Ayan's customers, both existing and potential, from employing Aus-Halal's Muslim slaughtermen and supervisors. In addition, these statements were designed to thwart Mr Ayan's legitimate right to provide interim and transfer certificates simply because the ICCV saw his participation in these processes as compromising the integrity of the final certificates.

Therefore, Justice Beach found that Mr Ayan had been defamed in the letter published by the ICCV with the consent of its chairman, Mr Ibrahim Mohammed. Because of the letter's disastrous effects on his reputation and the profitability of his company, Mr Ayan was awarded \$125,000 in damages plus interest.

This case may be viewed at: www.austlii.edu.au/au/cases/vic/VSC/2009/119.html

2.9.10 THE ARCHITECTS (AUST) PTY LTD T/AS ARCHITECTS AUSTRALIA V BETHANY BRISBANE INTERNATIONAL CHURCH INC [2009] QDC 56 (DISTRICT COURT OF QUEENSLAND, 11 MARCH 2009) FILE NO: 2217/07

The Architects (Aus) Pty Ltd Architects (Architects Australia) claimed that the Bethany Brisbane International Church Inc (the Church) owed them \$71,500 in fees for architectural design work undertaken in 2006–2007. This claim was refuted by the Church. In October 2006, according to Architects Australia, an unsigned, standard Royal Australian Institute Client and Architect Agreement outlining a proposed building program was sent to the Church's board. Schedule 6 of that agreement set out the professional fees involved. The designs were to include a worship cum recreational facility as well as student accommodation and the required parking at the Church's Eight Mile Plains site. A Church representative, Mr Hanny Yasaputra, accepted the contract over the telephone in November 2006, and authorised Mr Kildey, the architect in charge of the job, to commence work.

A number of meetings were held between September 2006, and March 2007. From the outset, at the 25 September meeting, Mr Kildey made it clear that his fees would range between 10% and 13% of the cost of the development. He also pointed out that, in his estimation, the project would prove to be expensive. Mr Yasaputra indicated that the Church's budget was approximately \$900,000, a figure Mr Kildey dismissed as inadequate. Unaware that the \$900,000 represented the limit of the Church's funds, Mr Kildey agreed to undertake some preliminary planning on a good faith basis prior to formal entry into a contract, to allow the Church to effect settlement of the Eight Miles Plains land.

With numerous revisions to the original proposals, Architects Australia submitted an estimated costing of \$1,628,650 in a letter dated 6 February 2007. One quarter of 10% of this amount, \$40,716.25, was owed to the firm for the successful completion of Stage 1, as outlined in Schedule 6. At a meeting on 20 March 2007, attended by both board and non-board members, the subject of the architectural firm's fees was specifically raised. Mr Yasaputra balked at the suggested figure, maintaining the development could be achieved less expensively. Subsequently, in April Mr Kildey offered a reduction in the existing professional fees which the Church failed to accept. After further consultation concerning the fee non-payment with Mr Henry Louw, one of the Church's non-board members, in late June Mr Kildey was informed that the Church wished to terminate the contract as the property development no longer seemed feasible. A last minute offer from the Church of \$15,000 for his professional services to date failed to sway Mr Kildey and he gave notice of placing the matter in his solicitor's hands on 27 June 2007.

The matter came before Judge Searles in the Queensland District Court. After commenting favourably on Mr Kildey's veracity, His Honour rejected the Church's attempt to argue that, according to paragraph 14 of the Board of Architects of Queensland Code of Practice, a contract for professional fees exceeding \$1,500 must be in writing. As there was no legal basis for this contention, the Church's reliance on section 28(b) of the *Associations Incorporation Act 1981* (Qld) was impossible. It had been its intention to claim that Mr Yasaputra had no authority, express or implied, to enter into such a written contract. Any notion that Mr Kildey's services were provided gratuitously was also rejected as far-fetched by the judge. No viable, architectural business could afford to embark on a commercial venture where payment was subject to the client's whim.

In the event an agreement between the Church and Architects Australia did exist, the Church's endeavour to invoke the clauses relating to misleading and deceptive practices under the *Trade Practices Act 1974* (Cth) or the *Fair Trading Act 1989* (Qld) proved unsuccessful too. His Honour declared that fee determination on a percentage basis was clearly delineated. The mention of hourly rates in Item 4 of Schedule 6 was not misleading as, from the outset, the Church was aware of the method to be used. Finally, he asserted that Mr Yasaputra possessed the authority to act on the Church's behalf and engage Architects Australia's services.

To determine more precisely what the architectural firm was owed, the judge relied on the evidence of Mr Simpson, an architect with 40 years experience. He stated that not only was Stage 1 complete, but also that Stage 2 was 65% finished, a total in fees of \$76,181.80. Judgment was entered for Architects Australia for \$83,312, inclusive of \$11,812 interest.

This case may be viewed at: www.austlii.edu.au/au/cases/qld/QDC/2009/56.html

Implications of this case

This case illustrates that all business arrangements need to be clearly understood and put in writing to avoid expensive litigation. The informal way in which the board of the Church engaged professional services for such a major project also brings in to question the governance procedures.

**2.9.11 GRIFFITHS & ORS V JOHN FAIRFAX PUBLICATIONS & ANOR
[2009] NSWSC 100 (3 MARCH 2009) FILE NUMBER: 20301/01**

These proceedings arose out of a s.7A trial in September 2005. According to the definitional section of the New South Wales Supreme Court Common Law Practice Note 4, such a trial involves, 'A trial of issues provided by section 7A(1)(3) of the *Defamation Act 1974* (NSW). Although the other parties were unsuccessful, the Foundation for Humanity's Adulthood (the FHA) was found to have been defamed in a *Sydney Morning Herald* article titled 'Prophet of the Posh' which was published on 22 April 1995. The defamatory allegation involved a statement claiming that, 'The FHA's demands on its members tore their families apart.'

On 14 February 2008, John Fairfax Publications Pty Ltd, the publishers of the *Sydney Morning Herald*, indicated their intention to dispute this finding which the FHA clearly had an interest in upholding. Later, on 9 December 2008, the publishers' solicitors sought from the FHA security for the costs of the trial and expenditures incurred as a result, to the value of \$500,000. Because the FHA claimed payment of such a sum would make it impossible financially to mount its own case, the request was declined. As a result, the matter of whether the FHA should provide security for costs fell to the Supreme Court for determination in March 2009.

The FHA argued that, in 1990, it was incorporated as a company limited by guarantee whose interest lay in human evolution and biological development, with a specific focus on the present problems affecting *homo sapiens* and how they could be addressed. Since the beginning of the 2001 financial year, the FHA has been regarded as income tax exempt because the Australian Tax Office deems it a charitable institution. The FHA is reliant for its funds on donations and holds no interest in land.

Donations as a source of income are notoriously unreliable, a fact of which Justice Nicholas was acutely aware. Under the *Uniform Civil Procedure Rules 2005* Pt 42, r.42.21(1)(d) or, in the alternative, under section 1335(1) of the *Corporations Act 2001* (Cth), security for costs is awarded where there is reason to believe a corporation will be unable to pay the costs of a defendant who is successful. At the time in question, the FHA's net assets were \$777,115 with an estimated \$329,641.22 in cash in hand. Given this base figure, His Honour was not satisfied that there would be sufficient funds in the future to cover John Fairfax Publications Pty Ltd's costs if the Court so ordered.

To the FHA's claim that ordering security for costs would frustrate its litigation, the judge replied that the evidence suggested there was everylikelihood that the voluntary donations which had financed its legal proceedings so far, would continue to do so. Therefore, Justice Nicholas ordered that the FHA pay the \$500,000 in \$100,000 instalments as security for costs prior to the hearing already set down for 10 August 2009.

This case may be viewed at: www.austlii.edu.au/au/cases/nsw/supreme_ct/2009/100.html

3.0 STATE AND TERRITORY LEGISLATION REVIEW 2008

3

3.1 COMMONWEALTH

The relevant Acts and Regulations in the Commonwealth (or federal) jurisdiction include:

- *Corporations Act 2001*
- *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
- *Extension of Charitable Purpose Act 2004*
- *Income Tax Assessment Act 1997*

In addition, many other federal laws apply to nonprofit organisations such as those governing employment of staff, anti-discrimination, using digital communication, sending funds overseas and being in receipt of government agency funding.

Taxation issues specific to nonprofit organisations are covered in detail below; see '4.0 ATO Updates'.

Changes to Prescribed Private Funds

Since 2001, it has been possible to establish privately controlled trusts known as Prescribed Private Funds (PPFs). They were entitled to a number of taxation concessions including deductible gift recipient (DGR) status and income tax exemption. Their sole purpose was to provide money, property or benefits to a range of other DGRs such as public benevolent institutions, health promotion charities, overseas aid funds, and organisations on the register of cultural organisations and the register of environmental organisations. After a review by Treasury, legislation was introduced to alter the PPF regulatory regime and on 1 October 2009 a new regime began, with PPFs now known as Prescribed Ancillary Funds (PAFs). More detailed coverage of the changes can be found below: see '5.1 Private Ancillary Funds'.

Regulation of trustee companies

In July 2008, the Council of Australian Governments (COAG) agreed that the Commonwealth would assume responsibility for the regulation of trustee companies. Trustee companies have previously been regulated at an entity level under State and Territory laws. These laws also allow private trustee companies to enter the market for personal trustee and estate administration work and facilitate the establishment of long term and perpetual trusts, such as charitable trusts. This makes regulation of trustee companies of interest to the nonprofit sector.

Schedule 2 of the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* inserted Chapter 5D (Licensed trustee companies) into the *Corporations Act 2001*. Chapter 5D implements the transfer of trustee company regulation from the States and Territories to the Commonwealth. The amendments are scheduled to commence on 6 May 2010.

The policy intention is that the Commonwealth will have exclusive responsibility for 'entity level' regulation of trustee companies' traditional services, including licensing those companies and regulating the fees they can charge for those traditional services. At the same time, State and Territory legislation, and the rules of common law and equity, will continue to govern the functions and powers of trustee companies. Also, it is intended to preserve rules which apply generally to persons such as trustees, executors, administrators and guardians (including trustee companies when they perform those roles).

Many jurisdictions previously imposed caps on the fees that trustee companies could charge. In relation to charitable trusts, under Division 4 of Chapter 5D there is 'grandfathering' of fees charged to existing clients, and 'capping' of fees charged to

new clients. In relation to new trusts and estates other than charitable trusts, there is deregulation, subject to requirements that the company's fee schedule be disclosed on the internet, and that trustee companies charge no more than the fees specified in their published fee schedule immediately before the trustee company started to provide the service. The government has indicated that it will review the fees arrangements for both existing and new charitable trusts after the provisions have been in operation for two years.

3.2 NEW SOUTH WALES

The relevant Acts and Regulations in New South Wales are:

- *Associations Incorporation Act 1984*
- *Associations Incorporation Regulation 1999*
- *Associations Incorporation Act 2009*
- *Association Incorporation Regulation 2009*
- *Charitable Fundraising Act 1991*
- *Charitable Fundraising Regulation 2008*
- *Charitable Trusts Act 1993*
- *Lotteries and Art Unions Act 1901*
- *Lotteries and Art Unions Regulation 2007*

Legislation in New South Wales had a notable change in 2009, with the enactment of the *Associations Incorporation Act 2009* and *Associations Incorporation Regulation 2009*, which will replace the *Associations Incorporation Act 1984* and the *Associations Incorporation Regulation 1999*. The new Act 2009 was passed by State Parliament on 31 March 2009 and given royal assent on 7 April 2009 to commence from a date to be proclaimed. The new Regulations are currently still in the public consultation phase. It is expected that this Act and Regulation will commence in early 2010, at which time the 1984 Act and 1999 Regulations will be repealed.

Once commenced, the Act will streamline and simplify regulations and requirements surrounding the incorporation of nonprofit associations. One key development is the introduction of a two-tiered system based on a financial threshold to be specified in the forthcoming regulations, relieving smaller organisations of administrative burdens such as yearly audits that are required of larger organisations (sections 42 to 49). The legislation also introduces makes it an offence for committee or board members to misuse their positions or information gained through their positions, which should provide better protection for organisations from dishonest board or committee members (sections 32 and 33).

Other reforms aimed at simplifying the requirements of associations include changes to allow postal voting and to enable general meetings to be held in multiple locations, through the use of technology such as teleconferencing (sections 30(2) and 38(1) (b)). The Act also enables appeals from certain decisions of the Director-General to the Administrative Decisions Tribunal (section 104). Technical changes include the substitution of 'constitution' for 'rules' which appeared in the 1984 legislation, and a clearer definition of 'pecuniary gain', reducing the ambiguity associated with determining nonprofit status for some associations.

For details of Acts and regulations in NSW see:

www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0

3.3 VICTORIA

The relevant Acts and Regulations in Victoria are:

- *Associations Incorporation Act 1981*
- *Associations Incorporation Regulations 2009* (including Jan 2010 amendments)
- *Charities Act 1978*
- *Charities Regulations 2005*
- *Fundraising Act 1998*
- *Fundraising Regulations 2009*
- *Lotteries Gaming and Betting Act 1966*
- *Gambling Regulation Act 2003*
- *Gambling Regulation Regulations 2005*

In line with its *Strengthening Community Organisations Action Plan*, the Victorian government made many changes to the laws regulating the operation of nonprofit groups operating in its state, with amendments to the incorporated associations legislation, as well as bingo and fundraising laws. Further significant changes to the incorporated associations' regime are expected in 2010.

Incorporated associations

As the *Associations Incorporation Regulations 1998* had reached their sunset date, they were replaced by the *Associations Incorporation Regulations 2009* (enacted on 28 July in substantially the same form as the 1998 regulations). Some subsequent changes were made in 29 September and 19 January 2010. A prescribed association (i.e. having gross receipts over \$200,000 or assets over \$500,000) now has to prepare financial statements in accordance with the accounting standards applicable under the *Corporations Act 2001* (Cth), i.e. the AASB Accounting Standard (see reg. 13A). There are also new provisions about security to be given by liquidators (reg. 14A); and allowing the committee to fine members for breach of the rules (see reg. 18A and clause 7 of model rules).

The *Associations Incorporation Amendment Bill 2008* was passed on 7 April 2009. Some of the main reforms are listed in the following table.

TABLE 1 REFORMS IN AIA BILL 2008

Topic and commencement	Comments
'Public officer' to 'secretary' <i>11 Dec 2011 unless earlier date</i>	This change (and several of the other changes below) will require amendments to the model rules so commencement has been delayed pending a re-write of the rules in 2010.
Meeting minutes <i>11 Dec 2011 unless earlier date</i>	The rules of an incorporated association will be required to cover a number of new matters in relation to the keeping of, and access to, minutes of meetings.
Return of documents held <i>7 April 2009</i>	All office-holders, former office-holders or members of an incorporated association are required to return any documents belonging to an incorporated association within 28 days if they cease to hold office or be members of the organisation. The association can apply to the Magistrates' Court to ensure performance.
Special resolutions <i>7 April 2009</i>	A notice of a proposed special resolution must set out the full details of the proposed special resolution and must be provided to members at least 21 days in advance. The notice must also make it clear that the resolution is being proposed as a special resolution.
Documents provided to Registrar and changes to rules to be approved by Registrar <i>7 April 2009</i>	The Registrar (Consumer Affairs Victoria) has a new power to refuse to receive any document submitted by an incorporated association if the Registrar believes the document is not a valid document of the incorporated association. If an incorporated association submits a special resolution for alteration of its rules to the Registrar (under s 22), the Registrar can accept some, only, of the proposed alterations.
Statutory management <i>7 April 2009</i>	This is a completely new remedy, likely to be of assistance to financially viable associations experiencing some form of serious dysfunction. The Registrar can investigate the affairs of an association, including its functioning and financial condition. Following an investigation, if the Registrar considers it is in the interests of members, creditors or the public, the Registrar can apply to the Magistrates Court for the appointment of a 'statutory manager' to conduct the affairs of the association. If a statutory manager is appointed, all members of the committee of management (or governing body) immediately cease to hold office. A statutory manager has a range of powers to deal with the association's affairs.

<p>Actions in Magistrates Court</p> <p>7 April 2009</p>	<p>There are a number of new actions that can be taken to the Magistrates Court:</p> <p>the Registrar can apply for an order restraining the association from doing an act that is outside its statement of purposes, if the Registrar is satisfied it is in the 'public interest' to do so;</p> <p>a member (or, in more limited cases, a former member) can apply for an order preventing an association from engaging in oppressive conduct.</p>
<p>Voluntary cancellation of registration and voluntary administration</p> <p>7 April 2009</p>	<p>Small incorporated associations with less than \$10,000 in assets (and which meet other requirements) can apply to the Registrar for voluntary cancellation of their registration.</p> <p>The voluntary administration provisions of the <i>Corporations Act 2001</i> (Cth) will now apply to Victorian incorporated associations.</p>
<p>Removal of auditor</p> <p>7 April 2009</p>	<p>An auditor can be removed by a resolution of members at a general meeting. Notice of the proposed resolution must be given to members at least 2 months in advance of the meeting and copies must be provided to both the auditor and the Registrar as soon as possible.</p>
<p>Surplus assets on winding up</p> <p>Rule for existing association made before 7 April 2009 valid</p>	<p>A new provision now prevents the surplus assets of an incorporated association from being distributed to members on voluntary winding up, unless the 'member' is a body corporate (like an association or a trust) which itself cannot distribute assets to its members.</p>

Fundraising

As foreshadowed in the 2008 Legal Almanac, the *Fundraising Appeals and Consumer Acts Amendment Act 2008* came into force on 11 February 2009 (with a few provisions commencing later in 2009). The name of the principal Act has been changed to the *Fundraising Act 1998*. Objects have been introduced to the Act, stated to be for 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'.

The definition of a fundraising appeal has been changed to recognise that an appeal can be an on-going activity, rather than just a one-off event (section 5(2)(ca)).

New section 12A and 12B of the Act increase the disclosure requirements for businesses and fundraisers. Under section 12A a business which represents that a portion of money received in return for goods or services is to be applied for benevolent or beneficial purposes must disclose the dollar or percentage amount to be used for those purposes. The disclosure must be made in writing to the person to whom the goods or services are to be supplied before the contract of 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. Under section 12B, other disclosure requirements can be imposed on registered fundraisers. Other changes are also aimed at better transparency for the benefit of donors, such as ensuring direct debit forms allow donors to work out the nature of the arrangement they are signing up for.

Community and charitable gaming (bingo)

With effect from 25 November 2009 the rules for Victorian community and charity organisations that wish to conduct bingo sessions were changed. Now if a community group is a 'declared' organisation, it is not required to obtain a minor gaming permit to conduct a bingo session. Instead, a declared community organisation need only complete a form and lodge it with the Victorian Commission for Gambling Regulation (VCGR) at least seven days before the commencement of the bingo game(s). Once the community organisation notifies VCGR of the intended bingo session, it will receive a 'Notice of Authorised Bingo Sessions' that must be prominently displayed at the entrance to the bingo venue. If not already 'declared', an organisation may apply to be 'declared' at the same time as it applies to actually conduct bingo, however the application for becoming a declared organisation should be lodged at least 28 days before the commencement of the bingo game(s). VCGR has power to make rules for the game and conduct of bingo. Rules have been published and are available on the VCGR website (www.vcgr.vic.gov.au). An organisation can also apply to the VCGR to vary the rules. See *Gaming Regulation Amendment (Bingo) Regulations 2009* and, for VGR rules, the *Victorian Government Gazette* No. S 419, 20 November 2009.

The *Gaming Regulation Further Amendment Bill 2009* (21 October, 2009) provides that any prize of more than \$1,000 must be paid by cheque (not payable to 'cash') (Part 7) and made some amendments to the public lotteries provisions (see Part 4).

Details of all Victorian Acts and Regulations (including amending Acts and regulations) can be found at: www.legislation.vic.gov.au

PilchConnect's free monthly e-bulletin provides updates of Victorian legislative changes and proposed law reforms. (See www.pilch.org.au/PCLawReform).

3.4 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*

During 2009 the Queensland government introduced major reforms in respect of the structure of its civil and administrative review tribunals and the Freedom of Information regime. The reforms in respect of the tribunals saw the introduction of one comprehensive Tribunal to cover all civil and administrative matters in Queensland. The Queensland Civil and Administrative Tribunal (QCAT) has amalgamated jurisdiction of 23 previous bodies (18 of which have been abolished) and provides a single gateway for civil and administrative reviews. QCAT commenced operation on 1 December 2009. The *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* amended 216 pieces of Queensland legislation to give QCAT jurisdiction for a wide range of matters. The conferred jurisdiction includes changes of jurisdiction for administrative review procedures and amendments have been made to the following relevant Acts:

Associations Incorporation Act 1981

- Amendments to the headings in Part 12. Previously this Part was headed 'Reviews and appeals'; it is now titled simply 'Reviews'. Omitting the words 'and appeals' reflects the fact that, under QCAT, appeals from administrative decisions are known as 'reviews'. The heading of Division 1 was also amended: previously titled 'Review of decisions', it is now titled 'Internal review', making clear that reviews under the Division are internal reviews by the chief executive. Reviews to QCAT are external reviews.
- Sections 111 and 112 were amended to confer on QCAT the jurisdiction previously held by the District Court in respect of review of decisions about the incorporation of associations.

Charitable and Non-Profit Gaming Act 1999

- Under Part 8 of the Act, reviews of decisions of the chief executive including: matters in respect of licences; appointing an administrator; approvals in relation to gaming equipment; or forfeiture to the State, are now to be made to QCAT (see section 174).
- Appeals from QCAT under this Act can only be made to the Court of Appeal (not to the Appeal Tribunal) on a question of law

For full details of the operation of QCAT go to www.qcat.qld.gov.au.

Reforms in relation to the right of access to government information have resulted in two new Acts which were introduced during 2009. These Acts, namely the *Right to Information Act* and the *Information Privacy Act* have relevance to nonprofit organisations, especially those who are funded by or contract to provide services for the government and deal with personal information. A more comprehensive discussion on the impacts of these reforms on the nonprofit sector is included below under Practitioner Perspectives: see '5.7 Right to Information and Information Privacy'.

Details of all Acts and Regulations in Queensland can be found at:
www.legislation.qld.gov.au/Acts_SLs/Acts_SL.htm

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*

During 2009 there were no material changes to the relevant law in Western Australia. A Bill currently before the Western Australian Parliament will amend the formatting of the *Associations Incorporation Act* and the *Charitable Collections Act* along with numerous other State Acts. The *Standardisation of Formatting Bill 2009*, was introduced into the Legislative Council on 18 August 2009, to bring uniformity of layout, style and formatting across the legislation database, in order to improve readability and search functions. Having a standard format will help to make legislation more user-friendly, improving access to justice.

Western Australia (along with South Australia and the Northern Territory) also enacted its updated payroll tax laws in accordance with the national tax harmonisation project. Of relevance to the charity and nonprofit sector is the expansion of wage exemptions included in the assessment of payroll tax. The exemption now includes a nonprofit organisation having a charitable purpose as its sole or dominant purpose (but excludes educational institutions) and takes into account wages paid for work undertaken to carry out that charitable or benevolent purpose. An exemption is also included for the wages of workers who volunteer as fire-fighters or for emergency relief.

The review of the *Associations Incorporation Act* is still continuing. In November 2009 it was announced that the feedback from the consultation period indicated there were some contentious matters relating to the proposal to introduce a three-tiered structure of financial accountability and the obligation to appoint a public officer. It is now proposed that a two-tier structure be introduced, where Tier 1 associations have revenue of less than \$500,000 per annum, with Tier 2 having revenue of \$500,000 or greater per annum. Tier 1 associations will not be required to have their financial statements audited but will still have to present those statements in a manner which can easily identify the financial solvency of the association. Auditing of financial accounts for Tier 2 associations will be mandatory. It is also proposed that associations will no longer be required to appoint a public officer as this is considered to be too great a burden on smaller associations. It is expected that a new Bill will be drafted and presented to Parliament sometime later in 2010. Details may be found at: www.commerce.wa.gov.au/associations

Details of all Acts and Regulations for Western Australia can be found at www.slp.wa.gov.au/legislation/statutes.nsf/default.html

3.6 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*

During 2009 the *Associations Incorporation Act* was amended by the *Statute Amendment (Public Sector Consequential Amendments) Act 2009*. This amendment removed section 49B which had provided immunity from liability for departmental officers engaged in the administration or enforcement of the Association Act. The immunity still exists but is now included in the *Public Sector Act 2009* which commenced operation on 1 February 2010 and provides a comprehensive civil immunity for public sector employees which acting under official powers or exercising official functions.

Other related legislation which is of interest is the *Mount Gambier Hospital Hydrotherapy Pool Fund Act 2009*. This Act came into operation on 16 April 2009 to overcome a difficult situation in relation to funds collected for a project that has been abandoned. The Mount Gambier and Districts Health Service Incorporated established the Mount Gambier Hospital Hydrotherapy Pool Fund in 2000 to raise \$1 million to build a hydrotherapy pool. By June 2003 a total of \$270,769.00 had been raised but as it was well short of the required construction costs, the proposal was abandoned. The Mount Gambier and

Districts Health Service is an institution listed under Schedule 2 of the *Public Charities Funds Act 1935*. Section 11 of this Act provides in these circumstances all funds donated vest immediately in the Commissioners for Charitable Funds and as such these monies would be held under a charitable trust administered by the Commissioners. Pursuant to the *Public Charities Funds Act*, the charitable trust established would only be able to disburse the income of the trust not the capital and would be unable to refund donations. The local community believed the monies donated should be returned to the donors or used for an alternative purpose as there was no likelihood of the pool ever being built. The *Mount Gambier Hospital Hydrotherapy Pool Fund Act* accedes to the communities wishes and allows for the return of donations were applicable, and the utilisation of the funds for an alternative purpose. The Act transfers the funds held to County Health SA Hospital Incorporated to administer the funds as set out in the Act including finding an alternative community purpose.

This Act highlights the shortcomings of the *Public Charities Funds Act* in circumstances where there is a strong community wish to redirect funds of an abandoned project for the benefit of the community.

South Australia (along with Western Australia and the Northern Territory) enacted new payroll tax legislation in 2009 in accordance with the national scheme tax harmonisation project. Of relevance to the charity and non-profit sector is the expansion of wage exemptions included in the assessment of payroll tax. The exemption now include a nonprofit organisation having a charitable purpose as its sole or dominant purpose (but excludes educational institutions) and takes into account wages paid for work undertaken to carry out that charitable or benevolent purpose. An exemption is also included for the wages of workers who volunteer as fire-fighters or emergency relief.

Details of all Acts and Regulations for South Australia can be found at:
www.legislation.sa.gov.au/index.aspx

3.7 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 2009.

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

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 above listed legislation during 2009.

However as part of the national tax harmonisation program to reduce payroll tax compliance costs for businesses, the Northern Territory government introduced its new *Payroll Tax Act 2009*. Pursuant to the agreement of all States and Territories, the new provisions were to take effect from 1 July 2009. New South Wales, Victoria and Tasmania had enacted provisions in accordance with the harmonisation program in 2008. Queensland already had consistent provisions in place. At the time the Northern Territory legislation was introduced, South Australia was moving towards fully harmonising its payroll tax legislation as was Western Australia (see above). The NT Act was assented to on 25 June 2009 and commenced on 1 July 2009. The new *Payroll Tax Act* extends existing payroll tax exemption for wages paid by religious institutions and public benevolent institutions to include nonprofit organisations that have a sole or dominant purpose that is charitable, benevolent, philanthropic or patriotic. The exemption is conditional on the wages being paid to a person who is exclusively engaged in work of a religious, charitable, benevolent, philanthropic or patriotic nature. Payroll tax exemptions are also extended to employees participating in voluntary work for bushfires or emergency relief.

Details of all Acts and Regulations for the NT can be found at:
www.nt.gov.au/dcm/legislation/current.html.

3.9 AUSTRALIAN CAPITAL TERRITORY

The relevant Acts and Regulations in the ACT are:

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

There were a number of amendments to the relevant legislation in the ACT during 2009.

The *Associations Incorporations Act 1991* was amended (with effect from 11 September 2009) to allow the Registrar-General to keep confidential the residential address of a committee member of an association. Application can be made to the Registrar-General who has the discretion whether to afford the applicant confidentiality as requested.

Further amendments were made to the *Associations Incorporation Act* to incorporate the recommendations of the Standing Committee on Public Accounts (Report No 17 of 2008) with regard to incorporated associations. The amendments extended the circumstances under which the Registrar-General can begin the process for cancelling an association's incorporation under section 93, to include:

- Where the association has failed to submit an annual return for each of the previous two years (previously this was three years);
- where, for the previous three years, the association has filed an annual return with qualified audits where the auditor is unable to affirm whether or not the association has complied with the accounting requirements and other provisions of the Act.

Other situations where the Registrar-General may instigate cancellation remain, for example where an association has not convened an AGM for the previous three years.

The amendments were contained in the *Justice and Community Safety Legislation Amendment Bill 2009 (No 2)*, and took effect from 29 September 2009.

The *Charitable Collections Act 2003* section 7, was amended to clarify the activities that are exempt from the operations of the Act. Up to this point the *Charitable Collections Regulation 2003* set out the coverage of the Act, in particular, that entities that do not solicit donations or that do not conduct collections are not bound by the *Charitable Collections Act* simply because they receive a donation. The exemption is now included in the text of the Act (section 7) itself to ensure that there will be no dispute when reading the provisions of the Act that these sorts of activities are exempt from the requirements of the Act. (The amendments were contained in the *Justice and Community Safety Legislation Amendment Bill 2009 (No 2)*).

The new *Unlawful Gambling Act 2009* is awaiting commencement. It replaces the *Unlawful Games Act 1984* and two other outdated Acts, namely, the *Gaming, Wagers and Betting Houses Act 1901* and the *Gaming and Betting Act 1906*. Once proclaimed it will be the principal legislation regulating gambling in the ACT, including charitable gambling. The provisions of this Act were developed following a public review of the *Unlawful Games Act 1984* by the Gambling and Racing Commission. The *Unlawful Gambling Act* provides that all gambling in the ACT is unlawful except to the extent it is permitted by legislation. Approved charitable fundraising through games will be permitted under certain circumstances and under certain controls. The Act recognises that fund-raising activities are an important part of the community but the provisions seek to ensure there is integrity in any fund-raising gambling activities. The draft regulation dealing with the issue of charitable gambling sets out the nature of record keeping and reporting that will be required.

Details of all Acts and Regulations for the ACT can be found at: www.legislation.act.gov.au

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

In 2009 the ATO:

- released its views on the Word Investment case (High Court) and the Victorian Women's Lawyers Association case (Federal Court). Decision Impact Statements were released for both cases, and Taxation Rulings TR2005/21 and TR2005/22 are under review as a result of the Courts' decisions;
- prepared guidelines and materials for the new deductible gift recipient category of Private Ancillary Funds (formerly Private Prescribed Funds), which commenced on 1 October 2009;
- won the Barganna case and the Aid/Watch Case (casenotes for both of these cases can be found in the Casenotes part of this Legal Almanac, under the Taxation heading);
- allowed deductions for the Victorian bushfires, Italian earthquake, Taiwan typhoon, Samoan earthquake and tsunami, earthquake damage in Sumatra, and the tropical storm in the Philippines.

The ATO also has a nonprofit news service readers can subscribe to. Below are articles from 2009, which can be viewed at www.ato.gov.au/nonprofit/pathway.asp?pc=001/004/020.

Non-Profit News Service No. 0261 – Proposed amendments relating to higher education providers and deductible gift recipient (DGR) status

Dec 2009. Treasury is inviting comments on proposed amendments to the tax law. The amendments include varying the requirements for DGR endorsement under the categories 'Higher education institution' and 'Affiliated residential educational institution'.

Non-Profit News Service No. 0260 – Rewrite of Part 3 of the Charities consultative committee – resolved issues document

Dec 2009. Part 3 of the Charities consultative committee resolved issues document has been updated.

Non-Profit News Service No. 0259 – Productivity Commission releases draft report on the contribution of the not-for-profit sector

Nov 2009. On 14 October 2009, the Productivity Commission released its draft report on the contribution of the Australian not-for-profit sector.

Non-Profit News Service No. 0258 – New products released for private ancillary funds

Oct 2009. The Tax Office has released new products to assist organisations seeking deductible gift recipient status under the new category for private ancillary funds effective from 1 October 2009.

Non-Profit News Service No. 0257 – Donations to help disaster victims in Samoa, the Philippines and Sumatra

Oct 2009. We provide information for individuals and organisations wanting to collect funds or make donations to help victims of the recent disasters in Samoa, the Philippines and Sumatra.

Non-Profit News Service No. 0256 – Court decision confirms Tax Office’s view on what is a charitable institution

Oct 2009. On 23 September 2009, the Full Federal Court of NSW ruled in favour of the Tax Office in its decision in the case of Aid/Watch Incorporated.

Non-Profit News Service No. 0255 – Government consultation on GST reforms – non-profit sub-entities

Sep 2009. The Assistant Treasurer recently released a second consultation paper on GST reforms that include non-profit sub-entities accessing the same GST concessions as parent entities. Consultation closes 9 October 2009.

Non-Profit News Service No. 0254 – Prescribed private fund information return for the period 1 July 2008 to 30 June 2009

Sep 2009. The prescribed private fund information return for the period 1 July 2008 to 30 June 2009 is now available on our website. The return forms and their instructions will not be mailed out this year.

Non-Profit News Service No. 0253 – Private ancillary funds: legislation passed

Sep 2009. Tax Laws Amendment (2009 Measures No 4) Bill 2009 has been passed and awaits royal assent. The bill amends the tax law to improve the integrity of prescribed private funds (PPFs), renamed private ancillary funds (PAFs) under the new framework.

Non-Profit News Service No. 0252 – Revocation of endorsement as a tax concession charity

Sep 2009. When a charitable fund is not applied to the purpose for which it was established, its charity endorsement may be revoked. This article discusses recent compliance activities undertaken by the Tax Office in this area.

Non-Profit News Service No. 0251 – Support for victims of Typhoon Morakot in Taiwan

Aug 2009. The Assistant Treasurer has announced his decision to recognise Typhoon Morakot in Taiwan as a disaster for the purposes of tax deductibility of donations.

Non-Profit News Service No. 0250 – Compliance Program 2009–10 released

Aug 2009. On 6 August, Tax Commissioner Michael D’Ascenzo released the Compliance Program 2009–10. The compliance program contains a non-profit organisations chapter that outlines the key priorities and activities for the non-profit market segment.

Non-Profit News Service No. 0249 – Addendum to GSTR 2006/9 Goods and services tax: supplies

Jul 2009. We recently released Goods and Services Tax Ruling GSTR 2006/9A2 – Addendum. It further clarifies and gives examples of the Tax Office view on multiparty arrangements, especially the third party proposition.

Non-Profit News Service No. 0248 – Deductibility of management fees – High Court decisions (Spriggs & Riddell)

Jul 2009. On 18 June 2009, the High Court handed down its decisions in Spriggs v. FC of T and Riddell v. FC of T. The court allowed the taxpayers’ appeals to deduct management fees for negotiating contracts with new clubs.

Non-Profit News Service No. 0247 – Recent case: fund denied charitable status

Jul 2009. On 12 June 2009, the Federal Court handed down its decision in the case Commissioner of Taxation v Bargwana.

Non-Profit News Service No. 0246 – Private ancillary funds: legislation introduced and draft guidelines released

Jul 2009. On 25 June, legislation was introduced into parliament to establish a comprehensive legal framework for private ancillary funds (PAFs). Draft guidelines on how the new PAF framework will apply were also released for public consultation.

Non-Profit News Service No. 0245 – GST: Change in use of goods and services

Jul 2009. If the creditable purpose of goods and services changes, you are required to make an adjustment to the amount of GST credits previously claimed.

Non-Profit News Service No. 0244 – Refund of franking credits mailout

Jun 2009. On 19 June 2009 the Tax Office mailed the 2008–09 refund of franking credits application package to non-profit organisations that received a refund of franking credits in the prior year.

Non-Profit News Service No. 0243 – New ruling SGR 2009/2 on the meaning of ‘ordinary time earnings’ and ‘salary or wages’

Jun 2009. A new superannuation guarantee ruling SGR 2009/2 has been released on the meaning of the terms ‘ordinary time earnings’ and ‘salary or wages’. The ruling includes easy-to-follow examples and replaces SGR 94/4 and SGR 94/5.

Non-Profit News Service No. 0242 – Decision impact statements released: Word Investments Ltd and Victorian Women Lawyers’ Association Inc

May 2009. The Commissioner has released decision impact statements outlining his position in relation to the case decisions in Word Investments Ltd and Victorian Women Lawyers’ Association Inc.

Non-Profit News Service No. 0241 – Updated fringe benefits tax (FBT) web products

May 2009. Provides a link to four fringe benefits tax (FBT) web products that have been recently updated to help you meet your FBT obligations.

Non-Profit News Service No. 0240 – 2009–10 Budget: measures relevant to non-profit organisations

May 2009. The Government has announced several measures that are relevant or of interest to non-profit organisations in the 2009–10 Budget.

Non-Profit News Service No. 0239 – Education tax refund for approved care organisations

Apr 2009. The education tax refund is a new tax offset approved care organisations (ACO) can claim for the eligible education expenses they incur for each child in their residential care who is in primary or secondary school.

Non-Profit News Service No. 0238 – Support for victims of recent Italian earthquake

April 2009. The Assistant Treasurer has announced his decision to recognise the 2009 Italian earthquake as a disaster for the purposes of tax deductibility of donations.

Non-Profit News Service No. 0237 – Productivity Commission to review the contribution of the not-for-profit sector

April 2009. The government has announced the Productivity Commission will examine the not-for-profit sector’s contribution to Australian society, how their contributions are currently measured and obstacles to maximising their contributions to society.

Non-Profit News Service No. 0236 – Support for victims of recent Victorian bushfires

April 2009. The Treasurer and Assistant Treasurer have declared the recent Victorian bushfires as a disaster for the purposes of tax deductibility of donations.

Non-Profit News Service No. 0235 – GST and gambling activities

Mar 2009. In most cases, gambling sales your organisation makes (such as lotteries or gaming machine activity) are taxable. You only apply GST to your margin on these taxable gambling sales – not to each individual sale.

Non-Profit News Service No.0234 – Guidance for non-profit organisations on counter-terrorism financing

Mar 2009. The Attorney-General's Department has released a draft guidance document to assist NPOs to protect themselves from the risk of terrorism financing. The Attorney-General's Department encourages interested parties to provide their comments.

Non-Profit News Service No.0233 – Legislation tabled: proposed changes to Australian disaster relief funds

Feb 2009. Proposed amendments tabled in Parliament on 25 February 2009 contain measures affecting the deductible gift recipient category – Australian disaster relief fund.

Non-Profit News Service No. 0232 – Recent bushfires and floods and GST concessions for charitable fund-raising events

Feb 2009. Certain organisations can choose to have all supplies they make in connection with a fund-raising event treated as input taxed for goods and services tax purposes.

Non-Profit News Service No. 0231 – GST-free non-commercial activities

Feb 2009. Non-commercial activities are GST-free for some non-profit organisations.

Non-Profit News Service No. 0230 – Henry Review releases consultation paper

Jan 2009. The Australia's Future Tax System Review Panel has released its consultation paper, providing the basis for further community input in 2009. Section 7 of the paper considers the main tax concessions available to not-for-profit organisations.

For the first time, we have invited a number of legal practitioners to provide succinct summaries of significant legal issues nonprofit organisations can encounter. These summaries are meant as a ready reference point rather than a definitive guide and you should consider taking formal and considered legal assistance where appropriate.

5.1 PRIVATE ANCILLARY FUNDS

John Emerson, Freehills

Since 2001, it has been possible to establish privately controlled trusts known as prescribed private funds (PPFs). PPFs were entitled to a number of taxation concessions including deductible gift recipient status and income tax exemption. Their sole purpose was to provide money, property or benefits to a range of other deductible gift recipients such as public benevolent institutions, health promotion charities, overseas aid funds, and organisations on the registers of cultural organisations and environmental organisations. By 30 June 2009, over 800 PPFs had been established, they had received more than \$1.3 billion in gifts, and distributed more than \$300 million to deductible gift recipients. On 1 October 2009 a new regime began for PPFs.

Main changes

Existing PPFs became Private Ancillary Funds (PAFs) and they were taken to be endorsed as deductible gift recipients. The Minister was given power to make guidelines about the establishment and maintenance of PAFs. Each trustee of an existing PPF was taken to have agreed to comply with PAF Guidelines. Only a constitutional corporation can be a trustee of a PAF.

The administration of PAFs was vested fully in the Commissioner of Taxation, subject to some transitional provisions. The Commissioner has power to:

- endorse PAFs as deductible gift recipients and tax concession charities or income tax exempt funds;
- revoke endorsement;
- impose administrative penalties on trustees, and their directors; and
- suspend, remove and replace trustees.

The legislative changes are contained in *Tax Laws Amendment (2009 Measures No. 4) Act 2009* (Cth) which received Royal Assent on 18 September 2009. The PAF Guidelines were signed on 28 September 2009 and a model trust deed was released soon after by the Australian Taxation Office.

The PAF Guidelines are a legislative instrument and so have legal effect, in contrast to the guidelines that applied to PPFs. PAFs must agree to comply with the Guidelines.

Main requirements in Guidelines

In each financial year, a PAF must distribute to deductible gift recipients an amount equal to at least 5% of the market value of its net assets as at the end of the previous financial year. The market value of the assets must be estimated as specified in the Guidelines.

A PAF must not acquire a collectable, may not carry on a business, and may not solicit donations from the public. A PAF is also limited in the donations it can accept from 'outsiders'.

A PAF must have and maintain a current investment strategy and subject to some exceptions, may not borrow or maintain an existing borrowing. The trustee must prepare and maintain a current investment strategy meeting the requirements of the PAF Guidelines. Special obligations are also imposed on the independent responsible person on the board of directors of the trustee.

The Guidelines contain some exceptions/qualifications in respect of the above rules, and the Guidelines and Act contain transitional provisions in respect of certain PPFs that existed before 1 October 2009.

The new regime does not affect the basic tax concessions that applied to PPFs. It is, however, essential that the trustee of each existing PPF and its directors examine the new legislation and the PAF Guidelines carefully to ensure their PAF complies with them.

Further information

The materials outlined below can be located on the ATO website (www.ato.gov.au) and by searching for 'PAF'.

- The *Tax Laws Amendment (2009 Measures No 4) Act 2009*, Schedule 2 Private Ancillary Funds;
- *Explanatory Statement to PAF Guidelines* (28 September 2009);
- *ATO Non-Profit News Services*, No. 0246, 1 July 2009; No. 0253, 14 September 2009; and No. 0258, 15 October 2009;
- *Private Ancillary Fund Model Trust Deed*;
- *Endorsement as a Deductible Gift Recipient*, NAT 2949;
- Agreement to comply with the rules in the PAF Guidelines;
- *Revocation of the agreement to comply with the rules in the PAF Guidelines*;
- *Private Ancillary Fund – Schedule for deductible gift recipient applicants*;
- Transitional arrangements for PPFs;
- *Private Ancillary Fund Guidelines 2009* (under the *Taxation Administration Act 1953*) are available on the Federal Register of Legislative Instruments at www.frli.gov.au – see www.ato.gov.au/nonprofit/content.asp?doc=/content/00216088.htm.

The ATO is also intending to issue a detailed list of FAQs.

5.2 NATIONAL RENTAL AFFORDABILITY SCHEME

Mark Fowler, Neumann and Turnour Lawyers

The National Rental Affordability Scheme commenced with the enactment of the *National Rental Affordability Scheme Act 2008* (Cth), the *National Rental Affordability Regulations 2008* (Cth) and newly inserted Division 380 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 97). The Scheme's principal aim is to stimulate the construction of 50,000 new dwellings across Australia. These dwellings are to be let to tenants who meet means-tested eligibility criteria for a maximum of 80% of the then current market rent.

Applicants are invited to submit tenders to the Department of Families, Housing, Community Services and Indigenous Affairs, the Commonwealth department responsible for overseeing the Scheme, for a share of 50,000 individual 'allocations', each of which is linked to an 'approved rental dwelling'. These allocations are to be released across three rounds. At the time of publication, rounds one and two were closed with the final

round remaining open to 31 August 2010. The holder of an allocation ('the approved participant') will be entitled to an annual 'incentive' in the amounts displayed at Table 2 (to increase in line with Consumer Price Index).

TABLE 2: INCENTIVES

Contributed by	Amount
Australian government	\$6 504.00
State/Territory government	\$2 168.00
Total	\$8 672.00

Under Division 380 of the ITAA 97 the approved participant may be one of the following:

- an individual;
- a partnership;
- a trust; or
- a participant in a 'non-entity joint venture'.

Subject to the individual tax circumstances of the recipient, the incentive may take the form of either a tax offset certificate, or a payment. Entitlement to an incentive will be determined by the proportion of actual rent received by the investor, which in turn is consequent upon the structuring of the approved participant. Ongoing entitlement to the incentive is conditional upon satisfaction of ongoing reporting and compliance requirements. Individual State government requirements vary across Australia.

Nonprofit involvement

Given the strong historical involvement of the nonprofit sector in affordable housing, from its inception the Scheme anticipated the participation of the sector. Enactments to the *Extension of Charitable Purpose Act 2004* (Cth) were introduced to ensure the charitable endorsements of NFPs would not be affected by participation in rounds 1 and 2 of the Scheme. Subsequently the Treasurer has expressed his view that, subject to the circumstances outlined in the *Commissioner of Taxation v Word Investments Ltd*,⁸ NFPs participating in the Scheme will retain their charitable endorsements under the tax laws where they direct surplus funds generated from their participation in the Scheme towards their charitable purpose.

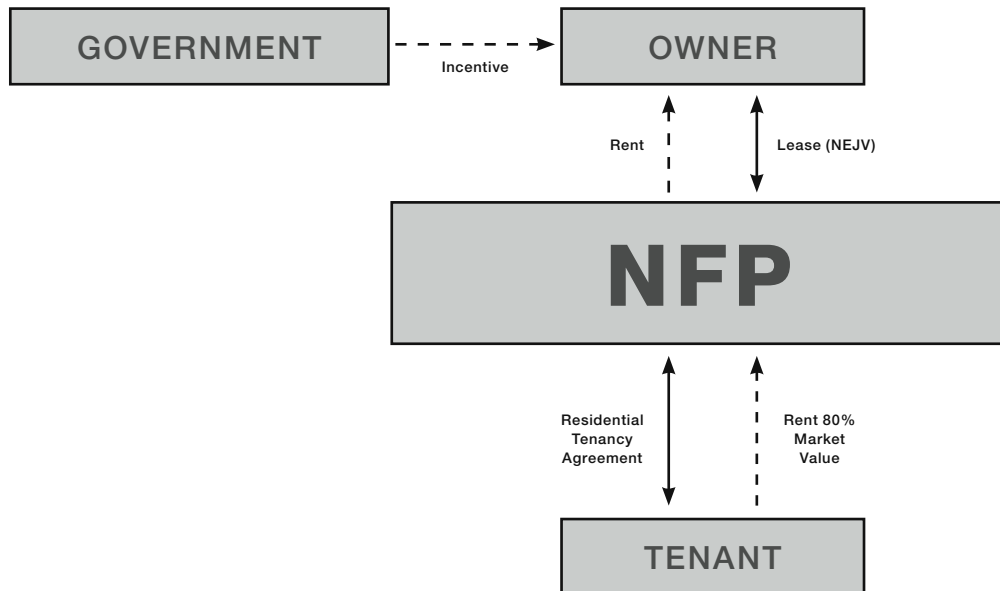
There are several forms that NFP participation in the Scheme may take, including property and tenancy management, joint equity involvement, syndication or outright ownership. The novel aspect for many NFP providers entering the Scheme may be the level of direct engagement with private and institutional investors and consequently, the tension between market imperatives and tenant interests.

The different potential manifestations of nonprofit involvement are perhaps best illustrated by a sample of the property structures that are currently being utilized within the Scheme.

8 *Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204.

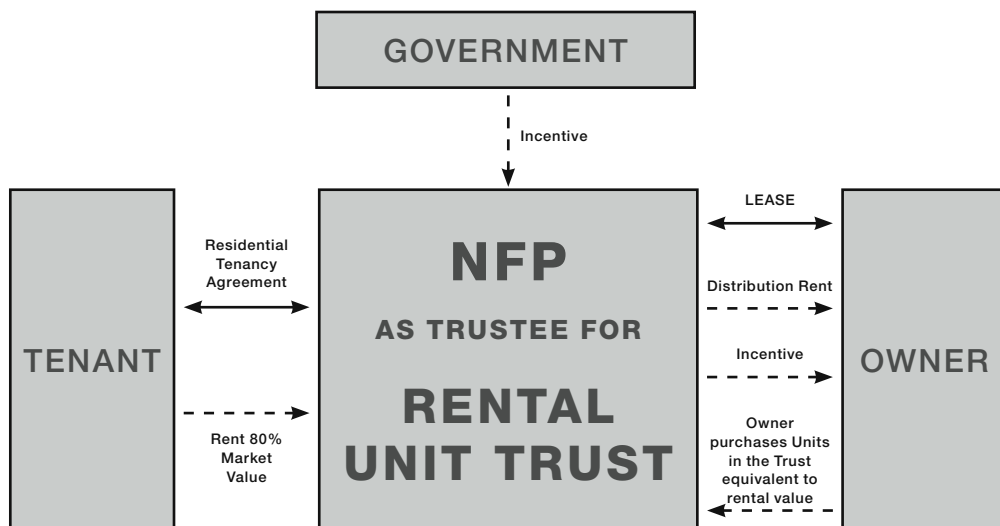
Property Structuring

1. Head Lease Model, comprising non-entity joint venture



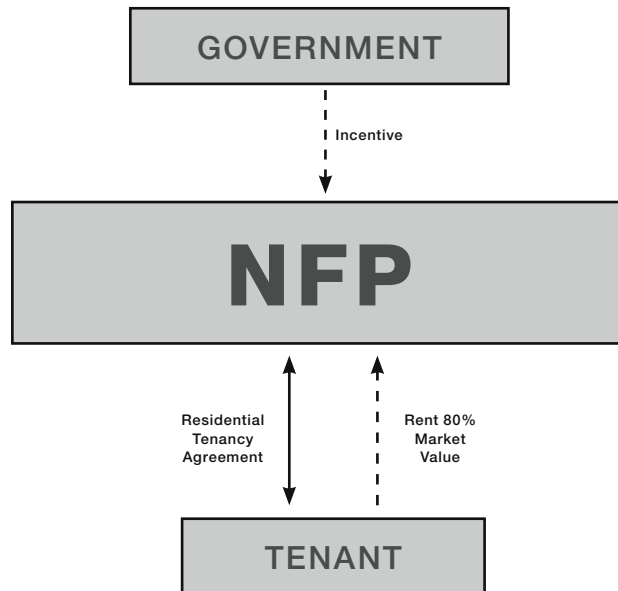
At the time of printing the Treasurer and Minister for Housing have flagged their intention to introduce legislative change to clarify further the taxation consequences of entrance to this model.⁹

2. Rental Unit Trust



⁹ ATO Interpretive Decision No. 2009/146 provides further commentary on the non-entity joint venture model where it takes the form of a Head Lease, and in particular the parties entitled to receipt of the incentive within such a model. The illustration given should be read in conjunction with that Interpretive Decision.

3. Direct Ownership



In each of the above models the NFP may conduct the following:

- Application to Federal Government for Incentive (approved participant);
- Tenancy and property management (the NFP may elect to subcontract this activity); and
- Compliance reporting to Federal (and State) Government.

Issues requiring the consideration of the nonprofit in assessing the merits of individual property structures may include:

- Protection of longer term security of tenure for residential tenants;
- Potential liability to investors in the event of non-receipt of the incentive;
- Occupier's liability as sublessor of property (if the NFP is to have exclusive possession of the approved rental dwelling);
- Consequences of sale of approved rental dwelling by Owner; and
- GST concessional benefits flowing from charitable status.

Further information on the Scheme is available at www.fahcsia.gov.au and the Australian Tax Office have released several examples of property structuring arrangements for participation in NRAS, available on their website www.ato.gov.au. It is recommended that nonprofit entities considering participation in NRAS should seek their own legal and taxation advice.

5.3 MONEY LAUNDERING

Heather Watson, McCullough Robertson – Lawyers

Money laundering is an important and necessary element of any organised crime network engaged in crimes with a financial reward. Money laundering techniques are also employed by terrorist organisations to access funds required to carry out terrorist activities.

Money laundering is the process by which criminal organisations attempt to conceal the true origin and ownership of the proceeds of their criminal activities. If money laundering is successful, those proceeds can lose their apparent criminal identity and appear legitimate.

In 2006, the Commonwealth government enacted the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (AML/CTF Act). The Australian Transactions Reports and Analysis Centre (AUSTRAC) is the regulatory body responsible for enforcing compliance with the AML/CTF Act. The Act imposes various compliance obligations on persons who provide certain 'designated services'. These obligations include:

- a. identification and verification procedures for customers;
- b. suspicious matter reporting;
- c. threshold transaction reporting;
- d. AML/CTF Act compliance reporting;
- e. cross-border transfer reporting;
- f. implementation of AML/CTF programs; and
- g. record keeping requirements.

Section 6 of the AML/CTF lists the designated services which are caught by the regime. The majority of listed designated services could be described as relating to the provision of financial services, such as banking activities, loans businesses, certain dealings with securities and acting as an agent for a person in relation to the provision of a financial service. Gambling services, dealings in precious metals and cash remittance services are also listed designated services.

Potentially, the provision of a 'one off' designated service may be caught by the AML/CTF Act. Section 5 provides that a business concerning the provisions of a designated service includes: 'A venture or concern in trade or commerce, whether or not conducted on a regular repetitive or continuous basis'.

AUSTRAC has published its interpretation of 'carrying on a business' in its *Public Legal Interpretation*, No. 4 of 2008, which provides that: 'It is not essential that the activities be undertaken for gain or profit, but that the activities must occur as part of a venture or concern in trade or commerce'. Based on AUSTRAC's assessment, it would appear that nonprofit activities which involve the provision of a designated service will fall within the scope of the AML/CTF Act.

Nonprofit entities who are incidentally involved in the provision of a designated services may also be required to comply with the AML/CTF Act, depending upon the scope of their activities. For example, a nonprofit entity providing financial accommodation to individuals in the form of a loan may be required to comply with the AML/CTF Act.

Nonprofit entities should seek legal advice if they are unsure whether their activities may be caught by the AML/CTF Act. More information in relation to the Act can be found at www.austrac.gov.au.

5.4 WORKPLACE HEALTH AND SAFETY

Nathan MacDonald, PilchConnect

On 1 February 2008, the Workplace Relations Ministers' Council agreed that the best way to achieve uniformity of Australia's occupational health and safety (OHS) laws is through the development of model legislation.¹⁰ This process includes the implementation of a model OHS Act, model OHS regulations and model OHS codes of practice.

On 11 December 2009, Safe Work Australia released the model *Work Health and Safety Act* (Model Act). Depending on what state or territory OHS laws you are familiar with, the Model Act represents varying degrees of change from existing OHS frameworks.

Primary duty of care

As a starting point, the Model Act imposes a primary duty of care on any 'person conducting a business or undertaking' to ensure, as far as is reasonably practicable, the health and safety of workers. Volunteers are included in the definition of 'worker' and are therefore owed the same duties under the Model Act as paid employees.¹¹

The Model Act's primary duty of care does not distinguish between operations that are conducted 'for-profit', and those that are 'nonprofit'. However, the Model Act excludes 'volunteer associations' from the definition of 'conducting a business or undertaking', which effectively means that these organisations do not owe this primary duty to their workers. Section 5(5) defines a 'volunteer association' as:

a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

It can be inferred from this definition that once an organisation takes on just one paid employee, it will no longer be deemed a 'voluntary association' and therefore will be unable to rely on the Model Act's exclusion. How this applies to organisations that engage part-time contractors or periodic paid staff (e.g., a bookkeeper) remains to be seen.

Other duties of care

The Model Act imposes further duties of care in relation to certain activities, particularly where there is 'management and control' of a workplace. The Model Act defines a 'workplace' as a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work. It is hoped that this definition is clarified further to provide certainty to the nonprofit sector, which operates in many non-traditional workplaces such as private residences and public spaces.

Where an organisation owes a duty under the Model Act, an officer¹² of that organisation must exercise due diligence to ensure that duty is complied with.

10 Workplace Relations Ministers' Council, Communiqué, 1 February 2008, www.workplace.gov.au/NR/rdonlyres/31BED76B-2655-4CDF-952F-E84FE0CD3469/0/WRMC75AgreedCommunique.pdf (accessed 18 February 2010).

11 Section 7 of the Model Act.

12 As defined at section 9 of the Corporations Act 2001 (Cth).

Offences

The Model Act introduces three categories of offences where a person is found to have breached a safety duty.

Category 1 offences are the most serious and consequently provide for the most severe penalties. This category is reserved for persons who breach a safety duty which causes serious injury or death (or a high risk of this occurring), and where that person is found to be reckless as to these consequences.

Category 2 offences apply to persons who have breached a safety duty in the same circumstances as Category 1, but are not found to have been reckless.

Category 3 provides the least severe penalties, and includes all other breaches of the safety duties not found to fall within the first two categories.

Treatment of volunteers

While volunteers are owed duties under the Model Act as workers, they are exempt from incurring liability under the majority of the offence provisions. However, volunteers may still be liable where they fail to comply with the duty to take reasonable care for their own health and safety, or where they fail to take reasonable care to ensure that their actions do not adversely affect the health and safety of others.¹³

The term 'volunteer' is defined in the Model Act as a person who is acting on a voluntary basis, irrespective of whether the person receives out-of-pocket expenses.¹⁴ The volunteer exclusion from the offence provisions is therefore relevant for volunteer committee or board members, or volunteer managers who might otherwise be considered to be conducting a business or undertaking and would therefore incur liability.

From here

The Model Act is the first stage of reforms, with regulations and a code of practice still to be developed in 2010. Safe Work Australia has indicated that there will be further public consultation throughout this process. It intends to have all jurisdictions enact the model laws by the end of 2011.

Resources

PilchConnect's free monthly e-bulletin (see e-bulletin link on: www.pilch.org.au/PCLawReform) provides updates of Victorian and relevant national legislative changes and proposed law reforms. To subscribe please email connect@pilch.org.au.

5.5 CHANGES TO THE WORKPLACE RELATIONS REGIME

Tim Longwill, McCullough Robertson

A number of employers across the country, including nonprofit organisations, have been affected by the commencement of the *Fair Work Act 2009* (Cth) (the Act). From 1 January 2010, all states except Western Australia referred their industrial relations power to the Federal government. This means that the majority of Australian employers,

13 Section 33 of the Model Act.

14 Section 4 of the Model Act.

including those that are not 'constitutional corporations', are now covered by the federal regime. This article briefly outlines some of the major changes affecting employers in the nonprofit sector.

Introduction of the National Employment Standards

The National Employment Standards (NES) set out the minimum standards applicable to all national-system employees from 1 January 2010. The NES effectively introduce the following five new standards:

1. the right of any employee, who is the parent or carer of a child under school age, or a disabled child, to request flexible working arrangements;
2. the right to be absent from work in order to conduct recognised community service activities. These activities are currently limited to jury service and voluntary emergency management duties;
3. an entitlement to redundancy pay (although there is an exception for small enterprises);
4. an eligible employee's entitlement to 12 months of unpaid parental leave on the birth or adoption of a child and their right to request an extension of parental leave for a further period of up to 12 months; and
5. an employer's obligation to give each new employee a Fair Work Information Statement (which may be downloaded from www.fairwork.gov.au) as soon as practicable after they commence employment.

The NES also confirms that:

- employees' hours of work must not exceed 38 hours per week; and
- eligible employees are entitled to:
 - annual leave;
 - personal leave, carer's leave and compassionate leave;
 - long service leave; and
 - public holidays.

It is important for employers to note that the NES will apply to all employees regardless of any agreements between the employer and the employee. Any contractual provision which is inconsistent with the NES will no longer be valid. Although this will not invalidate the remaining terms of any employment contract, employers may wish to consider updating their contracts to reflect these changes.

Introduction of modern awards

Generally speaking, modern awards also commenced application on 1 January 2010. However, special transitional arrangements are in place for organisations which only became subject to the federal regime due to the 'referral of powers' legislation. These arrangements will affect a large number of nonprofit organisations which are not constitutional corporations. In most cases modern awards will not apply to these organisations until 1 January 2011. However, it is important to note that there is an exception to this rule if there was no State award applying to the organisation in question on 1 January 2010.

For employers who are constitutional corporations, transitional arrangements have been introduced into each modern award, permitting the 'phasing in' of new financial provisions. This measure is intended to ease the burden of the introduction of new pay scales on both employers and employees.

All employers should familiarise themselves with any relevant modern awards which may apply to their organisations. Modern awards may be downloaded from www.airc.gov.au/awardmod/fullbench/awards.htm.

Other relevant changes

A number of other changes have been introduced by the Act. These include:

- changes to unfair dismissal laws, including the introduction of the Small Business Fair Dismissal Code for employers with fewer than 15 employees;
- the introduction of 'workplace rights' laws, which prohibit any adverse action on the basis of the exercise of an employee's workplace right;
- amended 'right of entry' laws setting out the circumstances in which a union official can enter a workplace; and
- the formation of Fair Work Australia and the Fair Work Ombudsman.

Further advice

Although this article aims to provide a brief outline of the major changes affecting nonprofit organisations, please bear in mind that the Act introduces a complex new industrial relations regime. In a number of respects, the application of the Act to each organisation will be affected by their individual circumstances. Independent advice should therefore be sought to ensure compliance with the new laws.

In particular, assistance may be required to determine whether an organisation is a constitutional corporation, which will affect modern award coverage (although for many organisations this exercise will already have been undertaken under the Work Choices regime). Advice may also be required to navigate the transitional provisions for awards, particularly for employers that are not constitutional corporations.

5.6 COMPANIES LIMITED BY GUARANTEE

Matthew Turnour and Nathan Rieck, Neumann and Turnour Lawyers

In December 2009 the Commonwealth government announced proposed changes to the laws regulating the reporting requirements for companies limited by guarantee. The proposed changes are to simplify the reporting requirements for companies limited by guarantee depending upon their annual revenue and their tax deductibility status. These changes appear to be based on a desire to simplify the reporting requirements of small entities and reduce the costs of complying with the requirements whilst ensuring that all relevant information is made available to those who would be most adversely affected should a company become insolvent. These changes form part of a wider agenda across the common law world to reform corporations through which citizens participate in civil society. In this overview the proposed changes are summarised and located in the international discourse.

Current Legislation and Proposed Changes

Under the legislation, as it currently stands, companies limited by guarantee are regulated as other public companies and as such are required to comply with the substantial reporting requirements imposed upon them.

As the majority of companies limited by guarantee in Australia are small, community-based or charity organisations, these reporting requirements can become quite onerous. The proposed changes seek to categorise companies limited by guarantee into one of three tiers according to (a) the annual revenue of the company and (b) the tax deductibility status of the company. The reporting requirements vary for each tier. The following table sets out the proposed reporting requirements for each of the tiers as set out in the *Corporate Amendment (Corporate Reporting Reform) Bill 2010* (Cth).

TABLE 3 REPORTING REQUIREMENTS FOR THREE TIERS UN

Tier	Qualifications Companies with:	Reporting Requirements
First Tier	<ul style="list-style-type: none"> Annual revenue less than \$250,000 which do not have deductible gift recipient status. 	<ul style="list-style-type: none"> Companies would be exempt from preparing the financial report and directors' report.
Second Tier	<ul style="list-style-type: none"> Annual revenue less than \$250,000 that are deductible gift recipients; or Annual revenue of \$250,000 or more but less than \$1 million, irrespective of whether the company is a deductible gift recipient. 	<ul style="list-style-type: none"> Prepare a financial report which they could elect to have reviewed rather than audited; Prepare a streamlined directors' report, rather than a full directors' report; and Be subject to a streamlined process for distributing the annual report to members.
Third Tier	<ul style="list-style-type: none"> Annual revenue of \$1 million or more, irrespective of whether the company is a deductible gift recipient. 	<ul style="list-style-type: none"> Continue to prepare an audited financial report; Prepare a streamlined directors' report, rather than a full directors' report; and Be subject to a streamlined process for distributing the annual report to members.

Streamlined Directors' Report

Instead of the reporting obligations required of a public company which companies limited by guarantee are currently required to comply with, under the proposed amendments, the annual Directors' Report for second and third tier companies need only address the following:

- Strategic Issues:
 - Short and long term objectives of the company;
 - Strategy for achieving the objectives;
 - Activities undertaken by the company;

-
- How the activities assist in achieving objectives;
 - Performance measures;
 - Governance issues
 - Details of directors;
 - Qualifications of directors;
 - Number of meetings;
 - Amount that members are liable to contribute if the company is wound up (by class and in total).

First tier companies are not required to prepare a Directors' Report.

Review of Financial Reports

Under the current legislation, companies limited by guarantee are required to have their reports audited by a registered company auditor. The proposed streamlined process aims to reduce costs. Rather than subject all companies limited by guarantee to a complete audit, companies that fall into the second tier may elect to undertake a review process by a registered company auditor *or* a member of a professional accounting body who holds a practising certificate. This allows more people to undertake the review process and should reduce compliance costs.

The review process, as opposed to an audit, is not designed to provide any assurance that the financial reports are free from error. The review process consists of a preliminary investigation and review of financial and accounting processes and the people involved in these processes. This will bring some matters of concern to the attention of the directors but does not cover the detail required to provide complete assurances.

Under the proposed amendments the review process will only be an option available to second tier companies limited by guarantee. First tier companies limited by guarantee will not be required to prepare financial reports while third tier companies limited by guarantee will still be required to prepare fully audited financial reports.

Streamlined Distribution Process

Companies which fall within the second and third tiers and which do not have the technology facilities available to make their annual reports available to members electronically would be required to write to their members and inform them that the reports have been prepared and how they can obtain printed copies.

International Context

These changes are likely to simplify and reduce the cost of the regulatory and reporting requirements significantly for most clubs and charitable organisations. However, they fall a long way short of the international developments in legislation to facilitate and encourage participation in the voluntary sector.

The most recent development of this body of law is in Canada where a non-profit corporation statute, the *Canada Not-for-Profit Corporations Act 2009*, has been passed but is not yet law. In the United Kingdom, England and Wales now have specialist civil society facilitating entities in the form of the Charitable Incorporated Organisation and Community Interest Company. In 2008, the State of Vermont in the United States of America passed specialist legislation facilitating nonprofit trading entities called L3Cs.

Conclusion

With these changes, the Australian government has not taken the opportunity to build from international developments. Instead the proposed changes have been relatively minor. They are, however, likely to be well received in the sector and should simplify procedures for many companies limited by guarantee.

5.7 RIGHT TO INFORMATION AND INFORMATION PRIVACY

Linda Lavarch, The Australian Centre for Philanthropy and Nonprofit Studies

Until recently, information held by the Queensland government was regulated by the *Freedom of Information Act 1992* (Qld) (FOI Act). This Act and its legislative framework operated to provide an avenue for the public to access information held by government, including personal information. It was not intended to apply to the private sector and therefore only had a minor impact on the operations of nonprofit organisations. The principal legislation regulating personal information held by the private sector, including nonprofit organisations, is a Commonwealth Act, the *Privacy Act 1988* (Cth).

However, in 2008 the government released a report, *The Right to Information: Reviewing Queensland's Information Act*, which has led to significant reform to the right to information and the privacy in information, chiefly the enactment of the *Right to Information Act 2009* (Qld) and the *Information Privacy Act 2009* (Qld). These two Acts have the potential to have a greater impact on the private sector including nonprofit organisations.

This article aims to outline broadly the most significant impact the changes might have on a nonprofit organisation and briefly outlines the proposed changes to Commonwealth privacy laws that may affect nonprofit organisations.

Changes in the new Queensland Acts

The *Right to Information Act 2009* (RTI Act) and the *Information Privacy Act 2009* (IP Act) operate to complement each other and together they replace the *Freedom of Information Act 1992* (Qld) (FOI Act). The RTI Act gives a legal right to access information in the government's possession and under its control unless it is contrary to the public interest to give the access. It deals with non-personal information. The IP Act gives access to, or the right to amend, an applicant's personal information.

While the provisions of both Acts are aimed predominantly at the public sector, the reversal of the test for the release of documents and the broadening of the coverage may see their application to the nonprofit sector change. Under the old FOI Act régime, the principle was that information should only be released when it was in the public interest to do so. Under the new *Right to Information Act* the approach now is that information should be released unless, on balance, it is not in the public interest to do so. The new approach to access to information adopts a 'push' model rather than the previous 'pull' model – i.e. the starting point is pro-disclosure, rather than pro-protection, of information.

Privacy

Prior to the enactment of the 2009 Acts, Queensland did not have any privacy legislation with the exception of the *Invasion of Privacy Act 1971* which does not give a general protection for privacy or personal information. The IP Act introduces a new framework to safeguard the handling of personal information held in the public sector environment, that is personal information held by agencies. In order to understand the changes made to privacy laws in Queensland and the possible impact on nonprofit organisations there are two critical terms that must first be defined:

‘Personal Information’: the IP Act has the same definition as the Commonwealth *Privacy Act 1988*. This term covers any information or opinion that identifies a person or could be used to identify a person.

‘Agency’ is defined in section 18 of the IP Act (for most purposes of the Act) as:

- a. a Minister; or
- b. a department; or
- c. a local government; or
- d. a public authority, which is any body created by an Act of parliament for a public purpose.

(Any board, council, committee etc, established to help or to perform functions connected with an agency is taken to be part of the agency.)

The Act sets out information privacy principles (IPPs) in Schedule 3. Most ‘agencies’ must comply with these principles (apart from the Health Department which must comply with the national privacy principles (NPPs) in Schedule 4).

Application to the nonprofit sector

There are a number of nonprofit organisations that for various legal reasons were created by enactment, typically schools and churches. However it is unlikely they would be considered to be public authorities (and therefore agencies) because they have not generally been created for a public purpose. (Schedule 2 of the Act specifically exempts grammar schools to which the *Grammar Schools Act 1974* (Qld) applies.)

For other nonprofit organisations established by legislation they would only be caught by the provisions of this Act if they met the public purpose test. The exception to this would be those organisations which are supported directly or indirectly by government funds or other assistance, or over which the government is in a position to exercise control. An example of this type of organisation would be a hospital foundation created under the *Hospital Foundations Act 1982* (Qld).

However, organisations that provide services on behalf of the government will probably be considered to be public authorities. This is because of Chapter 2.

Chapter 2 of the IP Act regulates compliance with the privacy principles. Part 4 of Chapter 2 binds ‘contracted service providers’ to comply with the privacy principles. This is likely to have the greatest impact upon Queensland nonprofit organisations, as an organisation that makes a contract or arrangement to perform one or more functions of an agency must comply with Part 1 or 2 and Part 3 of Chapter 2, if they deal with or transfer personal information under the arrangement with the government agency.

There is little guidance in the Act as to what is meant by ‘function of an agency’, and given the wide variety and constantly changing roles performed by government it is

impossible to create an exact list of agency functions. Any nonprofit organisation that contracts to provide a service for an agency should err on the side of caution and assume that it is performing a function of the agency.

A nonprofit organisation that enters into an arrangement to provide services for the performance of one or more of a government agency's functions must comply with the IPPs in Schedule 3; or if it contracts to provide services for the Health Department, it must comply with the NPPs in Schedule 4. Generally speaking these principles deal with the way an organisation can collect, store, use and access personal information. These nonprofit organisations must also comply with the requirements about transferring personal information outside of Australia (Part 3 of Chapter 2).

Under section 35, the obligation is placed on the government agency to ensure that its contracted service provider 'is required to comply with part 1 or 2 and part 3 [of Chapter 2], as if it were the agency, in relation to the discharge of its obligations under the arrangement'. This applies only if the contracted service provider will deal with personal information on behalf of the contracting government agency; or the provision of services under the arrangement will involve transfer of personal information to the agency or will involve providing services to a third party for the agency (see section 35(2)).

Under section 36, the contracted service provider has to comply with the privacy principles when discharging its obligations under the arrangement with the government agency as if it were the government agency. It's important to note also that the nonprofit organisation continues to be bound by the privacy principles 'in relation to personal information it continues to hold', even after the service arrangement is finished (section 36(2)).

Any nonprofit organisation that contracts (whether formally or by arrangement) to provide a service for an agency, should always check whether it will be caught by the provisions of the IP Act. The Office of the Information Commissioner (Qld) has produced a number of resources, including 'Contracted service providers – a checklist for agencies', available online from www.oic.qld.gov.au/toolkit

The test

Chapter 3 of the IP Act governs access to personal information. An individual can apply to the agency to access her or his own personal information and to amend inaccurate, outdated or misleading personal information in documents held by the agency. Section 40 of the Act limits access only to documents that contain the applicant's personal information (although the documents may contain other information as well; irrelevant material may be deleted before access is given: section 88). Section 54 of the Act sets out the steps to be undertaken by the agency to assess whether the application can be made under this Act.

The pro-disclosure approach is in section 64, i.e. the agency (or contracted service provider) should decide to give access to the document unless giving access would, on balance, be contrary to the public interest. There is a right to refuse access to documents under section 67. This requires consideration of whether the release would be contrary to the public interest, and the grounds on which access may be refused are to be interpreted narrowly. Refusal of access requires an informed decision by the decision-maker in the organisation.

Right to Information

The *Right to Information Act 2009* (RTI Act) applies to applications for information, other than personal information, which is held by an 'agency'. Applications relating to personal information must be made under the IP Act as outlined above.

Section 14 of the RTI Act defines an 'agency' as:

- a. a department; or
- b. a local government; or
- c. a public authority (as defined in section 16); or
- d. a government owned corporation; or
- e. a subsidiary of a government owned corporation.

The RTI Act is mostly concerned with the mechanics of making an application, and with the operation of the Office of the Information Commissioner. The Act gives the right to access documents, defined in section 12 to mean documents in the possession or under the control of the agency, including documents the agency is entitled to access.

Application to nonprofit organisations

Importantly for nonprofit organisations which are funded by government agencies or which contract to provide services for government agencies, documents in the possession or control of the government agency, which relate to their funding or service provider arrangement, may be subject to a right to information request. However, the information request would be to the government agency, not to the nonprofit organisation. This would also have been the case under the previous FOI Act, but the approach to release of information has changed as outlined above, i.e. the approach is now pro-disclosure of information rather than pro-protection of information. It is also important to note that, under section 37 an agency must not disclose information where disclosure would be of concern to a relevant third party, without first informing the third party and getting their response. This would be relevant to a nonprofit organisation if an application were made for access to documents relating, for example, to their funding agreement or service provider contract. The nonprofit must be asked for its view about whether the information is exempt or it would not be in the public interest to disclose it.

For more detailed information go to the website of the Office of the Information Commissioner (Queensland): www.oic.qld.gov.au

Proposed Changes to the Privacy Act 1998 (Cth)

The Australian Law Reform Commission (ALRC) published the *For Your Information: Australian Privacy Law and Practice* report in August 2008. This report made 295 recommendations designed to simplify and improve Australia's privacy laws. The recommendations of the report are to be introduced in two stages over a period of three years. On 14 October 2009 Senator Ludwig publicly released the Commonwealth government's first stage response to the ALRC report, outlining the government's position on 197 recommendations relating to:

- developing a single set of Privacy Principles;
- redrafting and updating the structure of the *Privacy Act*;
- addressing the impact of new technologies on privacy;
- strengthening and clarifying the Privacy Commissioner's powers and functions;
- introduction of comprehensive credit reporting and enhanced protections for credit reporting information; and
- enhancing and clarifying the protections around the sharing of health information and the ability to use personal information to facilitate research in the public interest.

The Commonwealth government intends to release draft legislation implementing the first stage response in early 2010.

Implications for nonprofit organisations

As a result of the expansive changes made to the Queensland laws regarding the right to information and information privacy it is now possible that nonprofit organisations will be required to introduce proper protections for personal information including establishing systems to receive and decide applications for access to personal information under the IP Act. Any nonprofit organisation planning to contract with the Queensland government to perform their services, where the arrangement will involve receiving or transferring any personal information, should first seek expert advice on establishing policies and systems for information privacy.

Further it is highly likely that there will be major changes to both Queensland and Commonwealth information privacy laws in the next 12 to 18 months. It is critical that all nonprofit organisations keep their information privacy systems up to date with the law.

5.8 DISCLOSURE OF EXPENDITURE ON POLITICAL CAMPAIGNING

Linda Lavarch, The Australian Centre for Philanthropy and Nonprofit Studies

Since the enactment of the first *Commonwealth Electoral Act* in 1902, political donors have been required to furnish returns if they had spent any money or incurred any expense for a political participant. Over the past century the *Commonwealth Electoral Act* has been subject to a number of amendments surrounding measures that sought to improve integrity, accountability and transparency.

Over this time, third party individuals and organisations that are independent of political parties and candidates have increasingly had electoral expenditure disclosure requirements placed upon them. In the political arena there is a fear that third party individuals or groups will be used as a loophole, to circumvent financial disclosure rules for candidates and political parties and as a consequence undermine the measures put in place to ensure accountability, integrity and transparency in the electoral system.

Nonprofit third parties play a critical role in the democratic process in contributing to public debate by expressing views on specific issues and advocating for change. They play a critical role acting as the link between the community and government conveying important information to governments that would otherwise remain out of the public arena.

In 2006, the then federal government introduced a number of amendments to the *Commonwealth Electoral Act 1918*. One of these amendments that has had a major impact on third parties is the requirement for a third party to make an annual report to the Australian Electoral Commission (AEC) documenting political expenditure. Political expenditure is broadly defined but relates to expressing an opinion or view on a candidate, party or issue in an election, for example, the 'Your Rights at Work' campaign by the Australian Council of Trade Unions (ACTU).

The reason given for these reforms having a wider reach than previous disclosure requirements was that the measure was necessary to ensure accountability and transparency and to give voters all relevant information on the financing of campaigns. Current proposals to amend the existing reporting regime also have the potential to draw a greater number of nonprofit organisations and/or nonprofit activities within the Commonwealth Electoral Act's disclosure obligations. So it is important that nonprofits be aware of the reporting requirements under the electoral laws; and if, for example, they

are involved in a campaign or strategy expressing a view on an issue that may form part of an election campaign, they should have a system in place to identify and if necessary report on what has been spent in this regard.

Current Reporting Requirements under the Commonwealth Electoral Act 1918

Currently, individuals and organisations that incur 'political expenditure' above the disclosure threshold are required to lodge an annual return with the AEC by 17 November in each year.¹⁵ (The disclosure threshold is adjusted for CPI on 1 July each year; at present it is \$11,200.) This report must document total political expenditure and identify the value and source of donations used to fund the political expenditure. Annual Return Forms for 'Third parties incurring political expenditure' can be accessed via www.aec.gov.au/Parties_and_Representatives/forms_handbooks/.

Political expenditure is defined as expenditure incurred by a person or organisation, or with their authority, on:

- public expression of views on a political party, candidate in an election or member of the Federal Parliament by any means;
- public expression of views on an issue in an election by any means;
- printing, production, publication, or distribution of any material that is required to include a name, address or place of business¹⁶ (all electoral advertisements are required to be authorised at all times, including advertisements on the Internet);
- broadcast of political matter in relation to which particulars are required to be announced;¹⁷

opinion polling and other research relating to an election or the voting intention of voters.

The expenditure only needs to be directly related to any of the categories above and does not include, for example, amounts spent on administration or travel. Expenditure incurred totalling more than the threshold amount in the reporting year (i.e. 1 July to 30 June) must be reported under one or more of the five specified categories listed above.

'Election' refers to a general election or a Senate election. The election period is defined as the period commencing on the day of issue of the writ for the election and ends at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote.¹⁸ An electoral advertisement is defined as an advertisement intended or likely to affect voting in an election, including campaign advertisements by parties and organisations. In addition to reporting expenditure above the threshold, gifts that are more than the threshold amount which were used, even partly, to incur the political expenditure or reimburse the amount spent are to be included in the disclosure return.

The AEC recommends third parties should consider the financial recording systems and procedures necessary to enable the return forms to be completed properly. This entails documenting and recording all transactions including a donations register and retaining all relevant receipts and invoices. Records must be kept for three years. Failure to lodge a

15 Commonwealth Electoral Act 1918 (Cth) s. 314EB.

16 Commonwealth Electoral Act 1918 (Cth) ss 328 and 328A.

17 Broadcasting Services Act 1992 (Cth) Schedule 2; see the broadcasting guidelines at www.acma.gov.au.

18 Commonwealth Electoral Act 1918 (Cth) s. 287.

return or retain records can attract significant penalties.¹⁹

Understanding what is and what is not political expenditure can be difficult for third parties. The lack of guidance from either federal Parliament or the courts on where to draw the line between the normal everyday expression of views on an issue and the expression of views in an election is especially problematic. In response to this, some third party organisations are simply choosing not to be involved in the political process as a way of erring on the side of caution. Although this is a choice that is understandable in the circumstances, not becoming involved in public debate is potentially harmful to democracy in Australia.

The AEC's Funding and Disclosure Guide can be viewed at: www.aec.gov.au/pdf/political_disclosures/handbooks/2009/ThirdParty-Guide.pdf.

Proposed Changes to the Commonwealth Electoral Act

In March 2009, in response to a report of the Joint Standing Committee on Electoral Matters, the federal government introduced into Parliament a Bill containing a number of amendments to the *Commonwealth Electoral Act*. Three of the proposed amendments will affect third parties' involvement in election campaigns:

- Firstly, it is proposed that third parties be required to lodge their reports with the AEC documenting political expenditure once every six months (the new 'reporting period') instead of annually. As well, the time period in which to lodge the report would be reduced from within 20 weeks after the end of the financial year to 8 weeks after the end of the reporting period.
- Secondly, the fines for providing misleading or false information in a report to the AEC would be substantially increased.
- The most significant proposal is that the disclosure threshold be reduced to a flat rate of \$1,000.

At the time of writing, the Bill has failed to pass the Senate. It is likely to be re-introduced to the Parliament in the near future.

States' and Territories' election expenditure disclosure requirements for third parties

Queensland

In Queensland, third parties who incur expenditure in an election period must report amounts of \$200 or more after each election. All broadcasters who broadcast an advertisement relating to the election during the election period are required to give a return showing details of the advertisements broadcast. Publishers who publish advertisements relating to the election during the election period are also required to give returns if the total amount charged for the advertisements is \$1000 or more. Reports are to be furnished within 8 weeks after the election.

For more details see Electoral Commission Queensland: www.ecq.qld.gov.au/asp

New South Wales

Third party political donors are required to report every 6 months where they have incurred \$1000 or more of specified electoral expenditure. Publishers and broadcasters are not required to report. An Inquiry into public funding of election campaigns is being undertaken currently by the Electoral Matters Committee of the NSW Parliament.

For more details see NSW Election Funding Authority: www.efa.nsw.gov.au

19 See Commonwealth Electoral Act 1918 (Cth) s 315.

Western Australia

Third parties are required to report after every election on sums of specified electoral expenditure where the total is \$500 or more. Publishers and broadcasters are not required to report.

For more details see WA Electoral Commission: www.waec.wa.gov.au/pp_candidate/financial_disclosure

Victoria

Victoria does not have any requirements for third parties to disclose campaign expenditure.

For more details see Victorian Electoral Commission: www.vec.vic.gov.au

South Australia

South Australia does not have any requirements for third parties to disclose campaign expenditure or funding.

For more details see Electoral Commission South Australia: www.ecsa.sa.gov.au

Tasmania

Tasmania does not have any requirements for third party disclosure however under Part 6 of the *Electoral Act 2004* (Tas) there are strict provisions for candidate expenditure in respect of Legislative Council elections. These provisions place a cap on campaign expenditure for each candidate (at present this is \$12,000) and prohibit expenditure by third parties with a view to promoting or procuring the candidate's election.

For more details go to Tasmanian Electoral Commission: www.tec.tas.gov.au

ACT

Third parties are required to report after every election where they have incurred \$1000 or more of specified electoral expenditure. Publishers and broadcasters are required to report on electoral advertisements after every election.

For more details go to: www.elections.act.gov.au/parties/fad.html

Northern Territory

Third parties are required to report after every election on sums of specified electoral expenditure where the total is \$200 or more. Publishers and broadcasters are required to report on electoral advertisements after every election.

For more details go to Northern Territory Electoral Commission: www.nt.gov.au/nteo

Implications

Many nonprofit organisations, especially peak bodies, lobby government to seek policy and legislative changes. Many run directed campaigns on specific issues. Last year disclosures were made by 37 organisations, amounting to expenditure of nearly \$6.5 million on political commentary, advertising, polling or other research. In the previous year (which included the 2007 federal election) 75 third-party returns were lodged, disclosing a total expenditure of \$51 million. It can be unclear whether particular expenditure by a third party comes under the requirements of the Act, but the AEC can help clarify the issue. The requirement to disclose expenditure should not be a deterrent to engage in debate on political issues. However there is a cost of compliance and organisations which engage in political expenditure should have in place a system of recording and reporting.

Political Donations and Tax Deductibility

Political parties are not deductible gift recipients (DGRs) but, to date, individuals and businesses have been able to claim income tax deductions for contributions and gifts to political parties, independent candidates and Members of Parliament. The value of the gift or donation that can be claimed is capped at \$1500.

However this is about to change, with enactment of the *Tax Laws Amendment (Political Contributions and Gifts)* Bill 2008 which completed its passage through federal parliament in February 2010 (at the time of writing, the Bill is awaiting royal assent). When the amendments come into effect, businesses will no longer be able to claim tax deductions for such political donations and gifts (neither as a political donation nor as a general business deduction). Individuals will still be able to claim the tax deduction for political donations and gifts up to \$1500.

The amendments will apply retrospectively from 1 July 2008.

6.0 WHAT DOES 2010 HOLD?

6

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 for the sector. The Productivity Commission Research Report on the Contribution of the Not-for-Profit Sector released its final report in February 2010 with forty recommendations, and at the time of writing the Report from the Australia's Future Tax System Review (the Henry Review) had been handed to government, but not released. We have summarised some of the more important inquiries, reports or investigations in progress in early 2010. Further background and detail on many of these can be found in the Legal Almanac 2008.

6.1 COUNCIL OF AUSTRALIAN GOVERNMENTS (COAG)

Standard Chart of Accounts

The lack of consistency in accounting categories and terms for grant reporting required by state and federal government departments causes:

- An inability to aggregate and compare financial data for any purposes, such as public policy development, benchmarking of performance and indications of financial effectiveness or efficiency to funders;
- Significant compliance costs to nonprofits, and
- Significant administration costs for government agencies.

A national taxonomy would resolve these issues and the QUT Standard Chart of Accounts (SCOA) Project, an initiative of an Australian Centre for Philanthropy and Nonprofit Studies and School of Accountancy²⁰ sought to develop such a standard taxonomy. The project has implemented standard taxonomies for charts of accounts in Queensland, New South Wales, Victoria and Western Australia. COAG agreed at its December 2009 meeting to implement a national standard chart of accounts.²¹ Implementation is to begin by 1 July 2010.

Fundraising Legislation Review

COAG also referred to its Business Regulation and Competition Working group the issue of whether state and territory fundraising regulation should be reformed to provide a more consistent. There have been submissions made for a national fundraising regime.

20 More information on the QUT Standard Chart of Accounts is available at the ACPNS website <https://wiki.qut.edu.au/display/CPNS/Standard+Chart+of+Accounts> (accessed 19 February 2010).

21 Council of Australian Governments, 'Regulatory Reform', COAG Communique, 7 December 2009, www.coag.gov.au/coag_meeting_outcomes/2009-12-07/index.cfm?CFID=518001&CFTOKEN=38641218#business_reg (accessed 19 February 2010).

6.2 TREASURY REVIEW OF FINANCIAL REPORTING FOR UNLISTED COMPANIES 2007²²

In December 2009 the Commonwealth government announced proposed changes to the laws regulating the reporting requirements for companies limited by guarantee.²³ This follows on from a 2007 Treasury discussion paper on financial reporting by unlisted public companies. The exposure draft bill, entitled the *Corporate Amendment (Corporate Reporting Reform) Bill 2010 (Cth)*, seeks to categorise companies limited by guarantee into one of three tiers according to: (a) the annual revenue of the company, and (b) the tax deductibility status of the company, with proportionate reporting requirements for each tier. These matters are discussed in more detail under Section 5.5 Companies Limited by Guarantee above.

6.3 DISCLOSURE REGIMES FOR CHARITIES AND NOT-FOR-PROFIT ORGANISATIONS — SENATE ECONOMICS COMMITTEE JUNE 2008²⁴

The Senate Economics Committee issued its final report in mid-December 2008. The Government has delayed responding to the recommendations until after it has given due consideration to the Productivity Commission Report and the outcome of the Henry Review of Australia's Future Tax System. Information about the Senate Committee's inquiry and a full list of the recommendations can be found in the Legal Almanac 2008.

22 Australian Treasury, Financial Reporting by Unlisted Public Companies – Discussion Paper, www.treasury.gov.au/documents/1269/PDF/Discussion_paper_Financial_Reporting_by_Unlisted_Public_Companies.pdf (accessed 19 February 2010).

23 The Hon Chris Bowen MP, Press release, No. 42, 4 December 2009, <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/042.htm&pageID=003&min=ceba&Year=&DocType> (accessed 19 February 2010); the Exposure Draft Bill is available at www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1677 (accessed 19 February 2010).

24 Further information on the Senate Inquiry into Disclosure Regimes for Charities and Not-For-Profit Organisations, including the full report, is available via the ACPNS Developing Your Organisation wiki: <https://wiki.qut.edu.au/display/CPNS/DYO+Home> (accessed 19 February 2010).

6.4 CO-OPERATIVES NATIONAL LAW

In 1990, the report of the Brady Committee of Inquiry into Non-Bank Financial Institutions and Related Financial Processes²⁵ noted that cooperatives had been arguing that existing legislation was antiquated and did not provide a suitable framework in the current commercial and social environment. The cooperatives submitted that their activities were hamstrung by the inadequacies of the legislation.

Currently, all States and Territories in Australia have legislation which enables a cooperative to register and to become incorporated as a legal entity. The legislation is very similar across jurisdictions and is based on a set of standard provisions developed in 1996 by the Standing Committee of Attorneys-General, which signed the Consistent Cooperatives Laws Agreement. Under the agreement each jurisdiction agrees to enact cooperatives legislation containing the agreed core consistent provisions.

A Co-operatives National Law²⁶ is now proposed for all States and Territories. Fair Trading NSW is collecting comments on behalf of the Ministerial Council on Consumer Affairs on the proposed Co-operatives National Law Bill and on a Consultation Regulatory Impact Statement for the proposed legislation.

The proposed Co-operatives National Law will replace separate cooperatives legislation in each State and Territory. The plan is that New South Wales will enact the national law in 2010. Other States and Territories will then have 12 months to enact the national law or enact consistent legislation.

6.5 AUSTRALIA'S FUTURE TAX SYSTEM (THE HENRY REVIEW)

Since May 2008 the Australia's Future Tax System Review Panel (the Henry Review) has been examining the current tax system,²⁷ holding public meetings and focus groups, and taking submissions. The deadline for public submissions was 1 May 2009 and a policy conference on the tax and transfer policy was held in mid-June 2009. Further consultation with industry, professional and community groups on the broader tax and transfer system continued during the second half of 2009.

In December 2009, the Review Panel delivered its final report to the Treasurer. However, the government is still considering the report and has not made it public.

25 Queensland, Independent Committee of Inquiry into Non-Bank Financial Institutions and Related Financial Institutions and Related Financial Processes in the State of Queensland, Report of the Independent Committee of Inquiry (the Brady Committee Report), Government Printer, Brisbane, 1990.

26 See www.fairtrading.nsw.gov.au/Cooperatives_and_associations/Cooperatives/Cooperatives_legislation/Cooperatives_national_law.html (accessed 18 February 2010).

27 Background on the Review and its mandate can be found in the Legal Almanac 2008. Timeline for the review, is available at <http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/timeline.htm> (accessed 19 November 2008).

6.6 NATIONAL COMPACT

The second phase of consultation for the national compact²⁸ was held from May to October 2009 (including an online forum during August and September). Two bodies were established: an Across Government Working Group across the Australian public service; and the National Compact Joint Taskforce. The Joint Taskforce includes sector representatives, along with commonwealth and local government and union representatives.

A Draft National Compact was released in February 2010 March 2010²⁸. The National Compact is expected to be launched on 17 March 2010.

6.7 COUNTER-TERRORISM FINANCING

The Commonwealth Attorney-General's Department released a draft paper entitled *Guidance for non-profit organisations on counter-terrorism financing* in February 2009 as part of its Anti-Money Laundering and Counter-Terrorism Financing initiative.²⁹ (*The Anti-Money Laundering and Counter-Terrorism Financing Act* was passed in December 2006 and commenced in stages throughout 2007 and 2008. See above, 5.2 Money Laundering, for more information about the Act and nonprofit organisations and money laundering.)

6.8 THE PRODUCTIVITY COMMISSION'S RESEARCH STUDY OF THE CONTRIBUTION OF THE NOT-FOR-PROFIT SECTOR

The Productivity Commission commenced its research project on the contribution of the nonprofit sector to Australian society in March 2009.³⁰ The Commission published a draft report in October 2009 and released its final report in February 2010.³¹ The report included the following recommendations which the government will respond to during 2010.

28 Available from http://fahcsia.gov.au/sa/communities/progserv/nationalcompact/Pages/draft_national_compact.aspx

29 Australia, Attorney-General's Department, *Guidance for Nonprofit Organisations on Counter-Terrorism Financing* (draft), February 2009.

30 Information about the background and scope of the Productivity Commission's study can be found in the *Legal Almanac 2008*.

31 Productivity Commission, *Contribution of the Not-for-Profit Sector: Research report, 2010*; the Report and submissions can be found at www.pc.gov.au/projects/study/not-for-profit (accessed 19 February 2010).

RECOMMENDATIONS

Building knowledge systems

Promoting national data systems on the NFP sector

Recommendation 5.1

The Australian Government should initiate an Information Development Plan for the not-for-profit sector. Given its central role in providing data on the sector, and its legislated responsibility for statistical coordination, the Australian Bureau of Statistics should be given responsibility for formulating the Information Development Plan.

Among the issues the Information Development Plan should address are:

- the appropriate frequency for publication of the satellite account on the sector
- the scope to develop administrative and other longitudinal data sets to support the analysis of net impacts of sector activities
- the collation of the information from these and other data sources to provide a more detailed assessment of the contribution of the not-for-profit sector over time
- the feasibility of obtaining accurate estimates of the number of unincorporated not-for-profit organisations in a cost-effective manner.

Building a better evidence base for social policy

Recommendation 5.2

Australian governments should adopt a common framework for measuring the contribution of the not-for-profit sector. Having regard to the diversity of the sector's activities and structures, measurement using this framework should embody the principles of proportionality, transparency, robustness, flexibility, and relevance.

Recommendation 5.3

To minimise compliance costs and maximise the value of data collected, Australian governments should agree to implement a reform agenda for reporting and evaluation requirements for organisations involved in the delivery of government funded services. This should:

- commit to basing reporting and evaluation requirements in service delivery contracts on a common measurement framework (appropriately adapted to the specific circumstances of service delivery)
- require expenditure (input) measures to be based on the Standard Chart of Accounts
- develop data standards for the relevant non-expenditure items
- ensure that information generated through performance evaluations are returned to service providers to enable appropriate learning to take place and allow organisations to benchmark their performance
- employ, where practicable, the principle of 'report once, use often'.

Recommendation 5.4

The Australian Government should provide funding for the establishment of a Centre for Community Service Effectiveness to promote ‘best practice’ approaches to evaluation, with an initial focus on the evaluation of government funded community services. Over time, funding should also be sought from state/territory governments, business and from within the sector. Among its roles, the Centre should provide:

- a publicly available portal for lodging and accessing evaluations and related information provided by not-for-profit organisations and government agencies
- guidance for undertaking impact evaluations
- support for ‘meta’ analyses of evaluation results to be undertaken and made publicly available.

Smarter regulation of the not-for-profit sector

Enhancing the legal options for NFPs

Recommendation 6.1

The Australian Government should amend the Corporations Act to establish a separate chapter relating to not-for-profit companies limited by guarantee. This should:

- embody the principles of proportionality in relation to reporting, fees and charges
- provide clear rules on the disposal of assets in the event of the company being dissolved or restructured, in addition to the proposed prohibition on the payment of dividends
- include a plain English guide (as currently exists for small and medium scale enterprises)

As part of this process, the Australian Government should, in consultation with stakeholders, examine whether there are additional requirements that are inappropriate or unduly restrictive for not-for-profit organisations that should also be addressed.

A national one-stop-shop for regulation and tax endorsement of NFPs

Recommendation 6.5

The Australian Government should establish a one-stop-shop for Commonwealth regulation by consolidating various regulatory functions into a new national Registrar for Community and Charitable Purpose Organisations. While ultimately the Registrar could be an independent statutory body, initially it should be established as a statutory body corporate or organ in the Australian Securities and Investment Commission.

The Registrar will undertake the following key functions:

- register and regulate not-for-profit companies limited by guarantee and Indigenous corporations, with a stakeholder team dedicated to Indigenous corporations
- assess the eligibility of not-for-profit organisations for Commonwealth tax concession status endorsement and maintain a register of endorsed organisations
- register cross-jurisdictional fundraising organisations and/or activities by not-for-profit organisations
- provide a single reporting portal for public record corporate and financial information.
- provide appropriate guidance in relation to governance matters
- investigate compliance with regulatory requirements
- provide complaints handling in respect of the above functions.

Recommendation 6.4

Responsibility for endorsement for Commonwealth tax concessional status for not-for-profit organisations and maintaining a register of endorsed organisations should sit with the Registrar for Community and Charitable Purpose Organisations. To retain endorsement for Commonwealth tax concessions, endorsed organisations should be required to submit an annual community-purpose statement to the Registrar which would be accessible to the public.

The Australian Commissioner for Taxation should have the right to seek a review of decisions of the Registrar in relation to the endorsement of not-for-profit organisations for tax concessional status. The Commissioner should also have the power to issue a directive to the Registrar for the dis-endorsement of an organisation where there has been a breach of taxation compliance requirements.

Reduce compliance costs and improve effectiveness

Recommendation 6.2

Australian governments should, through the Council of Australian Governments Business Regulation and Competition Working Group, pursue harmonisation of state and territory based incorporated associations legislation, with an initial focus on:

- aligning not-for-profit organisations' public corporate and financial reporting requirements
- rules on the distribution of assets on the dissolution or restructuring of a not-for-profit organisation
- allowing not-for-profit organisations to migrate from one legal form to another and to move to the Commonwealth jurisdiction without onerous transaction costs.

Recommendation 6.3

To promote confidence in and reduce the compliance costs associated with fundraising regulation, Australian governments, through the Council of Australian Governments Business Regulation and Competition Working Group, should:

- agree to and implement mutual recognition and harmonised fundraising regulation across Australia, through the establishment of model fundraising legislation
- support the development of a fundraising register for cross-jurisdictional fundraising organisations and/or activities, to be administered by the proposed national Registrar for Community and Charitable Purpose Organisations
- clarify the responsibility for regulation of fundraising undertaken through electronic media such as the internet, and move to ensure appropriate regulation of such mediums including through Commonwealth legislation.

Recommendation 6.6

The Registrar should implement the principle of 'report once, use often' by providing a single reporting portal and form for annual reporting on community-purpose, governance arrangements, financial accounts and fundraising activity. Australian governments, through the Council of Australian Governments, can support this principle and substantially reduce compliance costs for not-for-profit organisations by:

- adopting and developing an implementation strategy for the Standard Chart of Accounts for reporting by not-for-profits in receipt of government grants or service contracts
- expanding the Standard Business Reporting initiative to include reporting requirements by not-for-profits

-
- encouraging their agencies to utilise the governance and financial account information (that will be lodged with the Registrar) to meet their organisation level 'health check' requirements for contracting purposes.

Improving arrangements for effective sector development

Improving equity and effectiveness of tax concessions for philanthropy

Recommendation 7.1

The Australian Government should adopt a statutory definition of charitable purposes in accordance with the recommendations of the 2001 Inquiry into the Definition of Charities and Related Organisations.

Recommendation 7.2

State and territory governments should recognise the tax concession status endorsement of not-for-profit organisations at the Commonwealth level. Given the disparities between eligibility for tax concessions across jurisdictions, state and territory governments should utilise such Commonwealth endorsements in determining eligibility for their jurisdictional concessions, and seek to harmonise tax concessional status definitions or classifications with the Commonwealth over time.

Recommendation 7.3

The Australian Government should progressively widen the scope for gift deductibility to include all endorsed charitable institutions and charitable funds. Consistent with the Australian Taxation Office rulings on what constitutes a gift, payments for services should not qualify as a gift.

Recommendation 7.4

To encourage cost-effective giving, the Australian Government should explore options to promote and support planned giving, especially payroll giving. Specifically, the Australian Government should provide funding for a national campaign to promote payroll giving and the associated tax benefits. As part of the campaign, governments should encourage the establishment of payroll giving within all their agencies.

Developing a sustainable market for NFP debt

Recommendation 7.5

Australian governments should assist in the development of a sustainable market for not-for-profit organisations to access debt financing through:

- building business planning skills for not-for-profit organisations, notably social enterprises (recommendations 9.2 and 9.6)
- improving funding certainty for those not-for-profit organisations involved in the delivery of government services to improve loan viability by improving clarity about funding (recommendation 11.1) and the appropriate length of contract (recommendation 12.5)
- exploring options to encourage (for a limited period) community development financial institutions to develop appropriate financial products and services for the sector
- exploring options to make better use of the corpus of philanthropic foundations and trusts to make loans to deductible gift recipients and endorsed charitable institutions.

The Australian Government should establish an advisory panel, chaired by Treasury, to consider options and assess progress in developing a sustainable market for not-for-profit organisation debt products with the aim of establishing mainstream financial products for investors who are willing to accept a lower risk adjusted financial return for an accompanying social return.

Building sector capabilities to improve governance and enhance productivity

Recommendation 9.1

Information and communication technology has the potential to enable more cost-effective and higher quality human services. With due considerations to protocols for protecting privacy, in specific service areas, Australian governments should explore the potential for selective sharing of client information between agencies and not-for-profit organisations and other providers, through the utilisation of enhanced information and communication technology.

Recommendation 9.2

State and territory governments should review their full range of support for sector development to reduce duplication, improve the effectiveness of such measures, and strengthen strategic focus, including on:

- developing the sustainable use of intermediaries providing support services to the sector, including in information technology
- improving knowledge of, and the capacity to meet, the governance requirements for not-for-profit organisations' boards and management
- building skills in evaluation and risk management, with a priority for those not-for-profit organisations engaged in delivery of government funded services.

Recommendation 9.3

Australian government agencies providing extensive grants to, or using external agencies for, service delivery should establish evaluation programs to assess the effectiveness and actual cost of their programs. Where related to community services, these evaluations should be posted with the Centre for Community Service Effectiveness.

Addressing workforce issues

Recommendation 10.1

Australian governments should introduce a system of 'Working with Vulnerable People Checks' that provides for checks to be portable between organisations for a designated time period.

Further, Australian governments should explore the feasibility of developing a consistent national system allowing portability across states and territories of police checks and the exchange of information on people deemed unsuitable for working with vulnerable people, especially children.

Recommendation 10.2

In order to ensure that not-for-profits can sustain their workforces, and as wages are a major factor in the successful recruitment and retention of staff, Australian governments purchasing community services need to base funding on relevant market wages for equivalent positions. Costings need to take into account the skill sets required to perform the purchased services and be indexed appropriately to market wage growth within that industry sector.

Recommendation 10.3

The Australian Government, in consultation with Skills Australia, should commission the Community Services and Health Industry Skills Council to undertake workforce planning for the community services sector having regard to the current and future workforce challenges arising from growing demand and increasing supply constraints.

Stimulating social innovation

Recommendation 9.5

Australian governments should require all programs (of over \$10 million) delivering community services through not-for-profit organisations to set aside a small proportion of the program budget (for example, one per cent) to a program related social innovation fund. The fund should support trials of new approaches to service delivery, including evaluation of their cost-effectiveness.

Building sector capabilities to support innovation

Recommendation 9.4

The Cooperative Research Centre program should facilitate applications by collaborations of not-for-profit organisations (including universities), government agencies and businesses in the areas of social innovation by:

- actively promoting the opportunities that are now available
- providing specialised advice and facilitation support to organisations expressing interest but lacking the knowledge and resources to develop the partnerships required.

Recommendation 9.6

The Australian Government should fund the Enterprise Connect program to expand its specialist services to a new Centre that provides business advisory services to organisations involved in social enterprise activity.

Improving the effectiveness of direct government funding

Providing clarity over funding obligations

Recommendation 11.1

Australian governments should, in the contracting of services or other funding of external organisations, determine and transparently articulate whether they are fully funding particular services or activities undertaken by not-for-profit organisations, or only making a contribution towards the associated costs and the extent of that contribution.

Australian governments should fully fund those services that they would otherwise provide directly (allowing for co-contributions from clients and any agreed contributions by service providers). In applying this criterion, governments should have regard to whether the funded activity is considered essential, as part of the social safety net or an entitlement for eligible Australians.

Recommendation 11.1

Australian governments should ensure that service agreements and contracts include provision for reasonable compensation for providers for the costs imposed by changes in government policy that affect the delivery of the contracted service, for example, changes to eligibility rules, the scope of the service being provided, or reporting requirements.

Recommendation 8.1

The Departments of the Treasury and Finance and Deregulation should jointly conduct a review into the feasibility, the costs and the benefits of requiring value for money assessments for government procurement to consider significant input tax concessions. Such a review should be wide-ranging, including the *not-for-profit* and for-profit sectors.

Ensuring appropriate independence

Recommendation 11.3

Australian governments funding service provision or making grants should respect the independence of funded organisations and not impose conditions associated with the general operations of the funded organisation, beyond those essential to ensure the delivery of agreed funding outcomes.

Removing impediments to better value government funded services

Getting the model right

Recommendation 12.1

Australian governments should ensure that they choose the model of engagement with not-for-profits that best suits the characteristics and circumstances of the service being delivered. In choosing between alternative models of engagement, governments should consider the nature of the outcomes sought, the characteristics of clients, and the nature of the market. In particular:

- there should be no presumption that purchase of service contracting will always be the most appropriate model
- where governments are seeking the delivery of a clearly defined outcome and markets are genuinely contestable purchase of service contracting should remain the preferred approach
- where truly competitive markets develop and clients face real choice in the services available to them, governments should consider moving to clientdirected service delivery models. This transition should be conditional upon there being appropriate safeguards in place to protect and empower vulnerable clients (or their carers) in exercising choice and ensure an acceptable minimum level of service quality and provision.

Recommendation 12.2

Where a marketbased approach is not feasible or appropriate, governments should use other models of engagement. This may involve governments entering into either extended life or shortterm joint ventures.

Extended life joint ventures should adopt an iterative process that will:

- involve all parties in the design of the program
- embed and fund an agreed evaluation process, informing program design and modification
- regularly review and revise the service delivery approaches in light of findings from evaluation, changing demands or environmental conditions
- provide long-term or rolling funding with capacity to adjust funding in light of the modifications.

Recommendation 12.3

Australian governments should ensure that whatever model of engagement is used to underpin the delivery of services it is consistent with the overarching principle of obtaining the best value for money for the community. In determining value for money, governments should explicitly recognise any indirect or wider benefits that providers may be able to generate. An evidence based approach should be used to assess the nature, extent and relevance of these types of benefits on a case-by-case basis.

Recommendation 12.4

Australian governments should assess the relative merits of the lead agency model on a case-by-case basis. This should include an assessment of the costs to not-for-profits of adopting this approach including any duplication of reporting and accountability requirements, the additional transaction costs associated with subcontracting, and the potential for loss of diversity among providers.

Improving procurement and management processes

Recommendation 12.5

The length of service agreements and contracts should reflect the length of the period required to achieve agreed outcomes rather than having arbitrary or standard contract periods.

Extended life service agreements or contracts should set out clearly established:

- processes for periodically reviewing progress towards achieving a program's objectives
- conditions under which a service may be opened up to new service providers or a provider's involvement is scaled back or terminated.

Recommendation 12.6

When entering into service agreements and contracts for the delivery of services, government agencies should develop an explicit risk management framework in consultation with providers and through the use of appropriately trained staff. This should include:

- allocating risk to the party best able to bear the risk
- establishing agreed protocols for managing risk over the life of the contract.

Recommendation 12.7

Australian governments should urgently review and streamline their tendering, contracting, reporting and acquittal requirements in the provision of services to reduce compliance costs. This should seek to ensure that the compliance burden associated with these requirements is proportionate to the funding provided and risk involved.

Further, to reduce the current need to verify the provider's corporate or financial health on multiple occasions, even within the same agency, reviews should include consideration of:

- development of Master Agreements that are fit-for-purpose, at least at a whole-of-agency level
- use of pre-qualifying panels of service providers.

Recommendation 12.8

The Department of Finance and Deregulation should develop a common set of core principles to underpin all government service agreements and contracts in the human services area. This should be done in consultation with relevant government departments and agencies and service providers.

Implementation of the proposed package of reforms**Recommendation 14.1**

The Australian Government should establish an Office for Not-For-Profit Sector Engagement, for an initial term of five years. The Office would support the Australian Government in its efforts to:

- implement sector regulatory and other reforms and the implementation of the Government's proposed compact with the not-for-profit sector
- promote the development and implementation of the proposed Information Development Plan
- oversee the establishment of the proposed Centre for Community Service Effectiveness
- implement the proposed contracting reforms in government funded services
- act as a catalyst for the promotion and funding by government agencies of social innovation programs
- facilitate the establishment of the advisory panel on development of a not-for-profit capital market
- facilitate stronger community and business collaboration.

The Office should, through the relevant Minister, report publicly on an annual basis on its achievements.

Recommendation 14.2

Compacts between Australian governments and the sector must be supported by well documented plans of action, including at agency level, if appropriate, and supported by practical measures including monitoring and evaluative processes that give concrete expression to the proposed relationship.

Recommendation 14.3

State and territory governments should develop a public strategy for implementing government-sector reforms arising from this report. Priority areas should include means to improve government-sector engagement, enhanced risk assessment and risk management strategies, contract design, effective reporting, and evaluation methods.

6.9 DISABILITY CARE AND SUPPORT

The Productivity Commission has been given a research brief to examine the feasibility, costs and benefits of replacing the current system of disability services with a new approach which provides long-term essential care and support for people with severe or profound disabilities however acquired.³² The Report will be titled *Disability Care and Support*, to begin in April 2010 and report by July 2011.³³ The report is likely to be very significant for those with a mission to assist such persons and their carers.

-
- 32 Joint Media Release with The Hon Kevin Rudd MP Prime Minister and The Hon Jenny Macklin MP Minister for Families, Housing, Community Services and Indigenous Affairs and The Hon Bill Shorten MP Parliamentary Secretary for Disabilities and Children's Services Australian Government to Consider New Approaches to Disability, No. 093, 23/11/09 <http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/093.htm&pageID=003&min=njsa&Year=&DocType=>
- 33 www.pc.gov.au/projects/inquiry/disability-support

Administrator

Someone appointed to administer or direct the affairs of another, for example a business or company in voluntary administration, to determine whether it should go into administration, be wound up or can resume trading as normal.

Appellant

The party who has lodged the appeal in an appeal case

Charitable institution

An organisation which carries out charitable purposes or holds property in trust for charitable purposes

Charitable trust

A trust which is set up for a purpose – being a recognised charitable purpose – rather than for the benefit of a person

Cy près scheme

A scheme devised by a court to give effect to a charitable purpose when the intended purpose cannot be fulfilled, because it is impossible, impracticable or illegal. For example property left in a will to be used for a general charitable intention may be inadequate for the purpose, or an institution to receive the benefit of a charitable trust may no longer exist. The court can direct the funds as near as possible (cy près) to the original intention.

Ex parte

Denotes an application brought and heard by a court in the absence of the opposing party, e.g. where a matter is urgent.

Fiduciary duties

Duties which require a party to act with the utmost loyalty to another party's (the principal's) interests (or to their joint interests in a partnership). The 'fiduciary' must not, without fully informed consent: act in her or his own interests if they conflict with duties to the 'principal'; act according to a duty to another person if that duty conflicts with duty to the 'principal'; or derive a benefit (profit) from being in the fiduciary position.

Incorporated association

An association incorporated under State or Territory incorporated associations legislation, e.g. the *Incorporated Associations Act 1981* (Qld). An incorporated association is recognised as a legal person, like a company, and therefore can hold property, can sue and be sued.

Injunctive relief

A remedy in the form of an injunction. An injunction is an order by a court to prohibit someone from doing an act (prohibitory injunction) or to require someone to do an act (mandatory injunction). The order can be limited as to time (interim or interlocutory) or it can be permanent (perpetual).

Interlocutory injunction

An injunction ordered to maintain the status quo until the main trial.

Insolvent

Unable to pay debts as and when they fall due. An individual in this situation is bankrupt; a company or business, is in insolvency

Liquidator

The person who assumes control of a company's affairs in a winding up, in order to ascertain liabilities (debts), terminate contracts liquidate assets, distribute available funds to pay creditors, and dispose of the business leading to dissolution.

Non-retained profits

Profit that is distributed in the financial year, for example as a dividend to investors. Retained profits are accumulated over a number of accounting periods, i.e. carried forward to the following financial year.

Pemsel

Pemsel's case (*Commissioners for Special Purposes of Income Tax v Pemsel*) was an 1891 English case which brought together the law on what was a charitable purpose, classifying charitable objects into four categories (the four heads of charity): the relief of poverty, age and impotence; the advancement of education; the advancement of religion; other purposes beneficial to the community.

Prima facie

At first glance; on the face of it

Probate

The granting of the right to administer a will

Qualified Privilege

In an action for defamation, qualified privilege gives protection to the person who communicated the allegedly defamatory statement, if he or she had an interest or duty to make the communication, and the person who received the communication had an interest or duty to receive it. The privilege is not available if the person making the statement is doing it maliciously or for an improper purpose.

Respondent

The party who has to answer to a case, e.g. in an appeal, the party who has to respond to the appellant's case. In civil cases the person bringing the case (i.e. suing) may be called the plaintiff or the applicant while the other party may be called the defendant or the respondent.

Trusts

A trust is a device for ensuring property is held for the benefit of a particular person or persons, or for a charitable purpose. The trustee holds legal title to the trust property. The beneficiary has a beneficial (or equitable) interest in the property, and the trustee must administer the trust property for the benefit of the beneficiaries or the charitable purpose.

Ultra vires

Outside of power or authority – i.e. an act which is beyond the power or authority of a person or institution to perform, and therefore invalid. Something in legislation can also be ultra vires, for example something in an Act which is not authorised by the Constitution or something in a Regulation which is not authorised by the governing Act.

Voluntary administration

If a company is in financial difficulties but could be saved, an administrator may be appointed to investigate its affairs and recommend to its creditors whether it should enter a deed of company arrangement, be wound up or can resume normal trading.

Wound up

A form of administration where a liquidator assumes control and winds up a company's affairs to dissolve the company as a legal entity. The liquidator investigates the finances to determine the debts, converts assets into cash for payment of creditors, terminates contracts and disposes of the business. A winding up can be voluntary (by members or creditors) or compulsory (by court order).

8.0 INFORMATION ON CONTRIBUTING ORGANISATIONS

8

THE AUSTRALIAN CENTRE FOR PHILANTHROPY AND NONPROFIT STUDIES

The Australian Centre for Philanthropy and Nonprofit Studies (ACPNS), located in the School of Accountancy is part of QUT's Faculty of Business which is internationally recognised for its high quality teaching and research. ACPNS brings together academics and research students with expertise in philanthropy, nonprofit organisations, and the social economy. This, combined with our strong industry links and unique and practical teaching, ensures that we stay at the leading edge of knowledge, providing our students with a teaching and research environment that is up to date and relevant to the needs of students interested in pursuing careers in the philanthropic and nonprofit sectors.

Through our research and teaching, ACPNS brings to the community the benefits of teaching, research, technology, and service relevant to philanthropic and nonprofit communities.

Goals of ACPNS

1. Teaching and Learning: To ensure that QUT students in philanthropy and nonprofit studies possess an education that enhances the capacity of the philanthropic and nonprofit sector.
2. Research: To advance and apply knowledge germane to the philanthropic and nonprofit community in order to assist in the creation of social capital and to enhance civil society.
3. Technology: To bring the benefits of appropriate technology to the philanthropic and nonprofit sector.
4. Community Service: To contribute to the professionalism, effectiveness and international reputation of the Australian philanthropic and nonprofit sector by providing professional service and commentary on issues relevant to philanthropy and the nonprofit sector.

PILCHCONNECT

Who or what is PILCH?

The Public Interest Law Clearing House (Vic) Inc. (**PILCH**) was established in 1994, and is an independent, nonprofit community legal service based in Melbourne.

PILCH seeks to meet the legal needs of individuals from disadvantaged or marginalised backgrounds, and nonprofit organisations. PILCH works creatively to match clients with lawyers willing to give their services without charge. PILCH has also developed a reputation for well-targeted law reform and advocacy, drawing on experience from its case and referral work.

Since its inception, PILCH has successfully established a range of innovative services including the Homeless Persons' Legal Clinic – an outreach service that has now been replicated in several states. PILCH's collaborates with its counterparts in other states: PILCH NSW, Q-PILCH, Justice Net SA and ACT Pro Bono Clearing House.

PILCH's core funding comes from its members (private law firms of varying size, the Victorian Bar, the Law Institute of Victoria, corporate legal departments, community legal centres, all Victorian university law faculties and others in ancillary fields), plus a growing number of individual supporters.

PILCH has developed into a unique 'one-stop shop' for pro bono and access to justice.

Help us improve access to justice, strengthen human rights and promote the *pro bono* ethic

support pilch



Donate

1

Any donation over \$2 is tax deductible. See form below.

Become a PILCH member

Victorian-based (including national) law firms, sole practitioners, barristers and lawyers are eligible for PILCH membership. For more information or to apply for membership, please email admin@pilch.org.au, call (03) 8636 4400, or visit our website: www.pilch.org.au/get_involved.

Become a Friend of PILCH

If you are interested in *pro bono* and public interest law and the work we do, you or your community organisation can sign up to become a Friend of PILCH. Being a Friend of PILCH will entitle you to receive invitations to our free *pro bono* seminar series and other events, as well as copies of our bi-monthly publication *PILCH Matters*, which provides up to date information and comment on *pro bono* and public interest issues.



To become a friend and/or donate, please complete this form and send it along with payment to:

PILCH, 17/461 Bourke St Melbourne 3000
PO Box 16013 Collins Street West VIC 8007 | DX 128 Melbourne
fax: 03 8636 4455 | email: admin@pilch.org.au

contact details

name _____

organisation
(if applicable) _____

address _____

phone _____

email _____

payment (inc GST)

to become a friend (please tick):

	1 year	3 years
full	\$35 <input type="checkbox"/>	\$70 <input type="checkbox"/>
concession	\$20 <input type="checkbox"/>	\$40 <input type="checkbox"/>

and/or donation \$ _____

cash (in person only)
cheque
credit card

number: _____ / _____ / _____ / _____

expiry: _____ / _____

signed _____ date _____

Public Interest Law Clearing House (VIC) Inc. ABN 54 206 789 276 A0029409J
This document will be a tax invoice for GST purposes when you make a payment. Please retain a copy for your records.

PilchConnect

PilchConnect is PILCH's specialist service for nonprofit community organisations – formally launched in November 2008. PilchConnect provides free and low cost legal information, training, and legal advice (via phone) to Victorian based nonprofits. It also matches eligible, public interest nonprofits, that have more complex legal issues with PILCH member law firms. PilchConnect has already undertaken significant law reform and policy work at both a state and federal level.

By developing as a sector-based hub of NFP legal expertise, PilchConnect supports excellent standards of governance and regulatory compliance by nonprofit community organisations so their economic and social contribution to Australia is maximised. In effect, PilchConnect is 'helping the helpers' by supporting the establishment and the effective running of well-governed community organisations. In turn, these NFPs provide crucial support and assistance to the local communities in which they operate, including services to clients and members, promoting volunteering and community well being.

The PilchConnect service currently receives no government funding and relies on pilot funding from The William Buckland Foundation and the Legal Services Board of Victoria.

PilchConnect works with peak bodies such as Volunteering Victoria, Volunteering Australia and VCOSS. In particular, we enjoy a formal partnership with Australian Centre for Philanthropy and NonProfit Studies and are grateful to the CPNS team (in particular, Professor Myles McGregor-Lowndes) for tremendous support and encouragement!

THE AUSTRALIAN CHARITY LAW ASSOCIATION

There is an emerging need for accountable, charity-related legal services in Australia. In recognition of and response to this, the Australian Charity Law Association (ACLA) was established in 2009. ACLA is a nonprofit public company association, based in New South Wales.

ACLA aims to provide legal education that is legitimate, targeted and relevant to all those who work with the sector including external advisors for charities, in-house lawyers employed by charities, charity workers, administrators and even interested members of the public. In the provision of this education, ACLA seeks to raise the standard of legal assistance provided to charities, and consequently, bolster the strength of the charitable sector as a whole.

ACLA's means of education include courses, seminars and publications. These educational programs are informed by ACLA's members and are targeted to address the specific needs of charities in Australia. They also incorporate useful information on the current legal issues affecting the Australian charitable sector.

The current Directors of the organisation are Claire Jones (Senior Associate, Prolegis), Dr Myles McGregor-Lowndes (Director, The Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology) and Anne Robinson (Solicitor Director, Prolegis).

The Honourable Sir Anthony Mason AC KBE (Former Chief Justice of the High Court of Australia and non-permanent Judge of the Hong Kong Court of Final Appeal) has accepted our invitation to be the Australian Patron of ACLA.

In addition, our International Patron is University Professor Harvey Dale (Director, National

Center on Philanthropy and the Law, New York University School of Law).

How you can get involved

In September 2010, ACLA will be hosting a series of master classes on current charity law issues. These classes will be targeted at those who already possess a general knowledge of the Australian charitable sector.

Further information on the master classes can be obtained by calling ACLA Company Secretary Julie McConnell:
phone 02 9466 5222
email jmccconnell@prolegis.com.au

Become a member. Membership forms are available on request from ACLA Company Secretary, Julie McConnell:
phone 02 9466 5222
email jmccconnell@prolegis.com.au