TEN CASES THAT SHAPED CHARITY AND NONPROFIT LAW IN 2020 AND TEN TRENDS TO CONSIDER

ACPNS Legal Case Reports found over 200 cases in 2020 from charity jurisdictions to summarise and make available to the nonprofit sector. Of these, ten cases have been chosen as providing significant judgements that develop the sector’s jurisprudence, or are otherwise noteworthy. In no particular order they are:

1. **Lehtimäki and Others v Cooper** [2020] UKSC 33 concerned a small membership charitable company facing a special legal situation unlikely to ever arise again. Despite these caveats, this English case is chosen for its potential to influence the progress of Australian charity jurisprudence, and at the same time for providing several challenges. Many will applaud the view that a corporate body (including, but not limited to, a company, incorporated association, or cooperative) can be a charity in itself and not merely a trustee for a charitable trust. Further, a corporator owes the charity fiduciary duties, unlike in a for-profit company where the shareholders exercise their rights (e.g. votes) according to their perception of their own interests.

Few would argue with holding the charitable purpose of a body as the prime determinant of the appropriateness of conduct of its related actors. In England, the utility of the decision has already been demonstrated in the church faction case of **Ethiopian Orthodox Tewahedo Church St Mary of Debre Tsion, London** [2020] EWHC 1493 (Ch). However, it does raise a slew of ‘what ifs’ that commentators to our case note implications section draw attention to. How far can a corporate constitution go in modifying a member’s fiduciary duty before it infringes on ‘the irreducible core of all fiduciaries’? Will there be a declaration of member conflicts before meetings? What happens when the single member/director of a charitable corporation has a conflict of interest, to whom do they disclose it and who can deal with it? Should members seek insurance for the financial effect of a breach of their duties? Will these and many other issues be left to the inherent jurisdiction of the Court to solve, or is statutory intervention the appropriate course? The immediate issue for charity law practitioners is to consider whether or how a body’s constitution should be drafted or amended to respond to the members’ fiduciary duties.

2. **Greenpeace of New Zealand Inc v Charities Registration Board** [2020] NZHC 1999 may be the final salvo in the altercation between the New Zealand Charities Registration Board and Greenpeace NZ. The case is significant for its possible impact, and the implications section of our case note includes the considered views of experts from many jurisdictions. The Greenpeace NZ case adds to the understanding of the primacy of the purpose test, and the breadth of illegality as a vitiating factor, whilst signalling at the same time convergence and divergence of approaches to advocacy by charities in New Zealand and Australia. As Murray Baird sagely commented in the case note’s implication section:

   To discern purpose, start with the Constitution rather than trawling the web. A website is not a statement of purposes. Activities are one of the things from which purpose can be inferred along with website content and other sources of information (at [121]). This approach is consistent with the Australian approach expressed succinctly by Allsop J. in Word Investments: It is an integrated, holistic enquiry directed to whether a body of
facts and circumstances satisfies a legal category or conception...Such an inquiry inevitably focuses on an analysis of activity.¹ This methodology has been enshrined in a note to section 5 in the Charities Act 2013(Cth):

Note 1: In determining the purposes of the entity, have regard to the entity's governing rules, its activities and any other relevant matter.

3. **Family First New Zealand v Attorney-General** [2020] NZCA 366 is a long-running New Zealand case involving charity purposes of education and the fourth head overlaid with advocacy concerns. It is again on appeal. Implications of the case around the charity world are expounded by a bevy of experts in the implications section of our case note. Is there a link to Australian jurisprudence found largely in the judgment of the majority of the High Court of Australia in Aid/Watch v Federal Commissioner of Taxation [2010] HCA 42?

4. **New Lanark Hotels Ltd v Office of the Scottish Charity Regulator** [2020] UT 9 and **New Lanark Trading Limited v Office of the Scottish Charity Regulator** [2020] UT 10 are recommended as related cases about the public interest necessary for charity registration, but with different facts. Marvel at the arguments that led a court to conclude that an ice cream shop provided a dual purpose of education and the promotion of agriculture in an historical site theme park, and the critical role of a window so that the public could watch ice cream being made ‘without prejudicing food hygiene’.

5. **Better Public Media Trust v Attorney-General** [2020] NZHC 350, concerning the charitable status of public interest journalism, stands out because it is at odds with the Charity Commission of England and Wales’ views outlined in Charity Registration Decision: Public Interest News Foundation based on English case law. The New Zealand case is under appeal and there are prospects of an enlightening decision on the scope of advancement of education, advancement of citizenship and advocacy as a purpose.

6. **YWCA Australia v Chief Commissioner of State Revenue** [2020] NSWSC 1798 is a state duties case where the judgement contains clarification on the contemporary meaning of “the relief of poverty” and its cure. It confirms that the concept of poverty in this context embraces persons whose lot needs improvement or who are “subject to some degree of financial necessity”, and not “poverty line” assessments such as that published by the Organisation for Economic Cooperation and Development. The judgement also distinguishes narrow Canadian decisions and outlines accounting methods for establishing accounting evaluations of “use of resources”, confirming that a purely evaluative approach, rather than a mathematical calculation, is also warranted in such matters.

7. **Attorney General v Zedra Fiduciary Services UK Ltd** [2020] EWHC 2988 (Ch) is an illustration of the Attorney General acting on her own volition to represent the Crown as *parens patriae* (parent of the nation) to redirect a moribund charitable trust. The charitable fund, initially established in 1928 with £500,000 to fund the eventual discharge of the UK National Debt, grew to £512m with no distributions in a tax free environment. The Court found the fund was for charitable purposes, and a further proceeding will apply the accumulated funds *cy-près* to another charitable purpose.

8. **Clarke v Australian Computer Society Incorporated** [2019] FCA 2175 is chosen for the clarification the judgement provides about giving notice for general meetings where special resolutions will be considered by members, and the duties of a chair in determining meeting procedures. The Court discussed sending meeting notices by email, use of hyperlinks to websites with ‘nested’ material, and application of consumer law to meeting notices. Further, the Court declared that a chair must act not only in good faith, but also reasonably and for the purposes for which the powers were conferred, in regulating a meeting of members.

9. **The Church of Jesus Christ of Latter-Day Saints Trust Board v Commissioner of Inland Revenue** [2020] NZCA 143 is a significant case because of the masterly discussion by the Court of the meaning of ‘gift’ and its careful analysis of authorities from a number of jurisdictions. The prime question before the Court was whether voluntary payments made by missionary member taxpayers or their relatives to the Church were gifts providing a tax credit under the *New Zealand Income Tax Act 2007*.

¹ Commissioner of Taxation v Word Investments Limited [2007] FCAFC 171 per Allsop J (at [14]-[15]).
10. Fafalios v Apodiacos [2020] EWHC 1189 (Ch) and Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee 2020 ONCA 282 are two cemetery cases on either side of the Atlantic that are as far apart legally as they are geographically. As Francis Moore's Reading on the Statute of Charitable Uses in 1607 notes, the repair of churches, including their surrounding land, which was usually a burial ground, was charitable. However, cemeteries drifted into municipal and even private hands over the centuries, but have they floated past the bounds of charity?

Fafalios’s case concerned three charitable trusts operating within the Greek community in London. The 1860 Greek Cathedral Cemetery Enclosures Trust (Cemetery Trust) is a charitable trust with minimal trust deed documentation, but a surplus of income that required investment. One of the issues was whether associated religious charities could direct that investment. It is a complex case that touches on a number of charity law issues involving the interpretation of old trust deeds.

Friends of Toronto Public Cemeteries Inc was an appeal decision which considered, amongst other issues, whether cemeteries were charitable under the fourth head of Pemsel. The Court found that there was no compelling jurisprudential trend that the purpose of operating a cemetery can be a charitable purpose. It based this decision on the lack of matters being brought before the courts and that the cemetery could generate commercial profits, which in Canadian charity taxation jurisprudence indicates non-charitable status.

Those cases that were memorable for various reasons, but ultimately did not make the cut, were:

- Laliberté v. Canada, 2020 FCA 97 is a case that is just out of this world. The founder and controlling shareholder of the Cirque du Soleil enterprise argued that his $42 million space travel to the International Space Station was a promotional activity for the Cirque du Soleil group and for a charity, the One Drop Foundation. Despite reciting poetry in a broadcast from space supporting the Foundation’s cause, taking pictures that served both as souvenirs and were for a book benefitting One Drop, and filming a documentary about his space journey, which partially benefitted One Drop, the Tax Court determined that the purpose of the trip was ‘overwhelmingly personal’. As the space flight was a long-held dream of the appellant, the Court allocated only 10% of the trip as business-related.

- Tudora v The Queen 2020 TCC 11, in which a Canadian (non?) taxpayer who claimed a gift deduction in a tax abusive scheme asserted that the Canadian tax authorities should have warned him in a timely manner about the scheme.

- Reurich v Shoalhaven Heads Bowling and Recreational Club Ltd [2020] FCA 427 where there was no quarter given to Boofhead, the assistance dog of a disgruntled bowler.


Ten Trends to watch in 2021

After summarising in excess of 200 cases from across the charity jurisdictions, we stand back and reflect on how the dots can be joined to discover trends. In some instances, it is the dots that are missing that provide significant insights for the sector to reflect upon.

1. Intervention And Peak Body Appearances Before Courts

+ Environmental and NIMBY organisations often expressly incorporate limited liability nonprofit legal entities for the purpose of opposing developments, and have long used the courts to frustrate for-profit company operations (for example, New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc, [2020] QSC 212; Aireborough Neighbourhood...
Development Forum v Leeds City Council [2020] EWHC 45; Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee 2020 ONCA 282). But there may be the start of a broader emerging trend for other nonprofit concerns to use the courts to achieve their purposes.

It is possible to appear before a Court proceeding other than as a party to the litigation. In Australia this can be in one of two ways, as an amicus curiae (friend of the court) or as an intervener in the proceedings. The role of an amicus curiae is to assist the court ‘by drawing attention to some aspect of the case which might otherwise be overlooked’. The role of an intervener is to represent the intervener’s own legal interests in proceedings. In both types of case, the non-party must apply to the Court for leave to be so joined or heard.

It can be a strategy employed by organisations representing a broad constituency that would be generally affected by the decision or having specialist knowledge that can be shared with the Court for the greater public benefit.

+ In Family First New Zealand v Attorney-General [2020] NZCA 366 the Charity Law Association of Australia and New Zealand (CLAANZ) intervened with leave of the Court to address two issues of principle. This appears to be a first for charity law in New Zealand and perhaps a signpost to greater activism by third parties in attempting to shape charity jurisprudence in the region.

+ In Hospice New Zealand v Attorney-General [2020] NZHC 1356 a nonprofit hospice peak body sought declarations about the statutory meaning of parts of an Act concerning end of life issues passed by Parliament (but not yet in force) that was to be put to electors in a general referendum. The model of passing an Act and having a national referendum on it appears to be a helpful way to let citizens have a direct say on legislation that may be socially controversial. The ability of nonprofit organisations to seek the assistance of the Court to expound on the statutory meaning of the Act’s provisions also appears to be helpful, both for the organisations, their front-line members and the general public in their voting deliberations. As the Attorney General was at pains to point out to the Court, this is not without the dangers of entering into the political sphere or providing guidance on hypothetical matters that a later court faced with the situation may decide differently on the facts.

+ Actions to clarify the Queensland law on political donations were The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors [2020] QSC 54 and The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors (No 2) [2020] QSC 174. The case concerned the issue of whether gifts from prohibited donors can be made to a third party circumventing the prohibition on prohibited donors to the campaigns of political parties and candidates in Queensland in the Electoral Act 1992 (Qld).

+ The courts in the UK and Canada appear to hear more cases than Australia where nonprofit community service peaks challenge government administration. For example, Poole Borough Council v GN (Through His Litigation Friend The Official Solicitor) and Another [2019] UKSC 25 is a case from the UK which considered whether a local authority or its employees owe a common law duty of care to children affected by the manner in which the local authority exercises, or fails to exercise, its social services functions. R (on The Application of Z and Anor) (Ap) v Hackney London Borough Council and Anor [2020] UKSC 40 involved a charitable housing association with the primary purpose of housing members of the Orthodox Jewish Community, which successfully defended a claim under the Equality Act 2010 (UK). In Canada public interest standing to litigate the constitutionality of non-consensual mental health care was considered in the matter of Council of Canadians With Disabilities v. British Columbia (Attorney General) 2020 BCCA 241.

This strategy might be an avenue for disability peaks to challenge NDIA/NDIS policy (refer to NDIA costs trend below).
2. Delays And Costs Of Litigation

The fictional equity case of Jarndyce v Jarndyce that lasted generations for nought served as the backdrop to Charles Dickens’ *Bleak House*. It serves to remind us today that the law divorced from justice is futile. Dickens’ words that ‘there is not an honourable man among its practitioners who would not give—who does not often give—the warning, “Suffer any wrong that can be done you, rather than come here!”’. Dickens’ words remain a warning that costs and delay in the courts are the enemies of justice.

It appears common place that those with legitimate complaints of wrong-doing by non-charity office bearers are unable to take matters to Court because of the cost. Corporate entity regulators at both state and federal level are reluctant to become involved, and the office bearers would rather ‘tough it out’ than join in meaningful mediation.

**Costs**

+ In *Olsen v James* [2020] NSWSC 1432 (also *Olsen v James* [2020] NSWSC 1015) a will contained bequests to three charities, and legal costs of over $500,000 were incurred in the dispute where an estate was worth $600,000. The fault was laid at the feet of lawyers. The Court remarked at [180]-[181]:

> The result of these proceedings has been a disaster for Mr James. On the evidence, he took on his duties as an executor as a family friend of the deceased and appears to have acted throughout in perfect good faith. He now finds himself being ordered to pay out of his own pocket for hundreds of thousands of dollars awarded against him as a result of the settlement of Mr Olsen’s claim and hundreds of thousands of dollars more taken by his solicitors out of the estate, to say nothing of interest and further cost liabilities. To add insult to injury, his own legacy has been applied to cover costs of WMD [his lawyers] which were disallowed as impermissible. Mr James’ good faith is no answer to the claims for which he is legally responsible as executor. But his liabilities all appear to result from steps taken on his behalf by WMD which can now be seen to have been erroneous or ill-advised. Indeed, the whole course of the administration as revealed by the evidence causes one to wonder whether any proper consideration was ever given on WMD’s part to Mr James’ interests. There is an obvious potential for claims by Mr James against WMD for damages or compensation to cover his liabilities.

+ The costs of pursuing litigation in complex legal matters causes serious consideration for all parties of average wealth. Having the charity pay the costs has often been the norm, but this may be changing where claims are unmeritorious or prolonged. It is reported in the latest accounts of the charity involved in *Lehtimäki and Others v Cooper* [2020] UKSC 33 that the case has cost the charity £6.85 million. In *Hopkins v Edwards* [2020] VSC 456 involving a foundation with assets in excess of $30 million, the costs of the plaintiffs were $1.72 million and the costs of the active defendants were $1.04 million. In *Levey v Bishop Paul Bernard Bird* [2020] VSC 615, a procedural hearing in a case of alleged sexual abuse, the estimated cost of responding fully to a subpoena was put at $120,000-$140,000. The plaintiff contended that if any costs were payable, they should be payable by the defendant.

+ Internal disputes in associations, particularly religious bodies, are notoriously intractable and have been battled out in Court despite many litigants having significant personal financial exposure to costs. Some are parties in an individual capacity as office bearers of unincorporated associations. They are too numerous to mention, but an example is *An v Joo* [2020] NSWSC 377, a dispute over costs arising from *An v Joo [2019] NSWSC 39* involving church management to which there was no litigated outcome, but on an indemnity basis Mr An was likely to recover $306,994, and on the ordinary basis, he was likely to recover $247,430.

Our case summaries have also included NDIS/NDIA cases on the basis that they are dealing with new legal issues and would be germane to the work of many community organisations. The number of self-represented applicants in such
matters was significant, presumably because of costs, and many achieved their claims. Costs in this area are an unwarranted barrier to justice for a vulnerable population.

The final word on costs must surely be this extraordinary case from the United Kingdom. In Jovicic & Ors v The Serbian Orthodox Church-Serbian Patriarchy [2020] EWHC 2229 (QB) a costs order was sought personally against the lawyer acting for clients seeking to sue The Serbian Orthodox Church-Serbian Patriarchy for alleged abuse by its clergy. The Court found that all the costs were caused by the negligent and unreasonable conduct of the lawyer.

Delay

In Greenpeace of New Zealand Inc v Charities Registration Board [2020] NZHC 1999, the charity had been seeking charitable status since 2008 and only after six proceedings was its status confirmed twelve years later. Some may excuse the delay based on the complexity and significance of the case. There are consequences practically for the sector, as Sue Barker points out in her implications of the decision. The regulator encourages some charities to voluntarily deregister, or withdraw their application so as to bypass registration as a charity, and other organisations simply do not file for charity status. Over twelve years this may amount to potentially hundreds of charities which have been adversely affected by an approach that has now been confirmed by the High Court as incorrect.

In Re Sir Colin and Lady Mackenzie Trust (No.2) [2020] VSC 335 (see also Re Sir Colin and Lady Mackenzie Trust [2019] VSC 834) the Court’s attitude towards the delay of the professional trustee in bringing the matter before the Court is a salutary warning. Six years was too long. In Re Estate of Henry Brough Smith; Perpetual Trustee Company Ltd v Uniting (Victoria and Tasmania) Ltd & Ors [2020] VSC 378 the trustee sought advice from counsel about the entitlements in 2015 and again in 2016, but it was 2018 before court proceedings were filed, and not until the end of June 2020 before a decision was received from the Court. In a working paper written 20 years ago, Regulatory Infrastructure for Nonprofit Organisations, attention was drawn to the delays by trustees in bringing appropriate charitable issues before the Court, with one languishing for over 90 years.

Hat tip to the Queensland Attorney General who (unlike other State Attorneys General) seems to have a practice in appropriate cases of not seeking to recover costs where matters involve wills and charities - Banwell v Attorney-General [Qld] [2020] QSC 239 and Re Graham (Deceased) (No 2) [2020] QSC 168.

3. Use Of Defamation And Bullying At Work In Internal Disputes

While the threat of defamation has always been in the toolbox of lawyers representing those in internal association disputes, they usually do not pass the stage of a ‘stopper writ’. However, several have proceeded to judgement in 2020, and this builds on the trend noticed in 2019 (Sargon Eshow v Bishop Mar Meelis Zaia [2019] VSC 465 and Park v Kim [2019] NSWDCC 609). They often involved social media, with the defamed organisation also seeking redress for the defamation as well.

In Webster v Brewer (No 3) [2020] FCA 1343 a not-for-profit organisation operated in rural New South Wales to provide benevolent relief from social isolation, poverty, ill-health, destitution and distress for pregnant women and new mothers who lacked support and resources. It was defamed on social media, along with its founders. The Court awarded damages of $300,000 and, while recognising that an entity may not be awarded damages for hurt feelings, the Court said the sum awarded was required to convince a bystander of the baselessness of the defamatory claims. Another instance was Brown v Kirkpatrick [2020] SASC 5.

There have been a number of Fair Work Commission claims for bullying in the workplace that appear to have their genesis in associational internal disputes. As volunteers, the applicants have failed the jurisdictional ‘worker’ hurdle, Donald Dwyer v Seymour Racing Club [2020] FWC 2286; Annemaree Collins v Team Rubicon Australia [2020] FWC 2412; David Gibson [2020] FWC 3373.
4. Fundraising

It is not hard to join the dots between the cases we summarised about fundraising in 2020. After (or even well before) the *Celeste Barber Bushfire appeal case*, it seemed clear that cyber crowdfunding on behalf of nonprofits brings both unlimited opportunities and challenges for the sector and for the general public. Internet technologies have enabled low entry barriers for fund seekers and low search costs for givers. This is combined with the ability to connect without regard to geography.

A classic case study of the regulatory failure of this area of public administration is contained in the case *McLachlan & South Ozz Shelter v Hamilton* [2020] SASC 126. It was a dispute over funds raised via a website appeal to support an animal shelter. Evidence disclosed that the particular platform was deliberately chosen because it did not require a fundraising collections license for participation. The Court warned (at [58]):

> Unfortunately, fraudulent activities masquerading as “charities” continue to be a serious problem and in fact continue to increase in line with the ever-expanding ambit of cheap, instantaneous electronic canvassing via “social media” and the internet generally.

The case is now subject to appeal: *McLachlan & South Ozz Shelter (Charity Licence No. CCP3261) An Incorporated Charitable Institution v Hamilton* [2020] SASCFC 123.

Australian fundraising legislation is without exception deficient in dealing with online issues. Take the Queensland definition of an appeal for support drafted in 1966 before the advent of email, a web page, Twitter or Facebook. It couches the definition of advertising in terms of:

> ...any circular, leaflet, newspaper, publication, or other document, by any placard, poster, or sign, or by any public announcement made by means of producing or transmitting light or sound; and

> any notification to the public expressly or impliedly indicating that any proceeds of, or any moneys from, or any collections at, any dance, concert, social entertainment, bazaar, fair, fete, carnival, show, sport, game, or other diversion, activity, or function;...

Bespoke legislative facilitation, with nuanced donor and nonprofit organisation protections, is required in the unregulated world of interminable boiler plate terms, conditions and indemnities nested in the dark corners of a powerful multinational cyber behemoth’s web site. Australia does not have to invent the wheel since others have made promising starts in regulatory schemes. The *Report of the Office of The Attorney General of the State of New York* records a settlement with the PayPal Charitable Giving Fund Inc. by multistate US Attorneys General concerning its online donation platform, and offers guidance for emerging public policy in this area. In August 2020, a *Uniform Benevolent and Community Crowdfunding Act, 2020* was adopted by the Uniform Law Conference of Canada that further provides helpful guidance. The US Attorneys General Association has also commenced work on drafting model US state provisions to deal with philanthropic crowdfunding.

A comparison with crowdsource funding facilitation and regulation for the for-profit sector is instructive, even if it uncovers familiar themes of unwarranted public policy and shameful regulatory neglect of the nonprofit sector. The potential of cyber crowdfunding was not lost on the business community and the Commonwealth government. In 2017,

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2 *In the matter of the New South Wales Rural Fire Service & Brigades Donations Fund; Application of Macdonald & Or* [2020] NSWSC 604.
the Crowdsourced Funding Act was enacted, making minor amendments to the Australian Securities and Investments Commission Act 2001, to provide a legislative framework for business crowdsourced funding and around fintech operators. It reduced the regulatory requirements for such fundraising while maintaining appropriate investor protection measures, with lashings of guidance provided by the regulator for participants. On one view, this is a laudatory public policy initiative to grease the wheels of commerce with the ‘trickle down’ to benefit the wider Australian community. ASIC even found the time, energy and funds to survey all the intermediary platforms under the legislation to measure the impact of the Act. It discovered that in the first full financial year of the Act’s implementation that $26.33 million was raised from 56 offers involving 14,257 investors.

Compare this to the size, scale and reach of nonprofit crowdsourced funding. In just two weeks the bushfire Facebook appeal by Celeste Barber raised $51 million from 1.3 million donors. Overall 53 per cent of all adult Australians donated to bushfire appeals, raising an estimated $500 million. Research at the time suggested that for nearly 66 per cent of donors, this was the first time they had ever given through Facebook and 85 per cent of them were likely to give in this way again. There were an unknown number of fraudulent scam web site appeals.

If for-profit interests can move Parliament to facilitate just $26 million of equity raising from a mere 14,000 investors, why should the nonprofit sector not have the same impact? How much stronger is the case for providing a ‘fit for purpose’ legislative framework for nonprofit crowdsourced funding, reducing the current chaotic regulatory requirements for such fundraising, while maintaining appropriate donor protection measures, with generous appropriate guidance provided by the regulator for participants? ‘Considerable’ or ‘immense’ is the suggested reply.

A bright spot in fundraising cases was Australian Competition and Consumer Commission v Oscar Wylee Pty Ltd [2020] FCA 1340. An optical company made statements between 2014 and 2018 that for each pair of glasses a consumer purchased from Oscar Wylee, it would donate another pair of glasses to someone in need. It also stated that it made such donations at or around the time of the consumer’s purchase. Oscar Wylee sold 328,010 pairs of glasses but donated only 3,181 pairs of glasses. It further represented that it was closely affiliated with a named charity, but throughout the period this was confined to one donation of $2000, and the donation of 100 glasses frames in 2014. Oscar Wylee admitted the contraventions and was ordered by the Court that it pay pecuniary penalties totalling $3.5 million, make corrective advertising on its website and social media, and enter into a 3 year compliance program.

This course of conduct occurred over four years and was done in the full glare of public notice on a national scale. There are provisions in state fundraising legislation about third party fundraising, and sometimes registration, reporting and rules for its conduct. It would be interesting to know if any State regulators had received complaints about the situation, or whether their internal regulatory activities had such behaviours on their radar. If regulators do not detect or follow up inappropriate behaviour promptly, then their primary legislation falls into disrepute, and even its ritualistic and ceremonial value as a social and moral compass wanes.

Help reform fundraising by visiting #fixfundraising.

5. Identity Of Charities In Bequests

Misdescription of named charitable beneficiaries in wills has always been an issue before the courts, but rapidly growing mergers and consolidation of the community services sector in Australia has exacerbated this trend. The life span of the identity of worthwhile community organisations is dramatically decreasing. When naming an organisation in your will, how do you know it will be around at the time of the distribution of your estate? Both will drafters and charity beneficiaries can plan to mitigate the frustration of such situations.

5 Fintech businesses are the platform intermediary firms.
In *Re Estate of Henry Brough Smith; Perpetual Trustee Company Ltd v Uniting (Victoria and Tasmania) Ltd & Ors* [2020] VSC 378 the trustee of a charitable trust established in 1969 sought the advice of the Court as to whether successor organisations to the fifteen originally named institutions could benefit. Only three of fifteen named organisations continued to exist in their original form. Two were hospitals and the other organisation grew by taking in other community organisations. In *Banwell v Attorney-General (Qld) [2020] QSC 239* a declaration was brought before the Court because the eight organisations named in the will were not legal entities at the date of death, or had altered their names.

There is no better example of ensuring the right name is included in a will than *Re Estate of the Late Stasha Berger* [2020] NSWSC 750 where the Court considered whether a gift in a will to a Melbourne Catholic religious shrine was capable of wider interpretation to embrace the purposes of the religious Order who owned it. The net value of the residuary gift to the Shrine was estimated at $7,500,000.

6. **Charitable Companies**

Our signalling of *Lehtimäki and Others v Cooper* [2020] UKSC 33 as one of the most significant charity law cases in 2020 leads us consider the likelihood of Australian jurisprudence embracing the concept that a corporate body (including, but not limited to, a company, incorporated association, or co-operative) can be a charity in itself and not merely a trustee for a charitable trust. There were some decisions that considered the issue, but an authoritative statement will probably await High Court consideration.

*Hope Community Church (Wymondham) v Phelan and others (as Trustees of The Phelan Group Limited Retirement Benefits Scheme)* [2020] EWHC 1240 was an English decision that provides a base for moving the law forward, but it was *Grain Technology Australia Limited & Ors v Rosewood Research Pty Ltd & Ors* [2019] NSWSC 1111 that provided a spark of hope for a clear statement of the law of corporate charities. Although the matter has settled, there still may be a further hearing to declare the claimed charitable trusts, the approval of schemes to fulfil their charitable purposes and to provide a further statement of the law. However, *Harmony – The Dombroski Foundation Ltd v Attorney General in and for the State of New South Wales* [2020] NSWSC 1276 is a case with a number of puzzles that failed to engage with this key issue. It stands only, in our view, for the unsatisfactory state of the law in Australia.

7. **Civil Liability And Nonprofits**

With a hardening insurance market this year where price is high and coverage is limited, nonprofits again will be increasingly exposed to liability risks this year. The *Civil Liability Act* defences were successfully relied upon by associations involved in risky pastimes such as horse sports and kart racing: *Tapp v Australian Bushmen’s Campdraft & Rodeo Association Ltd* [2020] NSWCA 263; *Cooper bht Cooper v Australian Karting Association Limited t/as Karting Australia* [2020] NSWSC 664; *Carter v Hastings River Greyhound Racing Club* [2020] NSWCA 185 and *Menz v Wagga Wagga Show Society Inc* [2020] NSWCA 65. The courts are upholding validly drawn and executed ‘Indemnity and Waiver’ forms with ‘risk warnings’ for the purposes of civil liability defences. The policy question remains of where liability for such injuries should rest and who is in the best position to mitigate the risks faced in these community endeavours?

If nonprofit boards had not got the message about the importance of the culture of their organisation, particularly in relation to their responsibilities for caring for their beneficiaries, then *SMA v John XXIII College (No 2)* [2020] ACTSC 211 graphically conveys the message in bold capital letters. The Court commented in no uncertain terms (at [16]):

I have reached the conclusion that the defendant was well aware of the appalling conduct that characterised the Pub Golf event, and others like it, but, by intended policy or feigned ignorance, condoned the conduct. I had the distinct impression that the defendant guarded its reputation as a hard drinking, good living
establishment as a badge of honour and a lure to students who thought these attributes were requirements of their introduction to adulthood and university life.

And further (at [20]):

John’s was supposed to be a haven of Catholic values. Instead its catholic interests made a virtue of the consumption of alcohol. The history of the College and a description of Pope John XXIII...bears a distant relationship to the College as it had become by 2014 and 2015.

Those charged with a duty of care to young adults are put on notice by this case that they will be held to account for allowing an inappropriate culture in their institutions.

John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John’s, 2020 NLCA 27 will send a shiver down the spine of those that seek to shield from liability behind separate incorporation. Although the Archdiocese did not have day to day control of the Brother’s orphanage, when the whole relationship was considered it did have control, pointing to a guarantee given to the government in 1897 about the conduct of the institution, cannons which gave power to the Archdiocese to remove brothers from the institution, and placement of a priest on-site at the institution to assist residents, and not merely for an associated Parish.

8. What The Case “Tea Leaves” Tell The Attorneys General As Protectors Of Charity

The Court in McLachlan & South Ozz Shelter v Hamilton [2020] SASC 126 ably discussed the role of the Attorney General in relation to charity proceedings. It is the duty of the Crown, as parens patriae, to protect property devoted to charitable purposes, and that duty is executed by the Attorney General as the officer who represents the Crown. The Attorney General represents the beneficial interest - in other words, the object of the charity. Two 2020 cases give us reason to consider how the office of the Attorney General should be conducted in relation to charity matters.

In Better Public Media Trust v Attorney General [2020] NZCA 290 the charitable trust that was appealing a decision sought dispensation from having to pay security for costs of about NZ$8,000. The Attorney General opposed the application on the basis, inter alia, that the appeal was ‘not one of significant public interest and the law engaged by the appeal is settled’. The Charities Act 2005 (NZ) is silent on the role of the Attorney General. Under the general law, the Attorney General is not usually named as a respondent in a charity case, but rather occupies the role of a protector of charities. Moreover, costs awards are rare in charity appeals, given that the other party is not defending a decision they were party to, but rather is concerned with the development of the law more generally. Sue Barker in her implications to our case note of Greenpeace of New Zealand Inc v Charities Registration Board [2020] NZHC 1999, reflecting on the that case and Better Public Media Trust, remarked that: ‘it seems axiomatic that the role of the Attorney General as ‘protector of charities’ is not necessarily aligned with the interests of the Charities Registration Board’.

The case of In the matter of the New South Wales Rural Fire Service & Brigades Donations Fund; Application of Macdonald & Or [2020] NSWSC 604 has also prompted comment by the Hon Marilyn Warren AC QC (former Chief Justice of Victoria) in conversation with Jennifer Batrouney AM QC about the role of the Attorney General in charity proceedings, the importance of neutrality and of having a contradictor to assist the Court. With increasing numbers

9 Refer to the New Zealand case of Foundation for Anti-Aging Research [2016] NZHC 2328 at [46], where the Court indicated that the Charities Registration Board cannot appear as a respondent and it should confine its submissions to matters on which it can provide impartial assistance to the Court. This appears to have led to a new practice whereby the Attorney-General will appear in place of the Board, as a respondent, thereby enabling the Attorney-General (represented by the same counsel as would have represented the Charities Registration Board) to take an active part in the appeal. Our thanks to Sue Barker for this insight.

of charities that relieve the state of functions that they would otherwise be obliged to fulfil at significant fiscal cost,\textsuperscript{11} is there a risk of this neutrality and single focus on the furtherance of the charitable object being compromised?

The classic English disaster fund case \textit{In re Gillingham Bus Disaster Fund} (1959) 1 Ch 62 might offer some wisdom. The donors were represented by the Official Solicitor. The Treasury Solicitor represented the Crown seeking the surplus \textit{bona vacantia} and the Attorney General was advocating for the charity. They assisted the Court to appreciate all the various competing stakeholder’s views and considerations.

\section*{9. What The Case “Tea Leaves” Tell The ACNC}

\subsection*{Delegation}

\textit{McKee & Others v Charity Commission for Northern Ireland} [2000] NICA 13 threw a spanner in the works of the Commission, invalidating up to 170 orders made by staff without appropriate statutory delegations being in place. Similar concerns were drawn to the attention of the ACNC Review in 2018 by the ACNC itself, and the Government has agreed to alter the ACNC Act to give the Commissioner broader powers to delegate functions or powers to ACNC staff. It is now 2021, and the Government has yet to proceed with amending legislation. The number of ACNC SES staff has been reduced, increasing the risk of an invalid delegation. We would expect advisors when preparing challenges to ACNC decisions to consider the application of McKee.

\subsection*{Reporting by Small Charities}

While Aristotle cautioned that ‘one swallow does not make a summer’, for the second year in a row it appears the small charity reporting concessions may be being used to gain fiscal concessions while avoiding appropriate public scrutiny of affairs that might otherwise be questioned.

\textit{Borman & Hunter} [2019] FamCA 1003 was a family law proceeding that considered whether the assets within a charitable trust were subject to division in a family law settlement. The evidence showed that the Foundation owned $2,004,657 in assets, the major part of which was $1,896,820 held in gold, platinum and silver bullion. It was established with ATO charitable registration in 1990 and registered with the ACNC from 2012. The evidence was that no books and records had been kept relating to the Foundation. It was unclear what the purpose had actually been. Only one withdrawal had ever taken place from the Foundation, and that money was placed in an unrelated bank account. It is a seeming failure of our charity regulatory system that a foundation could be established over 30 years ago and be largely dormant. The matter appears still not to have been addressed with the establishment of the ACNC and publication of foundation financial documents for public and ACNC scrutiny.

We speculate that this may have been accomplished by classifying the foundation as a ‘small charity’ for ACNC reporting purposes, presumably justified on the basis that the precious metals did not generate any ‘revenue’. However, the AIS return that even small charities are required to file should have raised flags. How many other zombie charity registrations are languishing on the register with moribund assets denied to the public good? For example, an \textit{analysis of Queensland charity} ACNC AIS returns in 2014 Indicated 306 small charities, 46 medium charities and 49 large charities that specifically stated that they have no staff or volunteers. So how did they operate?

This case follows on from \textit{Togher & Anor v Alexander & Ors (No 2)} [2019] NSWDC 221 where two so-called ‘small’ charities, SOCA Church Australia and Grace Missions appeared from the evidence before the Court to have engaged in extensive financial dealings and enterprises with limited respect for governance principles.

\textsuperscript{11} For example, some might assert that the government was relieved of funding fire services because of donations, and also by charitable school building funds for state schools, and charitable research foundations for publicly funded hospitals.
The last Annual Compliance Report of the ACNC was for 2018 which indicated that 15% of concerns assessed by the Compliance team were identified through ACNC data matching, and that it had appointed a dedicated intelligence analyst. Information from Annual Information Statements was considered to identify areas of risk.

10. Missing Dots

The ACNC has only been involved in one case since its inception and this is a very low number compared to New Zealand, England and the CRA in Canada. This is underscored by only two of our top ten cases for 2020 being from an Australian jurisdiction. What do the missing dots tell us?

Firstly, for charity law to be relevant requires adaption to current social conditions. Court judgements are one way in which this may be achieved, but it may also be achieved through charity regulators’ administrative decisions and guidance documents or legislation. Legislation is not a complete solution as usually it sets the framework, leaving details to courts, administrators and self-regulation. In England during the 1980s and 1990s there were few superior court charity cases, but the law of charity was progressed through the Commission’s review of the register process which produced both administrative guidance and publicly available Commission decisions. With the ACNC’s last Commissioner’s Interpretation Statement being in 2015 and its legal inability to publish its administrative case decisions, this path of keeping charity law current is difficult to tread. There is a case for further Commissioner’s Interpretation Statements on topics such as advocacy purposes, illegal acts as a vitiating factor, governance standards (domestic and cross border), determination of ancillary purposes, each of the twelve charitable purposes, public benefit and necessitous circumstance funds. Although there are fact sheets and guidance on such issues, these resources do not replace the Commissioner’s detailed and referenced understanding of how the law and its logic applies to charities.

Secondly, charity regulators need to be called to account outside their internal appeal processes. It is inconceivable, even with the best of intentions, that every Commissioner’s decision is correct in law. It is a healthy accountability mechanism for appropriate reviews of a regulator’s decisions to be heard in independent judicial forums. The Government provided the ACNC with $1 million of additional litigation funding in the 2018-19 Budget to enable the Commissioner to enforce and develop the law where ambiguity exists, following a recommendation by the ACNC 2018 Review Panel. The panel also recommended that the ACNC should be given test case litigation funding (similar to the ATO model). This would provide registered entities with financial assistance to take matters with broad implications to Court with the objective of clarifying contentious areas of law. However, this was not supported by the Government, which instead suggested exploration of legislative options to address uncertainty in the law.
The Australian Centre for Philanthropy and Nonprofit Studies (ACPNS) produces succinct case notes for lawyers, accountants and managers involved in the nonprofit sector throughout each year. The Case Notes are posted to QUT ePrints, an institutional Internet repository of research output of QUT staff and postgraduate students. The papers deposited in QUT ePrints are freely available, with an advanced search facility available. You can subscribe for a quarterly case email alert at The Australian Centre for Philanthropy and Nonprofit Studies.

Further resources on grant-seeking, fundraising and philanthropy are available from the QUT Community Collection for grant-seekers, fundraisers and philanthropists.

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