

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## ACPNS Quarterly Case Notes - 1 January to 31 March 2022

A summary of significant cases involving charitable, philanthropic, nonprofit and social enterprises organisations in Australia and overseas.

[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 ACPNS Quarterly Case Notes Series summarises cases noted in each quarter and links them directly to its full case notes 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.

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

This case note summary collects and summarises cases of particular interest decided in the first quarter of 2022.

### The experts' pick of cases to consider:

#### **Myles McGregor-Lowndes – Professor Emeritus ACPNS**

They say not to mention “politics or religion”, but this quarter has seen significant political cases (6) and a number of messy internal faith-based disputes (8). Both large political parties and faith-based organisations are often organised through unincorporated association structures. The current Australian political cases have involved whether the 1930s Australian High Court decision in [Cameron v Hogan](#) prevails to prevent political parties organised as unincorporated associations from airing their preselection disagreements in the Courts due to a lack of justiciability. The High Court has refused several times in this quarter to grant leave to appeal on the justiciability question to both sides of the political spectrum. It is noticeable that the justiciability of unincorporated association disputes in other jurisdictions is rarely considered to be an issue because a contract between the members is assumed or found. There has also been some interesting litigation in Canada about parties disclosing what information they collect on voters, and also the results of an internal audit of party member voting discrepancies.

#### **Bob Wyatt – Executive Director of The Muttart Foundation and member of The Pemsel Case Foundation<sup>1</sup> (Canada)**

This quarter continues to highlight cases demonstrating an increasing litigiousness amongst disaffected members within organisations. One might well wonder how “civil” civil society really is. But the compendium has other interesting cases. The ongoing saga of Keeping Kids Company is notable both for the revelations about the regulatory system, and as a case study for those examining the impact of founder’s syndrome. The Human Concern International case is notable because it shows the continuing reluctance of Canadian courts to provide any re-examination of the

<sup>1</sup> <https://muttart.org>; and <https://www.pemselfoundation.org/about-us/the-pemsel-case-foundation/>

regulator's actions, leaving the regulator effectively as prosecutor, judge, jury, and executioner. I am also intrigued by the four cases listed under "volunteer" and wonder whether this, too, is a litigation nightmare on the horizon, in which case all charities, regardless of jurisdiction, should take note.

### **Murray Baird – Charity Law Advisor**

The inclusion of [Registration Decision: New Zealand Entrepreneurs Rescue \(NZER\)](#) in this Legal Case Reports Series recognises the impact that regulatory decisions have on the practice of charity law. Whilst such decisions are subject to the supervision of the courts by way of appeal, the paucity of appeals from decisions of charity regulators makes such decisions a significant source of guidance on the way the law will be applied by the regulator standing as gatekeeper to registration, and the privileges that entails.

In New Zealand, Te Rātā Atawhai, the Charities Registration Board delegates most registration decisions to staff at Charity Services in the Department of Internal Affairs. However, the Board always deals with more complex or novel cases and those where organisations disagree with Charities Services' decisions. In order to foster the confidence of the sector and the public, the Board always publishes its decisions. This contrasts with the position in Australia where the ACNC is not permitted to publish its decisions.

In this case, the Board explains its approach to determining a charitable purpose as a three step approach which it says derives from the guidance of the High Court in [Re the Society for Anti-Ageing Research and the Society for Reversal of Solid State Hypothermia](#) [2016] NZHC 2328:

- whether the Society's stated purposes are capable of being charitable;
- whether the Society's activities are consistent with or supportive of a charitable purpose;
- if the Society's activities are found not to be charitable, whether they can be said to be merely ancillary to an identified charitable purpose.

The Board has slipped easily into the false concept that activities can be classified as charitable or non-charitable in themselves. The examination of activities is only a **means** to determine charitable purpose.

With respect, the formulation in the third bullet point by the Board is not a fair reflection of the relevant passage from the Judgement of Ellis J:

[88] In the present case, therefore, my own view is that the proper analysis would have been to begin by asking whether FAAR's stated purposes are charitable or not. If they are clearly not, then that is the end of the inquiry. If they are (or if the stated purposes are unclear), then the chief executive or the Board needed to consider what information it has about FAAR's present and proposed activities (and to consider requesting such information). Then, the question is **whether those activities are consistent with or supportive of the identified charitable purpose**. If they are, then there is no difficulty. If they are not, then it would need to be determined whether the activities can be said to be merely ancillary to the identified charitable purpose. [emphasis added]

Note the difference in approach. The Court emphasises reference to activities as a signpost to charitable purpose. The Board asserts that activities (in themselves) can be non-charitable.

The danger is that a Board decision left unappealed becomes entrenched as the received knowledge on the crucial question: How do we discern charitable purpose? Sue Barker observes in her commentary in the case note: "[the decision] puts New Zealand out of step with all comparable jurisdictions".

There may be indeed at least three sources governing charity law: Common Law, Statutory Law and Regulator Lore.

## Charity

+ The decision in [H M Attorney General v Zedra Fiduciary](#) [2022] EWHC 102 (Ch) concerned how a trust established to discharge the National Debt for charitable purposes could be applied cy-près. It has long been held that a gift to benefit the nation by reducing the National Debt (whether wholly or in part) is a charitable purpose, notwithstanding that the way in which citizens of the nation benefit from that gift is either by a reduction in their taxes or an increase in funds available for general public spending. The initial case was [Attorney General v Zedra Fiduciary Services UK Ltd](#) [2020] EWHC 2988 (Ch).

+ In [Re Jim Crerar Charitable Trust](#), 2022 BCSC 60 the Court dealt with the issue of whether a trust to fund the poor to bring unfair dismissal cases was charitable. It considered that neither the charitable head of relief of poverty, nor other purposes beneficial to the community, could be applied to the purpose on the basis that there was not a sufficient segment of the population who might benefit from its purpose.

+ Whether a local council held a community centre on charitable trusts was considered in [London Borough of Brent v Johnson](#) [2022] EWCA Civ 28. The fact that property is held for charitable purposes does not necessarily lead to the conclusion that it is held on charitable trusts. A local authority may acquire land on which to build a swimming pool and the provision of a public swimming pool is a charitable purpose. However, it does not inevitably follow that the local authority is a charitable trustee of the land on which the pool is built.

+ A report by the Charity Commission for England and Wales following the insolvency of the Keeping Kids Company was released - [Charity Inquiry: Keeping Kids Company Statutory Inquiry Report](#). This follows a number of other government inquiries and the case of [The Official Receiver v Batmanghelidjh and Ors](#) [2021] EWHC 175 (Ch), which was an action to disqualify the directors of the insolvent Keeping Kids Company.

+ Whether a charity should be deregistered for its inadequate administration and its unsupervised international activities was the subject of [The Albayan Foundation - Charity Commission for England and Wales](#), Charity Inquiry Report, 3 March 2022.

+ [Capricorn Animal Rescue and Sanctuary \(inc. Aston, Hawarden Animal Aid\) Charity Inquiry Report](#) is a Charity Commission for England and Wales report of an inquiry resulting in the removal of a charity from the register. An interim manager was appointed and there were allegations of poor financial controls, rapid turnover of trustees, private benefit through accommodation to a trustee, and animal management concerns.

+ In [Registration Decision: New Zealand Entrepreneurs Rescue \(NZER\)](#) the Charities Registration Board of New Zealand, considered whether NZER was suitable for registration as a charity in New Zealand. It decided that NZER had a non-ancillary, non-charitable purpose to promote its views about the New Zealand employment regime. It adopted an “ends, means and manner approach”.

## Trustees

+ [Chevron Canada Resources v Canada](#), 2022 ABCA 108 was an appeal concerning whether a trustee (government) could indemnify itself out of the trust’s funds for a judgment against it for overpayment of royalties by Chevron for the eventual benefit of four Indian bands. Canada was not entitled to judgment against the bands, but it was entitled to indemnify itself from the trust funds for the amounts that it paid to Chevron.

## Tax

+ In [Reflection Productions v. Ontario Media Dev. Corp.](#), 2022 ONSC 64 the issue was whether a series of televised bible readings with picturesque natural backgrounds was a documentary that qualified for a tax credit. The production did not present an in-depth discourse, for example, about God, spirituality, scriptures, religion, music, or nature. Rather, it literally displayed excerpts from scriptures with photographic backgrounds. The tax credit was denied.

+ [Alfred Michael Dwan, Amanda Dwan, Malcolm Terence Hunnisett, Andrew Mark, John Openshaw-Blower, Richard Parkinson v Revenue & Customs](#) [2022] UKFTT 36 (TC) concerned the valuation of shares gifted to charity primarily for tax purposes. The Tribunal rejected settling on the mid-point of the share price difference in favour of a price that would be paid by a prudent purchaser who had informed himself as to all relevant facts such as the history of the business, its present position, and its future prospects.

+ [Human Concern International v. Canada](#), 2022FCA 41 was an appeal from an interlocutory application to postpone the CRA's suspension of a charity's authority to issue charitable receipts. The charity concerned was the oldest muslim international relief charity in Canada. It was accused by CRA of making false tax receipts. The appeal was dismissed.

+ In [Trustees of the Diocese of Tasmania v Huon Valley Council](#) [2021] TASM 07 the Court considered whether a rates exemption for charitable use of land applied to a Church-operated unit complex that provided affordable housing. It found that providing increased opportunities for persons aged over 55 years, who were homeless or at risk of homelessness, to gain secure long-term accommodation was within the meaning of 'charitable purposes' in the statute. Further, a community room that was used one day a week by a community organisation for a fee was merely ancillary to the charitable purpose.

+ In [Herring v. The Queen](#) 2022 TCC 41 taxpayers who participated in a leveraged donation tax shelter in Canada sought to have charitable tax credits recognised. This case is part of a line of Canadian cases dealing with abusive tax behaviour in relation to charitable gifts and tax credits.

## Incorporated Associations and Societies

+ An application to set aside the termination of membership from an incorporated association was upheld in [Shipton v South East Queensland Sport Aircraft Club Incorporated](#) [2022] QSC 5. It was argued that the association failed to abide by natural justice in providing a legal opinion that was referred to in the reasons for his termination as a member, and sufficient particulars of the member's breaches. While the association was not normally required to give reasons for its decisions, the rule offended by the conduct of the member was necessary.

+ In [Agency Chiefs Tribal Council Inc. v Big River First Nation](#), 2022 SKCA 16 there was an appeal from a decision about when a member's resignation takes effect from an incorporated body with no bylaws on the matter. It was found that it was not a resignation, but rather notice that the member intended to resign at a future time.

+ In [Singh & Ors v Brisbane Sikh Temple \(Gurdwara\) Inc](#) [2022] QSC 17 an incorporated association with constitutional provision for unlimited memberships sought to reject member applications on the basis of facility occupancy limits exacerbated by COVID-19 and continuity of past membership. The management committee was directed to consider the rejected applications in accordance with the association's constitution and the law.

+ [Knox v Nile & Ors](#) [2022] NSWSC 195 was an application to have an incorporated association, which was a political party, wound up on just and equitable grounds. The case stands as an example of a complete breakdown in internal

relationships within an incorporated association that could not be resolved by the Court, and that led to the dissipation of all of the funds of the association on litigation and administration costs.

+ [Bagri and Ors v Arik and Ors](#) [2022] SADC 27 was an appeal of an order to grant an injunction restraining the use of an incorporated association's funds to pay legal costs in a dispute about its rules and the validity of a committee election. It considered the role in litigation of the incorporated association where there is a dispute between members.

+ In [Returned & Services League of Australia \(Queensland Branch\) Southport Sub-Branch Inc v The Southport RSL Memorial Club Inc](#) [2022] QDC 20 a service association transferred its land to a third party. The transfer was subject to a lease to a club which had in turn allowed the service association to use some club facilities. The Court found that the club had breached its obligations to the service association and awarded damages.

+ In [Sandhu v. Singh and Sikh Heritage Centre](#), 2022 ONSC 1604 the issue was whether a person had standing to bring a derivative action in relation to a Sikh temple and whether a director had a conflict of interest.

+ [Hon v Liao](#), 2022 ABQB 43 concerned an application for relief from an invalidly conducted election during COVID-19, where a government prohibited public gatherings. The Court found the alternative meeting and voting procedures were a breach of the bylaws, and the member had standing to bring the claim.

### **Unincorporated Associations**

+ In [Camenzuli v Hawke](#) [2022] NSWSC 168 the issue before the Court was whether a failure to call an AGM in due time resulted in the vacation from office of elected office bearers. The Court found that no member of the state executive ceased to hold office as such by reason only of that circumstance.

+ [Asmar v Albanese](#) [2022] VSCA 19 was an appeal from the decision in [Asmar v Albanese \(No 4\)](#) [2021] VSC 672 where an unincorporated political party member sought the Court's declaration about the validity of intervention by the national executive into candidate pre-selection. The Court considered the justiciability of the action in light of the High Court decision in [Cameron v Hogan](#) [1934] HCA 24 and a number of other state decisions. Leave to appeal the decision to the High Court was refused.

+ [Camenzuli v Morrison](#) [2022] NSWCA 51 involved a challenge to the validity of federal intervention in the pre-selection of candidates and also considered the justiciability of the action in light of the High Court decision of [Cameron v Hogan](#) [1934] HCA 24. The Court endorsed the primary decision of [Asmar v Albanese \(No 4\)](#) [2021] VSC 672 and in some respects the Court of Appeal decision in [Asmar v Albanese](#) [2022] VSCA 19. Leave to appeal the decision to the High Court was refused.

+ In [Bajwa v BC Liberal Party](#), 2022 BCSC 194 a political party member sought an injunction on releasing a leadership vote result until he had received full disclosure of a voter qualification audit. The audit was conducted during the election because there were allegations of voting irregularities and possible voter fraud. The Court found that the balance of convenience did not favour the granting of an injunction.

+ [Club Los Claveles and Others against First National Trustee Company Limited](#) [2022] ScotCS CSOH 6 involved members of a club that held timeshares in properties in a resort known as Los Claveles in Tenerife. The club committee fell out with the trustee and manager of the timeshare property, and required the determination of who were the committee members of an unincorporated association after AGMs were declared invalid due to COVID-19 issues. The Court found that the last validly appointed committee members remained in office and could act.

+ In [Ahmeds & Ors v Mukith & Ors](#) [2022] EWHC 315 (Ch) there was a dispute as to the validity of elections in an unincorporated association (mosque) made more difficult by COVID-19 restrictions. The Court also required notices to be placed in the mosque as to how the judgment could be obtained to prevent its misquoting.

### Wills and Estates

+ [The Estate of Yunupingu](#) [2022] NTSC 4 concerned the will of the late Gurrumul Yunupingu who was the most commercially successful Aboriginal Australian musician at the time of his death. The issues concerned the validity of the will and who should be appointed to administer it.

+ In [Morris v Fuirer](#) [2021] EWHC 3566 (Ch) the will maker, after becoming estranged from her son, altered her will to leave the residuary of her estate to charities. A self-represented challenge to the will failed.

+ [Johnson v Johnson](#) [2022] NSWSC 44 involved a self-drawn will where the will maker gave her entire residuary estate (a family farm) to be held on trust by a testamentary perpetual trust equally for her children and their descendants and for the care and protection of native wildlife, especially particular native birds. The Court held that a charitable trust was not created as the main object was not charitable.

+ In [Marzec v. Nemi](#), 2022 BCSC 178 charities named in a will sought to dismiss an action by the deceased's son for maintenance because of a delay of seven years. The Court found that the delay was inordinate, but that it would be unjust to dismiss the action because of the reason for the delay being the health of the son, who had reasonable prospects of success.

+ [Re Tuck; Estate of the Late Wilfred Richard Tuck](#) [2022] NSWSC 107 concerned whether three gifts to charities in a will were sufficiently identified. This was despite the will being professionally drawn, and could have been avoided by indication of the relevant ACN/ABN identifiers for the charities.

+ In [Cabrera v. Coughlan](#), 2022 ONSC 1087 there was a will dispute following the estrangement of four daughters of the deceased where the impugned wills benefited charity beneficiaries. The estate was estimated to be worth approximately CAD\$96 million at the date of this hearing.

+ [Unger Estate \(Re\)](#), 2022 BCSC 189 involved an application by executors of a will with a gift over to charities where the will-maker was murdered by a beneficiary. As a matter of public policy, a murderer is excluded from taking any benefit because of their criminal act, but does this extend to a bequest to their issue?

### Volunteer

+ [Port Sorell Bowls Club Inc v Dann](#) [2022] TASFC 2 was an appeal by a volunteer at a Bowls Club function who was burnt while cooking on the BBQ. The case considered their contributory negligence and the assessment of damages.

+ In [Tim Seidenspinner v Anthony Jacobs](#) [2022] TASCAT 17 a volunteer's complaint against racist behaviour whilst volunteering was heard by the Tribunal. The volunteer sought a written apology, compulsory attendance at a sensitivity course, a donation of \$3,000 to a charity, compensation of \$6,000, and a written undertaking by the respondent not to engage in such behaviour and conduct towards anybody for a minimum period of 12 months. The Tribunal made an award of \$500 in damages and noted that any forced apology would not be sincere.

+ [Abraham \(Abram\) Garcia v Launceston City Mission Inc, Peter Freak, Bernadette Jones, Luke Cowen](#) [2022] FWC 208 concerned an application by a volunteer for an order to stop bullying under s.789FC of the [Fair Work Act 2009](#) (Cth).

The Commission was satisfied that the actions of the City Mission were reasonable management actions undertaken in a reasonable manner, and the application was dismissed.

+ In [Woodland v. Kirkham](#), 2022 ONSC 1393 the Court considered whether a costs order could include amounts for volunteer legal students and pro bono accounting assistance by a university law clinic. It was recognised that the concept of acting on a pro bono basis did not necessarily mean that the lawyer was volunteering his or her time with no expectation of any reimbursement.

## Names

+ [Ruddick v Commonwealth of Australia](#) [2022] HCA 9 concerned whether legislative provisions about the name of a political party infringed the constitutional foundations of implied freedom of communication on government or political matters. This matter involved the Liberal Democratic Party (LDP) and an amendment to the [Commonwealth Electoral Act 1918](#) (Cth) by the [Electoral Legislation Amendment \(Party Registration Integrity\) Act 2021](#) (Cth) that sought to deny registration to, and compel deregistration of, a political party the name of which contained a word in the name of an earlier registered political party. The Court delivered a split decision, but the majority upheld the provision, with one of the majority (Steward J) noting that (at [174]):

The amendments made ... may rightly be characterised as heavy-handed. Conferring upon this country's two major political parties enduring monopolies over the words "liberal" and "labor" (or "labour") for the purposes of party registration under the Act, and as a solution to voter confusion, may be unappealing.

+ Whether an application to register as a political party was properly rejected where it involved similarity with the name of a prominent public body that was likely to confuse the public was considered in [Electoral Commissioner SA Family First v Electoral Commissioner](#) [2022] SACAT 1. The application was found not to comply with other requirements of registration.

+ In [The Hospital Research Foundation Incorporated v St John Ambulance Australia South Australia Inc](#) [2022] ATMO 23 an objection to the registration of a lottery trademark by a dominant charity lottery operator in the same market was before the Registrar of Trade Marks. The registration was allowed.

## Defamation

+ [Port Alberni Shelter Society v. Literacy Alberni Society](#), 2022 BCSC 239 concerned an application to set aside damages for defamation against a Society and its executive director obtained by default judgment due to lack of a defence and the board not appreciating the significance of the judgment. While the Court had some sympathy for the volunteer board members, it refused the application due to 'a willful — albeit unfortunate — failure to file a response'.

## Liability

+ In [Lorraine Lench v St. Patrick's Guild \(Incorporated\) \(in Voluntary Liquidation\), Kathleen Newell, Kathleen Lang, Patricia Lenihan, Ireland and The Attorney General](#) [2022] IEHC 82 there was an application for discovery of documents involving the illegal adoption of an Irish child to an English couple against a faith-based adoption agency, individual faith-based members, and the Irish Government.

## Grants

+ In [Mobilizegreen, Inc. v Community Foundation for The Capital Region](#), No. 19-CV-0861 District of Columbia Court of Appeals, 27 January 2022, a start-up organisation that entered an agreement with a community foundation that was its sponsor for a grant from the government, sued the foundation claiming breach of contract and fiduciary duty.

+ [The Corporation of the City of Cambridge](#), 2022 CanLii 12258 (ON IPC) involved a donor seeking access under freedom of information law to financial records given to a city council by a charity for the purposes of contractual arrangements. The donor was apparently motivated by the belief that his donation to the charity had not been used for its specific purpose. The adjudicator found that it was reasonable to expect that the charity would suffer harm from the disclosure of information that did not appear in the appellant's charitable tax filings, which were publicly available.

## Faith-based

+ [Rowe v The Roman Catholic Archbishop of Perth \[No 2\]](#) [2022] WASCA 28 was an appeal from removal of a caveat by a quasi-parish over lands held by an Archbishop as a corporation sole. The dispute involved a Latin mass community. New canon law requires individual bishops to approve celebrations of the Latin Mass, and requires newly ordained priests to receive explicit permission to celebrate it from their bishops in consultation with the Vatican.

+ [The Presbyterian Church of Queensland Incorporated by Letters Patent v Attorney-General for the State of Queensland](#) [2022] QSC 38 was a further application to approve the sale of property of a Letters Patent body by its receiver. The case follows on from [The Presbyterian Church of Queensland Incorporated by Letters Patent v Attorney General for the State of Queensland](#) [2021] QSC 136.

+ [In the matter of The Rustat Memorial, Jesus College, Cambridge](#) [2022] ECC Ely 2 was a matter in the Consistory Court of the Diocese of Ely concerning a petition for the removal of a memorial to Tobias Rustat from Jesus College Cambridge. The removal was sought due to pastoral concerns about his involvement in the slave trade.

See also [Reflection Productions v. Ontario Media Dev. Corp.](#); [Human Concern International v. Canada](#); [Singh & Ors v Brisbane Sikh Temple \(Gurdwara\) Inc](#); [Ahmeds & Ors v Mukith & Ors](#); [Abraham \(Abram\) Garcia v Launceston City Mission Inc](#), [Peter Freak, Bernadette Jones, Luke Cowen](#); [Lorraine Lench v St. Patrick's Guild \(Incorporated\)\(in Voluntary Liquidation\)](#), [Kathleen Newell, Kathleen Lang, Patricia Lenihan, Ireland and The Attorney General](#);

## Privacy

+ In [Conservative Party of Canada \(Re\)](#), 2022 BCIPC 13 the Office of the Information & Privacy Commissioner for British Columbia considered whether political parties were subject to a provincial statute concerning personal information. Three residents sought access on the ways in which their personal information had been and was being used, how their personal information was being used to profile them, and to whom their information had been disclosed by all of Canada's main political parties. After considering constitutional and charter issues, the provincial Act was held to apply.

## Miscellaneous

+ [Guelph and Area Right to Life v. City of Guelph](#), 2022 ONSC 43 concerned an application for judicial review relating to the decision of city council to remove anti-abortion signs from the council's buses. The decision was challenged on the basis that the council had violated the applicant's section 2(b) Charter right to freedom of expression and had improperly fettered its discretion by delegating the decision-making process. The council's decision was found to be unreasonable and required to be reconsidered.



+ [Fair Play for Women Ltd against The Registrar General for Scotland and The Scottish Ministers](#) [2022] ScotCS CSIH 7 concerned an appeal of a judicial review by a nonprofit advocacy group. The organisation argued that guidance given to answering the Scottish Census question about sex/gender was illegal. The appeal was refused.

+ [Ottawa \(City\) v. ClubLink Corporation ULC](#), 2021 ONCA 847 concerned the application of the law of perpetuities to an agreement with a city council about a golf course. The Court of Appeal found that the agreement created a contingent interest in land “fettering” real property, and excluding it from “commerce and development”, rather than being a mere contractual right.

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