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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 July to 30 September 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 from the third quarter of 2022.

The experts pick of cases to consider:

Ian Murray - University of Western Australia

In Australia, the Labor party's commitment to doubling philanthropy in the next decade suggests that the main focus is on increasing the quantity of philanthropy, rather than on concern for quality. In particular, there is potential for elite philanthropy to entrench elite worldviews and power, and to potentially undermine our democratic institutions.

[Philip Pinkert v Schwab Charitable Fund](#) reflects this danger, with the donor expressly arguing that the (purportedly excessive) administration and investment fees damaged his interest in expressing his values as he had less money to distribute to charities that pursued projects consistent with his values. On one reading, Pinkert highlights the dangers to efficient achievement of charitable objectives from the growing use of intermediaries such as donor advised funds, or, in the Australian context, named sub-funds of public ancillary funds.

The risk lies in the possibility that the donor advised fund sponsor or public ancillary fund arranges to pay high fees to entities controlled by the founders of the sponsor/public ancillary fund. However, the Pinkert case also highlights a significant advantage for maintaining the equity of philanthropy and consistency with our democratic institutions. That is, the philanthropic gift is no longer the donor's money to control as they please, a point reflected in other donor advised fund cases, including [Fairbairn v Fidelity Investments Charitable Gift Fund](#). Under a private ancillary fund or an endowed charity structure, it is much easier for a donor to maintain control over the use of donations, either by writing their worldview into the charity's constituent documents or acting as a decision-maker. In the case of donor advised funds or sub-funds, the donor can only advise, because the ultimate decision is up to the public ancillary fund. This

'ego-checking' function of public charity intermediaries is a real reason to celebrate the donor advised fund/public ancillary fund institutional form.

Murray Baird - Charity Law Adviser

[Australian Christian College Moreton Ltd & Anor v Taniela](#) [2022] QCATA 118 (ACCM Case) provides further guidance on the vexed question of the limits on a school regulating the length of student hair. The issue can divide school communities. In 2018 it led to the dismissal and later reinstatement of a deputy principal of a prestigious private school in Melbourne, and the subsequent resignation of the school principal.

The ACCM case raised questions of direct and indirect discrimination on the grounds of race, specifically a cultural practice associated with Cook Island/Niuean culture for a haircutting ceremony to be conducted at a time of the parent's choosing. On appeal the Tribunal upheld the indirect discrimination finding from the original case, but quashed a finding of direct discrimination.

At first instance, ([Taniela v Australia Christian College Moreton Ltd](#) [2020] QCAT 249), a separate issue of discrimination on the basis of sex was briefly discussed by the Tribunal. The underlying principle is that uniform policies do not have to be identical for different genders, but must not treat one less favourably than another.

In the Victorian case of [Arora v Melton Christian College](#) [2017] VCAT 1507 a young boy who had a head covering of a non-Christian faith was refused entry into Melton Christian College. The Tribunal held that was indirect discrimination. In that case the lack of community consultation about uniform standards was relevant.

The ACCM Case highlights that schools must make accommodations for cultural or religious practices even when they are inconsistent with school hair policies. Schools must also ensure uniform policies provide for an equal level of burden on boys and girls. Schools should conduct regular consultation with their school community so that policies reflect the views of that community.

Charity

+ The purpose of the charitable trust, founded by the Fairfax family, was to provide scholarships for philosophy students at Balliol College, one of the constituent colleges of Oxford University. The trustees applied to the Court to wind up the trust and transfer the funds under identical trusts to a foreign trustee in a foreign jurisdiction, Balliol College - [Allen Ralph Robinson as Trustee for the Trust Fund of the Fairfax Fellowships at Balliol College v Attorney General of New South Wales](#) [2022] NSWSC 996.

+ In [Aboriginal Housing Office v Mabel Mary Jacky](#) [2022] NSWSC 916, the question before the Court was whether a trust to hold a property used by indigenous persons was in fact, charitable. After examining the trust deed the Court found that the trust was to benefit particular persons, rather than to advance a charitable object

+ Could trustees of land held for charitable purposes of a public park lease part of the land to a film studio that was required primarily to be used as a venue for exhibitions, trade fairs, and events? The issue of standing to bring the matter before the Court by private citizens and commercial interests was considered - [Spillane v Cornwall Park Trust Board](#) [2022] NZHC 1527

+ [Windels v Canadian Broadcasting Corporation](#), 2022 SKCA 72 was an appeal against lifting a sealing and publication ban of action to order an investigation of a charity by the executive director of the charity.

+ [Assyrian Church of the East Relief Organization](#) is a report by the Charity Commission for England and Wales of its inquiry into the management and financial dealings of a church-related charity involving its operations in high risk overseas countries, including Iraq.

+ The Court considered an application to alter the geographic purposes of a charitable trust in [Re Trevor Wilson Trustee Limited](#) [2022] NZHC 2118. The purposes of the trust had for some time been frustrated by the strict geographic restriction in the trust deed. It was amended as nearly as was reasonably possible in the changed circumstances to the terms of the original trust, and the amendments were not contrary to law, public policy or good morals.

+ In [The First Armagh Presbyterian Church, Re](#) [2022] NICH 4 the Court was requested to remove a charitable trustee under a medical disability without a replacement appointment, which required the exercise of the Court's inherent jurisdiction.

+ The United States Court of Appeals for the Ninth Circuit, decided an appeal against lack of standing to challenge alleged excessive fees charged in a Donor Advised Fund arrangement. The Court found that the donor was bound by the terms of the agreement with the DAF sponsors and that the non-binding recommendations were not a property right - [Philip Pinkert v Schwab Charitable Fund](#)

Incorporated Associations and Societies

+ [Singh & Ors v Brisbane Sikh Temple \(Gurdwara\) Inc](#) [2022] QSC 151 concerned an application to seek the appointment of a receiver to approve memberships and hold a general meeting of an incorporated association that had previously been the subject of Court orders in [Singh & Ors v Brisbane Sikh Temple \(Gurdwara\) Inc](#) [2021] QSC 290 and [Singh & Ors v Brisbane Sikh Temple \(Gurdwara\) Inc](#) [2022] QSC 17.

+ [Moala v Free Wesleyan Church of Tonga in Australia \(Vic\) Inc \(No 7\)](#) [2022] VSC 599 concerned an application for an interlocutory injunction to delay an annual general meeting while membership applications were outstanding.

+ An urgent application to overturn the findings of a football tribunal suspending a player before the final competition rounds, with claims of misleading the Tribunal without reasonable notice was heard in [Jesse White v SA Amateur Football League Incorporated](#) [2022] SASC 85

+ The Court used its inherent jurisdiction to transfer land on which there was a hall held in the name of a deceased chair of the preceding unincorporated association, [Patea Old Folks Association Incorporated](#) [2022] NZHC 1856.

+ [Blood Tribe v Bearspaw Nation](#), 2022 ABQB 590 concerned an application to the Court to dissolve a society on the just and equitable ground. The primary purpose of the society was to advocate for First Nations bodies to governments.

+ An application for access to the register of members of a society was considered by the British Columbia Civil Resolution Tribunal in [Wheatley v. Victoria Canoe and Kayak Club](#), 2022 BCCRT 1033.

See also [Mcintosh v Canberra Choral Society](#) [2022] ACTMC 16 below.

Company Limited by Guarantee

+ Whether the Victorian Farmers Federation had validly exercised its power to terminate a membership was considered in [Morris v Victorian Farmers Federation](#) [2022] VSC 407. Issues concerning the doctrine of *functus officio*, contending that a decision previously made by a decisionmaker in respect of the same application cannot be revisited, estoppel and procedural fairness were considered.

+ [Australian Karting Association Ltd v Karting \(New South Wales\) Incorporated](#) [2022] NSWCA 188 was an appeal by a sporting peak against a finding concerning trust monies held on behalf of a state association from the decision [Australian Karting Association Ltd v Karting \(NSW\) Incorporated](#) [2021] NSWSC 1075.

Unincorporated Associations

+ [Brady v Moore & Anor \(Approved\)](#) [2022] IEHC 420 concerned an unincorporated association member who was injured while volunteering for an association and sought to recover damages under occupier's liability. The issue of permitting a person to sue for breach of an obligation said to be owed to them by the members of an association of which they are also a member was considered.

+ An appeal from the determination of who were the committee members of an unincorporated association after AGMs were declared invalid was decided in [Club Los Clavales against First National Trustee Company Ltd](#) [2022] ScotCS CSIH 35. It was held that the committee members who were in place before the invalid AGMs remained in office until they retired at a future AGM.

+ In [Dublin 8 Residents Association v An Bord Pleanála & Ors](#) [2022] IEHC 482, the High Court of Ireland considered whether an unincorporated association had standing to seek a judicial review of a planning decision where directives of the European Union were applicable. The Court referred seven questions to the Court of Justice of the European Union for consideration.

Tax

+ [Wintercorn v. Global Learning Group Inc.](#), 2022 ONSC 4576 concerned an application seeking discovery of documents involved in tax shelter arrangements and a claim of professional legal privilege. It was in the context of a class action

suing a group, including lawyers and scheme promoters, for fraud, conspiracy, unjust enrichment, and fraudulent and negligent misrepresentation, among other claims arising from a gift deduction scheme.

+ Whether an environmental charity was exempt from local property taxes as an educational seminary of learning was considered in [Near North Enviro-Education Centre v. Municipal Property Assessment Corp. et al](#), 2022 ONSC 3856. It was argued that to qualify as a seminary of learning, a property must primarily be used as a bona fide school that has students, physical facilities, teachers or instructors, and a curriculum designed to further the advancement in life of those in attendance, so that they might better pursue their vocation or life's work. Further, there must be a structured curriculum leading to a specific target. These arguments were not accepted by the Court, so that the education centre was exempt from local taxes.

Advocacy

+ [MBR Acres Ltd v Free the MBR Beagles](#) [2022] EWHC 1715 (QB) was an application for injunctions granted in [MBR Acres Ltd v Free the MBR Beagles](#) [2021] EWHC 2996 (QB) to be varied to further restrict animal rights protestors and their drones protesting around animal testing laboratories. The Court made an important statement about its role in upholding the ability of the public to protest peacefully.

+ The High Court in [Farm Transparency International Ltd v New South Wales](#) [2022] HCA 23 considered whether the NSW statutory provisions to protect the privacy of farmers from animal activists impermissibly burdened the implied freedom of political communication and was unconstitutional. The High Court, by a 4/3 majority, held that ss 11 and 12 of the [Surveillance Devices Act 2007 \(NSW\)](#) did not impermissibly burden the implied freedom in their application to, respectively, the communication or publication by a person of a record or report, or the possession by a person of a record of the carrying on of a lawful activity, at least where the person was complicit in the record or report being obtained exclusively by breach of s 8 of the Act.

+ A motion to dismiss an action for defamation and other matters on the grounds that it limited freedom of expression on matters of public interest was heard in [40 Days for Life v. Dietrich et. al](#). 2022 ONSC 5588. It involved an individual's campaign on social media to oppose a Texas-based non-profit corporation that engages the public advocacy for an end to abortion.

Fundraising

+ [Support the Heroes](#) is a Charity Commission for England and Wales Inquiry Report about a charity using a third party fundraiser which took 2/3 of the funds raised from the public in fees. The Report makes recommendations for charities partnering with a specialist individuals or businesses to raise money.

+ [Maghdoori v. Sanjari](#), 2022 ONSC 4624 concerned an application for dismissal of a claim for the return of online crowdfunding funds by the parents of a deceased crowd funder from her husband. Although the parents had no standing under the deceased's will, the court was willing to entertain a claim under a constructive trust.

Liability

+ An application to extend the limitation period for a professional football player to bring a claim against a football club and two of its doctors for back and concussion/brain injuries was considered in [Zantuck v Richmond Football Club & Ors](#) [2022] VSC 405. The Court agreed to the extension of time.

+ In [Mcintosh v Canberra Choral Society](#) [2022] ACTMC 16, a claim for damages due to an unsafe stage causing personal injury at a musical performance was successful. The fact that the Society was an amateur organisation run only by volunteers, had a small budget, and made a loss on the performance, was not considered to relieve it of liability or responsibility.

+ The Supreme Court of Victoria, in [RWQ v The Catholic Archdiocese of Melbourne & Ors](#) [2022] VSC 483, considered if a secondary victim could claim under the [Legal Identity of Defendants \(Organisational Child Abuse\) Act 2018](#) for nervous shock. After consideration of the Legal Identity of Defendants (Organisational Child Abuse) Act 2018, the Court found that a claim could be made.

Testamentary Gifts and Bequests

+ Whether the gift of a residence sold before death was valid and not adeemed was considered in [Catholic Parish of St Brigid Marrickville v Habib as Executor of the Estate of the late Tereza Efram](#) [2022] NSWSC 1139. Will makers might make specific gifts of property, but then, over time, dispose of that property by sale or otherwise, or the property can be lost or destroyed. In that case, the gift is not available in the estate and is adeemed.

In [Royal Trust Corporation Of Canada v The Welfare Institution of The Jews of Athens](#), 2022 BCSC 1454 the Court considered whether the property of a testamentary trust should be distributed to the contingent residual beneficiary of the original will maker. This could have been a potentially very complex conflict of laws case involving Canadian, Swiss and Greek law on various points. Wills were made under Greek, Swiss and Canadian laws, but Canadian law was held to be the proper law.

Funding

+ [Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia](#), 2022 BCCA 247 was an appeal for judicial review of a funding decision by a nonprofit organisation funded and contracted by the government to deliver a program. The Court found that the rejection of the funding application was defective in law and remitted the applications for reconsideration in a manner that was procedurally fair.

Fraud

+ The Supreme Court of the United Kingdom in [R v Andrewes](#) [2022] UKSC 24, considered whether a CV fraudster on conviction of fraud could be required under a Proceeds of Crime Order to repay their earnings. During his time as CEO, the CV fraudster was regularly appraised as either strong or outstanding, and a review approximately a month before the termination of his appointment gave a glowing account of his skills in all areas. The Court decided that it would be proportionate to confiscate the difference between the higher earnings made as a result of the CV fraud and the lower earnings that the defendant would have made had he or she not committed the CV fraud.

+ In [Amadi v Amissih](#) 2022 SKPC 35 the Court dealt with an action to recover funds from a pyramid scheme. In an organised tort of deceit or fraudulent misrepresentation, tortfeasors cannot rely on contributory negligence.

Trademarks

+ In [Ozcare v Auscare Home & Community Care Limited \(Further Orders\)](#) [2022] FCA 835 the Federal Court granted an injunction to restrain redirection from two infringing websites that were found to be identical or deceptive to another's trade mark.

+ [Steven Penson v Aquarian Foundation Inc](#) [2022] ATMO 115 concerned an objection to the registration of a trade mark for a religious organisation. The objector had various business interests branded as 'Aquarian' but failed to establish any grounds for objection. The evidence was that the applicant was the Church of Higher Spiritualism for higher spiritualism teachings for the Aquarian Age (i.e. the Age of Aquarius) founded in Seattle in 1955, and coming to Australia in 1995. Its registration as a charity was revoked on 17 March 2016.

+ [Australian Karting Association v Karting \(New South Wales\) Incorporated](#) [2022] FedCFamC2G 614 primarily concerned an action for infringement of copyright and a registered trade mark, and was an interlocutory application to allow an affidavit that was 600 days overdue to be relied upon at a final hearing.

Discrimination

+ In [Australian Christian College Moreton Ltd & Anor v Taniela](#) [2022] QCATA 118 the Queensland Civil and Administrative Tribunal, decided an appeal from a finding of direct and indirect discrimination by a school. The issue involved the School's policy on boys' hair styles and the cultural practice associated with Cook Island/Niuean culture for the eldest son to undergo a hair-cutting ceremony at a time of choosing of the parents. Indirect discrimination was confirmed by the Tribunal. In May 2021, Queensland's Attorney-General requested the Queensland Human Rights Commission (QHRC) to conduct a review of the [Anti-Discrimination Act 1991](#) (Qld) to ensure it continues to provide suitable protection against discrimination and sexual harassment.

Volunteer

+ In [Re A1901320 2022](#) CanLII 83181 (BC WCAT) the British Columbia Workers' Compensation Appeal Tribunal considered whether an injured ski patroller was a volunteer or worker for the purposes of worker's compensation. The Tribunal found that the injured ski patroller was a worker.

Miscellaneous

+ [Kontis & Anor v Coroners Court of Victoria](#) [2022] VSC 422 concerned the judicial review of a Coroner's decision requiring managers of an aged care facility, St Basil's Home for the Aged, to give evidence in an inquest. The Chairman of the Board and the Facility Manager/Director of Nursing (Management) were found to be the management of St Basil's at the time. Management objected to giving evidence on the ground that it may tend to incriminate them in the Coronial hearing. The Coroner also considered whether 'the interests of justice' required that the management give evidence.

+ An administrative law challenge to the renewal of a community interest radio broadcast licence was heard in [Australian National Imams Council Limited v Australian Communications and Media Authority](#) [2022] FCA 913. Muslim Community Radio Incorporated had held the sole community radio broadcasting licence (Religious – Islamic) for the Sydney area since 2001 and applied for a renewal. The Australian National Imams Council Limited applied to the Court to restrain ACMA from determining the application on the grounds that ACMA had failed to provide procedural fairness in the hearing of objections.

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