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.

CASES THAT SHAPED CHARITY AND NONPROFIT LAW IN 2022 AND TEN TRENDS TO CONSIDER

Top Ten Cases

ACPNS Legal Case Reports found over 200 cases in 2022 from charity jurisdictions to summarise and make available to the nonprofit sector. Of these, ten cases have been chosen as providing significant decisions that develop the sector's jurisprudence or are otherwise noteworthy. This year the majority of cases are from the Australian jurisdiction.

In chronological order they are:

1. In January 2022, the much anticipated decision in H M Attorney General v Zedra Fiduciary [2022] EWHC 102 (Ch) was handed down by the High Court of England and Wales. An anonymous donor settled an amount of cash and securities in 1928 initially valued at almost £500,000. This amount was to be held by Barings Bank as trustees to accumulate income and profits until the date fixed by the trustees as being the date when, either alone or together with other funds then available for the purpose, it was sufficient to discharge the UK national debt.

   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 public spending.

   As the prospect was now "vanishingly small" that the trust's £512m corpus, approximately 0.026% of the UK national debt of £2,004 billion at the time of the decision (now £2,436.7 billion**)**, could in the future discharge the national debt, the Attorney General sought for the funds to be applied cy-près and paid in reduction of the national debt.

   The trustees argued that a new trust should be established, and the funds distributed to other existing charitable organisations. The Court was persuaded by the arguments of the Attorney General that the funds be paid into the National Debt. The initial case was Attorney General v Zedra Fiduciary Services UK Ltd [2020] EWHC 2988 (Ch).

2. The 2022 federal election was fertile ground for the development of a slew of cases by political parties and their members, which I reflect further on below, but the non-intervention of the High Court by refusing leave to appeal for both sides of the aisle is significant legally. The High Court decision in Cameron v Hogan [1934] HCA 24 reigns over the attempted judicial breakout in Baldwin v Everingham [1993] 1 Qd R 10 and the Commonwealth Electoral Act 1918 (Cth) statutory recognition deviations.

   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 and a number of other State decisions. Leave to appeal the decision to the High Court was refused ([2022] HCASL 71).

An application for leave to appeal to the High Court was also dismissed in Camenzuli v Morrison [2022] NSWCA 51, which involved a challenge to the validity of federal intervention in the pre-selection of candidates and the justiciability of the action in light of the High Court decision of Cameron v Hogan. The Court endorsed the primary decision of Asmar v Albanese (No 4) and, in some respects, the Court of Appeal decision in Asmar v Albanese [2022] VSCA 19.

3. Family First New Zealand was deregistered as a charity in 2013 by the New Zealand Charities Registration Board as its purposes were held to be not solely charitable. Its primary purpose was advocacy for a particular point of view. Over the next seven years, there were five decisions about its charitable status until the final appeal was heard by the Supreme Court of New Zealand in Attorney General v Family First New Zealand [2022] NZSC 80.

   The Board refused registration on the basis that Family First's advocacy could not be regarded as for the benefit of the public, and it did not present the results of its research objectively but merely to persuade the reader to a particular point of view consistent with its own. It possibly marks a divergence from Australian charity law.

   The decision touches upon many charity law balancing principles, and as Adam Parachin noted in his case comment:

   > Lawyers and scholars will study the decision for its analyses of an extensive list of hot button issues related to the legal meaning of charity. These include the distinction between charitable education versus non-charitable propaganda (what the Court called mere "viewpoint expression"),[1] the relevance of fiscal considerations to the adjudication of applications for charitable status, the extent to which assessments of charitableness should take into account the activities (not merely the purposes) of applicants for charitable status, the lingering impacts of the doctrine of political purposes (notwithstanding the same Court's previous rejection in *Re Greenpeace*[2] of an exclusionary rule for political purposes) and the proper approach to the ever vexing fourth head of charity.

   Expert commentary on the case is provided by Sue Barker (NZ), Anne Robinson (Australia), Debra Morris (UK), Kerry O'Halloran (Ireland), and Adam Parachin (Canada).

4. The High Court of England and Wales has delivered an important test case decision in Butler-Sloss and ors v Charity Commission for England and Wales and anor [2022] EWHC 974 (CH) giving approval for charitable trustees of two foundations to implement a green investment policy that fully aligned with the goals set down in the Paris Agreement for limiting the increase in global temperatures to well below 2°C, and preferably to 1.5°C. The Court summarised the law in relation to charity trustees taking into account non-financial considerations when exercising their powers of investment. It is also critical for charities generally that test cases are brought to clarify the law on relevant issues, of which this was one. Scott Donald, Associate Professor in the School of Private and Commercial Law, UNSW contributes expert commentary on the case.

5. Soka Gakkai International of Hong Kong Ltd v. Lam Kin Chung [2022] HKCA 480 concerned an action by a member to bring a derivative action on behalf of a faith-based charitable company in relation to remuneration paid to directors and alleged improper property transactions. The case contains a significant discussion of Lehtimäki and Others v Cooper [2020] UKSC 33, in which the UK Supreme Court considered whether a member of a charitable

[1] Paragraph 16.
[2] [2014] NZSC 105.

company is a fiduciary, and that a member of a charitable company is not a person exercising their own right of property to vote as they see fit, but rather such a member must exercise their vote in the best interests of the charity. The Court noted a *parens patriae* appearance had not occurred.

The Court referred to the case of Sik Chiu Yuet where it was found that the Secretary for Justice (SJ), as *parens patriae*, had no resources or power to carry out investigations, and that there were significant gaps in practice and in reality in the fulfilment of the role of the SJ in protecting the public interest in respect of charities. A further appeal was lodged in the Hong Kong Court of Final Appeal, but a decision was given refusing the appeal in Lam Kin Chung v Soka Gakkai International of Hong Kong Limited [2022] HKCFA 21 until the matter had proceeded to trial at first instance. The Appeal Committee affirmed the lower court decision.

6. The Uniting Church in Australia Property Trust (Vic) v Attorney- General (Vic) [2022] VSC 610 and The Uniting Church in Australia Property Trust (Vic) v Attorney-General (Vic) (No 2) [2022] VSC 764 canvass a number of legal issues that face large faith-based charitable property trusts, and considered a line of authorities from Andrews v M'Guffog (1886) 11 App Cas 313 to the present about whether trustees were legally obliged to restore the capital to the trust mistakenly withdrawn, but paid to the charitable purposes. The issue was further complicated by the situation that the source of restoration of capital would be another charitable trust, that is, the Property Trust. The case also considered the issue of delegations of authorities and their supervision, costs of an intervener who was a member of the faith-based association, and relief from the breaches of trust.

7. While company director breach of fiduciary and statutory duty cases are relatively common, there are not many nonprofit company cases. A claim that a director of a member's club had breached their fiduciary duties to the club was considered Senatore v Andriolo [2022] ACTSC 285. It involved The Italo-Australian Club in Canberra. There is a detailed discussion of the law as it applies to nonprofit directors and their duties under ss 180-182 of the Corporations Act 2001 (Cth), and also of the application of the rules in Barnes v Addy. The rule in Barnes v Addy imposes liability on third parties where they knowingly receive property in breach of trust or other fiduciary duty (first limb), or assist with knowledge in a dishonest and fraudulent design on the part of a trustee or fiduciary (second limb). Application of both limbs of the rule depends on proof of a requisite degree of knowledge. It was found that the director had not contravened his statutory duties or the Act. There was no breach of his fiduciary duties to the Club, and the claim for relief against him failed.

8. 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 thus 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 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. I elaborate further on this case below and its link to the ill-fated attempt to alter the governance standards under the ACNC regulations.

9. The underlying legal proposition is that a dedication of land or property to public or charitable purposes will always yield to a statute, as was the case in Rookwood General Cemeteries Reserve Land Manager v Attorney-General NSW [2022] NSWSC 1763. Sydney's largest cemetery dating from the 1860's was originally divided on a denominational basis, with a separate trustee body for each burial ground, and a joint committee to manage the common facilities. More recently it was amalgamated by state legislation and the land was converted into Crown land, abolishing the trusts over the land. The new manager of the cemetery contended that although the amalgamation legislation had extinguished the trusts in relation to the land, the proceeds (Anglicans alone had over $20m in funds) were still held subject to a charitable trust enforceable in equity. The Court held that any trust in

equity over the Anglican Cemetery Land ceased to exist when the Act was amended to repeal the provisions claimed to have created the trust. This legislative power to terminate charitable trusts bears out the importance of the quality and integrity of legislators, and accountability for their actions in such instances.

10. The appeal case of National Disability Insurance Agency v KKTB, by her litigation representative CVY22 [2022] FCAFC 181 and the Employment Court decision in Martyn Campbell v SA Support Services Incorporated (ABN 88 538 863 439) [2022] SAET 169 may not be cited in the law texts for their black letter legal principles, but as law in action, their importance should neither be understated by politicians nor overlooked by voters.

    A strong bench of the Full Court of Federal Court considered an appeal by residents with disabilities of a small rural charity that operated permanent accommodation for six people and respite care for another six, who required care 24 hours per day, 7 days a week, about NDIA reassessment of their care plans. The NDIA approved new plans for each resident, which included support by a registered nurse, but not at the level sought by each participant. Rather a 'Delegated Model of Care' was applied. A 'Delegated Model of Care' is where disability support workers provide a much larger proportion of care under the supervision of registered nurses. It was part of the policy objective of the NDIA, relying on those objectives of the NDIS Act, which seek to have the NDIS administered in a cost-effective way.

    The Administrative Appeals Tribunal (the Tribunal) set aside the internal review decisions and in their place decided that the NDIA was to approve funding for the level of registered nursing support that had been sought by each of the residents. The NDIA appealed the decision. The Full Court heard extensively from experts on both sides and affirmed the Tribunal's decision.

    In the employment decision, SA Support Services (the Service), an NDIA accommodation and care provider in a farm setting for young men with disabilities, pleaded guilty to a breach of workplace health and safety legislation and was fined $72,000 when a resident assaulted a night shift worker, attempting to remove her clothing. The Service sought an increase in funding from the NDIA in 2019 and 2020, which would allow the client to receive one-to-one supervision and care. The request identified the client's inappropriate sexual behaviour towards women and summarised incident reports related to problematic behaviours. Both requests were rejected.

    It is noted that the NDIS has recently published the findings of an Own Motion Inquiry into Aspects of Supported Accommodation in the NDIS, examining the experiences of participants living in supported accommodation through Reportable Incidents and Complaints that have occurred in connection with the supported accommodation services provided by a small number of NDIS providers that are large providers of supported accommodation.

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

Seriously interesting, but just missed the cut

In the matter of the Rustat Memorial, Jesus College, Cambridge [2022] ECC Ely 5 was a hearing about costs following a finding against Jesus College in the Consistory Court of Ely: In the matter of the Rustat Memorial, Jesus College, Cambridge [2022] ECC Ely 2. The original case rejected the College's application for removal of the Rustat Memorial from the ancient wall adjoining the chapel, as it was found that the application for removal was based on a 'false narrative' of Rustat's involvement in the slave trade, and that the moneys given to the College were not moneys made from the slave trade itself. An intriguing insight into the ecclesiastical courts and current preoccupations within English universities.

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 his parents' choosing. Indirect discrimination only 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. The final report is available here.

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. The result raised many charity lawyers' eyebrows.

The Western Australia State Administrative Tribunal considered a complaint that prospective foster parents were indirectly discriminated against on religious grounds in an assessment by a nonprofit foster agency as to their suitability in Hordyk and Wanslea Family Services Inc [2022] WASAT 117. The Tribunal found that the complaint was substantiated and that the complainants should be compensated with damages in the sum of $3,000 each, and the Department's Foster Carer Directory amended. Whatever your views on the issues, this is a well written and devised judgement.

Lawrence v Melbourne Football Club Ltd [2022] VSC 658 concerned an application by a member for a company limited by guarantee to provide member e-mail addresses for a proper purpose. The Court rejected concerns about member privacy and found that the requirement under s 169(1)(a) of the Corporations Act 2001 (Cth) for the register to contain the member's address included an obligation to contain, not only the residential address, but any address nominated by the member for the purposes of communications, relevantly including electronic addresses. One to remember for your next internal dispute.

Only in Queensland Award

Bell v State of Queensland [2022] QSC 80 was a case about whether a satanist group was a religious denomination or society for the purposes of religious instruction in state schools. The Court remarked that it (at [49]):

> …was nothing more glorified than a base political stunt. [The applicants'] persistence with that attempt through the medium of this proceeding has resulted in a deplorable waste of the resources of the State which had to be marshalled in opposition to the relief sought and the needless allocation of court time and resources to deal with it.

The Best and the Worst of North America

A retired Superior Court Judge was a party in Crane v. The King, 2022 TCC 115 (CanLII) concerning the issue of whether the initial donation ($11,000) in a leveraged gift scheme, which resulted in a claimed gift deduction for $100,000, was in fact a tax gift. The Court found that there was no gift in the absence of donative intent.

An application challenging an access ban on a volunteer by park rangers to a park used by the homeless was heard in York v. Vancouver Board of Parks and Recreation, 2022 BCSC 1944. The Court examined the internal appeals process of the agency and found numerous defects. Ironically, the appeal had not been heard before the access ban expired.

Mayo Clinic v United States of America File No. 16-cv-03113 (ECT/ECW) involved an application by the Mayo Clinic that it was operated exclusively for educational purposes and was therefore not subject to the Unrelated Business Income Tax. The decision details the history of the Mayo Clinic from the 1880s. The Court preferred a global view of the whole organisation to establish its purpose, which was reminiscent of the approach taken in Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd [2008] HCA 55 and later related cases.

In the Matter of the Otto Bremer Trust, a case from the Ramsey County District Court, Minnesota, was an application by a State Attorney General to remove trustees of a charitable trust founded in 1944 that held considerable shares in Minnesota banks and financial institutions. The trustees comprised the third generation of trustees, each with family ties to the initial trustees, and they had made trustee successor appointments of specific relatives if they died or became incapacitated. The Attorney General requested the Court to remove the three trustees in response to allegations related to trustees' compensation, general administration, human resources, trust expenses, grant making, and the manner of sale of its bank stock. The Court removed one of the trustees.

Boxing On until the End

Batmanghelidjh v Charity Commission for England and Wales [2022] EWHC 3261 (Admin) was an application by a former charity CEO for judicial review of a Charity Commission of England and Wales statutory inquiry report (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. UK taxpayers ended up footing a bill of £8.25 million in costs for the trustees of the charity, and £1.2 million for the Official Receiver in respect of the litigation alone.

An application for summary judgment and a permanent stay of proceedings in relation to nine years of proceedings by parties involving an incorporated association and an internal dispute was granted in Thompson v Cavalier King Charles Spaniel Rescue (Qld) Inc [2022] QSC82. The court proceedings in the matter were extensive, with 341 filed documents, two aborted trials, numerous interlocutory applications, many directions hearings, three unsuccessful appeals to the Court of Appeal, and one application to the High Court of Australia.

Ten Trends to Watch in 2023

After summarising over 200 cases from across the charity jurisdictions, I stand back and reflect on how the dots can be joined to discover trends. In some instances, the trends continue over from previous years, while others have newly arisen.

1. Charitable Companies

In 2020 we signalled Lehtimäki v Cooper [2020] UKSC 33 as one of the most significant charity law cases in that year and considered the likelihood of Australian jurisprudence embracing the concept that a member of a charitable company is not a person exercising their own right of property to vote as they see fit, but rather such a member must exercise their vote in the best interests of the charity.

In 2021 there had been some surprisingly quick case law developments with Jaffer v Jaffer [2021] EWHC 1329 (Ch) extending the principles to unincorporated charities, as well as Official Receiver v Batmanghelidjh and Ors [2021] EWHC 175 (Ch), and In the matter of The Ethiopian Orthodox Tewahedo Church St Mary of Debre Tsion, London [2020] EWHC 1493(Ch). It was also mentioned in Boyd & another v Talbot & others [2021] QSC 99.

In 2022 the highest court in Hong Kong accepted and applied the principles in Soka Gakkai International of Hong Kong Ltd v. Lam Kin Chung [2022] HKCA 480. A decision was given refusing the appeal Lam Kin Chung v Soka Gakkai International of Hong Kong Limited [2022] HKCFA 21 until the matter had proceeded to trial at first instance. The Appeal Committee affirmed the lower court decision.

We predict that Lehtimäki v Cooper [2020] UKSC 33 will continue to be a platform for new law development and await a detailed consideration in the Australian jurisdiction.

2. Unincorporated Associations

There are two observations about unincorporated associations this year. Both relate to political parties that are formed as unincorporated associations.

First, as noted above, the High Court further entrenched its decision in Cameron v Hogan [1934] HCA 24 that there is usually no basis for a member to bring an action against an unincorporated association unless some proprietary right can be shown, or a breach of some trust obligation. The Court also put a stop to further development of the Commonwealth Electoral Act 1918 (Cth) statutory recognition deviations. In Cuthbert v Abbott & Ors [2022] QSC 113, the Queensland Supreme Court found an unincorporated association political party member who sought relief after expulsion did not have a justiciable claim. Significantly, the Court declined to follow Baldwin v Everingham [1993] 1 Qd R 10, where the statutory recognition and registration of political parties post Cameron v Hogan was used as a basis to distinguish the High Court decision. It appears to recognise Baldwin v Everingham as now being incorrect, given the recent statements in John Setka v Noah Carroll & Ors [2019] VSC 571 Asmar v Albanese [2022] VSCA 19, Asmar v Albanese (No 4) [2021] VSC 672, and Camenzuli v Morrison [2022] NSWCA 51. Thus, there is usually no basis for a member to bring an action against an unincorporated association unless a proprietary right can be shown, or there is a breach of some trust obligation.

In 2022, political parties had a record year of member disputes reaching the courts, with high profile cases from both sides reaching the High Court, as detailed above, but also numerous other decisions such as Dawkins v The State Secretary, Australian Labor Party (WA Branch) [No 2] [2022] WASC 117, Cockman v Gorman [2022] WASC 125, and

Knox v Nile & Ors [2022] NSWSC 638, being the latest proceeding concerning the Christian Democratic Party (Fred Nile Group) Incorporated. Other matters included Ananda-Rajah v Crawford [2022] FCA 620, seeking removal of non-complying electoral signs on election day, Ruddick v Commonwealth of Australia [2022] HCA 9 concerning whether legislative provisions about the name of a political party infringed the constitutional foundations of implied freedom of communication on government or political matters, and 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 in SA Family First v Electoral Commissioner [2022] SACAT 1.

Second, is increased member litigation in our political parties. During 2022 there was general discussion in the sector and beyond about the decline in membership of societies, clubs, faith-based organisations, trade unions, and volunteering to Australia's detriment. It is worth reflecting on whether the decline of community participation might be in some small part due to the aversion of most community members to joining organisations that cannot have robust, but harmonious, internal relations without recourse to the Courts. There are usually few win-win scenarios in Court, and the High Court has indicated that, as a principle, the courts are not the appropriate forums to play out internal disputes unless some recognised property right or trust obligation is evident.

3. Advocacy

Case law appears to have driven a renewed interest in governments seeking to curb frontline advocacy from protestors, with animal rights at the forefront.

An epic civil law tussle is playing out in the United Kingdom with protesters outside animal testing facilities. 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 and attempting to injunct "persons unknown" who were protesting.

This was followed by MBR Acres Ltd v Free the MBR Beagles [2022] EWHC 3338 (KB), which again sought to further vary the injunctions to prevent protestor harassment of third-party suppliers and their employees to the business, such as animal transport firms. It also attempted to join a solicitor working primarily in criminal litigation and assisting protesters pro bono, because of an alleged breach of the injunction at the protest site. A previous action by MBR for contempt against the solicitor was dismissed and certified as being "totally without merit".

New criminal law restrictions on protests were introduced by the UK government after a wave of direct actions by climate protesters closed motorways and other infrastructure. The Police, Crime, Sentencing and Courts Act 2022, assented to in April 2022, gave police greater powers to restrict protests that cause disruption, including where they might cause 'serious disruption to the activities of an organisation'. The proposed public order Bill seeks to introduce offences of 'locking on' and 'interference with key national infrastructure', which can both be punishable by imprisonment. The Bill provides for new 'serious disruption prevention orders' targeting protesters 'determined to repeatedly inflict disruption on the public'.

As noted above, in Australia, the High Court was called upon to decide on the constitutionality of restrictive state laws in Farm Transparency International Ltd v New South Wales [2022] HCA 23. In other states, there were the Police Offences Amendment (Workplace Protection) Act 2022 (Tasmania), the Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022 (Victoria), and the Roads and Crimes Legislation Amendment Act 2022 (NSW), which could see protestors who disrupt roads, train stations, ports and infrastructure hit with up to two years in jail and a $22,000 fine in New South Wales.

In 2021 the then government sought to amend ACNC governance standard three to allow the ACNC to take action against a charity if it committed, or failed to adequately ensure its resources were not used to commit, certain types of less serious offences such as trespass, vandalism and assault. The proposed regulation was eventually disallowed by the Senate after a significant campaign against the regulation by the charity sector. The activities of animal rights organisations were believed by many to be a significant driver behind the regulatory proposal.

The New Zealand jurisdiction spawned two relevant cases for consideration.

A little gem from New Zealand in a judgment challenging e-scooter regulation is worth bearing in mind. An advocacy organisation sought a review of an administrative decision declaring e-scooters not to be a motor vehicle in Living Streets Aotearoa Inc v Auckland Council [2022] NZHC 2500. Living Streets argued that the Agency had a duty to consult both with it and with the general public, including organisations that advocate on behalf of the disabled. The Court agreed that at common law, in exceptional circumstances, this duty had been recognised. While in Australia, appropriate consultation is recognised as critical to good policy making, our Courts have not overly embraced the common law duty to date.

Attorney General v Family First New Zealand [2022] NZSC 80 is a significant case which started its litigation journey in 2013, and finally made its way after nine years into the Supreme Court of New Zealand. Were the organisation's purposes solely for education or to advocate for a cause/propaganda? The legal line is fine. As Adam Parachin explains in his case note, charitable programming that stigmatizes through discriminatory blunt exclusions, such as a scholarship trust specifically excluding applicants in same-sex relationships, is properly disqualified from charitable status as being at cross purposes with the inclusive ethic inhering in the public benefit standard. The challenge for charity law is to nurture acceptance of others as a pre-condition to charitable status without going so far as to distort the public benefit standard into a disguised ideological test. The future question is how do inclusion and diversity co-exist in charity law?

4. Down and Out

While nonprofit organisations and charities have occasionally undergone formal insolvency (National Safety Council Case), those that do not continue to operate are wound up without significant debts, or merged with other organisations. They are comparatively successful compared to the oft-quoted figure of 20% of businesses failing in their first year, and 60% within the first three years. Could this be about to change?

The historic sexual abuse cases of faith-based institutions, schools, and youth organisations, as well as the financial pressures caused by aged care provision, are taking their toll. While many organisations in financial difficulties still tread the route of merger or takeover, often facilitated by government funders, there may be more insolvency or re-deployment of trust asset cases before the courts in coming years.

The trend in North America is already apparent, as illustrated by Roman Catholic Episcopal Corporation of St. John's (Re), 2022 NLSC 81 being the culmination of a number of cases after the corporation was eventually found liable for damages amounting to $2,395,312.45 to the four claimants, with a class action to follow with claims that may exceed $50,000,000. This proceeding was an application to transfer bankruptcy arrangements by a Church Corporation facing sexual abuse litigation. It appeared that many of the parishioners would likely be involved in acquiring the assets of the Corporation by the tender process or otherwise.

Closer to home, and in relation to financial difficulty originally arising from aged care provision, judicial approvals necessary for the orderly sale of trust assets came before the Court in The Presbyterian Church of Queensland Incorporated by Letters Patent v Attorney-General for the State of Queensland [2022] QSC 38. 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. The Court indicated that its approval was necessary in many instances involving insolvency.

5. Funding

It is uncommon for governments to be called to account in their funding arrangements with nonprofit organisations in the courts. A combination of the expenses of litigation, reputational concerns, settling out of Court, and the power imbalance that is present contributes to this situation.

In 2022, a rare case on the construction of government funding agreements and their overarching legislative provisions was discussed in Sisters Inside Inc v State of Queensland [2022] QSC 130. The contest concerned the scope of documents a government funder could request under a funding contract.

This case is important to clarify the terms of such funding agreements and indicates that the State must adhere to the terms of the funding agreements and its legislation when dealing with nonprofit organisations. There are good arguments that the protective provisions that apply to small businesses dealing with oppressive, take it or leave it, unfair contracts should be extended to government funding contracts. A term that is not reasonably necessary to protect the legitimate interests of the party that would benefit from the term is unfair. Refer Myles McGregor-Lowndes and Amanda McBratney, Government community service contracts: Restraining abuse of power, *Public Law Review* 22(4) (2011): 279-297; Amanda McBratney and Myles McGregor-Lowndes, 'Fair' government contracts for community service provision: Time to curb unfettered executive freedom? *Australian Journal of Administrative Law* 19(1) (2012): 19-33; Myles Mcgregor-Lowndes and Matthew Turnour, (2003) Recent Developments in Government Community Service Relations: Are You Really My Partner? *Journal of Contemporary Issues in Business and Government* 9(1) (2003): 31-42.

Notable cases of funding from overseas jurisdictions were:

- Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia, 2022 BCCA 247, 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.
- 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.

6. Volunteers

In 2022, there continued to be cases seeking remedies under the Fair Work legislation for alleged bullying of volunteers. Cases such as Peter Tippett v Down To Earth (Victoria) Co-Operative Society Limited and others [2022] FWC 2569 and Abraham (Abram) Garcia v Launceston City Mission Inc, Peter Freak, Bernadette Jones, Luke Cowen [2022] FWC 208 were both unsuccessful applications.

In Jay & Anor v Petrikas & Ors (No.4) [2022] NSWDC 628 and Jay v Petrikas [2022] NSWSC 1497, volunteers and volunteer office holders sued for damages (including aggravated and exemplary damages) in the tort of injurious

falsehood arising from publications concerning an internal investigation, report, and communications in the NSW Rural Fire Service. They were unsuccessful.

Volunteers often have difficulties in obtaining a hearing as the orgnaisiation may not be considered a constitutional corporation or the volunteer's services have been terminated. If this forum is not available to volunteers, then should there be access to some other institution to enable their grievances to be dealt with? Clearly, experiences where volunteers feel in some way abused, with little or no right to a fair hearing or redress, will cause reluctance to volunteer in the future. A conversation needs to be had about whether volunteers should be able to have access to an independent review of their treatment outside the nonprofit organisation.

7. Sub-funds/donor advised funds

Sub-funds are available to donors for structuring their philanthropy, usually within a public ancillary fund. Sub-funds can be described as a giving account that allows donors to make a charitable gift, receive an immediate tax deduction, and then recommend grants from the fund over time to the trustees. Donors can contribute to the fund as frequently as they like and then recommend grants to eligible organisations in their own time.

A similar arrangement known as a Donor Advised Fund (DAF) exists in the United States and is a rapidly growing philanthropic device. The gifting of funds through a Donor Advised Foundation does not usually give rise to any obligation to distribute the gifts at the behest of the donor. For the situation to be otherwise, this would be to call the tax concessions associated with the gift into question. Further, such a gift is not subject to revocation as this would also imperil the tax concessions of the donor.

In the USA there have been strident and repeated calls to reform DAFs on a number of fronts, including the rate of disbursement of funds to charities and the fees charged by trustees, who are often professional for-profit organisations linked to investment service bodies.

There are not many reported cases involving DAFs, but we found two this year:

In Philip Pinkert v Schwab Charitable Fund a DAF challenged a founder's lack of standing to challenge alleged excessive administrative and investment fees charged to his DAF. The Appeal Court rejected a number of arguments as to why the founder could object to the fees charged and deducted from the DAF. The Appeal Court fell back to relying on the DAF agreement to govern the relations between the parties.

Whether a gift to a DAF that was not distributed in accordance with the donor's advice could be regarded as a debt for a bankruptcy application was considered in Bankruptcy of the Jewish Foundation of Greater Toronto, 2022 ONSC 2120. The Court did not look kindly upon the making of a bankruptcy application to pressure the Foundation to follow the directions of the DAF founder when other more appropriate applications were before the Courts.

There is likely to be more litigation involving DAFs, given their exponential growth and the fuzzy law that surrounds them. In Australia, there has been far less public controversy about sub-funds, probably due to a mandated annual distribution rate and a significant number of nonprofit trustees in the sub-fund marketplace. See: Murray, I., Donor Advised Funds: What Can North America Learn from the Australian Approach? Canadian Journal of Comparative and Contemporary Law 6 (2020): 260-304.

8. Online

The rise of online giving platforms that range across many jurisdictions is bringing change to how organisations fundraise, and also allows individuals to put their funding case before millions of potential donors in many different countries. The scope for disagreements, abuse, privacy breaches and fraud to arise is significantly increased given the lack of regulation in the area, and in Australia, largely outdated fundraising statutes. These issues were reflected in the cases we summarised this year.

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. The wife had raised $238,474 from 2,000 donors that she deposited into a new bank account in her name for her cancer treatment. Some funds were also advanced by her family and co-mingled in the bank account. After her death, her parents alleged that the husband had misappropriated, for his own use and benefit, some of the donated funds. The parents had no standing under the deceased's will, but the Court was willing to entertain a claim under a constructive trust.

Philando Castile was a black motorist killed in 2016 by a police officer during a traffic stop. Mr Castile had been a school cafeteria worker who paid for the lunches of students who could not afford them. Ms Fergus was a psychology professor at Metropolitan State University in St. Paul. In August 2017, she began fundraising with a modest goal of $5,000 to pay off lunch debts at J.J. Hill Montessori, the elementary school where Mr Castile worked. It was part of an in-class service project for her class. The crowdfunding campaign gained national attention as the donations swelled above $200,000 and were deposited in Ms Fergus' personal bank account. Ms Fergus repeatedly said in public that she would use the donations to pay off students' lunch debts and changed the donation goal to $999,999. In State of Minnesota, by its Attorney General, Keith Ellison vs. Pamela Fergus, a/k/a Philando Feeds the Children a consent order was awarded to settle fundraising litigation concerning failure by Ms Fergus to register as a solicitor, keep books and records, and for Ms Fergus to pay $120,000 to the State, which will be distributed to St. Paul Public Schools to pay off lunch debts for children in need, as was intended.

A class action by Canadian donors seeking to reclaim donations allegedly fraudulently misappropriated by a faith-based organisation was heard in Zentner v. GFA World, 2022 ONSC 1683. A claim was made in the United States against GFA USA, and other associated persons, on behalf of American donors in a class action for misuse of donations. The class action was settled and there was no admission of liability under the settlement. The Court found that there was no cause of action disclosed on the pleadings, and that the class action could not be sustained in Canada.

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 collected from various sources, including from online materials. Three residents sought access to 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.

This issue is likely to continue to produce litigation in the future as the adoption of online fundraising continues apace in an environment without bespoke regulation and contrived compliance with statutes enacted before social media and, in some cases, emails and the internet were developed. A worthy topic for law reform in Australia. California has already passed the first pioneering legislation, AB-488 Charitable organizations: charitable fundraising platforms and platform charities, to regulate giving platforms. The legislation, beginning in January 2023, would establish that charitable fundraising platforms and platform charities are trustees for charitable purposes, subject to the Attorney General's supervision, annual registration, being in good standing with tax and other regulators, and providing

prescribed conspicuous disclosures that prevent a likelihood of deception, confusion, or misunderstanding. The written consent of a recipient charitable organisation is required before using its name in a solicitation

9. Liability

The litigation with faith-based organisations about sexual abuse shows no signs of slowing in the Courts, with many cases about quantum issues that we have not summarised. One development is that some claims have been prevented from proceeding due to the Court's view that a fair trial cannot be held because of factors such as the availability of evidence and witnesses in historic sexual abuse cases.

Smith v The Council of Trinity Grammar School [2022] NSWCA 93 was an appeal from a decision to permanently stay proceedings for damages for historical sexual abuse against a school being unjustifiably oppressive and manifestly unfair. The initial Court noted that its decision was regrettable. The Court of Appeal agreed that the effect of the decision was to deny the appellant a trial, and that there was a measure of public importance attached to cases such as these in light of the seriousness of the allegations. However, the principles applicable had been correctly stated by the trial judge, so the conclusion that a fair trial was either not possible, or so unfairly and unjustifiably oppressive as to constitute an abuse, had to stand. A similar result occurred in Fields v Trustees of the Marist Brothers [2022] NSWSC 739, where there was a successful application to permanently stay proceedings involving a historical claim of sexual abuse by a teacher over five decades ago.

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. The judgment makes instructive reading for sporting administrators, coaches, and medical staff in their duties of care to players. It is likely that cases such as this will escalate in coming years, and there will be scrutiny of protocols for the management of player health, and actual delivery where such protocols exist.

An appeal of a damages claim to the High Court was decided in Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2022] HCA 11 involving the liability of a volunteer association for personal injury. The High Court has now indicated that the characterisation of an obvious risk pursuant to section 5L of the Civil Liability Act 2002 (NSW) (CLA) should be assessed at the same generality as the risk of harm for the purposes of section 5B of the CLA. This approach could result in claims relating to dangerous recreational activities where plaintiffs are likely to formulate a risk of harm at a higher level of specificity, making it easier for plaintiffs to argue that the risk of harm that materialised was not an obvious risk of a dangerous recreational activity.

10. Litigation intervention

While the practice of nonprofit organisations intervening as friends of the Court in appropriate litigation has been commonplace in other jurisdictions, such as In Re Avery [2021] NZHC 2939, Association for Reformed Political Action v. City of Hamilton, 2022 ONSC 6691, Guelph and Area Right to Life v. City of Guelph, 2022 ONSC 43, Council of Canadians with Disabilities V. British Columbia (Attorney General) 2020 BCCA 241 and Attorney General v Family First New Zealand [2022] NZSC 80, it is less common in Australia.

It is notable that The Charity Law Association of Australia and New Zealand (CLAANZ) was represented by silks of the highest calibre to intervene in the Family First proceedings. It was principally in relation to the issue of whether the fiscal consequences of a finding that an entity has charitable objects should be ignored by decision-makers. CLAANZ argued that if it was assumed that the tax advantages for a charity are concessions from tax law, then it can equally be argued that the non-taxability of charities is part of the definition of the tax base.

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