

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 2023 to 30 September 2023

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 2023.

The experts' pick of cases to consider:

Myles McGregor-Lowndes

This quarter's summary is remarkable for cases that are not specifically about charities or nonprofits, but have a direct relevance to their jurisprudence. [Application of MLC Investments Limited \(ACN 002 641 661\)](#) [2022] NSWSC 1541 and [Automotive Invest Pty Limited v Commissioner of Taxation](#) [2023] FCAFC 129 are decisions worthy of consideration as to their application to charities. Thanks to those who drew my attention to them.

As the Treasury has recently sought to consult on the reform of the [ACNC secrecy provisions](#), I draw the reader's attention to [Madden v Commissioner of Police](#) [2023] QCA 182 and [Jim Ratcliffe Foundation](#) where regulators made public disclosures about the investigations of charities that were not found to be substantiated. The high water mark of such cases is [Official Receiver v Batmanghelidjh and Ors](#) [2021] EWHC 175 (Ch).

The narrative of an alleged fallen saint and a possibly disgraced charity is of intense interest to the community, and transgressions by a charity can give rise to a sense of moral outrage. It is one thing to be cheated by a business, but another to be taken down by a supposed trusted pillar of society. Adverse publicity about a charity usually has a wider impact on the charity organisation than on business sector entities. It has an almost immediate and significant impact on its ability to fundraise, attract volunteers and cooperate with others in achieving its mission, which in turn potentially has an impact on beneficiaries and their families (for example, for charities involved in aged care or disability care). The regulatory strategy of some business regulators such as the ACCC and ASIC of "naming and shaming" errant business firms is not generally effective in cases involving charities.

Murray Baird – Charity Law Advisor

[Grain Technology Australia Ltd v. Rosewood Research Pty Ltd \(No 5\)](#) closes, with a whimper, a decade long forensic saga around the nature of a charitable company in Australia.

The catalyst for the litigation was the conversion of a not-for-profit company into a share-based company. The central issue was whether assets in a charitable company were subject to a charitable trust. The trial judge held that the assets were not subject to a charitable trust: [Grain Technology Australia v. Rosewood Research \(No 4\)](#).

A notice of appeal was lodged, but before it could be heard, the parties appeared to get bogged down in concerns about the risks of adverse costs orders following the determination of the appeal. A settlement was reached, and Court approval of the settlement sought. The judge approving the settlement observed that the appeal was “seriously arguable”.

Thus, we are left with a “highly arguable” proposition that the assets of a company with charitable objects may be held on charitable trusts, and may only be applied to charitable purposes. However, the proposition has not been argued or established on appeal. It remains an open argument if it comes before an appeal court in another case.

Charity

- + Two further proceedings followed [Grain Technology Australia Ltd v Rosewood Research Pty Ltd \(No 3\)](#) [2023] NSWSC 238 as to whether a company held its assets on charitable trusts. These were [Grain Technology Australia Ltd v Rosewood Research Pty Ltd \(No 4\)](#) [2023] NSWSC 822 and [Grain Technology Australia Limited v Rosewood Research Pty Ltd \(No 5\)](#) [2023] NSWSC 1141. In [Grain Technology Australia Ltd v Rosewood Research Pty Ltd \(No 4\)](#) the issue was whether a settlement deed could be construed as contemplating the situation where the Court did not find a charitable trust, and [Grain Technology Australia Limited v Rosewood Research Pty Ltd \(No 5\)](#) considered whether a draft deed to settle proceedings should be accepted by a receiver and manager.
- + In [Mermaids v Charity Commission](#) [2023] UKFTT 563 (GRC), the First-tier Tribunal (General Regulatory Chamber) considered whether a registered charity had legal standing to challenge the registration of another organisation as a charity. A charity supporting transgender, non-binary and gender-diverse people under 19 and their families objected to the Commission registering the LGB Alliance as a charity that supports lesbian, gay and bisexual people.
- + The Charity Commission for England and Wales published an inquiry report concerning whether a charity was conducted for its purposes, and in the public interest: [The Cowesby Trust Charity Inquiry Report](#).
- + An English charity provided grant funding to a French charity that offered children and young people in a French alpine resort the opportunity to enjoy alpine sport activities at a subsidised cost. The resort site was also in part occupied by an exclusive ski clubhouse that charged high membership fees. The Charity Commission for England and Wales examined whether the English charity had furthered its purposes with the funding, and whether it met the public benefit test: [Jim Ratcliffe Foundation](#).
- + In [St Hilda's College Ltd & Ors v Uniting Church in Australia Property Trust \(Victoria\) & Anor](#) [2023] VSC 462 a university college sought to direct the charitable trustee of the land on which it operated to transfer title to the land to the college.
- + The previous case can be compared to [South Central Jurisdictional Conference of The United Methodist Church and Bishop Scott Jones v. Southern Methodist University](#) No. 05-21-00151-CV Court of Appeals, Fifth District of Texas at Dallas, which was an appeal from the summary dismissal of a claim by a religious denomination that a university had improperly severed connections with it. The original charter provided that the university had no capital stock and was "to be owned, controlled and managed" by the church.

Trustees

- + [Edwards v Attorney-General for the State of Victoria](#) [2023] VSC 569 was an application by trustees to seek judicial advice and amend a trust deed.
- + [Miller & Anor v The Charity Commission for England and Wales & Anor](#) [2023] UKFTT 805 (GRC) was a review of a Charity Commission scheme for a charity holding property that was to be involved in a major redevelopment by the trustee's other property.
- + In [Dewat v Lal](#) [2023] NZHC 1908, where a trust was responsible for the administration and operation of the Sanatan Dharam Mandir Hindu Temple in Tauranga, and for other charitable purposes, the issue was whether the removal and appointment of trustees was valid and whether Public Trust should be appointed to manage the affairs of the trust.
- + In [Re The Jubilee Crippled Children Foundation Trust Board](#) [2023] NZHC 2318, the Court considered an application to alter a trust deed as to the appointor of new trustees.
- + This case was not strictly about charitable or nonprofit issues, but it has implications for the retirement of charitable trustees and any indemnities given to them, particularly as there are no members of a charitable trust to approve such arrangements. In [Application of MLC Investments Limited \(ACN 002 641 661\)](#) [2022] NSWSC 1541, a trustee sought the

consent of the Court for the cost of retirement and indemnities under s 249E of the [Crimes Act 1900](#) (NSW). Case commentary is by Jessica Lipsett, Corney & Lind Lawyers.

Public Benevolent Institutions

+ A significant PBI case, [Equality Australia Ltd and Commissioner of the Australian Charities and Not-for-profits Commissioner](#) [2023] AATA 2161, was decided by the Administrative Appeals Tribunal. It concerned whether a charity was entitled to be registered with the subtype public benevolent institution when it was organised for the relief of distress of members of the LGBTIQ+ community, and whether members of the LGBTIQ+ community were persons in need of benevolence. Commentary on the case note is provided by Murray Baird and Elizabeth Shalders. The matter is on appeal to the Federal Court.

Tax

+ [James Tarpey v United States of America](#) No. 22-35208 D.C. No. 2:17-cv- 00094-BMM United States Court of Appeals for the Ninth Circuit, is an example of US tax abusive behaviour involving charities. It concerned an appeal about a penalty for a tax abusive charitable donation scheme that involved timeshare properties.

+ [Richard John Nixon v The King](#) 2023 TCC 124 is an example of Canadian tax abusive behaviour involving charities. The matter involved an application by a taxpayer, who claimed a charitable deduction through a scheme, to overturn a reassessment of his taxation return.

+ In [Automotive Invest Pty Limited v Commissioner of Taxation](#) [2023] FCAFC 129, the Full court of the Federal Court of Australia decided an appeal concerning a classic car museum, and the application of GST and LCT to its stock. Not a usual case to be reported as a charity and nonprofit case, but it qualifies because it deals with the review of charity rating cases, the determination of 'purpose', and the meaning of 'exclusively' and 'solely' in the relevant tax provision. Commentary is provided by Matthew Turnour and Murray Baird.

+ An ongoing case of public interest in Canada is [Muslim Association of Canada v. Attorney General of Canada](#), 2023 ONSC 5171. In this proceeding, the issue was whether Court intervention in a CRA audit was proper before the conclusion of the CRA audit. It involved Canada's largest Muslim charity, which claimed the audit was based on discriminatory information, beliefs, and conclusions that violated its rights to freedom of religion, freedom of expression, freedom of association, and freedom from discrimination under the Canadian [Charter of Rights and Freedoms](#).

Bequests and Estates

+ The case of [In the estate of Pryor](#) [2023] ACTSC 170 involved whether a gift inter vivos caused ademption of a gift in a will. Ademption concerns the destruction of the subject matter of a testamentary gift, whether by physical dealing by the testator during their lifetime, or by operation of the rules of equity.

+ [In Re Robert T. Keeler Maintenance Fund for the Hanover Country Club at Dartmouth College](#) involved whether an estate had standing to oppose a charitable gift in a will to a university being repurposed. The gift, of \$1.8 million, was for the stated purpose of maintaining the college golf course for the use of Dartmouth students and members of the wider college community.

+ In [The Uniting Church in Australia Property Trust \(Q.\) v Sewell](#) [2023] QSC 198 the Supreme Court of Queensland was faced with the issue of whether the executor of an estate should be removed for improper conduct. Although this was a small estate, the charity beneficiary chose to pursue the issue of what the beneficiary and, ultimately, the Court considered unexplained legal fees, which represented approximately one-third of the estate.

+ In relation to a will made long before the death of the will maker and never updated, the case of [Perpetual Trustee Company Ltd v University of New South Wales](#) [2023] NSWSC 1061 considered whether and how instructions to a trustee contained in a will should be carried out.

+ [Harder Estate \(Re\)](#), 2023 ABKB 496 dealt with whether an amount in a joint account vested in the survivor, or whether the amount formed part of the residuary of the estate. The case indicated the need for any charitable intentions of a will maker to be explicitly expressed in the will, as mere discussion of possible charitable objects will be irrelevant.

Religion

+ Whether a settlement between two church factions could be enforced by a Court was considered in [Bethel Restoration Ministries v. Greaves](#), 2023 ONSC 3972.

+ In [Rev. Hedley Wycliff Atunaisa Fihaki v Uniting Church In Australia, Qld Synod](#) [2023] FWC 1650, the Fair Work Commission considered whether a minister was an employee of a church for the purposes of an unfair dismissal claim. The Court discussed in detail the law in relation to ministers as employees.

+ In the US case of [James Huntsman v. Corporation of The President, Et Al](#), No. 21- 56056 (9th Cir. 2023) United States Court of Appeals for the Ninth Circuit, an appeal from a decision summarily dismissing a claim for tithes paid to a church to be recovered because of an allegation of fraud was considered.

+ [GP as Tutor for PP v The Church of Jesus Christ of the Latter Day Saints](#) [2023] NSWSC 1105 dealt with the approval of a settlement of damages for the sexual abuse of a child.

Refer also [The Uniting Church in Australia Property Trust \(Q.\) v Sewell](#) [2023] QSC 198, [Muslim Association of Canada v. Attorney General of Canada](#), 2023 ONSC 5171, [Dewat v Lal](#) [2023] NZHC 1908, [South Central Jurisdictional Conference of The United Methodist Church and Bishop Scott Jones v. Southern Methodist University](#) No. 05-21-00151-CV, [St Hilda's College Ltd & Ors v Uniting Church in Australia Property Trust \(Victoria\) & Anor](#) [2023] VSC 462, and [Superior Court](#), 2023 QCCS 3380.

Incorporated Associations and Societies

+ An appeal was heard in [Southport Memorial Club Inc v Returned and Services League of Australia \(Queensland\) Southport Sub-Branch Inc](#) [2023] QCA 146. It concerned a service association transferring land, including a lease, to a club that permitted the service association to use some of its facilities, to a third party, but wishing to retain benefits of the use of facilities at the club.

+ In [Thompson v Canoe Racing New Zealand Incorporated](#) [2023] NZHC 1533 the Court held a judicial review of a member's expulsion from a society, and a claim for breach of contract.

+ [Calabretta & Anor v Huyen VI Buddhist Enlightenment and Charity Association Inc](#) [2023] VSC 405 concerned whether the payment of funds to an association that bought land funded by a loan could support an equitable lien. The Society's receivers and managers claimed a lien over the land because the Society had made payments on the mortgage taken out by the Association to finance the purchase of the land.

+ A dispute between Pickleball and tennis players about the control of tennis courts was heard in [Gowing v. Mayne Island Community Centre Society](#), 2023 BCSC 1286. The dispute involved an unincorporated association that funded and maintained the courts, and an incorporated body that owned the land and facilities

+ In [Superior Court](#), 2023 QCCS 3380, the directors of a nonprofit foundation for non-political, non-profitable, religious and socio-culture purposes committed to the cause and services of the Muslims living in Canada sought orders for meeting resolutions to be declared void, and for damages.

+ [Benoit v. Federation of Newfoundland Indians Inc.](#), 2023 NLSC 90 considered whether oppression could be established against an organisation by its former members. A complex First Nations situation in Canada was involved.

+ Whether a council could repurchase property sold to a community organisation on certain conditions that were breached was considered in [Dar-Alawda \(Wendel Street\) Community Centre Inc. v Merribek City Council](#) [2023] VSC 433. The Court made observations about the form of membership applications and their assessment.

Corporations

+ The US case of [Turner v. Victoria](#), S271504 Supreme Court of California, considered whether a director of a charitable corporation, who lost that position after instituting a lawsuit against fellow directors under director enforcement statutes, also lost standing to maintain the lawsuit. It was held that the director had standing to maintain her action against the directors of the Foundation even though she herself was no longer a director.

Political Parties

+ In [Baini v Liberal Party of Australia NSW Division & Anor](#) [2023] NSWSC 837 the Supreme Court of New South Wales considered a former political party member's pleadings for the tort of privacy and injurious falsehood where the party sought for them to be struck out.

+ In [Cuthbert v Abbott & Ors](#) [2023] QCA 139, the Queensland Court of Appeal dismissed the claim that an expelled member of an unincorporated political party was permitted to sue the party for failing to comply with party rules and natural justice.

Bank De-Risking

‘De-risking’ refers to financial institutions unilaterally closing the accounts of clients perceived as high risk for fraud, money laundering, or terrorist financing abuse, and has affected some charities and non-profit organisations.

+ In [The Christian Church Community Trust and Others v Bank of New Zealand](#) [2023] NZHC 2523 the Court considered whether a bank could unilaterally close all the accounts of a charity. The charity is more commonly known as Gloriavale Christian community and was involved in [Courage v Attorney-General](#) [2022] NZEmpC 77. The bank claimed that the closure was based on its customer’s human rights breaches.

+ In [Human Appeal International Australia v Beyond Bank Australia Ltd \(No 2\)](#) [2023] NSWSC 1161 the decision of a members’ mutual bank to close the bank account of Australia’s largest Muslim charity was challenged.

Fundraising

+ [La-Z-Boy Incorporated v Te Kupenga National Literacy Trust](#) DRS 1477 was a determination about whether a charity had unfairly registered an internet domain name. The charity funded its activities by the strategic acquisition and divestment of domain names.

See also [Gowing v. Mayne Island Community Centre Society](#), 2023 BCSC 1286.

Freedom of Information

+ In [‘AEG’ and Australian Charities and Not-for-profits Commission \(Freedom of information\)](#) [2023] AICmr 72, the Office of the Australian Information Commissioner considered whether the disclosure of documents concerning an investigation should be withheld by the ACNC under freedom of information provisions.

Employment

+ In [Savet v Rosebank College](#) [2023] NSWSC 1015 an application by a teacher for judicial review on grounds of jurisdictional error (natural justice) of a decision by the head of a relevant entity, made in the context of the reportable conduct scheme set out in Part 4 of the [Children's Guardian Act 2019](#) (NSW), was considered. There is extensive commentary provided by Sam Burnett of Prolegis Lawyers.

+ In [Estate of Mahmoud Eid v. University of Ottawa](#), 2023 HRT0 1360, the Human Rights Tribunal of Ontario heard a matter brought by the spouse of the deceased, acting in her capacity as representative of his estate, as to whether a previously agreed human rights settlement with a university had been breached.

+ [Madden v Commissioner of Police](#) [2023] QCA 31 and [Madden v Commissioner of Police](#) [2023] QCA 182 were, respectively, an appeal from a District Court decision that there was no jurisdiction to make a costs order as the charges had already been dismissed, and a cost order appeal. The original context had been one of dismissal from employment.

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Date of creation: October 2023

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