

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 September to 31 December 2023

A summary of significant cases involving charitable, philanthropic, nonprofit and social enterprise 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](#).

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This case note summary collects and summarises cases of particular interest from the fourth quarter of 2023.

The experts pick of cases to consider:

Murray Baird – Charity Law Advisor

[GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore](#) [2023] HCA 32 and [Kneale v Footscray Football Club Ltd](#) [2023] VSC 679, along with [RC v The Salvation Army \(Western Australia\) Property Trust](#) [2023] WASCA 29 (noted in the [First Quarter Summary 2023](#)), illustrate the implications of the removal of limitation periods that previously applied to claims arising from sexual abuse of children, following recommendation 85 of the [Royal Commission into Institutional Responses to Child Sexual Abuse](#).

In [RC v The Salvation Army \(Western Australia\) Property Trust](#) [2023] WASCA 29, the claimant alleged that he was sexually assaulted by an Officer in a Salvation Army Boys home in 1959 and 1960 when he was 12 years old. The alleged perpetrator died in 2006 and no other officers who worked at the home in the relevant period were still alive. The Court of Appeal refused to disturb the decision of the primary judge that the defendant could not meaningfully defend the action, having available to it no contemporaneous material of any kind to evaluate the claim. Accordingly, the case warranted the exceptional step of granting a permanent stay.

In [GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore](#) [2023] HCA 32, a 3/2 majority overturned a permanent stay of proceedings granted by the New South Wales Court of Appeal. The claimant alleged sexual assault by a priest in 1968, when the claimant was 14 years old. The High Court considered that a stay was a decision of last resort “on the basis that no other option is available” and that it required exceptional circumstances (at [3]). The majority described the situation following the abolition of the limitation period as a “new world” in the fair trial of child sexual abuse claims. The effect of the decision is to make it more difficult to stay proceedings in child sexual abuse cases.

In [Kneale v Footscray Football Club Ltd](#) [2023] VSC 679, the Club was held liable for a breach of duty of care to ensure the safety of a child spectator. The child was 11 years old in 1984, when abuse commenced which continued for 5 years. Total damages approaching \$6 million were assessed.

No one would want to deny fairness to survivors of sexual abuse. On the other hand, the “new world” of the trial of child abuse claims following the removal of limitation periods is likely to have a dramatic impact on the viability of many non-profit institutions. Death of witnesses, disposal of records, cost of investigations and representation, and unavailability of insurance indemnity are some of the challenges for defendants. Expect to see further impact of these cases across the NFP sector in this brave new world.

On the related matter of vicarious liability in sexual abuse cases, watch for the outcome of [Bird v DP](#) (a pseudonym) [2023] HCATrans145 on appeal from the Victorian Court of Appeal to the High Court in which special leave to appeal was granted by the High Court on 20 October 2023. The High Court will consider the scope of vicarious liability in the context of a non-profit institution.

See also [Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB](#) [2023] UKSC 15 in which the Supreme Court of the United Kingdom set out its test for vicarious liability in sexual abuse cases.

Myles McGregor-Lowndes – Professor Emeritus ACPNS

This Quarter has cases for everyone from board members to the Minister for Charities to read and consider.

Murray Baird has already identified historical sexual abuse cases that have implications for all nonprofit organisations that will continue to work their way out over the next decade.

All board members would do well to digest [Pacific Lutheran College \(Privacy\)](#) [2023] AICmr 98 and reflect on how their organisation meets the cyber security standards set out by the Privacy Commission, and [PayPal, Inc.](#) [2023] APO 54 gives us a glimpse of what AI will bring to fundraising in the future.

[Carabetta & Anor v Carlingford Bowling, Sports & Recreation Club](#) [2023] NSWSC 1442 reminds boards and their advisors to consider carefully the nature and intended effect of their constitutional by-laws, and whether an incorporated association’s members can bring a derivative action under the general law is considered in [Diakovasili & Anor v Order of AHEPA NSW Incorporated](#) [2023] NSWSC 1282.

For those tangling with cy-près orders in New South Wales, refer to [Green v Attorney General of the State of New South Wales](#) [2023] NSWSC 1229, which is a gift to greater legal understanding, as is [Trinity College Gawler Inc. v Commissioner of State Taxation](#) [2023] SASC 178 for school payroll tax issues.

Faith-based organisations and their advisors may find benefit in noting [Lindsay Cameron](#) [2023] FWC 2902 and [Serenity Pilgrim, Anna Courage, Rose Standtrue, Crystal Loyal, Pearl Valor and Virginia Courage v The Attorney-General Sued on Behalf of The Ministry of Business, Innovation and Employment, Labour Inspectorate](#) [2023] NZEmpC 105.

Those cases that regulators and government advisors should pay special attention to are [Re Leeuwin Ocean Adventure Foundation Limited \(In Administration\); Ex Parte John Allan Bumbak and Richard Scott Tucker as joint and several administrators of Leeuwin Ocean Adventure Foundation Limited](#) [2023] WASC 480 (ASIC and ACNC registers) and [In the matter of Hunter Aged Care Foundation Limited \(in liquidation\)](#) [2023] NSWSC 1358 (status of ATO Gift Funds).

Charity

+ In [Better Public Media Trust v Attorney-General](#) [2023] NZCA 553, the Court of Appeal New Zealand determined an appeal as to whether an organisation with the purpose of advocating public media was charitable. The Charities Registration Board concluded that the Trust's advocacy was not directed towards a charitable end. It was primarily an advocacy organisation that promoted public media delivered by others, rather than public media itself. The Court of Appeal considered that the Trust's objectives were to enhance democratic and social values through the advancement of public media, which was important in a free and healthy democracy, enhancing social cohesion. Sue Barker and Murray Baird provide further commentary on the case.

+ Should a charitable trustee be remunerated by a percentage of the value of the charity's assets or for work done? In [Simmons v Arthritis Queensland Ltd](#) [2023] QSC 251, the Supreme Court of Queensland provided guidance on appropriate remuneration for the trustee, who was also an accountant in private practice.

+ Did the forfeiture rule apply to the devolution of an estate benefiting charity? A husband took his own life after admitting in writing that he had killed his wife, who was suffering from advanced cancer. In the end, the Armiger Foundation, which had the purpose of promoting education about classic and historical vehicles by promoting knowledge of their repair and maintenance, and the provision of apprenticeships and training in such matters for young persons, benefited from the wills - [Withers Trust Corporation Limited v The Estate of Hannah Goodman](#) [2023] EWHC 2780 (Ch)

+ In [the matter of Hunter Aged Care Foundation Limited \(in liquidation\)](#) [2023] NSWSC 1358, the Supreme Court of New South Wales determined an application by liquidators to be able to distribute a gift fund and surplus of a company with charitable purposes and a gift fund. The status of a 'Gift Fund' was discussed by the Court, with a submission made by the NSW Attorney General that it might be dealt with by an application made under s 12 of the [Charitable Trusts Act 1993](#) (NSW) for the establishment of a cy-près scheme, or that such a scheme could be addressed by the Court, as the Gift Fund was a charitable trust.

+ In [Mohammed v Daji](#) [2023] EWHC 2761 (Ch), the trustees of a mosque sought a declaration of ownership after a schism within the membership. The issues the Court had to deal with were how the property was funded and branch/parent relations. The Court made a valuable summary of the legal principles relating to appeals for funds from the public, and charitable trusts.

+ A bitter tussle between factions on the appointment of a new minister under a clearly outdated constitution was before the Court in [Auimatagi & Ors v Mangere Congregational Church of Jesus Trust Board](#) [2023] NZHC 3120. The Court dealt with an application to strike out pleadings with a plea from the bench for the parties to put their differences aside and reform their constitution into a culturally appropriate governance document.

+ The Court of Appeal of New Zealand in [Rohit v Daya](#) [2023] NZCA 649 gave a decision about the succession of a Swamiji of the Yogi Divine Society (NZ) Inc., incorporated as a charitable trust. The decision involved the interpretation of charitable trusts in New Zealand and India and their interrelationships, attempted variation of the trusts, and validity of special general meetings.

Cy-près, Schemes and Gifts

+ In [Zedra v HM Attorney General](#) [2023] EWCA Civ 1332, the Court of Appeal determined an appeal about the appropriate application of funds held on charitable trusts under a cy-près scheme. This matter was an appeal from [HM Attorney General v Zedra Fiduciary](#) [2022] EWHC 102 (Ch) (leave to appeal granted in [HM Attorney General v Zedra Fiduciary Services \(UK\) Ltd](#) [2023] EWHC 838 (Ch)) and the decision holding that the trust was charitable but incapable

of achievement, [Attorney General v Zedra Fiduciary Services UK Ltd](#) [2020] EWHC 2988 (Ch). A donor in 1928 began a fund to accumulate until there were sufficient funds to discharge the UK national debt, and by 2020, had funds in hand of £600 million. However, the National Debt, as at the end of October 2021, was £2,277.6 billion. Should the funds be paid to reduce the national debt, or distributed for general charitable purposes in the UK? In deciding to apply the funds to the national debt, there was a substantial discussion on the spirit of the gift and its ascertainment.

+ In [Green v Attorney General of the State of New South Wales](#) [2023] NSWSC 1229, the Supreme Court of New South Wales went out of its way to provide a history and a practical description of cy-près in New South Wales. The case also serves as a warning to those who voluntarily revoke their status as a charity registered with the ACNC, and the tax consequences of doing so.

+ The issue of charities named in a will that had ceased to exist was examined in [Perpetual Trustee Company Limited v The Bays Healthcare Group Incorporated & Anor](#) [2023] VSC 727. The Court noted that the application for judicial advice was unnecessary as it was self-evident that the charities were successor charities to those named in the will, and there was no controversy.

+ In a similar case to the above, the [Estate of Clarke](#) [2023] NZHC 3341 proposed a scheme to vary a charitable bequest left for a defunct facility, and to substitute it with another charitable bequest for the purposes of a different programme operated by the same entity.

+ The High Court of New Zealand in [Barham](#) [2023] NZHC 2760 facilitated charitable trustees to amend the trust deed and regularise the appointment of trustees. There were two trust deeds, with the amendments dealing with the appointment of trustees, and their retirement every four years.

+ In [Frank Sydenham Scholarship Trust](#) [2023] NZHC 2556, the High Court of New Zealand varied a charitable trust for a second time to widen the applicants' catchment, and various other minor matters.

+ A person formerly domiciled in South Australia and then emigrating to Canada left bequests to Australian animal welfare charities, some of which had ceased to operate. [In the Matter of the Estate of Jesse Weir, Deceased](#) [2023] BCSC 2278, the Court dealt with gifts to non-existent charities subject to a general charitable intention and cy-près.

Tax

+ In [Trinity College Gawler Inc. v Commissioner of State Taxation](#) [2023] SASC 178, the Supreme Court of South Australia decided an appeal regarding payroll tax exemption for the 125 staff of a school multi-use complex that housed a gymnasium, swimming centre, ball game courts, a 1,200 seat theatre, a creche, a shop, and tenants including a café. Exemptions were considered under provisions for education, health services and charitable purposes.

+ In [United Grand Lodge of England v Commissioners for His Majesty's Revenue and Customs](#) [2023] UKUT 307 (TCC), the Upper Tribunal (Tax and Chancery Chamber) determined an appeal concerning VAT payable on membership subscription fees. The appeal included a discussion about the meaning of the term "philanthropic".

+ A property tax exemption for municipal taxes was denied in [McDonald v Edmonton \(City\)](#), 2023 ABKB 615 for property housing homeless people. The Court noted at [31] that: "Funds that would have been used to support programs at the property will now be used for property taxes" and that the City financially supported housing homeless people, so "At least some of that funding will come from the homeless-serving sector paying property taxes."

+ In [Craig Kay v The Commissioners for His Majesty's Revenue and Customs](#) [2023] UKFTT 861 (TC), the First-Tier Tribunal (Tax Chamber) heard an appeal concerning the valuation of shares gifted to a charity involving the Alternative Investment Market (AIM), being a specialised unit of the London Stock Exchange catering to smaller, more risky companies.

+ An application for interim relief from a notice of revocation of charity status was refused in [Sheldon M. Chumir Foundation for Ethics in Leadership v. Minister of National Revenue](#) [2023] FCA 242. The Foundation argued that it would suffer irreparable harm to its reputation, capacity to fund and maintain its programming, and relationship with third parties. The Canadian Federal Court of Appeal was unconvinced on the balance of probabilities that the Foundation would suffer such damage.

+ In [Walby v. The King](#) 2023 TCC 164, taxpayers appealed reassessments of denied charitable tax credits of a sham scheme involving cash and in-kind gifts. Neither taxpayer had donative intent in making their cash contributions, but instead each was participating in a series of interconnected transactions meant to lead to their enrichment. The Tax Court of Canada dismissed the appeals.

+ An appeal as to the property tax exemption of a housing corporation was determined in [Stamford Kiwanis Non-Profit Homes Inc. v. Municipal Property Assessment Corp.](#), 2023 ONSC 6625. The issue was whether Stamford was “organised for the relief of the poor”, or was merely an owner of property.

Company Limited by Guarantee

+ In [Carabetta & Anor v Carlingford Bowling, Sports & Recreation Club](#) [2023] NSWSC 1442, the Supreme Court of New South Wales examined whether new by-laws were inconsistent with an existing club constitution. The issue of whether by-laws were part of the statutory contract between the Club and each member by s 140 of the [Corporations Act 2001](#) (Cth) was considered.

+ Whether a Corporations Act s249D notice to a company limited by guarantee to hold a member’s meeting to vote on replacing the President and Vice President was valid was considered in [Weidemann v Victorian Farmers Federation, in the matter of the Victorian Farmers Federation](#) [2023] FCA 1643. The Court found that the defect of insufficient member signatures was not a procedural irregularity, as it was central to the statutory preconditions of the notice.

+ [Lucas, as liquidator of Blackwater Mine Workers’ Club Limited \(in liq\) v Blackwater Mine Workers’ Club Limited \(in liq\)](#) [2023] FCA 1636 concerned an application by a liquidator of a club to appoint himself as the administrator of the club to secure the passing of a Deed of Company Arrangement, which would allow the club to operate into the future.

+ An application by persons appointed as administrators by a charity company board (whose members were not listed on the ASIC register) seeking validation and directions as to the use of public fund accounts was made in [Re Leeuwin Ocean Adventure Foundation Limited \(In Administration\); Ex Parte John Allan Bumbak and Richard Scott Tucker as joint and several administrators of Leeuwin Ocean Adventure Foundation Limited](#) [2023] WASC 480. Another instance of the problems with the interface of ASIC and ACNC registers also raises the question of whether the funds held by a company limited by guarantee for a specified charitable purpose are held on trust by that company.

+ In [Chiodo Corporation Pty Ltd v Coolangatta & Tweed Heads Golf Club Ltd](#) [2023] FCA 1566, the Federal Court of Australia heard an application to seek an injunction to prevent voting on a special resolution until a claim of misleading and deceptive conduct had been decided. The claim was that the Club had provided information to its members about a special resolution that breached the [Competition and Consumer Act 2010](#) (Cth)).

Incorporated Associations

+ In [Re Yeronga Bowls Club Inc](#) [2023] QSC 275, the Supreme Court of Queensland considered whether a bowling club should be wound up on just and equitable grounds when long-standing members opposed it. It was not enough that the club would trade at a loss to show that the substratum of the entity had failed.

+ An appeal from a successful application to strike out a claim under consumer affairs legislation against a Victorian incorporated association, [Myers v Kew Hebrew Congregation Inc](#) [2023] VSC 684, was heard by the Supreme Court of Victoria. The appeal failed as the Court upheld that the Victorian Civil and Administrative Tribunal had no jurisdiction to hear the matter.

+ [Australian Islamic Society of Bosnia Herzegovina Incorporated v Muhamed Kumalic](#) [2023] NSWSC 1505 concerned an application to vest property held by trustees on behalf of the members of an unincorporated association to a new incorporated association established in 2005. The trustees had not complied with the request to transfer ownership, and section 71 of the [Trustee Act 1925](#) (NSW) was invoked.

+ Two cases arising out of the same factual situation were [Gouros & Ors v Order of AHEPA NSW Incorporated](#) [2023] NSWSC 1281, being an application for the declaration as to the membership of a state-wide incorporated association by some branches in the context of a factional feud, and [Diakovasili & Anor v Order of AHEPA NSW Incorporated](#) [2023] NSWSC 1282, which was an application to determine whether members of an NSW-incorporated association could bring a derivative claim under the general law on behalf of the association. These two cases are at the end of a long line of litigation between feuding factions of a well-established Hellenic association. The first case considered abuse of process in bringing similar and overlapping litigation. The second case was whether a member's derivative action about an incorporated association was permissible under general (not statutory) law.

Clubs and Societies

+ In [Salim Akbar Cricket Club v. West Coast Cricket Organization](#), 2023 BCSC 2202, a cricket club was removed from a district association register of members and sought a declaration of unfair prejudice and legal costs for removal from the members' register.

+ Whether a Club was required to repay a member's collateral payment when they ceased membership was considered in [Breitman v. Atlantis Yacht Club](#) 2023 N.J. Super. App. Div. Superior Court of New Jersey. The Court considered arguments of illegal contract because it breached the prohibition of the distribution to a member of income or profit under the relevant statute.

+ The case of [Vietnamese Association, Toronto v. Duong](#), 2023 ONSC 731, an application for a declaration of the proper board after a disrupted Annual General Meeting, was appealed in [Vietnamese Association, Toronto v. Duong](#), 2023 ONSC 6203. The Appeal Court and the Primary Court had stern words about multiple litigation in the small organisation, ending with, at [4]: "This needs to stop".

+ An application to dismiss a notice of change of solicitor in proceedings involving an internal dispute in an incorporated faith based society was considered in [The Samoan Assemblies of God in New Zealand \(Incorporated\) v Morisa](#) [2023] NZHC 3049. The Court declined to set aside the notice of change of solicitor, and subsequent notification of discontinuance by the new solicitor.

+ In a separate but related proceeding to that above, [Na'Amanu v Morisa](#) [2023] NZHC 3599, a faction of a Church sought injunctive relief to access bank accounts and property. The Court found that on the balance of convenience of the Fellowship being able to operate for the members, and in the interests of justice, the orders sought should be granted.

+ [Birhane v. Medhanie Alem Eritrean Orthodox Tewahdo Church](#), 2023 ONCA 815 was an appeal from a decision that a Church should hold an Annual General Meeting with a neutral chair under its existing bylaws. The appeal was allowed in part, and noted the danger of courts straying into non-justiciable matters of church doctrine when addressing issues

of church governance, and the need for expert evidence to understand the relevant canon law where a conflict arises with civil law.

+ A Civil Resolution Tribunal considered an application to restore membership to an unincorporated association and for damages for lost sales as a consequence in [Tennis v. Bennett](#), 2023 BCCRT 841.

Liability

+ The High Court handed down a significant decision in [GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore](#) [2023] HCA 32, decided by a 3/2 majority, overturning the decision of the Court of Appeal of the Supreme Court of New South Wales. The issue was whether an alleged case of child sexual abuse brought to trial 55 years after the event was an abuse of process justifying a permanent stay of the proceedings. There is no limitation period on cases of child sexual abuse in New South Wales, and the Courts are required to evaluate contentions of abuse of process within this new normative structure. The majority held that it was not an abuse of process and the trial could be brought. The minority believed that any trial would fall below the minimum standard of fairness that the law requires because the Church was in no position to plead to the allegation put against it, nor to challenge the claim in an informed manner. Therefore, the continuation of the proceeding would be so unfairly and unjustifiably oppressive as to constitute an abuse of process.

+ In [Kneale v Footscray Football Club Ltd](#) [2023] VSC 679, the Supreme Court of Victoria, in a jury trial, upheld a claim by a child spectator for damages against a football club whose volunteer sexually abused the child for five years and trafficked him for abuse by others, often at the club on game days. While the Court held that vicarious liability did not apply in this case, there was a duty of care owed by the Club to a child spectator to avoid foreseeable risks of injury of which it knew or ought to have been aware. Damages were assessed as \$3,250,000 for pain and suffering and loss of enjoyment of life, \$2,605,578 for past loss of earnings and loss of earning capacity, and \$87,573 for future medical and related expenses.

+ In [Christian Congregation of Jehovah's Witnesses \(Australasia\) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions](#) [2023] NZHC 3031, the High Court of New Zealand heard a challenge by a Church to the lawfulness of reporting the findings of a Royal Commission concerning sexual abuse. An application for judicial review claiming that a guidance document of the Commission was ultra vires the ToR, inconsistency of treatment with other religious institutions, breach of natural justice and legitimate expectation, and predetermination by failing to hear from the Jehovah's Witnesses as to matters of scope before inquiring, were all advanced.

+ An appeal from a decision that a sporting club was liable for the death of a child from a falling stone monument installed on the Club's premises was considered in [Black Head Bowling Club Ltd v Harrower](#) [2023] NSWCA 267. The Court of Appeal found that liability should be apportioned 50% to the contracted stonemason and 50% to the Club. The stonemason's acts were a significant cause of the damage. The Club's breach of duty was also significant in that it failed to take reasonable steps that would have uncovered his negligent construction of the monument at the outset. A reasonable person in the Club's position would have engaged a structural engineer to assess and certify the stability and integrity of the proposed installation method.

+ In [Doyle v Crumlin Boxing Club & Anor](#) [2023] IEHC 665, the High Court of Ireland considered whether an injured person was a boxing club member for the purposes of a personal injury suit. The club argued that as it was an unincorporated association, a member of the Club was estopped from maintaining proceedings against the Club. There is a line of authority that holds that where a club is an unincorporated association that has no separate legal identity from that of its members, then a member suing the club using action against the club's trustees or committee members as representatives of the members is, in law, suing themselves.

+ An appeal by claimants who lost loved ones to COVID-19 in two aged care facilities for the discovery of insurance policy details was dealt with in [Agnello v Heritage Care Pty Ltd; Fotiadis v St Basil's Homes for the Aged in Victoria \(No 2\)](#) [2023] VSC 653. It was argued that discovery of the policy should be made to enable a mediated settlement, because if it proceeded to Court, the resources of the Court would be wasted on litigation that turned out to be pointless if the aged care facilities had no assets and insurance to satisfy a judgment. The order was refused.

Advocacy

+ In [Save the Children Australia v Minister for Home Affairs](#) [2023] FCA 1343, an Australian charity sought to have the Australian Government repatriate Australian women and children detained overseas in North East Syria. The charity applied to the Court for a writ of habeas corpus (often expressed as 'produce the body') issued against the Government. The Court was satisfied (on the balance of probabilities) that the Government did not have control over the detention of the relevant women and children, and a writ of habeas corpus should not be issued. In [Save the Children Australia v Minister for Home Affairs \(No 2\)](#) [2023] FCA 1542 concerning application costs, the Court departed from the usual position that costs follow the event to order that each party bear their own costs. The Court explained that (at [8]), "...this is a most unusual case, raising matters of high public importance. It concerned the amenability of the Commonwealth to legal process in relation to the repatriation of citizens who are being detained by a third party overseas".

+ [Costa v. Seneca College of Applied Arts and Technology](#), 2023 ONCA 673 was an appeal from a costs order against a non-party where it fundraised to fund two others to bring a case as the formal parties. Two students enrolled in the college brought an application against the school, claiming that it had breached their rights under ss. 2(a), 7, 8, and 15 of the [Canadian Charter of Rights and Freedoms](#), with its policy requiring all students who attended the campus to be fully vaccinated against COVID-19. The primary Court awarded approximately \$156,000 in costs against the non-party who funded the students to bring the action. The Appeal Court set aside the decision.

+ [ClientEarth v Shell Plc and others](#) [2023] EWCA 1897 was an application by an environmental charity for permission to continue a derivative action against Shell. The charity had purchased 27 shares in Shell, so was a member. The Court refused permission because the allegations of breach of directors' duty made could not be supported by cogent evidence. A later application to the Court of Appeal was refused on the papers. Costs for all the related actions were awarded to Shell.

Costs

+ [Human Appeal International Australia v Beyond Bank Australia Ltd \(No 3\)](#) [2023] NSWSC 1622 was a costs hearing from the proceeding [Human Appeal International Australia v Beyond Bank Australia Limited](#) [2023] NSWSC 382 about bank de-risking. The bank was unsuccessful in seeking to deprive the other party of some of its costs.

Also refer to [Costa v. Seneca College of Applied Arts and Technology](#), 2023 ONCA 673 and [Save the Children Australia v Minister for Home Affairs \(No 2\)](#) [2023] FCA 1542 above.

Foundations

+ In [Vancouver Foundation \(Re\)](#), 2023 BCSECCOM 489, a foundation sought relief from provisions of securities legislation to allow other charities to have the Foundation manage funds for them in their pooled investment funds. Several Canadian community foundations had offered to manage the endowments or investments of other charities to take advantage of their economies of scale and expertise. It was questioned whether this required regulatory approval, and this is the first time since then that a foundation has been relieved from securities regulation with conditions.

Fundraising

+ An objection to the refusal to patent an AI recommendation system based on individualised information was considered in [PayPal, Inc.](#) [2023] APO 54 (Australian Patent Office). PayPal used the example of a charity donation in its specification. PayPal claimed to have developed a system that provided recommendations during a transaction tailored to a particular consumer and across domains. It involved three AI machine-learning processes that would be combined and result in a recommendation score for a particular charity.

+ [In re: Health Diagnostic Laboratory, Inc., et al., Debtors](#), the United States Bankruptcy Court considered whether donations to a US Church from a bankrupt's estate were required to be refunded. Amongst several arguments, the Church contended that it had spent nearly all the donations on good works, and that given the changed circumstances, it would be inequitable to now require it to repay more than what remained of the money it had received. In ordering the return of all the funds, the Court found that the relevant statute was concerned with returning fraudulently transferred property to the estate. It did not consider the potential hardship to, or the particular circumstances of, a subsequent transferee.

Discrimination

+ In [Grass v McIntosh, Leong and Auyeng](#) [2023] NSWCATAD 258 the Tribunal considered the decision as remitted by the Appeal Panel. The Appeal Panel determined that there was no requirement for the Tribunal to make a finding of discrimination within the meaning of the [Anti-Discrimination Act 1977](#) (NSW) (the Act) in determining whether or not there had been victimisation under s50(1)(c) of the Act. It was sufficient to establish that the person alleging to have been victimised made an allegation that 'would amount' to a contravention of the Act.

Privacy

+ An application sought personal information from a Church about material held by an associated charitable entity that provided emergency housing to the applicant in [Cook v Legacy Church](#) [2023] NZHRRT 31. The Human Rights Review Tribunal found that the separate legal character of each entity was decisive and meant that Legacy Church was not the agency holding the tenancy-related information. This was merely an outcome of the core concept of separate legal personality.

+ In [Pacific Lutheran College \(Privacy\)](#) [2023] AICmr 98, the Australian Information and Privacy Commissioner considered whether a school had complied with its obligations under the [Privacy Act 1988](#) (Cth) after a phishing incident leading to a data breach. The College had two previous notifiable data breaches from June 2019 to May 2020, and was found to be in breach of the Privacy Act.

Volunteers and Employment

+ Whether a Church was a 'constitutionally covered business' for the purposes of the [Fair Work Act 2009](#) (Cth) and whether a person was a 'worker' was considered in [Lindsay Cameron](#) [2023]FWC 2902. The Commission found that while the applicant may have been a worker, the Church was not a constitutional corporation, and the application was out of its jurisdiction. The Commissioner discussed the principles that might be considered in determining whether a body is a constitutional corporation.

+ In [Application by Lulu Lisa Liang-Godber](#) [2023] FWC 2423, the Fair Work Commission heard an application by the chair of an incorporated association for stop bullying orders against Commonwealth Government officers who funded the association. This matter is notable as it involves a volunteer for a Commonwealth Department that funded, supervised, and provided administrative support to an incorporated association.

+ In [Linda Beaver \[2023\] FWC 3460](#), a former volunteer sought a stop bullying order in relation to Scouts NSW and two of its officers. As the person was not a volunteer at the time of the application, was no longer a member of the association, and there was no likelihood that a relationship between the two would be restored in the foreseeable future, the application was dismissed.

+ Former adherents in a closed Christian community sought to determine whether they were employees, and the identity of their employer, in [Serenity Pilgrim, Anna Courage, Rose Standtrue, Crystal Loyal, Pearl Valor and Virginia Courage v The Attorney-General Sued on Behalf of The Ministry of Business, Innovation and Employment, Labour Inspectorate \[2023\] NZEmpC 105](#); [Serenity Pilgrim, Anna Courage, Rose Standtrue, Crystal Loyal, Pearl Valor and Virginia Courage v The Attorney-General Sued on Behalf of The Ministry of Business, Innovation and Employment, Labour Inspectorate \[2023\] NZEmpC 227](#). The Court considered the definition of an employee in contradistinction to a homeworker, a volunteer within the context of a religious community, work for reward, contract for services, unincorporated associations as employers, and the [New Zealand Bill of Rights Act 1990](#), section 13, which protects freedom of thought, conscience and religion, and section 15, which protects the right to manifest religion and belief.

Miscellaneous

+ [The Uniting Church in Australia Property Trust \(Q.\) ABN 25 548 385 225 v Queensland Heritage Council \[2023\] QPEC 40](#) was an appeal against the heritage listing of a Brisbane Church. It was determined that the Church was neither important in demonstrating the evolution or pattern of Queensland's history, nor was the place important because of its aesthetic significance.

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Date of creation: January 2024

Number of case: 2024-1

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