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The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.

You should seek legal advice or other professional advice in relation to any particular matters you or your organisation may have.
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FOREWORD

The annual publication of an almanac is an anticipated event, a means of surveying and analysing the cases and data in a given field. In a relatively short time The Australian Nonprofit Sector Legal and Accounting Almanac, published by The Australian Centre for Philanthropy and Nonprofit Studies (ACPNS) at Queensland University of Technology (QUT), has positioned itself as an invaluable resource for practitioners and researchers – and indeed regulators!

Whether your area of practice or interest is charitable status, taxation, governance or workplace relations, the charity sector is a diverse and dynamic one. So too, is the regulatory framework that surrounds us, making a uniform approach difficult. However, regulators, tribunals and courts often grapple with common issues, and practitioners strive for the common goal of good regulation and governance.

This is where The Australian Nonprofit Sector Legal and Accounting Almanac comes into its own as a resource for the charity sector. The publication of case summaries involving not-for-profit organisations from around the world provides a credible and constructive insight into the evolution and challenges of regulation across the sector.

I encourage anyone who works, or has an interest, in the sector to make the Almanac a part of their ‘go to’ resources. Its useful referencing of important legal rulings and legislative changes makes it a practical tool to guide sound decision making and help support charities to continue to carry out the important work they do within the Australian community.

I applaud The Australian Centre for Philanthropy and Nonprofit Studies at QUT, Professor Myles McGregor-Lowndes and the contributing organisations for their commitment to supporting the sector with such a comprehensive document. Informed decision making can only enhance charities’ capacity to achieve their mission better and thus enhance the health and wellbeing of our wider community.

Susan Pascoe AM
Commissioner
Australian Charities and Not-for-profits Commission
1.0 INTRODUCTION

CASES

For a number of years, Professor Myles McGregor-Lowndes, Frances Hannah and Anne Overell have compiled one to two page summaries of cases involving nonprofit organisations and published them on The Australian Centre for Philanthropy and Nonprofit Studies, Developing Your Organisation (DYO) website.¹ You can be alerted of new case summaries as they are posted to the DYO website by subscribing to the ACPNS RSS feed or the ACPNS twitter service.²

There were some very significant cases during 2013, such as Commissioner of Taxation v Cancer & Bowel Research Association (see case notes 2.8.2 and 2.8.11), The Hunger Project case which is under appeal, but could change the face of PBI jurisprudence (see case note 2.8.7) while Home Health Pty Ltd retained the PBI status quo but might have been different if appealed (see case note 2.8.8). For sheer interest there is nothing better in my 30 odd years of reading tax and charity judgements than case involving The Study and Prevention of Psychological Diseases Foundation Incorporated (see case note 2.1.1). It even rivals some of the more bizarre cases from the US jurisdiction of which St Joseph Abbey v Castille (case note 2.10.9) is certainly 'dead centre'. A set of cases which stand out for attention are those involving New Zealand's Christchurch Cathedral which anyone with responsibility for heritage-listed buildings should study carefully, for implications in relation to their own circumstances.

A number of cases summarised in this Almanac are working their way through the appeals process and care should be taken with their application. In addition, some of the cases are from jurisdictions outside Australia, and readers should exercise caution when considering the implications of these cases for Australian law.

LEGISLATION

The Almanac includes a review of major statutory amendments during 2013, which are relevant to the nonprofit sector in all Australian jurisdictions. Special thanks must go to Nathan MacDonald and the JusticeConnect team for providing legislative updates for Victoria.

SPECIAL ISSUES DURING 2013

A number of legal practitioners have contributed articles on significant legal issues facing nonprofit organisations: charitable trusts giving to government entities (Alice Macdougall); workplace bullying (Tim Longwill); and privacy (James Tan and Nina Brewer).

WORLD ROUND-UP

Major developments from the UK and Ireland (Kerry O’Halloran), Canada (Peter Broder), New Zealand (Michael Gousmett and Susan Barker) and Jamaica (Frances Hannah) are all summarised in a review of a significant part of the common law charity jurisdictions.

¹ https://wiki.qut.edu.au/display/CPNS/Legal+Case+Notes
² Click on ACPNS RSS feed at https://wiki.qut.edu.au/display/CPNS/ACPNS+Wiki+Home; or go to http://twitter.com/CPNSinsides.
WHAT DOES 2014 HOLD

The final section moves from looking in the rear view mirror to peering out the front windscreen to discern the reform agenda. The view from the windscreen in 2013 was of considerable reform traffic at the Commonwealth level jostling for a place in the parliamentary agenda. This year is quite different with a smaller number of vehicles ahead, but the potential for significant impact.

DOWNLOAD

This publication is available in PDF format through QUT e-prints http://eprints.qut.edu.au/ (search for all of: nonprofit legal almanac 2013). Earlier editions are also available.
2.0 CASES BY CATEGORY

Cases in this section are presented reverse chronologically under designated subject headings (with a ‘Miscellaneous’ heading for cases that do not fit elsewhere.)

2.1 CHARITIES AND CHARITABLE STATUS

2.1.1 THE STUDY AND PREVENTION OF PSYCHOLOGICAL DISEASES FOUNDATION INCORPORATED AND COMMISSIONER OF TAXATION [2013] AATA 919 (ADMINISTRATIVE APPEALS TRIBUNAL, DEPUTY PRESIDENT MOLLOY, 20 DECEMBER 2013)

This case concerned the tax-exempt status of The Study and Prevention of Psychological Diseases Foundation Incorporated (SPED). SPED had received the following endorsements from the Australian Taxation Office on 1 January 2005:

- An entity exempt from income tax as a charitable institution under section 50-110 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) in accordance with section 50-5 item 1.1;
- A deductible gift recipient in accordance with section 30-125 of the ITAA 1997 on the basis that it was a health promotion charity under section 30-20 of the ITAA 1997, item 1.1.6.

SPED also obtained the following endorsements from 1 July 2005 (although it was possible that these had been backdated to 1 January 2005 – the point was not argued):

- A health promotion charity under section 123D(2) of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (FBTAA).

A review of SPED’s endorsement as an income tax exempt charity under Subdivision 50-B of the ITAA 1997 was commenced in August 2009. By letter dated 6 April 2011 the Commissioner advised SPED that it had not satisfied the requirements for the above endorsements, and that they would be revoked with effect from 1 January 2005. SPED objected but the objection was disallowed by the Commissioner on 27 April 2012. In this case, SPED applied for a review of that decision to disallow the objection. The issues were:

1. Whether SPED was a charitable institution;
2. Whether SPED was a health promotion charity; and
3. If any of SPED’s endorsements were revoked, then from what date (or dates) should the revocation have taken effect.

The founders of SPED had previously been engaged in group living experiments, and ‘research’ since the mid-1980s. One of its founders had published a book on the issue of ‘emotional quotient’, and another had operated multidisciplinary health clinics. They had also developed the ‘Ideal Human Environment’ (IHE) as a means of assisting young people with social disorders.

SPED was formed to engage in ‘24 x 7’ research and then trial and test research findings through the conduct of programs designed to promote the prevention of psychological disease, and included in its objects:
• ‘The Foundation[’s] objects are for public benefit and charitable purposes, in seeking to promote the prevention and control of psychological diseases in human beings and therefore setting out to ultimately create the Ideal Human Environment (IHE).’ (at clause 4 of its Constitution)

• ‘...primarily to operate and fund a research team that functions 7 days a week, 24 hours a day, whose purpose is to research human psychological disease by studying a cross-section of human behav[iour] in a variety of emotional, social and physical conditions, circumstances and environments.’ (at clause 5.1 of its Constitution)

Any person could become a member of SPED, and the number of members was allegedly unlimited. There were two types of membership: full-time research team members (FTRs), and freelance research team members (FLRs, which included anyone who had ever attended a course run by SPED). However, only the FTRs were really regarded as members and as at the present date, they numbered 17. All the members were bound by blood ties, marriage or friendship. SPED had never actively sought membership from the general public.

SPED was said to undertake ‘action based qualitative research whereby research is undertaken in an interactive real time manner’. This involved using ‘the whole number of possible hours in any one week’. All the members were described both as ‘researchers’ and ‘guinea pigs’. However, none of them had any qualifications in psychology or any social science, although one of the founders was a chiropractor.

The range of human experiences examined was said to include dealing with poverty, opulence, crowded living, living alone, living in cities, living in remote isolated communities, living overseas, and living in Australia. In effect, however, the members were just living their normal lives, and referring to that experience as ‘research’.

One of the projects undertaken was ‘Project Inebriation’ which dealt with the experience of owning and using luxury motor vehicles. The vehicles, including a Hummer ($100,000), a Ferrari ($300,000) and a Rolls Royce ($695,000), were purchased by SPED. Another was ‘Project India’ which funded a member’s trip to India to attend a wedding. None of the ‘research’ conducted was ever published in any journal of medicine or social science, although there were apparently internal reports produced.

Membership required payment as described by clause 9 of the Constitution:

> Upon joining the SPED SRT [Social Research Team] all your assets become part of the asset base to be available for use by the SPED Foundation. This includes cash and all forms of property. These assets form part of what is termed entry princip[al] assets.

Assets were said to be returnable ‘upon the completion of this agreement’ but no interest was payable. In addition, all the income earned by members (most of whom were employed or self-employed in ‘normal’ jobs) was given to SPED. Thus, all the members paid no income tax. All the members’ expenses (including ordinary household expenses) were paid by SPED, and claimed by it as costs of research.

SPED’s accounts revealed that it engaged in very substantial share trading during 2008–09. It had assets of $10,665,655 and liabilities of $3,151,812 as at 30 June 2009. There were very substantial expenses recorded during 2009 including ‘research expenses’, which at $760,000, embraced ordinary household expenses, travel and ‘personal items’. Moreover, there were questionable amounts included which in evidence were identified as possible loans, but appear to have been advances to companies owned and operated by the founder members.
Was SPED ‘charitable’?

The word ‘charitable’ has a technical legal meaning that can be traced to the law of trusts and, ultimately, to the preamble to the Statute of Elizabeth: Federal Commissioner of Taxation v Word Investments Ltd [2008] HCA 55; (2008) 236 CLR 204. In the absence of a statutory definition of charity in Australia, the meaning of ‘charitable purpose’ has long been derived from the decision in Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531, where Lord Macnaghten said (at 583):

‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

SPED claimed to be a charitable institution having charitable purposes within two of the classes described in Pemsel: the advancement of education and other purposes beneficial to the community. However, an institution is charitable if its only purpose, or its main or dominant purpose, is charitable in the technical legal meaning, and it is established and maintained for that charitable purpose: Federal Commissioner of Taxation v Word Investments Limited (2008) 236 CLR 204 at 216–217. If an institution’s objects in its constituent documents indicate a purpose that is charitable, but its actual activities and other relevant factors indicate the substance and the reality point to the contrary, the institution will not be charitable.

Taking all the evidence into account, the Tribunal did not accept that SPED’s activities were at all charitable, or in accordance with its objects (at [70]–[71], [74]–[75]):

SPED’s principal activities, as it claims, are the research its members are carrying on 24 hours per day, seven days a week. I do not accept that this is research. The members’ activities, described by SPED as research, are predominately the ordinary activities of life. They are carried out for the personal benefit of the members themselves. Similarly SPED claims that all of its expenditure is on research. However, overwhelmingly, its expenditure goes on its members’ living expenses, other personal expenditure, and commercial investments. Expenditure in any way beneficial to the community is insignificant compared to expenditure on private purposes....

SPED’s actual activities do not coincide with the stated objects in its Constitution. It does not fulfil the charitable purposes it asserts. It exists, and existed during the relevant years, for the benefit of its small number of members. A considerable part of that benefit is financial.... SPED was not at any relevant time a charitable institution.

Was SPED an institution?

The Commissioner contended that SPED was neither ‘charitable’ nor an ‘institution’. The latter descriptor depends on the totality of the circumstances. The Tribunal had no difficulty in agreeing with the Commissioner (at [80]–[82]):

SPED’s members are all related by blood, marriage or friendship. The conditions that it places on its members mean that its membership is unlikely to grow. Any new membership is likely to be confined to persons who are born into SPED, or marry or commence a relationship with an existing member. There is little, if any, public utility in SPED’s activities. Its activities, which it calls research, are predominately its members’ ordinary activities of life, carried out for their own benefit. Its expenditure, in general, is for the personal benefit of its members. SPED is not an institution in the relevant sense.
Was SPED a health promotion charity?

In addition to being a charitable institution, there was a requirement (in the context of the deductible gift recipient provisions of the ITAA 1997 and exemption from fringe benefits tax under the FBTAA) that SPED’s principal activity be to promote the prevention or the control of diseases in human beings. Disease includes any mental or physical ailment, or disorder. The Tribunal had few words to spare on this issue (at [86]): ‘SPED’s principal activity was not, at any relevant time, to promote the prevention or control of diseases in human beings.’

What was the relevant date for revocation of endorsements?

The Tribunal said that SPED was not entitled to any of the endorsements granted to it in 2005. Therefore, the relevant date for revocation was 1 January 2005. The Commissioner’s decision was confirmed.

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/aat/2013/919.html

Implications

The activities carried out by the organisation and its surrounding context would alert any reasonable person in the street that charitable tax exemptions and deductions for this organisation were too good to be true – and they were. The wheels of ATO’s formal scrutiny appeared to turn slowly with a review of the status being commenced in August 2009 and the letter revoking the status in April 2011. The organisation was also subject to a BAS audit in February 2007, and provided information requested by the ATO, separately, in 2007. The audit and information do not appear to have raised any alarms.

It will be interesting to see how the ATO deals with the issues now that the taxation concessions have been withdrawn. Some comfort may be provided by the mutuality principle, a legal principle established by case law. It is based on the proposition that an organisation cannot derive income from itself. The principle provides that where a number of persons contribute to a common fund created and controlled by them for a common purpose, any surplus arising from the use of that fund for the common purpose is not income. The principle does not extend to include income that is derived from sources outside that group.

2.1.2 MILE ROAD ALLOTMENT AND LEISURE GARDENERS ASSOCIATION
(REGULATORY DECISION OF THE CHARITY COMMISSION FOR ENGLAND AND WALES, 16 DECEMBER 2013)

The Mile Road Allotment and Leisure Gardeners Association, based in Bedford, UK, was refused charitable status in June 2012. The Charity Commission had ruled that an allotment association was not a charity because it was not established exclusively for charitable purposes and for the public benefit. Rather, it appeared to benefit individual members as its main purpose. Any possibly charitable purposes, such as the advancement of horticultural education, were incidental.

The organisation provided allotments to members at reasonable annual rents, with concessionary rates for elderly people, unemployed people and those on low incomes. The membership of the organisation is open to all and the allocation of plots is to the next person on the waiting list on a ‘first come, first served’ basis. The Association also supported a community plot for use by non-members.

The Association requested a review of the Charity Commission’s decision. In a formal Decision Review, the Charity Commission ruled that the allotment association could be registered as a charity if it changed its objects:
Following a review of the information provided with the application, additional subsequent information provided by the applicants and proposed amendments to the objects, we have concluded that the Association, when it amends its objects will be established for exclusively charitable purposes within the descriptions of purposes in section 3(1) of the Charities Act 2011 and for the public benefit. It is therefore entitled to be registered on the Register of Charities under section 29 of the Charities Act 2011.... We were satisfied that working an allotment plot can be a form of healthy recreation. The organisation has therefore been invited to amend their objects to reflect a clear charitable purpose, with a view to entering the organisation onto the Register of Charities.

The Decision Review considered whether the provision of allotments by the Association was charitable under the principles contained in the now repealed Recreational Charities Act 1958. The principles of that Act were subsumed by section 5 of the Charities Act 2011.

Section 5(1) of the Charities Act 2011 (which reflects section 1(1) of the repealed Act) provides that:

It is charitable (and is to be treated as always having been charitable) to provide, or assist in the provision of, facilities for—
(a) recreation, or
(b) other leisure-time occupation,
if the facilities are provided in the interests of social welfare.

Basic conditions must be met, as outlined in section 5(3) (section 1(3) of the repealed Act):

The basic conditions are—
(a) that the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended, and
(b) that—
(i) those persons have need of the facilities because of their youth, age, infirmity or disability, poverty, or social and economic circumstances, or
(ii) the facilities are to be available to members of the public at large or to male, or to female, members of the public at large.

The previous Act’s provisions are further reproduced in section 5(4):

Subsection (1) applies in particular to—
(a) the provision of facilities at village halls, community centres and women’s institutes, and
(b) the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation,
and extends to the provision of facilities for those purposes by the organising of any activity. But this is subject to the requirement that the facilities are provided in the interests of social welfare.

Public benefit must be shown, as required by section 5(5) of the Charities Act 2011 (reflecting section 1(1) of the repealed Act).

The decision is reported at: http://www.charitycommission.gov.uk/our-regulatory-work/reporting-our-regulatory-work/regulatory-decisions/our-decisions/
Implications of this case

Provisions similar to section 1 of the Recreational Charities Act 1958 (now section 5 of the Charities Act 2011 in the UK) exist in Queensland, Western Australia, South Australia and Tasmania: see the Trusts Act 1973 (Qld) at section 103; the Charitable Trusts Act 1962 (WA) at section 5; the Trustee Act 1936 (SA) at section 69C; and the Variation of Charitable Trusts Act 1994 (Tas) at section 4(1). Queensland, Western Australia and South Australia adopted the wording and approach of the Recreational Charities Act 1958. This means that in those states, provision of facilities for recreational and leisure activities is charitable if the facilities are provided for the social welfare. Tasmania adopted a wider approach, deeming a gift to provide opportunities or facilities for sport, recreation and other activities associated with leisure to be a gift for charitable purposes.

By contrast, charitable purposes in Australia (and for federal purposes) do not usually include sporting or recreational activities: see http://www.acnc.gov.au/ACNC/FTS/Fact_typeCharPurp.aspx. However, see Bicycle Victoria Inc and Commissioner of Taxation [2011] AATA 444 (or casenote, available at: https://wiki.qut.edu.au/display/CPNS/Bicycle+Victoria+Inc+v+Commissioner+of+Taxation).

In fact, sporting bodies may be given an exemption from income tax under the Income Tax Assessment Act 1997 (Cth). To be income tax exempt a sporting body must be not-for-profit and have as its main purpose the encouragement of a game or sport, but gardening is very unlikely to be regarded as a sport. See: http://www.ato.gov.au/General/Enquiry-hot-topics/In-detail/Non-profit-organisations/Income-tax-guide-for-non-profit-organisations/?anchor=P731-50469#P731-50469.


This case concerned a consideration of whether Scientology in the UK constituted a religion. Hodkin and her fiancé wished to be married in a church which was part of the Church of Scientology. However, in R v Registrar General, Ex parte Segerdal [1970] 2 QB 697 the Court of Appeal had held in a similar case that a different church within the Church of Scientology was not a 'place of meeting for religious worship' within the meaning of section 2 of the Places of Worship Registration Act 1855 (18 & 19 Vict c 81) (PWRA), with the result that a valid ceremony of marriage could not be conducted there. This appeal challenged that decision.

The challenge to the Registrar General’s decision arose because on 31 May 2011 a trustee of the relevant church applied on behalf of the congregation to the Superintendent Registrar of Births, Deaths and Marriages at the Islington and London City Register Office to register the church as a 'place of meeting for religious worship' under PWRA and as a building ‘for the solemnization of marriages therein’ under the Marriage Act 1949. The application was supported by statutory declarations made by Hodkin and by the minister of the church. It was also supported by a certificate signed by 24 householders stating that it was their usual place of worship (as was required by section 41 of the Marriage Act). The application was referred to the Registrar General and rejected. The refusal letter stated that the Registrar General was bound by the decision in Segerdal and therefore unable to proceed with the application. The Court below (see [2012] EWHC 3635 (Admin)) had also considered itself bound by Segerdal, in which case the Court of Appeal had defined religious worship as involving the veneration of a deity (or similar).

Section 2 of the PWRA provides that:
Every place of meeting for religious worship of Protestant Dissenters or other Protestants, and of persons professing the Roman Catholic religion, ... not heretofore certified and registered or recorded in manner required by law, and every place of meeting for religious worship of persons professing the Jewish religion, not heretofore certified and registered or recorded as aforesaid, and every place of meeting for religious worship of any other body or denomination of persons, may be certified in writing to the Registrar General of Births, Deaths and Marriages in England, through the superintendent registrar of births, deaths, and marriages of the district in which such place may be situate; ... and the said superintendent registrar shall, upon the receipt of such certificate in duplicate, forthwith transmit the same to the said Registrar General, who, after having caused the place of meeting therein mentioned to be recorded as hereinafter directed, shall return one of the said certificates to the said superintendent registrar, to be re-delivered by him to the certifying party, and shall keep the other certificate with the records of the General Register Office.

The current provisions giving legal effect to marriages in places of worship registered under the PWRA are contained in the Marriage Act 1949, as amended.

The Church of Scientology was established in the United States by L Ron Hubbard in 1954, and its customs and practices are based on his writings. Scientology involves belief in and worship of a supernatural power, also known as God, the Supreme Being or the Creator. Understanding of the Creator is attainable only through spiritual enlightenment, and the goal of Scientology is to help its members to obtain such enlightenment. Scientology holds that the accomplishment of spiritual salvation is possible only through successive stages of enlightenment. L Ron Hubbard identified eight human impulses which he termed dynamics of existence. In ascending order they are the urge of survival as an individual, the urge of survival through one’s family, the urge of group survival, the urge of survival for all humankind, the urge of survival for all life forms, the urge of survival of the physical universe, the urge of survival for all spiritual beings and lastly the urge of existence as infinity. God is infinity although Scientologists do not describe God in anthropomorphic terms. All Scientology practices are aimed ultimately at complete affinity with the eighth dynamic or infinity.

The minister of the relevant church in this case led regular services which included recitations akin to prayer, a sermon based on Hubbard’s writings, and a process called auditing. The Supreme Court considered evidence of the wording of the prayers, which included several references to ‘God’. The Court of Appeal in Segerdal had considered the same evidence as to the wording of the prayers of the church, but concluded that they represented more a philosophy than a religion. The Court of Appeal found that there was no evidence of reverence or veneration of (as a sort of humble submission before, or seeking intercession from) God or a Supreme Being (Ex parte Segerdal [1970] 2 QB 697 at 697, 707–709).

The Supreme Court noted that there had never been a universal definition of religion in English law. Nevertheless (at [32]–[33]):

Religion and English law meet today at various points. Charity law protects trusts as charitable if they are for the advancement of religion. Individuals have a right to freedom of thought, conscience and religion under article 9 of the European Convention. They enjoy the right not to be discriminated against on grounds of religion or belief under EU Council Directive 2000/78/EC and under domestic equality legislation...
More recently Parliament provided partial definitions of religion in section 2 the Charities Act 2006 (now section 3 of the Charities Act 2011) and section 10 of the Equality Act 2010 for the purposes of those Acts. Understanding the historical background of the PWRA was important. However (at [34]):

...the expression ‘place of meeting for religious worship’ in section 2 of PWRA has to be interpreted in accordance with contemporary understanding of religion and not by reference to the culture of 1855. It is no good considering whether the members of the legislature over 150 years ago would have considered Scientology to be a religion because it did not exist.

Moreover, other common law jurisdictions had moved on in this area some time ago. The Supreme Court quoted the judgment of Adams CJ in Malnak v Yogi 592 F.2d 197 (1979) concurring in a per curiam opinion of the US Court of Appeals, 3rd Circuit, and the judgment of the High Court of Australia in Church of the New Faith v Cmr of Pay-Roll Tax (Victoria) [1983] HCA 40.

In Malnak v Yogi the issue was whether the teaching in a public school of a course entitled the ‘Science of Creative Intelligence – Transcendental Meditation’ was a religious activity violating the first amendment of the US Constitution (which forbids the establishment of a State religion). Without making a narrow definition, Adams CJ identified three indicia of religion in that case:

1. That the belief system was concerned with the ultimate questions of human existence: the meaning of life and death, mankind’s role in the universe, the proper moral code of right and wrong;
2. That the belief system was comprehensive in the sense that it provides an all-embracing set of beliefs in answer to the ultimate questions;
3. That there were external signs that the belief system was of a group nature which could be analogised to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organisation, and attempts at propagation.

This set of indicia was subject to some criticism, including in the Church of the New Faith case from Australia. In that case, the Church of Scientology was seeking exemption from payroll tax in Victoria because it was a ‘religious institution’. The High Court also looked for criteria (at [17], per Mason CJ and Brennan J):

We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.

The Church of the New Faith (Scientology) was a religious institution under these criteria, and thus was exempt from income tax. Theistic definitions of religion such as existed in England were too narrow in the High Court’s view, and the indicia of Adams CJ in the US included indicia which did not really relate to religion. Wilson and Deane JJ put the relevant test as follows (at [18]):

One of the more important indicia of ‘a religion’ is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has ‘a religion’. Another is that the ideas relate to man’s nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and
varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium (cf. *Malnak v. Yogi* [1979] USCA3 125; [1979] 592 F (2d) 197) is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.

Since Scientology satisfied all these criteria, it was a religious institution for the purposes of exemption from payroll tax, and for other purposes, including charity law, in Australia.

The Supreme Court unanimously agreed (per Lord Toulson) with the non-theistic approach of the High Court of Australia (at [51], [58]):

Unless there is some compelling contextual reason for holding otherwise, religion should not be confined to religions which recognise a supreme deity. First and foremost, to do so would be a form of religious discrimination unacceptable in today’s society. It would exclude Buddhism, along with other faiths such as Jainism, Taoism, Theosophy and part of Hinduism....

Of the various attempts made to describe the characteristics of religion, I find most helpful that of Wilson and Deane JJ. For the purposes of PWRA, I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. I prefer not to use the word ‘supernatural’ to express this element, because it is a loaded word which can carry a variety of connotations. Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind’s nature and relationship to the universe than can be gained from the senses or from science. I emphasise that this is intended to be a description and not a definitive formula.

Therefore, Scientology was a religion (at [60]), and its church was a place of worship within the PWRA. Segerdal was expressly overruled as ‘unduly narrow’ on the issue of what constitutes a religion for the purposes of the PWRA (at [61], [65]). This was because (at [62]–[63]):

I interpret the expression ‘religious worship’ as wide enough to include religious services, whether or not the form of service falls within the narrower definition adopted in *Segerdal*....

The broader interpretation accords with the purpose of the statute in permitting members of a religious congregation, who have a meeting place where they perform their religious rites, to carry out religious ceremonies of marriage there. Their authorisation to do so should not depend on fine theological or liturgical niceties as to how precisely they see and express their relationship with the infinite (referred to by Scientologists as ‘God’ in their creed and universal prayer). Those matters, which have been gone into in close detail in the evidence in this case, are more fitting for theologians than for the Registrar General or the courts.

The case may be viewed at: [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2013_0030_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2013_0030_Judgment.pdf)

**Implications of this case**

This case has important implications in England because until now the Church of Scientology has been denied charity status by the Charity Commission of England and Wales (the law of Scotland already
accepts Scientology as a religion). When denying registration as a charity, the Charity Commission had argued that there was no public benefit from Scientology. Although the Supreme Court has now ruled that Scientology is a religion for the purposes of registering a place of worship for marriage, the public benefit issue in the context of charity law has still to be resolved.

The Church of Scientology is registered as a charity in Australia: see www.acnc.gov.au

### 2.1.4 THE HUMAN DIGNITY TRUST: REVIEW DECISION OF THE CHARITY COMMISSION FOR ENGLAND AND WALES, 3 OCTOBER 2013

The Human Dignity Trust (HDT) is a company limited by guarantee which challenges the criminalisation of private consensual sexual activity in countries where that occurs. The Charity Commission (the Commission) first denied charitable status to the HDT in June 2012. The HDT sought an internal review of this decision. Charitable status was again denied in a review decision published on 3 October 2013.

The basis for the original decision was that the HDT’s objects were not exclusively charitable because some of its purposes were directed at changing the law. ‘Changing the law’ is not a charitable purpose and therefore cannot meet the public benefit test under current English law. Although the Charities Act 2011 of England and Wales recognises the advancement of human rights as a charitable purpose, the Commission said (at [3]):

> It is a long standing and important rule in charity law that political purposes cannot be charitable purposes, as changes to the law or government decisions, either in this country or abroad, cannot necessarily be seen as beneficial and therefore meeting the public benefit requirement. Given that the purposes of human rights organisations may be directed towards such aims, whether the public benefit requirement is met is also an issue in considering the charitable status of such bodies.

In its review decision, the Commission said that the purposes of the HDT were unclear and the public benefit uncertain on a reading of its objects. This was because its objects referred to the Universal Declaration of Human Rights (a United Nations document) and its references to dignity and social development. The Commission took the view that the Universal Declaration of Human Rights in fact contains no express right to dignity or social development, although it certainly refers to dignity as something separate from rights.

As the objects were judged unclear, the Commission then considered the factual background to the HDT, including its website contents. It disagreed with the HDT’s contention that there was a body of case law dealing with human dignity. The Commission said that the HDT’s sole focus was (at [14]):

> ...to bring and assist in bringing legal proceedings either in foreign jurisdictions or international courts to seek to change domestic legislation in foreign jurisdictions which criminalise homosexuality. Accordingly, it is arguable from the relevant background information that the most significant element of the company’s purpose is directed towards procuring changes in such laws of foreign countries.

The HDT’s purposes were found to be not exclusively charitable because although the advancement of human rights could be a charitable purpose under the Charities Act 2011 (section 3(1)(h)), ‘human dignity’ was a fundamental value underpinning human rights rather than a fully articulated right in itself. This seemed clear from the wording of the Universal Declaration of Human Rights, so that the expressed objects of HDT fell short of being charitable (at [19]):
In determining charitable status the Commission must consider the purposes as set out in the constitution of HDT. If the rights, in particular, to human dignity, privacy and to personal and social development are not ‘human rights’ as such then the objects of HDT do not fall within the advancement of human rights in the **Charities Act 2011**.

Although the HDT proposed altering its objects to meet the requirements of the Commission, its proposed changes were also rejected as being not charitable. Whilst advancing the administration of justice or clarifying the law might be charitable purposes, changing the law was not (at [26]):

Under charity law a purpose directed towards changing the law or changing decisions or policies of government or government authorities either in this country or in foreign jurisdictions is not charitable, and as such would not fall within any of the descriptions of purposes set out in section 3(1) of the 2011 Act; McGovern v Attorney General following House of Lords authorities National Anti-Vivisection Society v Inland Revenue Commissioners and Bowman v Secular Society Ltd. The rationale for this approach being said to be that the courts must proceed on the basis that the law is right as it stands and that the court would have no means of judging whether any change in the laws be for the public benefit. Further, even if the court were able to conclude prima facie that a change in the law was desirable, such changes are a matter for the legislature not the courts who in the last resort may need to administer charitable trusts. To take any view would usurp the function of the legislature.

The law stated in **McGovern v Attorney-General** (1982) Ch 321 was the current law and thus bound the Commission. Seeking to change the law of a foreign jurisdiction (as opposed to enforcing it) was arguably (at [34]):

...within the remit of the legal principles established in McGovern precluding purposes seeking such challenges from being charitable...Even if our court could decide that the challenge to the foreign law would be for public benefit being consistent with human rights law enshrined in the law of England and Wales, it may be contrary to public policy for our court, (which would ultimately be responsible) to control and enforce trusts aimed at changing the law in another jurisdiction. It would seem to fail the crucial test of the competence of the court to control it. The English court would, it is considered, have no way of assessing how a foreign court might seek to construe its own constitution or treaty obligations; in particular in the light of relevant social, religious and cultural circumstances in that jurisdiction.

The Commission recognised that the position might now be different within the United Kingdom since the **Human Rights Act 1998** had been enacted, incorporating the European Convention on Human Rights. However, McGovern was still the law, and the position would be even more difficult when it came to changing the law of foreign countries.

On the question of public benefit, the Commission reiterated that McGovern had upheld the decisions in **Bowman v Secular Society** [1917] AC 406 and the **National Vivisection Society v IRC** [1948] AC 31 that trusts for political purposes could not be charitable because the public benefit involved was incapable of proof. Was the position now different? The Commission said that it was not. Since there was no public benefit arising from the HDT’s activities, it could not be charitable.

The decision may be viewed at:  
Implications of this decision

Australia has already moved beyond the UK position on this issue, and the same issue of political purposes and charitable status is about to be decided in New Zealand. The Commission indicated that there was some room for appeal, particularly since the issue had not been considered by the courts since 1998 (at [35]):

The Commission recognises that promoting human rights will frequently involve challenges to the law, policy and administrative decisions of government and there is some uncertainty in determining the extent to which human rights charities may engage in such activities within the parameters of charity law. It is acknowledged that McGovern was decided when the Universal Declaration was not incorporated within UK law, and before the advancement of human rights was recognised as a description of charitable purposes in the Charities Act 2006. It may be that such changes in the legal landscape do impact upon the law in this area, but the Commission, despite its constructive approach to the law, considers it is bound by the legal authority in McGovern...

2.1.5 REGENTFORD LIMITED V CHARITY COMMISSION FOR ENGLAND AND WALES (FIRST TIER TRIBUNAL, GENERAL REGULATORY CHAMBER, CHARITY, WARREN J, 21 AUGUST 2013)

This case was to review a decision of the Charity Commission for England and Wales (the Commission) to open an enquiry into the financial affairs of Regentford Limited (Regentford) on 23 October 2012. Regentford was incorporated in 1990 and was put on the register of charities in early 1991. Its principal charitable objects were the advancement of religion in accordance with the orthodox Jewish faith and the relief of poverty. Regentford last filed accounts with the Commission on 30 September 2006, showing assets of about £1 million, and annual income of about £80,000.

However, investigation by the Commission disclosed that several large bank transactions were not recorded in the filed accounts, including two amounts totalling £400,000 which were paid to two trustees of Regentford. In addition, there was a transaction recorded in the minutes for 18 July 2007 relating to a 99 year lease over real estate belonging to Regentford, which was transferred to a company owned by the same two trustees. The company, Quain, was described in the minutes as a wholly owned subsidiary of Regentford, and the interest in the real estate was said to be held on trust for Regentford. Neither of these things was true, though the shares in Quain were transferred to Regentford five years after the events in question.

In November 2007, the two trustees obtained a £950,000 interest-only loan on the real estate in question. The mortgagee later sold the real estate for £400,000, making a substantial loss. There was no information as to what had happened to the £950,000.

In April 2010 Regentford was fined £250,000 at Croydon Crown Court for breaches of health and safety legislation. This followed the death of a man doing building work on scaffolding at premises said to be owned by the company. The judge who sentenced the company formed the view that it had operated in an irregular way for a number of years and asked the prosecutor to draw this to the attention of the Commission. This was done in a letter dated 9 June 2010. On 29 July 2010 Regentford was dissolved and removed from the register at Companies House for failure to file accounts.

On 22 September 2010 the Commission removed Regentford from the Register of Charities. This was required under section 34(1)(b) of the Charities Act 2011 because the charity had ceased to exist. However, the Commission made no enquiries in so doing. It emerged later that Regentford had very
substantial assets, apart from its failure to file accounts and reports since 2006. The court in this case said that the failure to file and the letter from the court (at [10]):

...should have rung alarm bells about what had happened to the charity’s assets. I do not criticise the Commission because I do not have the full facts. By s34(1)(b) Charities Act 2011 the Commission were under a duty to remove Regentford from the Register because it had ceased to exist. The possibility arises that, within the Commission’s operations, the removal was seen as a comparatively low level automatic operation. If that is so, then the Commission may wish to enquire as to whether some refinement is needed to deal with cases involving substantial funds. There is an indication in the material before me that what happened to Regentford was not unique.

Regentford was restored to the register of companies by an order of the Companies Court in February 2011 made on an application by one of the trustees referred to above. The Commission then restored Regentford to the Register of Charities in July 2011. Correspondence ensued between Regentford and the Commission after its re-registration, but by the time the enquiry was opened, the two trustees in question had resigned, and the remaining one lived abroad and denied knowledge of the records of the charity.

His Honour considered the various submissions, deciding to use this case either to stop or allow the Commission’s enquiry without further delay. The Commission’s grounds for an enquiry were those described above: the unreported bank transactions, the Quain transaction, and the mortgage transaction. Counsel for Regentford contended that these transactions had since been satisfactorily explained or were ‘unfortunate investment decisions’. His Honour said (at [29]):

I cannot accept that there remains nothing to enquire about. In my judgement, even now, there has been no proper account of the trustees’ stewardship of charitable assets. For example, why did the 2006 transactions not appear in the annual accounts? What exactly happened to the £950,000 received by Quain purportedly on behalf of and with the approval of Regentford? These and other questions remain unanswered and the ‘attack on the merits’ must fail.

Therefore, the application for review failed, and the Commission’s enquiry will proceed.


2.1.6 BLACKMORE V THE QUEEN, 2013 TCC 264 (CANLII) (TAX COURT OF CANADA, CAMPBELL J, 21 AUGUST 2013)

This was a case concerning the meaning of a ‘religious organization’ and a ‘congregation’ in section 143 of the Canadian Income Tax Act (the Act). The section had not previously been considered in Canadian case law. Section 143 is in Division F of Part I, which is titled ‘Special Rules Applicable in Certain Circumstances’. It provides for separate tax treatment to those communal religious organizations that can bring their community within the statutory definition of ‘congregation’ contained in subsection 143(4) of the Act.

The appellant was the leader of a group calling itself Bountiful which had an established community in British Columbia, Canada. The group was an offshoot of the fundamentalist Latter Day Saints, and practised polygamous marriage. In question were assessments of income tax for the tax years 2000 to 2004 and 2006, amounting to about $2 million, plus penalties. If the position taken by the appellant was
correct, and section 143 applied, it would have had far-reaching implications not only for the appellant, but also for all the members of Bountiful.

Section 143 operates to deem the existence of an inter vivos trust which would be superimposed upon the community of Bountiful. This meant that, for tax purposes, all of the assets and property of the congregation, or of any business agency of the congregation, would be deemed to be the assets and property of the deemed trust. Therefore, any income from property or business activities of the congregation would be deemed to be the income of the deemed trust. Since business agencies of the congregation would be deemed to have acted as agents of the deemed trust in all congregational matters, their income from business activities would also be deemed to be income of the trust.

If section 143 had applied in these appeals, the appellant’s tax burden would have been shifted to the other members of Bountiful. The company that earned the income (known as J R Blackmore and Sons Ltd) would be viewed as an agent of the community or an extension of the congregation, holding its assets, property and income for the benefit of the entire congregation and its members. Allocation of income across the qualifying membership in a community would have recognized the lack of personal ownership of property and assets, which would be in accordance with the intent and purpose of section 143, and would eliminate any potential for double taxation that would occur with assessments pursuant to subsections 15(1) and 6(1) of the Act.

However, to be within section 143, and therefore to succeed in the appeal, the appellant had to show that Bountiful could meet the definition of ‘congregation’ in section 143(4) of the Act. The definition has four components, being that the members of a community, society, or body of individuals, whether or not incorporated:

a) live and work together;
b) adhere to the practices and beliefs of and operate according to the principles of the religious organization of which it is a constituent part;
c) do not permit any of the members to own any property in their own right; and
d) require the members to devote their working lives to the activities of the congregation.

Her Honour said that the words used in the section were not clear and precise, so that from a statutory interpretation standpoint, she would be entitled to look at both the legislative history of the section, and cases on its previous incarnations in the Act involving the Hutterite communities of Canada.

Did the group ‘live and work together’? The appellant contended that the members of Bountiful were separate and insular, shared properties, socialized together, educated themselves, had familial relationships which were at the direction of the head of the church, livelihood through community employers and worshipped to the exclusion of outsiders.

The respondent submitted that the Act is practical and not spiritual or theoretical, so that ‘living together’ required cohabitation in the same place at the same time, and ‘working together’ required working on common projects at the same place at the same time. The evidence disclosed that not all members of Bountiful lived and worked together in close proximity since the community was spread over properties throughout British Columbia, Alberta, and the United States. Their logging operations were in some cases over 500 kilometres from their base. In addition, some members of the community worked entirely outside the community, some operated their own businesses which were not commonly held, and some non-members were employed by the companies owned by the appellant.

This was to be compared with the Hutterite communities which had previously been found to come within the predecessor section to section 143. Hutterite communities were limited to 100 persons, and were
entirely contained on a farm which provided their whole subsistence. They were completely separated from
the outside world, shunned individualism and held all property in common.

Her Honour held that the members of Bountiful did not live and work together. They lived and worked
in several different locations. Many worked outside the community. Property was not held exclusively in
common. The group did not meet the standard required in the section (at [153]):

However, that does not mean that it is an impossible standard to meet and, because of the special
tax treatment that can be afforded such a community that meets it, the interpretation to be
applied must be narrow and well defined. If the standard is widened so that a community like
Bountiful, where its members are spread out geographically in respect to both the living and
working aspect, then arguably the meaning of ‘live and work together’ would be reduced to a more
general notion of ‘operating in an integrated way or fashion’ or ‘living communally.’ Such an
interpretation would allow a geographical spread, like that of Bountiful, which goes directly against
the intent of Parliament and the plain and ordinary meaning of the requirement to ‘live and work
together,’ which I have concluded should be assigned to it.

Although the respondent’s interpretation of living and working together, which was based on the
Hutterite model, was too narrow in Her Honour’s view, the appellant’s operations were much too
widely dispersed.

Did the community of Bountiful adhere to the practices and beliefs of and operate according to the
principles of the religious organization of which it is a constituent part? This issue turned on whether
Bountiful was part of a ‘religious organization’. Bountiful in fact stood alone in its particular beliefs. Its
leader had been excommunicated from both the Mormons (who had banned polygamy in the 1890s) and
from the Fundamentalist Latter Day Saints (FLDS), who practised polygamy, but with whom the appellant
had disagreed over episcopal authority. Moreover, both the FLDS and Bountiful itself had suffered a split in
2002.

The respondent submitted that none of the Mormons, the FLDS or Bountiful on its own, were religious
organizations. The term ‘religious organization’ is defined in the Act as:

... an organization, other than a registered charity, of which a congregation is a constituent part,
that adheres to beliefs, evidenced by the religious and philosophical tenets of the organization,
that include a belief in the existence of a supreme being.

Expert evidence was taken. After reviewing the evidence, Her Honour held that the members of Bountiful
were an independent group of Mormon fundamentalists who were not part of a religious organization (at
[202]). Her reasoning was that (at [227]–[230]):

- Mormonism is not a religious organization of which Bountiful could be a part, because Mormonism
  is a religious tradition only (in the same way that Christianity is a religious tradition);
- The community of Bountiful could not be a part of the mainstream Latter Day Saints (LDS) Church,
a religious organization, because the members of Bountiful did not follow the beliefs of the LDS
Church. They practised polygamy which the LDS Church had disavowed.
- The FLDS Church was not a religious organization because the lines of priesthood authority within
it had been broken when it separated from the mainstream LDS.
- At most, the community of Bountiful consisted of an independent group of fundamentalist
Mormons who could not bring themselves within the parameters established for this part of the
definition of ‘congregation’.
Did the community of Bountiful prohibit any of its members from owning any property in their own right? The evidence was clear that this was not so, and therefore this aspect of the definition of ‘congregation’ could not be met by the Bountiful community. However, Her Honour found that some property was held in common, but not in the way envisaged by the Act (at [277]–[278]):

In summary, the facts do establish that Bountiful has developed its own unique relationship to property ownership. It encompasses a set of practices that are in opposition to what we think of as being in sync with ordinary capitalist norms. The members of Bountiful have permitted Winston Blackmore to provide directives respecting where they reside and the manner in which some of their personal resources are to be utilized within the community. However, this unique relationship to their property does not satisfy the strict test of paragraph 143(4)(c). The language in paragraph 143(4)(c) requires an explicit prohibition contained in either articles of incorporation, religious doctrine or practices, rather than an implicit prohibition gained entirely through a fact-based inquiry. This is in line with the principles of statutory interpretation and administrative efficiency. The community of Bountiful exhibits a ‘communal’ approach to some aspects of their property, but it is not ‘communal’ in the sense envisioned by the Act and, specifically, this provision; that is, Bountiful does not explicitly prohibit private ownership of property by all of its members, in either its practices or in its religious doctrine and principles or in any existing articles of incorporation.

Did the community of Bountiful require its members to devote their working lives to the activities of the congregation? Although the company was the primary community employer, it was not exclusively so. Members were in fact encouraged to find work elsewhere. There was no Hutterite-like obligation to devote all a member’s working hours to the agrarian work effort on an enclosed property, although Her Honour agreed that there was some expectation of devoting some work time to community activities (at [307]–[308]):

While members were, in fact, encouraged to work or obtain secondary education outside the community, there was a general expectation that, if individuals were part of the community, then one’s working life would include contributing towards the activities of the community by working in the Company activities. However, the text of component (d) implies that such a requirement must be explicit and ongoing. The Hutterite example...confirms this interpretative approach. The facts in these appeals do not support the existence of an explicit requirement, by the congregation, either within the community of Bountiful itself, the LDS Church, the FLDS Church or Mormonism generally, for members to devote their working lives to the activities of the community.

Therefore, the definition of ‘congregation’ in the Act was not met by the Bountiful community, and the appellant could not take advantage of section 143 of the Act to shift his tax liability onto the community of Bountiful generally. The appellant was found liable for all the tax owing and for a gross negligence penalty of $148,983.


**Implications of this case**

The issues in this case dealt with section 143 of the Canadian Income Tax Act (the Act), which provides special tax treatment for religious communal congregations that operate within cultural and property norms outside the mainstream. To be eligible for this tax treatment, a community must satisfy all of the four tests set out in the definition of ‘congregation’ in the Act. Any community that meets these four criteria may seek specialised tax treatment. However, the community in this case did not meet any of the criteria because it was not a ‘religious organization’ as defined in the Act, and its members were too integrated into the
community, despite some evidence of communal work and property, separation, and their practice of polygamy.

2.1.7 ADLER v SAVE (NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION, JUDGES FUENTES, HARRIS, KOBLITZ, 5 AUGUST 2013)

This case dealt with the enforceability of a conditional inter vivos charitable gift. SAVE, a charity now known as SAVE, A Friend to Homeless Animals (SAVE), was founded in 1941 as a nonprofit animal shelter located in the greater Princeton, New Jersey, area. SAVE is recognised as a charitable organisation under 26 USCA §501(c)(3), with the object of providing for the rescue, shelter, veterinary care, and adoption of stray companion animals in its region.

Mr and Mrs Adler gave a $50,000 donation to SAVE on certain conditions. These were that the money be used for the construction of a building which would cater for the needs of large dogs and older cats, both of which were hard to place in new homes. The gift also included naming rights to the rooms in question. The Adlers had a great concern for animal welfare, and had previously (over about 20 years) given smaller gifts to SAVE, up to $1500 at a time, as well as food and toys for the animals housed by SAVE. The gift in contention was the Adlers’ first substantial gift to SAVE.

However, before the gift could be utilised in construction of a large building planned for Princeton, SAVE merged with another animal charity, Friends of Homeless Animals. The merged entity formed an alternative plan to move the entire shelter to a nearby town, and to reduce its size by half. Moreover, the evidence revealed that the proposed new shelter would not include rooms specifically for the accommodation of large dogs and older cats.

The Adlers sued for the return of their $50,000 gift, and were successful at first instance. In this appeal, SAVE argued that the Adlers’ gift was not conditional, and thus restricted to the purpose originally nominated. Further, SAVE contended that, even if the gift were conditional, it could still be utilised since it could be subject to the cy près doctrine, which allows a charitable gift to be redirected to a similar charitable purpose.

The appeal court did not agree. The court noted that the evidence showed that the merged SAVE intended to construct a substantially smaller facility than in its original plans; outside the Princeton area; without any designated rooms for large dogs and older cats; and without any mention of the Adlers’ names. This was totally outside the intended nature of the gift. The court said:

...a charity that accepts a gift from a donor, knowing that the donor’s expressed purpose for making the gift was to fund a particular aspect of the charity’s eleemosynary mission, is bound to return the gift when the charity unilaterally decides not to honor the donor’s originally expressed purpose. Absent the donor’s consent, the recipient of a gift is not at liberty to ignore or materially modify the expressed purpose underlying the donor’s decision to give, even if the conditions that existed at the time of the gift may have materially changed, making the fulfilment of the donor’s condition either impossible or highly impracticable. When, as here, the donor is alive and able to prove the conditional nature of the gift through his or her testimony and other corroborative evidence, a reviewing court’s duty is to enforce the donor’s original intent, by directing the charity to either fulfil the condition or return the gift.

The appeal court held that SAVE had breached its fiduciary duty by ignoring the conditions placed on the gift by the Adlers. It had ‘aggressively’ courted the Adlers for the donation, and by failing to use it as it had undertaken, and failing to give naming rights as it had promised, it had forfeited its right to the
donation. In those circumstances the court said that ‘requiring SAVE to return the gift appears not only eminently suitable, but a mild sanction’.

The court was unimpressed with SAVE’s arguments about the cy-près doctrine, saying that:

...it would be a perversion of these equitable principles to permit a modern charity like SAVE to aggressively solicit funds from plaintiffs, accept plaintiffs’ unequivocally expressed conditional gift, and thereafter disregard those conditions and rededicate the gift to a purpose materially unrelated to plaintiffs’ original purpose, without even attempting to ascertain from plaintiffs what, in their view, would be ‘a charitable purpose as nearly possible’ to their particular original purpose.

The case may be viewed at: http://njlaw.rutgers.edu/collections/courts/appellate/a0643-10.opn.html

Implications of this case

SAVE also advanced a public policy argument that New Jersey charities would be put at risk because of this decision. The court did not agree, saying that there would be no ‘parade of horrible consequences’. The court said that responsible charities would welcome this decision because it will ensure prospective donors that the expressed conditions on their gifts will be legally enforceable in future.

2.1.8 SEA SHEPHERD AUSTRALIA LIMITED V COMMISSIONER OF TAXATION [2013] FCAFC 68 (FEDERAL COURT OF AUSTRALIA, FULL COURT, BESANKO, GORDON, DODDS-STREETON JJ, 3 JULY 2013)

This was an appeal from Sea Shepherd Australia Limited v Commissioner of Taxation [2012] AATA 520 in which the Administrative Appeals Tribunal (the Tribunal) decided that Sea Shepherd Australia Limited (Sea Shepherd), although it was a charity, was not entitled to be endorsed as a deductible gift recipient under section 30-125(1) of the Income Tax Assessment Act 1997 (Cth) (the 1997 Act) (with reference particularly to para (a) of Item 4.1.6 in section 30-45 of the 1997 Act). There were two grounds of appeal:

- That the Tribunal erred in law in its interpretation of item 4.1.6(a) of the table in section 30-45(1) of the 1997 Act;
- That the Tribunal ought to have held that, upon its proper construction, item 4.1.6(a) extended to the case of a charitable institution whose principal activity is the protection of marine animals living in their natural environment from being harmed or killed by humans.

Sea Shepherd was established by Sea Shepherd Conservation Society (SSCS), a company incorporated in the United States of America, as an international nonprofit marine wildlife conservation organisation. Sea Shepherd was incorporated in January 2007, and is registered as an unlisted public nonprofit company. Clause 3.1 of Sea Shepherd’s constitution provides that its purposes are:

- 3.1.1 to advance education in the field of marine and freshwater ecology;
- 3.1.2 to promote the conservation and preservation of marine and freshwater living organisms;
- 3.1.3 to promote humane behaviour towards animals, particularly but not exclusively marine animals, which are in need of care and attention by reason of sickness, maltreatment, poor circumstances or ill-usage;
- 3.1.4 any other purposes deemed charitable.

Clause 10.2 of Sea Shepherd’s constitution provides:
In the event of the organisation being dissolved, the amount that remains after such dissolution and the satisfaction of all debts and liabilities shall be transferred to another organisation with similar purposes which is not carried on for the profit or gain of its individual members.

Sea Shepherd’s main activity is the conduct of what it terms ‘campaigns’ which are designed to protect marine wildlife from being harmed or killed by humans. The campaigns involve intercepting whaling fleets and obstructing the whalers’ activities so as to prevent the killing and injuring of whales. Sea Shepherd’s activities also include the protection of other marine wildlife, by intervening so as to prevent the killing of sharks for their fins and the clubbing of seals, and tracking and removing dolphin drift nets. Sea Shepherd engages in activities other than campaigns. For example, it co-ordinates the rescue, transport and cleaning of affected wildlife during disasters, but these latter activities were found not to be its primary purpose.

The relevant legislation is contained in Division 30 of the Act. Division 30 of the Act deals with deductions for certain gifts or contributions made by taxpayers. Section 30-15 enables deductions for gifts or contributions made to certain recipients, including a ‘fund, authority or institution covered by an item in any of the tables in Subdivision 30-B’ (Item 1 of the table in section 30-15). Section 30-17 requires that such a recipient be endorsed under Subdivision 30-BA as a ‘deductible gift recipient’.

Subdivision 30-B sets out tables of recipients for deductible gifts, including both general categories of recipients and ‘specific’ (named) recipients in various fields of endeavour such as health, education, research and the environment. In particular, ‘welfare and rights recipients’ are enumerated in the tables in section 30-45.

The table in section 30-45(1) sets out general categories of welfare and rights recipients. Item 4.1.6 of that table provides for the following category, upon which the applicant relied in this case:

...a charitable institution whose principal activity is one or both of these:
(a) providing short-term direct care to animals (but not only native wildlife) that have been lost or mistreated or are without owners;
(b) rehabilitating orphaned, sick or injured animals (but not only native wildlife) that have been lost or mistreated or are without owners.

Section 30-120 of Subdivision 30-BA provides that, upon application by an entity in accordance with Division 426 in Schedule 1 to the *Taxation Administration Act 1953* (Cth) (the TAA), the Commissioner must endorse the entity as a deductible gift recipient if the entity is entitled to be so endorsed. Subsection 30-125(1) governs the entitlement to such endorsement. Relevantly to this case, the provision states:

An entity is entitled to be endorsed as a deductible gift recipient if:

.....
(b) the entity is a fund, authority or institution that:
   (i) is described (but not by name) in item 1 .... of the table in section 30-15; and
   ...
   (c) the entity meets the requirements of subsection (6) ....
   ....

Sub-section 30-125(6) provides that (when read in conjunction with sub-section 30-125(7)) the entity must be required by (amongst other things) a document constituting the entity or rules governing the entity’s activities to transfer any surplus assets upon being wound up to another fund, authority or
institution that is a deductible gift recipient. Sea Shepherd’s winding up provision did not meet this requirement.

Sea Shepherd had applied for endorsement as a deductible gift recipient on the basis that it is a fund, authority or institution that is described (but not by name) in Item 1 of the table in section 30-15, being covered by Item 4.1.6 in the table in section 30-45(1) setting out general categories of welfare and rights recipients. It had contended that its activities fell within the terms of para (a) of Item 4.1.6 in the Act because:

1. They constituted the provision of ‘short-term direct care’ to animals. Sea Shepherd submitted that the word ‘care’, according to its ordinary meaning, encompassed protection from harm or death, and accordingly, in undertaking its campaigns, the applicant provided ‘care’ within the terms of the provision.
2. The care provided was both ‘direct’ and ‘short-term’ as per the provision.
3. The whales and other marine life protected by Sea Shepherd’s campaigns were ‘animals...that...are without owners’ for the purposes of that provision.
4. The animals protected were not ‘native wildlife’, which meant wildlife on the mainland of Australia.

In response, the Commissioner had submitted that:

1. The phrase ‘short-term direct care’ was to be construed as a composite phrase and meant some form of direct physical assistance, such as shelter or medical care. The Commissioner’s contention was that the para (a) is concerned with the provision of such care to categories of animals which have suffered some misfortune, and in that regard that the phrase ‘without owners’ was concerned with animals requiring care as a result of an event which had occurred, rather than being concerned with any unowned animals (whether wild or otherwise) that might suffer some misfortune in the future.
2. Therefore, Sea Shepherd’s principal activity of preventing wild animals from being killed or injured by humans did not satisfy the terms of para (a).
3. Further, Sea Shepherd’s activities did not satisfy the terms of para (a) in any event because all the marine wildlife protected by the applicant were ‘native wildlife’. Accordingly, its activities were expressly excluded from Item 4.1.6. The Commissioner submitted that the phrase ‘native wildlife’ in para (a) included migratory species naturally found in Australian waters, and that all of the marine species protected by Sea Shepherd fitted that description.

The Tribunal had embarked on a statutory interpretation exercise in response to these submissions. It held that Sea Shepherd’s interpretation of the terms ‘care’ and ‘without owners’ was flawed because it was without context. The words had to be construed in their wider context as composite terms. On this issue, the Tribunal said (at [48]–[49]):

We do not accept the applicant’s contention that legislature has employed the phrase ‘without owners’ so as to encompass both abandoned animals and wild animals. On the applicant’s contended construction, the provision of care to certain stray animals (for example, a domesticated animal born stray) would be excluded, because they were neither wild nor abandoned. In our view, the applicant’s contended construction does not accord with the legislative intention evinced by the rest of the provision. The word ‘care’ forms part of a composite phrase with the preceding adjectives ‘short-term’ and ‘direct’ and is to be construed accordingly. We reject the applicant’s piecemeal approach to the construction of that phrase. In our view that phrase confirms that para (a) is not concerned with the protection of animals.
from anticipated harm. Rather, it comprehends the provision of physical assistance, such as food, shelter or veterinary care, to animals with unmet needs arising from specified circumstances.

However, the Tribunal did not accept the Commissioner’s view on the meaning of ‘native wildlife’ as encompassing migratory species in Australian waters. Rather, the Tribunal agreed that the term meant indigenous species within Australia. Therefore, the Tribunal did not find that Sea Shepherd’s activities were confined to the protection of ‘native wildlife’ for the purposes of Item 4.1.6. Nevertheless, its actual activities (protecting whales, dolphins etc) did not fall within those described in para (a) of Item 4.1.6 of the Act. As Sea Shepherd’s activities did not satisfy the terms of Item 4.1.6, the applicant was not ‘a fund, authority or institution’ described in Item 1 of the table in section 30-15. Accordingly, it was not entitled to be endorsed as a deductible gift recipient for the purposes of section 30-125 of the Act.

The Full Court, in a 2-1 decision, agreed with the Tribunal as to the correct approach to interpretation of the relevant statute (at [35]–[36]):

Sea Shepherd’s argument depended upon an atomised analysis of Item 4.1.6. Its submission depended upon taking separate words of the provision (particularly the word ‘care’) and, contrary to the principles of statutory construction, applying to each word one particular aspect of a dictionary definition. Sea Shepherd then sought to add the various definitions together and produce what it submitted was a meaning for the relevant provisions that accorded with its case. This approach to construction of the relevant provisions was rightly rejected by the Tribunal. Construction of a statute cannot be undertaken with no more than the words of the provision in one hand and a dictionary in the other....

What was meant by ‘providing short-term direct care to animals (but not only native wildlife) that have been lost or mistreated or are without owners’? The Full Court said that read as a whole, the expression directs attention to activities and services (‘short-term direct care’) provided in respect of a class of animals (that cannot be restricted to ‘native wildlife’) identified as animals ‘that have been lost or mistreated or are without owners’ (at [37]). The activities of Sea Shepherd did not meet the definition (at [38]):

The activities in which Sea Shepherd engages do not constitute the provision of ‘short-term direct care to animals’ [emphasis added]. Read in the context of the whole provision, the expression connotes the direct provision by the organisation concerned of treatment or accommodation to animals. It is animals that must be the object of the care. Taking steps to interrupt or prevent others harming animals in the wild, as Sea Shepherd does, is not the provision of ‘short-term direct care to animals’ [emphasis added]. What Sea Shepherd attempts to do is to prevent the killing of whales. The object of its campaigns is the Japanese whaling fleet. It does not provide care to any animal.

The appeal was dismissed with costs.

Dodds-Streeton J disagreed with the majority saying the appeal should be allowed. She reached a different conclusion on the construction of paragraph (a) of Item 4.1.6 in the table in section 30-45 of the 1997 Act, preferring the view proffered by Sea Shepherd. This was a wider view than had been endorsed by the Tribunal and the majority of the Full Court (at [78], [81]):

‘Care’ according to ordinary usage includes but it is not limited to the provision of food, shelter and medical care. In my opinion, protection from harm by taking action to intercept or prevent the infliction of threatened injury or death is also a common place (rather than rare or arcane)
meaning of care, which does not require resort to dictionary definitions.... The requirement in paragraph (a) that the care be short-term and direct neither mandates nor strongly supports its restriction to physical assistance in the form of food, shelter or veterinary services. The provision of care in such forms is neither inherently short-term nor uniquely direct. The provision of care in the form of action to avert the anticipated infliction of harm by a third party may, depending on the circumstances, assume the requisite short-term and direct character and cannot be excluded on that basis. Whatever the form of the care, whether it is short-term and direct in nature will be a question of fact and degree in each particular case.

Thus, on this view, Sea Shepherd’s activities could be ‘short-term direct care’. Moreover, whales could be included in the animals covered by the relevant provision (at [102], [104]):

In my opinion, ‘short-term direct care’ in paragraph (a) can include (but is not limited to) action to avert threatened injury, death or other harm to wildlife (including whales). Although such wild animals have never had and may not ordinarily be expected to have owners, in my view they constitute ‘animals ... that ... are without owners’ within the meaning of paragraph (a)...whether care is short-term and direct is a question of fact and degree, which, in the context of care constituted by action to prevent threatened harm, is necessarily informed by the circumstances (including the nature, extent, duration and immediacy of the threat) and the probable effectiveness of the responsive action and its relationship to the threat (including whether there are intervening steps between the action taken and the achievement of the protection).

Dodds-Streeton J took the view that Sea Shepherd’s direct action was ‘short-term direct care’ (at [105]):

...whales within the range of the whaling fleet’s harpoon ships are the immediate objects of hunting and are at imminent threat of being harpooned, injured, killed and loaded onto the factory ship for processing. In the circumstances to which Mr Hansen deposed, directness does not require physical interposition between the harpoon ship or the harpoon and an individual whale. The blockading of the loading slipway of the factory ship suspends or averts, without any significant intermediate stage or process, the imminent threat of injury and death that would otherwise confront the whales within range. It is thus in my view an effective, short-term and sufficiently direct provision of care.

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/FCAFC/2013/68.html

Implications of this case

This case seems ripe for further appeal. Item 4.1.6 of the table in section 30-45 of the 1997 Act describes a qualifying institution for gift deductibility as follows:

<table>
<thead>
<tr>
<th>Item</th>
<th>Fund, authority or institution</th>
<th>Special conditions—fund, authority or institution</th>
<th>Special conditions—gifts</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1.6</td>
<td>an institution whose principal activity is one or both of the following: (a) providing short-term direct care to animals (but not only native wildlife) that have been lost or mistreated or are without owners; (b) rehabilitating orphaned, sick or injured animals (but not only native wildlife) that have been lost or mistreated or are without owners</td>
<td>the institution must be a registered charity</td>
<td>None</td>
</tr>
</tbody>
</table>
Sea Shepherd based its claim on paragraph (a) of Item 4.1.6. It did not contend that it was covered by paragraph (b). Are whales which are protected on the high seas animals being provided with ‘short-term direct care’? Are they lost or mistreated or without owners? The majority held that there was no short-term direct care, or indeed any ‘care’ to whales by Sea Shepherd. Rather Sea Shepherd prevented others from harming whales. They were not providing shelter and care to whales in a whale shelter. The issue of whales as high seas wild animals, incapable of ownership, was not fully considered in this decision, nor was the nature of Sea Shepherd’s activities on the high seas. These are perhaps issues for the High Court to consider.

(A case involving the UK registered charity, Sea Shepherd UK, in one of its conservation campaigns is noted below: see Fish & Fish Ltd v Sea Shepherd UK & Ors, at 2.10.5.)

2.1.9 AUSTRALIAN FLYING CORPS & ROYAL AUSTRALIAN AIR FORCE ASSOCIATION (WA DIVISION) INC. AND CITY OF MANDURAH [2013] WASAT 89 (STATE ADMINISTRATIVE TRIBUNAL OF WESTERN AUSTRALIA, JUDGE SHAPE (DEPUTY PRESIDENT), 17 JUNE 2013)

The applicant (RAAFA) owns and operates a retirement village within the City of Mandurah (the City) in Western Australia. It sought an exemption from land rates on the ground that the property was used exclusively for charitable purposes. The City refused the exemption, saying that the residents of the village occupied their units for full cost. This precluded the land from being used for a charitable purpose. The parties agreed that the effect of charging for the units was the only point of difference between them and the applicant referred the matter to the Tribunal.

RAAFA is a body corporate and an association incorporated pursuant to section 9(1) of the Associations Incorporation Act 1987 (WA). RAAFA is a nonprofit organisation, its income and property being applied solely to the promotion of its objects and not paid directly or indirectly by way of pecuniary profit to any member or any other person. RAAFA is:

- registered with the Australian Taxation Office as a public benevolent institution;
- licensed as a charitable organisation with the Charitable Collections Advisory Committee; and
- approved as a charitable institution by the State Taxation Department.

RAAFA is the registered proprietor of the land subject to the relevant local government rates. The land is used as a retirement village (Erskine Grove) of 197 independent living units (ILUs). Apart from occasional Lotterywest grants (grants from state lottery surpluses), RAAFA does not receive any funding in respect of the facilities and services provided either from the Commonwealth or State Governments or from any other external source. The costs to RAAFA of providing the facilities and services at Erskine Grove are funded through entry loans, retention sums and operating costs charges.

An ingoing resident to an ILU pays an interest free entry loan to RAAFA in consideration of the grant of a lease (entry loan). Since Erskine Grove commenced operations, each resident of an ILU has paid an entry loan ranging from $160,000 to $307,000 depending on the type of ILU concerned. This is calculated based on the median house price of the locality and the equivalent charges being made by other retirement villages in the area. Upon the termination of the lease, RAAFA repays the entry loan, less a retention sum, to the resident, or his or her estate.

The residents of each ILU also pay to RAAFA an operating costs charge as a contribution to operating costs by monthly payments in advance. The operating costs charge is an annual charge equal to 25% of the single aged pension per annum where an ILU is occupied by one person, or 30% if an ILU is occupied by two persons. The operating costs charge may be increased in the following financial year where it is
anticipated that there will be a shortfall between this charge and the village's operating costs. Where
the actual operating costs of Erskine Grove are less than the fee collected by the operating costs charge
in any financial year, RAAFA must either apply the surplus against the following financial year's
operating costs or, where the residents so resolve, to a purpose that is of benefit to the residents. All
these arrangements are standard in retirement villages in Australia.

RAAFA's by-laws contain provisions for determining priority for entry to residency in an ILU through a
points system and a waiting list. However, in practice, none of the vacancies that were filled at Erskine
from persons on the waiting list. All of the vacancies were advertised and offered to the general public.

Could it be concluded that the land was used exclusively for charitable purposes within the meaning of
section 6.26 of the Local Government Act 1995 (WA) (the Act) by providing relief to the aged? The
Tribunal said that this was not in dispute. The words ‘charitable purposes’ are not defined in the Act, but
the term 'charitable' was to be understood in its technical legal (and long-established) sense.

The Tribunal referred to its own previous decisions on the same point: see Uniting Church Homes (Inc)
and City of Stirling [2005] WASAT 191 and Retirees WA (Inc) and City of Belmont [2010] WASAT 56. The
Tribunal said that it is generally accepted that in order to be charitable, a purpose must either fall within
the list of purposes enumerated in the Statute of Charitable Uses 1601 (the Statute of Elizabeth), or
within one of the four categories of charitable purposes laid down by Lord Macnaghton in
Amongst the purposes accepted as being charitable is ‘the relief of aged, impotent and poor people’.
Those elements are to be construed disjunctively, so that the relief of the aged need not be confined to
the relief of aged people who are also poor (at [29]). The second requirement for a purpose to be
charitable (except possibly in relation to the relief of the poor) is that there be a ‘public benefit’,
meaning a benefit that is directed to the general community or to a sufficient section of the community
to amount to the public as a group.

There was no contention that the provision of retirement dwellings was for the relief of the aged. But
was there a difference when the retirees paid for the provision themselves? As the Tribunal put it ‘the
focus of...deliberations is whether the effect of the adopted financial model precludes a finding that the
Land is used exclusively for a charitable purpose’ (at [33]). Previous case law of the Tribunal, though not
binding, seemed clear: if RAAFA derived a surplus over expenditure from its operations at Erskine Grove,
this did not necessarily mean that the land was not used for a charitable purpose.

The City argued that for the relief of the aged to be a charity, the relief must be by way of bounty, not
relief by way of bargain. Therefore, the City contended that if the people who are having their needs
met are also the people who are paying the full costs of having their needs met, then there can be no
charitable purpose. The Tribunal was prepared to concede that relief of the poor might involve some
element of bounty, but the relief of the aged was not so circumscribed (at [53]–[56]) [emphasis added]:

I have stated earlier in these reasons that the term ‘charitable’ is understood in its technical
legal sense. I have also noted that for a purpose to be charitable it must be within the list of
purposes in the Statute of Elizabeth I or in one of the four categories of charitable purposes set
out in Pemsel. Finally, I have observed that for a purpose to be charitable there must be a
public benefit. **What is absent from those requirements is a requirement that the relief is
given at no cost or at a cost less than the value of the relief being provided.** That may be the
case where the word ‘charity’ is used in its ordinary or dictionary sense. In its legal sense, there
is no authority to support an argument that this requirement exists where the charitable
purpose is the relief of the needs of the aged. Those needs do not necessarily include relief from a shortage of funds. The needs of the aged wealthy, and the aged poor are, in most respects, the same. I should add, however, that the level of the charges must not be so great as to exclude all but the very wealthy, to the effect that the element of public benefit is excluded.

Therefore, even if the residents of Erskine Grove were required to pay to RAAFA the costs associated with the provision of accommodation and other services for the relief of the aged, and even if, on a consistent basis, the amount paid produced a surplus of income over expense, that did not preclude a conclusion that the land was used exclusively for a charitable purpose.

The Tribunal’s conclusion was, however, subject to the following provisos:

- any such surplus should not be for the private profit of the provider; and
- the costs of the accommodation and services should not be so great as to exclude the element of public benefit.

Thus, the applicant was successful in showing that its purposes were exclusively charitable, and was exempt from local government land rates on that basis.

The case may be viewed at: http://www.austlii.edu.au/au/cases/wa/WASAT/2013/89.html

Implications of this case

The retirement village in this case was employing a standard financial model for such villages. Residents pay an entry loan, which varies by the size and type of ILU provided, and then a monthly fee for the ongoing expenses of the village. Typically, this is a set proportion of the aged pension. If the retiree is not in receipt of the aged pension, then the fee is set according to income level. Upon ceasing to occupy the unit, the entry loan is repaid with a set retention fee being retained by the village.

This decision confirmed that land used for such villages in not rateable, if the purposes of the provision of accommodation are exclusively charitable, and provided on a nonprofit basis. The Tribunal considered the legal technical meaning of a charitable purpose, and noted that no profits from the village were paid to a private owner but instead were retained by the applicant, which is a nonprofit organisation. The Tribunal concluded that the charging of occupancy costs at or around commercial rates did not affect the charitable status of the village.

It noted, however, that the outcome might have been different if the rates charged were so high that only a limited portion of the community, namely the very wealthy, could afford to take up a place at the village. This would preclude a finding of public benefit. How that level might be determined was not explained in more detail. Obviously, luxury villages provided by commercial providers (which are increasingly common), are not within this decision’s parameters. However, nonprofit providers are now also marketing luxury retirement complexes with entry fees up to $1 million. The cut-off point for ‘public benefit’ has not yet been tested.
2.1.10 PUBLIC SAFETY CHARITABLE TRUST V MILTON KEYNES COUNCIL; PUBLIC SAFETY CHARITABLE TRUST V SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL; CHESHIRE WEST AND CHESTER BOROUGH COUNCIL V PUBLIC SAFETY CHARITABLE TRUST [2013] EWHC 1327 (ADMIN) (HIGH COURT OF JUSTICE, QUEENS BENCH DIVISION, ADMINISTRATIVE COURT, SALES J, 14 MAY 2013)

These were three appeals from Magistrates’ Court decisions concerning the test for relief from non-domestic rates for charities. The appeals constituted a test case for charitable relief from non-domestic rates.

The Public Safety Charitable Trust (PSCT) is a registered charity. It functions by leasing a large number of premises within the UK on which it might ordinarily be liable for payment of non-domestic rates. The premises are unoccupied, and leased for peppercorn or nominal rents. The PCST then arranges for a broadcasting transmitter or transmitters, each similar in size to a domestic broadband box, to be placed at the premises. This equipment is the only thing placed in the premises and is connected to the existing power supply. The equipment provides free wireless internet access (wifi) to anyone within range of the transmitter or transmitters, and also broadcasts Bluetooth messages on crime prevention and public safety related themes to willing recipients who are in range and have a Bluetooth enabled mobile phone.

The leases to PSCT are subject to a short notice period (e.g. seven days), and the landlord pays the PSCT a ‘reverse premium’ in respect of its occupation. In this way, the saving in terms of relief from liability for non-domestic rates is shared between the landlord and the PSCT, the loser being the public purse. Milton Keynes and South Cambridgeshire Councils had obtained orders for payment of rates against the PSCT. Cheshire and Chester Council had been unsuccessful in a similar case.

The PSCT claimed that it was not liable for rates on the basis that it was a charity in occupation of the relevant hereditament (i.e. the unit of property used for rating purposes) and the hereditament was ‘wholly or mainly used for charitable purposes’: section 43(6)(a) of the Local Government Finance Act 1988 (LGFA).

The main issue was whether the premises were wholly or mainly used for charitable purposes. There were differing views in the courts below – whether to judge the use of the premises on the extent of their use for charitable purposes, which would be minimal given the only ‘occupant’ was a wifi box, or to use a purpose test. Was the use to which the premises were put a charitable one, regardless of the automated nature of the machine ‘occupant’, and its minimal use of the leased space?

His Honour said that the issue had been decided recently in Kenya Aid Programme v Sheffield City Council [2013] EWHC 45 (Admin). The correct interpretation of section 43(6)(a) of the LGFA was based on an ‘extent of use’ test, rather than a purpose test. His Honour said (at [34]):

In the context of this legislation and having regard to the language used, it is reasonable to infer that Parliament intended that the substantial mandatory exemption from rates for a charity in occupation of a building should depend upon the charity actually making extensive use of the premises for charitable purposes (i.e. use of the building which is substantially and in real terms for the public benefit, so as to justify exemption from ordinary tax in the form of non-domestic rates), rather than leaving them mainly unused.

Therefore, since the extent of use of the premises by the PSCT for charitable purposes was minimal, the Councils were successful in enforcing their orders for the payment of rates.
The case may be viewed at: http://www.bailii.org/ew/cases/EWHC/Admin/2013/1237.html

Implications of this case

There was argument in this case about the advance in technology which allowed the work of the charity to be done by a small automated machine, where once it might have required an office full of people. Did this affect the nature or size of the hereditament? For example, could the wifi box be said to be the hereditament itself? His Honour had no qualms in dismissing this argument (at [50]). The space leased (with its attendant wifi network) was the hereditament. The fact that it was only occupied by a small machine operated by the charity was not relevant to the rating scheme.

Further to this case, the Public Safety Charitable Trust was wound up in insolvency on 8 July 2013. In addition, the Charities Commission has launched an inquiry into the former charity.

2.1.11 WELLINGTON SCHOOL (AYR) LIMITED, INQUIRY UNDER SECTION 33 OF THE CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005 (OFFICE OF THE SCOTTISH CHARITIES REGULATOR (OSCR), 11 MAY 2013)

This inquiry was part of an ongoing issue in the UK concerning the public benefit provided by private fee-paying schools which are registered as charities. The Wellington School (Ayr) Limited (the charity) was found to fail the charity test, owing to lack of public benefit. Its charitable status is to be removed (subject to appeal), unless it takes mitigating steps before 31 October 2014.

To maintain their charitable status in Scotland, charities must continue to meet the ‘charity test’ as laid out in sections 7 to 8 of the Charities and Trustee Investment (Scotland) Act 2005 (the Act). The charity test requires charities to have exclusively charitable purposes, to provide public benefit in Scotland or elsewhere, and to meet certain other conditions. Section 7(1)(b) of the Act provides that a body meets the charity test if: ‘...it provides (or in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere’.

Section 8(2) of the Act provides that, in determining public benefit, regard must be had to:

(a) how any:
   (i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and
   (ii) disbenefit incurred or likely to be incurred by the public,
   in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and
(b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

The charity operates a co-educational day school situated in Ayr, Scotland. The charitable purposes of the charity are the advancement of education and the advancement of citizenship and community development. As with many such schools, the charity charges substantial fees (between £5,000 and £10,500 per year) which, in the OSCR’s view, means that it has no public benefit since the school cannot be accessed by the majority of the population. Such fees were therefore unduly restrictive.

Moreover, the inquiry found that the school rendered substantial private benefits to those who could access it, which included access to a wide variety of extra-curricular activities, and to shared resources with other schools. These private benefits were free to those attending the school.
Although the school offered monetary assistance with its fees for some students (as do most such schools), these were found to be in the form of low-value bursaries rather than full scholarships (of which there was only one offered). Their total amounted to 3.1% of the school’s available income of over £4.7 million per year. The provision of fee-paying assistance of this level did not alter the public benefit finding. Mitigation of this aspect of its fee structure before 31 October 2014 was a requirement of continuing its charitable status after that date.

Other aspects of the charity test were met. The OSCR inquiry report said (at page 6):

We are satisfied that Wellington School has charitable purposes and that there is no evidence of any significant private benefit or disbenefit arising as a consequence of the charity’s operations. These parts of the charity test are therefore met.

Moreover, there was some wider benefit provided by the school through its contribution to educational training and activities in its region. However, this was not enough to amount to a public benefit. The only issue therefore was the lack of provision of public benefit. The report continued (at page 7):

Where a fee is charged which may affect the access to a benefit, we expect some kind of facilitated access or other mitigation to be in place.... Forms of facilitated access which are clearly linked to the financial situation of potential beneficiaries (for instance through means-testing) are likely to have the greatest impact in addressing undue restriction in this context. Facilitated access arrangements, such as support to pay any fees or charges, which come from a body that is not a charity or is not connected with the charity can and do in practice facilitate access to the benefit a charity provides. The cost of providing the benefit that is being charged for is relevant to assessing whether any fee or charge is unduly restrictive – some benefits are more expensive to provide than others and we recognise that charities must be able to cover the cost of providing benefit.

Therefore, more substantial fee mitigation by the school was a requirement of continuing charitable status. This was to be ‘by increasing the proportion of income spent on means-tested bursaries by 31 October 2014’ (at page 10). If Wellington School (Ayr) Limited does not comply with this direction within the given timescale, OSCR will remove it from the Scottish Charity Register under section 30(3) of the Act.

The inquiry report may be viewed at: http://www.oscr.org.uk/media/416808/2013-05-01_-_section_33_report_wellington_school.pdf

2.1.12 GATEWAY CITY CHURCH V CANADA (NATIONAL REVENUE), 2013 FCA 216 (CANLII) (FEDERAL COURT OF APPEAL, CANADA, STRATAS JA, 7 MAY 2013)

The Gateway City Church (the Church) is registered as a charity under Canada’s Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (the Act). In this appeal, the Church applied for an order to prevent the Minister for National Revenue (the Minister) from revoking its charitable status under the Act. The revocation of charitable status operates from the Minister’s publication of a notice to that effect in the Canada Gazette.

The Minister had recently given the Church notice of her intention to revoke its registration as a charity under subsection 168(1) of the Act. In her notice, the Minister alleged that the Church had failed to comply with the Act in several respects:

a) Failure to maintain adequate books and records: ss 149.1(2); 168(1)(e); and 230;

b) Failure to devote all of its resources to its own charitable activities: ss 149.1(1); 149.1(2); and 168(1)(b);
c) Provision of personal benefits to a proprietor, member, shareholder, trustee or settlor: ss 149.1(1); 149.1(2); and 168(1)(b).

The Church lodged an objection to the notice, and sought a stay to prevent loss of registration (via publication of the Minister’s notice) until its objection had been heard fully. The Church had to show:

- it had an arguable case against the revocation;
- it would suffer irreparable harm if the revocation was allowed to happen; and
- the balance of convenience lay in its favour.

On the first issue, the Church had only to show that the matter was not destined to fail or that it was ‘neither vexatious nor frivolous’. His Honour said that given the low threshold for finding an arguable case, this element was present.

As to irreparable harm, the loss of charitable status would mean that the Church could no longer take donations, or give receipts for donations. The Church stated that this would cause donations to decline, preventing it from doing essential work for its congregation and the wider community. His Honour said that ‘such a general assertion is insufficient to establish irreparable harm’ and that its success would ‘unduly undercut the power Parliament has given to the Minister to protect the public interest in appropriate circumstances by publishing her notice and revoking a registration even before the determination of the objection and later appeal’ (at [14]). Convincing evidence of irreparable harm was required. His Honour said that the evidence put forward by the Church fell short of the standard required in several respects, including lack of financial records to show the actual effect of any possible fall-off in donations (at [17]). He added (at [18]):

Irreparable harm must be demonstrated, not just asserted. Demonstration is achieved by supplying particular information that empowers the Court to find the existence of harm that cannot be repaired later. In the record before this Court, there is only assertion, not demonstration.

Given the failure by the Church to show irreparable harm, there was no need to discuss the balance of convenience, and the appeal was dismissed with costs.

The case may be viewed at: http://www.canlii.org/en/ca/fca/doc/2013/2013fca126/2013fca126.html

Implications of this case

Where, as here, the charity has not requested the revocation of its charitable status, the publication of the Minister’s notice in the Canada Gazette is deferred for 30 days in order to allow the charity to challenge it: paragraph 168(2)(b) of the Act. The challenge consists in making an objection and, if necessary, an appeal to the Federal Court of Appeal: section 172.

The 30 day period can be extended: paragraph 168(2)(b) of the Act. In this case, by an application brought under Rule 300(b) of the Federal Courts Rules. The Church here was seeking an extension until the Minister decided upon the Church’s objection, or until the Federal Court of Appeal determined the appeal from the Minister’s decision, whichever was later. However, the Church was unsuccessful.
2.1.13 PRESCIENT FOUNDATION V MINISTER FOR NATIONAL REVENUE (FEDERAL COURT OF APPEAL, CANADA, MAINVILLE, PELLETIER, GAUTHIER JJA, 1 MAY 2013)

This is an appeal brought by Prescient Foundation (Prescient) pursuant to paragraph 172(3) of Canada’s Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.) (the Act) from the confirmation by the Minister of National Revenue (the Minister) of a proposal under subsection 168(1) of the Act to revoke the registration of Prescient as a charity.

The Minister relied on four independent grounds to sustain the revocation of Prescient’s registration:

1. it participated in a tax planning arrangement for the private benefit of others;
2. it transferred an amount of $574,000 for a share purchase that was in fact a non-charitable gift to a non-qualified donee arising from the tax planning arrangement;
3. it made a gift to a non-qualified donee in the form of a $500,000 transfer to a non-profit organization in the United States; and
4. it failed to maintain adequate books and records.

Prescient disputed all grounds in this appeal.

Prescient was incorporated on 18 March 2004 as a corporation without share capital under Part II of the Canada Corporations Act, R.S.C. 1970, c. C-32. On 19 May 2004 it was registered as a charity under paragraph 149(1)(f) of the Act, and was designated a charitable public foundation. Three of Prescient’s activities were in contention:

- A series of transactions relating to the sale of a farm (the farm sale transactions) in British Columbia which involved other charities and third parties and took place in February and March of 2005. The Minister subsequently revoked Prescient’s registration as a charity on the ground that the farm sale transactions were part of a tax planning arrangement for the private benefit of certain taxpayers.
- The Minister also took the view that, as part of these transactions, a purchase of shares by Prescient resulted in a $574,000 non-charitable gift to a non-qualified donee.
- On 22 December 2005, Prescient transferred $500,000 as a donation to the DATA Foundation (DATA), a non-profit organization resident in the United States and recognized by the American authorities as exempt from taxation pursuant to section 501(c)(3) of the US Internal Revenue Code, U.S.C. 26. Because of this, the Minister revoked the appellant’s registration on the ground that it had made a gift to a non-qualified donee.

A Canada Revenue Agency (CRA) audit of Prescient’s activities took place in April 2008 during which several areas of non-compliance were found. The auditor recommended revocation of Prescient’s registration as a charity. A notice of intention to revoke Prescient’s registration pursuant to subsection 168(1) of the Act was sent to it on 23 December 2010 by the Director General of the Charities Directorate of the CRA. This letter set out a detailed explanation of the grounds supporting the notice. Prescient objected under subsection 168(4) of the Act, and on 20 April 2012 a decision on that objection was reached, proposing to confirm the intention to revoke. The formal notice of this confirmation was issued on 4 June 2012, and Prescient instituted this appeal.

The Court said that the standard to be applied in reviews of this type was established (at [12]):

In an appeal from a decision of the Minister confirming a proposal to revoke a registration of a charity brought pursuant to paragraph 172(3) of the Act, extricable questions of law, including
the interpretation of the Act, are to be determined on a standard of correctness. On the other hand, questions of fact or of mixed fact and law, including the exercise of the Minister’s discretion based on those facts and the law as correctly interpreted, are to be determined on a standard of reasonableness....

There were extricable questions of law raised in this appeal including whether a charitable gift to a non-qualified donee is a valid legal ground to revoke a registration. The court thus dealt with the DATA transaction first, saying that the only question arising from Prescient’s financial contribution to DATA was whether the Minister could revoke its registration for having made a contribution to a foreign charity. After reviewing the legislative provisions, including some amendments to the Act which were never passed by the federal legislature, the court held that (at [30]–[31]):

Though the CRA holds that registered charities cannot make gifts to foreign charities that are not qualified donees, that position is not grounded in an enforceable legislative enactment. The Minister reiterates, at para. 85 in his memorandum of fact and law, his position that, to qualify as charitable, a charitable public foundation must not only operate exclusively for charitable purposes, but must also only disburse funds to a qualified donee. However, the Minister offers no authority for that proposition, nor does he refer to any enforceable statutory requirement providing for such a restriction. In this case, the Minister has revoked the registration of Prescient invoking a ground that is not reflected in enforceable legislation. In effect, the Minister applied to Prescient the ground of revocation provided for in paragraph 149.1(3)(b.1) of the Act, a provision which was not in force at the time the decision to revoke was made, and which, I repeat, is still not in force.

On the issue of the farm sale transactions, the court agreed with the Minister that the impugned transactions were not for charitable purposes. The transactions were for tax avoidance purposes (at [38]):

The special advantages extended to charities under the Act are meant to assist them in pursuing their charitable purposes. Under subsection 149.1(1) of the Act, charitable foundations must thus be operated exclusively for charitable purposes. Prescient broke that important rule through its participation in the Farm Sale Transactions. By so doing, it ignored the fundamental purpose of the special advantages provided to charities under the Act. In the light of the egregious nature of the Farm Sale Transactions and of Prescient’s participation therein, it was reasonable for the Minister to revoke Prescient’s registration under the Act.

Although charities, including Prescient, did obtain money in the form of commissions through the farm sale transactions, their primary purpose was not charitable.

Were there inadequate books and records kept? The CRA took the position that Prescient had contravened section 230 of the Act by failing to maintain complete and sufficient records allowing the CRA to verify the information contained within its registered charity information returns and financial statements. The facts showed that Prescient did not maintain records relating to the impugned transactions (at [55]–[56]):

In light of this, it was reasonable for the Minister to conclude that Prescient did not maintain adequate records. That being said, was it also reasonable for the Minister to conclude that Prescient’s registration should be revoked for that reason alone? Though Prescient was remiss in maintaining proper records of the Farm Sale Transactions, the CRA auditor was nevertheless supplied with a considerable amount of information concerning these transactions which allowed her to understand both their scope and their nature. In my view, it would not have
been reasonable for the Minister to revoke Prescient’s registration on that basis alone. On the other hand, Prescient’s failure to maintain adequate records and books of account showing that its contribution to DATA was made to an American charity, coupled with its failure to voluntarily and promptly disclose this fact to the auditor, constitutes a very serious matter. Thus, both failures, taken together, are sufficient, in the circumstances of this case, to conclude that the Minister acted reasonably in revoking Prescient’s registration on the ground that it had failed to maintain adequate books and records.

Therefore, as there were proper grounds to support revocation, the Minister was correct to revoke Prescient’s registration as a charity. The appeal was dismissed with costs.

The case may be viewed at: http://decisions.fca-caf.gc.ca/en/2013/2013fca120/2013fca120.html

**Implications of this case**

The most interesting question in this appeal (which ultimately did not have to be decided in this judgement) concerned the contribution by Prescient to DATA, a nonprofit organization contemplated by section 501(c)(3) of the US Internal Revenue Code (its principal mission being to alleviate poverty and illness in Africa).

It was interesting because of the application of the Canada–US tax treaty. Prescient had submitted that the Minister erred in law by revoking its registration based on the $500,000 transfer to DATA not being a gift to a ‘qualified donee’ under Canadian law. Prescient first noted that a registered charity qualifies as a ‘qualified donee’ under the definition of that term set out in s 149.1(1)(b) of the Act. Prescient further submitted that, by operation of paragraph 7 of Article XXI of the Canada–US Tax Convention and of subsections 3(1) and (2) of the Canada–United States Tax Convention Act, 1984, S.C. 1984, c. 20, a gift by a resident of Canada, such as Prescient, to a US charitable organization, such as DATA, was to be treated, for the purposes of Canadian taxation, as a gift to a registered charity within the meaning of the Act. Since a registered charity is a ‘qualified donee’ under the Act, Prescient concluded that the Minister was thus bound to treat its gift to DATA as one made to a ‘qualified donee’.

The Court did not consider this argument since it concluded under the alternative ground argued by Prescient that the gift to DATA was not a ground for revocation. Thus, the court avoided deciding the key question of the impact of the Canadian–US tax treaty on the ability of Canadian registered charities to give funds to section 501(c)(3) organizations.

**2.1.14 TRINITY GLOBAL SUPPORT FOUNDATION V CANADA (NATIONAL REVENUE), 2013 FCA 109 (CANLII) (FEDERAL COURT OF CANADA, NEAR JA, 23 APRIL 2013)**

This was an application brought in the Federal Court of Canada by the Trinity Global Support Foundation (the Foundation), a registered charity, pursuant to paragraph 168(2)(b) of the Income Tax Act, R.S.C. 1985, c.1 (5th Supplement) (the ITA). The application was for an order extending the period of time that had to expire before the Minister of National Revenue (the Minister) would be allowed to publish a notice of intention to revoke the Foundation’s registration as a registered charity.

The Minister gave notice of intention to revoke the registration of the Foundation’s charity status on 1 February 2013 in accordance with subsection 168(1) of the ITA. The Foundation argued that revocation would cause it irreparable harm as it would collect fewer donations from fewer donors and thus lose revenue. It also argued that clients of the Foundation would be seriously impacted if the Foundation was unable to continue to fund their charitable activities.
In this application, the Foundation had to establish that each of the requirements of the tripartite test set out in RJR-MacDonald Inc. v. Canada (Attorney General), 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 were met. This involved the Foundation showing that:

- there was a serious issue to be tried;
- it would suffer irreparable harm if the requested order were not granted; and
- the balance of convenience favoured granting the order.

The Crown did not dispute that the serious issue element of the test was present. However, His Honour said that the evidence submitted by the Foundation was not convincing with respect to its outstanding future funding obligations or to the impact upon client charities. He held that there was no substantive evidence that the Foundation or its clients would be forced to shut down or be significantly affected prior to its notice of objection being considered. There was no ‘compelling evidence of irreparable harm’ to the Foundation, even on its own submitted material.

The Foundation also submitted that there would be harm to its reputation if revocation were to occur. On this point, His Honour said (at [6]):

> It is clear from the evidence that the reputation of the Foundation has already been subject to intense public scrutiny for reasons distinct from the notice of intention to revoke. As such, I see no basis upon which to conclude that any possible further harm to the Foundation's reputation will be such as to amount to irreparable harm.... [[It is clear that serious allegations have been raised in the context of the proposed revocation. It is clear from the Foundation’s own evidence that it has been engaged in fundraising activities using tax shelter arrangements, which have been an activity of legitimate concern generally to the Minister. As such, in my view the public interest in the Minister protecting the integrity of the charitable sector outweighs the Foundation’s interest in staying revocation and I see no reason for the Court to grant an equitable remedy to the Foundation.]

His Honour went on to say that given these findings, he did not need to consider the balance of convenience. The requisite elements for a stay were not met and the application was dismissed, with costs.


**Implications of this case**

The charity in this case had been the subject of litigation, including a class action by donors participating in a leveraged charitable donation scheme: see Charette v Trinity Capital Corporation 2012 ONSC 2824 (CanLII). There have been several of these cases in Canada, all involving schemes whereby donors to charitable bodies effectively tried to make a profit on their donations. In leveraged donation schemes taxpayers made donations, partly using their own money, and partly borrowed money (hence leveraged donations). They then claimed the full amount of the donation as a tax credit even though not all the money was their own. In a particular tax year, they could therefore get a larger tax credit than the amount of cash they had actually donated. The loan repayments were deferred to a later time. All the scheme donations were disallowed for tax purposes, leading to donors launching class actions against promoters and legal firms who backed the schemes. This case shows that the charities involved also suffered consequences, including deregistration.
2.1.14 CHARITY BANK LTD, DECISION OF THE CHARITY COMMISSION FOR ENGLAND AND WALES, 25 MARCH 2013

The Charity Bank was originally registered as a charity by a decision of the Charity Commission in 2002. Although it was an operational bank, it was also accepted as a charity. This was acknowledged to be a novel concept, and was designed to encourage ‘social investment’.

Charity Bank was an innovation of the Charities Aid Foundation (CAF), and was established to make beneficial loans and guarantees to charities and for charitable projects by obtaining loans and taking deposits on beneficial terms from the public and others. At the time it required a licence from the Financial Services Authority (FSA) to take deposits from the public. It was an essential feature of the arrangements that the taking of deposits on beneficial terms should be accepted as an integral part of the charitable purposes of the organisation.

The objects of the Charity Bank were to promote any charitable purpose for the benefit of the public by:

(i) the provision of loans and guarantees on beneficial terms to charities or for charitable purposes by receiving donations and by obtaining loans and taking deposits on beneficial terms from the public and others in order to provide such loans or guarantees;
(ii) promoting the efficient and effective application of charitable resources by those charities and for charitable purposes by the provision of financial advice, support and related assistance to charities and for charitable projects in relation to such loans and guarantees;
(iii) advancing any other purpose which may be charitable according to the law of England and Wales.

However, changes to financial laws now mean that the Charity bank can no longer operate as a charity. Therefore, the Charity Commission of England and Wales, (the Charity Commission) published a scheme on 25 March 2013 for the alteration of the Charity Bank’s articles of association so that although it would no longer be a registered charity, it would still be able to fulfil its charitable objects while operating as a bank. This alteration in objects needs to be approved by 90% of the Charity Bank’s shareholders.

In the original decision of 2002, the Charity Commission reviewed the law relating to charitable loans, and found that such activities had long been recognised as charitable in English law. The Commission made clear that its view had always been that the raising of funds in itself could not be a charitable purpose, however it took a constructive approach in applying the law in changing social circumstances. Charity Bank was to lend to charities, or to non-charitable bodies in support of charitable projects, and in this way would support the building of a robust charitable sector, more able to support its beneficiaries. In particular, Charity Bank was designed to provide loans where money was not available elsewhere on commercial terms. In this respect, the Charity Commission said (at pp 6–7 of their 2002 decision):

Charity Bank ... aims to operate in such a way as to provide a pool of funds available to charity on a lasting basis. It will do this by operating as a bank, taking deposits cheaply so as to raise a capital base on which resources are made available to charity by way of soft loans and can continue to be made available to charity on an ongoing basis as loans are repaid and funds recycled.... In relation to public benefit, the Commissioners were satisfied that tangible benefits would arise from Charity Bank’s activities and in particular through the provision of finance of charitable purposes in circumstances where nothing comparable currently existed, and through the provision of targeted financial advice. Charity Bank may also confer intangible benefits, (amongst others) through the promotion of the concept of charitable giving in the community,
bringing relief and benefit to the objects of charity, encouraging altruism in society, fostering closer association between donors and charities and charitable beneficiaries and identifying and supporting the charity sector where it seeks, on its own or in partnership with Government, to relieve the disadvantaged in society. The Commissioners were satisfied that the objects of Charity Bank did constitute a novel charitable purpose for the benefit of the public and that Charity Bank was acceptable for registration as a charity.

At the time of the 2002 decision, the Charity Commission was satisfied that the banking regulation applicable would not oust the charity jurisdiction of the courts or the Charity Commission ‘to any material extent’. However, that was before the UK banking crisis of 2008–2009, and that position has become untenable in the light of new regulatory requirements for banks: see the Financial Services Act 2012, which commenced on 1 April 2013. On 1 April 2013, the Financial Services Authority transitioned to two bodies, the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA), separating the prudential and conduct parts of banking regulation in the UK. Under that regime, the Charity Bank can be either a charity or a bank, but not both.

The Charity Bank wishes to continue as a bank. Under the new regime, the Charity Bank will not have sufficient capital to meet the new prudential requirements unless the property it holds under section 197(2) of the Charities Act 2011 (which is charitable property) continues to be part of its capital. For this to be so, the Charity Bank required a capital grant from the CAF trustees (CAF is its major shareholder), as a social investment to further its charitable purposes. All parties (including the FSA) were in agreement that these arrangements were appropriate.

The scheme put forward by the Charity Commission was designed to allow for the protection of the Charity Bank’s charitable assets and ensure that these continued to be used for its existing charitable purposes. It was expected to be operational by 30 April 2013. The scheme involved permission being granted to the Charity Bank to alter its status pursuant to section 198 of the Charities Act 2011 (at p 1 of this decision):

The Charity Commission (‘the Commission’) notes that the Charity Bank Limited (‘the Bank’) has to make certain changes to its articles in order to operate as a bank. The Commission is of the view that these changes are not compatible with the Bank being a charity. If the Bank cannot operate as a bank, a very useful resource will be lost to the charitable sector. Accordingly, in the exceptional circumstances of this case and because it is satisfied that there are sufficient safeguards to ensure that the charitable assets used to forward the work of the Bank will not be lost to the charity sector, the Commission is prepared to permit the Bank to change its articles even though this has the effect of it ceasing to be a charity.

The amended articles had the effect of converting the Charity Bank into a commercial company with directors (rather than charitable trustees). Under the scheme, the charitable assets of the Charity Bank were transferred for the time being to the trustees of CAF, who would then transfer those assets to the Charity Bank as a capital contribution without conditions of repayment. It thus became an irrecoverable gift within section 110 of the Charities Act 2011. This gift gave the bank the capital it needed to fulfil its obligations under the new financial laws.

The Charity Bank’s website is: http://www.charitybank.org/
2.2 DISCRIMINATION

2.2.1 HALL V THE QUEEN, 2013 TCC 314 (CANLII) (TAX COURT OF CANADA, PIZZITELLI J, 24 SEPTEMBER 2013)

In this Canadian case, the appellant (Hall) appealed the denial of a charitable tax credit pursuant to section 118.1(3) of the Income Tax Act (ITA) in relation to his contribution, in 2011 of $24,800 to an entity that was not a registered charity and hence not a ‘qualified donee’ under section 149.1(1) of the ITA. The main ground was that the denial was a violation of section 15(1) of the Canadian Charter of Rights and Freedoms (the Charter) which states that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In 2011 the appellant donated the sum of $24,800 to the International Association of Scientologists (IAS) which is an organisation involved in (amongst other things) drug addiction education and treatment, disaster relief and other charitable-like activities throughout the world. There was no dispute on the facts that the IAS conducted what are normally considered charitable or charitable-like activities, but the IAS is not a registered charity in Canada.

The appellant contended that his choice to support the IAS as his preferred charitable organisation unfairly denied him the right to a charitable tax credit when other Canadians have access to a tax credit if they choose to donate to registered charities. This was, in his view, a violation of his rights under the Charter.

The respondent said that there was no charter violation for two main reasons:

- there is no law that grants every contribution made to a charitable organisation a tax credit and hence no-one had been directly or by effect excluded from the benefit of any such law; and
- in the alternative, that the appellant had not demonstrated that the government made a distinction based on any enumerated grounds set out in section 15(1) of the Charter, or any analogous grounds.

Section 118.1(3) of the ITA allows an individual to claim a tax credit based on a formula that applies to the individual’s ‘total gifts’ for the year. The individual’s ‘total gifts’ for a year are defined in section 118.1(1) as a percentage of the individual’s ‘total charitable gifts’ which are in turn defined in the same section as the total of all amounts, each of which is the fair market value of a gift made by the individual in the year, or in any of the preceding 5 years if not previously deducted, made to, inter alia, (a) a registered charity.

A ‘registered charity’ is defined in section 248(1) to include a charitable organisation, within the meanings assigned by section 149.1(1), that is resident in Canada, and has applied to the Minister in prescribed form for registration and that is at the time so registered.

There was no dispute relating to these definitions. Rather, the appellant’s position was that he should be entitled to a tax credit for contributions to a charitable organisation that was not a registered charity. His Honour did not agree (at [7]–[8]):

In my view, the provision of a tax credit for contributions to a non-registered charity is not a benefit provided by subsection 118.1 of the ITA, hence subsection 15(1) of the Charter cannot be infringed.... The Appellant has not demonstrated that the particular provisions allowing tax credits
for donations to registered charities directly discriminates against any particular charity, let alone IAS. Moreover, there is no discrimination by effect.... Here, as the Respondent has pointed out, the scheme dealing with charitable tax credits has as its purpose to only provide tax credits, effectively subsidized by the Canadian taxpayer, to specific registered charities.

The scheme in the Canadian ITA allows any charitable organisation to apply for registration if the requirements of the ITA are met by it. This is pursuant to a legislative scheme (at [9]):

...to vet and reasonably monitor those organisations that effectively ask the Canadian public to partially fund their activities through the charitable tax credit provisions. No specific group is barred from applying and the decision to do so rests with the organisation itself. If an organisation chooses not to avail itself of such registration or fails to meet the requirements for registration, it does not mean there is discrimination when registration is not a matter of right for everyone. Moreover, if a taxpayer chooses to contribute to an organisation that is not a registered charity rather than a registered charity, his personal choice does not mean he was denied the benefit of a law that only grants tax advantages for contributions made to registered charities.

Therefore, since there was no violation of any right (the benefit sought being one not provided for by law), the appeal was dismissed.

The case may be viewed at: http://www.canlii.org/en/ca/tcc/doc/2013/2013tcc314/2013tcc314.html

Implications of this case

As His Honour pointed out at [8], the Supreme Court of Canada had already discussed the scheme of the ITA in relation to tax credits in Vancouver Society of Immigrant and Visible Minority Women v MNR [1999] 1 SCR 10, saying (at [2] of that case):

Given the central role that charities play in our society, the large sums of money devoted to charitable purposes, and the considerable privileges that attach to charitable status Parliament has considered it essential to provide a legal framework to regulate charities and their activities. That legal framework, which aims to ensure charities use the funds provided to them for charitable purposes in an efficient manner, is of ancient origin.

Moreover, the Supreme Court had also held (in Auton (Guardian ad litem of) v British Columbia (Attorney General) [2004] 3 SCR 657 at [14]), that a Canadian legislature was under no obligation to create a particular benefit, so that a legislative choice not to accord a particular benefit did not give rise to a review under section 15 (1) of the Charter.

2.2.2 BELL V DE CASTELLA AND ROB DE CASTELLA’S SMARTSTART FOR KIDS LTD [2013] ACAT 27 (AUSTRALIAN CAPITAL TERRITORY CIVIL AND ADMINISTRATIVE TRIBUNAL, LENNARD (SENIOR MEMBER), 23 APRIL 2013)

This was a case concerning alleged discrimination. The applicant (Bell) made a complaint under the Human Rights Commission Act 2005 (ACT) (HRC Act) to the ACT Human Rights Commission on or about 20 December 2010. On 1 July 2011, the ACT Human Rights and Discrimination Commissioner closed the complaint as lacking in substance pursuant to subsection 78(2)(c)(iv) of the HRC Act. On 7 February 2012, following a request from the applicant, the Commissioner referred the complaint to ACAT.

The applicant made a further complaint under the HRC Act to the Commission on 16 January 2012. The second complaint was also referred to ACAT on 7 February 2012. The second complaint canvassed some of the same issues as the first complaint, but added a ground of complaint relating to a meeting
between the parties on 21 December 2010 at which a document entitled ‘SmartStart for Kids Volunteer Allowance Agreement’ was proffered to the applicant. ACAT dealt with the two complaints together.

The respondent, Rob de Castella’s SmartStart for Kids Ltd (SmartStart), is a nonprofit company limited by guarantee. Its main activity is the Indigenous Marathon Project, which promotes running and walking within indigenous communities, and healthier lifestyles. As part of the project, workshops and courses in health and fitness education and assessment were developed specifically for indigenous people, including indigenous marathon runners. Smartstart also delivers primary school based health programs funded by the ACT government. Robert de Castella is one of three directors of Smartstart and the project director for the Indigenous Marathon Project.

The Indigenous Marathon Project commenced in 2009. The applicant, an experienced coach, was engaged as a marathon coach from 1 April 2009 to 15 November 2010. The applicant was not paid a salary or wages, but was provided with expenses, a laptop computer and mobile phone. The alleged discrimination arose from the nature of that engagement, the alleged conduct of Mr De Castella during the course of the engagement, and the termination of the engagement.

The applicant identified three attributes that he alleged formed the basis of his complaint of discrimination: race, profession and political conviction. In relation to race, the applicant said that he had been discriminated against because he was white Anglo-Celtic. As to profession, the applicant described himself as a ‘coach of athletes’. There was an issue raised as to understanding the cultural requirements of indigenous athletes, especially those from remote communities. On the issue of political conviction, there was contention about the flying of the aboriginal flag.

The HRC Act refers to an unlawful act within the meaning of the Discrimination Act 1991 (ACT) (the Act). The relevant provisions of the Act say that a person discriminates against another person if the person treats or proposes to treat the other person unfavourably because the other person has an attribute among the listed attributes in section 7. The attributes relevant to this application are found in subsections 7(h), (i) and (m) – race, political conviction and profession.

The Act defines ‘employment’ to include work as an unpaid worker. Section 10 of the Act provides, inter alia, that it is unlawful for an employer to discriminate against a person in the terms or conditions on which employment is offered (section 10(1)(c)); in the terms or conditions of employment that the employer affords the employee (section 10(2)(a)); by dismissing the employee (section 10(2)(c)); or by subjecting the employee to any other detriment (section 10(2)(d)).

The applicant alleged discrimination because of unfavourable treatment meted out to him on one of the three attributes described above. The Act does not define ‘unfavourable treatment’. However, there must be a direct link between the unfavourable treatment and the attribute. The applicant alleged many bases for possible discrimination:

1. There was no written agreement of engagement or employment;
2. Lack of remuneration for coaching;
3. An issue relating to a televised interview with an athlete;
4. Unfair dismissal;
5. An issue relating to unpaid and volunteer coaches;
6. Re-engagement as a volunteer coach;
7. An issue relating to the City to Surf race;
8. Issues relating to advice given to athletes, a public argument, and a Grand Final breakfast photo;
9. An issue relating to the New York marathon; and
10. An issue relating to a radio interview on 8HA in Alice Springs.

The Tribunal found that:

1. There was no written agreement relating to the applicant’s coaching duties. He was always regarded as a volunteer. The Tribunal said (at [66]):

   Even were the lack of a written agreement to be regarded as unfavourable treatment, the applicant’s evidence is not sufficient to discharge the onus of proof in relation to the causal connection between the lack of a written agreement and his race or his profession. The tribunal is not satisfied on the balance of probabilities, that the respondents failed to offer a written agreement to the applicant because of his race or profession.

2. There was no direct evidence of a remuneration agreement. The Tribunal held that the applicant was engaged under an informal verbal agreement, and as a volunteer (at [67]).

3. The issue about a televised interview with an indigenous athlete came down to differences in coaching approaches. The Tribunal found that the applicant had not shown evidence sufficient to discharge his onus of proof (which was on the balance of probabilities). The Tribunal was not satisfied on the balance of probabilities that the actions taken by Mr de Castella in refusing to follow the advice of the applicant, or imposing disciplinary action upon the applicant for what he subsequently did, were motivated by the applicant’s race or by his profession (at [78]).

4. The relationship between the applicant and the respondent deteriorated rapidly after the interview incident. The applicant was dismissed from his post. The applicant contended that if he was an indigenous coach he would not have been dismissed. The Tribunal did not accept this contention (at [88]):

   The question then is whether any coach whose conduct was, in the view of the respondent, unprofessional and damaging to the project would have been treated by Mr de Castella in the same way? The applicant asks the tribunal to accept that the indigenous community would expect an indigenous coach whose conduct was as described above to be kept on as volunteer coach despite the manager’s view that their conduct was unprofessional and damaging to the project. The tribunal does not accept that argument.

Allegations 5 to 7 were dealt with together by the Tribunal. After some discussions, the applicant was re-engaged as a ‘volunteer coach’ on the Marathon Project. He remained unpaid. The applicant alleged that calling him a volunteer coach was damaging to him, and misrepresented his role in developing the project. The Tribunal said that (at [93]):

   Even if the use of the title ‘volunteer coach’ is accepted as unfavourable treatment, there is no evidence that the application of that description to the applicant’s role was because of any of the attributes identified by him. Rather, the evidence supports the view that the title ‘volunteer coach’ was applied to the applicant because it was an accurate description of his role within the indigenous marathon project.

There were conditions imposed upon the applicant in his role as volunteer coach:

- that the involvement of the applicant in the project would cease upon return from the New York marathon in November 2010;
• that the applicant would not be permitted to attend the City to Surf race in which the athletes were competing in August 2010;
• that the applicant would no longer be directly involved in the coaching of the Alice Springs-based athletes; and
• that the applicant was to take a two week break from involvement in the project from 3 August 2012.

Were these conditions discriminatory? The Tribunal said that they were not. There was no evidence to establish that the treatment was afforded to the applicant on the basis of his profession, race or political conviction. The applicant’s evidence is not sufficient to discharge the onus of proof (at [103]).

The eighth allegation was based on the respondent not taking advice from the applicant about an athlete’s ankle injury, and his exclusion from a newspaper photograph published in an Alice Springs newspaper. The Tribunal said that no unfavourable treatment arose from these allegations (at [107]). The ninth allegation referred to the respondent’s conduct at the New York marathon in 2010. Mr de Castella posed with some indigenous athletes in front of the Australian flag. The applicant said that this should have been the aboriginal flag. Moreover, there was contention about not providing global roaming facilities for the applicant’s phone, and another public argument about an almost missed flight. These matters were not bases for unfavourable treatment. Nor were the matters raised by the applicant’s other allegations.

Therefore, because the applicant could not show any evidence of causal links between his complaints and discrimination under the Act, the case was dismissed.

The case may be viewed at: http://www.austlii.edu.au/au/cases/act/ACAT/2013/27.html

Implications of this case

The main problem with the applicant’s submissions in this case was that he could not establish a causal link between his allegations of unfavourable treatment and discrimination on the basis of the attributes designated in the Act. His evidence was described by the Tribunal as ‘subjective, self-serving or hearsay’. Such evidence could not meet the burden of proof required.

2.2.3 ST MARGARET’S CHILDREN AND FAMILY CARE SOCIETY: REPORT OF THE OFFICE OF THE SCOTTISH CHARITY REGULATOR (OSCR) UNDER SECTION 33 OF THE CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005 (5 MARCH 2013)

St Margaret’s Children and Family Care Society (the charity) is a voluntary adoption agency connected with the Roman Catholic Church. This was a request for a review of the OSCR’s finding that it failed the charity test. The OSCR found the charity did not provide a public benefit because the way that it provided a benefit involved unlawful discrimination which caused detriment to the public and to particular groups of people. The overall effect was that this discrimination outweighed the other positive effects of the charity’s work. In addition, the OSCR found that access to the benefits provided by the charity was unduly restricted.

The original investigation into the charity was triggered by a complaint to the OSCR from the public. The original finding agreed with the complainant that the charity was operating in breach of the Equality Act 2010 (UK) (the 2010 Act) by unlawfully discriminating against same sex couples. The charity’s preferred criteria prioritised couples who had been married for at least two years. Since marriage was not available to same sex couples this constituted direct discrimination. The OSCR found that the exceptions
in the Act for discrimination by charities and religious bodies did not apply to the charity. The OSCR directed that the charity alter its external and internal guidance and procedures so that discrimination no longer took place. On 11 February 2013, the charity requested a review of the OSCR’s decision. This review decision on 4 March 2013 confirmed the original decision.

The original decision

The charity was established in 1955, and first registered as a charity in 1999. Its objects, as set out in its memorandum of association, include:

The society is established to promote (irrespective of creed) the welfare of children, whose interests are paramount, to foster the stability of family relationships and to assess the suitability of applicants as adoptive parents all in accordance with the teachings of the Catholic Church....

The objects had been amended on 23 October 2008, following consent by the OSCR on 9 October 2008. The OSCR’s consent process at the time involved no examination of the charity’s activities and did not imply any consideration or approval of these.

The charity’s main activity is assessing and approving potential adoptive parents under sections 28 and 29 of the Adoption and Children (Scotland) Act 2007 (the 2007 Act). There is a rigorous process of assessment for adoptive parents, with a ‘sift’ of initial enquirers followed by a full assessment for those passing the ‘sift’. Those approved by the charity’s Adoption Panel are presented to adoption agencies (usually Scottish local authorities) for matching with the agency’s potential adoptees. An inter-agency fee is paid to the charity when a placement occurs. The charity also provides post-adoption support for adoptive parents – a significant part of its work, as the charity is particularly involved with adoption of ‘hard to place’ children, where more support is needed.

The chair of the charity trustees is a Roman Catholic cleric and Canon lawyer. There are 7 other trustees. The president and vice-presidents of the charity (who are not charity trustees) are the Archbishop and Bishops of the contributing Dioceses. Most of its income comes from inter-agency fees, but about one-quarter is provided from the Archdiocese of Glasgow, the dioceses of Paisley, Galloway and Motherwell, and from donations from local parishes.

The review focused on the charity’s criteria for adoptive couples. There were ‘preferred criteria’ in assessing which enquirers should go forward for full assessment as adoptive parents. These gave greater priority to prospective adoptive parents who were:

a) Members of a couple;
b) Catholic;
c) Married (for at least two years);
d) Others who wish to adopt within the framework of the Roman Catholic faith.

Lower priority was accorded to:

a) enquirers who have been married for less than two years;
b) couples in civil partnerships;
c) single people;
d) married couples who did not wish to adopt within the Roman Catholic faith.

The OCSR’s view was that the charity’s ‘preferred criteria’ result in less favourable treatment to people sharing the following protected characteristics under the Act:
a) Sexual orientation: since marriage (as opposed to civil partnership) is not available to gay or lesbian couples the less favourable treatment for unmarried couples amounts to direct discrimination against same sex couples on the grounds of their sexual orientation.

b) Religion or belief: on the face of it, the less favourable treatment which the charity’s guidelines suggest it gave couples who did not wish to adopt within the Roman Catholic faith (as opposed to Roman Catholic couples or those wishing to adopt within the framework of that faith) amounted to direct discrimination on the basis of religion. (This finding was based on what the OSCR admitted was ‘limited evidence’.)

Neither of the Act’s two relevant exceptions (for charities and religious bodies) applied to the charity.

**Charity exceptions did not apply**

Section 193 of the Act allows a charity to restrict the benefits it provides to people with a particular protected characteristic (in this case non-Catholics or gay or lesbian couples) if:

a) it is acting in pursuance of its charitable instrument (constitution); and

b) it is a proportionate means of achieving a legitimate aim.

The OSCR’s view was that in operating its preferred criteria the charity was acting in pursuance of the charitable purposes set out in its constitution (as amended), in that it was ‘…assessing the suitability of applicants as adoptive parents, all in accordance with the teachings of the Catholic Church’. The question therefore became: what legitimate aim was the operation of the preferred criteria intended to achieve, and were the preferred criteria a proportionate means of achieving this aim? The OSCR did not agree with the charity’s argument that the operation of its preferred criteria was in the best interests of adopted children. Whilst the charity did very good work in placing hard-to-place children, OSCR found (at page 7 of its report):

...the charity’s success in these respects does not in itself prove that the children’s best interests are being served by the operation of the preferred criteria. Other factors in the way the charity carries out the full assessment process or its provision of support in placement may also contribute. Increasing the number of successful placements would be a legitimate aim, but it is not clear that the operation of the preferred criteria, and removal of homosexual potential adoptive parents from consideration, is actually a means of achieving this, let alone a proportionate means. ...OSCR has also considered evidence about the wider context of adoption in Scotland. Our understanding is that nationally there is a mismatch between the needs of children awaiting adoption (with the majority of those on the National Adoption Register being aged over 4) and the preferences of approved potential adoptive parents (the majority of whom wish to adopt a child under 4). Clearly, any action which was aimed at better matching the needs of children with the supply of potential adopters willing to take them would be in the best interests of those children and a legitimate aim. We note also that evidence submitted in the Catholic Care case in England and Wales suggested that same sex couples were more likely than heterosexual couples to consider adopting harder to place children such as sibling groups and older children. This does not tend to support the case that the best interests of such children are best served by the operation of the preferred criteria in removing same sex couples from consideration as potential adoptive parents.... While acting in the best interests of children by increasing the number of successful placements would be a legitimate aim there is no clear evidence that the operation of the preferred criteria is a means of achieving this aim, or that it is a proportionate means of doing so.
The OSCR also rejected the charity’s arguments that its preferred criteria for adoption were fulfilling the requirement of adoption law in Scotland (section 14 of the 2007 Act), which required the adoption agency to take into account the religious persuasion of a child. In this respect, the OSCR found (at page 8 of its report):

Religious persuasion is only one factor among many which Section 14 of the 2007 Act says adoption agencies should take account of in order to safeguard and promote the welfare of the child in coming to a decision on adoption. Another factor which must be taken into account is the ‘value of a stable family unit’. Here however the charity has failed to recognise that a stable family unit is not necessarily only a married couple. The 2007 Act makes clear that unmarried couples, couples in civil partnerships or indeed single people may adopt. The charity is not complying with its statutory duty ... by its use of the preferred criteria and by its prioritising of religious persuasion above other relevant factors. It is not clear, in any case, that the children who are placed for adoption with parents approved by the charity are always or exclusively of a Roman Catholic persuasion.

The charity’s final argument was that its preferred criteria were in accordance with religious tradition and Roman Catholic doctrine. Whilst agreeing that the preferred criteria were in line with doctrine, the OCSR considered (at page 8 of its report):

...that religious belief alone cannot provide a lawful justification for discrimination on grounds of sexual orientation in the delivery of a public service such as the operation of an adoption agency.

Therefore, the charity exception did not apply because the operation of the preferred criteria was not a proportionate means of achieving a legitimate aim in furtherance of the charity’s purposes.

**Religious exception did not apply**

Schedule 23 of the 2010 Act provides an exception to specified Parts of the Act for organisations which have certain purposes relating to religion or belief. An organisation which has such a purpose is permitted to restrict access to participation in activities or the provision of goods or services on the basis of the protected characteristic of sexual orientation where it is necessary to do so:

a) to comply with the doctrine of the organisation, or
b) to avoid conflict with strongly held convictions of a significant number of a religion’s followers.

The charity took the view that the restrictions involved in the operation of the preferred criteria fell under this exception, since:

a) its purposes fell under one or all of the headings listed in the 2010 Act;
b) the preferred criteria comply with the doctrine of the Roman Catholic Church, of which they saw the charity as a part.

The OSCR agreed that the preferred criteria fell within the doctrine of the Roman Catholic Church, and that their application brought it potentially within the scope of the religious exception. The OSCR found, however (at page 9 of its report):

...whilst the religious exception may apply where organisations are conducting activities such as acts of worship or devotion, it is unlikely that it will apply where a religious organisation is providing services to the public or carrying out functions of a public nature. In terms of the relevant case law, religious belief by itself cannot justify discrimination on grounds of sexual
orientation when an organisation is providing a public facing service, such as the provision of a voluntary adoption agency, which is the charity’s function in terms of adoption law. Our view therefore is that given the nature of the public facing service provided by the charity they cannot rely upon the religious exception to justify their use of the preferred criteria in respect of sexual orientation.

Therefore, the religious exception under the Act did not apply to the charity. The OSCR concluded that the operation of the charity’s preferred criteria for adoption constituted unlawful discrimination in respect of same sex couples. The OSCR’s report said (at page 10):

This being the case, the prevention of access of same sex couples to the benefit that the charity provides in terms of assessment as potential adoptive parents is unduly restrictive. There is also disbenefit in that the operation of the preferred criteria necessarily means that persons in same sex couples who might be suitable adoptive parents and serve the best interests of children are simply not considered by the charity and may be dissuaded by such discrimination from entering the adoptive pool. We therefore consider that the charity places undue restriction on access to the benefit that it provides, and so fails the charity test.

The OSCR directed that the charity take steps to meet the charity test, as required under section 30(1)(a) of the Charities and Trustee Investment (Scotland) Act 2005.

(The first instance decision is available at http://www.oscr.org.uk/media/386066/2013-02-12_st_margaret_s_s33_report_updated_pdf.pdf)

**The review decision**

The charity’s review request set out a number of grounds challenging the OSCR’s decision, including:

a) that OSCR was in error in its application of the exceptions in the 2010 Act;
b) that the direction contravenes the charity’s rights to freedom of thought, conscience and religion under the European Convention on Human Rights (ECHR);
c) that adoption law requires adoption agencies to have regard to the religious background and persuasions of prospective adopters and adoptive children;
d) that OSCR had not considered the effect on other charitable adoption agencies of having dissociated themselves from the Roman Catholic Church.

OSCR found on review:

a) that the charity discriminated unlawfully, in breach of the Equality Act 2010;
b) that the charity discriminated directly on grounds of religion or belief and on the ground of sexual orientation;
c) that the exception provided for charities under the Equality Act 2010 did not apply to the charity or to the ways in which the charity discriminated;
d) that the ECHR rights in regard to religion did not apply in the case of the charity, which was not a church or a religious community, but rather an adoption agency;
e) that the exception provided for religious bodies under the Equality Act 2010 did not apply to the charity as its purposes did not fall within this exception.

The Review Panel found that the charity’s benefits to the community were substantial, but that these were outweighed by the ‘disbenefits’ which the application of its preferred criteria brought about.
Therefore, the charity failed the charity test. The charity has the right to appeal the decision to the Scottish Charities Appeal Panel.

2.2.4  TREVANION V WYANGALA COUNTRY CLUB LTD (NO 2) [2013] NSWADT 27 (NEW SOUTH WALES ADMINISTRATIVE DECISIONS TRIBUNAL, CHESTERMAN (DEPUTY PRESIDENT), KELLEGHAN, MCCLELLAND (MEMBERS), 5 FEBRUARY 2013)

This proceeding follows on from Trevanion v Wyangala Country Club Ltd [2012] NSWADT 257. The applicant, Trevanion, had operated a bistro at the Wyangala Country Club Ltd (the Club) under a written licence agreement (to operate the bistro), and an oral rental agreement (to occupy space within the Club). The licence agreement was terminated on the ground that there had been complaints about the food. The applicant contended that the true reason for the termination was his homosexuality. The applicant said that he had endured homosexual discrimination by two people employed by the Club as bar staff, as well as a group of about 13 other persons. He contended that the two bar staff had encouraged people to sign a petition about the food and service offered at the bistro. The Board of the Club terminated the licence agreement for the operation of the bistro in a letter dated 26 October 2012. The termination was to operate from 1 December 2012.

On 29 November 2012, the applicant sought an interim order from the Tribunal to be permitted to continue to operate the bistro until the full hearing was concluded. In a decision on 30 November 2012, the Tribunal said that this should be granted ‘because the loss to him in the short term outweighs any loss or prejudice to the Club’ (at [1] of that decision). The Tribunal also ordered that the hearing of the complaint be expedited, and indicated that the parties should request the President of the Anti-Discrimination Board (ADB) to refer the complaint formally to the Tribunal. This reference was made on 18 December 2012. The President’s Report described the complaint as ‘homosexuality discrimination in the provision of goods and services and accommodation’.

The orders sought by the applicant were that the licence agreement he had with the Club should be reinstated, that his rights under his rental agreement with the Club should be reinstated, and that he should be compensated for distress sustained on account of the termination of the licence agreement.

In dismissing the applicant’s complaint, the Tribunal considered evidence relating to the bistro’s menu and service. The menu was predominately Thai food, with a few ‘Aussie’ dishes, a kids’ menu and a dessert menu. The nature of the menu caused contention within the club, with the club apparently losing substantial business to a newly-opened steakhouse nearby. The applicant repeatedly showed reluctance to change the menu. Surveys were conducted (one mostly negative conducted by the Club and one mostly positive conducted by the applicant) and a petition presented about the poor food and service in the bistro.

Evidence was then considered concerning alleged homosexual discrimination directed towards the applicant, particularly by two of the bar staff of the Club. There was evidence of inappropriate epithets being directed towards the applicant by one bar staff member, but the motivation for these might have been personal animosity arising from a false allegation of theft against the other staff member, rather than homophobia per se. In any event, the Board was dissatisfied with the behaviour of the two bar staff in question and sought to terminate their services in the latter part of 2012.

The Tribunal considered the applicable law under the Anti-Discrimination Act 1977 (NSW) (the Act). The relevant sections were 4A (reasons for act done), 49ZG (what constitutes discrimination on the ground of homosexuality), 49ZQ (unlawful discrimination in relation to accommodation) and 53 (liability of employers).
On the applicable law of causation, the Tribunal said (at [28]):

The question a Tribunal should ask when addressing the causation element of direct discrimination is whether the person’s sex, race, disability, etc (including the extended definitions of those grounds) is at least one of the ‘real’, ‘genuine’ or ‘true’ reasons for the treatment. For that to be the case, that reason must have been a reason which, either alone or in combination with other reasons, was the true basis for the treatment. Depending on the circumstances, the motive and purpose of the alleged discriminator, as well as the effect on the aggrieved person, may all be relevant.

Was homosexuality a ground for the termination of the applicant’s licence agreement? The Board’s decision to terminate the licence agreement was by five votes to two. The Tribunal said that although there was evidence that the five Board members who voted for the termination of the licence agreement did have negative views about the applicant’s homosexuality, or at least homosexuality generally, there was not enough in the evidence given to draw an inference that this was the reason for the termination of the licence agreement (at [87]):

In declining to draw this inference, we take full account of two [things].... The first is that 'it is not enough that [an] inference is a mere possibility: it must be one of "probable connection"'. The second is that 'an inference cannot be made where more probable and innocent explanations are available on the evidence'. We interpret 'innocent' here to mean lacking any discriminatory element.

After a consideration of the available evidence, which demonstrated real issues arising from the nature of the menu, food and service at the bistro, the Tribunal concluded that the evidence did not show that the applicant’s homosexuality was 'at least one of the "real", "genuine" or "true" reasons' for the decision taken by any of the directors who may have expressed negative views about homosexuality generally to vote in favour of terminating the licence agreement. Therefore, the applicant’s complaint of direct discrimination on the ground of homosexuality, brought under sections 49ZG(1)(a) and 49ZQ(2) of the Act, was dismissed.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWADT/2013/27.html

Implications of this case

Direct discrimination occurs where one person is treated in a different (less favourable) manner from the manner in which another is or would be treated in comparable circumstances on the ground of some unacceptable consideration (such as sex or race). In these sorts of cases, the applicant bears the burden of proof. In civil cases, the strength of the evidence leading to proof on the balance of probabilities is crucial. In this case, the evidence presented was not strong enough to support the contentions raised by the applicant on the balance of probabilities.

2.2.5 EWEIDA AND ORS V THE UNITED KINGDOM [2013] ECHR (EUROPEAN COURT OF HUMAN RIGHTS, FOURTH SECTION, 15 JANUARY 2013)

This was an appeal to the European Court of Human Rights which combined four different applications into one hearing. All the applicants were Christians who alleged some form of discrimination against them because of their religion. The respondent was the United Kingdom (UK) as a member of the European Union (EU) and a signatory to its Conventions. There were two cases of particular interest amongst the four: those of the applicants Ladele and McFarlane.
Applicant Ladele

Ms Ladele, a practising Christian, had been employed by the London Borough of Islington (the Borough) as a registrar of births, deaths and marriages since 2002. The Borough had a ‘Dignity for All’ policy relating to equality and diversity which did not allow discrimination on the basis of age, gender, disability, faith, race, sexuality, nationality, income or health status.

As a registrar, Ms Ladele (the applicant), held her office under the aegis of the Registrar General, but was paid by the Borough. She was obliged to abide by the Borough’s policies. An issue arose with the passing of the Civil Partnership Act which came into force on 5 December 2005. This Act allowed for the registration of civil partnerships between two people of the same sex, and accorded such couples the same rights and obligations as a married couple. The Borough made all its registrars of births, deaths and marriages registrars of civil partnerships in December 2005. The Act did not require this, but rather provided that a sufficient number of such registrars be available. Moreover, other local authorities allowed those registrars with sincerely held religious beliefs to opt out of registration of civil partnerships.

At first, the applicant was able to make informal arrangements with colleagues to exchange work in such a way that she did not have to conduct civil partnership ceremonies. This led to a complaint by two colleagues in March 2006. The applicant was informed that she was in breach of the Borough’s Code of Conduct and equality policy. In 2007, homosexual colleagues added a complaint of victimisation because of the applicant’s refusal to carry out civil partnership ceremonies. A disciplinary hearing ensued after which the applicant was asked to sign a new job description requiring her to carry out civil partnership signings, but not ceremonies.

The applicant took the matter to the Employment Tribunal complaining of direct and indirect discrimination on the ground of religious belief and harassment. On 1 December 2007, a change in the law made the applicant an employee of the Borough, meaning the Borough would be in a position to dismiss her (if there were grounds for dismissal). She argued before the Employment Tribunal that dismissal would follow if she lost the case. On 3 July 2008, the Employment Tribunal upheld the applicant’s complaint of direct and indirect discrimination on the ground of religion and harassment. The Borough appealed to the Employment Appeal Tribunal, which reversed the decision of the Employment Tribunal. Ladele appealed to the Court of Appeal which, on 15 December 2009, upheld the decision of the Employment Appeal Tribunal. An application for leave to appeal to the Supreme Court of the UK was refused on 4 March 2010.

Applicant McFarlane

Mr McFarlane (the applicant) worked as a counsellor for Relate Avon Limited (Relate), part of the Relate Federation, a national private organisation which provides confidential sex therapy and relationship counselling. The applicant was a former elder of a large multicultural church in Bristol, and held deep and genuine beliefs, based on Biblical teaching, about the sinfulness of homosexual relationships.

As a counsellor, however, he had counselled lesbian couples with non-sexual problems without incident. In 2007, the applicant commenced Relate’s post-graduate diploma in psycho-sexual therapy. An issue arose about working with homosexual couples on sexual problems. Colleagues complained to the General Manager about the applicant’s unwillingness, on religious grounds, to counsel gay, lesbian and bisexual clients with sexual problems. Correspondence arose between the General Manager and the applicant which confirmed that the applicant had no difficulty counselling same sex couples generally, but that his views on sexual counselling were still evolving. The General Manager interpreted this
correspondence as a refusal to carry out psycho-sexual therapy with same sex couples and the applicant was suspended, pending a disciplinary hearing.

After further discussion and disciplinary proceedings, McFarlane was dismissed on 18 March 2008 on the ground that he could not comply with Relate’s policies. He lodged a claim with the Employment Tribunal claiming direct and indirect discrimination, unfair dismissal and wrongful dismissal. The Employment Tribunal dismissed the claims. He appealed to the Employment Appeal Tribunal which upheld the decision of the Employment Tribunal in dismissing the applicant’s claims. An application for leave to appeal to the Court of Appeal was refused (on 20 January 2010), in the light of its Ladele decision of 15 December 2009.

The European Court of Human Rights (ECHR) decision

The ECHR firstly reviewed the relevant domestic law, regulation 3 of the Employment Equality (Religion or Belief) Regulations 2003, and regulation 3 of the Equality Act (Sexual Orientation) Regulations 2007. They then considered the applicable EU law which was the EU Framework Directive for Equal Treatment in Employment and Occupation 2007/78/EC which underlay both sets of domestic regulations.

The UK argued that the applicants’ adherence to Judaeo-Christian sexual morality was not a manifestation of their religious belief, and so was not protected under Article 9 (with or without Article 14) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).

Article 9 of the Convention provides:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14 provides:

The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Ms Ladele argued that she had been discriminated against under both Articles. The ECHR said (at [104]–[107]):

The Court...agrees with the applicant’s contention that the local authority’s requirement that all registrars of births, marriages and deaths be designated also as civil partnership registrars had a particularly detrimental impact on her because of her religious beliefs. In order to determine whether the local authority’s decision not to make an exception for the applicant and others in her situation amounted to indirect discrimination in breach of Article 14, the Court must consider whether the policy pursued a legitimate aim and was proportionate.... [I]t is evident that the aim pursued by the local authority was legitimate.... It remains to be determined whether the means used to pursue this aim were proportionate. The Court takes into account that the consequences for the applicant were serious: given the strength of her
religious conviction, she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar and, ultimately, she lost her job. Furthermore, it cannot be said that, when she entered into her contract of employment, the applicant specifically waived her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement was introduced by her employer at a later date. On the other hand, however, the local authority’s policy aimed to secure the rights of others which are also protected under the Convention. The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights....

Under the circumstances, the ECHR did not think the employer or the UK tribunals and courts had gone beyond what was reasonable in striking a balance between competing rights. Therefore there was no violation of articles 9 or 14 in relation to Ms Ladele’s matter and she was unsuccessful.

In relation to Mr McFarlane, who also complained under both Article 9 and 14 of the Convention, the ECHR said (at [108]–[110]):

The Court accepts that Mr McFarlane’s objection was directly motivated by his orthodox Christian beliefs about marriage and sexual relationships, and holds that his refusal to undertake to counsel homosexual couples constituted a manifestation of his religion and belief. The State’s positive obligation under Article 9 required it to secure his rights under Article 9. It remains to be determined whether the State complied with this positive obligation and in particular whether a fair balance was struck between the competing interests at stake.... In making this assessment, the Court takes into account that the loss of his job was a severe sanction with grave consequences for the applicant. On the other hand, the applicant voluntarily enrolled on Relate’s post-graduate training programme in psycho-sexual counselling, knowing that Relate operated an Equal Opportunities Policy and that filtering of clients on the ground of sexual orientation would not be possible.... While the Court does not consider that an individual’s decision to enter into a contract of employment and to undertake responsibilities which he knows will have an impact on his freedom to manifest his religious belief is determinative of the question whether or not there been an interference with Article 9 rights, this is a matter to be weighed in the balance when assessing whether a fair balance was struck.... However, for the Court the most important factor to be taken into account is that the employer’s action was intended to secure the implementation of its policy of providing a service without discrimination.

The Court considered that the ‘margin of appreciation’ had not been exceeded in Mr McFarlane’s case – the balance between his rights and his employer’s interest in providing a service in accordance with the rights of its clients was appropriate. Therefore, he was unsuccessful in the ECHR.

In both cases, the applicants’ rights were infringed to some extent, but they were unsuccessful because a balance had to be struck between the competing rights involved, and the ECHR held that the UK was within the ‘margin of appreciation’ allowed to member states of the EU in applying the law as it had. In each case, the aim of the UK was legitimate, but the real issue was of proportionality: were the actions taken against the applicants proportionate in the circumstances? While the applicants were harmed, the ECHR said the actions were within a wide band of permissible actions to uphold the Convention.

The case may be viewed at:
http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#("respondent":["GBR"],"itemid":["001-115881"])
Implications of this case

This case was about balancing competing rights. In the UK, an employer must show that it has used a proportionate means to achieve a legitimate aim to avoid an accusation of discrimination against an employee. The ECHR agreed that the applicants had suffered a disadvantage, but the aims of each of the employers (the Borough, and the charity Relate) were to provide non-discriminatory services. This was a legitimate aim. Their response in refusing to accommodate the religious positions of the applicants (thus contradicting their principles) was a proportionate response. The lesson for charities and nonprofits is that policies about equality must be clear and legitimate, and communicated unambiguously to staff.

2.3 EMPLOYMENT AND WORKPLACE RELATIONS

2.3.1 FISHLEY V INCLUSION WORKS ASSOCIATION INC [2013] FWC 2104 (FAIR WORK COMMISSION, COMMISSIONER SPENCER, 21 JUNE 2013)

This was an unfair dismissal case. The applicant was employed by the respondent as a Community Development Worker from February 2010. From then until June 2012, the applicant stated he did not have any issues at work. The respondent dismissed the applicant on 23 November 2012, after he claimed to have been bullied and harassed at work from June 2012.

As the respondent had only eight employees at the time of the applicant’s employment the Small Business Fair Dismissal Code (the Code) applied. Section 385 of the Fair Work Act 2009 (Cth) (the Act) deals with dismissals which are harsh, unjust or unreasonable, and not consistent with the Code.

The respondent association submitted that the applicant’s use of the grievance and complaints process against several of his colleagues reasonably amounted to a vexatious and frivolous abuse of process and produced outcomes which caused discomfort to his colleagues. The respondent contended that some of the claims caused irrevocable damage to the working relationship between the applicant and his colleagues. In addition, the respondent submitted that the applicant acted contrary to reasonable directions and instructions given to him and failed to follow the respondent’s standing policies and procedures. Therefore, the respondent’s position was that its dismissal of the applicant was not unfair, that it correctly followed the law and internal policies and procedures, and applied procedural fairness in terminating the applicant’s employment.

The applicant had made accusations of bullying and undermining against three of his fellow employees from a total of seven other employees. The matters behind the claims of bullying involved issues about time off in lieu and leave, and various matters relating to behaviour in meetings and undermining of his position within the association. The respondent had appointed an independent consultant to investigate the applicant’s claims. The consultant found no basis for the applicant’s grievances.

Section 387(a) of the Act outlines criteria for considering harshness of dismissal. The Commission found that there was a valid reason for dismissal (at [73]):

...the Applicant had engaged in a grievance/complaint process against his colleagues. The range of these complaints by the Applicant could not be substantiated and undermined the working relationship. The series of complaints had the effect of destabilising these employment relationships and reducing the effectiveness of the small business organisation. Further, the actions of the Applicant were viewed to be vexatious in that he demonstrated a disregard for the instructions or directions given by his supervisors. He also preferred his own view of progressing matters contrary to the Respondent’s policies and procedures.
The applicant had been given proper notice of his dismissal and two weeks paid time to respond. He had not responded. This was a further valid reason for dismissal (at [78]). The dismissal was consistent with the Code. The process was transparent and the applicant was afforded natural justice. The Commission said (at [85]–[86]):

The Applicant deliberately contributed by way of his conduct in sending constant, lengthy, emails, behaving in an argumentative manner to other staff members and disregarding the directions of his employer, the standing of his superiors, in the knowledge that this was certain to cause aggravation and upset to his colleagues. There was a valid reason for the dismissal and the Applicant was afforded procedural fairness. The Applicant had made the employment relationship unworkable. The Applicant’s behaviour in his interpersonal employment interactions was disappointing, as all of the reports regarding his ‘community’ work with clients were very favourable. The report and his colleagues spoke of his passion for this work. Despite the issues that arose with his colleagues, the separate work of the Applicant with his clients was not criticised. It is hoped that given his devotion to this part of his work, he will gain further work in the ‘community’ sector.

The application was dismissed.

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/FWC/2013/2104.html

Implications of this case

This case showed that a small nonprofit organisation working on government funded projects, and without a human resources staff, could still proceed correctly under the fair work legislation which applies to all such bodies. Having followed the proper processes, and given adequate notice and time for response to the employee in question, there was no issue arising with unfair dismissal.

2.3.2 KATSALIS V GYMPIE AND DISTRICT RSL MEMORIAL AND CITIZENS CLUB [2013] FWC 2830 (FAIR WORK COMMISSION, SENIOR DEPUTY PRESIDENT RICHARDS, 21 MAY 2013)

This was an application concerning unfair dismissal from the respondent club. Katsalis, the applicant, had been an employee of the Gympie and District RSL Memorial and Citizens Club (the club) since July 2009. On 6 November 2012, the applicant made an application under section 394 of the Fair Work Act 2009 (Cth) (the Act) seeking an unfair dismissal remedy in respect of the decision by the club to dismiss her from its employment on 25 October 2012.

The alleged ground for the applicant’s dismissal was unreliability in attending her rostered shifts. The apparent facts underlying her non-attendance at some shifts involved an incident of domestic violence from her former boyfriend which resulted in injuries and pain. The head chef at the club happened to share accommodation with her former boyfriend.

The applicant was dismissed by the General Manager, who was also responsible for human resource management at the club. It emerged that there had been several instances when the applicant had been late for work over the preceding years, which was contrary to the club’s policies.

The relevant legislative provision was section 387 of the Act (criteria for considering harshness):

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:
(a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
(b) whether the person was notified of that reason; and
(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
(f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
(h) any other matters that FWA considers relevant.

Was there a valid reason for the dismissal under section 387(a)? The Commission found that there was not. The head chef’s evidence was unreliable at best, and he had misinformed the General Manager about the applicant’s situation. The General Manager had thus acted upon unreliable (or possibly false) information.

The only relevant part of section 387 was section 387(h). The applicant had received warnings before about tardiness, non-attendance at shifts or performance of her duties. However, she was a single mother with a dependent child, and had been unemployed since her dismissal. She contended that the effect of the dismissal was unduly harsh. The Commission said (at [80]–[82]):

Dismissals mostly by definition will always have a harsh and disruptive effect on the person dismissed (be they young or much older, single or married, childless or with numerous dependents, long serving or short serving employees, or between the seemingly psychologically resilient and the less psychologically resilient employee). Indeed, for such judgments in these respects to be more than expressions of empathy or speculation would involve a wholly additional avenue of inquiry, with a longitudinal element as well. It seems arguable that representations of the notion of harshness that extend beyond the manner in which the dismissal was given effect, such as where a summary dismissal is disproportionate to the conduct alleged, require careful weighting. The authorities nonetheless appear to indicate that harshness may reside in the effect of a dismissal on an employee, given their personal circumstances (however made out and over what period of time). But equally, that alone is not determinative of the wider finding (as to whether the dismissal itself was harsh, unjust or unreasonable)....

The Commission concluded that, in all the circumstances, the applicant’s dismissal was unduly harsh, unjust and unreasonable. The remedy was reinstatement to her position, with all pay and superannuation restored for the time period that she was not in employment.

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/FWC/2013/2830.html

**Implications of this case**

This case demonstrates that a nonprofit enterprise must ensure that the facts of allegations about an employee’s conduct are thoroughly investigated before dismissal is contemplated. As the Commission put it (at [90]):
It is the case, rather, that [the General Manager] was misinformed (to put it at its lowest) as to the Applicant’s conduct. In saying as much, arguably though [the General Manager] could have tested [the head chef’s] evidentiary claims more thoroughly than he did.

Moreover, although the applicant had some complaints about her work on her record, these were not enough to persuade the Commission not to exercise its discretion on her behalf. They were not directly relevant (at [93]–[94]):

Each case turns on its facts, of course, and reliability can sometimes be a critical factor in sustaining the employment relationship. But here, whilst the Respondent had expressed its concerns to the Applicant about her lapses in attendance at points (and for which the Applicant had tenable explanations I should add), I do not discern in the circumstances that this is enough to cause me to not reinstate the Applicant to the position to which she had been employed immediately before the dismissal. Moreover, and importantly, the Applicant’s conduct in this particular instance was not contributory....

2.3.3 RAMOS V GOOD SAMARITAN INDUSTRIES [2013] FCA 30 (FEDERAL COURT OF AUSTRALIA, BARKER J, 30 JANUARY 2013)

This was an appeal from the Federal Magistrates Court of Australia concerning section 340(1) of the Fair Work Act 2009 (Cth) (the Act). The appellant, an employee of the defendant, alleged contravention of that section. The respondent is an agency of the Uniting Church in Australia, and sells recycled clothing and other goods to consumers in Western Australia.

The appellant commenced full time work with the respondent as a store manager on 22 June 2009. He was employed under the Good Samaritan Industries Union Collective Workplace Agreement 2007 (the Agreement) and an employment contract which he signed. The duty statement for the position described the appellant’s role as:

...[t]o manage a [Good Samaritan Industries] retail outlet which exemplifies excellence in customer service, product merchandising, reach sales budgets and manage cost structures set for the Shop and .... To be committed to developing a cohesive and effective team of staff – by the provision of training and staff development opportunities for all staff and .... To provide employment and training opportunities for people with disabilities.

On 30 March 2010, a store managers’ meeting was held at the respondent’s head office in Western Australia. From 1pm to 4pm that day a session was held which was titled ‘Professional development: Conflict resolution training to be conducted by facilitators from “Solutions for Conflict”’. This involved a role play by the store managers in attendance. During the role play, the divisional manager of commercial operations (Ms Cameron) interjected when the appellant called someone ‘darl’.

This, and some issues relating to criticism about the sales figures for the store managed by the appellant on 31 March 2010, led the appellant to send a letter of complaint to the human resources manager of the respondent. The appellant said that he had been ‘mistreated’ by both Ms Cameron and the retail operations manager for North Perth (Mr Gordon) in an ‘unjust and unsatisfactory manner’ during the meetings on 30 and 31 March 2010, that they had shown him a ‘total lack of respect’, and that he was highly offended.

His complaint was responded to with a meeting and a written response from the company’s chief executive officer (CEO). In his written response to this letter, the appellant accepted that the behaviour complained of at the training session had been dealt with, but strongly disagreed with the CEO’s response to the issues concerning the appellant’s performance as a store manager. After a further
meeting with the CEO on 29 April 2010, the CEO wrote to the appellant to say that he would be transferred to another store at Armadale in WA.

Further issues then arose relating to a claim for an amount outstanding ($2,759) for overtime worked, claims for vehicle use by the appellant, a banking shortfall of $320.75 from his store, and the lack of a medical certificate for time taken off work. Moreover, the appellant indicated that he did not want to be transferred to another store. The appellant indicated to the CEO that he thought he was being treated unfairly because he had made a complaint.

Further complaints against the appellant emerged on 3 and 4 June 2010, including that he:

- used profane language to staff in front of other staff;
- shouted at staff;
- spent an excessive amount of time in his office attending to personal phone calls and other business;
- delegated too much work that was his responsibility to his staff; and
- made staff feel humiliated, pressured and intimidated.

These allegations were investigated by another senior employee who had not previously been in contact with the appellant or his store and its employees. She concluded that the first two allegations were supported, but the others were not supported by sufficient evidence.

This report resulted in the CEO sending a final warning letter to the appellant on 16 June 2010 regarding breaches of the respondent’s Code of Conduct. The appellant went on sick leave for two weeks on 17 June 2010. After correspondence between the CEO and the appellant about the nature of the leave being taken and whether it was with or without pay, the appellant resigned on 22 July 2010. The resignation was accepted on 23 July 2010, with four weeks pay granted in lieu of notice.

On 29 September 2010, the appellant filed an application in the Fair Work Division of the Federal Magistrates Court seeking relief under section 340(1) of the Act alleging ‘adverse action’ against him, including his constructive dismissal from his employment. The appellant sought compensation and pecuniary penalties. The Federal Magistrates Court dismissed that proceeding, finding that the respondent did not contravene the Act: see *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341.

Section 340(1) provides that a person must not take ‘adverse action’ against another person by reason of or on account of certain rights or for certain purposes, namely:

(a) because the other person:
   (i) has a workplace right; or
   (ii) has, or has not, exercised a workplace right; or
   (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

The meaning of ‘adverse action’ is set out in the table in section 342. By section 342(1), item 1, adverse action is taken by an employer against an employee if the employer:

(a) dismisses the employee; or
(b) injures the employee in his or her employment; or
(c) alters the position of the employee to the employee’s prejudice; or
(d) discriminates between the employee and other employees of the employer.

After a consideration of the facts of the case, and of the finding by the Federal Magistrate, His Honour said that (at [114]):

In my view, whatever be the correct characterisation of each of the actions complained of following the complaint, contravention of s 340(1) cannot be made out because none of the alleged adverse actions is shown to have occurred by reason of or on account of the existence or exercise of the appellant’s workplace right to make a complaint. In terms of s 340(1)(a)(i) none of the alleged adverse actions can be shown to have occurred ‘because’ the appellant ‘has a workplace right’, namely the right to make a complaint or inquiry, being the workplace right defined in s 341(1)(c)(iii).

There was no doubt that the appellant had a workplace right under section 341(1)(c)(ii) – the right to make a complaint. But there was doubt as to whether there had been any adverse action taken in response to his exercising this right. The appellant alleged constructive dismissal, which would be an ‘adverse’ action. However, His Honour said (at [116]):

But the fact of constructive dismissal, if it can be established, does not establish contravention of s 340(1). It must additionally be shown that the constructive dismissal was by reason of, or on account of, the rights there listed – which in the present case means that the appellant needs to establish that his alleged constructive dismissal occurred because he had the workplace right to make a complaint in relation to his employment.

The appellant contended that he had been ‘squeezed out’ of his employment by the various responses to his original complaint over time, and that this left him with no alternative but to resign, and this was a form of constructive dismissal. The respondent’s contention was that there were real concerns about the work performance of the appellant. On the issues of constructive dismissal, His honour held that (at [136]–[137]):

Ultimately it is claimed that the appellant felt, in light of his treatment since he made his complaint in early April 2010, that he was being forced to quit. But his subjective assessment in that regard cannot be the benchmark for the determination of whether he was constructively dismissed. It is by no means clear that he had no other option but to quit his employment at that point. He could well have returned to work and continued to negotiate and deal with his employment situation through discussions with Mr Knowles [the CEO]. Indeed, the correspondence shows that Mr Knowles was expecting the appellant to resume work and to engage in such discussions with him. In all the circumstances, for the reasons given by the Federal Magistrate, it cannot reasonably be concluded that the appellant was constructively dismissed from his employment as store manager at the Dianella store and it has not been shown that his Honour erred in coming to that conclusion.

In relation to adverse action under the Act, His Honour said that (at [138]):

Further, it cannot be said that any of the particular alleged adverse actions were by reason of, or on account of, the existence or exercise of the appellant’s right to make a complaint to the respondent about his employment. In my view, it was open to the Federal Magistrate to find as he did that all the alleged adverse actions and the ultimate decision of the appellant to resign from his employment arose out of legitimate management and workplace issues to which the respondent was entitled, if not obliged, to respond. Having reviewed all the evidence and the
sequence of events, I consider his Honour’s findings were open to him and no appealable error has been identified.

Therefore, the appeal was dismissed.

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/FCA/2013/30.html

Implications of this case

The primary claims made by the appellant in this case arose under Pt 3-1 (General protections) of the Fair Work Act 2009 (Cth). This case turned on the use of the word ‘because’ in section 340: whether the alleged adverse action occurred because of one of the proscribed reasons listed in section 340(1)(a) and (b). His Honour held that it did not. There were legitimate management reasons for the action taken by the respondent. The relevant workplace right of the appellant (to complain) was not an operative factor in the taking of any of the action alleged to be ‘adverse action’ as defined in the Act. Thus, those actions were not the operative factor that led to the appellant deciding to resign his position.

2.3.4 CABRA-VALE EX-ACTIVE SERVICEMEN’S CLUB LTD V THOMPSON [2013] NSWWCCPD 49 (WORKERS COMPENSATION COMMISSION OF NEW SOUTH WALES (PRESIDENTIAL), DEPUTY PRESIDENT ROCHE, 26 SEPTEMBER 2013)

This was an appeal from a decision of an arbitrator. The issue was the nature of a ‘worker’ for the purposes of workers compensation law in New South Wales. A worker who has received an injury is entitled to receive compensation from the worker’s employer in accordance with section 9 of the Workers Compensation Act 1987 (NSW). The term ‘worker’ is defined in section 4 of the Workplace Injury Management and Workers Compensation Act 1998 (NSW) (the 1998 Act) to mean:

...a person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing).

The issue in this case was whether the appellant’s (the Club’s) pension officer, who was also one of the appellant’s directors, was a ‘worker’ under the relevant legislation when he fell at the appellant’s premises injuring his right shoulder and back on 25 April 2008.

The respondent had been elected a director of the appellant in 1996, and then in every year thereafter. In 2000, the Club’s board appointed Mr Thompson as its pension officer to act on behalf of war veterans in their dealings with the Department of Veterans’ Affairs (the Department) and to advise members about obtaining information from local authorities and the Department. That appointment was renewed each year and was current at the date of Mr Thompson’s injury. As the pension officer, Mr Thompson would meet members at an office or room made available by the Club, or visit them at their home. He would interview the members, copy documents, assess their needs, provide advice and complete forms on their behalf. He kept files of the members’ applications, which were stored at the Club. He received training for the position by completing two week-long courses with the Department.

However, the respondent did not receive a salary or wages, but rather two honoraria for his two positions within the appellant:

1. As a director, he received an honorarium of $3,000 per annum, later increased to $3,500.
2. As pension officer, he received an honorarium of $2,500 per annum.
It was the Club’s position that the respondent was not employed by the Club. The reasons advanced for this contention were:

- The position of pension officer was ‘autonomous’ in that the respondent did not have to report to anyone at the Club;
- The respondent did not work any set or regular hours;
- The two honoraria were paid without the submission of any invoice, or the deduction of any tax;
- The two honoraria were not based on hours worked or any position description;
- No superannuation was paid on behalf of the respondent;
- The Club provided no tools of trade or vehicle – everything used by the respondent (e.g. his car) was his own property, although his travelling expenses were reimbursed;
- The Club had no power or control over the respondent, and provided no supervision of his activities;
- He was not appraised, reviewed or held accountable for his activities as pension officer;
- He used a ‘communal room’ at the Club for both directors’ meetings and his work as the pension officer;
- He received no form of leave (e.g. sick leave, annual leave, long service leave) from the Club;
- He did not identify as a Club employee (e.g. wear a Club uniform) during his activities as pension officer, although he had a Club uniform which he wore at formal occasions as a director.

The Club’s insurer disputed liability on the ground that the respondent was not a worker within the meaning of that term in section 4 of the 1998 Act and therefore had no entitlement to compensation. The basis for this assertion was that the respondent was a senior director of the Club and his position was an honorary one. The insurer contended that there was no contract of employment between the respondent and the Club and any relationship created was not with the intention of creating a master and servant relationship. Nevertheless, the arbitrator determined that Mr Thompson was injured in the course of his employment.

On appeal, the Deputy President said that there were four essential features of a contract of employment:

(a) there can be no employment without a contract;
(b) the contract must involve work done by a person in performance of a contractual obligation to a second person;
(c) there must be a wage or other remuneration, otherwise there will be no consideration; and
(d) there must be an obligation on one party to provide, and on the other party to undertake, work.

The Deputy President held that (at [33]–[34]):

Applying the above principles to the present matter, the Arbiter erred in finding that the Club made a contract of employment with Mr Thompson. As [the Club] submitted, there is no evidence that Mr Thompson undertook the duties as the pension officer in return for payment. There was no work done by Mr Thompson in performance of a contractual obligation to the Club. The very essence of a contract of service, namely, the obligation on one party to provide, and on the other party to undertake, work, is missing in the present matter. Mr Thompson had no obligation to perform the duties of the pension officer. His evidence was that he was
‘appointed’ as the pension officer in early 2000. There is no evidence that he accepted that position in return for a promise of remuneration or that he had any obligation to perform activities of a pension officer.

The honorarium paid to the respondent in his role as pension officer was ‘a voluntary payment or a gift’ (at [38]). It was not a payment made under a contractual obligation.

The Deputy President went on to consider whether, if there had been a payment under a contract, would the contract have been one of service? The key issue in that consideration is the degree of control over the person doing the work. The Deputy President held that there was no evidence of control over the respondent by the Club (at [48]–[49]):

Not one of the usual features of a contract of employment is present in this case. I refer, in particular, in addition to the lack of control, to the following:

(a) the lack of any fixed or regular hours;
(b) the lack of any right in the Club to dismiss or suspend Mr Thompson;
(c) the lack of any regular remuneration that related to or was commensurate with the duties performed...;
(d) no uniform was worn while acting as the pension officer;
(e) the lack of any obligation on Mr Thompson to do the activity;
(f) the absence of tax deductions or superannuation contributions, and
(g) the absence of leave entitlements.

While no one matter is determinative, these matters, taken together, and ‘consider[ing] the whole of the circumstances of the relationship’ (Connelly at 414), point strongly to Mr Thompson not being a worker.

Therefore, there was no contract of service involved in the respondent’s activity within the Club, and there was no entitlement to workers compensation.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWWCCPD/2013/49.html

Implications of this case

This case dealt with the sometimes vexed issue of the position of volunteers in nonprofit organisations. From a taxation point of view, a nonprofit organisation needs to determine whether those who do work for it are employees, independent contractors or volunteers as this may affect the tax and superannuation treatment of transactions between the organisation and the worker. Although the Club paid the respondent two honoraria, it had no legal obligation to do so. Thus there were no contractual (and therefore legal) relations between the two parties, and the respondent was not entitled to worker’s compensation under the legislation in New South Wales.

2.4 INSOLVENCY AND WINDING UP

2.4.1 RE ASSOCIATION FOR VISUAL IMPAIRMENT, THE HOMELESS AND THE DESTITUTE INC. (IN LIQ) [2013] VSC 673 (SUPREME COURT OF VICTORIA, FERGUSON J, 13 DECEMBER 2013)

The Association for Visual Impairment the Homeless and the Destitute Inc (the Association) was purportedly set up as a charitable organisation. The purported objects of the Association included promoting the welfare of persons who experienced blindness. The Association was also to use the net
proceeds from any subdivision of land acquired, or part of such land, to provide shelter or occupation for homeless or destitute persons as a refuge.

On 29 June 1999, Ms Lois Stewart agreed to transfer two properties at Niddrie (the Niddrie land) to the Association for $450,000. However, no money was paid to Ms Stewart at any stage. Under the terms of the agreement, Ms Stewart was entitled to repurchase the Niddrie land for $450,000 within 10 years. Other land was purchased by the Association at Bacchus Marsh, and a scheme for subdivision and sale of 109 lots off the plan was instigated. In mid 2006, freezing orders were made against the Association on the application of the Deputy Commissioner of Taxation and another person.

The Association was wound up in mid-2007 and liquidators were appointed. The liquidators disclaimed 31 land contracts in the subdivision plan. Those aggrieved by the disclaimer have lodged proofs of debt in accordance with the usual practice. In this case, the liquidators sought directions in relation to two matters:

1. whether they were entitled to reject the lodged proofs of debt, or whether they would be justified in conducting the winding up of the Association by rejecting one such lodged proof of debt;
2. whether the Association held the Niddrie land on a presumed resulting trust for Ms Stewart as the sole beneficiary of the trust, or would be justified in conducting the winding up of the Association on the basis that such a trust existed.

The liquidators’ application was made pursuant to section 479(3) of the Corporations Act 2001 (Cth) (the Act). That section provides that a liquidator may apply to the court for directions in relation to any matter arising under the winding up. Her Honour said that it was clear, on the basis of authority, that the court had power to make the directions sought by the liquidators in this proceeding. The question was rather whether the Court ought to exercise that power as a matter of discretion.

Her Honour held that she could make directions as to the first issue but not the second. In relation to the first issue, she held that there should be no rejection of the proof of debt in question. Therefore, the liquidators could not proceed to full liquidation at this time. They must admit the proofs of debt, estimate the losses suffered, and proceed to further court action from there.

On the second matter, no directions were issued by Her Honour. There were complex legal principles involved, and evidence which needed to be tested in court. The court could not sanction the transfer of the Niddrie land to Ms Stewart for no consideration until the facts had been thoroughly canvassed.


Implications of this case

The association in this case was wound up in mid-2007 and matters are still being worked out. This case shows that liquidation of an association can be as complex as that of a corporation. Indeed, the same rules apply. Although directions relating to trust matters have been sanctioned by the High Court (see e.g. Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar [2008] HCA 42), this was not a case which allowed that to happen. Therefore, although the liquidators were anxious to proceed with the winding up, there were numerous matters still to be resolved in this case.
2.4.2 IN THE MATTER OF EMPLOYEES OF BHP MUTUAL BENEFITS FUND [2013]
NSWSC 1497 (SUPREME COURT OF NEW SOUTH WALES, WINDEYER AJ, 15 OCTOBER 2013)

This case concerned the winding up of an employees’ mutual fund which was an unincorporated body. The ‘Employees of Australian Iron and Steel Limited Mutual Benefits Fund’ (the Fund) was apparently established in about 1935. Several versions of its Rules were in evidence, the earliest an incomplete version from 1952. It became apparent during the case that there was no power in the Rules for them to be amended, though they purportedly had been amended several times over the years. There remained only one sole manager of the Fund because no-one else remained alive, or could be found, to manage it. There was no suggestion that the Fund had not been managed appropriately in all the circumstances, and His Honour held that there should be no breach of trust involved.

Was the Fund a charitable trust or a private non-charitable fund? Both the Australian Taxation Office and the NSW Attorney-General took the view that the Fund was not charitable. However, the 1992 version of the Rules contained the following at Rule 17:

In the event of the Fund being dissolved or wound-up the amount which remains after such dissolution or winding-up and after the satisfaction of all debts and liabilities shall not be distributed amongst the subscribers but shall be paid to a charitable institution or organisation or fund with similar objectives selected by the Committee.

There are at present about 1,050 fund members on the books but it was apparent in evidence that a number of those ‘members’ were dead. In the past 14 years there have been fewer than 100 claims on the Fund, with 23 claims in the past 3 years. Audited accounts for the year to 30 June 2013 showed the Fund had net assets of $635,620. These assets include monies in bank accounts of about $124,000 and share holdings of about $508,000. Upon advertisement of the proposed winding up of the Fund, 232 claims were received from members.

Could the Fund be wound up under the provisions of Part 5.7 (Winding-Up) of the Corporations Act 2001 (Cth) (the Act)? This required that the Fund be a ‘Part 5.7 body’. Under the definition in section 9 of the Act, a ‘Part 5.7 body’ means in part:

...(c) a partnership, association or other body (whether a body corporate or not) that consists of more than 5 members and that is not a registrable body.

The Fund was held not to be a ‘registrable body’ as that term is defined in section 9 of the Act, and it had more than five members. Thus it was a ‘body’. In a somewhat circular definition, ‘body’ is defined in the Act to mean ‘a body corporate or an unincorporated body and includes, for example, a society or association’. Despite this circularity, His Honour held that the Fund was a ‘body’ for the purposes of Part 5.7. Therefore, it could be ordered to be wound up, if it was just and equitable to do so. His Honour said that the situation was similar to a deadlock (at [28]). The Fund could not be administered in a proper way, and there were no persons available to manage it. There was no power in the Rules to alter the Rules, so that there had been invalid alterations. The Fund proceeds should not be distributed to charity. The Fund should be wound up and distributed in equal shares to the members (at [30]):

In circumstances which are based in contract, as is the position with members bound by the Rules of the Fund in question here, equal distribution is appropriate. One reason for this is that had any payments been made on behalf of the deceased member those amounts were fixed by the Committee: length of membership did not determine the sum payable; another reason is the great difficulty in establishing the actual amounts contributed by any particular member;
and the third reason is that length of membership and amounts of contributions are really irrelevant for the purposes of the Fund and the interests of the beneficiaries in the Fund.

The Fund was ordered to be wound up under section 583(c)(ii) of the Act, with the court’s order as to distribution made binding on the liquidator.


2.4.3 **ANANDA MARGA PRACARAKA SAMGHA LTD V TOMAR (NO 7) [2013] FCA 863**

(FEDERAL COURT OF AUSTRALIA, DODDS-STREETON J, 27 AUGUST 2013)

(See also Ananda Marga Pracaraka Samgha v Tomar (No 6) below: case note 2.5.4)

This case is part of long-running litigation, and followed on from Ananda Marga Pracaraka Samgha Ltd v Tomar (No 6) [2013] FCA 284 (Ananda Marga No 6). In this proceeding, the application concerned whether Ananda Marga Pracaraka Samgha Ltd (the company) should be wound up on the just and equitable ground in section 461(k) of the Corporations Act 2001 (Cth) (the Act).

The company is a company limited by guarantee incorporated in 1986, which has, as a principal object ‘to propagate the philosophy, the ideals and practice of Ananda Marga which is an autonomous religion, faith and social system’. It was common ground that the company has substantial assets (with an estimated value of approximately $20 million) and an annual income of about $1 million. It engages in charitable activities and conducts a substantial business enterprise, including a number of schools, yoga and meditation courses, festivals and retreats. It sponsors visa applications by Ananda Marga monks and nuns. It is a recipient of government grants and charitable donations and has considerable outgoings, including the payment of teachers’ salaries, workers’ compensation, public liability insurance and mortgage instalments.

The parties to the case were in dispute over the identity of the members and directors, the construction of the constitution and the control and future disposition of the first plaintiff. The litigation had at its root the religious differences which had emerged within the Ananda Marga movement about 10 years ago. Thus, despite the apparent corporate law issues involved, there was also a religious dimension in this case.

In the earlier decision, Ananda Marga (No 6), the defendants submitted that if they were unsuccessful in their contentions on membership and oppression (which they were), the company should be wound up pursuant to section 461(1)(k) of the Act. In support of an order for winding up under section 461(1)(k), the defendants relied on numerous ongoing failures by the company and its directors to comply with the requirements of the Act which had emerged from the evidence, including the failure to keep an updated and accurate members’ register, the failure consistently to take or preserve minutes of meetings, the signing of returns to ASIC containing inaccuracies by the directors, and the failure to hold annual general meetings (AGMs) as and when required.

Her Honour found that these contentions were true. There had been no properly constituted AGM for at least 10 years, because of lack of proper notice. Accounts were seldom considered at the AGMs which were held, and directors’ reports were never considered. The defendants submitted that the company should be wound up because it was unworkable, its committee (board) was ‘bifurcated’, and its substratum had failed.

However, Her Honour had held at the end of the earlier decision that the situation was not unworkable. The committee had previously functioned quite well, with decisions being made mostly unanimously. There were no entrenched factions at work, and no apparent deadlock within the board. Therefore,
there were no immediate grounds at the time for winding up the company under section 461(1)(k) (the just and equitable ground). However, Her Honour deferred a final decision on this issue, on the basis that there were still some details to be determined, for which she ordered an expert report to be prepared.

In this application, Her Honour considered the expert report which was prepared by Ferrier Hodgson. It found that the directors had taken sufficient measures and procedures to ensure future compliance with statutory obligations and requirements in respect of keeping books and records, financial reports, directors’ reports, and minutes of meetings. The directors had also complied sufficiently with audit and lodging requirements. The report concluded (at [140] of the report, quoted at [13] of the case) that:

Based upon the current measures undertaken and those planned as documented, in my view, [the company] and the directors have taken sufficient measures and procedures that will assist in achieving an appropriate standard of governance going forward.

Her Honour was satisfied that this report supported her previous finding that the company should not be wound up on the just and equitable ground (at [14]):

I was satisfied that on the basis of the matters and opinions contained in [the] report that the non-compliances or contraventions that occurred during the relevant period were few in number, satisfactorily explained, appropriately addressed and/or not of a character which warranted winding up on the just and equitable ground. Further, the company had instituted appropriate and adequate measures in relation to staffing and training to ensure the future awareness of and compliance with the obligations of the company and its officers. I concluded that (as was common ground) there was no basis to order that the company be wound up on the just and equitable ground pursuant to s 461(1)(k) of the Act.

This judgement also included a costs order. As the defendants had been wholly unsuccessful in their case, costs were ordered against them.

The case may be viewed at: [http://www.austlii.edu.au/au/cases/cth/FCA/2013/863.html](http://www.austlii.edu.au/au/cases/cth/FCA/2013/863.html)

2.4.4 CORREA V WHITTINGHAM [2013] NSWCA 263 (COURT OF APPEAL OF NEW SOUTH WALES, BARRETT, GLEESON, TOBIAS JJA, 15 AUGUST 2013)

This appeal was part of extensive litigation relating to the external administration of the Spanish Club Ltd (the Club) in New South Wales. The Club was at all relevant times a company limited by guarantee, and a registered club under the Registered Clubs Act 1976 (NSW). At some time between 14 November 2008 and 17 November 2008, Mr Whittingham was appointed, or purportedly appointed, as voluntary administrator of the Club by a resolution passed, or purportedly passed, by the Club's directors under section 436A of the Corporations Act 2001 (Cth) (the Act).

At first instance, the date on which the appointment took effect and the validity of the appointment were in issue. Prior to the purported appointment of the administrator there had been dissension among club members and directors. Mr Whittingham had a meeting with one director at which various matters were disclosed to him such as that the club was trading at a loss, and that creditors were unpaid. He recommended voluntary administration. Documents which purported to appoint the administrator were exchanged, but there was some uncertainty whether these were in fact representing a resolution of all four of the directors of the club. The club’s constitution required seven directors, with a quorum of four. The appointment of an administrator under section 436A of the Act requires the board to have resolved to the effect that, in the opinion of the directors voting for the resolution, the
company is insolvent or likely to become insolvent at a future time. The formation of such an opinion is a precondition to the valid exercise of the power to appoint an administrator.

Although there was contention surrounding the appointment of an administrator from the point of view of the company, the voluntary administration went ahead. Because voluntary administration is a process controlled by the creditors, Mr Whittingham went on to formulate a deed of company arrangement under the Act, and to become the deed administrator. Real property belonging to the Club was sold.

At first instance, the plaintiffs had sought a declaration that Mr Whittingham was not validly appointed as voluntary administrator and consequently was not validly appointed as deed administrator of the Club and was a trespasser to the Club's property and assets. That declaration was sought at general law and not under section 447G of the Act which confers power on the Court to make such declarations in respect of an administration. As the administrator had allegedly not been validly appointed at any time during the administration process, the plaintiffs contended that Mr Whittingham should not be entitled to recover his fees and expenses of acting as administrator and deed administrator and should be required to disgorge the fees and expenses which have already been paid to him. The plaintiffs' submissions indicated that the primary foundation for that claim was their contention that Mr Whittingham was not validly appointed and that any defect in his appointment should not be cured under section 447A or section 1322 of the Act.

His Honour held at first instance that, although Mr Whittingham should probably have made further enquiries of the other directors, there was no impediment to his appointment, and that it was not invalid. Curative orders were available under section 447A of the Act. Therefore, pursuant to a resolution made under section 436A of the Act, the appointment of the administrator was valid from the day he consented to act as an administrator, which was 17 November 2008.

The other bases raised by the plaintiffs were also dismissed by His Honour at first instance. These included that although His Honour found that the administrator had not obtained consent to his appointment under section 41 of the Registered Clubs Act until 11 days after his appointment, that section did not invalidate the appointment of an administrator where such consent was in fact given, albeit not prior to the appointment. His Honour gave curative orders to that effect under section 447A of the Act.

Allowing the appeal, the Court of Appeal held that the appointment was invalid, because of the contravention of section 41 of the Registered Clubs Act. This meant the respondent was not capable of being appointed to act in the capacity of voluntary administrator of the Club, or of acting as such voluntary administrator. This defect in the administrator’s appointment could not be cured by section 447A of the Act. The Court said on this point (at [103]–[105]):

Firstly, whilst the powers under s 447A are wide, they are not entirely without limit. In particular, s 447A is not a general power standing apart from the scheme found in Pt 5.3A of the Corporations Act: see Australasian Memory Pty Ltd v Brien at 280 [20] and 281 [24]. Secondly, s 447A(1) speaks of orders about how 'this Part' is to operate in relation to a particular company. The reference ‘this Part’ is to be understood as a reference to each of the provisions in it.... Clearly, s 41 of the Registered Clubs Act is not a provision contained in Pt 5.3A. Thus, there is no power under s 447A of the Corporations Act to validate the invalidity of an administrator’s appointment arising under s 41 since the former section is directed to how Pt 5.3A of the Corporations Act operates in relation to a company, not the operation of separate State or Territory legislation. The conclusion that there is no power under s 447A to
validate an invalidity under s 41 of the Registered Clubs Act means that the appeal must be allowed, the declaration and orders of the primary judge be set aside and the proceedings remitted to the Court below to determine the respondent's quantum meruit claim in relation to his remuneration and expenses, which was not dealt with by the primary judge.

This disposed of the appeal in the appellants’ favour. However, other issues were considered in the judgement ‘if the above conclusions are wrong’ (at [106]). This seems to indicate that there may be a further appeal. These issues were:

- Reliance on the statutory assumptions in sections 128 and 129 of the Act

At first instance, the administrator relied on the application of the ‘indoor management rule’, a legal principle that a person dealing with a company can rely on the internal arrangements in the company having been properly constituted. This rule is now contained in sections 128 and 129 of the Act. His Honour at first instance held that this reliance was appropriate (at [59]–[60]). On appeal, the Court of Appeal agreed with this conclusion, so that this part of the appeal was not successful.

- No resolution of insolvency under section 436A of the Act

The appellants contended that there had been no proper resolution of insolvency as required under the Act. This ground of appeal was held not to be made out because the appellants had proceeded on an erroneous reversal of the onus of proof.

- Failure to consent to appointment under section 448A

The appellants submitted below and on appeal that the administrator’s written consent to act as administrator was given after the time that Mr Whittingham had commenced to act as administrator of the Club, so that he was invalidly appointed. At first instance, this was said to be subject to curative orders under section 447A, with which the Court of Appeal agreed. This element of the appeal was not successful.

All other grounds of appeal being rejected, it was held that (at [299]–[300]):

The challenge to the primary judge’s finding that Mr Whittingham was validly appointed administrator of the Club succeeds, but solely on the ground of contravention of s 41 of the Registered Clubs Act.... The orders and declaration of the primary judge should be set aside and an appropriate declaration should be made concerning the respondent’s incapacity to act as administrator of the Club. The respondent’s notice of contention that curative orders may be made under s 447A of the Corporations Act, such that Pt 5.3A of the Act is to operate in relation to the Club as if the delegate of the Authority had approved Mr Whittingham to act in the capacity of administrator of the Club prior to his appointment to act in that capacity, should be rejected. There is no power under s 447A of the Corporations Act to validate an invalidity of an administrator’s appointment arising from s 41 of the Registered Clubs Act.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWCA/2013/263.html

**Implications of this case**

This is an important case because it deals with the extent of the power contained within section 447A of the Corporations Act 2001 (Cth) to cure defects in procedure relating to voluntary administration of a club (or indeed any company). Section 447A is in Part 5.3A of the Act. The section has been held by the High Court to be very wide in its scope: Australasian Memory Pty Ltd v Brien [2000] HCA 30. But is it so...
wide that it can cure defects in procedure which are completely outside the Act? The view taken in this case was that the power vested in a court by section 447A of the Act is a statutory power which may be exercised only for the purpose for which it was granted within the scheme of Part 5.3A of the Act. Since the defect here was in procedure under section 41 of the unrelated Registered Clubs Act 1976 (NSW), section 447A was held not applicable to cure the defect. On this point, Barrett JA said (at [8]):

Such an order would... exceed the proper purpose limitation. It would do nothing to promote any object for which Part 5.3A exists or to facilitate or assist the form of external administration for which it provides. The purpose of the order would be to seek to neutralise the State law provision. Nor, despite its form, would the postulated order be an order about how Part 5.3A was to operate in relation to the Club. It would be an order about how the State law was to operate in relation to the Club. For those two reasons, the order would not be authorised by s 447A.

2.4.5 IN THE MATTER OF CALABRIA COMMUNITY CLUB LTD [2013] NSWSC 998 (SUPREME COURT OF NEW SOUTH WALES, BRERETON J, 26 JULY 2013)

This case concerned winding up of a club. The Calabria Community Club Ltd (the Club) is a company limited by guarantee. The Club was incorporated on 10 July 1981 as a social club for the Calabrian community in Sydney. It was formerly, but is no longer, a registered club. As at 30 June 2011, the Club had 89 members. However, as a result of recruitment activity during the last twelve months, the membership had increased to approximately 400 at the time of this hearing. The Club has no employees, and no income.

On 8 April 1983, the Club acquired land located in Prairiewood (near Fairfield) in New South Wales (the land) for $200,000. The land was then zoned for ‘community’ purposes. The Club built a soccer field on the land and, for a time, operated a soccer team. The Club’s sole activity since 1998 has been permitting soccer teams to train on the field that occupies that land. According to the Club’s financial report for the year ended 30 June 2010, the value of the land was $1,179,719.

Since at least 7 February 2002, the Club had aspirations of redeveloping the land into a clubhouse, retail shops, residential units, sports field, piazza, car park and other community facilities. A first step to achieving this was having the land rezoned. On 8 December 2006, the Club mortgaged the land to the Uniting Church (NSW) Trust Association Limited (the church), as security for a loan of $750,000. On 17 January 2008, the Club gave the church a further mortgage, to secure a further loan of $220,000. The proceeds of these loans were applied, at least in part, to the preparation of an application for rezoning the land, and in April 2008, the Club submitted a rezoning application to Fairfield Council, for the land to be rezoned for ‘operational’ purposes. This application was approved by the Council on 15 December 2010, but awaited ministerial approval, which was eventually given on 12 August, and gazetted on 19 August 2011. A December 2010 valuation of the rezoned land was $13.55 million, and it is currently valued in the range of $5–$15 million.

Because the Club had no source of income, it became reliant on directors and members to contribute the mortgage instalments payable to the church. Between March 2010 and May 2011, Mr Carbone (a member and former director) made payments to the church from his own resources, totalling $111,554.23, which constituted a loan by him to the Club, in respect of which he was entitled to interest of $20,283.97. These payments included a reduction of principal in March 2010, and the instalments for the months of August 2010 to March 2011 (although the payments for February and March were not made until May 2011).
The church mortgages were due to expire on 30 September 2010. With a view to refinancing, the Club applied for finance from Provident Capital Limited (Provident) in July 2010. Mr Gino Marra of Carrington National mortgage brokers, an associate of Mr Carbone, was involved in finding finance for the club. Provident provided an 'indicative' loan approval on 9 August 2010, on terms that included (1) an advance of $1.3 million or 40% of the value of the land (whichever was the lesser); (2) interest at a rate of 17% per annum (reducible to 11% for prompt payment) to be prepaid; (3) loan term of two years; (4) application fee of $28,600. In December 2010 the Club paid the first instalment of the application fee, $6,500, which Mr Carbone provided.

On 20 January 2011, the directors each signed an application for a loan of $1.3 million from Provident, and on 14 February 2011 the Club forwarded a cheque for $1,750 to Provident for legal fees. However, the practical consequence of the stipulated loan/security ratio was that the loan could not proceed unless and until the land was rezoned. This did not occur until later in 2011.

The payments for the church mortgage fell into arrears in April and May 2011. The defendants claimed that Mr Carbone did not tell the directors, or any other members of the Club, that he would not be making, or had not made, those payments. His Honour accepted this evidence, although he said that he was unpersuaded that Mr Carbone had any obligation to do so (at [13]). The church then moved to foreclose, but payments by club members (free of interest) prevented this from happening, and the church extended the loan.

Other attempts were made to find refinancing with individuals and firms from Cabramatta, particularly a firm known as CDT, which offered a $3 million loan. The relevant firm later became Panbic, which was described in evidence as a lender of last resort.

The application in this case was for winding up of the company, not in insolvency, but because the transactions related to the refinancing of the loan were not in the best interests of the company as a whole under sections 232, 233(1)(a), 461(1)(f), (g) of the Corporations Act 2001 (Cth) (the Act). It was also contended that the directors had acted in their own interests rather than in the interests of the members as a whole or in any other manner whatsoever that appeared to be unfair or unjust to other members under section 461(1)(e) of the Act; or that it is just and equitable that the company be wound up under section 461(1)(k) of the Act.

However, His Honour did not agree that the refinancing attempts and transactions were not in the best interests of the company as a whole. Nor could he find any other reason why the company ought to be wound up. There had been no oppression of members, no misconduct of meetings, or failure to provide information, nor any failure of the substratum of the company. The case was dismissed with costs.


**Implications of this case**

Winding up of a company can occur for a number of reasons unrelated to insolvency. These are mostly to be found in section 461 of the Corporations Act 2001 (Cth). The most common of the grounds used in section 461 is section 461(k), known as the just and equitable ground for winding up. Winding up on the just and equitable ground will be ordered where there is total deadlock within a company’s board, or the working relationships on a board have become untenable. However, in this case, there was no such situation. There was a working board which had taken decisions together (without the presence of the applicant, Carbone). Those decisions were held to be appropriate to the circumstances in which the Club found itself.
Since this case however, the Club has become involved more publicly in controversy with questions about the rezoning and members expressing anger about development over their soccer field (http://www.abc.net.au/7.30/content/2013/s3918700.htm ABC, 7:30 Report, 30 December 2013).

2.4.6 RE THE DROPS OF HELP LTD (WINDING UP UNDER SECTION 124A OF THE INSOLVENCY ACT 1986 BY THE SECRETARY OF STATE FOR THE DEPARTMENT OF BUSINESS ON BEHALF OF THE INSOLVENCY SERVICE (UK), 16 JANUARY 2013)

The Insolvency Service (UK) applied to wind up an alleged charity, Thedropsofhelp Ltd, on 30 October 2012. The application, on the grounds of public interest, was unopposed, and the company was duly wound up on 16 January 2013. The ‘charity’ was a sham, operating as a clothes collection charity which supposedly collected clothing for ‘poor families, orphans and asylums’. None of the money raised from the clothing collected was given to charity. Instead, the clothes were shipped overseas and sold at a profit.

The ‘charity’ delivered collection bags to households in Kent and East London asking for donations of clothing for the needy. The bags had signage printed on them which indicated the charity aspect of the collection, and the company had a website which detailed the alleged charitable nature of the business. The company received about 15 tonnes of clothing per month.

Investigations into the company were made under section 447 of the Companies Act 1985 (UK). The specific grounds for winding up were that:

- the company made false and misleading statements and engaged in objectionable business practices;
- the company had breached the Consumer Protection for Unfair Trading Regulations 2008;
- the company had breached the House to House Collections Act 1939;
- the company had failed to cooperate with the investigation into it by the Insolvency Service and the Trading Standards Institute.

The company and the two directors of the company were sentenced in separate proceedings to a fine of £10,000 and imprisonment for 2 years (suspended) and 250 and 150 hours of community service respectively. Both directors were disqualified from acting as a director of any company for a period of five years.

A summary of the case may be viewed at: http://www.bis.gov.uk/insolvency/news/press-releases

Implications of this case

As the company is now wound up, all its affairs are in the hands of the Official Receiver in the UK. Several such sham clothing charities have now been wound up in Britain, most operating as part of organised crime networks based in Eastern Europe. The ‘charity’ in this case was certainly not recognised as such by the Charity Commission of England and Wales, and was not registered as a charity, but nevertheless attracted substantial donations of clothing through its ‘charitable’ front.
2.5 MEMBERSHIP AND OFFICE

2.5.1 YOUNG V NEW SOUTH WALES RADIO YACHTING ASSOCIATION INC [2013] NSWCA 430 (NEW SOUTH WALES COURT OF APPEAL, BASTEN, MEAGHER JJA, 13 DECEMBER 2013)

On 12 April 2012 the Committee of the respondent, the New South Wales Radio Yachting Association Inc (the Association) resolved to expel the applicant from his membership of the Association. The applicant challenged that decision in the Supreme Court, but on 19 April 2013 Ball J dismissed the proceedings and ordered the applicant to pay the respondent’s costs: Young v New South Wales Radio Yachting Association Inc [2013] NSWSC 383.

The applicant appealed on the following grounds:

1. Whether clauses 10, 11 and 12 of the 1984 Model Rules continued to have effect, and remained part of the constitution of the respondent, notwithstanding the repeal of the 1984 Act;
2. Whether the committee of the prospective respondent was bound to apply clauses 10, 11 and 12 in and about the complaints and disciplinary action concerning the applicant as a member of the prospective respondent;
3. Whether the applicant was denied natural justice by reason of his purported expulsion having followed a committee meeting at which his principal accusers acted as witness, prosecutor and tribunal.

The reference to the ‘1984 Act’ was to the Associations Incorporation Act 1984 (NSW), which was replaced by the Associations Incorporation Act 2009 (NSW) (the 2009 Act). The 1984 and 2009 Acts included Model Rules. In the 1984 Model Rules, clause 11 dealt with the disciplining of members and clause 12 with the right of appeal of a disciplined member. The primary judge held that clauses 11 and 12 did not form part of the Association’s constitution.

An application for incorporation under the 1984 Act had to be accompanied by a copy of the rules of the proposed association which complied with section 11: section 9(c). Section 11 required that the proposed rules could either adopt the Model Rules or otherwise provide for ‘the several matters specified in Schedule 1’: section 11(1)(a). Schedule 1 of the Act referred to the matters of ‘disciplining of members’ (at clause 5) and ‘internal disputes’ (at clause 5A).

Clause 7 of the Association’s constitution dealt with expulsion and rights of appeal. There was no other provision for ‘disciplining of members’, but the primary judge accepted that clause 7 satisfied the requirement of Schedule 1, clause 5. Schedule 1 did not require rules dealing with discipline of members (referring only to ‘procedure’ (if any) and ‘mechanism’ (if any)), nor, if there were rules, were they required to take any particular form or have any particular content.

Section 19 of the 1984 Act envisaged that the rules of an incorporated association might be rules complying with section 11 which accompanied the application to incorporate, or might be the Model Rules in force from time to time. Section 19 (Objects and Rules) included, inter alia:

(3) Where in relation to any matter the model rules make provision but the rules of an incorporated association do not make provision, the provision of the model rules shall, in relation to that matter, be deemed to be included in the rules of the incorporated association.
(4) An object or a rule of an incorporated association is of no effect if it is inconsistent with this Act or contrary to law.
The Court of Appeal was satisfied with the primary judge’s findings on this issue, even if not all the parts of Schedule 1 to the 1984 Act were addressed (at [9]–[10]):

To the extent that some parts of Sch 1 were optional and not addressed in rules which were accepted [by the primary judge] as complying with s 11, it is not entirely clear whether s 19(3) would have any operation. It is sufficient for present purposes to note that the primary judge considered that cl 7 complied with s 11 in respect of the matter identified in Sch 1, cl 5. There is no reason to doubt that conclusion. The applicant’s summary of argument referred to an intention of the 1984 Act ‘to provide for minimum standards to automatically apply to constitutions of associations’. That proposition was only partly true: s 19(4) prohibited an object or rule inconsistent with the Act or contrary to law, but did not suggest that the model rules were to form a minimum standard with which rules which otherwise complied with s 11 must be consistent.

As to the continuing operation of clause 10 of the Model Rules after the repeal of the 1984 Act, the primary judge had held that the clause did not survive the repeal. The Court of Appeal said that it might be arguable that there had been some continuation under the transitional arrangements to the 2009 Act, but the matter was irrelevant in any event. Clause 10 did not deal with discipline, but with internal disputes, and that was not in issue.

On the appeal ground of natural justice, the Court of Appeal said (at [12]):

The third matter concerned a denial of natural justice by reason of either actual or apprehended bias on the part of the committee (the ground did not seek to distinguish between these categories of natural justice). The primary judge identified the relevant principles, referred to the evidence and the principles and applied them, at [50]–[61]. There is no reason to doubt the correctness of the analysis and the conclusion that the Association did not breach its obligation to afford the applicant natural justice.

There was a requirement for leave to appeal in this situation (since the judgement of Ball J was a final order dismissing the proceedings at first instance), but leave was denied, and the appeal was dismissed with costs.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWCA/2013/430.html

2.5.2 RANA V SURVERY [2013] NSWCA 234 (COURT OF APPEAL OF NEW SOUTH WALES, BATHURST CJ, MACFARLANE, HOEBEN JJA, 24 JULY 2013)

This appeal concerned the internal affairs of the Islamic Association Western Suburbs Sydney Inc. (the Association), an association originally incorporated under the Associations Incorporation Act 1984 NSW (the Act). The Constitution of the Association states that its objects are to ‘foster and promote Islam and to assist Muslims to abide by the principles of Islam in regard to their social, moral and spiritual way of life and to organise instructions in certain languages and cultures as determined by the members from time to time’.

The appellants were members of the Executive Council of the Association. The respondents were the President and Secretary of the Association (who were also members of the Executive Council). The issue was the validity of membership of 175 persons admitted to membership of the Association on 21 November 2008. At first instance the judge dismissed the appellants’ claim that the memberships were valid.
The case at first instance – Pembroke J

On 21 November 2008, a block of 183 new members was admitted to membership of the Association by the Executive Council. In 2008 the statute which regulated the Association’s affairs was the Associations Incorporation Act 1984 (NSW) (the 1984 Act). Its successor, the Associations Incorporation Act 2009 (NSW) did not commence until 1 July 2010.

Section 11(1) of the 1984 Act provided that the rules of an incorporated association comply with the requirements of the section if they make provision ‘whether by the adoption of the model rules or otherwise’ for the matters specified in Schedule 1 and any other matters that may be prescribed. There were no matters prescribed in relation to that Act. The only relevant matter in Schedule 1, which is headed ‘Matters to be provided for in rules of an incorporated association and in model rules’, is Item 1. Item 1 is described as ‘Membership Qualifications’. Section 19 of the 1984 Act was of particular importance in this case. Section 19(2) provided that the rules of an incorporated association are either its own rules, as long as they comply with section 11, or the model rules in force from time to time. However, the model rules could still have a role to play even where an incorporated association had its own rules that comply with section 11. Thus section 19(3) provided:

Where in relation to any matter the model rules make provision but the rules of an incorporated association do not make provision, the provision of the model rules shall, in relation to that matter, be deemed to be included in the rules of the incorporated association.

The Executive Council of the Association is the ‘committee’ for the purpose of the 1984 Act, regulations and rules. It controls and manages the affairs of the Association and exercises all of the functions and powers of the Association other than those that are required to be exercised by the members in general meeting. The Constitution of the Association provides that the Executive Council shall consist of a maximum of 11 members and a minimum of 9 members elected by the financial full members of the Association. It states that the maximum of 11 and the minimum of 9 shall ‘include’ President, Vice-President, Secretary, Assistant Secretary, Treasurer and six Executive Council Members (that is, 11 persons).

In the case at first instance, there was a threshold issue as to the meaning of the words in sub-section 19(3) ‘any matter [for which] the model rules make provision but the rules of an incorporated association do not’. In particular, the question was whether the effect of sub-section 19(3) was to require comparison of the content of the model rules with the content of the equivalent rule of the incorporated association.

In a given case, both sets of rules may cover a general topic such as membership qualifications, but they may do so differently and the model rules may impose more detailed and more extensive requirements. The issue of the interaction between the model rules and the rules of an incorporated association was thrown into sharp relief in the circumstances of this case by the marked difference between the provisions of the rules of the Association which dealt with membership and the model rules provisions dealing with membership.

His Honour explained that section 11 of the 1984 Act referred to the ‘several matters’ specified in Schedule 1 and section 19(3) referred to ‘any matter’ for which the model rules made provision, and that these did not refer to ‘quite the same thing’. In response to that difference, the plaintiffs’ counsel submitted that in order to preclude the operation of section 19(3), the Constitution ‘only had to deal with the matter, not the content of the [model] rules’. On the basis of this approach, he submitted that the model rules should not be included in the Association’s rules in relation to the requirements for membership. His Honour did not agree with this submission.
His Honour went on to compare Clause 4 of the Association’s rules Model Rule 3, both of which dealt with membership matters. There was a ‘substantial and stark’ difference (at [14]). Clause 4 of the Association’s rules addressed the topic of membership of the Association, but there were many aspects of the membership process on which it was silent. In particular, Clause 4 contained no provisions dealing with:

- the form of nomination for membership;
- whether a nomination must be in writing;
- whether it must be signed by any person, or by whom the nomination for membership must be determined;
- whether that determination must be formal or may be informal.

In the primary judge’s view, Clause 4 of the Association’s rules did not make any provision at all for a number of the matters provided for in the model rules. His Honour went on to hold that the model rules provided clearly and expressly for a ‘matter’, namely the process of nomination and approval for membership, while the Association’s rules did not. Therefore, sub-section 19(3) applied to fill the gap and the Model Rule 3 was included in the rules of the incorporated association.

Since Model Rule 3 applied to membership applications to the Association, then the 183 new members purportedly added to the membership at the Executive Council meeting of 21 November 2008 were invalid memberships. The membership forms were submitted en masse, there were no appropriate resolutions by the Executive Council, there were no proper written records, and no membership register.

The appeal

The issues on appeal were:

- whether Model Rule 3 of the Associations Incorporation Regulation 1999 was incorporated into the Constitution of the Association; and
- whether there was substantial compliance with Model Rule 3.

The appellants submitted that Model Rule 3(1) was not incorporated so as to make nomination or a particular form of nomination a criterion for membership of the Association. They submitted the criteria for membership were set out in Model Rule 2, which provides:

A person is qualified to be a member of the association if, but only if:
(a) the person is a person referred to in section 15(1)(a), (b) or (c) of the Act and has not ceased to be a member of the association at any time after incorporation of the association under the Act, or
(b) the person is a natural person:
   (i) who has been nominated for membership of the association as provided by rule 3, and
   (ii) who has been approved for membership of the association by the committee of the association.

However, Model Rule 2 provides for nomination in accordance with Model Rule 3 and approval by the committee of the association. The memberships in contention were submitted in a manner about which there was some doubt at first instance. The central point seems to have been that there was no list of names attached to the memberships. Did they in fact exist?
The respondents submitted that even if, contrary to the finding of the primary judge, Model Rule 3 did not apply, it remained the fact that members could only be admitted with the approval of the Executive Council. They submitted that the Executive Council did not make any decision to admit any new members or any group of members. There was at most an in principle decision to admit new members, and evidence was accepted that this occurred late at night almost as the relevant meeting closed.

**The Court of Appeal decision**

The Court of Appeal noted that the appeal case was conducted by the appellants on the basis that it was necessary for a nominee for membership of the Association to be approved by the Executive Council for admission to membership. That was contrary to the basis on which the case was conducted in the court below where it was stated that it was not necessary to identify the 175 nominees who were admitted to membership and that there was no point in time when one could identify the 175 persons. The primary judge had expressly proceeded on the basis of this concession (at [18] of the case at first instance).

The Court held that (at [63]–[64]):

> Although the primary judge framed his conclusion in the terms of Model Rule 3, his conclusion was that there was no legally binding decision of the Executive Council to admit named individuals. It is not necessary in the present case to consider whether Model Rule 3 or for that matter Model Rule 2 was incorporated into the Constitution of the Association. As I indicated earlier, the power to admit members is vested in the Executive Council, that power being implicit in cl 12(1)(a), cl 12(1)(b) and cl 4(4) of the Constitution. The exercise of the power required the approval of nominees. Once it was conceded that the 175 persons purportedly admitted to membership could not be determined...then it must follow that the primary judge was not in error in rejecting the appellants' claim.

The relevant minutes of the Association, which were in evidence, were clear. The minutes did not record any approval of individual nominees, either separately or by reference to a bundle of forms presented to the meeting. Nor did they record any instruction given to prepare a list of persons approved, much less confirmation of this list as the persons in fact approved for membership. The Court of Appeal held that in these circumstances, the inference which should be drawn from the minutes was that the meeting went no further than approving in principle the admission of 175 members (at [69]). There was no actual admission to membership.

The appeal was dismissed with costs.


**Implications of this case**

On appeal in this case, although upholding the decision of Pembroke J, the court took a view which turned on the minutes of the Association, rather than the applicability of the Model Rules. The minutes were held to be evidence which is not to be displaced and is conclusive as between the parties who are bound by them. The *Associations Incorporation Act 1984* (NSW), and its successor, the *Associations Incorporation Act 2009* (NSW), each contain provisions stating that the association's constitution binds the association and its members to the same effect as if it were a contract between them: section 11 of the 1984 Act and section 26 of the 2009 Act. In this case, the Constitution of the Association (at clauses 2, 4, 8–10, and 12) was clear in giving the Executive Council the relevant power concerning memberships. These powers applied and nothing else needed to be referred to.
2.5.3  MYLNE V THE RETURNED & SERVICES LEAGUE OF AUSTRALIA (QLD BRANCH)
MAROOCHYDORE SUB BRANCH INC & ORS [2013] QSC 179 (SUPREME COURT
OF QUEENSLAND, DOUGLAS J, 20 JUNE 2013)

This case involved a dispute about the election of a chair for the Returned and Services League of Australia (Queensland Branch) (the Queensland Branch). The plaintiff was nominated by the Currumbin–Palm Beach sub-branch of the Queensland Branch, and an alternative candidate was nominated by the Maroochydore sub-branch of the Queensland Branch. The plaintiff argued that the Maroochydore sub-branch was an entity incapable of nominating a person for election as chair of the Queensland Branch. He contended that this conclusion should follow because the Maroochydore sub-branch had not applied for a charter from the Queensland Branch.

The Queensland Branch is a body incorporated with letters patent issued under the Religious Educational and Charitable Institutions Act 1861 (Qld). Those letters patent continue to be of full force and effect pursuant to section 144 of the Associations Incorporation Act 1981 (Qld) (the Act).

By-law 3.01 of the Queensland Branch provides that the chair of the Queensland Branch shall be elected from nominations submitted by sub-branches. The definition of ‘sub-branch’ in clause 30 of the Queensland Branch’s constitution means ‘a branch of RSL (Queensland Branch) established under a charter issued by RSL (Queensland Branch) with such responsibilities assigned to it by RSL (Queensland Branch)’.

The Maroochydore sub-branch was first issued with a charter in 1932. Later, in 2001, it became incorporated under the Act, and that incorporated body was issued with a charter dated 10 October 2001. In August 2011, the Maroochydore sub-branch decided to amalgamate with an associated services club which was also incorporated under the Act.

The amalgamated body’s constitution was approved by the Queensland Branch which consented to the amalgamation, and a certificate of incorporation of the amalgamated association was issued on 21 June 2012. However, no charter had been sought for the amalgamated association until 13 June 2013 when the chief executive officer (CEO) and secretary of the Queensland Branch, purported to issue one pursuant to a delegation of power to him by the Queensland Branch’s board. The plaintiff’s case was that this only occurred after his name had been put forward for the position of chair of the Queensland Branch.

It was submitted for the plaintiff that the charter issued to the pre-amalgamation Maroochydore sub-branch by the Queensland Branch ceased to be effective when its incorporation was cancelled pursuant to section 86(b) of the Act, which deals with amalgamation of incorporated associations. The plaintiff’s case was that this conclusion was supported by clause 14.9 of the Queensland Branch’s constitution, which requires a sub-branch seeking incorporation to apply for the Queensland Branch’s approval and, following incorporation, submit an application for a new charter. The plaintiff said that the charter issued by the CEO was not authorised by the constitution and was ineffective without an application by the sub-branch and a decision by the Queensland Branch’s board.

The first issue was standing and justiciability under the common law. Did the plaintiff have standing to bring this case since he was not a member of the Maroochydore sub-branch? This issue arose because of the principle that courts do not, as a matter of course, intervene in the affairs of voluntary associations, unincorporated or incorporated: see Cameron v Hogan [1934] HCA 24.

However, in Kovacic v Australian Karting Association Queensland Inc [2008] QSC 344 Margaret Wilson J held that it was now accepted that the Courts will intervene in the affairs of voluntary associations in
some circumstances, including where there has been a breach of contract, where a proprietary right has
been infringed, and where someone’s livelihood or reputation is at stake. The plaintiff submitted that
there had been a breach of contract in this case (i.e. of the Queensland Branch’s constitution).

His Honour did not agree, saying (at [8]):

In circumstances such as these, it does not seem to me to be appropriate to treat the breach of
the rules complained of as one raising a breach of contract amongst the members of the
Queensland Branch which should be justiciable. It does not affect proprietary rights or Mr
Mylne’s livelihood or reputation, and it is difficult to see what contractual rights sounding in
damages, for example, he could be seeking to vindicate. It seems to me to be one of those
cases where, on existing authority, the courts should stay their hands from interfering in the
internal affairs of these bodies.

Various other arguments were raised in favour of the plaintiff, of which His Honour said that he would
consider only two: those based on sections 88 and 133 of the Act. Section 88(1) of the Act provides that
amalgamation of old associations into a new association does not affect a right or obligation of the old
associations. The respondents argued that this subsection, combined with section 88(2), which provides
that the amalgamation does not affect a right, obligation or benefit the new association would have had
or enjoyed apart from the amalgamation of the old associations, meant that the Maroochydore sub-
branch should continue to enjoy the benefit of the charter it previously held.

The plaintiff argued that this section did not transfer any rights to the new association. His Honour held
that this was not a necessary consequence of the section (at [10]–[11]):

That, however, does not carry the necessary consequence that the pre-existing right to
nominate a candidate in reliance on the previous charter has ceased to exist. Within the
context set by the Queensland Branch’s constitution, it seems to me to be fairly arguable that
the old association had a right to the charter that had been issued to it which should not have
been affected by the amalgamation by reason of the application of section 88(1)(a) of the Act.
That clause 14.9 of the Queensland Branch’s constitution requires application for a new charter
upon incorporation of a sub-branch does not have the necessary consequence that any former
charter ceases to be effective. In that context, it may be significant that the holding of a charter
does not now seem to be a necessary prerequisite to recognition of sub-branches by the
Queensland Branch: see clause 14.5 of the constitution. In those circumstances, therefore, I
would also hold that section 88(1)(a) preserves the Maroochydore sub-branch’s right to the
charter previously held by the old association of that name.

Section 133 of the Act deals with irregularities in proceedings under the Act. However, section 133
relates to proceedings under the Associations Incorporation Act. The fact that the Queensland Branch
was incorporated by letters patent under the Religious Educational and Charitable Institutions Act was
said by the plaintiff to be fatal to the application of section 133 on the basis that the defect was a failure
to comply with the constitution and by-laws of the Queensland Branch, so that section 133 had no
application.

His Honour was not persuaded. He agreed with the respondents’ position that, though there was
arguably an irregularity, the proceeding was one which the Court could rectify of its own motion or on
the application of an interested person pursuant to the section (at [16]):

The latter application of section 133(3), does seem to me to be likely to be available to validate
the nomination of Mr Meehan in spite of the failure of the Maroochydore sub-branch to apply
for the issue of a new charter pursuant to clause 14.9.3(c) of the Queensland Branch’s constitution. [Counsel for the plaintiff] submitted that the form of clause 4.1 of the Maroochydore sub-branch’s constitution, in merely stating that it was cognisant of the Queensland Branch’s rules, was a reason for the Queensland Branch to refuse a charter as its constitution required the sub-branch to ensure its members complied with its rules pursuant to clause 14.3.3 of its constitution. [Counsel for the respondents’] response to that argument for the Queensland Branch was to point out that the sub-branch’s members were also members of the Queensland Branch and, therefore, already bound by its rules, an argument which seems to me to be compelling.

Therefore, His Honour held that section 88(1)(a) preserved the right of the Maroochydore sub-branch to nominate a person for the position of chair of the Queensland Branch because its previous charter continued to be effective. He said that he did not need to make an order under section 133, and dismissed the plaintiff’s application.

The case may be viewed at: http://www.austlii.edu.au/au/cases/qld/QSC/2013/179.html

Implications of this case

This was a case in which the well-known case of *Cameron v Hogan* was said to apply. It is authority for the proposition that courts will not interfere in the internal affairs of associations. His Honour also considered the case of *Baldwin v Everingham* [1993] 1 Qd R 10, a case concerning a political party, where Dowsett J took the view that the statutory recognition of political parties allowed him to conclude that *Cameron v Hogan* did not apply in that case. In this case, His Honour said on that issue (at [7]–[8]):

That was factually rather similar to the present circumstances in that it dealt with eligibility to stand for electoral office, but as a member of a political party registered federally. The plaintiff there had submitted that there had been irregularities in the conduct of the endorsement procedure leading up to and including the resolution of the executive of the party to reject his application for endorsement as a candidate... [but] Had it not been for the statutory recognition of political parties...[Dowsett J] would have been compelled to the conclusion that the principle in *Cameron v Hogan* did apply.

There was no political party involved in this case, nor was there any other basis for justiciability to be found in the common law. If common law was all that was available, the plaintiff would have had no standing to bring the case, and it would not have been justiciable. However, the Act was available for consideration and the conclusion in this case relied on statute. The outcome was, nevertheless, ultimately the same, since His Honour held that the Act did not support his contentions.

2.5.4 ANANDA MARGA PRACARAKA SAMGHA LTD V TOMAR (NO 6) [2013] FCA 284 (FEDERAL COURT OF AUSTRALIA, DODDS-STREETON J, 3 APRIL 2013)

(See also Ananda Marga Pracaraka Samgha v Tomar (No 7) above: case note 2.4.3)

This case is part of long-running litigation. In this proceeding the parties continued to be in dispute over the identity of the members and directors, the construction of the constitution and the control and future disposition of the first plaintiff, Ananda Marga Pracaraka Samgha Ltd (the company).

The company was incorporated as a company limited by guarantee in 1986. Its principal object is ‘to propagate the philosophy, the ideals and practice of Ananda Marga which is an autonomous religion, faith and social system’. It was common ground that the company has substantial assets (with an
estimated value of approximately $20 million) and an annual income of about $1 million. It engages in charitable activities and conducts a substantial business enterprise, including a number of schools, yoga and meditation courses, festivals and retreats. It sponsors visa applications by Ananda Marga monks and nuns. It is a recipient of government grants and charitable donations and has considerable outgoings, including the payment of teachers’ salaries, workers’ compensation, public liability insurance and mortgage instalments.

In this case, various persons said that they were members and directors of the company, and denied that others apparently on the registers of the company were members or directors. The judgement definitively settled the issue of membership of the company.

The litigation had at its root the religious differences which had emerged within the Ananda Marga movement about 10 years ago. The persons involved in this litigation all professed adherence to the Ananda Marga faith. However, the dispute here is not just over control of the company, but also about religious orthodoxy. Ananda Marga as a movement is both a faith and a social system based on the teachings of Shri P R Sarkar, known as Shrii Shrii Anandamurtii. The Articles of Faith and the religious doctrines of Ananda Marga include:

- The belief in One, Infinite, Supreme Entity which in the Sanskrit language is referred to as Parama Purusa.
- The belief that through the twice daily practice of Ananda Marga meditation the Supreme, Infinite Being may be fully and personally realised by the individual.
- Meditation and hence realisation of the Supreme, Infinite Being is dependent upon the proper application of cardinal moral principles (Yama and Niyama) in the individual’s life.
- It is a duty of the highest order to encourage all persons to practise Ananda Marga meditation and to follow a life of virtuous and righteous conduct.
- Engaging in selfless, humanitarian service dedicated to the relief of human suffering, whether it be physical, mental, or spiritual, is indispensable in the individual’s progress toward the realisation of the Supreme, Infinite Entity.

The plaintiffs had submitted in previous litigation that the Ananda Marga movement in its home country, India, is in dispute, is dysfunctional, split into rival factions and governing structures, and is involved in ongoing litigation. They said that this is reflected in the dispute in this case, since they disagree with the defendants’ construction of holy scripture and the status of persons such as the General Secretary in the religious hierarchy in India.

The structure of the Ananda Marga in India is enormously complex, with multiple boards and committees. There is a parallel structure throughout the world to the Ananda Marga organisation in India. It is organised into nine geographical sectors, with Australia being part of the Ananda Marga sector known as the Suva Sector. The structure of each geographical sector replicates that of the organisation in India, with a Sectorial Executive Committee (SEC), a Sectorial Secretary, 42 departments and 42 boards. Ideally, each sector should include further tiers of 42 boards at descending regional and diocesan levels, though in practice there would not be enough persons to establish them. Each department in the sectors has a secretary or head, who is a member of the SEC.

In Australia, the articles of association of the company allow the board of directors, called the committee, to determine the admission or rejection of members. The committee can also expel or suspend members in some circumstances. Members of the company in general meeting elect the office bearers and other committee members. The company by ordinary resolution (with special notice) can
remove any office bearer or other committee member before the expiration of his period in office, and
by mere ordinary resolution, appoint another person instead.

Immediately prior to 20 March 2010, the company had five directors. At a general meeting on 20
March 2010, resolutions were passed to remove two of the directors from office. The removal was
challenged in court on several bases, and a court hearing ensued: see *Ananda Marga Pracaraka Samgha
that first case was who were the legitimate members and directors of the company. Her Honour made a
number of orders in that case, and a mediation was ordered. The mediation failed to resolve the
dispute, and another case followed.

In *Ananda Marga Pracaraka Samgha v Tomar (No 2)* [2010] FCA 1342 (casenote
https://wiki.qut.edu.au/pages/viewpage.action?pageId=111119416) there was still contention as to the
number and identity of the directors and members of the company. The plaintiff continued to allege
that there were five directors of the company, and the defendants that there were only two. Moreover,
company membership issues continued to be complicated by the international dispute within the
Ananda Marga religion as to who represented the valid central authority of the movement. In this
second case, the company sought an interlocutory injunction restraining the defendants from certain
activities and requiring, among other corrective steps, that the company seal be returned. The
company’s submission was that there was a strong case that the purported directors were in breach of
their directors’ duties. Her Honour agreed.

All parties in the second case were agreed that the orders made by Her Honour in the original hearing
did not effectively provide for the interim management of the company. The defendants asked that an
external administrator be appointed to the company on the basis of deadlock in management. The
plaintiff submitted that this was a drastic remedy of last resort, posing particular problems in a company
whose objects included the propagation of a religious faith. Moreover, the appointment of an
administrator or receiver might trigger default provisions in its mortgages and could jeopardise its
government grants.

Her Honour in the second case did not accept the need for an administrator. Rather, she put in place an
interim regime as follows:

- No alteration to the directors, members or constitution as existing immediately prior to 20
  March 2010 should be attempted or made, and no meetings in relation to any such alteration
  should be called or held.
- The directors holding office immediately prior to 20 March 2010 should be taken to remain as,
  and should be registered as the directors of the company.
- Subject to the orders made and undertakings given on 31 March 2010 and other relevant
  orders, a majority of the directors should have power to manage the company. No single
director should have authority to exercise the management power unless it is delegated by a
majority of the directors.

The dispute continued until this hearing. This case dealt with, inter alia, the construction of the
company’s constitution, the defendants contending that there was an implied term that membership of
the company depended on membership ‘in good standing’ of Ananda Marga. There was certainly no
express term in the company’s memorandum to that effect. Her Honour considered the relevant law on
the issue of implied terms in company constitutions, saying (at [153]):
Courts traditionally showed marked reluctance to imply terms or rely on extrinsic evidence when construing a company's memorandum and articles which, unlike ordinary contracts, were public documents on which third parties might rely.

Moreover, Her Honour considered the concept of an implied membership requirement as misconceived (at [152]):

The alleged pre-condition for maintaining membership of the company, which was not itself express, thus depended on nebulous concepts, the specific content of which depended on an elaborate cascade of unstated assumptions and further non-express terms, which the defendants themselves failed consistently to elucidate.

In the light of the membership argument being unlikely to succeed, was it any more likely that arguments based on oppression would be successful? In this respect, could extrinsic evidence be used to construe the company's memorandum and objects? Her Honour said (at [172]):

In order to determine whether the conduct or circumstances alleged in this case breach the corporate objects, constitute oppression because the legitimate expectations of members are defeated or demand winding up on the just and equitable ground, it is, in my view, necessary to consider evidence on the nature, ideals, philosophy, practice, organisation and relevant texts of Ananda Marga.

Thus, extrinsic evidence was admitted for consideration of the oppression and winding up issues. Various experts gave evidence as to the nature of the Ananda Marga movement. Was it a religion, as opposed to a socio-spiritual movement, system or philosophy? Was it fundamentally hierarchical and autocratic in nature or pluralistic, consultative and primarily focused on spiritual development rather than authority and control? These differences in viewpoint were fundamental to the corporate law issue.

After hearing expert testimony, Her Honour said that she was unable to determine if Ananda Marga was a religion (at [248]). She went on to say (at [249], [250]–[251]):

Whatever the correct classification of Ananda Marga, I was not persuaded that its defining hallmark is a hierarchical and authoritarian organisation which always requires unquestioning obedience of followers...as conceived of in the Founder’s scriptures and writings, [it] was more than a hierarchical organisation, was not consistently dictatorial or authoritarian in its practical operation, allowed scope for rational dissent or challenge to superiors and primarily emphasised spiritual, humanitarian and personal development goals. The vast number of tribunals, committees and boards and confirmation and appeal processes within the organisation under Carya Carya [a sacred text], which would be unnecessary to a merely autocratic system, fortified the conclusion that in practice, hierarchy and autocratic authority are subordinate in the wider context of Ananda Marga’s other significant core values. Accordingly, the defendants did not establish that Ananda Marga was a religion or a predominantly or merely hierarchical organisation described in Carya Carya, in which unquestioning obedience was an overriding core value which always outweighed all other considerations. They did not establish that disobedience of an order or a decree would result in a 'loss of good standing' (a term which was not in Carya Carya or any other text in evidence).

Her Honour also considered the situation with Ananda Marga in India, where it is an unincorporated association, and riven with internal strife and dissension. There have been several court cases there, of which Her Honour was informed in evidence. The defendants' fundamental contention (whether cast as
an implied term or otherwise) was that it was incompatible with the company’s objects for a person to remain a member if he or she had disobeyed or had become persona non grata with the General Secretary of the Indian-based unincorporated organisation or the West Bengali Society [a separate association recognised as a legal entity under the West Bengal Act]. Her Honour said of this issue (at [252]–[253]):

The evidence did not establish that unquestioning obedience to all commands of even duly constituted bodies or officers of the unincorporated organisation in India was an overriding core value or an essential commitment of all bona fide followers of Ananda Marga or was necessarily encompassed in its ‘religious doctrine, faith, moral canons and creed ... contained in the scriptures given by the Founder...’ as stated in cl 2(a) of the company’s memorandum as amended. Moreover, ..., I was not persuaded that the corporate object of propagating the creed thus described would require members and directors personally to observe such obedience. So to find in itself disposes of the defendants’ challenge to the membership of those on the plaintiffs’ register and significant elements of the related contingent claims of oppression and winding up.

On the issue of whether not following orders from either the unincorporated Indian body or the West Bengali Society in Australia would deprive members here of their membership in good standing, Her Honour said that she could find no evidence of such a requirement of unquestioning obedience to orders from abroad in the Carya Carya (the relevant sacred text). Even if there was disobedience by some adherents, there should not be a problem with membership of the company (at [379], [389]):

I was not persuaded that their continuing membership of the company would be contrary to its objects, the legitimate expectations of members or in breach of an implied term of the constitution.... The company’s objects clause does not refer at all to the unincorporated Ananda Marga organisation, the West Bengali Society, the General Secretary or any other external officer...there is no requirement that the company cooperate or be affiliated with, any ‘umbrella’ body or authority. There is no express requirement that the acquisition or maintenance of membership is conditional on obedience to, or the approval of, any such external office holder or body. The defendants submitted, in essence, that such a requirement was indirectly incorporated into the constitution by the reference (in the description of Ananda Marga in cl 2(a) of the memorandum as amended) to Carya Carya, where the unincorporated Ananda Marga organisation and its officers are described.

The defendants alternatively alleged that the continuing membership of persons on the plaintiffs’ register amounted to oppression under section 232 of the Corporations Act 2001 (Cth) (the Act), which does not depend on illegality or a breach of the corporate constitution. The general oppression provision is broad in scope. The defendants pleaded that the subscribers intended the company to be the embodiment of Ananda Marga and that incoming members had a legitimate expectation that the company’s affairs would be conducted consistently with Ananda Marga’s rules and practices.

Her Honour did not agree (at [452]–[453]):

The evidence established recommendations and involvement by and cooperation with the wider Ananda Marga organisation, but not that the company was run as a mere instrument of an external body. There was no evidence of an expectation or arrangement that the unincorporated organisation in India was empowered to make or participate in the decisions of the board or voting in the general meeting. The directors could not, consistently with their statutory and general law duties, wholly surrender their decision-making and management
powers to an external body or persons, whether based in Australia or some other country. Nor
is the unincorporated Ananda Marga organisation in India ‘a parent’ of the company under the
Act or in any other relevant sense.

Therefore, the defendants did not establish the existence of a legitimate expectation that control of the
company’s affairs (including the identity of its membership and directors) would be vested in, or
depended on, the approval of persons or bodies in the unincorporated organisation of Ananda Marga.
Overall, Her Honour held that the members listed on the company’s register were the members of the
company. Those said to be members by the defendants were not.

At trial, the defendants submitted that if they were unsuccessful in their contentions on membership
and oppression (which they were), the company should be wound up pursuant to section 461(1)(k) of
the Act on a number of bases, some of which were also advanced to support winding up or other relief
sought for oppression. In support of an order for winding up under section 461(1)(k), the defendants
also relied on numerous ongoing failures by the company and its directors to comply with the
requirements of the Act which had emerged from the evidence, including the failure to keep an updated
and accurate members’ register, the failure consistently to take or preserve minutes of meetings, the
signing by the directors of returns to ASIC containing inaccuracies, and the failure to hold annual general
meetings as and when required.

Her Honour found that this was true. There had been no properly constituted Annual General Meetings
(AGMs) for at least 10 years, because of lack of proper notice. Accounts were seldom considered at the
AGMs which were held, and directors’ reports were never considered. The defendants submitted that
the company should be wound up because it was unworkable, its committee (board) was ‘bifurcated’,
and its substratum had failed. The organisation in India claimed two legitimate heads, and was also
unworkable. If the Australian company was supposed to represent the organisation in India, it obviously
could not do so.

Her Honour held that the situation was not unworkable. The committee had previously functioned quite
well, with decisions being made mostly unanimously. There were not entrenched factions at work, as
several committee members were not aligned to any of the Indian factions (at [598]–[600]):

...the schism in Ananda Marga long predated and cannot fully explain the present division in
the board of the company. The company also functioned effectively for many years unaffected
by the split in India.... The board has not been deadlocked in the past, is not currently
deadlocked under the interim regime and there is no evidence that it will be deadlocked in
future.

Therefore, there were no immediate grounds for winding up the company under section 461(1)(k) (the
just and equitable ground). However, Her Honour deferred a final determination on this issue to a
further date on the basis that there were still some details to be determined, for which she ordered an
expert report to be prepared (at [614]–[617]):

Nevertheless, it is clear that for a number of years, the company and various directors failed to
comply with statutory obligations and did not institute any adequate policies or procedures for
ensuring compliance in formal and procedural matters or appropriate record keeping and
retention of records...While formally identified annual general meetings were not held as
required, in substance the committee and the board consisted of the same people. Previous
secretaries bore particular responsibility for many of the more procedural contraventions,
many of which were in the past. The committee collectively, including the defendant directors,
also bore responsibility...the nature of the company rendered such contraventions explicable,
although unacceptable...[however] there is no irretrievable mess. The members of the company have been ascertained.

Thus, the main finding here was that the membership issue was settled. The members on the company register were the proper members of the company. No other purported members put forward by the defendants were members.

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/FCA/2013/284.html

Implications of this case

This is another example of internecine struggle within a faith-based organisation. The breaches of duty alleged in this case could have serious consequences for directors. However, the final outcome relating to the alleged breaches has yet to be determined. A hint may perhaps be discerned from Her Honour’s references to the breaches as ‘formal’ (meaning as to form rather than substance) (at [615]), and ‘procedural’ (as opposed to substantive) (at [616]).

2.5.5 SHEW V POLICE AND CITIZENS YOUTH CLUB [2013] NTSC 15 (SUPREME COURT OF THE NORTHERN TERRITORY, MASTER LUPPINO, 26 MARCH 2013)

The Police and Citizens Youth Club (PCYC) is an incorporated association under the Associations Act (NT) (the Act). The PCYC’s objects have a focus on youth development and discouraging juvenile delinquency. The objects have been sought to be achieved by the establishment of various ‘disciplines’ within the PCYC which consist of sporting or recreational activities. The plaintiffs were members of the PCYC’s judo discipline. The PCYC owned a number of assets which were specifically acquired for the purposes of the judo discipline such as score boards, special floor mats and the like.

The PCYC has a close connection with the Northern Territory (NT) police. Its constitution required that the President be a commissioned officer of the NT Police appointed by the Commissioner of Police and that the club manager be a constable in the NT Police. Both are ex officio members of the Management Committee. Following an annual general meeting of the PCYC on 24 November 2010 a significant change in the membership of the Management Committee resulted. Some of the plaintiffs, who were members of the Management Committee before that annual general meeting, were not re-elected. After the meeting, the Management Committee resolved to close the judo discipline because of lack of financial viability. The plaintiffs were aggrieved by the closure of the judo discipline, and commenced these proceedings. The relief sought was:

- damages generally;
- orders pursuant to section 109 of the Act including orders for injunctions, the regulation of the future affairs of the PCYC, altering the constitution of the PCYC, and the re-instatement of expelled members;
- equitable damages;
- the return of property;
- orders in respect of breach of fiduciary and equitable duties;
- orders in respect of breach of contract and conversion of property.

An application for summary judgment was made on two bases, argued in the alternative. The first stemmed from an allegation of invalidity of the election of certain members of the Management Committee at the annual general meeting of the PCYC held on 24 November 2010. The second was based on conduct of the Management Committee and remedial orders available under section 109 of the Act. His Honour said that summary judgement should only be given with caution (at [12]):
The test of whether there is a real or serious question to be tried has been accepted in the Northern Territory as the appropriate test in applications under Order 22.02 of the Rules. Where discretionary relief is sought it will often be difficult to determine that there is no real or serious question to be tried absent hearing the evidence in its entirety.

His Honour held that the application for summary judgement should be dismissed. The Statement of Claim was unclear, and had not actually sought summary judgement. Therefore, the only matter to be determined was that of the alleged irregularity in election to the Management Committee at the meeting of 24 November 2010. The plaintiffs alleged that some of those elected to the Management Committee at that meeting were unqualified under the constitution.

The membership issue was somewhat clouded by historical issues. In 1983, 27 years before the annual general meeting referred to in this case, the Management Committee enabled membership subscriptions to be deducted from the pay of PCYC members who were NT Police officers. The evidence surrounding this type of membership was scant. However, it appeared that an amount representing the fortnightly equivalent of the subscriptions otherwise payable was deducted from salaries by the NT Police and paid to the PCYC. Members paying their subscriptions in this way were known as payroll deduction (PRD) members. The evidence revealed that despite there being many members of the PCYC who currently paid their subscriptions by way of payroll deductions, this was apparently not commonly known amongst other members of the PCYC who were not NT Police officers. This included other members of the PCYC who were NT government employees who presumably could have had payroll deductions made in the same way.

The plaintiffs’ argument was that PRD membership was not permitted by the constitution because it only permitted payment of subscriptions by a lump sum in advance, and for a period of membership of either six or twelve months (at clause 10). The contention was therefore, that PRD members were not valid members of the PCYC, and could not be elected to the Management Committee.

His Honour said that clauses 9 and 10 of the constitution as to membership and fees were ‘poorly drafted’, with confusing terminology. For example, the terms ‘annual fee’, ‘membership fee’, ‘subscription’ and ‘prescribed fee’ were used in the space of a few lines, without any explanation as to their apparent different meanings (if any). It was also not made entirely clear when membership should commence. Nevertheless, he did not agree with the plaintiff’s contention (at [29]):

I do not agree that the relevant paragraphs mandate only for lump sum payment of subscriptions. Nothing in the wording suggests that. I do not read those paragraphs as precluding the Management Committee, or the annual general meeting, from fixing other payment methods. I think that in setting a membership fee, the Management Committee could also validly set a payment frequency provided that the frequency did not exceed an annual frequency. It then follows that upon payment of the first instalment as so determined, ‘membership is granted’ at that time. The ‘payment date’ in paragraph 10(3) must then refer to the date of payment of the first instalment. I therefore conclude that the relevant persons were PCYC members and consequently, their election to the Management Committee is valid.

Therefore, His Honour held that the PRD members who had been elected to the Management Committee on 24 November 2010 were valid members who had been validly elected. His Honour went on to deal with an issue raised by the plaintiffs relating to the Register of Members. A Register of Members is required to be kept by section 34 of the Act. The plaintiffs argued that the Register of Members of the PCYC was deficient and inaccurate, and that this was an offence. His Honour said that the offence only related to not keeping records at all (at [35]):
I disagree with the submission. Although it appears clear there are deficiencies in compliance with section 34 of the Act by the PCYC, that section only sets out obligations to keep records and creates an offence if that is not complied with. It does not contain any deeming provisions to give those records any particular evidentiary value or to operate as a statutory aid to proof.

The plaintiffs' final contention was that allowing NT police members to pay their membership by PRD was conduct which was ‘oppressive or unfairly prejudicial to, or unfairly discriminatory against’ non-NT police members within the meaning of a section 109(1)(a) and (b) of the Act. His Honour said that relief under section 109 of the Act was discretionary and there was not enough evidence to support the exercise of that discretion. However, he commented on the similarity of the provision to sections 232 and 233 of the Corporations Act 2001 (Cth) (at [41]–[46]):

A number of principles relevant to the current case can be distilled from the cases. The first is that the question is whether objectively in the eyes of a commercial bystander there has [been] conduct that is so unfair that reasonable directors, (...) committee members), who consider the matter would not have thought the decision fair. Secondly, the conduct need not be illegal or fraudulent to constitute oppression or that the decision of the association was invalid. Conduct may still be oppressive even if the conduct is committed in good faith. Thirdly, conduct by a management committee of an association will be contrary to the interest of members as a whole if no committee acting reasonably could have engaged in that conduct.

Fourthly, proof of invalidity or non-compliance with an association's rules may indicate that a decision is contrary to the interest of the members as a whole. This is because the failure to observe the provisions of the constitution has the effect of depriving members of their right as members to have the affairs of the association conducted in accordance with the constitution of the association.

Fifthly, courts are not concerned with reviewing the underlying merits of a decision and the courts do not substitute their discretion for the discretion exercised in good faith by the management of the association. It is not assessed simply from one member’s point of view. Moreover the courts' approach is to regard the circumstances of a particular case as a whole and will assess the cumulative effect of the conduct complained of in that context. Lastly, courts are reluctant to interfere in the internal management of an association and will only do so in limited circumstances, which most notably is where a member’s proprietary rights have been adversely and unfairly affected by a decision.

In holding that the plaintiffs had failed to show oppression or unfair conduct, His Honour held that the arrangement to pay by PRD was not one which gave an unfair advantage to any member, nor was it prohibited by the constitution (at [48]). If there was an advantage, it was ‘inconsequential’, ‘nominal’ or ‘tenuous’. The position might have been different if the PRD scheme gave some sort of additional advantage, or if the exclusion of non-NT police from the scheme was deliberate. Therefore, the plaintiffs failed to show that the election of the members of the Management Committee complained of was unconstitutional, or that there has been oppression, unfair prejudice or unfair discrimination within the meaning of section 109 of the Act.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nt/NTSC/2013/15.html

Implications of this case

This was an application for summary judgement, but His Honour held that full evidence needed to be heard. The evidence revealed that the facts were sketchy, and without sufficient evidence, such that His
Honour was unable to exercise proper discretion. In any event, that exercise was not required since His Honour found against the plaintiffs on all issues raised in their application.

2.5.6 DIAFERIA V ELLIOTT, 2013 ONSC 1363 (ONTARIO SUPERIOR COURT OF JUSTICE, EDWARDS J, 7 MARCH 2013)

This Canadian case dealt with the internal affairs of an unincorporated association, the Nashville Road Community Church (the Church). The Church is a Protestant Christian Church in the Baptist tradition and is a registered charity under the Canadian federal Income Tax Act. The Church was founded in 1949, and has a written constitution (the constitution) which provides for the internal governance of the Church. The governance structure includes a pastor, four church elders, and a church management team. However, the Church had only 60 members at the date of this hearing, of which three had been admitted during 2012. The evidence showed that the greatest number of new members ever admitted in a year was five. Membership of the Church was governed by the constitution, which provided that membership involved a three-step process: an interview with an elder; baptism by immersion; and a vote of the Church members. However, there were a large number of attendants at Church services who apparently were not aware of the steps involved. They thought they were ‘members’ of the congregation, but technically were not.

The background to this application was a decision made by the Church elders on 7 February 2013 to call a meeting of the Church members for 3 March 2013 to discuss and vote on whether to dismiss the senior pastor of the Church, Reverend McLean. On 7 February the elders had also met with Reverend McLean who was advised that he was being placed on a paid leave of absence from his duties, effective immediately. On 10 February 2013, at the completion of the Church’s worship service, the senior elder (Mr Elliott) announced the meeting to be held on 3 March 2013 to decide whether to dismiss Rev. McLean from his senior pastor role. Immediately after Mr Elliott’s announcement, Rev. McLean came to the front of the Church and announced that he was going to oppose his termination. He then invited those present, who were not Church members and wished to support him, to attend a business meeting on 24 February 2013, at which time membership applications would be processed.

On 12 February 2013, the elders met to discuss the proper process to be followed for consideration of membership applications prior to the 3 March 2013 meeting. At that meeting, the Church elders decided that they would not recommend admission to membership of any person whose application for membership had not already been made and who had not already been interviewed by an elder as of 10 February 2013. The number of persons eligible was 12. At the meeting on 24 February 2013, Rev. McLean asked that 14 additional persons be admitted as new Church members. In response to this request, Mr Elliott ruled that only candidates who had met the pre-qualifications of membership as of 10 February 2013 would be presented. The 14 people that Rev. McLean had proposed as new Church members were not admitted.

A petition supporting Rev. McLean was then drawn up and signed by approximately 100 people who were not technically Church members, but who thought of themselves as parishioners regularly attending the Church. The majority of those who signed the petition wished to be admitted to membership of the Church and took the position that it was only through inadvertence that they had not previously applied for membership and that they were not actually aware that they were not full members.

The Church had no internal dispute resolution process in its constitution. This being so, His Honour said that (at [17]):
It is quite clear from a review of the jurisprudence, as it relates to when the courts might interfere in the religious affairs of a church or other religious organizations, that the courts must be sensitive to the ‘interplay between civil law and the internal law of a religious organization’. It is equally clear that the courts should only interfere where the process is unfair or does not meet the rules of natural justice.

Was this such a situation? His Honour said that the elders’ admission of 12 new members was unfair in all the circumstances. This represented a 20% increase in Church membership, and was unusual given that the largest number of new members in any previous year had been five. His Honour then asked whether this meant that ‘this court should interfere in the internal workings of this Church’ (at [20]).

The evidence revealed that there were at least a further 12 potential members who could perhaps be admitted to membership of the Church. His Honour said (at [22]):

This court has no intention of, in any way, influencing the decision of the Church elders and the Church members in determining whether or not the additional twelve people... are, in fact, made members of the Church. This court also has no intention of getting involved in how the ultimate meeting of the Church members proceeds in terms of the consideration of whether or not the senior pastor should be terminated. That is a determination that the Church members, in their ultimate wisdom, will have to decide. While the process adopted by the elders, as described above, was unfair, this court must, nonetheless, circumscribe the extent to which it becomes involved in the internal affairs of a religious organization.

Therefore, both parties had partial success in this case. The process of the elders was declared unfair, but mandatory relief was not available to force any particular outcome from the internal decision-making within the Church.

The case may be viewed at:

Implications of this case

As in other common law jurisdictions, Canadian courts are reluctant to become involved in the internal affairs of a religious organisation. The reasons for this include:

- freedom of religion (a right protected by the Canadian Charter of Rights and Freedoms) must be respected;
- there is a real risk of misunderstanding the relevant tradition and culture in the case;
- while the court will enforce the civil incidents of an agreement that originates in a religious context, such as in a contract, it will be reluctant to become involved in doctrinal disputes;
- the concepts underpinning the relationship between the civil law and religious organisations and their internal laws have not been fully worked out in Canada or elsewhere. There are some exceptions, such as the obligation of a religious organisation to follow its own rules, including the rules of natural justice.

2.5.7 YUKON GOVERNMENT (REGISTRAR OF CHARITIES) V HUMANE SOCIETY OF YUKON, 2013 YKSC 8 (SUPREME COURT OF YUKON, GOWER J, 1 FEBRUARY 2013)

This case concerned certain irregularities in the running of the Humane Society of Yukon (HSY), a charitable society in Canada. The Registrar of Charities in that territory brought this proceeding in the public interest and in the interest of HSY, including its donors, funders, patrons, supporters and
members. He sought the assistance of the court in clarifying the fiduciary and related legal duties of the individual respondents in their capacities as former directors of HSY, and in directing the individual respondents to fulfill those duties. The HSY is a society registered under the Societies Act R.S.Y. 2002, c. 206 (the Act). The question before the court was: did the individual respondents breach their fiduciary duties to HSY by failing to comply with certain of their statutory and contractual obligations under the Act and the Societies Regulations (the Regulations), O.I.C. 1988/124, and the HSY constitution and bylaws.

The issues in the case had their origin in an internal dispute among the directors of HSY. This escalated over time to encompass denial of membership to persons who did not meet criteria imposed by the directors, which were not part of the HSY’s constitution or bylaws. The individual directors’ submissions were that they were acting to protect the interests of the HSY from persons who were engaged in a lawsuit against the society, and held different ideological views. His Honour characterised this as a ‘subjective belief’ with ‘two fatal flaws’ because (at [9]):

... (1) it ignores HSY’s own bylaws; and (2) the respondents cannot be said to have been acting in good faith if their decisions to deny memberships were based on unreasonable grounds.

The Registrar had pointed out to the HSY Board that there were no grounds for screening membership in their bylaws. Although the default bylaws (in the Act) allowed for approval of applications for membership by the Board, the HSY bylaws, which had been altered, provided that any person or corporation who applied for membership and met the criteria for membership should be admitted. The criteria for membership in the HSY bylaws were that the person applied and paid the required fee. There was no discretion to screen applicants.

Counsel for the HSY submitted that the necessary power to screen applicants could be inferred or implied from the bylaws. His Honour disagreed. The current bylaws did not contain such a power, and if an unsuitable person applied and gained membership (such as a person who abused animals) then the HSY would have to go through the process of expelling that person in accordance with its own rules (at [15]).

Considering the second ‘fatal flaw’ His Honour asked whether the directors, though acting unreasonably, still acted in good faith. His Honour held that it was clear from precedent that just to believe subjectively that you were acting in good faith was not enough. The standard was objective. Furthermore, he said that the directors of charitable organisations are held to an even higher standard than directors of commercial corporations and are required by the common law to act consistently in good faith. His Honour commented that the relationship between members of charitable organisations and the directors of those organisations is considered to be contractual in nature and is governed by the relevant legislation, the documents creating the organization, its bylaws and fiduciary obligations and duties of good faith. However, the fiduciary duties are owed by the directors to the corporation (or society) and not to the membership. With respect to members, the directors have in past decisions been said to have an obligation to deal fairly and in accordance with the rules of natural justice. With respect to those persons applying for membership, the directors owed no contractual duty, nor a duty to comply with the rules of natural justice. Therefore, a refusal to admit somebody as a member will not normally be reviewable by a court, unless the directors failed to act in good faith.

Counsel for the HSY made a submission concerning the business judgement rule, a rule which applies to directors of commercial corporations. This rule says that if the directors of a commercial corporation make a decision honestly and in good faith, without any conflict of interest, and based on the best
information available, then as long as that decision is within a range of reasonableness, the courts should give due deference to the decision. On this point, His Honour said (at [24]):

...it remains an open question as to whether the business judgment rule has any application to charitable organizations. It would seem to be a debatable proposition, given that the directors of such organizations ‘are held to a higher standard’ than those of for-profit corporations in the exercise of their fiduciary duties... However, even if the rule does apply, because we are dealing with anticipatory breaches in the case at bar, the high standard of proof of clear and unambiguous evidence would still apply. For reasons which follow, I will attempt to show that the respondent’s decisions to refuse applicants for membership clearly failed to meet that standard.

Six applicants were denied membership on the ground of anticipatory breaches of the HSY’s constitution and bylaws. Correspondence in evidence revealed that the real reasons for denial of membership were political and ideological differences about animal care and training. His Honour found that the reasons for denial of membership were not only beyond the power of the Board, but also amounted to arbitrariness. This meant that the Board could not have acted in good faith (at [32]).

In relation to certain other matters raised by the Registrar, the Board was found to be in default, and was ordered to comply. The case on the remainder of the issues raised by the Registrar, which are technical in nature, is yet to be heard.

The case may be viewed at: http://www.canlii.org/en/yk/yksc/doc/2013/2013yksc8/2013yksc8.html

Implications of this case

His Honour made it clear that he agreed with authority (in particular Re London Humane Society, 2013 ONSC 5775 (CanLII)) that held that directors of corporations were obliged to act with utmost good faith, trust and confidence with a view to what is in the best interests of the corporation. Directors of charitable organisations were held to an even higher standard and were required by common law to ‘consistently act in good faith’. In London Humane Society, Granger J (at [31]–[36]) expanded on this notion of good faith, holding that it included an element of reasonableness and excluded arbitrariness. To refuse membership of a charitable organisation based on ideological differences was arbitrary and an inappropriate use of the Board’s power.

2.5.8 MACEDONIAN ORTHODOX COMMUNITY OF AUSTRALIA LTD V SUBESKI [2013] NSWSC 22 (SUPREME COURT OF NEW SOUTH WALES, GZELL J, 30 JANUARY 2013)

The plaintiff, the Macedonian Orthodox Community of Australia Ltd (MOCA) is a company limited by guarantee. MOCA’s membership is open to Macedonians, persons born of Macedonian parents, persons having a Macedonian mother or father, or descendants of such persons who are adherents to the teachings of the Eastern Orthodox denomination. Its principal objects are to organise ecclesiastical, social and other activities for Macedonian Australians of the Orthodox Christian faith. The defendant, Alex Subeski, was a member of MOCA. The general management of MOCA’s affairs is vested in a Council, sometimes called a Board. Subeski was a member of the Council. The Council passed a resolution expelling him from membership of MOCA, after which he persisted in publicly claiming that he was still a member of the Council. It was claimed by MOCA that Subeski was expelled from MOCA because he was aggressive at Council meetings.
In this case, MOCA sought a declaration that Subeski was validly removed from its register of members and thereby ceased to be a member of the Council, and an order permanently restraining him from representing that he is a member of the Council. Subeski sought a declaration that he was invalidly removed from MOCA’s register of members and never ceased to be a member of the Council, and an order permitting him to represent that he is a member of the Council. The case raised yet again the issue of the court’s jurisdiction to intervene in the affairs of a voluntary association. On this point, His Honour said (at [5]–[6]):

The existence of the court’s discretionary power at common law to intervene in the affairs of a voluntary tribunal has long been recognised notwithstanding an absence of consensus as to the source of the jurisdiction.... At times the foundation for the court’s intervention has been identified as contract. The jurisdiction has equally been characterised by reference to broader notions of justice and the protection of private rights or interests... [in any event] Mr Subeski was entitled to natural justice or procedural fairness in respect of the passing of the resolution expelling him from membership of MOCA.

The matters particularly raised by MOCA included that Subeski opposed the appointment of a new CEO of MOCA in 2009, and continued over time to be very aggressive towards the CEO, as well as threatening. In addition, a Council meeting became heated and almost violent when a question of liability arose. The background to this was that Subeski was also the President of the Bankstown City Football Club (the Club), which MOCA assisted from time to time. MOCA required restoration work to be carried out on St Ciryl Church at Rosebery. To assist the Club, an arrangement was entered into whereby the Club contracted with MOCA to carry out the work at a commercial fee but had the work done by specified contractors at cost. Mr Subeski was to supervise these works. Stevce Gorgievski painted the Church. In carrying out some touching up of his paintwork he fell from a ladder and was injured. He lodged a worker’s injury claim and the question arose as to who employed him, Mr Subeski on behalf of the Club, or MOCA.

In addition to these incidents, there were other episodes of violent behaviour, swearing and threats at meetings and soccer matches. Subeski admitted that he was angry and adopted inappropriate conduct at meetings. On 17 June 2011, an email was sent to Subeski informing him that a resolution relating to his expulsion from MOCA would be considered at a meeting to be held on 28 June 2011. This email included a copy of the draft resolution which the Council would consider in taking its decision, and invited the defendant to make a written response. He was also invited to attend the meeting to make an oral response provided he gave three days notice of his wish to attend. The defendant responded in writing on 27 June 2011.

Subeski did not attend the meeting of 28 June 2011 initially. The resolution, which was considered perfunctorily, was passed unanimously. Subeski and three supporters arrived at the meeting late to find the gate locked. They were let in, but asked to leave by the CEO and another Council member. Eventually the police arrived and convinced Subeski and his supporters to leave.

Later, Subeski convened two unauthorised meetings of the MOCA which were attended by about 150 people. He also organised three buses of supporters to attend an extraordinary general meeting of MOCA scheduled for 21 August 2011. However, these court proceedings were commenced on 17 August, so on 19 August 2011 Subeski gave an undertaking not to gather with his associates in front of the entrance to the extraordinary GM and not to obstruct people’s entry by way of harassment, abuse and intimidation, and not to threaten or intimidate any member or guest present at the extraordinary GM or otherwise disrupt it.
His Honour took the view that the defendant was not denied natural justice. He had been invited to respond in writing and had done so. He was asked to give three days notice of his attendance at the meeting to consider his expulsion, but he did not do so. Rather, he attempted to storm the meeting. His Honour said (at [46], [50], [52]):

In light of his prior conduct, it was not unreasonable to place this condition [of three days notice to attend] upon his attendance at the meeting. Had he given notice of his intention to attend he would have been told the time and place of the meeting. It was not a difficult task for Mr Subeski to give such notice. He failed to do so. He was not denied natural justice in the withholding of the time and place of the meeting until he gave the requisite notice.... The notice of meeting specified in great particularity the matters relied upon to ground the expulsion... [any] evidence would not have taken Mr Subeski by surprise.

His Honour went on to find that the defendant was validly expelled from MOCA under Article 11 of MOCA’s constitution.

Counsel for MOCA had also sought to make new submissions under section 1322(2) of the Corporations Act 2001 (Cth) (the Act) but His Honour did not allow it because it would prejudice the defendant. (Section 1322(2) provides that a proceeding under that Act is not invalidated because of any procedural irregularity unless the court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the court, and by order declares the proceeding to be invalid. A procedural irregularity is defined in section 1322(1)(b)(ii) of the Act to include a defect, irregularity or deficiency of notice or time.) In any event, it was unnecessary. Subeski was validly expelled at common law, and the court made a declaration accordingly. The court also declared that Subeski should be permanently restrained from representing that he was a member of MOCA and a council member of MOCA.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2013/22.html

Implications of this case

The jurisdictional issue raised in this type of case is often troubling to courts. In this case His Honour noted that the Supreme Court of New South Wales had previously quoted with approval the comments of Tadgell JA in Australian Football League v Carlton Football Club Ltd [1998] 2 VR 546 at 550:

Statutes aside, the courts have been disposed to interfere in a limited way with decisions of private or domestic tribunals in order to protect private rights that have been adjudged to deserve protection including rights in property. The concept of property has been broadly interpreted for this purpose and, in cases within that category, I believe that there is no decision of a private or domestic tribunal with which the courts will refuse to interfere if interference be considered necessary for the attaining of justice.

Thus, in His Honour’s opinion, there was no impediment to the court’s jurisdiction in this case.

2.5.9 GALLAGHER V MCLINTOCK [2013] QSC 292 (SUPREME COURT OF QUEENSLAND, M’MEEKIN J, 23 OCTOBER 2013)

This case concerned a dispute within the congregation of the Wesleyan Methodist Church (the church) in Yeppoon, Queensland. The applicant had attended the church for many years. A dispute arose between the applicant and the pastor and members of the board of the church relating to the manner of worship. Over recent times the applicant had become increasingly upset at the theological position of his church community. He felt that the pastor (McClintock) was unqualified for his position and was
implementing an entirely new concept of Christianity, a Christianity obtained from the United States of America involving an approach of brainwashing those exposed to it. The applicant created and distributed material (which he called ‘warning pamphlets’) to other members of the congregation voicing his concerns about the direction of the church. The respondents repeatedly requested that the applicant cease such conduct.

On 1 September 2013, the applicant was asked to leave the church premises because of his activity in distributing the pamphlets. The police were called, after which the applicant left. The board of the church then sent the applicant a letter which barred him from the church premises without the permission of the senior pastor and the church board. The applicant complied with this letter, but, feeling the bar to be unfair, sought redress by this application for an interlocutory injunction against the pastor and church board. The applicant was self-represented, and argued his case on the basis of free speech, and similar ‘rights’.

His Honour could see no basis for the application. There was no serious issue to be tried. Although appropriate evidence was not presented, His Honour worked on the assumption that the respondents were entitled to the present possession of the land on which the church was situated and from which the applicant had been excluded. Such entitlement typically included the right to use or enjoy the land, the right to exclude others from it and the right to alienate (sell) it. That being so, it was at the respondents’ discretion to allow or refuse any person licence to enter their property. It is not necessary that they first demonstrate that the exercise of their rights was a reasonable one (at [19]–[20]).

However, that being so, His Honour was concerned rather with the actual rights inter se between the applicant and the church. Was this a proper matter for the court? There was a paucity of evidence (at [22]–[24]):

Usually there would be a constitution detailing the powers of the respondents and perhaps the rights of members of the congregation. I have no information on the matter. To the extent that the dispute involves the doctrinal teachings of the church then the Court would be very reluctant to become involved…. Interference with the applicant’s proprietary rights is the proper concern of the Court[but]…. The highest that I suspect that it could be put is that the applicant had some form of right of user of the church property. He certainly demonstrated no more. Generally speaking it has been consistently held that such a right is not sufficient to found a proprietary interest sufficient to attract the Court’s jurisdiction to intervene…. Cameron v Hogan [1934] HCA 24; (1934) 51 CLR 358…. The defence of some right, usually of a proprietary nature, or at least of an equity, is at the heart of any injunction…. There is no free standing right to an interlocutory injunction.

Was there some type of implied term of contract involved, that the respondents would not purport to exclude him from the church otherwise than for sufficient reason, bona fide, and in accordance with the principles of natural justice? His Honour could find no basis for this contention either.

On the free speech issue, His Honour held that this argument, which embraced the Bill of Rights 1688 and the Australian Constitution, was misconceived (at [32]–[33]):

There is no section within the Australian Constitution which entitles a person to freedom of speech, nor is it enforced by the Bill of Rights of 1688. The specific section referred to by the applicant applies to the proceedings of parliament. It is commonly known as ‘parliamentary privilege’. It is a protection afforded to politicians to allow for open debate. The protection has now been codified in the Parliamentary Privileges Act 1987 and does not extend to the general public. That is not to say that there is no freedom of speech in our community or that the
Constitution does not have a part to play in the preservation, at least, of freedom of political communication. What Mr Gallagher asserts is a right to enter someone else’s property and distribute pamphlets there. Freedom of speech has nothing to do with it.

Thus, there was no serious question to be tried, nor did the balance of convenience favour an injunction, since the applicant did not make clear what harm would follow from his worshipping at another church. Therefore, the application was dismissed.

The case may be viewed at: http://www.austlii.edu.au/au/cases/qld/QSC/2013/292.html

Implications of this case

One issue in this case was the justiciability of the matter before the Court. A purely doctrinal matter would not be justiciable. However, the matter was not one of doctrine (though there were doctrinal differences involved), or of rights (since these were limited), but of whether there should be an interlocutory (temporary) injunction. Such an injunction requires that there be a serious issue to be tried in the main case (there was not), and that the balance of convenience (i.e. justice between the parties) favours the applicant (it did not).

2.6 NEGLIGENCE

2.6.1 OYSTON V ST PATRICK'S COLLEGE (NO 2) [2013] NSWCA 310 (NEW SOUTH WALES COURT OF APPEAL, MACFARLAN, BARRETT JJA, TOBIAS AJA, 23 SEPTEMBER 2013)

On 27 May 2013 the New South Wales Court of Appeal delivered judgment on the issue of St Patrick College's (the College's) breach of its duty of care to the appellant: Oyston v St Patrick's College [2013] NSWCA 135. The breach of duty found by the court was the College's failure, particularly during 2004 when the appellant was in Year 9, to take reasonable steps to bring the bullying of the appellant by other students to an end. The breach of the College's duty of care consisted of knowing that the appellant was vulnerable, and that she suffered from anxiety and panic attacks. She was, therefore, likely to be susceptible to psychological harm if bullied. The steps taken by the College during 2004 did not provide a reasonable response to the not insignificant risk of harm to students such as the appellant, if bullying of them continued. It was insufficient for the College merely to request teachers to keep an eye out for bullying once a complaint of bullying had been received. Once such a complaint was received it required investigation and, if substantiated, action against the perpetrator. In this context, the evidence established that the appellant was regularly bullied by three identified students. However, no reasonable steps were taken by the College to investigate the appellant's allegations of bullying by those students and to act on them.

This second judgement dealt with the issues of causation and damages. As to causation, the court said that the principles applicable were now well established. Section 5D(1)(a) of the Civil Liability Act 2002 (NSW) (the Act) requires that the relevant negligence must have been a necessary condition of the occurrence of the harm sustained by the plaintiff. The relevant approach to factual causation was articulated by the High Court in Strong v Woolworths Ltd [2012] HCA 5 at [32]. However, the primary judge in this case accepted that the appellant's family situation was also a contributing cause to her psychological injury. Therefore, the question arose whether this affected causation of the harm. The answer was no. The High Court said in Strong at [20]:

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Under the statute, factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm. A necessary condition is a condition that must be present for the occurrence of the harm. However, there may be more than one set of conditions necessary for the occurrence of particular harm and it follows that a defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation within s 5D(1)(a). In such a case, the defendant's conduct may be described as contributing to the occurrence of the harm.

Even more recently, in Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10, the majority (French CJ, Hayne and Kiefel JJ) observed at [43], [45]:

> The proper identification of damage should usually point the way to the acts or omissions which were its cause. Causation is largely a question of fact, to be approached by applying common sense to the facts of the particular case.... [T]he law's recognition that concurrent and successive tortious acts may each be a cause of a plaintiff’s loss or damage is reflected in the proposition that a plaintiff must establish that his or her loss or damage is ‘caused or materially contributed to’ by a defendant’s wrongful conduct. It is enough for liability that a wrongdoer’s conduct be one cause. The relevant inquiry is whether the particular contravention was a cause, in the sense that it materially contributed to the loss. Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss.

In this case, the application of commonsense led the Court of Appeal to the conclusion that it was more probable than not that, but for the failure of the College to actively implement its own bullying policy, the psychological injury to the appellant would not have occurred or at least would have been minimised. The court accepted that domestic issues contributed to the appellant's condition, but held that there could be little doubt, upon the medical evidence accepted by the primary judge and not challenged on appeal, that her psychological injuries were materially contributed to by the bullying that she was forced to endure during 2004 as a consequence of the College's breach of its duty of care. Therefore, the appellant was held to have established causation.

As to damages, the primary judge awarded the appellant $124,938.48. This part of the judgement was set aside on appeal and remitted for further calculation which took into account a larger sum for non-economic loss and interest.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWCA/2013/310.html

**Implications of this case**

This case again illustrates that it is not enough for a nonprofit organisation to have policies about bullying (or indeed any other workplace issue) 'in place'. Such policies must be implemented actively. The College submitted that nothing it could or should have done would have prevented the bullying of the appellant from continuing as it allegedly did. Moreover, there was an attempt in the College’s submissions, at least in part, to blame the appellant. These submissions were rejected at [70]:

> It was no answer to the College's otherwise inadequate efforts that it was pursuing what can only be characterised as a fairly passive approach on the basis that to do otherwise would cause resentment amongst the perpetrators and cause them to increase their bullying activities rather than abandon them.
Expert evidence, which was not challenged on appeal, was to the effect that bullying needed to be ‘nipped in the bud’ at an early stage by effective measures. The College had comprehensively failed to do that in this case.

2.6.2 DUFFY V SALVATION ARMY (VIC) PROPERTY TRUST [2013] VSCA 253 (COURT OF APPEAL, VICTORIA, HANSEN, TATE JJA, BEACH AJA, 20 SEPTEMBER 2013)

This was a case in negligence, appealed from the County Court of Victoria, where the appellant (Duffy) had been unsuccessful. The appellant is a disability support pensioner, and a shearer by occupation, although he had been in receipt of benefits from Centrelink because of the sporadic nature of shearing work. He alleged that he injured his left shoulder while working at premises occupied by the Salvation Army in Bairnsdale, Victoria (the premises) as part of the Work for the Dole Program (the program) initiated by the Commonwealth of Australia and implemented through the Department of Workplace Relations and Centrelink. The Salvation Army accept that Duffy was a ‘worker’ pursuant to the program and had been directed to work at the premises, primarily compressing clothing into wool bales.

The appellant claimed that at about noon on 8 March 2006 he rushed to catch a large mirror which detached and fell from a vanity unit while being unloaded from a truck. The mirror was a long octagon bevelled mirror weighing about 100 kilograms. He dislocated his left shoulder in the process. He had not been asked to assist in unloading the unit and mirror and he was not initially involved in doing so. In evidence, the appellant recalled that he had grabbed the mirror with his right hand on the right side and stabilised it as well as he could, slowly pulling it up and then slowly lowering it to the ground. He explained that he caught the mirror about a metre before it hit the ground. The distance for the mirror to fall from the truck was about two metres. He thought he had gone to lunch after the incident then did a few more light jobs in the afternoon. He said he had constant pain after the incident, and had extreme trouble sleeping that night. He told a manager in the Salvation Army shop the next day that he had trouble sleeping at night because of the pain in his shoulder. The manager filled out a handwritten note of the incident which Duffy gave to Centrelink. The appellant has not returned to the Salvation Army to work since the incident. The appellant alleged that, as a result of the incident, he had suffered injury to the left shoulder, probably to the rotator cuff; severe and constant pain; depression; psychological injury and probable permanent disability. He attributed his inability to undertake paid employment to the ongoing effects of the shoulder injury, which included repeated dislocation of the shoulder joint and chronic sleeplessness.

The appellant founded his claim in negligence, alleging in his particulars of negligence that the Salvation Army had failed to provide a safe system of work; had failed to provide him with any or any adequate or proper supervision; exposed him to risk of danger or injury which could have been avoided with reasonable care on the part of the Salvation Army; permitted and/or required him to work in a dangerous manner; failed to provide him with competent fellow employees; failed to provide any or any adequate equipment for the unloading of a vanity unit from the truck at the premises; required him to perform duties that were too onerous for him, and required him to prevent a large vanity unit mirror from falling to the ground during the course of its being unloaded from a truck. He also alleged that the Salvation Army was in breach of its obligations under the regulations made pursuant to the Occupational Health and Safety Act 2005 (Vic) and, further, that it had failed to comply with Part IIA of the Wrongs Act 1958 (Vic) particularly at section 14B(3), which sets out the content of the duty of care owed by an occupier of premises.

The appellant sought damages of $42,000,000 for pain and suffering, $4,000,000 for past loss of earnings, $100,000 for estimated future medical expenses, and $18,000,000 for future lost earnings as a successful shearer.
The Salvation Army accepted that it owed a duty of care to the appellant as he was an employee at common law. It denied any negligence on its part and denied any breach of duty as an occupier. It also submitted that if negligence was found, then the appellant’s actions had constituted contributory negligence, in that he failed to have sufficient regard to his own safety when he reached to catch a large falling mirror in circumstances where he knew or ought to have known that doing so presented a risk of injury to himself, and failed to remove himself from a position of danger. It alleged that the appellant was solely responsible for any injuries he suffered by reason of his contributory negligence. The Salvation Army’s defence consisted of reliance upon a variety of documents aimed at demonstrating that the appellant’s unfitness for work was related to his psychiatric difficulties, and that the restrictions on his work capacity from those difficulties were expected to be ongoing.

The trial judge had found in favour of the Salvation Army. Although Her Honour accepted that the Salvation Army owed a non-delegable duty of care to Duffy, she held that the incident could not have occurred in the way described in evidence. In effect, she just did not accept Duffy’s version of events. Therefore, she held that there was no evidence of negligence or a breach of duty.

The fundamental complaint which emerged from the grounds of appeal was that, in effect, the core features of the incident the appellant alleged were corroborated by his witness, and should have been accepted by the judge. Those core features included that Duffy, while employed by the Salvation Army and while standing on its premises, ran to catch a large falling mirror that had dislodged from a large vanity unit that was being unloaded and caught it in order to protect the people standing around the unloading bay, including the witness, and the other people who were engaged in the process of unloading the truck.

The Court of Appeal was unconcerned with differences in the two men’s evidence (such as where exactly the truck was, and the exact position of the appellant’s hands) saying (at [46]–[48]):

Given that the core features of the incident as alleged by Duffy were confirmed by Fitzgerald [his witness], and given that there was no evidence adduced by the Salvation Army which contradicted it, in our view the judge was obliged to accept it. This is consistent with the principle that a judge is obliged to accept uncontradicted evidence providing that it is reasonable and inherently probable. While there were differences in the evidence given by Duffy and that given by Fitzgerald, in our view those differences were matters of detail and did not undermine the core features of the incident. We consider that it was not open to her Honour to conclude that ‘Fitzgerald’s evidence [was] diametrically opposed to [Duffy’s] version of the incident’. Moreover, given the manner in which the Salvation Army chose to conduct its case, an adverse inference based upon Jones v Dunkel was clearly open to the effect that the failure of the Salvation Army to call any of the six or seven men engaged in unloading the vanity unit, or any other witnesses to the incident who clearly could have given relevant evidence on the central issues in the case, without an explanation of their unavailability, suggested that the evidence of those witnesses would not have assisted its case. We consider that, taking all those matters into account, it was not open to her Honour to conclude that ‘it was wholly improbable, wholly unlikely, and an impossibility for the incident to occur in the manner described by [Duffy]’.

The Court of Appeal also said that her Honour at first instance was wrong to say that even if the events had happened as the appellant described that the Salvation Army was not negligent or in breach of legislation. The unloading area and its environs were ‘inherently hazardous’ with ‘obvious risks’ (at [50]). The fact that there were six or seven men involved in the unloading might appear to constitute a safe system of work, but a better one could have been used, with better lines of communication, and the
exclusion of non-involved personnel. The fact that the appellant had put himself forward when it was not his job was not the issue (at [54]–[55]):

While it was not one of Duffy’s responsibilities to unload trucks delivering furniture, it was not suggested that his presence in the unloading area was anything other than attributable to his work with the Salvation Army. The Salvation Army must have known or should have known that unless employees not responsible for unloading were warned not to be present when furniture was unloaded, as Duffy and Fitzgerald both were, or the area was one where access could not be gained during unloading, there was a real and not fanciful risk that those employees could be injured. That risk was exacerbated by, and the Salvation Army must have known it would be exacerbated by, the real possibility that employees such as Duffy could misjudge a situation and attempt to retrieve falling furniture even where this would likely cause them injury. In our view it was not open for her Honour to conclude that even if the incident had occurred as alleged by Duffy, the Salvation Army was not negligent. We consider that the circumstances demonstrate that the Salvation Army breached the duty of care it owed to Duffy as a person employed to perform work for it on the day in question.

The appeal was accordingly allowed, and the matter remitted to the County Court for judgement on the issue of damages only.


Implications of this case

The appellant in this case, who was successful, claimed significant damages. The Salvation Army had previously submitted that the damages claimed by Duffy were well in excess of what he could reasonably claim even if his case was proven. It suggested that $17,500 to $25,000 was an appropriate figure for pain and suffering, with nil for the past loss of earnings, and $1,000 maximum for medical expenses. Furthermore, the Salvation Army submitted that Duffy’s schizophrenia, as well as a knee problem (arising from a fall in 2010), would severely restrict his capacity for employment in any event and that his future economic loss should therefore be determined in accordance with Victorian Stevedoring Pty Ltd v Farlow [1963] VR 594. In Farlow the Court held that unless there is evidence upon which it can be concluded that a plaintiff will earn less money post-injury, the Court should compensate the plaintiff only to the extent of a reasonable and moderate evaluation in money of the mere chance or risk of future unemployment or less remunerative employment. In practical terms this means that when a court cannot make an assessment with precision as to a loss of income then an assessment is to be made in a global sense, with the trial judge doing the best he or she can do with limited information. Her Honour’s views on this issue are yet to be determined.

2.6.3  SWAN V MONASH LAW BOOK CO-OPERATIVE [2013] VSC 326 (SUPREME COURT OF VICTORIA, DIXON J, 26 JUNE 2013)

This was an application for damages for pain and suffering and pecuniary loss allegedly suffered by the applicant because of psychiatric injury caused by her work for the defendant. The plaintiff alleged that the negligence of the defendant caused her injury by exposing her to an unsafe workplace in which she was subject to bullying, harassing, and intimidating conduct. The defendant, Legibook, operated a specialist law book co-operative from the basement of the law building at Monash University. As a co-operative, Legibook was a nonprofit organisation that sold law books at discounted prices to law students. It was operated by a board of directors (the board) comprising current and former students at Monash University Law School. At the relevant time, Legibook employed two permanent part-time workers: a manager, and an assistant. The plaintiff, Ms Swan, was employed as the assistant between
2002 and October 2008. Mr Kriston Cowell was employed as manager between 2002 and 2007. He was alleged to be responsible for the bullying, harassing and intimidating conduct. The chairman of the board at relevant times was Mr Paul Somers. Mr Somers had been a director of Legibook since 1997, first as a law student and, from 2001, as a solicitor.

In July 2002, the plaintiff applied successfully for a position as a retail-sales assistant with Legibook. There was no formal contract of employment or applicable job description. The advertisement to which she responded stated that she would be primarily responsible for book sales and customer service. Other responsibilities would include managing returns of unsold stock, administering the co-operative’s membership database and otherwise assisting the manager alongside whom she would work. The position was permanent part-time in nature.

The business operated out of small, cramped quarters in the basement of the Law Department building at Monash University. Legibook used one computer to operate a financial management and accounting software system, Quicken, and a member’s database program. Some modernisation occurred during 2002, and the evidence was that the plaintiff did considerable work to update the database once a new computer system was installed.

His Honour’s general findings were that from the outset the board engendered the plaintiff’s belief that she was Mr Cowell’s colleague, an employee of equal worth, entitled to be treated with proper respect and dignity (at [23]). The plaintiff was invited to make suggestions to the board about matters concerning workplace contracts, practices, and processes in the operation of the business of the bookroom, to attend board meetings, an annual dinner of the co-operative, and social dinners with the directors. Each was an occasion for the processes and operations of the bookroom to be discussed, and the plaintiff was never discouraged from participating in such discussions. His Honour found that Mr Cowell did not appreciate that the board had extended that invitation to the plaintiff (at [25]). Over time, Legibook and its directors demonstrated to the plaintiff in various ways that she was regarded as a valuable employee who contributed to the running of Legibook and a colleague of Mr Cowell, of equal worth.

The plaintiff first reported conflict with Mr Cowell to the board in March 2003. A board meeting was promptly called to discuss the matter. Various solutions were considered, but little was actually done beyond considering the formulation of relevant policies for the bookshop. Nevertheless, His Honour found that: ‘From the start, the board recognised that the allegation was of bullying behaviour by Mr Cowell, including occupational violence, that it needed to be investigated, that it warranted a response, and that it could cause an injury to the plaintiff compensable as a Workcover claim’ (at [37]).

At that time, Mr Somers asked what the plaintiff expected, stating that the board could take some sort of disciplinary measure or just take her comments on notice. The plaintiff apparently responded that the comments should be taken on notice. In the context of these observations, Mr Somers recommended to the board that Mr Cowell’s alleged conduct did not warrant any formal warning or further investigation, but that the board should take the action that had already been proposed to address the plaintiff’s complaints (workplace policies, position descriptions and formal contract of employment), and should maintain an ongoing dialogue with both staff members individually at regular intervals. However, the board failed to follow through on its recommendations and Mr Cowell remained ignorant of its general and its specific concerns.

Therefore, despite its resolutions, the board never settled position descriptions for the two employee positions or drew up workplace behaviour policies. Although the board did not consider a formal response appropriate, no informal investigation or inquiry was conducted. Neither did the board or any of its members engage in any informal contact or dialogue with Mr Cowell for the purpose of communicating the board’s expectation of behavioural standards to apply in the workplace. His Honour
said that this lack of action was ‘explained but not excused’ by the voluntary nature of the board members’ work (at [49]).

Tensions re-emerged in April 2005. His Honour commented that (at [56]):

The board members told the plaintiff Legibook would implement policies to make things work better. They said they understood she was very unhappy but that this should not happen again as the board would put the contracts into place that would clarify the employees’ roles. The plaintiff could not recall whether the board acted after this meeting, but putting contracts in place and workplace policies in the bookroom did not occur and why it did not remains unexplained.

A major conflict erupted between the plaintiff and Mr Cowell in July 2007. The plaintiff left work in a distressed state. The psychiatric assessment of the plaintiff was that she suffered ‘a breakdown’ in July 2007, after which her previous ‘bubbly’ personality was altered. His Honour held that Mr Cowell was at fault (at [61]–[62]):

Mr Cowell knew that the plaintiff felt intimidated and uncomfortable in his presence, but he didn’t care. Motive is irrelevant. Mr Cowell had a particular attitude, flowing from his personality. It is probable that Mr Cowell either positively disliked the plaintiff or simply did not care for her personal idiosyncrasies. In the crowded, cramped bookroom, which was mostly a private space for the two of them, Mr Cowell felt no compunction to treat the plaintiff with the level of respect that is reasonably expected and commonly afforded between two colleagues working together in such a space. It is out of personality conflict of this sort in that confined and isolated space, which cannot be fully analysed in a courtroom, that the repeating pattern of Mr Cowell’s conduct towards the plaintiff became unreasonable. I am satisfied that Mr Cowell’s conduct towards the plaintiff was initially disrespectful, arrogant, and uncaring. Mr Cowell saw no need to be polite to the plaintiff, but he did see a need to be controlling and to assert that he was in charge. I accept the plaintiff’s evidence of receiving his anger and other bad moods. It was evident that he has some need to manage these emotions. I think it probable that Mr Cowell reacts poorly to stress and it will appear that a number of the critical incidents occurred at times when he was under stress. One significant feature of the plaintiff’s character is that she likes things done properly and naturally looks for more efficient or better ways of completing tasks, perhaps something of a perfectionist or a little obsessive. This feature of the plaintiff’s personality grated on Mr Cowell and, given that he had no capacity to enjoy casual conversation with the plaintiff, was a significant part of their social interaction. What resulted was that Mr Cowell’s private interaction with the plaintiff was not polite or respectful and that became a pattern.

The evidence suggested that Mr Cowell had a ‘conservative, untrained management style’, and an ‘unwillingness to accept the plaintiff as a colleague’ (at [92]). On the plaintiff’s part, His Honour identified an inability to recognise that she could not cope with her manager’s behaviour, and that a breakdown was looming (at [95]).

After the 2007 incident, the board engaged a mediator, who reported to the board on 3 August 2007. His Honour described the mediator’s report as ‘of no assistance to the court’. After this, Mr Somers met with the plaintiff and explained, yet again, that the board intended to resolve the situation by bringing in employment contracts, workplace policies, counselling for each employee and a system of separate split shifts so that they would not work together. Meanwhile, the plaintiff had consulted her general practitioner, a clinical psychologist and a specialist psychologist. His Honour accepted all the medical evidence given by these professionals.
Did the defendant have a duty of care? His Honour held that it had, especially since it had been put on notice by the plaintiff (at [168]):

...no question of foreseeability, objectively assessed, of a risk of a psychiatric injury to the plaintiff from conduct of the type complained of arises in this case. Mr Somers was told in writing that the plaintiff considered she was working under very strained conditions because she was being continually subjected to sarcasm, hostility, rudeness and violent behaviour, threat of termination or lack of consultation within the workplace. Mr Somers immediately appreciated that such an environment within Legibook could cause a psychological or psychiatric injury to the plaintiff and the board’s awareness of that risk is plainly evident in minutes of its meetings and in written communications between directors from 25 March 2003. The duty of care to take reasonable care for the plaintiff’s mental health in the context of a risk that she might be injured by workplace bullying was engaged by this time.

Was that duty breached? His Honour held that it was; the behaviour of the defendant from March 2003 through until August 2007 fell short of the expected standard of an employer in that it failed to do anything effective about the matters which had been raised with it by the plaintiff (at [176]).

Did the breach cause the injury? The board’s lack of action from 2003 was crucial. His Honour said (at [190]):

I am satisfied that had the defendant acted prudently and appropriately in 2003, it is likely that the plaintiff would not have suffered any, or any significant, psychological injury and that the defendant’s negligence, as I have found it, was a cause of her injury, loss and damage. The defendant’s conduct operated as a cause of the plaintiff’s injury because she was unnecessarily and unreasonably exposed to stress factors in her employment that cumulatively broke her mental health. Had the defendant intervened as a reasonably prudent employer would have done, that exposure to damaging stress factors would have been eliminated or alleviated, in severity, duration, or repetition.

The defendant was liable. His Honour assessed the plaintiff’s pecuniary loss at $292,554.38 and her damages for pain and suffering and loss of enjoyment of life in the sum of $300,000.

The case may be viewed at: http://www.austlii.edu.au/au/cases/vic/VSC/2013/326.html

Implications of this case

This case, where a small nonprofit enterprise was subject to substantial damages, demonstrates that nonprofits need to have appropriate policies in place for dealing with workplace behaviour. In addition, they need to act promptly and effectively when complaints are received so that liability does not arise. As His Honour said (at [187]):

The opinion evidence from the psychologists emphasised the importance of early intervention to avoid or limit the damage and injury that flowed from sustained workplace stress and its resultant impact on the plaintiff. I accept that evidence. [emphasis added]


These were proceedings governed by the provisions of the Civil Liability Act 2002 (NSW) (the Act). The plaintiff was injured at the premises of the defendant, Liverpool Catholic Club Ltd (the club). He sustained a fracture to his right ankle after losing his footing, slipping and falling whilst descending a set
of stairs. At the time of his fall, the plaintiff was wearing ice skating boots and was descending the stairs in order to access an ice skating rink on the premises. The plaintiff claimed that the fall and his resultant injury were due to negligence on the part of the defendant, for which he claimed damages.

The plaintiff was aged 19 at the time of the incident. He attended the club with his family to go ice-skating. He put on his skates prior to going on to the ice rink. He then proceeded to the head of a flight of stairs in order to descend to the ice rink, which was at a level about 2 metres below the head of the stairs. The plaintiff said, and the judge accepted, that he did not recall seeing any warning signage on the entry doors to the premises or in the premises. There was no evidence that anyone had directed his attention to any such signs from the time he had entered the premises until the time that he had fallen.

The plaintiff used the edge of the skate blades to walk down the stairs, and slipped on a wet patch on the stairs. The floor area in the vicinity of the stairs, including the treads of the stairs, was covered in a reconstituted or recycled rubber carpet type compound that was clearly intended to be soft, waterproof, with a non-slip characteristic. The nosing of each step comprised a grooved edge strip which was yellow, and made of a non-slip, flexible polypropelene or rubber-like compound. There was CCTV footage of the incident, and the judge accepted the plaintiff’s version of events throughout. Aside from the physical damage to the plaintiff, he was unable to work for some time after the incident, which occurred in 2009.

Was there a duty of care owed to the plaintiff by the club? The club argued that the plaintiff had been generally warned of the risk of engaging in ice skating, through signs in the premises making those warnings. The club therefore contended that it did not owe the plaintiff a duty of care: section 5M of the Act. The content and colours of the relevant separate signs were as follows (NOTE these are not to scale):

- **NO RESPONSIBILITY**
  The Activities provided in this centre have a certain amount of risk attached. By entering the Centre our patrons and their guardians accept that there is a degree of risk and release the Centre from any responsibility or legal liability in an activity or actions of other patrons present or participating in [indistinct word] activity.
  [Red on black]

- **ARE YOU A BEGINNER SKATER?**
  Assistance available during some public skating times, Please ask at Cashier Counter.
  [Yellow on black]

- **NO SKATES BEYOND THIS POINT↓**
  [Black on green]

  Ice skating is a dangerous sport. All patrons are requested to read and understand the Conditions of Entry and the No Responsibility signage before entering the Ice Rink. Please skate carefully at all times.
  [Black on white; underlined words in red]

Did these signs have any effect on the liability of the club? The significance of these signs, and the intention behind them were matters requiring construction from the viewpoint of whether a reasonable person entering and using the premises for whatever purpose would have regarded the signs as warnings to which the exclusionary provisions of section 5M of the Act would apply. The plaintiff himself had difficulty ‘reading and pronouncing big words’ (at [106]), but did not suffer from any vision problems. He could not recall seeing any signs on the premises before his fall. However, he was not a
A beginner skater, and had skated at the club before. Nevertheless, taking all the evidence into account, the judge concluded (at [117]):

...the risk warnings contained within those signs were not likely to have the result of alerting the plaintiff of the risk of falling whilst negotiating the stairs within the premises, irrespective of the type of footwear that was being worn: s 5M(3) of the CL Act. The warnings inherent in the signs related to the recreational activity of ice skating, not other actions taken in preparation for ice skating, such as negotiating stairs within the premises in order to gain access to the ice rink for the purposes of engaging in the contemplated recreational activity of ice skating.

Thus, the signs were not ‘of sufficient specificity’ (at [120]). Slipping on a wet step in skates was held to be entirely foreseeable in this situation. A duty of care was owed. What was the content of that duty?

The plaintiff claimed that as the occupier of the ice rink, the club owed him, as a customer entrant onto the premises, a general duty of care to take reasonable care to avoid a foreseeable risk of injury. The duty of an occupier of premises extends not only to a static condition of premises, but also to activities conducted upon the premises (in this case skating and activities connected with skating, such as going down the stairs to enter the ice rink). The scope of such a duty of care is to be considered in conjunction with the expectation of the occupier that entrants onto the premises will exercise reasonable care for their own safety, but also envisages the possibility that entrants may at times be inattentive or negligent. In appropriate cases, the duty may be taken to extend to take into account, or allow for, the thoughtless, inadvertent, careless or misjudged actions of customers. In all the circumstances of this case, the judge held that (at [131]):

In the present case, it is clear from the evidence... that the defendant knew or ought to have known that its customers used the stairs in question as a means of ice rink access and egress.... Further, on an analysis based on common knowledge, by extension, because the area at the base of the stairs comprised an ice rink, and because where there was ice there must also be moisture where the ice is in contact with the atmosphere, the defendant must be taken to have known that it was foreseeable that the area of the steps could become moist or wet through contact with wet ice skate blades, if not from general atmospheric condensation in proximity to ice.

Thus, there was a duty of care by the club as the occupier of the premises. Was that duty breached? The judge said that it was. Section 5B(1) and (2) of the Act applied:

- the defendant clearly knew or ought to have known that there was a risk that a person using the stairs might slip and come to harm, thereby satisfying the requirement of foreseeability: section 5B(1)(a);
- the risk of falling on stairs was not insignificant in the circumstances: section 5B(1)(b);
- in the light of those matters, and on a common sense analysis, a reasonable person in the position of the defendant would have taken precautions to seek to avoid the risk of harm to persons who might fall on the stairs: section 5B(1)(c);
- there was a high probability that harm would occur if care were not taken: section 5B(2)(a);
- the likely seriousness of the harm that might occur in the event that precautions were not taken was not insignificant, as there was a likelihood of a range of limb and head injuries that might ensue: section 5B(2)(b);
- the extent of the burden faced by the defendant if the contended precautions (e.g. better, wider steps, a warning sign not to wear skates on the steps, a diagrammatic warning sign as
well as one in written form) for avoiding harm were required to be taken was not overly high: section 5B(2)(c).

Therefore, all the conditions for a breach of the relevant duty of care were met.

On the question of causation, section 5D of the Act applied. This contains a ‘but for’ test. In this case, the plaintiff was held likely not to have sustained his injury if the club had had the appropriate safety measures in place – ‘but for’ the club’s negligence, there would have been no injury.

The club pleaded contributory negligence on the part of the plaintiff. Should the plaintiff have held on to the hand rail provided at all times? Watched where he put his feet? Did he fail to take reasonable care in the face of an obvious risk? The judge held that there was no contributory negligence (at [185]). The plaintiff’s description of the events in his oral evidence and the CCTV footage did not demonstrate that the plaintiff had either acted unreasonably or that he ought to have been aware of specific obvious risks whilst wearing ice skating boots and descending the stairs in question. Moreover, there was no inherent risk – the action of descending the stairs to enter the ice rink was not itself a dangerous activity: section 5K of the Act.

The club was liable in negligence for the plaintiff’s injuries. The plaintiff’s total damages were assessed at $143,343, comprising the following:

(a) Non-economic loss $75,000
(b) Past economic loss $18,150
(c) Past loss of superannuation $1,996
(d) Future loss of earning capacity $50,000
(e) Future out-of-pocket expenses $2,500
(f) Past out-of-pocket expenses $697

Costs were also awarded to the plaintiff.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWDC/2013/93.html

Implications of this case

This case showed that provision of specific warnings is required in relation to the liability owed to customers and patrons as an occupier of premises. The club owed the plaintiff a duty of care to ensure that the plaintiff was provided with a safe means of access to the ice rink at the club, knowing that its customers usually used the stairs whilst wearing ice skating boots. The judge held that it could have provided safer access to the ice rink than it did e.g. by providing wider stairs to walk down, chairs at the bottom of the stairs (instead of at the top) to put on boots, and very specific warning signs about going down the stairs in boots both in diagrammatic form (for non-readers) and written form.

2.6.5 ECHIN V SOUTHERN TABLELANDS GLIDING CLUB [2013] NSWSC 516 (SUPREME COURT OF NEW SOUTH WALES, DAVIES J, 28 MAY 2013)

This was a case concerning liability for negligence. The plaintiff, who was a member of the Southern Tablelands Gliding Club (the club), was injured when a glider he was flying on 16 July 2008 collided with power lines as he was coming in to land at the airstrip used by the club. The quantum of damages applicable had been previously agreed at $750,000. The question for the court here was whether there had in fact been any negligence.
The club operated from a large parcel of rural land near Carrick, a short distance from Goulburn. The land was bounded on the southern boundary by the main southern railway line. The western side of the land proceeded in a north easterly direction bounded by Carrick Road. The boundary at the north which ran in an east south-east direction from Carrick Road consisted largely of a line of very tall pine trees. Close to the eastern boundary of the property, which ran in a largely north-south direction, were high tension electricity lines that ran from the north-east to the south-west with three towers located on or near the land.

The plaintiff had joined the club in May 2005, and had received instruction from qualified flight instructors. His log book was in evidence, but was ‘found wanting’ (at [8]). It had few accurate entries, many missed entries, and few instructor comments. However, it emerged that the plaintiff had commenced solo flights 19 months after first learning to fly (at his 76th flight). On the day of the accident the plaintiff undertook four flights. The first was a 12 minute solo flight. The second was with an instructor. The third was an 8 minute solo flight. The plaintiff had his accident during his fourth flight that day. It was a solo flight, and was his 150th flight.

The plaintiff commenced the flight at about 3:20pm. The logbook indicated that the flight was an 11 minute flight. Thus, it was a little after 3:30pm as he approached the landing strip. The plaintiff was attempting what is referred to as a ‘hangar landing’. The plaintiff said he was flying towards the sun which was low in the sky. When he thought he had flown over the power lines he deployed the dive brakes in order to increase the descent rate of the glider for landing. Within a second or two of deploying the dive brakes the aircraft collided with the powerlines and fell approximately 100 feet to the ground.

The particulars of negligence against the club were:

(a) Providing and/or designating a runway (runway 12/30) in a location such that the high tension electricity lines were likely to intersect the flight path of aircraft approaching the runway to land from the east;
(b) Failing to instruct the plaintiff adequately or at all as to the danger associated with attempting to use runway 30 for landing;
(c) Failing to instruct the plaintiff adequately or at all as to the risk of collision with the high tension electricity lines when attempting to land on runway 30 during the late afternoon;
(d) Instructing the plaintiff to perform a ‘hangar landing’ in circumstances where the plaintiff was not sufficiently experienced;
(e) Failing to ensure that the plaintiff was sufficiently trained and/or experienced before permitting the plaintiff to fly as sole pilot in command.
(f) Failing to ensure that the plaintiff was operating the aircraft under the direct supervision of a Level 2 instructor in breach of regulation 7.1.1 of the Gliding Federation of Australia operational regulation.
(g) Failing to ensure that the day’s operations were being conducted under the direct supervision of a Level 2 instructor in breach of regulation 7.1.1. of the Gliding Federation of Australia operational regulations.
(h) Permitting a Level 1 instructor to take charge of the first defendant’s operations in breach of clause 17.1.3.1 of the GFA manual of standard procedures.

Was the club negligent? In response to the questions raised in the particulars, His Honour considered expert evidence. The overall conclusion was that none of the grounds raised were made out. His Honour found that the plaintiff was a competent and safe pilot who was competent to fly solo. He had made a number of hangar landings before. His Honour said (at [34]):
The Plaintiff not only was aware of the obstruction created by the power lines but said that he had become aware of it during his training. Further, as his evidence set out above shows, he was instructed how to deal with such obstructions, and he had landed safely on that runway over the power lines previously when flying solo.

It was true that the state of the plaintiff’s logbook left much to be desired (at [45]):

It may be accepted that the paperwork in the logbook was less than desirable in terms of detailing matters that arose during the Plaintiff’s training. Nor was it satisfactory that flights were not signed off by the instructor concerned, particularly before the Plaintiff was regarded as suitable for solo flying. Those deficiencies must be seen, however, in the light of the fact that this was a small social club which did not appear to have, and might not be expected to have, strict auditing procedures to ensure that processes and practices were adhered to strictly.

Therefore, there was no negligence on the part of the club. Despite this finding, His Honour went on to consider the defences raised by the club. These were:

- Protection of volunteers doing community work: sections 61 and 3C of the *Civil Liability Act 2002* (NSW) (the Act)
- Dangerous recreational activity: section 5L of the Act
- Obvious risk: section 5F of the Act.

Volunteers doing community work are protected under the Act from personal civil liability. Community work is defined in section 60 as ‘work that is not for private financial gain and that is done for a charitable, benevolent, philanthropic, sporting, educational or cultural purpose, and includes work declared by the regulations to be community work but does not include work declared by the regulations not to be community work’.

The plaintiff accepted that the people involved in the club were volunteers within the meaning of the Act. Therefore, they had the protection from liability provided to them by section 61. However, did section 3C apply? This section limits or excludes vicarious liability to the same extent as liability is excluded by section 61. Was the defendant club covered by this exclusion? His Honour could find no vicarious liability of the club for any of its volunteers, particularly for its instructors.

Section 5L of the Act excludes liability for harm where the plaintiff has engaged in the obvious risks of dangerous recreational activity. ‘Dangerous recreational activity’ is defined in section 5K as meaning a recreational activity that involves a significant risk of physical harm. ‘Recreational activity’ is defined as including any sport or any pursuit or activity engaged in for enjoyment, relaxation or leisure. ‘Obvious risk’ is defined in section 5F as follows:

(1) For the purposes of this Division, an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.

(2) Obvious risks include risks that are patent or a matter of common knowledge.

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.
His Honour found that glider flying was a recreational activity. The question then was whether it was a dangerous recreational activity with obvious risks. His Honour considered the question at length and said (at [120]):

> A consideration of all of this evidence demonstrates that, as a recreational activity considered generally, gliding involves a significant risk of physical harm because, although the risk of an accident is low, the potential harm is catastrophic...The experts considered it contained dangers, some of which might be avoided and some of which might be unexpected. For these reasons I consider that gliding is a dangerous recreational activity as defined in the CLA as the cases make clear.

If this conclusion was too general, then if the particular activity in question was considered (landing over power lines), the same conclusion could be drawn (at [124]–[126]):

> Even if gliding generally could not be considered as a dangerous recreational activity, the act of performing a landing over the powerlines was a dangerous recreational activity... Where the Plaintiff himself acknowledges the danger of a particular activity it will not be difficult to hold that the risk would be apparent to a reasonable person in the Plaintiff's position... The risk of striking the powerlines was an obvious risk of gliding over powerlines and, more particularly, of performing a landing over the powerlines because of the need for a descent over them or very shortly after passing over them. It was that risk which materialised in the present case. Section 5L precludes a recovery by the Plaintiff even in circumstances where the Club was otherwise found to be negligent.

Thus, even if the club had been found to be negligent, the defences in the Act would have operated in the club’s favour. The plaintiff’s case was dismissed with costs.


**Implications of this case**

Legislation in New South Wales attempts to provide strong defences against cases in negligence, particularly for nonprofits using volunteers, such as the club in this case. In New South Wales, a volunteer does not incur any personal civil liability in respect of any act or omission done or made by the volunteer in good faith when doing community work which is:

(a) organised by a community organisation, or
(b) as an office holder of a community organisation.


**2.6.6 WEAYER V ENDEAVOUR FOUNDATION [2013] QSC 93 (SUPREME COURT OF QUEENSLAND, MCMEEKIN J, 12 APRIL 2013)**

This was a claim in negligence against the defendant charity, the Endeavour Foundation. At the material time the plaintiff, then aged 48, was employed by the defendant as a senior individual funding services manager. The plaintiff fell during a training session she was conducting in Rockhampton in May 2008. The training was in how to deal with aggressive clients, and involved a movement called a ‘back-steps’ manoeuvre, in which the evidence showed that the plaintiff had received proper training herself. This
manoeuvre consisted of walking backwards on the balls of the feet in a slightly crouched position while keeping attention directed strictly ahead towards the aggressor. When attempting to demonstrate the manoeuvre to trainees, the plaintiff fell onto her buttocks and back on a carpeted surface and suffered the injuries which were the subject of these proceedings.

An employer’s duty of care towards employees is well-established. For an employee to succeed in a cause of action in negligence against an employer the employee must establish:

(a) that the task involved a foreseeable risk of injury;
(b) that there were reasonably practical means of obviating that risk;
(c) that her injury belonged to the class of injury to which the risk exposed her; and
(d) that the employer’s failure to eliminate the risk showed a want of reasonable care for her safety.

His Honour said that this necessarily involved a consideration of ‘the shortcomings and idiosyncrasies’ of the actual employee in question. The plaintiff was overweight. She was wearing running shoes, which on the evidence caught on the carpet as the plaintiff was moving backwards, and caused her to fall. There was no question of a problem with the carpet, but it was possible that a change in floor level contributed to the fall.

His Honour could see no problem with the foreseeability question (at [55]–[56]):

It seems to me clear beyond doubt that directing a middle aged and, with respect, overweight lady to walk backwards on the balls of her feet while keeping her attention directed not to where she was going but to the ‘aggressor’ in front of her from whom she is retreating involves a risk of injury that she might fall over. It is nowhere near ‘far fetched or fanciful’. The risk is obvious, real and not at all unlikely to occur. That is so irrespective of whether the plaintiff was required to traverse a change in the level of the carpet and irrespective of the grip characteristics of her shoes. A change in level would compound the risk, as would the grip characteristics too. So much seems obvious to me.

On the issues of reasonably practical means of obviating the risk, His Honour could see no issue with the type of surface or shoes involved. The most obvious means of lowering the risk of the manoeuvre was to conduct it slowly. The plaintiff had done it quickly in accordance with the training she had received. Subsequent training in the practice (by a different trainer) had emphasised slowness. His Honour said (at [60]):

Such a direction would have substantially reduced the risk and given that the plaintiff had practised the technique previously and had some experience with it, justifies a finding that the fall would probably have been avoided in this instance had such a direction been given.

In relation to the class of injury question, His Honour held very briefly that (at [70]): ‘Plainly enough the plaintiff’s injury fell into the class of injury to which the risk exposed her.’

The remaining issue was want of reasonable care by the defendant charity. The act complained of was one of commission rather than omission (as is the more common in these types of cases). As His Honour pointed out (at [76]):

The complaint here – restricted to the question of instruction – is one of commission. The crucial point here is that the employer through its contractor [the previous trainer who had trained the plaintiff in the back steps manoeuvre] positively increased the risk of injury to
which the plaintiff was exposed. The plaintiff was endeavouring to perform her duty to the best of her ability. She felt duty bound to carry out her instructions to perform the task quickly. [The new trainer’s] approach shows that the instruction was unnecessary.

The defendant was liable for the injuries sustained by the plaintiff while demonstrating quickly moving backwards as part of a defensive manoeuvre. His Honour findings on this point were (at [78]):

No doubt many employees throughout Australia walk backwards at some point in their working day to carry out their tasks. It is an everyday event carried out without injury or incident in the vast majority of cases. Generally speaking an employer would not be liable for a worker tripping over as they walked – forward or backwards, absent some other feature. To succeed the plaintiff must take this case out of the usual. There are four features which in my opinion do that:

(a) The plaintiff was a middle aged overweight lady, not a robust or athletic person, or even a person accustomed to physical activity – the likelihood of a fall occurring was greater for her and the potential consequences more serious;
(b) The plaintiff did not choose how she walked backwards – she was directed how to do so. She was supposed to walk backwards on the balls of her feet. This too increased the risk of mishap;
(c) The plaintiff was not to keep her attention where she was headed so she could see where she was to place her feet. Rather her attention was required to be directed to the ‘aggressor’ in front of her from whom she was retreating. Again this increased the risk of mishap;
(d) To this ever increasing risk of mishap is added the requirement that this unnatural activity be done quickly.

The risk involved was not just ‘an everyday, obvious risk against which the employer need take no precautions’ (at [81]). A positive instruction had been issued to the plaintiff by her employer (via its trainer) that increased her risk. The defendant thereby exposed its employee to an unnecessary risk of injury. There was considerable medical evidence as to the physical and psychiatric injuries suffered by the plaintiff as a result of her fall. She had numerous physical ailments and major depressive illness, for which the plaintiff claimed in excess of $1 million. After detailed consideration, the amount of damages awarded was $369,000.02, consisting of the following components:

- $50,000.00 for pain, suffering and loss of amenities of life
- $2,470.00, interest on past general damages
- $145,000.00 for past Economic Loss
- $21,700.00, interest on past economic loss
- $110,000.00 for future Economic Loss
- $22,950.00 for loss of superannuation benefits
- $41,729.12, special damages (paid by WorkCover)
- $23,854.45, special damages (paid by the Plaintiff)
- $4,900.00, interest on special damages
- $15,000.00, for future medical expenses
- $9,705.00, Fox v Wood damages
- $30,000.00 for future Paid Care
- $477,308.57 total damages
- Less $108,308.55 refund to WorkCover
- $369,000.02 Net Damages
The case may be viewed at: http://www.austlii.edu.au/au/cases/qld/QSC/2013/93.html

Implications of this case

The reasonable foreseeability of injury is a key component in liability for negligence. In this case, the defendant charity was held to have been negligent not to have foreseen the risk of injury to an overweight employee who had been instructed to perform the particular defensive movement quickly, and had conscientiously tried to do so in accordance with her training. Instructing her to do the manoeuvre slowly was held to be the obvious means of reducing the risk to the employee, and was actually what was advised in training subsequent to the training the plaintiff had received.

2.6.7 PHEE V GORDON AND NIDDRY CASTLE GOLF CLUB [2013] CSIH 18 (COURT OF SESSION (INNER HOUSE), SCOTLAND, LORDS CLARK, HODGE, PHILIP, 14 MARCH 2013)

This Scottish case dealt with the issue of negligence by the Niddry Castle Golf Club (the Club). The plaintiff lost his left eye after being hit in the head with a golf ball hit by Mr Gordon at the Club. The plaintiff brought an action for damages against Gordon for common law negligence, and against the Club under section 2(1) of the Occupiers' Liability (Scotland) Act 1960 (the Act). At first instance the Lord Ordinary found Gordon and the Club liable to the plaintiff and apportioned liability for the agreed damages of £397,034.82 as to 70% on Mr Gordon and 30% on the Club. Both defendants appealed.

One claim on appeal was that the accident was wholly caused by the plaintiff and his contributory negligence. The evidence was that the plaintiff was a very inexperienced golfer, who was unfamiliar with the rules and etiquette of golf (especially as regards the use of the warning ‘fore’ used by golfers when attempting a potentially dangerous shot). He had never played on the Club’s course and was unfamiliar with its layout. Gordon was an experienced, though not expert, golfer with a handicap of 18. The shot in question was hit as a 200 yard drive from the 18th hole, but because of the tight layout of the course, the shot hit the plaintiff on the 7th tee. There were shouts of warning given. The plaintiff’s playing companions all ducked down low, in accordance with etiquette and the rules of golf, but the plaintiff did not know to do this and so was injured when his eye-glasses were shattered by the ball and glass entered his left eye.

The Club had no apparent safety protocols in place. Visitors, such as the plaintiff and his companions, were invited to play on the course, but were given no diagram of the course or other instructions. Accidents were not routinely reported. The Lord Ordinary accordingly held that the defendant Gordon was negligent in that he should not have played his shot when he saw the plaintiff and his companions on the 7th tee. As a player of only ‘moderate skill’, he should have foreseen the possibility that he would play a bad shot, which in fact was what had occurred.

As to the liability of the Club, the Lord Ordinary criticised the Club for not considering whether precautions were needed unless a danger had been disclosed by a reported accident. He held that the Club had failed in its duty to persons coming on to the course by taking such a restrictive approach to safety. There was evidence that golfers, including Mr Gordon, Mr Phee and his companions, would have had regard to warning signs or signs regulating priority. He concluded that such signs either on the 18th tee or between the 6th green and the 7th tee would have been effective in controlling conflicts between players in this area. It would be for the Club to determine what signs were appropriate. But in failing to have any such signs the Club failed in its duty to persons, such as the plaintiff, who used the path.

The appeal court said that golf injury cases were very fact specific (at [24]):
This case concerns a straightforward question of liability in negligence for alleged failures to exercise reasonable care to avoid causing personal injury. As the playing of golf on many courses involves potential conflicts between players on different holes, it is not surprising that the courts have held that golfers may owe a duty of reasonable care in their play to avoid injuring other people on the course. Nor is it unexpected that a golf club should owe a duty to exercise reasonable care to minimise the risk of such injuries in locations of conflict by providing warnings or fences or taking other protective measures. But the existence and practical content of such duties depend on the particular circumstances of the case.

The appeal judges agreed that Gordon had failed to exercise reasonable care in the circumstances, and was liable in negligence. There had been no contributory negligence which could reasonably be found on the evidence. As to the position of the Club, it was also liable (at [36], [38]):

Turning to the case against the Club, we are of the view that the Lord Ordinary was entitled to take the view that the conflict between players at the locus posed a foreseeable danger and that the Club failed in its duty of care to players in not providing warning notices. In a case under the 1960 Act, which uses the test of reasonable care in the circumstances, it is appropriate to adopt a similar approach to the calculus of risk as with common law negligence. The Club encouraged visitors to play on the golf course, whether or not they were experienced golfers. It was not entitled to assume that the people walking on the course were aware of the rules of golf or how to respond to a warning shout. It ought to have been aware that some golfers would be beginners or relatively inexperienced. It was not entitled to assume that all golfers would play in a safe manner all of the time. While a timely warning shout would often avoid serious injury when a golf ball was being hit a considerable distance and there was time to react to the shout, there was a greater danger if someone did not know how to respond to the shout or from where the danger was coming.

The appeal court’s overall finding in relation to the Club was that warning signs were necessary at the location in question. Moreover, the appeal judges said that the apportionment of damages was inappropriate in this case. The Club was most at fault. They said (at [43]–[44]):

...the Club's failure to warn was a significant failure which was of a different magnitude from that of Mr Gordon. As we have said, we are of the view that the Lord Ordinary was entitled to find fault on Mr Gordon's part. But we consider that some might judge his behaviour as not amounting to negligence when the players were at a distance at which most could be expected to respond appropriately and in a timely manner to a warning shout. In our view the lion's share of the blame rests on the Club. We consider that the agreed damages should be apportioned in the proportions of 20% on Mr Gordon and 80% on the Club.

Therefore, the appeal was denied except to the extent of the reversal of the apportionment of the quantum of damages.

The case may be viewed at: http://www.scotcourts.gov.uk/opinions/2013CSIH18.html

Implications of this case

The judgement in this case revisited several classic cases in the law of negligence. The principles in such cases are relatively decided, and the appeal court did not introduce any new principle. The use of warning signs in the avoidance of negligence cases is well-established. However, the appeal court did
decide that the bulk of the liability fell on the unincorporated Club. The Club was run on traditional and perhaps old-fashioned lines, with few changes having been made to its management over the years. The number and type of warning signs to be used were left to the Club’s discretion, although the appeal court suggested that (at [40]):

If the Club had included a warning near the 6th green that players should take care when walking to the 7th tee because they were within range of drives from the 18th tee, it is likely that most visitors would have adopted the practice of the members either to stay close to the tree or to walk keeping a good look out. Again this would have involved little cost and would have entailed fewer disadvantages in terms of delay than a priority sign on the 18th tee.

2.6.8 JOHNSTON V THE SHEILA MORRISON SCHOOLS, 2013 ONSC 1528 (ONTARIO SUPERIOR COURT OF JUSTICE, PERELL J, 12 MARCH 2013)

The litigation surrounding this case began in May 2009. This application was to approve a settlement which had been reached between The Sheila Morrison Schools (the school) and the plaintiffs, former students of the school. The plaintiffs’ motion was for an order to:

(a) approve the $4 million settlement of the action;
(b) approve class counsel’s fees of $1 million (exclusive of disbursements and tax);
(c) approve an honorarium payment of $5,000 for each representative plaintiff; and
(d) dismiss the action without costs.

The background to the case was that a class action (for which the plaintiffs were the representative plaintiffs) had been brought against the school, which was a co-educational residential and day school located near to the City of Barrie in Ontario, Canada. The school was for children 10–18 years of age who suffered from learning disabilities and behaviour problems. It operated from 1977 until the commencement of this action. The class action alleged that the defendants (the school and its principal) were negligent and in breach of their fiduciary obligations to the students at the school. The plaintiffs further alleged that:

- the students were physically, sexually, emotionally, and psychologically abused at the school;
- the students were deprived, endangered, exploited, and kept captive and isolated at the school;
- the funding for the school was inadequate to meet the needs of the students who resided at the school; and
- as a result of the defendants’ conduct, they and the other class members suffered abuse.

The original claim was for compensatory damages of $20 million, and punitive damages of $10 million. However, both defendants were impecunious, and the only source of recompense was insurance. Investigation showed that the available insurance cover was patchy. There were four insurers at different relevant times, with partial cover in many years, and no cover in others. In total there were at least eight uninsured years that were part of the period in question. Moreover, some of the available policies had exclusions for abuse.

The upshot was that without settlement, the insurers would pursue litigation. Therefore, His Honour approved the settlement of $4 million as representing a reasonable outcome. This amount had to cover all claims in the class action, fees of counsel, costs of administration, and taxes. Any moneys left over were to be given to four charities which represented the sort of care which the school should have provided to its students:
The Hincks-Dellcrest Treatment Centre which provides mental health services to more than 8,000 infants, children, youth and their families.

- Aisling Discoveries Child and Family Centre, a United Way Member Agency accredited by Children’s Mental Health Ontario. Aisling provides free services to children who are experiencing or are at risk of developing social, emotional or behavioural problems.

- The William J. McCordic School, a special education school in the Toronto District School Board for students with developmental disabilities.

- The Learning Disabilities Association of Ontario (LDAO), a registered charity dedicated to improving the lives of children, youth and adults with learning disabilities.

All former students were eligible for compensation under the settlement. The net amount available after fees, charges and taxes was $2,302,562.77. Fees to counsel were $1 million, which His Honour regarded as ‘reasonable and fair’ (at [41]). There were estimated to be between 400 and 600 claimants, with the wide range indicating that many former students had died or were unknown. This meant a compensation amount of between $7,500 to $10,000 was available for each student. However, the actual amount received under the settlement would depend on the type of experience the student had had at the school. Estimates of compensation were:

1. a class member who claimed no abuse at all would receive estimated net compensation of $3,833;
2. a class member who suffered physical assaults without either serious or observable injury would receive estimated net compensation in the range of $7,513 to $13,647;
3. a class member who suffered a serious injury such as a broken arm would receive estimated net compensation of $12,573 to $20,240; and
4. a class member who suffered a sexual assault (of which there were 4 possible levels) would receive estimated net compensation of $20,240 to $24,840.

His Honour approved all the elements of the settlement as being in the best interests of the class claimants (at [33]), applying section 29(2) of the Class Proceedings Act 1992 (Ontario).

The case may be viewed at:

Implications of this case

Section 29(2) of the Ontario Class Proceedings Act 1992 provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of the class.

In determining whether a settlement is reasonable and in the best interests of the class the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm’s-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.
2.6.9 TAYLOR v HAILEYBURY [2013] VSC 58 (SUPREME COURT OF VICTORIA, BEACH J, 22 FEBRUARY 2013)

This was case involving a claim for damages in negligence and breach of contract following psychiatric breakdown. The plaintiff was employed as a teacher of French at the defendant private school between January 2005 and May 2007. He ceased work in May 2007 following a psychiatric breakdown which he claimed was brought on by overwork at the defendant school. The plaintiff claimed damages for pain and suffering and pecuniary loss, pursuant to section 134AB of the *Accident Compensation Act 1985* (Vic). The plaintiff had never consulted a psychiatrist or taken any psychotropic medicine, apart from the herbal remedy St John’s Wort. He had undertaken some psychological counselling. Nevertheless, it was not disputed that he suffered from a major depressive illness. The school denied any liability.

The plaintiff taught French to years 5–8. The plaintiff’s case was that he was allocated 28 face-to-face 50 minute teaching periods per week in 2005, 29 in 2006 and 30 in 2007. He alleged that this was excessive, and that his teaching load should have been no more than 25 teaching periods per week in 2005, and less in 2006–07 because he also undertook ‘head of house’ duties. The plaintiff claimed that the teaching load place strain on him, and did not allow him adequate time for preparation and other duties such as sport. In addition, he suffered from bullying and bad behaviour by students which substantially increased his working time as he had to discipline all the students in his class via detentions. The plaintiff submitted that he worked 66.85 hours per week.

The plaintiff was employed under an Australian Workplace Agreement (AWA) which was attached to a letter of appointment. The letter of employment provided that:

.... As part of your teaching role, you are expected to participate in a range of duties beyond classroom responsibilities. These duties may include attending up to two after-school meetings, sports training, and professional development sessions each week of the school year. You are also required to attend other meetings and professional development days at the commencement of, and during, the school year. Some duties are performed at times other than during the school day, including weekends. You would normally be required to take up 24 weeks of Saturday Sport supervision or equivalent, as negotiated with the Principal.

The AWA attached to the letter of employment set out teaching and extracurricular duties in detail. In total, the plaintiff signed three AWAs with the defendant. All of these AWAs referred to a Staff Welfare Document. Two Staff Welfare Documents were tendered in evidence, one undated, and one dated 2006. Both were detailed, but the 2006 document was more so. Both referred to the workload as being 28 periods per week for junior school teaching, and 30 periods per week for middle school teaching. However, these workloads were described as ‘flexible’.

Detailed evidence was taken. His Honour expressed the view that he was ‘less impressed’ with the plaintiff’s evidence (at [104]) than with that of the defendant’s witnesses. His Honour concluded (at [109]):

Teaching, like other professions, is clearly a busy profession. As was said by a number of the witnesses, teachers (busy professionals with occupations of considerable responsibility) often complain about workloads. .... The short point is that while one might always be capable of constructing a case with hindsight about what might or might not have constituted a risk of excessive stress and/or a risk to mental health, nothing in the evidence in this case leads me to conclude that there was any basis, during the course of the plaintiff’s employment, for the defendant to suspect that the plaintiff’s mental health was at risk as a result of his workload.
His Honour then reviewed the relevant law. In terms of contractual liability, was there a breach of the AWA in this case? His Honour held that there was not. There were no stated maximum hours in the documents in evidence. Moreover, both the letter of employment and the Staff Welfare Document referred to flexibility in hours worked.

The leading case regarding psychiatric injury at work is Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44. In that case, the High Court rejected the proposition that reasonable foreseeability alone was the determinant of the content of the duty of care in a psychiatric injury case. Also to be taken into account were:

- the contract of employment;
- the nature and extent of the employee’s work;
- any signs from the employee concerned (for example, in the form of express warnings or the implicit warning that may come from frequent or prolonged absences that are uncharacteristic); and
- an assumption that the employee taking on the employment is capable of doing the job.

In addition, it did not matter that the hours of work exceeded the industry standard. As His Honour said (at [141]) ‘whether a risk is perceptible at all may in the end depend upon the vagaries and ambiguities of human expression and comprehension’. His Honour said that the plaintiff’s case bore ‘the hallmarks of litigious hindsight’, a term first used by Keane JA in Hegarty v Queensland Ambulance Service [2007] QCA 366 at [47], a decision with which His Honour agreed. His Honour had no doubt that the plaintiff’s workload was heavy, but doubted that it resulted in any psychiatric injury saying (at [144]):

The plaintiff has not established any breach of contract or negligence on the part of the defendant. Further, the plaintiff has failed to establish that the creation or implementation of additional policies, the education of staff contended for, the provision of further information or training, the provision of counselling to the plaintiff or the offering of treatment to the plaintiff would probably have alleviated the risk of the plaintiff suffering psychiatric injury. Additionally, having regard to the histories given by the plaintiff concerning his various difficulties with a particular student or students, it may be doubted that any particular reduction of the plaintiff’s workload would have been likely to have made any difference in any event.

Therefore, the plaintiff failed to prove his case in either negligence or breach of contract.

The case may be viewed at: [http://www.austlii.edu.au/au/cases/vic/VSC/2013/58.html](http://www.austlii.edu.au/au/cases/vic/VSC/2013/58.html)

**Implications of this case**

Good workplace health and safety measures are essential in any work context. The avoidance of claims in negligence involving psychiatric injury should be dealt with in the first instance by having sound workplace policies and documentation in place, as well as counselling for employees who need it. These should be clearly communicated to employees. However, as Keane JA said in Hegarty v Queensland Ambulance Service (at [47]):

...the law’s insistence that an employer must take reasonable care for the safety of employees at work does not extend to absolute and unremitting solicitude for an employee’s mental health even in the most stressful of occupations. A statement of what reasonable care involves in a particular situation which does not recognise these considerations is a travesty of that standard.

This was a claim against the defendant club (and one of its electrical contractors) for damages for negligence and consequent nervous shock. The issues for determination were:

1. The extent, if any, to which either of the defendants was responsible for any injury suffered by the plaintiff as a result of the incident;
2. The nature of any injury suffered by the plaintiff, in particular, whether she suffered as a result of the incident a significant psychological injury;
3. The extent to which the plaintiff was to be compensated by way of general damages, income loss, out of pocket expenses and the provision of domestic care.

The plaintiff was successful in her claim and was awarded $512,789.09 plus costs.

On 28 March 2008 the plaintiff, Mrs O’Donnell, went to the premises of the Ainslie Football and Social Club Limited (the Club) to have dinner with her husband and two children. Her daughter was then aged six, and her son was then aged one. The plaintiff stood at the reception counter in the process of renewing her membership of the Club while her husband and children remained seated on a lounge in the reception area. When she was required to provide proof of her identity, the plaintiff called to her husband to bring her driver’s licence to her. This prompted her daughter to walk from where she was seated and stand to the plaintiff’s right at the reception counter. At that time the child’s height was such that her head was below the level of the counter. The plaintiff’s evidence was that her daughter raised her arm and placed it under the counter. The child screamed and the plaintiff heard a very loud electrical noise that ran through the counter and she smelled burning flesh and hair. The plaintiff turned and either touched her daughter or the counter. She felt a blow to her hip after which she and her daughter fell to the ground. The child suffered a burn to her wrist that was surrounded by black soot and a second burn to the top of her arm. The plaintiff was not burned.

On the issue of negligence, Her Honour held that, at the time of the incident, the first defendant (the Club) was aware that the area in which the neon light was installed was accessible generally and that, in particular, it presented a hazard to children. As a consequence, even if the first defendant was not qualified to appreciate the potential for electric shock arising from the defects in the workmanship of the second defendant (the electrical contractor), it ought to have recognised the foreseeable risk of injury to persons, including children, from the heat generated by the unguarded electrically charged neon lights or from broken glass. In that respect, Her Honour said (at [19]–[21]):

In such circumstances, I considered that a reasonable person in the position of the first defendant should have taken steps to guard against these foreseeable risks of injury by enclosing the area in which the neon lights were installed and thereby preventing inadvertent access to that area. Had those steps been taken, the incident involving the plaintiff’s daughter would have been avoided. For these reasons I find both the first defendant and the second defendant negligent in respect of the defective condition of the installation of the neon lighting beneath the reception counter on the defendant’s premises on 20 March 2008. The second defendant, as the party responsible for the defects in the installation of the neon lighting must bear the greater proportion of liability. I apportioned liability at 70% to the second defendant and 30% to the first defendant.

The more contentious issue for consideration in this case that of ‘nervous shock’, that is a purely psychological injury which follows on from an incident of negligence causing harm to another. A mother
suffering psychological illness arising from fear and concern for her child would be an example of such injury. The plaintiff’s evidence was that she was terrified at the time of the incident, and subsequently continuously crying, upset and unable to sleep. The plaintiff was obliged to seek medication and to consult a psychologist. She was then diagnosed with Post Traumatic Stress Disorder. The medical evidence was of heavy use of medication, and frequent visits to both the plaintiff’s general practitioner and to a psychologist.

The plaintiff’s evidence was supported by that of her husband. At the time of the incident they had been in a relationship for 18 years and they married eight years prior to the incident. He said that up to the time of the incident the plaintiff was happy and resilient and enjoyed an active social life. She was not over protective of her children and she appeared to have no behavioural or psychological issues. However, since the incident this had changed drastically. The plaintiff did not sleep well, was hyper-vigilant about her children, and socially withdrawn. The defendant’s psychiatrist, who examined the plaintiff, found no evidence of any mental disorder, and described the plaintiff’s symptoms as ‘an artefact of the litigation process’. There were certainly stark differences between the medical opinions of examining doctors on each side of the case. However, Her Honour said that (at [86]):

The consistency in the plaintiff’s complaints of symptoms, in the diagnoses of her treating practitioners and the opinions of Dr Knox [her own examining psychiatrist], in the absence of any suggestion to the plaintiff that she lied or overstated her condition, persuaded me that I should accept that the plaintiff suffered from psychiatric injury in the nature of post traumatic stress disorder that was caused by the shock suffered in the incident of 20 March 2008 and that she continued to suffer the effects of that injury.

Damages for psychological injury (nervous shock) were assessed as:

- $150,000 general damages;
- $5,800 interest;
- $279,104.84 income loss caused by having to work only part-time since the incident (including future income loss);
- $36,929.85 medical expenses (past and future);
- $40,946.40 domestic care (@1.5 hours per week).

Total damages payable to the plaintiff were therefore, $512,781.09.


Implications of this case

This is a typical ‘nervous shock’ case. The Club was liable for the psychological injury to the plaintiff even though its negligence regarding the neon light had caused her no direct physical injury. Instead, the physical harm was to her daughter, but the distress of seeing her daughter injured brought on the psychological symptoms, which was a reasonably foreseeable result and for which compensation was payable. This is a clear reminder to all organisations to ensure that they are aware of reasonably foreseeable risk of injury in their premises and activities, and take steps that are reasonably practicable to address the risk. These issues should be accounted for in risk management plans.
2.7 NONPROFIT STRUCTURE AND GOVERNANCE

2.7.1 HARRINGTON AND ORS V COOTE AND ANOR [2013] SASCFC 154 (SUPREME COURT OF SOUTH AUSTRALIA, FULL COURT, KOURAKIS CJ, GRAY, PEEK JJ, 23 DECEMBER 2013)

This case concerned the internal affairs of an incorporated Anglican Church diocese in South Australia. The plaintiffs were five members of the Professional Standards Committee of the Anglican Diocese of Murray, the administrator of the Diocese of Murray, and the Synod of the Diocese of Murray, an incorporated body (the Synod). The first defendant was a licensed priest of the Anglican Church accused of sexual misconduct between 1994 and 1998.

The complaint against the first defendant had been heard before the Professional Standards Committee (the Committee) of the Diocese of Murray (the Diocese). Questions as to the fitness of the first defendant to be a priest were then put to the Professional Standards Board of the Diocese (the Board), and the first defendant was suspended from the clergy. The same decision was made when the matter was brought before a freshly constituted Board. The defendant sought a review of the suspension decision. This review was conducted by the second defendant, who found that although the Professional Standards Ordinance 2007 (the Ordinance) under which the Board had made its decision was itself valid, it did not authorise the enquiry which had been undertaken by the Board. On appeal, issues of the justiciability of the matter, and the validity of the Ordinance and its consistency with the Constitution of the Anglican Church of Australia, were in question.

Was the matter justiciable?

Chief Justice Kourakis (with whom Peek J agreed) held that the matter was justiciable on two grounds. Firstly, the Synod was incorporated under the provisions of the Associations Incorporation Act 1985 (SA) (the Act). Section 23(1) of the Act provides that the rules of an association bind the association and its members as if there were a contract between the association and its members. His Honour held that rules regulating the conduct and activities of parish priests of the Diocese were the very type of rules contemplated by section 23(1) of the Act.

Secondly, the Anglican Church of Australia is an unincorporated association recognised by Acts of Australian States giving legal force to the National Constitution of the Anglican Church (the National Constitution) and any rules made under it. The Murray Synod is a construct of the National Constitution. The Synod therefore had dual force both as an incorporated association under the Act, and as an organisation established under the National Constitution. However, not all the members of the parishes of the Diocese were members of the Synod. In particular, the Professional Standards Board and its members were not members of the Synod.

As an unincorporated association, the constituting documents and rules of the Anglican Church are a ‘consensual compact’ rather than a contract, as had been established by the High Court’s decision in Cameron v Hogan [1934] HCA 24. This had been dealt with in relation to the Anglican Church in Scandrett v Dowling (1992) NSWLR 483 at 527. In that case, Priestley JA had traced the provenance of the term ‘consensual compact’ in relation to the Anglican Church. He had found that the term originated in 1849 when the Anglican Church hierarchy in New South Wales recommended that the Church be established on that basis, since there was no established Church (as there was in England) in Australia. Thus, the nature of the consensual compact was one of ‘shared faith’, and ‘religious, spiritual and mystical ideas’ (at 554), not common law contract. However, when matters of property were involved the consensual compact had the ‘same effect’ as a common law contract.
The judgements in *Scandrett v Dowling* made clear that although there was only a consensual compact underlying the Anglican Church, some at least of its rules were capable of legal enforcement: see in particular the judgement of Mahoney JA at 505. Were the particular rules in this case of that kind, and so justiciable? Kourakis CJ considered the effect of section 3 of the *Anglican Church of Australia Constitution Act 1961* (SA) (ACAC), which provides that the constitution, canons and rules of the Church in South Australia are binding on the bishops, clergy and laity of the Church in South Australia in matters relating to property. He held that matters of property included the right to appoint a member of clergy to a position with a benefice or salary (at [17]), and the licence held by a member of the clergy to conduct spiritual ceremonies on the property of the Church (at [21]). Therefore, these matters were within section 3 of ACAC.

In addition, the National Constitution was appended to section 3 as a schedule, and was given legal effect by it (at [22]):

> It follows that s 3 of ACAC (SA) gives legal effect to the Anglican National Constitution, the constitution of Murray Diocese and the ordinances, canons and rules made under it in so far as they govern those aspects of Mr Coote’s licences as a parish priest. Those instruments legally bind Mr Coote...and the incumbents of the responsible offices of the Anglican Church...in all matters affecting Mr Coote’s licence and authority as rector of the parish....

His Honour also held that there was a contractual issue bound up in the fact that the licence held by the plaintiff carried with it a stipend, the loss of which would affect his financial well-being. Therefore, the issues were ones of property and the matter was thus justiciable on that basis.

**Was there inconsistency between the Professional Standards Ordinance 2007 and the National Constitution?**

The main issue here was whether the tribunal structure established under the National Constitution (at Chapter IX) was exclusive. His Honour held that there was no indication in the National Constitution that it was intended to deny diocesan synods of the Church the authority to establish such extra tribunals as might be thought necessary to exercise control over clergy. Although Chapter IX of the National Constitution maintained the tribunal structure of the Church as a ‘bishops’ court’, there was no indication that a narrow interpretation of this notion was required. Bishops had many and complex duties in the modern diocese, and such extra structures and procedures as were needed should be allowed to develop. His Honour said that the Professional Standards Ordinance 2007 was a good example of a ‘desirable additional procedure’.

**Did the Professional Standards Ordinance 2007 authorise the enquiry which had taken place in this case?**

The first defendant had argued that examination of the matters for which he had been suspended was time barred. After considering the history of the ordinances and canons preceding the Professional Standards Ordinance 2007 (the 2007 Ordinance) which had ultimately abolished time bars, His Honour found that it clearly conferred an unlimited authority to examine conduct ‘whenever occurring’ affecting the fitness of members of the clergy to hold office. Therefore, there was no time bar.

**The judgement of Gray J**

Gray J agreed that section 23(1) of the Act applied to the Diocesan Synod. The first defendant, as a member of the Synod, was bound by its rules, including the Professional Standards Ordinance 2007. The rules were deemed a contract under the Act, and as such enlivened the jurisdiction of the court. His
Honour held that this was sufficient in itself, without any necessity to consider the nature of the consensual compact underlying the Church. However, if he had been asked to do so, he held that the effect under a consensual compact would have been the same (at [141]):

...it may be concluded that the Anglican Church of Australia is a voluntary association bound together by a consensual compact, that the rights of its members inter se depend on the terms and conditions of the compact, and that the terms and conditions constitute a contract in which every member is bound to the whole body and to every other member to act in accordance with its provisions.

On the validity of the 2007 Ordinance, His Honour held that the powers of the Board were administrative in nature. It conducted investigations about fitness of clergy to hold office but did not establish offences, or seek to punish. Chapter IX of the National Constitution was not exhaustive in its coverage of disciplinary matters. The power contained within Chapter IX could be shared with diocesan synods – it was concurrent. The first defendant had argued that the disciplinary powers in Chapter IX were exclusive to the national church, but this was not so. There was no direct or implied conflict between the National Constitution and the 2007 Ordinance. Therefore, the 2007 Ordinance was a valid legislative enactment under the Murray Synod's powers.

Both judges agreed that the decision of the independent reviewer (the second defendant in this case) was seriously flawed, and was not in any way binding on the parties. Therefore, the decision to suspend the first defendant from the clergy was upheld as a valid decision of the Board.

The case may be viewed at: http://www.austlii.edu.au/au/cases/sa/SASCFC/2013/154.html

Implications of this case

This case demonstrated that parts of an unincorporated body which are incorporated associations are bound by the statutory rules contained in the relevant Associations Incorporations Act of each State. In this case, although the Anglican Church in Australia is an unincorporated body bound only by the traditional ‘consensual compact’, this did not affect the contractual nature of rules made under statute by its incorporated components.


(See the first instance decision on this case below at 2.7.7.)

This was an appeal from Pine Rivers, Caboolture & Redcliffe Group Training Scheme Inc & Ors v Group Training Assoc Qld & Northern Territory Inc [2013] QSC 31. The respondent was Group Training Association of Queensland and Northern Territory Incorporated (the Association) which is a peak body for Group Training Organisations (GTOs) in Queensland and the Northern Territory. The Association is a not for profit association incorporated under the Associations Incorporation Act 1981 (Qld) (the Act). Its 35 members, including the first appellant (East Coast) and the second appellant (Golden West), are GTOs which compete with each other to provide apprentice and trainee services to third parties. The third appellant, Mr Sparks, and the fourth appellant, Mr Fulton, are the chief executive officers of East Coast and Golden West respectively. Under the Association’s Rules, each of them was nominated by his GTO as its representative for election as a member of the Association’s management committee and was duly elected to that office at a meeting of the members of the Association.
Apart from membership fees, the Association receives most of its funding from Queensland state government grants, jointly funded programs by Commonwealth and Queensland Governments, Commonwealth funded programs, as well as programs funded jointly by industry and government. Those moneys are used by the Association to support its members in providing apprenticeships and group training programs throughout Queensland. Therefore, the Association operates as a vehicle for the provision of funding from the State and Federal Governments for projects which involve apprentices and trainees.

The rules of an association constitute a contract between the members and the association under section 71 of the Act. East Coast and Golden West, as members of the Association, sought a direction under section 72(1)(a) of the Act to enforce a claimed right under the Association’s rules of Mr Sparks and Mr Fulton, in their capacity as management committee members, to inspect and take copies of identified business documents of the Association. Mr Sparks and Mr Fulton were the only members of the seven member management committee who were not associated with a certain company. The primary judge found that Mr Sparks and Mr Fulton became concerned that the Association had made preferential allocations to those GTOs associated with the company. However, Her Honour at first instance held that there was no identifiable breach of the rules of the association on which the court could adjudicate, and dismissed the action.

The Court of Appeal did not agree with the primary judge’s conclusions (at [30]):

Many incorporated associations may have few members, hold little or no property, and carry on business only in a small way, if at all. For such associations the lack of a legally enforceable right in management committee members to inspect the association’s business documents may be of no moment. But it is apparent from s 5, particularly in light of the amplification in s 4, that there may also be incorporated associations – of which the Association is an example – which carry out substantial financial transactions and in respect of which a right in management committee members to have access to the business documents may be essential for the proper performance of their management functions. The characteristic of associations incorporated under the Act that they may not be formed or carried on for the purpose of providing financial gain for their members therefore does not justify the rejection of a prima facie right in persons charged with their management to inspect and take copies of the Association’s documents. The power conferred upon the Supreme Court by s 73(2) of the Act to refuse to entertain or make an order on an application under s 72 where the issue is trivial or the making of the application is unreasonable tends to dispose of any objection that the implication of such a right would open the floodgates for trivial applications to enforce the right.

The Court of Appeal said that ‘in most respects, incorporated associations have striking similarities to companies’ (at [31]). That being so, there were similar rights and duties involved (at [37]–[38]):

Aspects of the arguments at the hearing of the appeal assumed that the prima facie right of a director to have access to the company’s documents depended upon the director owing fiduciary duties or duties of care to the company. This seems to involve some circularity. The postulated duty would presumably not be imposed, or it could not be regarded as having been breached, if the director was not entitled to access to such of the company’s documents as were required for the fulfillment of the postulated duty. Rather, the right and the duty both arise from the duty of a director to act as ‘a manager’ and ‘agent’ of the company....
That is not relevantly distinguishable from the function of a member of the management committee charged by the Act [by section 60] with the control of the association’s business and operations who is ‘deemed to be the agent of the incorporated association for all purposes within its objects’. In this respect there is no substantial point of distinction between management committee members of incorporated associations and members of the governing bodies of other non-profit organisations who have been held to owe fiduciary duties to their organisations.

Case law from other jurisdictions has found or assumed that members of governing committees owed fiduciary duties to incorporated associations. The Court of Appeal said that (at [39]):

...if the existence of some such duty is necessary to sustain a management committee member’s prima facie right of access to an association’s documents it can be found in the duty of a management committee member to fulfil his or her management functions at least in a way which he or she believes to be in the interests of the association. It is not necessary in this appeal to consider the nature and extent of any other duties owed by management committee members.

However, there was no such right specifically allowed for in the Act. The Court of Appeal said that it was implied (at [40], [42]):

The implication that management committee members have a prima facie right of access to an association’s documents is not inconsistent with omission from the Act of a provision specifically conferring the right....

In any event, since s 60 of the Act imposes the right and obligation of managing an association upon the management committee rather than upon the members in general meeting, a resolution by a majority of members of an association could not deprive a management committee member of access to documents which that person considered was necessary to fulfil his or her duty in managing the association.

The Court of Appeal held that the absence of a rule expressly conferring upon management committee members a right to inspect and take copies of the Association’s business documents (which had underpinned the primary judge’s decision) was not an impediment to the inspection of such documents. This was because section 72(1)(a) of the Act allows for the enforcement of members’ rights which are implicit in the rules.

Nor was the fact that the case involved the court intervening in the internal affairs of the Association. The well-known case of Cameron v Hogan [1934] HCA 24 did not apply (at [45]):

[Cameron v Hogan] was not followed, ignored, or distinguished in many later cases. The resulting uncertainty in the law relating to the enforcement by members of unincorporated associations of their rights as members was discussed in detail in the 1980 Queensland Law Reform Commission Report which led to the Act. That topic is now regulated by ss 71–73 of the Act, which have overcome the difficulties about enforcement of members’ rights under the rules of an association, as they were designed to do. It follows that Cameron v Hogan has no enduring relevance in relation to applications by members of incorporated associations to enforce rights given to members by the association’s rules.

Therefore, East Coast and Golden West were entitled to seek directions under section 72(1)(a) of the Act to enforce their rights as members of the Association. The result was that Mr Sparks and Mr Fulton,
in their capacity as members of the management committee, should be permitted to inspect and take copies of the Association’s documents for the purpose of fulfilling their duties to the Association.

There was also no impediment in the in-confidence nature of some of the documents (at [49]):

It is also no answer to the application to say that the documents include contracts made by the Association which it and the other parties to the contracts agreed should be kept confidential. Because the management of incorporated associations is vested by the Act in the management committee, an agreement by the Association to keep a contract between it and another party confidential could not of itself preclude inspection of the contract by a member of the management committee acting in good faith in fulfilling his or her duty to the Association. Of course management committee members who do inspect or take copies of the Association’s confidential documents are obliged to keep the documents confidential and use them only for the purpose of fulfilling their duties to the Association. If the Association does not trust a member of the management committee to act in that way the remedy is in the Association’s hands. Rule 12 of the Association’s rules empowers a general meeting by resolution to remove a management committee member from office after that person is given an opportunity to oppose such a resolution.

Therefore, the appeal was allowed, with costs.

The case may be viewed at: http://www.austlii.edu.au/au/cases/qld/QCA/2013/358.html

Implications of this case

Section 60 of the Act provides:

(1) Subject to this Act, the business and operations of an incorporated association shall be controlled by a management committee.

(2) Every member of the management committee and any manager duly appointed by the management committee acting in the business or operations of the incorporated association shall be deemed to be the agent of the incorporated association for all purposes within its objects.

(3) The acts of a member of the management committee shall be valid notwithstanding any defect that may afterwards be discovered in the member’s appointment or qualifications.

Section 60 of the Act does not give any member of the committee the explicit right to inspect documents. The Court of Appeal in this case held that such a right was implicit because members of management committees owed duties to their association akin to the fiduciary duties that directors owe to their company.

2.7.3 HOWIE V LAWRENCE [2013] VSC 616 (SUPREME COURT OF VICTORIA, MUKHTAR ASJ, 1 NOVEMBER 2013)

This case concerned the proposed sale of St Stephen’s Uniting Church (the church), in Williamstown, Victoria by the Uniting Church (constituted in this case as the Standing Committee of the Synod of Victoria and Tasmania of the Uniting Church In Australia). The church property at Williamstown comprises the church worship centre, a meeting room, vestry and office as part of the church building, a hall, a carpark, tennis courts, a shed, a manse and some vacant land. The plaintiff is an active member of the congregation of the church, which has 119 members. The plaintiff contended that the decision to sell the church was made without any prior consultation with the congregation.
The Uniting Church is governed by a series of interrelated councils. One part of the government and administration of the church is the Synod. Under the constitution of the Uniting Church, the Synod has the general oversight, direction and administration of the church’s worship, witness and service within its bounds. It exercises executive, administrative, pastoral and disciplinary functions over the Presbyteries within its jurisdiction. From among its members, the Synod has appointed a Standing Committee which is empowered under the Constitution to act on behalf of the Synod between meetings in respect of certain responsibilities of the Synod. Within each Synod, there is created a body corporate known as the Synod Property Trust in which the legal title to all property is vested.

The relevant Synod in this case was for Victoria and Tasmania. In May 2013, that Synod resolved to relieve its debt burden by ‘releasing’ reserves, businesses, and underutilised properties. The moneys raised were to be used to extinguish debt of $36.6 million (relating to Acacia College) by 31 December 2014, and to raise $17.2 million for other purposes, including to provide liquidity.

The Synod also resolved that decisions relating to the sale of land would be made after discussion with presbytery standing committees, congregations, faith communities and stakeholders about issues including discernment of mission or directions. By letter dated 9 October 2013, the general secretary of the Standing Committee announced that a list of properties had been approved for divestment, which included the church, hall and dwelling at St Stephen’s in Williamstown.

The plaintiff said that there had been no discussion or notice of the proposed sale. The congregation, which, under clause 22 of the Constitution of the Uniting Church, is ‘the primary expression of the corporate life of the Church’, was not given the right to be heard on the decision. It was alleged that the congregation were merely told that the sale process would begin on Monday 14 October, 2013, and that the congregation had up to three months to vacate. The plaintiff (on his own, and not as a representative) made an application for review of the decision under the Administrative Law Act 1978 (Vic) (the Act). His Honour said of the Act (at [11]) that:

The principal purpose of the Administrative Law Act was to eliminate the complexities which attend at applications to the court for the grant of prerogative writs and similar remedies directed to tribunals or other bodies charged with the performance of public acts and duties: see Monash University v Berg. It also provides a means of review of the decisions of an extremely wide class of persons and bodies without the necessity of analysing in detail or at all whether those bodies should be categorised as judicial, quasi judicial or administrative: see Keller v Drainage Tribunal.

His Honour saw no difficulty in referring to the plaintiff as ‘a person affected’ by ‘a decision’. Moreover, there was no confinement to what is ‘a right or privilege’ under the Act (at [9]):

I am willing to proceed on the basis that it is enough for the plaintiff and his congregation to say they will be deprived of the real value and privilege to worship, engage in religious observance and commune in fellowship as part of a Church in which they are members.

The question was rather whether the Standing Committee was a body of persons which was required to observe the rules of natural justice (at [13]):

Generally speaking judicial review is confined to statutory decision making. Powers are given under a statute and the question is usually whether those powers have to be exercised in a certain way, such as, by observance of the rules of natural justice. That will be a question of construction of the statute.

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Were the Uniting Church, the Synod or the Standing Committee statutory bodies? His Honour was clear that they were not. However, they had a statutory underpinning (at [14], [17]):

But there is no doubt the church has a statutory origin and has a statutory recognition. Under The Uniting Church in Australia Act 1977 the Congregational Church, the Methodist Church and the Presbyterian Church (identified as the ‘Uniting Churches’) were empowered to unite in accordance with the Basis of Union, which is a schedule to the Act. Under s 9, the Assembly of the church was empowered to adopt a Constitution for the Church consistent with the Basis of Union. There was also constituted under the Act a corporation under the name of ‘The Uniting Church in Australia Property Trust (Victoria)’ which was given corporate identity and power to hold trust property in trust for the church and upon any other trust affecting the property....

Even though, as a general rule of amenability to judicial review, the courts look to the exercise of ‘public power’ or a body performing a public role somehow acting under the authority of government, bodies can be susceptible to judicial review even though they are not created by government or are not invested with relevant statutory powers. Examples would be regulatory bodies that are recognised by statute or have some sort of statutory linkage or (in age of privatisation) perform some public function with government.

His Honour said that even though the Standing Committee was not made under statute, there was a public element or public law consequences involved in its decisions, especially since the Uniting Church had a statutory origin. This was sufficient to bring it under the court’s jurisdiction for purposes under the Act (at [19]):

The church as an institution originates in statute. The basis of union is a statutory instrument. Although that does not mean that the church is a statutory authority, nevertheless I think there are sufficient, at least for the purposes of an order nisi, to say that the statutory origins of a church clothes it with a statutory quality and that in exercising powers, it is a public quality to the point where it ought be accountable to the norms and values of public law including the requirements of natural justice. That is not to say that religion, however much it is to be encouraged, is the business of government. And it is not to say that judicial review will reach into all powers or activities of the Church and its organs. But the disposition of property and assets stands in a distinct position. Under the Constitution of the Church the beneficial ownership of all property is vested in the Church, and under the Basis of Union it is the Congregation that is the embodiment of the Church, one that recognises the need for agencies for the ordering of its affairs in matters such as administration and finance. The Committee is exercising substantial powers having public consequences.

That being the case, His Honour granted the order for review, on the ground that there were sufficient public interests at stake, and ‘on no basis could it be said that there would be no substantial injustice’ to the congregation in question (at [20]).

The case may be viewed at: http://www.austlii.edu.au/au/cases/vic/VSC/2013/616.html

Implications of this case

His Honour said that he could not see that the Uniting Church represented purely private interests (at [19]). It had a public element, and its decisions could have public consequences and ‘carry enormous or widespread weight’. Therefore, given its statutory underpinnings, it was amenable to administrative review. If upheld, this decision may affect other Victorian denominations which have a legislative basis.
The Sikh Spiritual Centre Toronto is no stranger to this Court. Although servicing a congregation of up to 10,000 faithful, the Centre’s corporate membership of less than 100 people has demonstrated a singular inability to govern its affairs. Factionalism is endemic in its membership body and on its board of directors, which has resulted in members coming before this court on two previous occasions in 2005 and 2008 for the adjudication of the simple questions: Who are the members of the corporation? Who are its directors? Notwithstanding the detailed directions given by Pattillo J. in his 2008 trial decision, the members of the Centre have returned and again placed the same two questions before this court. The fundamental policy underlying the Ontario Corporations Act, R.S.O. 1990, c. C.38, under which the Centre was incorporated on May 9, 2001, is that those who come together to form the corporation will be capable of self-governance. Although the Corporations Act enables resort to the courts to call meetings of members or to wind-up the corporation, judicial intervention in the affairs of a corporation without share capital should be rare. It is not the policy of the Corporations Act that courts should baby-sit the affairs of such corporations; self-governance by the members is the operating norm. If members, such as those of the Centre, are incapable of governing the corporation, they should take a hard look in their collective mirrors and do one of three things: (i) reform their ways, which the current members seem incapable of doing; (ii) step aside and let new members who are unencumbered with the baggage of past factionalism take over the running of the corporation; or, (iii) wind-up the corporation, with the different factions parting company and setting up their own temples. Continued supervision by this Court of the affairs of the Centre through more litigation in the future is not an option.

The Sikh Spiritual Centre Toronto (the Centre) is a charitable non-share capital corporation, incorporated pursuant to the Corporations Act, R.S.O. c. C.38 (the Act) by letters patent issued on 9 May 2001 on the application of 17 persons. The objects of the Centre, as stated in its letters patent, are, among other things, to establish, maintain and support a house of worship with services conducted in accordance with the tenets and doctrines of the Sikh faith. In 2005, a disagreement arose concerning the membership and directors of the Centre. The litigation which followed was long and tortuous, ending with an appeal in 2008 before Patillo J who noted that the pattern of conduct within the faction-ridden governing body of the Centre was for mediation to be followed by apparent agreement, then breakdown of that agreement, and then further litigation. The factions had tried to obtain a balance on the governing board, but this tactic had failed. As His Honour said in this case (at [11]):

Balanced representation may have some practical place where both ‘sides’ can work together. More often than not it is a recipe for disaster, simply setting the stage for a governance deadlock. More importantly, by trying to balance factional representation, a board completely ignores the fundamental duty of each and every director – to act in the best interests of the corporation, not the best interests of a faction. As my review below of the evidence in this case will reveal, most of the Centre’s present directors have lost sight of their basic fiduciary duty under corporate law – to act at all times in the best interests of the corporation.

Nevertheless, after the 2008 decision, the affairs of the Centre were managed without incident until June 2012. The dispute in this case arose out of a series of directors’ and members’ meetings which took
place from late June 2012 through to early August 2012. There were competing meetings because the factional difficulties within the Centre’s governing body had again arisen.

All the plaintiffs were members of the Centre. Seven plaintiffs were directors whose terms did not expire until this year or next. The other seven plaintiffs contended that they were properly elected as directors at one membership meeting held on 5 August 2012. The first seven defendants were elected at another (competing) 5 August 2012 special members’ meeting (the Director Defendants). The remaining 23 individual defendants were new members purportedly admitted at a 24 July directors’ meeting (the New Member Defendants).

The plaintiffs sought declarations that the admission of 23 new members at the 24 July 2012 Board meeting was invalid and, as a result, the election of the seven Director Defendants at the August 5 special members’ meeting was null and void. The plaintiffs also sought related declaratory relief identifying the officers of the Centre. The Director Defendants counterclaimed for declarations affirming the admission of the New Member Defendants on 24 July and their election as directors on 5 August. They also sought a declaration that the election of the plaintiff directors at the other 5 August meeting was invalid. The New Member Directors asserted no counter-claim, but took the position that they were properly admitted as members of the Centre on 24 July 2012.

His Honour began by saying (at [26]):

...there is some suggestion in the case law that non-profit organizations should not be required to adhere rigorously to all of the technical requirements of corporate procedure for their meetings as long as the basic process is fair. While such an approach might have merit in certain circumstances, it does not in the present. In his 2008 reasons Pattillo J. gave fair notice [at [119] of his decision] to the Centre, its board and its members about the approach this Court would take to any further governance disputes:

‘[G]iven the history of the dispute which has occurred between the parties, it is necessary in my view that the Sikh Centre and its members and directors adhere strictly to the provisions of the Act and the By-Law in respect the governance of the Sikh Centre. Failure to do so will only result in strong sanctions by the court not only against the participants but also against the Sikh Centre.’

Since the Centre now appears for a third time before this Court, I intend to review the evidence to ascertain whether the Centre, its board and its members have adhered strictly to the requirements of the Act and the By-Law. In light of the continued factionalism which precipitated this action, I see no need to cut those involved in the governance of the Centre any slack. To the contrary, the challenge in this case is how to impress upon the members and directors of the Centre to comply with the corporate law which governs their corporation.

After an exhaustive review of the evidence, His Honour found for the plaintiffs, as follows:

- That the admission of the 23 New Member Defendants as new members of the Centre at the board meeting held on 24 July 2012 was null and void;
- That none of the 23 New Member Defendants were eligible to attend or to vote at the 5 August 2012 special members’ meeting. Without the presence of the New Member Defendants, no quorum was reached for the 5 August 2012 members’ meeting. Given the lack of quorum, the actions taken at that members’ meeting, including the election of the seven Defendant Directors, were null and void, and a declaration was issued to that effect;
That the board meeting held immediately following the 5 August directors’ meeting was invalid, and a declaration was given that the appointment of officers made at that meeting was also invalid;

A declaration was given that the members of the Centre were those persons who were members as of 9 July 2012 (i.e. immediately following the 8 July 2012 board meeting);

A declaration was given that the directors of the Centre were those persons who were directors as of 8 July 2012;

A declaration was given that the officers of the Centre were those persons who were appointed officers at the 8 July 2012 board meeting.

The plaintiffs had also asked for an order, pursuant to section 297 of the Corporations Act, that the court direct the holding of a members’ meeting within 60 days to elect replacement directors, and at which only those persons who were members on 24 June 2012 could vote. Section 297 of the Act states:

If for any reason it is impracticable to call a meeting of shareholders or members of the corporation in any manner in which meetings of shareholders or members may be called or to conduct the meeting in the manner prescribed by this Act, the letters patent, supplementary letters patent or by-laws, the court may, on the application of a director or a shareholder or member who would be entitled to vote at the meeting, order a meeting to be called, held and conducted in such manner as the court thinks fit, and any meeting called, held and conducted in accordance with such an order shall for all purposes be deemed to be a meeting of shareholders or members of the corporation duly called, held and conducted.

His Honour was underwhelmed by this request, saying (at [119]–[120]):

...if I possessed the power, I would order the winding-up of the Centre. The membership and board of the Centre is poisoned by factionalism. The directors have demonstrated that they have no practical understanding of their over-riding fiduciary duty to act in the best interests of the corporation; their loyalties appear to lie with their faction. Notwithstanding two previous proceedings before this court on the same issue – who are the members and who are the directors – the members and directors of the Centre have not changed their ways. I have significant doubts whether proper corporate governance can ever take root in the Centre given the current composition of its membership and board. That said, as the Corporations Act now stands, I have concluded that in the absence of a request by a member or the corporation, a court does not possess the power under the Act to wind-up a Part III corporation.

However, in the circumstances of ‘corporate governance chaos’, His Honour decided that he would order a section 297 meeting, but only on four conditions being strictly met before the meeting:

1. The accounting practices of the Centre had to be regularised. To that end His Honour ordered the appointment of a monitor of the Centre’s financial affairs. The monitor had to be a licensed trustee under the Bankruptcy and Insolvency Act and independent of the Centre (i.e. not a congregant at the Centre or related to any person who was a congregant or member of the Centre). Within 90 days of the date of the order the monitor had to report to His Honour whether, with the assistance of the monitor, the Centre had put in place proper accounting books, records and procedures;

2. Within 90 days of the date of the order given in this case an auditor had to prepare the reports described in section 96(2) of the Act for the 2012 financial year and the first six months of the 2013 financial year. The auditor had to be independent of the Centre as described above;
3. Within 90 days of the date of the order given in this case all current members of the Board had to attend, together, at the same time and in the same room, a one-day training session on basic corporate governance conducted by a recognised corporate governance organisation;

4. Within 90 days of the date of the order given in this case the board of directors had to develop an amendment to the By-Law, for consideration by the members at the special meeting, which details the process the directors were to follow when considering applications for new membership. The amendment had to address the following matters: (i) the circulation to all directors, in advance of the board meeting, of any applications for new membership, including details describing how the applicant ‘has worked as a volunteer or associated with’ the Centre over the preceding two years; and (ii) the discussion and consideration by the board of each individual application on its merits.

His Honour said that once the four conditions had been met, he would then order the section 297 meeting on the following basis (at [123]–[124]):

The preparation for and holding of such a meeting shall be supervised and chaired by an independent person, experienced in organizing and chairing corporate meetings, who is acceptable to 17 (80%) of the current directors and approved by this Court. In the absence of such agreement by the board, I shall appoint the chairperson. The chairperson shall arrange for a further independent person to take the minutes of the meeting. The business for that meeting shall be three-fold: (i) to receive the reports of the auditor prepared pursuant to section 96(2) of the Act; (ii) to elect directors to replace those whose terms have expired; and, (iii) to consider the amendment to the By-Law developed in accordance with paragraph 122(iv) of these Reasons.... I further order that until the court-directed special members’ meeting is held:

(i) the Board may not admit any persons as new members of the Centre; the persons entitled to vote at the special meeting shall be those persons who were members of the Centre as of July 9, 2012; and,

(ii) the Board may not approve or enter into any transaction out of the ordinary course of business, including the refinancing of any debt, or propose or approve any fundamental change in the corporate governance structure of the Centre without the approval of this Court.

His Honour also ordered that:

- the plaintiffs and the other current directors of the Centre consult and attempt to agree on the selection of the monitor and the auditor. If they could not agree, the monitor and auditor would be selected by His Honour; and
- the Centre’s website: www.sikhspiritualcentrerexdale.com show a copy of his reasons on its Homepage no later than 5 p.m. on Wednesday, 5 June 2013, on the basis that ‘[t]ransparency is a hall-mark of good corporate governance’. The posting was to remain in place until after the holding of the special members’ meeting.

The case may be viewed at:

His Honour made no finding as to costs on 11 October 2013:
Implications of this case

His Honour held out little hope of an agreement in this case, even after his unusually detailed orders to facilitate better corporate governance. He would have preferred to wind up the corporation (at [119]) but there was no power to do so, nor had either of the factional parties requested this remedy. Thus, declaratory relief was the only relief available. His Honour commented (at [120]) that this might be different and that the court might 'enjoy enhanced powers', after the coming into force of the Not-for-Profit Corporations Act, 2010, S.O. 2012, c. 15.

2.7.5 MOROMILOV V DRAGICEVIC [2013] ACTSC 91 (SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY, REFSHAUGE J, 17 MAY 2013)

This case relates to continuing litigation surrounding the Serbian Cultural Club of St Sava Inc (the club). There are presently five proceedings on foot in the Supreme Court of the ACT, five in the Court of Appeal of the ACT, and one in the High Court of Australia. This judgement dealt with the reasons for His Honour’s refusal of an injunction that the plaintiff had sought to restrain the holding of an Annual General Meeting of the club on 30 October 2011. The plaintiff described herself as a life member of the club. The defendant was accepted by all parties as the President of the club. However, the club is incorporated under the Associations Incorporation Act 1991 (ACT) (the Act). Under section 22 of the Act the club is a separate entity from its members. Thus, as His Honour pointed out, the President does not represent the club in any relevant sense. His Honour went on to say that the plaintiff had ‘sued the wrong party’, and, if he had granted the injunction, he would have to have ‘permitted the club to be substituted... as the relevant party’ (at [19]).

The background to the case, which has yet to reach full trial, is that the Serbian community in Canberra (and throughout Australia) is divided. The division in Canberra appears to be primarily related to religious allegiances and grouped around the two churches described by the plaintiff as follows:

- The Serbian Orthodox Church in Farrer (the Farrer Church) which is under the jurisdiction of Bishop Irinej Dobrijevic, Serbian Orthodox Bishop for Australia and New Zealand.
- The Free Serbian Orthodox Church, St George in Forrest, which is a totally independent Church, and is under the Old Calendar Orthodox Church of Greece, Diocese for Australia Inc. It operates under the auspices of the Bishop of Greece.

The Serbian Cultural Club St Sava Inc. is an independent cultural and social association consisting of financial members from all sectors of the Serbian community in the ACT and throughout Australia. It is a secular organisation which the defendant President deposed ‘ought to be free from religious or political disputes’. However, it was not. There had been disputation about notification of Annual General Meetings, and the consequent validity of those meetings. There had been an apparent split within the club, with the election of an ‘alternative committee’, of which the plaintiff was a member.

The issue before His Honour had been whether an Annual General Meeting should be held at the Farrer church hall. The plaintiff wanted the Annual General Meeting not to be held in the church hall at Farrer because this was close to or part of a group, namely the Farrer Church, with whom she had religious and political differences. His Honour considered the perennial issue of the court’s ability to intervene in the internal affairs of voluntary associations. He said (at [57]):

There is no doubt, however, that the jurisdiction of the Court to intervene in disputes within voluntary associations such as the Club is limited. That has been clear at least since the High Court decided Cameron v Hogan [1934] HCA 24; (1934) 51 CLR 358.
The scope of that decision has been explored in many cases since. It has emerged in the cases that courts will intervene in the affairs of voluntary associations in some circumstances, including:

- where there has been a breach of contract;
- where a proprietary right has been infringed;
- where someone’s livelihood or reputation is at stake.

There was no need to consider whether the relationship between the club and its members was contractual. This was dealt with by statute (section 48 of the Act) as was the court's ability to intervene (section 49 of the Act). As His Honour observed (at [65]): ‘This has done much to avoid the technical considerations that otherwise faced courts dealing with disputes within voluntary associations...’.

Did the club comply with its constitution in convening the meeting at issue in this case? The records of the club were in ‘bad shape’. On considering the evidence which could be gleaned from them, His Honour found that the club had complied with its constitution (at [72]). Was this decision unfair in some way? His Honour said on this point (at [73]–[74], [78]):

As noted, it is not the role of the Court to reconsider the merits of a decision of the Committee of a voluntary association. If, however, a decision imposes a disadvantage that, according to ordinary standards of reasonableness and fair dealing, is unfair, then the Court may intervene. It was this which caused me to pause most....

I can conclude that it may have been appropriate for the Committee to have chosen a more neutral venue for the meeting, but I have no jurisdiction to review the merits of the Committee’s decision unless the standard set out by Brennan J in Wayde v New South Wales Rugby League Ltd [1985] HCA 68; (1985) 180 CLR 459 at 472 is made out. I was not satisfied on the evidence that it reached this level and I remain of that view.

The final issue was whether the meeting was invalid on some basis connected with the improper rejection of membership applications. The memberships in question were of persons associated with the plaintiff. The constitution of the club gave apparent unfettered power to deal with memberships. Previous case law (see Millar v Houghton Table Tennis & Sports Club Inc and Pettit v South Australian Harness Racing Club Inc., per White J at [26]) had established that:

- The power to accept or reject membership applications must be exercised in good faith.
- The power to accept or reject membership applications must be exercised having regard to the objects of the association.
- A refusal of applications for membership without regard to the association’s objects may well be a decision which no reasonable committee could reach.
- It is not for [the] Court to determine as a matter of objective fact whether or not...membership applications are bona fide applications.
- An association may have many reasons for rejecting membership applications. It may determine that the aims and aspirations of an applicant are not consistent with the objects of the association. Even if the aims and aspirations of an applicant are consistent with the objects of the association, the application may be refused because, for example, the association does not have the ability to cater for an influx of members.

On this basis, there was no issue surrounding the committee’s rejection of new membership applications from persons associated with the plaintiff (of which there were 13). However, there was a
problem with the rejection of membership renewals, of which there were 34. The committee had no
power to reject renewal applications unless the members were expelled. His Honour said (at [89]–[90]):

Applications for renewal are in a different category. There is no occasion for the Committee
under the constitution to consider them. If the person is a member and pays the subscription
payable for renewal, then the payment must be accepted by the Club and the person remains a
member. Indeed, they can only cease to be a member if they are expelled in accordance with
the rules, or they die, resign or fail to renew their membership. The constitution gives the
Committee no power to refuse to accept the annual subscription and, thereby, somehow to
refuse to renew the person’s membership. That the Committee purported to do this was
something of a problem, for it had no power to do so.

However, His Honour found that this was not enough to justify an injunction, especially on the terms
sought by the plaintiff (at [93]–[95]):

An inspection of the documents filed showed that a majority of those who had applied for a
renewal of their membership already appeared in one of the three lists of members [available],
and thus was necessarily a member. The evidence was that notice of the Annual General
Meeting had been sent to all the people whose names appeared on any one of the three lists.
That so many of the names of the renewal applicants appeared on one of these three lists
shows that the Committee had been making a genuine effort to ensure that all persons who
may have some reasonable claim to membership received notice of the Annual General
Meeting. Had none appeared in any of the lists, that may have justified a different inference.
Given the state of the records of the Club, I am not satisfied, in the absence of other evidence,
that the renewal applicants whose names did not appear on any of the lists were already
members of the Club and were entitled to a renewal.

Therefore, there were no grounds for an injunction. The application was dismissed with costs.

This case may be viewed at: http://www.austlii.edu.au/au/cases/act/ACTSC/2013/91.html

Implications of this case

His Honour in this case said that the approach to the court’s jurisdiction over associations had been
comprehensively considered by Besanko J in Millar v Houghton Table Tennis & Sports Club Inc [2003]
SASC 1. There were three overarching considerations (at [114]–[116] of that case):

(a) A court may decline to grant relief because a member does not have standing to complain
about the particular breach;
(b) A court will decline relief if the breach constitutes no more than an irregularity; and
(c) The remedies of declaration and injunction are discretionary, and must be exercised by
reference to well-established principles.

In this case, His Honour exercised his discretion not to grant an injunction because there were no proper
grounds (as established by prior case-law) for doing so. The club had complied with its constitution, its
decision on where to hold the meeting had not been unfair in all the circumstances, and the meeting
held was not invalid because of improper dealing with membership applications.
The Association of United Ukrainian Canadians (the association) is an association that provides cultural, educational, recreational and social activities to its members. It has branches across Canada. The association has existed for almost 100 years but membership has dwindled and a large portion of its membership is now over 60. The association is incorporated federally as a corporation without share capital. It is governed by a National Committee and the National Executive Committee. The members of National Executive Committee are elected at the National Convention. The National Committee comprises the National Executive Committee members and additional members determined by the National Convention. The association owns real estate holdings, including a camp at Sylvan Lake, Alberta (the camp), which had been used for dance classes, a summer camp for children and various other activities. There are also several trailer pads that are rented out to members each summer.

In January 2012, the National Committee (the Committee) of the association decided to list the camp for sale and it was on the market at the time of this hearing for $3 million. A group of members from Calgary opposed the Committee’s decision to sell the camp before the National Convention to be held in October, 2013. The plaintiff, a member of the association who opposed the sale, brought this application for judicial review of the Committee’s decision to sell the camp. He applied either to have the decision declared a nullity or for an injunction against the sale of the property until the National Convention.

Articles 9 and 10 of the association’s by-laws were relevant. Article 9 sets out an appeal process. Article 10 provides that all property of the association is held in common for the common benefit of the association as a whole. Control of the assets is vested in the National Committee which ‘...at any meeting summoned to deal with such questions, shall have the full authority to sell or dispose of any asset of the Association...for such price or upon such terms as the National Committee, from time to time, may decide’: Article 10(2). Article 10(3) provides that before liquidating an asset valued at more than $10,000, the National Committee ‘...shall notify any affected branches, committees, and other interested parties and invite them to make written submissions regarding the proposed disposal to the National Committee. A motion to dispose of such assets shall be tabled for a minimum of 30 calendar days and until the next meeting of the National Committee to allow consideration of any submissions received prior to the vote on the motions’.

On 14 May 2012, the National Committee tabled a motion to sell the camp. The Committee sent letters as required by Article 10 advising of the intention to sell. On 18 June 2012, counsel for the plaintiff provided the National Committee with written submissions and evidence with respect to the proposed sale. The National Committee received other submissions, some supporting and some opposing the sale. On 23 June 2012 the Committee approved the motion to sell the camp. On 29 June 2012, counsel for the plaintiff and 49 other members informed the National Committee and the National Executive Committee of their intention to appeal the decision. Her Honour said that there were three questions for determination:

1. Was the decision of the National Committee subject to judicial review?
2. If it was, then did the National Committee violate its constitution?
3. If there was a violation, what was the remedy?

The first question raised the perennial issue of whether a voluntary association’s internal decisions were subject to judicial review. Did the standard law apply: that the court should only intervene when a proprietary or contractual right (such as one of employment) was in issue? Her Honour considered the
line of authority established in *Lakeside Colony of Hutterian Brethren v Hofer* 1992 CanLII 37 (SCC) where the Supreme Court of Canada stated that the courts could exercise jurisdiction where a property or civil right turns on the question of membership (at [6]), where either property or contractual rights are affected (at [8]), and that whether it is a property or contractual right, the question is whether it is ‘...of sufficient importance to deserve the intervention of the court and whether the remedy sought is susceptible of enforcement by the court’ (at [9]).

The plaintiff in this case did not claim any property interest in the decision. His only interest was a membership interest. However, Her Honour said (at [18]):

> Since Mr. Woloshyn agrees that there is no property interest at stake, I must look at what other interest there may be and whether the effect of the association’s decision on that interest is of sufficient importance that it merits judicial intervention. That, I think, is the proper reading of Lakeside. I do not agree that Lakeside limits judicial intervention to cases involving a property interest or membership. Here, as in all associations, Mr. Woloshyn has become a member because he has sufficient interest in the objectives of the association and the association has accepted him into its membership. There can be a range of interests that could be created by that relationship. Some may of sufficient importance that judicial intervention is appropriate.

Her Honour held that that this was not a case for public law judicial review (at [14]). Rather, it was a case where she could review the decision’s compliance with the by-laws to determine whether the decision to sell the camp was a nullity. This was a private law remedy. Her Honour said (at [24]):

> As indicated above, one of the tests is whether the question is of sufficient importance. The measure of importance must be objective. Otherwise all a person would need to do is say that an issue is important to him or her. On an objective scale the sale of the camp is certainly not of the same importance as employment as in Mayan or livelihood as in Lakeside. It is on the border of those decisions which ought to be taken up by the court. That said, the denial of Mr. Woloshyn’s right of appeal falls within the category of cases where the tribunal has been unfair in denying Mr. Woloshyn an appeal. This case is reviewable.

Her Honour’s finding on the right to appeal related to the fact that the decision of the Committee was not to be considered until the National Convention in October 2013. The association had argued that the right of appeal under Article 9 was limited to certain matters: applications for membership, dissolution of branches, and suspension or discontinuance of membership. Her Honour made the point that the plaintiff was entitled to a right of appeal on her reading of the by-laws. She said (at [23]):

> There is nothing in any of the articles where the right of appeal is specifically mentioned that indicates that the right of appeal is limited to [the matters argued by the association] nor is there anything in either Articles 9 or 10 that limits the right of appeal when the sale of property is involved. All Article 10 does is to identify who has authority to sell property. For these reasons, Article 9 permits an appeal to the National Convention in this case. Mr. Woloshyn is entitled to appeal to the Convention.

Given that the decision was to be made at the National Convention (a matter for the members as a whole), the appropriate remedy at this application was a permanent injunction until the plaintiff’s appeal was heard.

The case may be viewed at:
Implications of this case

This decision follows Mayan v World Professional Chuckwagon Association, 2011 ABQB 140 (CanLII) where it was held (at [25]) that the courts would be slow to interfere with the decision of a voluntary, private tribunal. In general, courts will intervene in cases where the tribunal’s decision could detrimentally affect a member’s employment, or where the tribunal has acted without jurisdiction, breached natural justice or made a decision that is patently unreasonable. However, the supervisory jurisdiction of the court does not extend to determining whether the tribunal’s decision was right or wrong in substance.

2.7.7 PINE RIVERS, CABOOLTURE & REDCLIFFE GROUP TRAINING SCHEME INC & ORS V GROUP TRAINING ASSOC QLD & NORTHERN TERRITORY INC [2013] QSC 31 (SUPREME COURT OF QUEENSLAND, ANN LYONS J, 28 FEBRUARY 2013)

(Note that this case was appealed to the Court of Appeal: see above, case note 2.7.2)

In this case, the respondent was Group Training Association of Queensland and Northern Territory Incorporated (the Association) which is a peak body for Group Training Organisations in Queensland and the Northern Territory. The Association deals with the provision of apprentices and trainees to government and industry. The Association is incorporated pursuant to the provisions of the Associations Incorporation Act 1981 (Qld) (the Act), and is a not for profit voluntary association established in 2001. The 35 members of the Association are Group Training Organisations (GTOs). Each GTO employs apprentices and trainees. These GTOs compete with each other for the provision of apprentice and trainee services to third parties including industry and local government. The two applicants in this case were GTOs. Apart from membership fees, the Association mainly receives funding from Queensland state government grants, jointly funded programs of the Commonwealth and Queensland governments, Commonwealth funded programs, and also programs funded jointly by industry and government. Those moneys are used by the Association to support its members in providing apprenticeships and group training programs throughout Queensland. Essentially, the Association is the vehicle for the provision of funding from state and federal governments for projects which involve apprentices and trainees.

The issue before the court concerned the internal management of the Association. The Association has Articles of Association and has an elected management committee made up of representatives of member GTOs. The management committee comprises seven members: a Chairman; a deputy Chairman; a treasurer; and four other members of the Association. There is also an Executive Officer. At a management committee meeting of 13 October 2011, it was resolved not to renew the then Executive Officer’s contract, and to conduct a search for a new applicant, assisted by KPMG as an independent party. This decision resulted in the resignation of two committee members.

There was then an enquiry and an FOI request about the disbursement of funding to the various GTOs by the CEO of the first applicant. At a subsequent special meeting of the management committee on 10 November 2011, it was resolved to extend the Executive Officer’s contract until July 2013. After this, the CEO of the first applicant, and the CEO of the second applicant (another GTO) were both appointed to the management committee at the Association’s Annual General Meeting (AGM), held on the same day. It transpired that these two CEOs were the only members of the seven member management committee who were not associated with an organisation called Skillforce.

The CEO of the first applicant continued to agitate for information and briefings on the state of affairs within the organisation, particularly in relation to travel and accommodation payments to committee members. Motions put to the committee to this effect were defeated by five votes to two. Some
Information was eventually provided, but some was withheld as commercial-in-confidence, or just not provided at all. This application to the Court ensued. The Applicants sought orders for:

1. A direction pursuant to section 72 of the Act that the management committee perform and observe the rules of the Group Training Association Queensland and Northern Territory Incorporated by providing a number of documents listed as documents A to U in the application.
2. A direction pursuant to section 72(1)(b) of the Act that the resolution of 10 November 2011 referred to in paragraph 34 of the affidavit of [the CEO of the first applicant] renewing the Executive Officer’s contract is void and of no effect due to the failure of the respondent to provide members of the management committee with all the relevant documents.
3. In the alternative to Order 2, that the resolution of 10 November 2011 renewing the contract is a resolution passed other than in accordance with the Act and the Articles of the Association.

Subsequent to the action being commenced, general meetings of the Association’s members were held, where it was agreed that access to certain of the documents sought by the applicants should be denied.

Her Honour identified the main issue as being concern by the applicants about the allocation of government funding as between the various GTOs. The applicants were concerned that preferential treatment was being given to organisations represented by other members of the management committee, contending that they were acting as a kind of consortium. Moreover, the applicants had concerns about the solvency of the Association.

Section 71 of the Act deals with the rights of members of an association. It provides:

(1) Upon incorporation the rules of the association shall constitute the terms of a contract between the members from time to time and the incorporated association.
(2) Where a member of an incorporated association is deprived by a decision of that association of a right conferred on the member by the rules of that association as a member thereof, the Supreme Court shall have jurisdiction to adjudicate upon the validity of that decision under the rules.
(3) An incorporated association shall be bound by the rules of natural justice in adjudicating upon the rights of its members conferred by the rules of such association on its members.

Her Honour said that section 71 therefore provided the Supreme Court with jurisdiction where a member is deprived by a decision of the association of a right conferred on the member by the rules (at [45]). However, she commented that the originating application in this case did not identify which rule of the Association or which section of the Act was breached.

The Act also provides a member’s right to documents in sections 59C, 16 and 53(1). Those rights include a right to a copy of certain defined financial documents, a copy of the Association’s Rules, a copy of the Association’s Minute book and a right to inspect the Association’s register. The Act and the Association’s Rules, however, do not otherwise provide members with a right to inspect any other of the Association’s documents. Her Honour said that she was not satisfied that the applicants had been denied access to any documents to which they were entitled under the Act. Consequently, their rights had not been infringed (at [47]).

On the access issue generally, Her Honour said (at [48]–[50]):

As s 71 makes abundantly clear, the rules of the Association constitute the contract between the members and an association. Those rules accordingly set out the rights as between the
Applicants and this Association. This court can adjudicate in relation to decisions made under the Rules which deprive a member of a right. I can find no such deprivation of a right in the present case. There was no entitlement to the documents that were sought under the rules of the Association. Furthermore, a Special General Meeting of the members was called and a series of resolutions were put to the members to ascertain if access to the documents should be given. The members voted against allowing access to certain categories of documents. Accordingly, it cannot be argued that there has been any breach of the rules of natural justice. There has been no intrinsic unfairness to the Applicants. It is clear that save where there has been a breach of natural justice the court’s jurisdiction to interfere with the internal management of a voluntary association is governed by s 72 of the Act. It is not entirely clear to me that the Third and Fourth Applicants have standing under s 72 of the Act to seek relief....

The very real issue in my view is that the First and Second Applicants have failed to identify which of the Association’s rules require an order of the Court for their performance or observation; or identify which of their rights and obligations they are entitled to enforce other than in vague and general terms.

Her Honour went on to say that (at [51]):

I also endorse Wilson J’s view in Kovacic that the mere fact that a respondent may be an Incorporated Association under the Act does not necessarily make the validity of a resolution justiciable and that ‘Incorporation under that legislation is not indicative of significance in public affairs such as that accorded by legislation to trade unions and political parties’.

There was no evidence to suggest preferential funding to members of the management committee other than the applicants. All proper procedures were in place, including audits. The issue of solvency did not arise, and there were no allegations of missing funds or misappropriation. There were no identifiable rules of the Association which had been beached, so section 72 was not engaged. The application was dismissed.

The case may be viewed at: http://www.austlii.edu.au/au/cases/qld/QSC/2013/31.html

Implications of this case

In Kovacic v Australian Karting Association (Qld) Inc [2008] QSC 344, Wilson J referred to the wide jurisdiction of the court to grant declaratory relief at the suit of a person with a real interest to establish pursuant to section 128 of the Supreme Court Act 1995 (Qld). This case distinguished Kovacic on the basis that the application was made pursuant to section 72 of the Associations Incorporation Act, rather than section 128 of the Supreme Court Act. Nevertheless, Her Honour said that, as members of the Association, the applicants ‘may’ have been ‘entitled to relief’ (at [49]). However, relief was not forthcoming since the applicants could not identify any rule of the Association which had been breached. As Her Honour said (at [50]), the applicants’ failure to identify particular rules which they wanted the Court to enforce or particular rights which had been infringed, meant their application could not succeed.

2.7.9 GLASGOW EAST REGENERATION SOCIETY (OFFICE OF THE SCOTTISH CHARITY REGULATOR, 15 JANUARY 2013)

Glasgow East Regeneration Agency Ltd (GERA) (the charity) was a company limited by guarantee, granted charitable status on 23 February 1993. The charity had a variety of objects designed to improve conditions for residents of East Glasgow. This decision was the result of an investigation by the Office of the Scottish Charity Regulator (OSCR) under section 33 of Charities and Trustee Investment (Scotland)
Act 2005 (the Act). The investigation arose out of reports in the press and elsewhere that a very high severance package for the Chief Executive had been agreed to by the charity trustees.

GERA was one of five local regeneration agencies set up by Glasgow City Council. In 2011 the five organisations merged into one Glasgow-wide organisation called Glasgow’s Regeneration Agency. One of the local agencies, Glasgow South West Regeneration Agency, acted as the receiving company for the new organisation. GERA subsequently applied to OSCR for consent to wind up and this was granted on 1 March 2011. On 31 March 2011 GERA transferred the whole of its assets and undertakings to Glasgow South West Regeneration Agency, which retained its charitable status and changed its name and objects to reflect its new Glasgow-wide remit.

GERA’s Memorandum & Articles of Association allowed for a maximum of 11 charity trustees, of whom no more than seven may be Appointed Directors and no more than four may be Co-opted Directors. Of the seven Appointed Directors, the Memorandum & Articles of Association provided that up to three may be appointed by Glasgow City Council, two by Scottish Enterprise Glasgow and two by Glasgow Community Planning Ltd. The charity trustees have the power to co-opt up to four further charity trustees on the basis of their specialist skills or that they are from an organisation with which the charity has close contact in the course of its activities. As at 28 March 2011 the charity had eight charity trustees.

The severance package agreed to by the charity’s trustees had components that had the effect of inflating the pension entitlement of the Chief Executive, and cost the charity £232,708.

Section 66 of the Act contains duties to act with care and diligence in the interests of the charity and to ensure that all of a charity’s assets are used to further its purposes. The OSCR’s investigation concluded that the charity trustees had breached their section 66 duties when deciding to make the discretionary payment to augment the Chief Executive’s period of membership of the pension scheme. This was considered misconduct in the administration of the charity. The amount involved was considerable, and took money away from the proper purposes of the charity.

However, the OSCR was unable to impose penalties in this case because the payment had already been made, and because GERA was in the final stages of being wound up. The OSCR report concludes (at section 4):

We consider that the actions of the charity trustees in this instance constituted misconduct in the administration of the charity. However, the payment has already been made and the charity is in the final stages of being dissolved. We find this position wholly unsatisfactory but unfortunately have no powers to recoup the funds for use in the charitable sector.

Although the OSCR could have pursued the charity trustees by not permitting them to act as trustees of other charities, the OSCR decided against this course after considering the types of charities those trustees were now involved with, and undertaking an awareness program with the trustees involved.

This decision may be viewed at: http://www.oscr.org.uk/media/381192/2013-01-15_gera_layout_published.pdf

Implications of this case

When the OSCR has evidence of misconduct, it has powers under the Act to apply to the (Scottish) Court of Session to disqualify individuals from acting as charity trustees in future. However, these powers are exercised proportionately. The report in this case said that (at section 5):
While this was a serious consideration in this case due to the clear and significant breach of charity trustee duties, in carrying out its functions OSCR must have regard to the principles of best regulatory practice. These include ensuring that any use of our powers is proportionate, accountable, consistent, transparent and targeted only where action is necessary. In this case, we consider that drawing the breach to the charity trustees’ attention and setting out our expectation of them for the future is, on balance, the proportionate action to take.

2.8 TAXATION

2.8.1 Kossow v Canada, 2013 FCA 283 (CanLII) (Federal Court of Appeal, Canada, Evans, Gauthier, Near JJA, 6 December 2013)

This was an appeal from Kossow v The Queen, 2012 TCC 325 (CanLII), 2012 TCC 325, concerning a sham charitable donation program promoted by Berkshire Funding Initiatives Limited (Berkshire) and Talisker Funding Limited (Talisker).

In 2000, 2001, and 2002, Kossow participated in a leveraged charitable donation program on the basis that the money donated would be used to finance the purchase of art for a registered charity. Berkshire organised the fundraising program and Talisker provided loans to participants so they could make payments that it was hoped would entitle them to charitable donation tax credits. Talisker itself borrowed money from a Canadian lender in order to provide the loans and then borrowed from an offshore lender to repay the original Canadian lender. The program’s participants, including Kossow, would then combine their own cash with the proceeds of a loan from Talisker to make a payment to a registered charity, Ideas Canada Foundation (ICF). ICF was structured to pass money on to other charities, rather than carrying on its own charitable activities. At least 88% of the total money paid to ICF flowed through an escrow account with a law firm pursuant to a series of directions (the remainder covered fundraising fees and administrative costs). The money was used to purchase art for the MacLaren Art Centre, which had no control over 87.5% of the money, receiving only 0.5% free of the direction of others. The art, and the price that the MacLaren Centre paid for the art, was decided upon by the promoters of the program and their associates. This process involved a complex and rapid set of transactions. However, very little money actually flowed from the program through to charities.

Under the terms of the donation program, Kossow’s payments to ICF were funded by 20% of her own cash and 80% from a 25 year, interest-free loan. She also paid fees to the promoters for processing her loans and organising the program, in a series of steps as follows:

- sign a pledge to ICF for the full amount of her donation;
- make a loan application for a 25 year, interest-free loan equal to 80% of her donation to Talisker (the Loan Amount);
- sign a cheque for 20% of her donation made payable to Talisker ‘as agent’;
- pay Talisker a security deposit equal to 10% of her Loan Amount which was to be invested and applied to the Loan Amount in 25 years time;
- pay Talisker a loan processing fee of 1-5% of the donation;
- sign a promissory note for the Loan Amount, due 25 years from the date on the note.

Section 118.1 of the Canadian Income Tax Act permits individual taxpayers to claim a tax credit for gifts made to registered charities and other qualified organisations in order to offset any income tax payable. Kossow claimed tax credits of $20,046 (2000), $24,060 (2001), $20,045 (2002) in respect of donations to (and charity receipts from) ICF of $50,000 (2000), $60,000 (2001), and $50,000 (2002). The actual cash
amounts contributed by Kossow were respectively $10,000, $12,000 and $10,000 in the relevant years, plus security deposits and fees:

<table>
<thead>
<tr>
<th>Year</th>
<th>Donation</th>
<th>Loan Amount</th>
<th>20% of Donation</th>
<th>Security Deposit</th>
<th>Loan Processing Fee</th>
<th>Charitable Receipt</th>
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</thead>
<tbody>
<tr>
<td>2000</td>
<td>$50,000</td>
<td>$40,000</td>
<td>$10,000</td>
<td>$5,000</td>
<td>$2,000</td>
<td>$50,000</td>
</tr>
<tr>
<td>2001</td>
<td>$60,000</td>
<td>$56,400</td>
<td>$12,000</td>
<td>$6,000</td>
<td>$2,400</td>
<td>$60,000</td>
</tr>
<tr>
<td>2002</td>
<td>$50,000</td>
<td>$40,000</td>
<td>$10,000</td>
<td>$5,000</td>
<td>$2,000</td>
<td>$50,000</td>
</tr>
</tbody>
</table>

On 4 September 2004, the Minister reassessed Kossow and disallowed 80% of the tax credit claimed for each to the years in question. On 9 September 2005, the Minister issued a subsequent reassessment, disallowing the entire tax credit received for the 2002 tax year. In court, the judge at first instance held that there was no gift under section 118.1 involved in the scheme. The 25 year interest-free loans were ‘significant benefits’ received in return for the donations, and the benefits flowed to Kossow. This was ‘sufficient to demonstrate that her donation did not constitute a gift’ (at [70] of the primary judgement).

On appeal, the Federal Court of Appeal reiterated the long-held view that a gift was the voluntary transfer of property owned by a donor to a donee for which no benefit or consideration flows to the donor. The primary judge had held that the Federal Court of Appeal decision in Maréchaux v. The Queen, 2010 FCA 287 (CanLII), 2010 FCA 287 (Maréchaux) governed the issue. That case stands for the propositions that:

(a) a long-term interest-free loan is a significant financial benefit to the borrower; and
(b) a benefit received in return for making a gift will vitiate the gift, whether the benefit comes from the donee or another person.

The Court of Appeal in this case agreed. Kossow had only contributed $17,000, $20,400 and $17,000 of her own money in each of the relevant tax years (see table above). From this she was able to ‘transfer’ $50,000, $60,000 and $50,000 as ‘donations’, and obtain charitable receipts for these ‘donations’. In addition, she obtained a significant financial benefit in interest-free long-term commercial loans. The benefit did not come from the donee but rather from Talisker, a third-party lender. This was exactly on point with Maréchaux (at [29]):

...in Maréchaux, the Federal Court of Appeal found that Mr. Maréchaux did not make a gift within the meaning of section 118.1 of the Income Tax Act because he made his payment to the charitable foundation expecting to receive a ‘significant benefit’ in return. The ‘significant benefit’ received in Maréchaux was an interest-free loan from a third party lender.... Ms. Kossow received a 25 year interest-free loan from Talisker and her donations were conditional upon being approved and receiving her interest-free loans. This resulted in the cash and leveraged components of the program and the donations being interconnected. In my view, the relevant facts of this case are so similar to the facts of Maréchaux that the judge did not err in law in reaching the same conclusion. Where cases are similar in nature, it is fundamental to the idea of justice that they receive the same treatment....

There being no reasons either to overturn Maréchaux , or to disagree with the primary judge's findings in this case, the appeal was dismissed, with costs.

The case may be viewed at: [http://www.canlii.org/en/ca/fca/doc/2013/2013fca283/2013fca283.html](http://www.canlii.org/en/ca/fca/doc/2013/2013fca283/2013fca283.html)
Implications of this case

There was some argument in this case that the Maréchaux decision had been affected by a decision of the Ontario Court of Appeal in *McNamee v McNamee*, 2011 ONCA 533 (CanLII), 2011 ONCA 533 (*McNamee*). That case had appeared to hold that at common law, a gift was only vitiated by the donor’s receipt of consideration if the donee provided it. Thus, if the benefit or consideration came from a third party there was no vitiation. However, the Federal Court of Appeal said that *McNamee* was a family law case (about a loan from a father to a son), and not relevant to the situation in this taxation case. Therefore, there was no need to change established law.

2.8.2 COMMISSIONER OF TAXATION V CANCER & BOWEL RESEARCH ASSOCIATION

[2013] FCAFC 140 (FEDERAL COURT OF AUSTRALIA, FULL COURT, EDMONDS, PAGONE, DAVIES JJ, 25 NOVEMBER 2013)

*(See also the AAT’s decision at first instance in this case: below, at case note 2.8.11.)*

This was an appeal from the Administrative Appeals Tribunal (AAT): see *Cancer and Bowel Research Association Incorporated as trustee for Cancer and Bowel Research Trust and Commissioner of Taxation* [2013] AATA 336. The decision of the AAT concerned the revocation by the Australian Taxation Office (ATO) of the applicant’s endorsement as a tax concession charity, and as a deductible gift recipient (DGR).

The Cancer and Bowel Research Trust (the Trust) was established by a deed made on 20 February 1998 between Nicholas Michael John Baldock as settlor and Cancer and Bowel Research Association Incorporated as Trustee. The facts as put to the AAT were not in dispute and showed that:

- The Trust was endorsed as a DGR with an initial eligibility period from 20 February 1998 to 30 June 2000 pursuant to s 78(5) of the *Income Tax Assessment Act 1936* (Cth) (1936 Act).
- On 19 May 2000, the Trustee applied for exemption from income tax as a tax concession charitable institution, and was subsequently granted that endorsement.
- The Commissioner of Taxation (the Commissioner) later issued formal advices of the endorsements that had been approved with effect from 1 July 2000.
- The advice about DGR status referred to ‘The Cancer & Bowel Research Trust’, with the endorsement made by reference to Item 2 of the Table in section 30-15 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997).
- The advice in respect of the income tax exempt charity status referred to ‘The Trustee for the Cancer & Bowel Research Trust’, with the endorsement made by reference to ‘Item 1.1 – charitable institution’ as the relevant item in Subdivision 50-5 of the ITAA 1997.
- A record of a search of the Australian Business Register, using the same ABN, recorded the same endorsements, except that in the case of the tax concession status, the relevant entity is described as ‘The Trustee for THE CANCER & BOWEL RESEARCH TRUST, a Charitable Institution’; the search also records that the entity is entitled to a GST concession, and an FBT rebate, in each case from 1 July 2005.
- The applicant (as Trustee) had been endorsed to access charity tax concessions in its own right, from 1 December 2002. Those concessions comprised an exemption from income tax as a charitable institution under Subdivision 50-8 of the ITAA 1997, GST concessions from 1 July 2005 as a charitable institution under Subdivision 176 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act), and FBT exemption from 1 July 2005 under s 123D of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (FBT Act).
• The Commissioner subsequently reviewed what were described as the endorsements of The Cancer & Bowel Research Trust as a ‘deductible gift recipient and as a charitable institution’. By letter dated 16 February 2012 the Commissioner advised that he had decided that the Trust did not satisfy the requirements for endorsement as a DGR or as a charitable institution for the purposes of the ITAA 1997, the GST Act or the FBT Act, and had not satisfied those requirements since 1 July 2000. The Commissioner further decided to revoke the endorsements from 1 July 2000, and enclosed reasons for the decision. The letter advising the Commissioner’s decision was addressed to the Trust for the attention of its chairman.

• The applicant objected to the decision by the Commissioner. In a letter dated 20 August 2012 the Commissioner advised that he disallowed the objection.

The AAT decision

The issues before the AAT were:

(a) whether the applicant was entitled to be endorsed as a DGR as at 16 February 2012, being the date of the Commissioner’s decision to revoke its endorsement as a DGR;
(b) whether the applicant, as trustee for the Trust, was entitled to be endorsed as exempt from income tax, FBT and GST as at 16 February 2012;
(c) should any revocation of the endorsements granted to the applicant take effect from 1 July 2000, or some other and what date;
(d) whether the applicant was entitled to be endorsed as a health promotion charity on or after 4 October 2010, being the date of its application for that endorsement; and
(e) what was the date at which the tribunal should determine the above issues.

The trust deed of 20 February 1998, which created the Trust, included a declaration by the Trustee that it would hold the Trust Fund (as defined) upon trust to distribute the net income thereof among the Eligible Beneficiaries in the manner described in the deed. The deed further provided that on the vesting day the Trustee would stand possessed of the net proceeds of sale of the Trust Fund upon trust to pay the same among some or all of the Eligible Beneficiaries then existing in the shares and proportions determined by the Trustee. The Trustee was also empowered in its discretion to distribute property of the Trust Fund in excess of the immediate requirements of the Trust among the Eligible Beneficiaries or one or more of them. The Trust was initially meant to support the research of a PhD student into issues concerning bowel cancer. The Trust was amended several times, and engaged in various kinds of activity.

A replacement trust deed was made in 2011 to amend the objectives of the Trust. The First Schedule to the 2011 Deed included a heading ‘Charitable Purposes’, and provided as follows:

**PRIMARY OBJECTIVE**
1. Educate and increase general community awareness of cancer and measures considered a preventative of cancer.

**ANCILLIARY [sic] OBJECTIVES**
1. Provide accommodation for the benefit of cancer patients and/or their families;
2. Support scientific and medical research into causes, cure or prevention of cancer;
3. Purchase equipment used at treatment, research and diagnostic levels;
4. Provide financial assistance to cancer patients and/or their families for any purposes considered beneficial to their treatment, or recovery, whether physical or therapeutic;
5. To assist, establish and promote in the research or promotion of, and to subscribe to or become a member of or associated or amalgamated with any such association, trust, foundation or any other entity whose objectives are analogous to those of this trust.

6. To provide services and support to any other association, trust, foundation or any other entity whose objectives and/or purposes are analogous to this trust.

In his reasons for the decision to revoke the relevant endorsements, the Commissioner concluded that the 2011 Deed was legally ineffective, primarily because the provision in the original trust deed to vary the trusts on which the Trust Fund was held empowered the Trustee to effect variations, whereas (it seemed) the Commissioner claimed that it was the Settlor, and not the Trustee, who had amended the Deed. This proposition was reiterated in the Commissioner’s reasons for the objection. The AAT did not agree with the Commissioner’s conclusions with respect to the 2011 Deed (at [61], [63]). The 2011 Deed was indeed the relevant one for consideration.

Should the Commissioner have revoked the endorsements retrospectively? The relevant power is contained in section 426-55 of Schedule 1 of the Taxation Administration Act 1953 (Cth) (TAA) (see further below). The relevant deed was the 2011 deed. Had the activities of the Trust been charitable under the terms of that deed? The Commissioner had contended that they were not. However, the AAT did not agree.

On a further issue of endorsement as a charity, the Trust had made a separate application for endorsement as a health promotion charity in 2011. The Tribunal said that (at [119]):

It is clear that the 2011 Deed, made on 8 February 2011, authorises the applicant to conduct a health promotion charity, having regard to the primary objective referred in the First Schedule to that deed.

However, this had also been rejected by the Commissioner; that decision was objected to, and the objection disallowed. This was really an unresolved matter in the view of the AAT, and required further consideration by the Commissioner in the light of additional information which should be provided by the Trust. The AAT set a deadline of 23 September 2013 for the Commissioner to reconsider this matter. Overall, the Tribunal found that it was proper for the Commissioner to revoke the DGR status of the Trust, and to make this revocation retrospective to 1 July 2000. However, insofar as the decision related to whether the applicant was entitled to be endorsed as an entity exempt from income tax under section 50-105 of the ITAA 1997, and as a charitable institution under section 176-1 of the GST Act, and section 123E of the FBT Act, the AAT could not make a finding on the available evidence. The AAT held that the matter should be remitted for further consideration by the Commissioner under section 42D of the Administrative Appeals Tribunal Act 1975 (Cth) (the AAT Act). It was this latter point which became the starting point for the appeal.

The Federal Court Full Court Appeal

There were two bases for the Commissioner’s appeal:

1. The Commissioner challenged the outcome in the AAT as a statutory appeal from a ‘decision’ under section 44(1) of the AAT Act. The competency of that proceeding depended on whether the way in which the AAT disposed of the proceedings before it amounted to a ‘decision’ by the Tribunal within the meaning of section 44(1);

2. The Commissioner challenged the AAT’s decision by way of judicial review under section 39B(1A) of the Judiciary Act 1903 (Cth). The outcome of the judicial review proceeding
depended in part upon whether the Court should, in the exercise of its discretion, entertain that proceeding.

The trustee challenged the competence of the statutory appeal proceeding to this court by contending that no reviewable error was made by the AAT. The trustee also contended that any relief in the judicial review proceeding should be refused as a matter of discretion and that, in any event, the construction of section 426-55 adopted by the AAT was correct.

Was a statutory appeal available?

In remitting the matter for further consideration by the Commissioner under section 42D of the Act, was there in fact a 'decision' of the AAT under section 44 of the Act upon which a statutory appeal by the Commissioner could be based?

The Full Court held that the power in section 42D permitted the AAT to remit a matter for reconsideration by a primary decision maker without the need for the AAT to set aside any decision. Section 42D was enacted to permit the AAT to deal with a proceeding without having to make a final decision. The purpose of the provision was explained in the explanatory memorandum to the relevant amending Act when section 42D was enacted:

100. Item 21 of Schedule 2 inserts new section 42D which will provide that the Tribunal has the power to order that a matter may be remitted to the decision-maker for further consideration at any stage of the proceedings. Where a decision is remitted the decision-maker may affirm, vary, or set aside the decision and make a new decision in substitution for the decision set aside.
101. New subsections 42D(3) and (4) will provide that where a decision is varied, or a new decision is substituted, the applicant may proceed with the application for review in respect of the varied or new decision or withdraw the application.

Since the AAT in this case correctly applied section 42D to enable the proceeding before the AAT to be reconsidered without final determination or decision, the Full Court held that the Commissioner’s statutory appeal was incompetent and should be dismissed.

Was judicial review available?

The Commissioner’s alternative challenge did not depend upon whether there was a ‘decision’ within the meaning of section 44 of the Act. Rather there arose a question concerning whether the conditions for the grant of a writ of certiorari had been established. The Commissioner contended that there were two errors of law in the AAT’s finding:

(1) in the Tribunal’s construction of section 426-55 of Schedule 1 to the TAA; and
(2) by reason that section 42D did not permit the AAT to remit the matter under review to the Commissioner with a direction as to the construction and application of section 426-55 of Schedule 1 to the TAA.

The trustee argued that there was no error of law in either the AAT’s construction of section 426-55 or in relation to the exercise of power under section 42D of the Act, and that even if there were such errors, the Court should refuse to grant an order for certiorari in the exercise of its discretion.

The Full Court found no error in the use of section 42D by the AAT (at [15]):
The Commissioner had contended that the Tribunal had erroneously exercised the power in s 42D by remitting the objection decision to the Commissioner in a way not permitted by s 42D: that is, with an impermissible direction to apply s 426-55 by reference to the approach considered by the Tribunal to be the correct approach. The Commissioner was correct in his submission that s 42D does not permit the Tribunal to remit the matter back to the primary decision maker with a direction as to how the Commissioner must determine the objection decision. The Tribunal, however, did not purport to do so. It had expressed a view about the proper construction of s 426-55 which, if correct, required additional facts if the Commissioner was to exercise his power according to law. The Tribunal’s expression of a view as to s 426-55 did not bind the Commissioner. The Commissioner, acting responsibly, could still affirm his earlier decision leaving it for the Tribunal, if minded to maintain the contrary view, to decide the proceeding by setting aside the Commissioner’s decision under s 43. It follows that the judicial review proceeding should be set aside on the basis that the error concerning s 42D was not made out.

As to the construction of section 426-55 of the TAA, this point was formally determined by the Full Court as a question of law. This section provides:

(1) The Commissioner may revoke the endorsement of an entity if:

(a) the entity is not entitled to be endorsed; …

(2) The revocation has effect from a day specified by the Commissioner (which may be a day before the Commissioner decided to revoke the endorsement).

The AAT had reasoned that the application of this provision involved two steps. The first was the determination of whether an entity was entitled to be endorsed. The second was to determine the date from which any revocation was to apply assuming that the entity was not entitled to be endorsed. The AAT had determined that the 16 February 2012 was the date on which the Commissioner was to make a finding as to endorsement (at [79]–[80] of the AAT decision):

It is well established that this tribunal, when determining applications for review, stands in the shoes of the decision-maker, and can exercise the powers of that decision-maker. In the present case, the practical effect of the revocation decision and its retrospective operation to 1 July 2000 is that the applicant was not entitled to endorsement in any of the taxation years from and after the 2001 financial year. However, the power to make the decision to revoke the endorsements is provided for in s 426-55 of Schedule 1 to the TAA 1953. This section entailed determining whether, as at 16 February 2012, the Commissioner’s discretion to revoke the applicant’s endorsement should be exercised. It follows from the express words of s 426-55(1) that it is only if that discretion is exercised that the power in s 426-55(2) to decide that the revocation should take effect from an earlier date is enlivened. I also observe that s 426-55(1)(a) is expressed in the present tense. If Parliament had intended the discretion to be exercised by reference to the entity’s ineligibility to be endorsed in earlier tax years, one might have expected s 426-55(1) to have read: ‘the entity is not, or has not previously been, entitled to be endorsed’, but that is not how paragraph (a) is worded. I therefore consider that in the present case (unlike the situation where a new endorsement is applied for and under consideration) I am required to consider the applicant’s entitlement to endorsement as at 16 February 2012, and not during earlier taxation years. That is not to say, of course, that evidence as to events in earlier taxation years might not inform the position as at 16 February 2012. I have concluded for the above reasons that any failure by the applicant to comply with the original trust deed will not disentitle the applicant to endorsement as at the date of the
Commissioner’s revocation decision, and that it is necessary to consider whether there has been compliance with the 2011 Deed, that being the deed that was in force at the date of the Commissioner’s revocation decision.

The Full Court could find ‘no fault’ in the AAT’s reasoning as to the contextual meaning of the use of the present tense in section 426-55 of the TAA (at [18]). However, the practical effect of the AAT’s finding needed to be clarified (at [19]). The Commissioner should not be prevented from considering an entity’s past behaviour (at [20]):

Nothing in the provision, of course, prevents the Commissioner from enquiring into the past to determine the period from which any revocation is to take effect. Nor did the Tribunal suggest otherwise. The provision, and the Tribunal’s construction of it, [does] require the condition for revocation to exist both at the date of decision making and from any earlier period the Commissioner may consider to revoke the endorsement.

Thus, there was no apparent error in the AAT’s construction of section 426-55 of the TAA as involving a two-step process. There being no basis for the Commissioner’s appeal, the case was dismissed.

The case may be viewed at:

Implications of this case

This case may be subject to further appeal by the Commissioner. At this stage, revocation of endorsement has been held to be a two-step process:

1. determination of whether an entity is entitled to be endorsed or not;
2. determination of the date from which any revocation is to apply assuming that the entity is not entitled to be endorsed.

It is only if the Commissioner considers that, as at the date of his decision, the entity is not entitled to endorsement that he can then go back and revoke any endorsement in previous years retrospectively. It follows that it is possible that prior revocations of endorsement could be ultra vires if the Commissioner did not consider the entity’s status at the time of his decision to revoke.

2.8.3 CARSON V THE QUEEN, 2013 TCC 353 (CANLII) (TAX COURT OF CANADA, MILLER J, 1 NOVEMBER 2013)

This was an appeal concerning the denial of a tax credit for a charitable donation in the 2009 tax year. The appellant, Carson, claimed a donation of $3120 in 2009 as an estimate of the fair market value of the use by Peaceful Schools International Society (Peaceful Schools) of two rooms in his matrimonial home over a two year period. Carson had no income in that tax year. Carson’s wife was the President of Peaceful Schools, a registered charity. She and Carson married in 2005, although she had been using the two rooms in her property in Granville Ferry, Nova Scotia for the operation of Peaceful Schools since 2001. After she and Carson married, and he moved into her residence, the rooms continued to be used for the operation of Peaceful Schools, one room for an office and the other for storing supplies. Carson’s wife remained the registered owner of the property. On 31 March and 31 December 2009, Carson was issued with receipts for donations of $1,950 and $1,170 respectively to Peaceful Schools. Carson stated the receipts indicated the amounts were ‘in-kind – rent’, though the receipts were not produced at trial. He calculated the value of the two rooms used by Peaceful Schools to be $130 a month, but acknowledged there was no lease or rental agreement involved.
The issue in this case was whether the use by Peaceful Schools of two rooms in Mrs Carson’s home, valued at $130 a month, represented a charitable gift from Carson to Peaceful Schools, eligible for tax credits pursuant to subsection 118.1(3) of the Income Tax Act (the Act). While the term ‘gift’ is not defined in the Act, ‘total charitable gifts’ is defined as ‘the total of all amounts each of which is the fair market value of a gift...’. Case law has consistently shown that a gift for purposes of the Act means a voluntary transfer of property. The Canada Revenue Agency (CRA) specifically addressed the issue of rent-free accommodation in IT11OR3, as well as in its newsletter of March 2005 as follows:

Can a charity issue a charitable receipt to a landlord who provides rent-free accommodations?

No. One of the criteria for a gift is that there be a voluntary transfer of property. In this situation, no property is being transferred – instead, use of the building is being provided. Since no property is transferred, no ‘gift’ is made. A tax receipt for the value of the loan of property cannot be issued. Although the loan of property does not constitute a gift, a charity may pay rent on a property to an individual and later accept a gift of all or part of the payment, as long as the gift is voluntary. The charity may then issue a receipt for tax purposes. The donor would have to report the income earned but would be able to claim the tax relief associated with the gift.

Response 2003-0018595 from the CRA concerning the use of rent-free office space also made clear that no tax credit was available, stating inter alia:

A ‘transfer of property’ in this respect means that the donor is divested of a property and the property vested in the registered charity. A transfer of property does not include a grant of a right to use the donor’s property. Moreover, it does not include a donation to the donor’s services.

His Honour was not convinced that these rulings accurately reflected the law (at [6]):

The CRA does not view the provision of office space, apparently even if pursuant to a lease, as a transfer of property, though would accept rent payments returned by the landlord to the charity as an appropriate charitable donation. I am not convinced that this is an accurate reflection of the law. The CRA is presuming that a legal right acquired by lease is not property, only money actually transferring hands is a transfer of property eligible to qualify as a charitable gift.

But did this assist the appellant? Had there been an implicit transfer of money representing rent? Had there been a transfer of property in the form of a right to the use of the two rooms? On the transfer of money aspect, in this case there was no rental agreement, no lease, nor indeed any form of legal obligation. Moreover, Carson did not even own the property. On the transfer of property in the form of the right to the use of the two rooms, His Honour took the view that the ‘right’ was not property, since a ‘right’ of the relevant sort must be an enforceable claim (at [15]):

Mr. Carson did not divest himself of any right. He simply lived in the matrimonial home owned by his spouse. The rooms were being used by her for her involvement with Peaceful Schools before her marriage to Mr. Carson. Peaceful Schools used the rooms not pursuant to any lease or even pursuant to any licence, but used the rooms with the couple’s blessing, through their kindness, at their will, on their good graces, choose any expression you like. There was no right, certainly no transferable right, no property. Peaceful Schools could not assign this purported right to the use of the rooms. Mr. Carson gave nothing to Peaceful Schools that was a property as such. He, or his wife, simply allowed Peaceful Schools the use of the rooms. He, with his wife, could have rented the rooms – they did not. They perhaps could have granted a licence for the use of the rooms – they did not. From both a practical and legal perspective, I fail to see how any property has been transferred.
Since there was no transfer of property of any kind, there could be no charitable gift involved. The appeal was dismissed.

The case may be viewed at: http://www.canlii.org/en/ca/tcc/doc/2013/2013tcc353/2013tcc353.html

Implications of this case

His Honour pointed out in this case that the CRA’s view on the issue of rent-free accommodation as a charitable gift was perhaps restrictive. The definition of property is set out in subsection 248(1) of the Canadian Income Tax Act:

‘property’ means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes
(a) a right of any kind whatever, a share or a chose in action,
(b) unless a contrary intention is evident, money,
(c) a timber resource property, and
(d) the work in progress of a business that is a profession;

Property is therefore defined as a right of any kind. However, there was no ‘right’ at all involved in this case, and so no property either. If property was not transferred, there was no charitable gift.

2.8.4 MOUNTSTAR PTC LIMITED V THE CHARITY COMMISSION FOR ENGLAND AND WALES (FIRST TIER TRIBUNAL (CHARITY), GENERAL REGULATORY CHAMBER, GERALD J. M. DUGGAL AND S. REYNOLDS, 17 OCTOBER 2013)

On 12 April 2013 the Charity Commission (the Commission) opened an inquiry into a registered charity known as The Cup Trust (the Charity) under section 46 of the Charities Act 2011 (the Act). On 26 April 2013, the Commission appointed an interim manager to the Charity and also ordered the Charity not to part with any property. The Charity’s sole corporate trustee Mountstar PTC Limited (Mountstar) was not given notice of these decisions and the related reasons until 26 April 2013. On 31 May 2013 Mountstar applied to the First Tier Tribunal (the Tribunal) to review and quash the decision to open an inquiry, and to appeal the other decisions.

The Cup Trust was registered as a charity on 7 April 2009 having been established by declaration of trust on 10 March 2009 with the general charitable object of applying its income and capital ‘for all and any charitable purposes’, the formulated grant policy being to make awards to small or start-up charities that benefit children and young adults. It was thus established as a general purpose, grant-making charity. Mountstar had been incorporated on the 2 January 2009 in the British Virgin Islands. There were three directors, Messrs Jenner, Mehigan and Stones. Jenner and Mehigan had been business associates since 2005. They own and are directors of a company called NT Tax Adviser Limited (NT). NT markets various tax avoidance schemes which, if successful, earn substantial contingency fees.

Jenner donated £10,000 to the Charity on establishment, but has not contributed since then. A further £20,000 and £80,000 were donated in December 2009 and January 2010 by The Somerton Charitable Trust, a charity based in Northern Ireland which was involved in a tax avoidance scheme promoted by Jenner in 2004. Apart from a further small donation of £5,000 made in early 2012 from an undisclosed party there had been no further donations outside of a gift aid tax fundraising scheme (the scheme) introduced to the Charity by Jenner. The Charity has made grants to small charities that benefit children and young adults totalling £55,000 in its financial year ending 31st March 2011; £97,292 in the following year, £18,500 of which had been earmarked for certain charities the previous year; and a further £13,500 shortly before the appointment of the interim manager.
The scheme introduced by Jenner was complex. The steps were as follows:

1. The Charity purchased gilts at full value (from The VL Settlement) with the aid of a loan from a foreign-based lender;
2. It then sold these to an intermediary at a nominal value (0.01% of full value);
3. The intermediary on-sold the gilts to a high net worth UK-based taxpayer at nominal value;
4. The high net worth UK-based taxpayer then sold them at full value back to The VL Settlement and ‘donated’ the net proceeds of sale plus a small amount (0.02%) to the Charity;
5. The Charity then used these proceeds to repay the loan from the foreign-based lender, retaining the 0.02%;
6. By this process, the beneficial ownership of the gilts was transferred from The VL Settlement to the Charity to the intermediary to the UK-based taxpayer and then back to The VL Settlement on the same day.

Provided it was repaid within 24 hours, the loan to the Charity was interest free. All of the steps were executed on the same day, virtually simultaneously, and repeated numerous times during the course of the day. The process was facilitated by all steps being transacted by, and all parties utilising, the same bare trustee (Romangate Limited) whose bank account was used, and which held legal title to all of the financial instruments (the gilts). All documents were executed by their common appointed attorney HNW Tax Services (HNWTS).

Romangate Limited (Romangate) was incorporated on 14 November 2008 by Jenner and Mehigan, and jointly owned by them until 21 January 2009. The evidence from Jenner was that Romangate was now owned by a Jersey-registered trust company, Plectron Trust Company Limited (Plectron). Jenner was a director of Romangate through the material period and remains one, while Mehigan was a director until 10 February 2010, and Stones until 22 December 2010. In addition, Jenner uses Plectron to hold shares in HNW Tax Advice Partners (HWTAP) on trust for himself and related persons.

The one-day circular process of financial instrument dealing occurred in ten ‘rounds’ between 30 January and 28 November 2010. There were 826 transactions involving around 300 to 400 UK taxpayers with over £176 million of gilts being purchased and sold by the Charity with money borrowed from the overseas lender. This was supposed to represent £176 million of ‘donations’ to the Charity. The only cash which the Charity retained from the scheme was £155,000 representing the nominal payments made by the intermediary and the taxpayer/donors. Under the scheme, the taxpayers were then able to claim higher rate tax relief on their ‘donations’, with the Charity claiming gift aid and gift aid transitional relief from Her Majesty’s Revenue and Customs (HMRC) on those ‘donations’. If successful, the Charity would receive £46 million in gift aid from HMRC whilst the donors’ higher rate tax relief would net them £55 million.

If the donors had really given £176 million to the Charity, the Charity would retain this amount and then be able to claim gift aid of £46 million, generating total funds of £222 million for the Charity. The donors would receive their higher rate tax relief of £55 million to offset their original donations of £176 million, leaving them £121 million out of pocket. Thus, if the scheme were successful, the £155,000 of actual cash provided to and retained by the Charity would generate £46 million gift aid and £55 million tax relief for the donors at a total cost of £101 million to HMRC.

The determination of the validity of the ‘donations’ was not a matter considered by the Tribunal in this hearing. That was a matter for the HRMC and the courts. The questions here were whether the Cup Trust inquiry should go ahead, and whether the orders of the Commission as to interim management were appropriate. This involved consideration of whether there were issues of conflict of interest, and
profiting by directors in the scheme in question. The Tribunal said that when Jenner proposed the scheme to the Charity, he did so on behalf of HNWTAP, a firm of which he was then a partner providing tax advice to high net worth individuals. This advice included participating in the scheme as a potential way of reducing clients’ tax liability. The scheme was so devised that it was only available to HNWTAP clients who had already expressed an interest and appointed HNWTS their attorney. The taxpayer-clients paid HNWTAP an up-front fee of 0.4% of the face value of the transactions (£704,000) plus a further 2% if the Scheme is successful (£3.52 million) for, in effect, on-going tax advice enabling them potentially, if successful, to shelter or recoup an estimated £55 million of tax from HMRC. Determining the ownership and control of HNWTAP involved a further series of convoluted transactions. The Tribunal found Jenner’s explanation of these transactions ‘difficult to follow and accept’. The upshot appears to have been that Jenner and his civil partner would share all the contingency fees paid for the scheme’s operation.

On information received from HMRC, the Charity Commission had previously investigated the operations of the Charity in 2010, within seven weeks of the first ‘round’ of transactions. The Commission identified various areas of regulatory concern: the administration, governance and management of the Charity; the protection of property (including reputation); application of funds; identification and management of risks; and Mountstar’s compliance with its duties and responsibilities as charity trustee, particularly in relation to the management of conflicts of interest. However, that investigation was closed on 7 March 2012. The Commission took the view that it could not deregister the Charity, which had been established for charitable purposes, because it was not for it to find fault with the scheme. That was for HMRC. The Commission found no direct personal benefit to the directors and accepted that no indirect benefit had been gained by them. The Tribunal said that ‘this is difficult to understand’ (at [46]), given that the destination of the contingency fees for the first five rounds at least (Jenner) was known to the Commission. The Commission issued guidance for Mountstar as to the management and recording of conflicts of interest.

The Tribunal was not impressed by this evidence (at [48]–[49]):

> What is striking, and regrettable, is that even though the Commission was particularly concerned about Mr Jenner being conflicted, at no stage did it have any form of communication with his co-directors. Instead, the Commission relied solely upon information provided by the very person they thought might be conflicted and overlooked his own (subsequent) acknowledgement that he had received financial benefit from the donors via HNWTAP. Without independent corroboration from Mr Mehigan and Mr Stones of what Mr Jenner had told them it is difficult to understand how the Commission could have reached any conclusions regarding conflicts of interest and their management which would stand scrutiny.

The Tribunal was not alone in its lack of understanding of the position taken by the Commission. In January 2013, The Times and other leading newspapers, prompted by various politicians, published a report criticising both HMRC and the Commission for its lack of action on the scheme. The report described the scheme as ‘a massive tax avoidance scam’. The criticism thus moved into the public arena, and the Commission’s opening of the statutory inquiry ensued. The Tribunal considered a large amount of behind the scenes evidence from the Commission, including oral evidence from officers of the Commission. This is very unusual. The evidence related to the preparation of the Commission’s regulatory case report (which precedes the opening of a statutory inquiry), the internal decision review, board meetings, internal emails, and formal correspondence from the Commission to Mountstar.

Should the statutory inquiry have been opened? The Tribunal said that the reasons advanced by the Commission for its opening were ‘reasonable and rational’. Was the inquiry opened for an improper
purpose? Mountstar had claimed that the inquiry was opened merely as a ‘knee-jerk’ reaction to the pressure from Parliament and the press. The Tribunal did not agree, though it did say that the Commission’s reputation had been ‘badly mauled’. There were real conflict of interest questions that had crystallised at some point (though not immediately) in the minds of the Commission’s officers which led to the setting up of the inquiry. Therefore, there was no improper purpose or anything else unlawful in the inquiry going ahead.

Should the interim manager have been appointed? Had there been mismanagement or misconduct by Mountstar? The Tribunal said that there were ‘myriad’ conflicts of interest, both personal and financial, involved in the scheme, and gave several detailed examples of these. The Tribunal concluded that it was ‘both necessary and desirable’ to appoint an interim manager to protect the property of the Charity (at [234]). Moreover, this appointment needed to continue (at [239]):

Mountstar is, for the reasons already stated, presently incapable of acting consistent with the fiduciary duties of a charity trustee due to the involvement of Mr Jenner and also the disengagement of Mr Mehigan. It has no un-conflicted director capable of addressing the issues now facing the Charity. Mountstar’s submission is in and of itself demonstrative of its inability to even consider the possibility that the Scheme might need to be examined by someone with true independence, and might be of questionable appropriateness for any charity to enter into, let alone a Charity whose trustee is controlled or irresistibly influenced by the same person who has controlled and influenced other participants and promoted the Scheme to the Charity.

Thus, the appointment of the interim manager and continuation of the appointment were entirely proportional as a response from the Commission (at [242]–[243]):

...it is in our judgment overwhelmingly in the public interest for there to be a full and proper inquiry by the Commission or by someone appointed to do so on its behalf under section 46(3) of the Act during which time the Interim Manager should remain in post....

In our judgment, the inquiry should not be confined to the Scheme and all that that entails but should also revisit the question of whether the Charity was established for public benefit or to serve or predominantly serve the private interests of HNWTA, Mr Jenner, the donor clients and others.

The Tribunal went on to criticise the approach of the Commission in deciding to disengage with the Charity in 2012, instead of investigating it properly (at [246]–[247]):

This approach, in our judgment, is in error. Whilst it is not the role of the Commission to adjudicate upon the tax efficiency of these sorts of fundraising schemes per se, it is the role of the Commission to promote compliance by charity trustees with their legal obligations in exercising control and management over the administration of charities and their accountability to donors, beneficiaries and the general public. One aspect of those overarching objectives is to ensure that charity trustees act in accordance with the standards of ordinary prudent men of business and independently of any conflicted party. If considering embarking upon an untested tax avoidance fundraising scheme, the charity trustee must carefully examine all aspects of it, fully understand it, require all directors to properly and fully disclose and declare their interests and take any necessary independent advice. To discharge its statutory duties and fulfil its role as sole regulator of charities, the Commission must ‘look and see’ if the charity trustee has discharged those duties.
The Tribunal went on to say that the Commission should take a wider interest in the activities of charities even if their processes concluded that their interest should terminate, as in this case. This was particularly so where charities acted in a way which ‘no ordinary prudent man of business would...acting independently of any conflicts of interest or loyalty’ (at [248]). This required a ‘critical sceptical eye’ and ‘searching questions’ (at [250]):

This is not to pre-judge the scheme or those involved but is to discharge the statutory objectives of the Commission as regulator of charities, which include maintaining public confidence in charities and the regulator and also ensuring that a charity and its privileged charitable status and access to funding opportunities such as gift aid are not being used to advance the private interests of those involved, even if the charity benefits in financial or other terms. If this is not done, and only the Commission is charged with regulating charities, public trust and confidence in charities and the regulator will be undermined.

Both the applications were dismissed, so that the Commission’s inquiry will proceed, and the interim manager appointed to the Charity will continue to act.

The decision of the Tribunal may be accessed at:

**Implications of this decision**

The Cup Trust issue has received very wide publicity in the UK, raising questions in Parliament and the community about the effectiveness of the Charity Commission as a regulator. The Commission had looked at the Cup Trust and its trustee, Mountstar, and found that, although it was clearly a tax evasion vehicle, it had been established for charitable purposes (as defined). The fact that it served as a tax evasion vehicle for the very rich was not a matter within its remit. Moreover, as a bureaucracy, the Commission put its checklists into play, and concluded that conflicts of interest within the Charity had been managed because the Charity had responded to its questions (through its only remaining director, who was ‘conflicted’) and had a conflicts of interest policy.

In this respect, the Tribunal said (at [251]):

During the first investigation the Commission was transfixed by its misconception that tax matters were not for it and also on whether or not conflicts of interest had been properly managed rather than focusing on the central issue: has the trustee, Mountstar, acted as an ordinary prudent man of business, independent of any conflicts, and discharged all of its duties owed to the Charity? Unfortunately, this error was carried through to the decision to re-engage with the Charity and to the submissions before us, the Commission being unwilling to open an inquiry unless there was something new.

**2.8.5  KENYA AID PROGRAMME V SHEFFIELD CITY COUNCIL (SHEFFIELD MAGISTRATES COURT, DISTRICT JUDGE BROWNE, 29 AUGUST 2013)**

This case followed on from a hearing in the English High Court earlier in 2013: see [2013] EWHC 54 (Admin). The issue was whether domestic rates were due to Sheffield City Council on two warehouses used by the Kenya Aid Programme (KAP) for the storage of used furniture to send to Kenya. This turned on whether the storage facilities were used wholly or mainly for charitable purposes. District Judge Browne had previously ruled in the Sheffield Magistrate’s Court that the rates were payable in full. This was appealed to the High Court. the High Court held that the decision of the District Judge was flawed and the matter was remitted to the Magistrate’s Court for reconsideration by District Judge Browne.
There were two competing legal positions argued in the High Court. The first was the test in English Speaking Union v City of Edinburgh Council [2010] RA 227 that the court should look at the whole of the evidence before it and decide, on a broad basis, whether the premises were being used wholly or mainly for charitable purposes, taking account of and placing weight upon:

(i) the extent to which the premises were used;
(ii) the inefficiency of the furniture storage use which was taking place at the premises;
(iii) whether there was a ‘necessity’ for KAP to occupy both premises, when one building would have satisfied their present and future needs; and
(iv) the mutual advantages to KAP and the landlord of the letting to KAP as a consideration against KAP’s entitlement to mandatory charitable relief.

The second was the approach set out by Lord Reid in the House of Lords decision in Glasgow v Johnstone [1965] AC 609, as to whether such use as KAP made of the premises was for charitable purposes, given that:

(i) it had been accepted on all sides that KAP was in rateable occupation;
(ii) the statutory scheme contained no provision (by way of regulations made under section 66A of the Local Government Finance Act 1988 or otherwise) which required or permitted the facts on the ground to be disregarded; and
(iii) there was no legal impediment to parties consciously structuring their arrangements so as to benefit from an established form of relief from non-domestic rates.

The High Court held that these decisions were not mutually exclusive. The District Judge had relied on the approach in the English Speaking Union case, and concluded that the premises were not wholly or mainly used for charitable purposes, since they were, based on the evidence, used to less than 50% of their capacity. The High Court said that this approach was flawed, because (at [60]–[61] per Treacey LJ):

Whilst the judge was entitled to have regard to the English Speaking Union case and to look at the whole of the evidence before him and decide on a broad basis whether the premises were being used wholly or mainly for charitable purposes, and whilst the judge was correct to take into account the extent to which the premises were used, he also wrongly took account of other factors. In particular he took account of the efficiency or otherwise of the furniture storage use at the premises and also the necessity for Kenya Aid Programme to occupy both premises. The latter consideration runs contrary to the Glasgow Corporation case; the former consideration is allied to the latter and, in my judgment, illegitimate. This consideration is of particular importance because it may be that by having compressed what the judge regarded as inefficient use of the premises to a level which he regarded as efficient use, the judge arrived at figures for uses of the two units which meant that the efficient use was less than 50%.

The matter was remitted to the District Judge and reheard. District Judge Browne held on rehearing that the rates were payable in full. The KAP, which has an income of £81,000 pa, used the two warehouses in Sheffield to store furniture it planned to send to Kenya, and claimed 80 per cent mandatory charitable rate relief. The landlord, who would be liable for the full amount of the business rates if the charity was not in occupation, paid the remainder of the rates and also made a donation to the charity. Such arrangements have become common in the UK. In the fresh ruling, the District Judge found that evidence from witnesses and photographs 'would support a use of the units not exceeding 50 per cent' and that therefore the property was 'mainly unused'. On 29 August 2013 he made a fresh liability order in the council’s favour, granting it rates owing of £1.76m for one building and £1.51m for the other, covering a period from 2010 to 2014.
The High Court decision may be viewed at: [http://www.bailii.org/ew/cases/EWHC/Admin/2013/54.html](http://www.bailii.org/ew/cases/EWHC/Admin/2013/54.html)

Decisions of the Sheffield Magistrate’s Court are not available online.

**Implications of this case**

The Charity Commission announced that it had opened a statutory inquiry into the Kenya Aid Programme charity in April 2012 to examine regulatory concerns about potentially significant financial loss to the charity and ‘serious governance failures’. This has not been finalised. In addition, following the Public Safety Charitable Trust case (see [2013] EWHC 1327 (Admin)), the Charity Commission issued a warning to all English charities on 20 May 2013 about the risks of getting involved in (possibly spurious) arrangements to enter into tenancy agreements and take advantage of business rates relief.

Full business rates are due on empty commercial properties that remain unoccupied after three months, including lower value properties such as small shops. However, charities occupying commercial property qualify for a mandatory 80% discount on business rates, provided the property is used wholly or mainly for charitable purposes. The local authority also has the discretion to grant the remaining 20% as a further discount. The Charity Commission said in its warning:

> The Charity Commission is aware of cases where charities are being approached by retailers and landlords of hard to let property to enter into tenancy agreements that would relieve the landlords of the requirement to pay full business rates. It can be advantageous for charities to enter such agreements and provide good opportunities for them to lease accommodation for charitable uses, for low or nominal rents. They may also sometimes receive charitable donations from landlords that reflect a percentage of the business rates that they would otherwise be liable for.

> However, these arrangements can represent a significant risk for charities and trustees. If the charity is not making sufficient use of the premises for charitable purposes which would attract the business rate relief, then it may be liable for the full business rate liability. In addition, the trustees may find themselves subject to personal liability if they have not carefully considered the proposed future use of the property before entering into any agreement and subsequently the claim for rate relief is not available.


This sentencing decision dealt with one of the many tax fraud schemes involving charitable donations which have occurred in Canada in recent years. Doreen Tennina was a tax agent who prepared tax returns for many hundreds of clients. The Crown’s case was that Tennina ‘rigged’ hundreds of tax returns she prepared to include charitable deductions her clients did not know about and charitable donations they had not made. This resulted in cash returning to her own pockets, and not returned to clients, since they did not know about it. This cash was unreported as income. The tax fraud scheme resulted in the evasion of over $17 million of tax. Tennina absconded on the eve of her trial on two counts of fraud, leaving her clients subject to assessments by the Canada Revenue Agency (CRA) which caused personal financial tragedy and bankruptcy for many.

Her Honour described the scheme as ‘elaborate, deliberate and well planned’. The Crown had sought the maximum sentence of 10 years imprisonment on each count, to run concurrently, and a fine on
count two to reflect the amount of tax revenue lost. Her Honour had no hesitation in imposing the sentence sought since the integrity of the tax system was in question:

There is also the fraud on the public purse to consider, which goes far beyond the taxes evaded. The reassessment and appeal process for the hundreds of taxpayers involved may go on for years. That will cost each and every one of us while CRA spends time and resources processing this rather than on other duties. The cost to the court system has also been almost incalculable.

Moreover, the integrity of charities in Canada had been compromised as well:

Ms. Tennina, by her actions, has compromised the good will and deeds done by so many charities. Who could blame an individual for hesitating to donate in the future after reading about this case? That damage cannot be calculated in dollars and cents. The result is that charities, who already find it difficult to obtain donations, must now feel compelled to demonstrate legitimacy before even asking for donations.

Her Honour held that there were no mitigating factors. Tennina had shown no remorse, she had absconded, she had not repaid any of the money owing, and she had no family or health issues to be considered. As she was not present for the trial, and unlikely to return to Canada, rehabilitation was not an issue in the sentencing decision. Rather the main point to be made in sentencing was general deterrence:

General deterrence is the most important factor in this case. The public must be made aware that not only are fraudulent schemes of this magnitude illegal, but the ripple effect on government, court resources and individuals has both an emotional and financial cost that affects every citizen in this country.

In addition, there were aggravating factors involved as per section 380.1 of the Criminal Code:

A) the magnitude, complexity, duration or degree of planning of the fraud committed was significant;
B) that the offence adversely affected or had the potential to adversely affect the stability of the Canadian economy of financial system, or any financial market in Canada or investor confidence in such a financial market;
C) the offence involved a large number of victims;
C.1) the offence had a significant impact on the victims given their personal circumstances, including their age, health and financial situation;
D) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community;
E) the offender did not comply with a licensing requirement or a professional standard that is normally applicable to the activity or conduct that forms the subject matter of the offence;
F) the offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.

Her Honour held that all these aggravating factors applied in this case and sentenced Tennina to 10 years imprisonment on each count, to be served concurrently, and fined her $699,608.

The case may be viewed at:
Implications of this case

This case is regarded as important because of the message it sent about deterrence in cases involving charitable deduction fraud, which have been frequent in Canada. The sentence was harsh, but symbolic, since the accused was not in the country. Nevertheless, Her Honour did also refer to specific deterrence, which would no doubt keep the accused out of Canada at least:

...Ms. Tennina must be stopped in her tracks. She must be isolated from society to ensure that no further harm is done. Her life of luxury illegally earned off the backs of innocent taxpayers must not be condoned.

2.8.7 THE HUNGER PROJECT AUSTRALIA V COMMISSIONER OF TAXATION [2013] FCA 693 (FEDERAL COURT OF AUSTRALIA, PERRAM J, 17 JULY 2013)

(Note that this case has been appealed; the decision is pending.)

The applicant in this case is part of a worldwide collaboration of organisations operating under the name ‘The Hunger Project’ whose principal aim is the relief of hunger. It was not in dispute in the case that the applicant’s purposes are charitable under Australian law. The applicant is principally a fund-raising entity and it is other members of The Hunger Project in the developing world which perform the charitable activities directed at the relief of hunger. It was the fact that the applicant is a fundraiser rather than a direct performer of charitable works which gave rise to the two principal issues in the case:

(i) to what extent does the applicant directly perform charitable activities; and
(ii) can an organisation which carries out charitable activities indirectly as a fund-raiser qualify as a ‘public benevolent institution’ within the meaning of section 57A(1) of the Fringe Benefits Tax Assessment Act 1986 (Cth) (the Act).

The characterisation as a ‘public benevolent institution’ was crucial because if the applicant was a ‘public benevolent institution’ within the meaning of section 57A(1) of the Act, then the provision of a benefit to one of its employees would be an exempt benefit for the purposes of the legislation and not taxable. The applicant is a company limited by guarantee originally incorporated as such under the former Companies (New South Wales) Code 1981 (NSW). Clause 2(a) of its Memorandum of Association (the Memorandum) evidences that it is a nonprofit company whose exclusive object is:

The relief of poverty, sickness, suffering, distress, destitution and helplessness with a particular emphasis on directly aiding and developing those suffering from chronic and persistent hunger in certified developing countries as approved by the Australian Minister for Foreign Affairs from time to time.

Subordinate objects include the soliciting of donations (clause 2(p)), the raising of funds (clause 2(d)) for the purpose of making donations for charitable purposes (clause 2(b)), and co-operating with other entities having similar objects (clause 2(c)). Clause 3 of the Memorandum prohibits the distribution of money to members or directors, a necessary object for a nonprofit company. The applicant has a board of directors, a chief executive officer, and three or four employees. These employees work on three broad activities: raising funds in Australia, co-operating with other partner countries to support programs in developing countries and involvement in the implementation of these programs through co-operation with other Hunger Project entities in program countries. The applicant’s main activity is fundraising, which attracts $1.6 million to $2.5 million per year. There were two kinds of fundraising conducted in the relevant tax period. The first kind of funds raised were called ‘unrestricted funds’ because the money donated could be used for any purpose within The Hunger Project. The second,
which were called ‘restricted’, were designated by an individual donor either for expenditure in a particular program country, or even on particular activities in a specified program country.

In addition to fundraising activities, there was also evidence of the applicant’s ad hoc involvement in various programs run by The Hunger Project in project countries, including Bangladesh, Uganda, and Malawi. Some of the employees travelled to these program countries, but His Honour found that this did not involve direct charitable work, except for a seed program in Malawi (at [35]). The CEO and one of the employees were also members of the Global Coordinating Committee of the Hunger Project. However, again His Honour did not see this involvement as direct charitable work (at [38]). In addition, the CEO travelled several times per year with existing or potential donors as part of her duties in encouraging new or continuing donations. His Honour held that, however much ‘utility’ these trips might have, they did not involve direct charitable work (at [41]).

Having found only one instance of direct charitable work on the evidence, His Honour concluded (at [44]):

I do not find, therefore, that the applicant is substantially engaged in the direct provision of charitable works. The correct characterisation of its activities is that it is predominantly engaged in fund raising and to a lesser extent in providing strategic guidance. Its direct charitable activities are negligible when viewed in the overall scheme of its operations.

In these circumstances, was the applicant a ‘public benevolent institution’? The term public benevolent institution is not defined in the Act. However, section 57A(1) of the Act provides:

(1) Where the employer of an employee is a public benevolent institution endorsed under subsection 123C(1) or (5), a benefit provided in respect of the employment of the employee is an exempt benefit.

The Commissioner of Taxation (the Commissioner) had refused the applicant’s application for endorsement as a public benevolent institution on 11 February 2011. An objection to that decision was lodged by the applicant on 12 April 2011 but this was refused on 16 August 2011 in terms which included the following passage:

It is accepted that the Project has a principal aim to provide relief from hunger however its activities indicate that this is achieved by the provision of funding for independent overseas projects which is not the direct provision of relief for the purpose of the term public benevolent institution. The organisations and projects supported by the Project provide the direct benevolent relief to the people who are experiencing chronic hunger.

His Honour reviewed the authorities on the meaning of public benevolent institution but held that he was not bound by any that existed (at [90]). However, he was persuaded by the applicant’s argument that its situation was analogous to that of the charity in Commissioner of Taxation v Word Investments [2008] HCA 55 (Word Investments). Word Investments was founded by persons closely associated with a charitable organisation which conducted missionary and bible translation activities overseas. There was no dispute that those activities were charitable. Word Investments accepted deposits from the public paying little or no interest upon them and used those inexpensive funds to earn profits which were then given to the charitable organisation. The Commissioner’s contention was that whilst it was an object of Word Investments to proclaim the Christian religion it did not, in fact, do so. All it did was to ‘raise money from commercial activities and hand it over to other bodies so that they could proclaim the Christian religion’ (Word Investments case, at [36]). The High Court did not accept that this prevented Word Investments from being classified as a charitable institution. Insofar as the law of
charities was concerned, it found nothing which would prevent such a fundraising entity from being characterised as being for charitable purposes. More importantly for this case, the High Court had observed that a consequence of the Commissioner’s argument was that if a charitable institution had arranged its affairs in such a way that it had two divisions, one engaged in charitable activities and the other in fundraising, then the organisation would be exempt, but if it were to be split into two organisations then the fundraising entity would lose its exempt status (Word Investments case, at [37]).

In this case, His Honour said (at [119], [122]):

I do not find compelling, therefore, any of the reasons put forward by the Commissioner for why the suggested limitation to direct activities should be discerned in the expression public benevolent institution. On the other hand there is at least one good reason not to do so and that is the High Court’s decision in Word Investments. That case was concerned with ‘charitable institutions’ rather than public benevolent institutions...[but] [t]he applicant submits that this powerfully supports its position for precisely the same argument can be made not only in the case of public benevolent institutions in general but in the case of the applicant in particular.

The Commissioner submitted that Word Investments provided no guidance in this case. It was concerned with the law of charities rather than with tax law. The use of the expression ‘public benevolent institution’ in earlier relevant tax law was an effort to move away from the technical complexities of the concept of charitable purposes in laws relating to tax. Further, the statutory history of the two concepts was quite different, making any analogy between them difficult.

In this last respect, the Commissioner argued strongly in this case that there was a legislative history that prevented the applicant from being regarded as a public benevolent institution owing to its not providing direct charitable relief. There were two reasons advanced by the Commissioner:

1. Previous legislation and case law supported the notion that directness of assistance was a necessary characteristic of a public benevolent institution; and
2. The explanatory memorandum to the Act referred to a public benevolent institution as one which was involved in dispensing direct aid to those in need.

His Honour did not agree (at [118]):

I would accept that the relevant passage in the explanatory memorandum appears to reflect a view on the part of its author that directness in the dispensation of aid is a required characteristic of a public benevolent institution. That view, however, had nothing to do with the legislative task with which the bill was concerned. In any event, the passage appears to reflect an erroneous assumption. The case law concerning public benevolent institutions does not, in my opinion, hold that directness is a requirement, and, to the extent that the explanatory memorandum suggests to the contrary, it is wrong.

His Honour agreed with the applicant’s overall argument on this point (at [124]–[126]):

I do not accept that either of these matters provides a good reason to distinguish Word Investments from the present situation. It is true that it was concerned with charitable institutions rather than with public benevolent institutions but the High Court’s reasoning... did not turn on any of those technical matters. It was instead simply the observation that it was difficult to discern the redeeming features of an approach which focussed entirely on the form an organisation took rather than its substance. If the law is affronted by the proposition that a charitable institution might lose its exempt status for its fund raising activities if they be
devolved into a separate entity (and Word Investments holds that it is) I cannot see why it would be any less affronted if a public benevolent institution lost exempt status for its fundraising activities by doing the same thing. There is no relevant difference. Nor does the difference in statutory history provide any reason to depart from that conclusion. If it were correct to say that the history and text of the...[previous legislation]... showed that the concept of a public benevolent institution included a requirement of direct provision I might be disposed to see some force in the Commissioner’s contention.... Whilst I accept that the statutory histories are different, without more, I do not discern any reason not to conclude that the reasoning in Word Investments is equally applicable to public benevolent institutions. For those reasons, I do not accept that it is a requirement that a public benevolent institution engage directly in the activities making up the object of its benevolence.

Therefore, the applicant was a public benevolent institution even if did not engage in the direct alleviation of hunger, but only in fundraising for that purpose to be undertaken by others. As a public benevolent institution, it was entitled to endorsement as a tax-exempt body under section 123C of the Act.

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/FCA/2013/693.html

Implications of this case

This case follows on from Word Investments in holding that a charity does not have to be engaged in direct assistance to retain its charitable status. The Court in this case determined, by analogy, that a public benevolent institution in the context of a taxation law is similarly situated. The major message from these two cases is that form does not rule over substance where charities are concerned.

2.8.8 HOME HEALTH PTY LTD V COMMISSIONER OF TAXATION [2013] AATA 458
(ADMINISTRATIVE APPEALS TRIBUNAL, TAXATION APPEALS DIVISION, WALSH SENIOR MEMBER, 1 JULY 2013)

The issue in this case was whether Home Health Pty Ltd (HH), a mental health services provider, was an ‘institution’, and therefore a ‘public benevolent institution’ (and ‘charitable institution’) within the meaning of Division 50 of the Income Tax Assessment Act 1997 (Cth) (ITAA 1997). Division 50 of the ITAA 1997 deals with entities which are exempt from tax. On 2 July 2012, the Commissioner refused to endorse Home Health as a ‘public benevolent institution’ (and, therefore, a ‘charitable institution’) under item 1.1 of the table in section 50-5 of the ITAA 1997. The Commissioner had decided that HH was not an ‘institution’, with the consequence that it was not entitled to be endorsed as an income tax exempt entity. HH submitted an objection against that decision (on 18 July 2012), but the Commissioner disallowed the objection (on 28 August 2012). HH sought a review of that decision.

Item 1.1 of the table in section 50-5 of the ITAA 1997 exempts ‘charitable institutions’ from income tax but not ‘public benevolent institutions’. However, in Taxation Ruling TR2003/5, Income Tax and fringe benefits tax: public benevolent institutions, the Commissioner accepted (at [2] and [24]) that entities which are ‘public benevolent institutions’ are also ‘charitable institutions’ for the purposes of section 50-5 of the ITAA 1997. Therefore, if HH was a ‘public benevolent institution’ it would also be treated as a ‘charitable institution’ under item 1.1 of the table in section 50-5 of the ITAA 1997.

HH is a proprietary limited company which had two members, Lloyd Archard and Barbara Archard, during the relevant period (1 July 2004 and 12 August 2012). Mr Archard is now the sole director. Until 6 January 2011, HH had a ’standard’ constitution for a proprietary limited company of its type. However,
on 6 January 2011, the constitution was amended to include a ‘nonprofit clause’ (clause 114), a dissolution clause (clause 115), and a new objects clause (clause 116). The new objects clause read:

The objects or purpose of this organisation is to alleviate the mental health problems of Australian citizens, particularly the vulnerable and disadvantaged members of our community. Our mission is to enhance the recovery journey to wellbeing and the quality-of-life of persons with mental health problems and to alleviate the burden of care for carers.

Pursuant to section 14ZZK(b)(iii) of the *Taxation Administration Act 1953* (Cth) (TAA), HH bore the burden of proving, on the balance of probabilities, that the Commissioner’s objection decision should have been made differently. Thus, HH had to establish, on the balance of probabilities, that the Commissioner should have allowed the objection and endorsed HH as a public benevolent institution (and charitable institution) under item 1.1 of the table in section 50-5 of the ITAA 1997 and for the purposes of section 50-110 of the ITAA 1997.

The current regime for the registration and regulation of charities is governed by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (ACNC Act) and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth) (ACNCT Act). Under the provisions of these Acts, the Australian Charities and Not-for-profits Commission (ACNC) is responsible for determining whether a particular organisation is a ‘public benevolent institution’ from 3 December 2012. Before 3 December 2012, the Commissioner of Taxation (the Commissioner) was responsible for that decision. As the date of the objection decision was 28 August 2012, and the ACNC Act and ACNCT Act regime is not retrospective, the relevant law for the Tribunal to consider was that of Division 50 of the ITAA 1997, and the endorsement procedures, as far as they were relevant, of Division 426 of Schedule 1 to the TAA. Before 1 July 2005, Subdivision 50-B of the ITAA 1997 contained all of the administrative procedures for applications for endorsement as a charity exempt from income tax. However, those procedural provisions (comprising former sections 50-115 to 50-160) were repealed and replaced by Division 426 in Schedule 1 to the TAA. From 1 July 2005, section 50-105(a) and (b) of the ITAA 1997 have provided that the Commissioner must endorse certain entities as exempt from income tax if the entity is ‘entitled to be endorsed’ under section 50-110 of the ITAA 1997, and it has applied for endorsement under Division 426 in Schedule 1 to the TAA. The endorsement procedures in Division 426 are substantially similar to those which were previously contained in Subdivision 50-B of the ITAA 1997.

The Tribunal said that it did not need to consider the implications surrounding HH being a charitable institution. Rather (at [41]), the issue was whether HH was a public benevolent institution, since this would embrace a charitable institution as well, due to TR2003/5. The High Court has previously dealt with the meaning of a public benevolent institution. (See *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224; *Public Trustee (NSW) v Federal Commissioner of Taxation* (1934) 51 CLR 75; and *Maughan v Federal Commissioner of Taxation* (1942) 66 CLR 388 at 395 per McTiernan J.) Such institutions deal with the poor, the sick, the destitute and the helpless. The definition was not meant to be rigid. Moreover, a public institution, whose services were predominantly the treatment of mental conditions or disability by psychotherapy, has previously been held to be a public benevolent institution: *Commissioner of Payroll Tax v Cairmillar Institute* [1992] 2 VR 706.

The High Court said in the decided cases that the term was a composite or compound expression. This meant that to constitute a ‘public benevolent institution’ an organisation must be: (i) public; (ii) benevolent; and (iii) an institution. It could not be just one or two of these. ‘Public’ means that the benevolence in question has to be directed to the public at large or a substantial section of it. A connection with government can help in this regard. ‘Benevolent’ means that the institution must be conducted on a nonprofit basis. There must be no private gain involved. In addition, there must be a
constraint on the distribution of profits and assets to members in the organisation’s constitution. In this regard, what has to be determined is whether the organisation has in law, and in fact, created the circumstance that its members cannot and do not receive any pecuniary benefit. The meaning of ‘institution’ has been considered widely in the cases, most recently in Federal Commissioner of Taxation v Word Investments Ltd (2008) 236 CLR 204. Generally an institution is an organisation (or similar body) formed for some object of public utility. Context is important in establishing whether a body is an institution, but membership numbers are particularly relevant: Christian Enterprises Ltd v Commissioner of Land Tax (1968) 72 SR (NSW) 72.

In this case, prior to 6 January 2011, HH was a ‘normal’ proprietary limited company. Its constitution permitted the declaration of dividends and the distribution of profits and assets to its members upon winding up. It could be carried on for a profit, even if it were not. In addition, before that date, HH’s constitution contained no benevolent object. The Tribunal held that this meant that HH could not be an ‘institution’ prior to 6 January 2011 (at [84]–[85]):

...the Tribunal considers that at no time prior to 6 January 2011 can [it] be said that Health was an ‘institution’ within the meaning of the composite expression ‘public benevolent institution’ (and ‘charitable institution’) for the purposes of Division 50 of the ITAA 1997. Consequently, the Tribunal considers that the Commissioner was correct to refuse to endorse Home Health as a ‘public benevolent institution’, for the purposes of Division 50 of the ITAA 199, in relation to the period prior to 6 January 2011.

What of the period after 6 January 2011 (after the constitution of HH was amended)? The Commissioner accepted that after that date, HH was both ‘public’ and ‘benevolent’ by virtue of its amended objects clauses. But was it also an ‘institution’? The Commissioner said that it was not. The main reason for this was the ‘small and exclusive membership’ of HH. The Tribunal agreed that HH was both public and benevolent (at [89]) after 6 January 2011. However, it was not an ‘institution’ (at [90]). The Tribunal held (at [90]–[91]):

It was not an ‘institution’ before 6 January 2011, nor did it become an ‘institution’ following the amendment to its Constitution on 6 January 2011. One reason for this is that the only members of Home Health are Mr Archard and his wife. To adopt the parlance of Beaumont and Lee JJ in Pamas Foundation ((1992) 35 FCR 117 at 125), this cannot be described as anything other than a ‘small and exclusive membership’.... In this case, there are only two members. Another reason is that... Home Health cannot be described as an organisation ‘greater than a structure controlled and operated by family members’. That is, despite the fact that, based on the facts and evidence, Mr Achard has approximately thirteen staff working for him... and the scale of Home Health’s activities cannot, based on the facts and evidence before the Tribunal... be described as ‘small’... it remains that Mr Achard is nevertheless the sole director (and company secretary) of Home Health. As such, the Tribunal agrees with the Commissioner’s contention that Mr Achard is Home Health’s controlling mind and will and that Mr Achard has unilateral control over Home Health.

Since ‘public benevolent institution’ is a composite term, HH failed to meet its requirements. Therefore, HH was not ‘entitled to endorsement’ (under section 105-110 of the ITAA 1997) such that the Commissioner was not required to endorse it (under section 105-105 of the ITAA 1997) as an income tax exempt entity (and charitable institution) under item 1.1 of the table in section 50-5 of the ITAA 1997.

This case may be viewed at: http://www.austlii.edu.au/au/cases/cth/AATA/2013/458.html
Implications of this case

This case demonstrates the importance of the High Court’s finding that ‘public benevolent institution’ is a composite term. In this case, the company was both ‘public’ and ‘benevolent’ after its constitution was amended in a way that brought this about, but it was not an institution. It served a sufficient part of the public, particularly as it had government contracts for provision of services, and its object was to assist the mentally ill, so was benevolent. But it was effectively a one-man operation, which, despite its size otherwise (in terms of operations and employees etc) could not be an institution in law.

2.8.9 THE POLLEN ESTATE TRUSTEE COMPANY AND KINGS COLLEGE LONDON V THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS [2013] EWCA CIV 753 (ENGLAND AND WALES COURT OF APPEAL, LAWS, MCFARLANE, LEWISON LLJ, 26 JUNE 2013)

This was an appeal from the UK’s Upper Tribunal: see The Pollen Estate Trustee Company and Kings College London v The Commissioners for Her Majesty’s Revenue and Customs [2012] UKUT 277. The decision of the Upper Tribunal was that if a charity acquires property in furtherance of its charitable purposes, or as an investment, it is entitled to relief against liability to pay stamp duty land tax (SDLT) on the purchase price. The same applies if a non-charity buys the property as bare trustee for the charity. But if the non-charity also has a beneficial interest in the property, then the charity is not entitled to any relief at all, not even in respect of its share of the beneficial interest.

The Pollen Estate Trustee Company (PETCL) is the current trustee of the Pollen Estate, a trust for sale (its shares are ‘fully alienable’ i.e. able to be sold) established under the Will and Codicils of the Reverend George Pollen who died on 27 March 1812. The Pollen Estate has large holdings of land and buildings in the West End of London, which are bought and sold as needed. The Pollen Estate has about 100 beneficiaries, some of whom are descendants of George Pollen and some of whom have bought their interest. Two of the current beneficiaries are the Church Commissioners for England (the Commissioners), a charity which holds a 64.109601% share of the Estate, and the Secretary of State for Defence, Greenwich Hospital, a Crown charity with its own governing Charter and statutes, which holds a 10.2257% share. In the case of the Greenwich Hospital (the Hospital), the Secretary of State for Defence is the sole trustee and holds all the assets of the Hospital on trust for the Queen, and for the exclusive benefit of the Hospital.

The case related to purchases of land and buildings. The Pollen Estate acquired three estates in fee simple and a leasehold, and Kings College London (KCL) purchased an existing leasehold interest in a building. In both cases the trustees were bare trustees (a bare trustee is one who holds property for beneficiaries who are absolutely entitled as against the trustee) for the holdings which were for the beneficial interest of the trusts, and held by them each as tenants in common. In the case of the Pollen Estate all the properties were purchased as investments, and were not used at all by the beneficiaries of the trust. In the case of the KCL property, it was purchased as a home for a professor at KCL, who had an exclusive right to occupy the premises and legal title, but the property was owned by the KCL trust as a tenant in common.

The issue before the Upper Tribunal was whether relief from SDLT was available to a charity or a Minister of the Crown where the purchaser acquires less than 100% interest in the property in question. The relevant legislation was the Finance Act 2003, particularly in Schedule 8. The Upper Tribunal observed that Parliament clearly intended that charities and government entities should be exempt from SDLT where there was an ‘outright purchase’ of land, the purchase of an ‘existing undivided share’ of land, the grant of a lease, or an existing undivided share in a lease. Paragraph 1(2) of Schedule 8
provides that the property acquired should be held for qualifying charitable purposes viz. the furtherance of the charity’s purposes or for an investment. HRMC contended that there was a joint purchase in these cases by a charity and a non-charity, so the exemption was not available for even the charity’s share. The trusts’ position was that the charity’s shares could be divided from the whole interest in the property.

The Upper Tribunal held that there were no policy reasons why the exemptions in this case should not be available. But the issue was: who held 100% of the beneficial interest in the properties? The Upper Tribunal held that in the case of the KCL lease, the relevant land transaction was the acquisition of the lease where two persons (the professor and KCL) became jointly entitled to the interest acquired, that interest being the entirety (100%) of the lease. Similarly, in the case of the Pollen Estate properties, the relevant land transactions were the acquisitions of each of those properties where more than two persons (the beneficiaries of the Pollen Estate) became jointly entitled to 100% of the beneficial interest. The Upper Tribunal’s decision meant that the position of HRMC was vindicated in the Upper Tribunal. Since whole interests were involved and not partial interests, there could be no partial relief from SDLT. As the Upper Tribunal said (at [76] of the Upper Tribunal’s decision):

Since the purchaser of the [Pollen Estate] Properties was not solely a charity or charities or a Minister of the Crown, and the purchaser of the [KCL] Lease was not solely a charity, the respective claims for relief from SDLT fail. Accordingly, the Appeals of PETCL and KCL are dismissed.

On appeal to the Court of Appeal, PETCL and KCL challenged the decision of the Upper Tribunal in two respects:

i) The Upper Tribunal identified the wrong interest in land as the basis for charge; and

ii) The Upper Tribunal adopted an unduly literal interpretation of the relieving provision applicable to acquisitions by charities.

The appeal was allowed on the second point only.

SDLT was introduced by the Finance Act 2003 (the Act) to replace stamp duty. Stamp duty was a tax on instruments, but SDLT is a tax on land transactions. A land transaction is a chargeable transaction if it is not a transaction that is exempt from charge: section 49(1). The amount of tax chargeable in respect of a chargeable transaction is a percentage of the amount of the chargeable consideration for the transaction: section 55(1). The tax rate begins at 1 per cent and varies according to the amount of the relevant consideration, and according to whether the property consists entirely of residential property or not. In relation to residential property the threshold is chargeable consideration of more than £125,000, and in relation to non-residential or mixed property it is chargeable consideration of more than £150,000.

The appeals before the Upper Tribunal and Court of Appeal were argued by PETCL and KCL on the principal basis that the only relevant chargeable interests that the charities acquired were their respective undivided shares in land, and that those acquisitions were to be treated as separate land transactions for the purposes of SDLT. The Upper Tribunal rejected that argument, largely on the basis of their analysis of how SDLT operated in the case of a joint purchase of an interest in land where no relief was in play. In this situation, only beneficial interests in land were involved. The Court of Appeal agreed with the Upper Tribunal that there was only one transaction (at [40]–[41]):

...there is only one equitable estate. It is held by a number of tenants in common in undivided shares; but the crux is that the shares are undivided. Since the shares are undivided, the
equitable estate is not divided. It follows that when one comes to identify the ‘subject-matter’ of the transaction for the purposes of section 43(6) one does so by reference to the equitable estate that has been collectively acquired. The chargeable consideration is the consideration given for that equitable estate (as the subject-matter of the transaction); and it is that consideration by reference to which SDLT is levied. There is no need to dissect the single land transaction any further.

Thus, HRMC were successful insofar as they had argued that there was only one joint transaction. This assisted with the avoidance of SDLT by e.g. splitting interests in several separate shares below the SDLT threshold of £125,000.

The Court of Appeal also agreed with the Upper Tribunal that there was no policy reason for SDLT relief not to apply to the charities in this case. Therefore, the issue became one of statutory interpretation of Schedule 8 of the Act which deals with relief from SDLT, including ‘charities relief’. Schedule 8 states, in part, [emphasis added]: ‘(1) A land transaction is exempt from charge if the purchaser is a charity and the … conditions are met’. The Upper Tribunal had held that because the beneficial interest held was indivisible, then no SDLT relief was available for a charity holding such an interest with a non-charity. The charity was not the purchaser by itself. The Court of Appeal held that the Upper Tribunal’s interpretation of Schedule 8 had been overly literal (at [47]–[48]):

The reading of paragraph 1(1) which I would favour is: ‘A land transaction is exempt from charge [to the extent that] the purchaser is a charity and the following conditions are met.’

Thus exemption would be available to the extent that the purchaser is a charity and to the extent that the conditions are met. This reading would have the consequence that a land transaction is partially exempt, but only to the extent of a charity's interest…the essence of HMRC's case (which I have accepted) is that the beneficial owners of the property in question (here the equitable estate in fee simple) must be viewed collectively. Viewed collectively, I cannot see why it is impossible to determine the extent to which, collectively, they hold the equitable estate for qualifying charitable purposes…[an] objection is that there is no machinery for determining what part of the interest is held for qualifying charitable purposes. But under Schedule 8 para 3 a charity is entitled to relief if it holds the ‘greater part’ of the subject-matter of the transaction for qualifying charitable purposes. There is no machinery for determining whether that condition is satisfied, so the absence of machinery cannot be an insuperable objection. Moreover, there is no indication in paragraph 3 whether the ‘greater part’ is greater by area or greater in value. Uncertainty at the edges cannot be decisive either.

The Court of Appeal made it clear that it was not ‘a Parliamentary draftsman’ (implying that Parliament should change the Act if the outcome obtained was not satisfactory to it), so that the court was satisfied that (at [49]):

...the gist or substance..., rather than its precise language...means...that the exemption would apply as regards that proportion of the beneficial interest that is attributable to the undivided share held by the charity for qualifying charitable purposes. I do not see that this gives rise to any conceptual uncertainty or to any insuperable practical administrative problems. In my judgment this reading is necessary in order to give effect to what must have been Parliament’s intention as regards the taxation of charities. There has been no principled reason advanced why a charity should be exempt from SDLT [in some situations]...but not be entitled to any relief at all on its proportionate undivided share in a jointly acquired property. Not to afford a charity relief in such circumstances would, in my judgment, be capricious.
Therefore, the appeal was allowed.

The case may be viewed at: http://www.bailii.org/ew/cases/EWCA/Civ/2013/753.html

Implications of this case

The argument in this appeal illustrates the uncertainty in interpreting exemption provisions for charity in the Finance Act, even on the part of HRMC. The issue of dealing with tenants in common came under consideration because to split the property transaction into seemingly several transactions (tenants in common are usually unconnected persons) was seen to be a way of avoiding the tax, since the threshold for payment of the tax is £125,000: see http://www.hmrc.gov.uk/sdlt/index.htm. The Upper Tribunal had been clear that whether there was a charity involved or not, the purchase by persons as tenants in common was a single transaction for SDLT purposes. The Court of Appeal agreed with that proposition, but interpreted Schedule 8 of the relevant Act in a different way (which had not been argued before the Upper Tribunal). This resulted in exemption for that part of SDLT which was attributable to the charity’s undivided share of the beneficial interest in the property.

2.8.10 R V GUINDON, 2013 FCA 153 CANLII (FEDERAL COURT OF APPEAL OF CANADA, NOEL, GOULTIER, STRATAS JJA, 12 JUNE 2013)

This was an appeal from a judgement of the Tax Court of Canada: Guindon v The Queen 2012 TCC 287 CanLII. The case concerned one of the many fraudulent charity donation schemes which operated in Canada in recent years. In this case, the participants in a donation program were to acquire timeshare units as beneficiaries of a trust for a fraction of their value and then donate them to a charity in exchange for tax receipts for the actual value of the units. No donations ever took place as the timeshare units never existed, and no trust was ever settled.

The respondent (Guindon) made, participated in, assented to or acquiesced in the making of 135 tax receipts that she knew, or would reasonably be expected to have known, constituted false statements that could be used by the participants to claim an unwarranted tax credit under the Income Tax Act (the Act). Penalties of $546,747 in respect of false statements made in the context of the donation program were assessed under section 163.2 of the Act. Guindon appealed the assessment in the Tax Court of Canada.

The decision of the Tax Court of Canada

Section 163.2 of the Act provides that monetary penalties can be assessed against third parties who knowingly, or in circumstances in which they should have known, make or participate in the making, of a false statement on an income tax return. Guindon, who was a lawyer, was involved in the donation program as both the signatory of the charitable recipient of the timeshare donations (Les Guides Franco-Canadiens District d’Ottawa (the Charity)), and as legal advisor for the developers of the timeshare (and trust) program. The third party assessment against her resulted from the fact that while tax receipts were issued by the Charity involved, neither the establishment of the trust nor the transfers of the timeshares to the Charity were found actually to have occurred. There were two main issues considered by His Honour at first instance (at [5]–[7]):

1. Whether the third party penalty imposed under section 163.2 of the Act involved by its very nature a criminal proceeding;
2. Whether the appellant should be found liable to a third party penalty pursuant to subsection 163.2(4) of the Act in respect of false statements (the tax receipts) made in the context of the program.

In respect of issue 1, His Honour said that (at [5]–[6]):
Such a finding would entail far-reaching consequences. If it was found that section 163.2 of the Act leads to a true penal consequence, then the protection of section 11 of the Canadian Charter of Rights and Freedoms (the Charter) would apply to guarantee fundamental substantive and procedural legal rights to any individual charged with an offence under section 163.2. Notably, the right to be presumed innocent would raise the burden of proof from that of proof on a balance of probabilities to proof beyond a reasonable doubt. Furthermore, if this Court finds that section 163.2 of the Act creates an offence, that offence would, pursuant to subsection 34(2) of the Interpretation Act, need to be prosecuted in provincial court under the criminal procedure provided for in the Criminal Code.

The Minister of National Revenue (the Minister), argued that section 163.2 gave rise to a civil penalty only. It was not designed to be penal in nature, but rather to uphold the internal integrity of the taxation system. Guindon was liable for a third party penalty under section 13.2(4) of the Act because her conduct was ‘wilfully blind’, reckless and showed a wanton disregard of the law. She was not only the president of the Charity but also the lawyer who signed a misleading opinion on the matters in contention. She knew that no supporting documents were ever provided by the principals of the program and, thus, that she could not rely on the legal opinion. Her responsibilities as an officer of a charity did not cease to exist at the time the legal opinion was signed or the tax receipts issued. On the contrary, Guindon had ongoing responsibilities which required that proper actions be taken to disclose to the participants and to the Canada Revenue Agency (CRA) any false statement those documents may have contained.

Guindon argued that section 163.2 of the Act is a provision with true penal consequences, and so came within section 11 of the Charter. She quoted in support of this contention R. v. Wigglesworth, 1987 CanLII 41 (SCC) where the Supreme Court of Canada held that proceedings will be subject to section 11 protection where the consequences include ‘imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity’. Following this rationale, Guindon argued that section 163.2 of the Act attracted the protection of section 11 by its unlimited terms as regards both the magnitude of the punishment and the time limit in which it can be imposed. The appellant further argued that the wrong done to society contemplated by the Wigglesworth test ‘does not require harm to the fisc’. In the context of section 163.2 of the Act, the harm contemplated is aid given by one person to a taxpayer which damages the integrity of the Canadian system of ‘honest self-reporting’.

Bédard J held that section 163.2 of the Act does create a penal consequence and thus attracted the protection of section 11 of the Charter. He relied on the Supreme Court decision in R v Wigglesworth. In that case, the Supreme Court determined that a matter could fall within the ambit of section 11 in two situations, namely, where the matter is by its very nature a criminal proceeding, or where the offence involves a sanction that has a true penal consequence. Since this was a donation program case, there were many participants who would be found to have avoided significant tax by virtue of donation receipts improperly claimed in their returns, so that the third party penalties could be very substantial. Thus, the section 163.2 penalty was held to be criminal in nature leading to the conclusion that all the criminal protections of section 11 of the Charter applied: the presumption of innocence, protection from self-incrimination, a trial to be held in provincial court in accordance with criminal (rather than tax) procedure, and a burden of proof beyond a reasonable doubt. This meant that in future there would be a higher burden imposed on the CRA in applying penalties in these sorts of cases. The Crown appealed.
The appeal decision

The Federal Court of Appeal held that the Tax Court did not have the jurisdiction to find that section 163.2 of the Income Tax Act created an offence, thus triggering the rights under section 11 of the Charter. The court said (at [3]):

That finding would require a ruling that, as a constitutional matter, some or all of section 163.2 was invalid, inoperable or inapplicable. The jurisdiction to make that ruling is present only when a notice of constitutional question has been served. None was served.

Moreover, the court ruled that the Wigglesworth test (see above) had not been met. Proceedings under section 163.2 were not criminal in nature, nor did they impose true penal consequences. Therefore, the Tax Court should have upheld the assessment against Guindon as valid. The court said that there was a line, ‘albeit sometimes a fuzzy one’, between cases under the Act which were criminal or non-criminal, and to which section 11 of the Charter applied or not (at [20]):

Drawing the line in matters arising under the Income Tax Act can be a challenge, particularly because the Act touches almost all Canadians, yet much of it is largely administrative in character. Nevertheless, indeed one can discern a line....

The court went on to illustrate this proposition with examples: filing a late tax return was not criminal, but tax fraud and tax evasion were. Section 11 of the Charter would not apply to the first example, but would apply to the second. Where did section 163.2 of the Act sit? The court said that section 163.2 was procedural: it provided for the assessment of a penalty, a reconsideration procedure, and an appeal to the Tax Court (at [37]): ‘...the assessment of a penalty under section 163.2 is not the equivalent of being “charged with a [criminal] offence.” Accordingly, none of the section 11 rights apply in section 163.2 proceedings’.

In addition, Guindon was seeking to raise a constitutional question (as to the applicability of section 11 of the Charter to her case), and had not given the appropriate notice of this to the court. She was in effect seeking the invalidity, inoperability or inapplicability of sections of the Income Tax Act. The appeal court was clear that the Tax Court had no jurisdiction to decide this question without notice. Therefore, it was not open to the Tax Court to find that section 163.2 of the Act prescribed a criminal offence such that all of the rights under section 11 of the Charter applied. Although the penalties under section 163.2 of the Act could be large, they were not penal (at [42]):

...section 163.2 is mainly directed to ensuring the accuracy of information, honesty and integrity within the administrative system of self-assessment and reporting under the Act. The imposition of a section 163.2 penalty by way of assessment and the subsequent procedures for challenging the assessment are proceedings of an administrative nature aimed at redressing conduct antithetical to the proper functioning of the administrative system of self-assessment and reporting under the Act. Put another way, proceedings under section 163.2 aim at maintaining discipline, compliance or order within a discrete regulatory and administrative field of endeavour. They do not aim at redressing a public wrong done to society at large.

Therefore, the appeal was allowed with costs. The appeal court thus gave ‘the judgement the Tax Court should have given’ (at [62]).

The original decision may be viewed at:
http://www.canlii.org/en/ca/tcc/doc/2012/2012tcc287/2012tcc287.html#_ftnref27
Implications of this case

The appeal court noted that there had been expressions of concern about the impact of section 163.2 of the Act in academic commentary. The court said that these expressions of concern were ‘overstated’ (at [52]), adding (at [53]–[54]):

The jurisprudence concerning section 163.2 is in an embryonic state. What now appears to some to be uncertain and worrying may later be addressed satisfactorily in the jurisprudence. In addition, there are many available tools to address procedural or substantive unfairness and any misuse of the section. As is well-known, an appeal ultimately lies to the Tax Court from the assessment of penalties. In that appeal, pursuant to subsection 163(3) of the Act, the burden lies on the Minister to demonstrate the facts justifying the imposition of the penalty. A number of procedural rules – including the right to adduce evidence, to test the Minister’s evidence, and to obtain disclosure of relevant documents – give the appellant a meaningful opportunity to challenge the assessment.

2.8.11 CANCER AND BOWEL RESEARCH ASSOCIATION INCORPORATED (AS TRUSTEE FOR CANCER AND BOWEL RESEARCH TRUST) AND COMMISSIONER OF TAXATION [2013] AATA 336 (ADMINISTRATIVE APPEALS TRIBUNAL OF AUSTRALIA, DEPUTY PRESIDENT JARVIS, 24 MAY 2013)

(Note that this case was appealed: see Commissioner of Taxation v Cancer & Bowel Research Association case note above at 2.8.2)

The Cancer and Bowel Research Trust (the Trust) was established by a deed made on 20 February 1998 between Nicholas Michael John Baldock as settlor and Cancer and Bowel Research Association Incorporated (applicant) as Trustee. This hearing concerned the revocation by the Australian Taxation Office (ATO) of the applicant’s endorsement as a tax concession charity, and as a deductible gift recipient (DGR).

The facts showed that:

- The Trust was endorsed as a DGR with an initial eligibility period from 20 February 1998 to 30 June 2000 pursuant to section 78(5) of the Income Tax Assessment Act 1936 (Cth) (1936 Act).
- On 19 May 2000, the Trustee applied for exemption from income tax as a tax concession charitable institution, and was subsequently granted that endorsement.
- The Commissioner of Taxation (the Commissioner) later issued formal advices of the endorsements that had been approved with effect from 1 July 2000.
- The advice in respect of the income tax exempt charity status referred to ‘The Trustee for the Cancer & Bowel Research Trust’, with the endorsement made by reference to ‘Item 1.1 – charitable institution’ as the relevant item in Subdivision 50-5 of the ITAA 1997.
- A record of a search of the Australian Business Register, using the same ABN, recorded the same endorsements, except that in the case of the tax concession status, the relevant entity is described as ‘The Trustee for THE CANCER & BOWEL RESEARCH TRUST, a Charitable
Institution’; the search also records that the entity is entitled to a GST concession, and an FBT rebate, in each case from 1 July 2005.

- The applicant (as Trustee) had been endorsed to access charity tax concessions in its own right, from 1 December 2002. Those concessions comprised an exemption from income tax as a charitable institution under Subdivision 50-B of the ITAA 1997, GST concessions from 1 July 2005 as a charitable institution under Subdivision 176 of the A New Tax System (Goods and Services Tax) Act 1999 (Cth) (GST Act), and FBT exemption from 1 July 2005 under section 123D of the Fringe Benefits Tax Assessment Act 1986 (Cth) (FBT Act).

- The Commissioner subsequently reviewed what were described as the endorsements of The Cancer & Bowel Research Trust as a ‘deductible gift recipient and as a charitable institution’. By letter dated 16 February 2012 the Commissioner advised that he had decided that the Trust did not satisfy the requirements for endorsement as a DGR or as a charitable institution for the purposes of the ITAA Act 1997, the GST Act or the FBT Act, and had not satisfied those requirements since 1 July 2000. The Commissioner further decided to revoke the endorsements from 1 July 2000, and enclosed reasons for the decision. The letter advising the Commissioner’s decision was addressed to the Trust for the attention of its chairman.

- The applicant objected to the decision by the Commissioner. In a letter dated 20 August 2012 the Commissioner advised that he disallowed the objection.

The issues before the Tribunal were:

(a) whether the applicant was entitled to be endorsed as a DGR as at 16 February 2012, being the date of the Commissioner’s decision to revoke its endorsement as a DGR;
(b) whether the applicant, as trustee for the Trust, was entitled to be endorsed as exempt from income tax, FBT and GST as at 16 February 2012;
(c) should any revocation of the endorsements granted to the applicant take effect from 1 July 2000, or some other and what date;
(d) whether the applicant was entitled to be endorsed as a health promotion charity on or after 4 October 2010, being the date of its application for that endorsement; and
(e) what was the date at which the tribunal should determine these issues.

There was a preliminary issue concerning the various endorsements, some of which were addressed to the Trust, which is not a legal entity, and some of which were addressed to the Trustee of the Trust (the proper legal entity concerned, and the proper applicant in this hearing). The Deputy President was concerned about the Tribunal’s jurisdiction (at [10]):

I had initially been concerned that the primary decision by the Commissioner to revoke the endorsements arguably did not relate to the applicant, because it was addressed to the Trust, and if that were the case there might be an issue as to whether the objection and the objection decision, insofar as they relate to the endorsements as a charitable institution in respect [of] exemptions from income tax, GST and FBT, were a nullity, with the consequence that this tribunal would then have had no jurisdiction to review the purported revocation of those endorsements. However, although the Commissioner’s letter that gave notice of the revocation was addressed only to the Trust, it is clear from the reasons for decision enclosed with the letter that the Commissioner had considered the entitlement of the Trustee as trustee for the Trust to the above endorsements, as well as the entitlement of the Trust as a DGR. I am therefore satisfied that there is no issue as to my jurisdiction.

The trust deed of 20 February 1998, which created the Trust, included a declaration by the Trustee that it would hold the Trust Fund (as defined) upon trust to distribute the net income thereof among the
Eligible Beneficiaries in the manner described in the deed. The deed further provided that on the vesting day the Trustee would stand possessed of the net proceeds of sale of the Trust Fund upon trust to pay the same among some or all of the Eligible Beneficiaries then existing in the shares and proportions determined by the Trustee. The Trustee was also empowered in its discretion to distribute property of the Trust Fund in excess of the immediate requirements of the Trust among the Eligible Beneficiaries or one or more of them.

The Trust was initially meant to support the research of a PhD student into issues concerning bowel cancer. The Trust was amended several times, and engaged in various kinds of activity. A replacement trust deed was made in 2011 to amend the objectives of the Trust. The First Schedule to the 2011 Deed included a heading ‘Charitable Purposes’, and provided as follows:

**PRIMARY OBJECTIVE**
1) Educate and increase general community awareness of cancer and measures considered a preventative of cancer.

**ANCILLIARY [sic] OBJECTIVES**
1) Provide accommodation for the benefit of cancer patients and/or their families;
2) Support Scientific and medical research into causes, cure or prevention of cancer;
3) Purchase equipment used at treatment, research and diagnostic levels;
4) Provide financial assistance to cancer patients and/or their families for any purposes considered beneficial to their treatment, or recovery, whether physical or therapeutic;
5) To assist, establish and promote in the research or promotion of, and to subscribe to or become a member of or associated or amalgamated with any such association, trust, foundation or any other entity whose objectives are analogous to those of this trust.
6) To provide services and support to any other association, trust, foundation or any other entity whose objectives and/or purposes are analogous to this trust.

In his reasons for the decision to revoke the relevant endorsements, the Commissioner concluded that the 2011 Deed was legally ineffective, primarily because the provision in the original trust deed to vary the trusts on which the Trust Fund was held empowered the Trustee to effect variations, whereas (it seemed) the Commissioner claimed that it was the Settlor, and not the Trustee, who had amended the Deed. This proposition was reiterated in the Commissioner’s reasons for the objection. The Tribunal did not agree with this conclusion (at [61]):

...this aspect of the Commissioner’s reasons was misconceived. I consider that the 2011 Deed constituted a valid variation of the trusts of the original deed, because clause 2.6 of the 2011 Deed provides expressly that it is the Trustee, and not the Settlor, which is exercising the power of variation conferred by the original deed.

The Commissioner’s reasons also referred to provisions in the 2011 Deed which purported to give the variations to the Trust retrospective effect, and stated that the original deed, and the beneficial interests created by the original deed, could not be varied so as to have retrospective effect.

The Tribunal again disagreed with the Commissioner (at [63]):

I agree that the 2011 Deed could not retrospectively vary the terms of the trusts created by the original deed. By virtue of the general law relating to trusts, the 2011 Deed could only operate from the date when it was made, namely 8 February 2011. But in my opinion, the 2011 Deed was valid and effective from that date.
Therefore, the 2011 deed was the relevant one for consideration. On the basis of that deed, was the Trust entitled to endorsement as a DGR? The Tribunal said that it was not (at [65]):

This issue can be disposed of shortly. As mentioned above, under ss 30-125(6) and (7) of ITAA 1997, to be eligible for endorsement as a DGR, the document constituting the entity or rules governing the entity’s activities must require the entity, on the winding up of the fund, authority or institution or the revocation of the entity’s endorsement as a DGR, to transfer any surplus assets to another fund, authority or institution which is itself endorsed as a DGR. Clause 6.1 of the 2011 Deed requires any surplus assets on a winding up to be transferred to an entity to which income tax deductible gifts can be made. However, the 2011 Deed does not require such a transfer of funds to be made in the event that the Trust’s endorsement as a DGR is revoked. Further, clause 6.1 also contemplates that on a winding up, surplus assets can be transferred to any other organisation with similar charitable purposes as the Trust, and does not require that any such other organisation be endorsed as a DGR. The Trust is therefore not eligible for DGR endorsement because its Trust Deed does not comply with s 30-125(6).

The winding up clause in the original trust deed had contained a similar omission, and the Tribunal therefore held that it was appropriate that the revocation of the DGR endorsement should take effect on and from 1 July 2000.

Was the Trust entitled to endorsement as a charitable institution pursuant to Sub-division 50–A of the ITAA 1997 and the relevant provisions of the GST Act and the FBT Act? The Tribunal considered first whether it was an ‘institution’. The Tribunal said that it was apparent from its history that the Trust had originally operated as an ancillary fund, but over time its activities were such that it became an institution within the meaning of item 1.1 of the table in section 50-5 of the ITAA 1997.

Should the Commissioner have revoked the endorsements retrospectively? The relevant power is contained in section 426-55 of Schedule 1 of the Taxation Administration Act 1953 (Cth) TAA). This section provides:

(1) The Commissioner may revoke the endorsement of an entity if:
(a) the entity is not entitled to be endorsed; ...

(2) The revocation has effect from a day specified by the Commissioner (which may be a day before the Commissioner decided to revoke the endorsement).

The relevant deed was the 2011 deed. Had the activities of the Trust been charitable under the terms of that deed? The Commissioner had contended that they were not. The Trust had been audited in 2007–2008. There were various transactions of concern to the Commissioner, including substantial payments to restaurants and hotels. On this point, the Tribunal said (at [98]):

I agree with counsel’s criticism that it is inappropriate for a charitable institution to incur substantial entertainment expenses. Nevertheless, in most organisations, some degree of entertainment expense will be incurred, and can be of benefit to them. The total amount of the entertainment expenses paid by the applicant [($27,475.37 in 2007 and $27,541.05 in 2008)] must be viewed in the context of the total income of the Trusts, which was in excess of $5 million in each of the years in question. The applicant’s accounts were audited each year by reputable independent auditors, and no query was raised regarding this item of expenditure (or for that matter, regarding any of the so-called related party payments referred to by the Commissioner).... In all of the circumstances, I do not think that this expenditure was such that it should result in the applicant’s endorsement as a charitable institution being revoked.
Another issue of concern to the Commissioner was the amount being expended by the Trust for its fundraising activities. In evidence, the applicant’s spreadsheet included its estimate of expenditure for charitable purposes as a percentage of revenue, and showed a range of percentages between a low of 15.8% to a high of 41.85% in the years 2005 to 2011. The spreadsheet then attributed a further percentage of the fundraising costs to what is described as ‘relief of poverty’. This apparently related to an estimate of the amount paid to the persons engaged by the applicant to carry out its fundraising activities (who would otherwise be unemployable), and was calculated at 20% of total fundraising costs. This additional amount increased the percentages paid for fundraising to a range of 27.73% to 50.25% in the years from 2005 to 2011. This was a relatively high amount compared to the average in New South Wales of about 21%. However, the Tribunal did not accept that this was unreasonable. The appropriate amount to devote to such purposes was difficult to quantify (at [108]–[109]):

For my part, I do not regard it as possible to quantify the dollar value of this aspect of the awareness and prevention activities of the applicant, or to express it as a percentage of revenue, other than to say that the applicant should be given credit for a reasonable proportion of its total fund raising expenditure under this heading, and that that proportion should not be regarded as immaterial in assessing whether the applicant was acting as a charity…. Further, the 2011 Deed expressly authorises the Trustee to employ persons. The engagement of persons who would otherwise have been unemployable did not constitute a breach of trust, and I think could be taken into account in considering whether the applicant was engaged in charitable activities.

The Commissioner was also concerned about the amount being distributed each year for the Trust’s charitable purposes. He contended that the Trust was a profit making business, rather than a charity. However, the Tribunal was again unmoved. It was ‘not persuaded that the ...[argument about distribution] would warrant the revocation of the applicant’s endorsement as a charitable institution’ (at [112]).

On a further issue of endorsement as a charity, the Trust had made a separate application for endorsement as a health promotion charity in 2011. However, this had also been rejected by the Commissioner, objected to, and the objection disallowed. The Tribunal said (at [119]):

It is clear that the 2011 Deed, made on 8 February 2011, authorises the applicant to conduct a health promotion charity, having regard to the primary objective referred in the First Schedule to that deed.

The Tribunal said this was really an unresolved matter, and required further consideration by the Commissioner in the light of additional information which should be provided by the applicant. It set a deadline of 23 September 2013 for the Commissioner to reconsider this matter. The Tribunal pointed out that the Commissioner’s decisions might now be affected by the ‘new regulatory regime under the auspices of the Commissioner of the Australian Charities and Not-for-profits Commission’ (at [117]).

Overall, the Tribunal found that it was proper for the Commissioner to revoke the DGR status of the Trust, and to make this revocation retrospective to 1 July 2000. However, insofar as the decision related to whether the applicant was entitled to be endorsed as an entity exempt from income tax under section 50-105 of the ITAA 1997, and as a charitable institution under section 176-1 of the GST Act and section 123E of the FBT Act, the Tribunal decided that the matter should be remitted for further consideration under section 42D of the Administrative Appeals Tribunal Act 1975 (Cth).

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/AATA/2013/336.html
Implications of this case

As the Tribunal pointed out, the Trust was an established entity, and would no doubt reapply for DGR status (at [117]):

...the applicant is an established organisation with experienced managers and employees who have been trained in its activities, and has a database of donors and procedures that it employs to pursue its charitable activities. I assume that the applicant will be making an application to obtain endorsement as a DGR, and if that application is successful, its capacity to raise additional funds and so increase expenditure on charitable purposes will be enhanced. I am also mindful that on the evidence before me, the applicant has up to 200 employees and contractors for whom it provides employment, and a significant proportion of those people might otherwise be unemployable, and become dependent on social welfare, if the issues that have arisen cannot be resolved, and the applicant is wound up.

Therefore, there was a need for the Commissioner of Taxation to consider the matter in the light of additional information to be provided by the Trust, and for a further hearing in the AAT to resolve the matter fully.

2.8.12 LIPSON V CASSELS BROCK & BLACKWELL LLP, 2013 ONCA 165 (ONTARIO COURT OF APPEAL, GOURDE, SIMMONS, GILLESE JJA, 19 MARCH 2013)

This appeal followed on from one of the many recent tax cases in Canada which dealt with fraudulent charitable donation schemes. Donors to these sorts of schemes actually sought to make a profit from their charitable donations.

The particular scheme underlying this case was one in which taxpayers, of whom the appellant was one, ‘donated’ cash and resort timeshare weeks to registered Canadian athletic associations during the four-year period between 2000 and 2003. The appellant and the other donors made their donations through a program referred to as the ‘Timeshare Tax Reduction Program’ (the Program) operated by the Canadian Athletic Trust (the Trust). The Trust was a Bahamian resident which purchased timeshare weeks in a Caribbean resort and transferred them to the Trust.

Under the terms of the Program, donors could apply to become beneficiaries of the Trust, and the Trustee could then distribute timeshare weeks to them. The donors in the scheme then ‘gave’ both cash and timeshare weeks to a registered Canadian athletic association, receiving two receipts, one for the cash (which in reality discharged the encumbrance on their timeshare weeks) and one for the fair market value of the timeshare weeks. Donors anticipated receiving tax credits worth more than their actual financial outlay, while the charities actually received very little.

In support of the viability of the Program, the promotional material included an opinion prepared by Cassels Brock & Blackwell LLP (Cassels Brock) indicating that it was unlikely that the Canada Customs and Revenue Agency (CCRA) could successfully deny the anticipated tax credits. However, in 2004 the CCRA notified the appellant that it intended to disallow all his claims for tax credits under the Program. Other donors under the Program were advised similarly. Litigation with the CCRA followed. In 2008, the CCRA settled with the donors to the Program on the basis that the donors would receive tax credits for their actual cash donations, but not for their donations of timeshare weeks, which had been paid for by a third party.

The donors, represented by the appellant, then commenced a class action against the respondent firm for negligence and negligent misrepresentation in giving the tax opinion that they did in relation to the Program. The appellant claimed damages in the form of interest arrears, lost opportunities to make
other donations, and special damages consisting of professional fees for challenging the CCRA’s position. On 14 November 2011, on a motion for certification of the action as a class proceeding, Perell J found that the proposed class action satisfied the criteria for certification, but could not proceed because it was statute-barred by the two-year limitation period set out in the Limitations Act, 2002, S.O. 2002, c. 24, Sched. B. In appealing this finding, the appellant raised two issues for consideration:

1. Did the motion judge err in dismissing his action as statute-barred?
2. Did the motion judge err in not certifying the action, including his proposed common issue relating to causation, as a class proceeding?

Cassels Brock provided six similar legal opinions between 2000 and 2003 on the tax issues related to the Program. Their Honours said that two elements of these opinions were key points in the case:

1. The opinions were directed to potential donors, with the words ‘...may be relied upon... by...potential donors’;
2. The opinions stated that ‘it is unlikely that the CCRA could successfully deny ... the [anticipated] tax credit[s]’.

The appellant’s evidence was that he had been introduced to the Program by his accountant in the latter part of 2000. He had been reassured on hearing about the Cassels Brock opinion (which he denied reading), and would not have participated in the Program without such an opinion as to its ‘legality’. The appellant alleged that Cassels Brock:

(i) fell below the standard of care of a reasonably competent tax solicitor in preparing its opinion, resulting in an opinion that contains material misrepresentations;
(ii) knew that a favourable tax opinion was a necessary precondition to the creation and successful promotion of the Timeshare Tax Reduction Program; and
(iii) knew that potential donors would rely on the existence of a favourable tax opinion in deciding whether to participate in the Program.

On the first question in the appeal, their Honours held that the motion judge (the judge at first instance) erred in holding that the action was statute-barred. Their Honours said that the motion judge erred in his interpretation of the Supreme Court of Canada’s decision in Central Trust Co. v Rafuse 1986 CanLII (SCC) as the relevant precedent (at [67]–[68]):

In our respectful view, the motion judge erred in interpreting and applying Central Trust Co. v. Rafuse. Moreover, when that decision is interpreted properly, it is apparent that the record before the motion judge did not disclose whether Mr. Lipson’s claim was statute-barred. Nor did it support the conclusion that the limitation period applicable to Mr. Lipson’s claim also applied to the entire class.

Their Honours said, quoting from another case, that in an action for solicitor negligence arising from a solicitor’s opinion, ‘[t]he date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence to run will depend on the circumstances of the particular case’ (at [76]). They said (at [82], [87]):

In our view, neither the fact that the CCRA was challenging the claimed tax credits nor the fact that the class members may have been incurring professional fees to challenge the CCRA’s denial of the tax credits is determinative of when the class members reasonably ought to have known they had suffered a loss as a result of a breach of the standard of care on the part of Cassels Brock....
On their face, Mr. Lipson’s pleadings do not demonstrate that, prior to January 2008, he knew that the CCRA’s challenge to his claimed tax credits would likely be successful. Accordingly, his pleadings do not demonstrate that his claim was statute-barred when he commenced his action in April 2009.

On the second issue in the appeal, their Honours again held that the motion judge had erred in saying that causation in simple negligence was not a common issue in the class action. It was a common issue. They said (at [100]):

...Mr. Lipson’s claim in simple negligence raises the issue of whether, but for the Cassels Brock opinion, the program would have been marketed and therefore available to cause harm to all members of the class. This issue is properly resolved in a common trial.

Therefore, the appellant was successful in both issues on appeal, and a class action was ordered to be certified for trial against Cassels, Brock & Blackwell LLP.

The case may be viewed at:
http://www.canlii.org/en/on/onca/doc/2013/2013onca165/2013onca165.html

Implications of this case

Favourable legal and tax opinions were always given in the donation fraud cases to date. Therefore, this case is important in leaving open the possibility of class actions against the opinion-givers in these cases.


This case concerned the value-added tax (VAT), a consumption tax levied in the UK. It was an appeal by Longridge on the Thames (the appellant), against a decision of The Commissioners for Her Majesty’s Revenue and Customs (HMRC) that the supplies made to the appellant in relation to the construction of a building on its premises were not zero-rated supplies.

The appellant is a company limited by guarantee and a registered charity, whose objects are:

1. To safeguard and promote Longridge as a centre of excellence for the advancement of education in water, outdoor and indoor activities for young people generally, and for purposes related thereto such as coaching, leadership and training in water and other activities; and
2. To promote the development of young people in achieving their full physical, intellectual, social and spiritual potential as individuals, as responsible citizens and as members of their local, national and international communities

The appellant carries out its charitable purposes by the provision of boating and other water-based courses, activities and facilities for young people at its premises on the banks of the River Thames. Certain of those courses, activities and facilities are also provided to adults. During 2010, in order to improve its facilities, the appellant engaged a contractor to build a Training Centre on its site. This had toilet, changing and shower facilities on the ground floor, and an area to be used primarily for training courses and meetings on the upper floor. The appellant’s contention was that the supplies made by the contractor in constructing the Training Centre should be zero-rated (in terms of VAT) under Items 2 and 4 of Group 5 of Schedule 8 to the Value Added Tax Act 1994 (VATA), on the grounds that the building was intended for use solely for relevant charitable purposes within the meaning of Note (6) to Group 5, and asked HRMC for confirmation of this, to enable the appellant to issue the necessary zero-rating.
certificate to the contractor. HRMC took the view that the nature of the appellant’s activities are such as to amount, in whole or in part, to business activities, and that accordingly the Training Centre was not intended for use solely for relevant charitable purposes (that is, it was not intended to be used otherwise than in the course or furtherance of a business).

The grounds of appeal were that the Training Centre is used in the fulfilment of the charity’s core objects, and that although it charges fees for the courses and other facilities it provides in pursuing those objects, such courses and facilities are substantially subsidised by donation income received by the appellant and also by the time and skills provided to the appellant by its large body of volunteers.

The issue before the Tribunal was whether, at the time the relevant supplies were made in the course of the construction of the Training Centre, the building was intended for use solely for a relevant charitable purpose, and thus could be zero-rated for VAT purposes. The disputed amount of VAT involved was about £135,000. The Tribunal reviewed the relevant legislation, which enacted a European Directive (European Community Council Directive 2006/112/EC), on the issue. Section 94(1) VATA provides that: ‘In this Act “business” includes any trade profession or vocation’. Section 30 VATA provides that certain supplies (specified in Schedule 8) by a taxable person are to be taxable at the zero rate. Group 5 of Schedule 8, headed Construction of Buildings, etc was relevant for this appeal. Items 2 and 4 of that part of Schedule 8 include as zero-rated:

2 The supply in the course of the construction of—
   (a) a building ... intended for use solely for ... a relevant charitable purpose; or
   (b) ... ,
   of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.

4 The supply of building materials to a person to whom the supplier is supplying services within item 2 ... of this Group which include the incorporation of the materials into the building (or its site) in question.

The Notes to Group 5 of Schedule 8 include Note 6:

(6) Use for a relevant charitable purpose means use by a charity in either or both the following ways, namely—
   (a) otherwise than in the course or furtherance of a business;
   (b) as a village hall or similarly in providing social or recreational facilities for a local community.

The evidence showed that the trustees’ intention in relation to the upper floor of the new building was to provide a training space for the young people who took part in its boating activities. However, the space had also been advertised on the appellant’s website as a space for corporate events following a single booking for such an event in 2011. Few other bookings had been received, and the space was almost fully utilised for the appellant’s charitable activities. Some adults, however, undertook activities as ‘corporate teams’.

The cost of the new building (£760,000) was met entirely by donations and grants, since the trustees were clear that they did not want to increase any fees for the activities provided by the charity. Amongst its many activities, the appellant offers fee-paying courses, packages of courses, and training for adults as coaches. The fees charged are similar to, or slightly lower than, those charged by local authorities and commercial organisations. A substantial number of volunteers contribute their time and skills to the appellant for the purposes of the courses and activities it provides. The volunteers mainly
act as instructors (there also paid full-time instructors), but there are also volunteers who assist with maintenance of premises and equipment and in administration and financial accounting.

The appellant’s financial statements showed that for each year from 2006–07 year onwards, it had shown a deficit on its operating activities, ranging from £95,400 in 2007–08 to £16,630 in 2010–11 (in some years depreciation of capital assets and the costs of redundancies had increased further the deficit on all activities). In each year donated income for ongoing activities (that is, disregarding donations for capital projects) had at least equalled the deficit accruing on activities. The Tribunal considered the appellant’s financial statements for its year 2010–11 as an example. These showed that total income from all its subsidised activities (that is, all young people’s activities, family activities, and those adults for whom a discount on the published price was given) was £580,883, and that the cost of providing those activities (disregarding the value of volunteer time, which was not accounted for) was £655,498. The analysis also showed that the total income from activities provided to all other adults (including those participating as a ‘corporate team’) was £61,998 and that the cost of providing those activities was £53,476. This figure also disregarded the value of volunteer time — the evidence was that in the case of activities provided for adults, a higher proportion of instructor/training input would be by way of paid instructors, but that where volunteers were used, they would be the more experienced volunteers.

In looking at the range of activities and courses provided by the appellant during the period from 1 January to 25 November 2012, the Tribunal found that 27,119 individuals took part, of whom 17,895 were young people who paid no charge or a charge discounted by 20% or more; 7,786 were young people who paid a charge discounted by up to 20%; 1,111 were adults who paid a discounted charge, and 327 (1.21%) were adults who paid a charge without any discount.

As to the specific use of the Training Centre, a schedule of users of the upper floor for the period from 16 October 2010 to 26 June 2012 showed that during that period 5,806 persons used the upper floor of whom 240 were persons comprising ‘corporate teams’ (4.13% of total users). All other users were individuals or groups whose activities were subsidised by the appellant, being youth groups, school groups, volunteers supporting the appellant, and, on five occasions, family groups. The use by volunteers ranged from use for training purposes to use for social activities. Use of the upper floor space for corporate events was limited to three events, for which the total charges were £380. Total charges for the upper floor during the period considered were £2,455, of which most were the nominal charge of £50.

Was the appellant carrying on a business? The Tribunal held that the appellant was engaged in economic activity (at [96]), saying (at [98]):

The Appellant runs its activities, and manages its financial affairs, in a professional and ‘business-like’ manner. In its trustee body and full-time employed chief executive it has an appropriate governance structure. It prepares budgets and forecasts with the aim of endeavouring to ensure continuing financial solvency and to provide a framework whereby its financial position can be monitored and its activities sustained. It has programmes for seeking grants and for raising donations to support its work, and in matters such as planning for and funding the construction of the Training Centre it is looking to continue and develop its activities over the long term. Where it charges for the courses and activities it contracts with its ‘customers’ on terms and conditions which a commercial organisation would recognise. Its turnover (including donated income) is approximately £1 million and its net assets approximately £2 million (most of which is accounted for by the value of the site it occupies). In our view its conduct of its activities, and in particular its financial management, is as one would
expect – and almost certainly as charity regulation would require – of a charity of this size and nature.

However, almost all its activities were carried out in pursuit of its charitable objects. The Tribunal said in relation to the fees charged (at [99]–[100]):

...charges are set with a view to their affordability for the young people the Appellant wishes to benefit; charges are set with a view to covering operational expenses after taking account of donated income and taking account also of the contributions of volunteers; discretion is given to permit reducing or waiving charge in particular cases where pursuit of the charitable objects is especially desirable; and all capital projects (with the exception of the Appellant’s original acquisition of the site, which was partly funded by borrowing) are financed by donations and grants, so that no part of the charges is directly or indirectly expended on the acquisition or funding of capital assets. In our view these are not factors which are indicative of a business, even if certain of those factors may demonstrate a degree of financial care and prudence aimed at ensuring that the Appellant can continue to carry out its activities. It is not consistent with a business activity that charges are set to meet operational costs to the extent that donated and grant income is not available to meet such costs; nor is it consistent with a business activity that the necessary capital costs of the activity are met by donations and grants so that no part of such costs, or the funding of such costs, is met by those to whom the Appellant provides its activities. The readiness by the Appellant to reduce or waive charges, undertaken not with a view to increasing business, but to ensure that its facilities and activities are made more widely available, is not consistent with a business activity. All these matters inform as to the true nature of the activity carried on by the Appellant, not merely its purpose in carrying that activity.

The Tribunal went on to say that the ‘most significant’ aspect of the appellant’s activities was the use of volunteers (at [101]). Taking all the factors into account, it was clear that the appellant was not carrying on a business for profit (at [102]). Its ‘intrinsic nature’ was the furtherance of its charitable objects, notwithstanding that it provided some courses and activities for adults (at [104]). As to the use of the Training Centre, its lower floor was held to be used solely for the appellant’s charitable purposes. The position in relation to the upper floor was ‘more complex’ (at [117]), but the evidence showed (see above) that on an actual use basis, and having regard to the de minimis rule (minimal use for other purposes), the upper floor had been used solely for a charitable purpose within the relevant VAT provisions (at [119]).

Therefore, the appeal was allowed.

The decision may be viewed at:

Implications of this case

The position is similar for charities in Australia under the GST (also a consumption tax) legislation. HMRC has recently brought several cases against charities in pursuit of VAT on construction projects. All have been unsuccessful. The HMRC takes the view that not being liable for VAT on construction is not useful for charities because then they are unable to recover VAT on their inputs, making their construction costs higher overall. The truth or otherwise of this assertion is, as yet, unproven.
2.8.14 NEVILLE V NATIONAL FOUNDATION FOR CHRISTIAN LEADERSHIP, 2013 BCSC 183 (SUPREME COURT OF BRITISH COLUMBIA, CULLEN ACJ, 6 FEBRUARY 2013)

The National Foundation for Christian Leadership (NFCL) is a registered charitable organisation under the Canadian federal Income tax Act, R.S.C. 1985, c.1 (5th Supp). The plaintiffs (Mr and Mrs Neville) gave two donations totalling $6,250 to the NFCL, for which NFCL issued a charitable donation receipt on 15 January 2003. On 6 December 2005, the Canada Revenue Agency (CRA) reviewed the donations and determined that they ‘were not gifts in law because they were intended to directly or indirectly benefit a person who was not dealing at arms’ length with the sponsor’. (The word ‘sponsor’ referred to the plaintiffs.) The tax credit claimed by the plaintiffs was accordingly disallowed. Litigation took place in the Tax Court of Canada, and the Federal Court of Appeal which found against the plaintiffs. An application to appeal to the Supreme Court of Canada was refused. Therefore, the matter was sent back to the British Columbia courts to resolve. The issues raised by this action were:

- whether the donations were valid gifts at common law and if so,
- whether their failure to maintain the status of a charitable donation operated to vitiate the gifts or to provide some basis in law or equity to order NFCL to repay all or some of the donations made.

The facts of the case were not in dispute. The plaintiffs had donated to the NFCL on the basis of representations that their donations would be tax-deductible. They were, however, given brochures before donating which contained a disclaimer that some donations were not tax-deductible. The NFCL used some of its funds to support students at Trinity Western University (TWU), a Christian college which the plaintiffs’ daughter was to attend. TWU operated a scheme whereby students solicited ‘donations’ which resulted in their receiving bursaries to study at TWU. Therefore, the ‘donations’ (although they were not ear-marked) resulted in a material benefit to the plaintiffs in that they were relieved from paying fees at TWU for their daughter. The donations were in fact used for their intended purpose and the plaintiffs’ daughter received an amount of $6,408 in total, consisting of a 2002 scholarship of $4,168 and a second scholarship of $2,240, which she received in 2003. The donation receipt read:

Thank you for your gift. Your gift has helped a student prepare for life in the real world where they can and do make a difference. NFCL can only accept gifts that are unrestricted and undesignated and makes no representation or warranty as to the income tax deductibility of any donation made to NFCL.

His Honour said that it seemed clear that the donations were gifts at common law. Thus, the remaining questions for resolution were whether the failure of the gift to attract a tax benefit vitiated the gift, or whether the gift was impressed with some sort of trust justifying its repayment to the plaintiffs upon its failure to avoid tax.

What was the purpose of the gift? Was it merely to avoid taxation? His Honour said on this point (at [29]–[30]):

It is clear that the plaintiffs’ purpose in making the gift was to donate to a foundation that supported the education of Christian students attending Christian educational institutions. It is equally clear that it was within their contemplation that their daughter would receive a scholarship or bursary from NFCL and that they understood there was no guarantee of a tax benefit from the gifts. In my view, the purposes of the gift were fulfilled: the donations made were paid to Christian students attending Christian institutions, the plaintiffs’ daughter
received two scholarships totaling more than they paid in donations, and they received charitable donation receipts from the defendant. Although the plaintiffs did not receive the tax benefit they had hoped for, that was not the purpose of the gift, although it may have furnished a partial motivation. In those circumstances, I do not see how the defendant Foundation could be said to have done anything outside of the contemplation of the plaintiffs when they made the gift so as to vitiate it.

There was no evidence that the donations were other than absolute gifts. There was no trust aspect to the case. The NFCL had not been enriched by the gifts. Indeed, the plaintiffs received more through their daughter’s bursaries ($6,408) than the value of their gifts ($6,250). The failure of the scheme as a tax avoidance measure did not change any of these facts. Therefore, as the plaintiffs were sophisticated professionals (an accountant and a financial advisor), who understood the nature of tax law, there was no reason why the gifts should be returned.

The case may be viewed at:

Implications of this case

In this case, the plaintiffs had expected to obtain a tax deduction for their ‘donations’ which were in fact returned to them (though not specifically marked as their money), in the form of bursaries to cover their daughter’s college fees. Therefore, they could not claim the gifts back, as their purpose had been fulfilled and the defendant had not been enriched by the scheme it operated. Indeed, as His Honour commented, only ‘the governments in right of Canada and British Columbia’ had been enriched in this case by not having to forgo revenue.

2.9 TRUSTS AND WILLS


(See also the related case: Church Property Trustees v Attorney General, below at 2.9.12)

This was an application for leave to appeal from Great Christchurch Buildings Trust v Church Property Trustees [2013] NZCA 331 (New Zealand Court of Appeal) which in turn was an appeal from a decision of the High Court of New Zealand in The Great Christchurch Buildings Trust v Church Property Trustees and The Canterbury Earthquake Recovery Authority [2012] NZHC 3045. The Great Christchurch Buildings Trust sought leave to appeal from the judgment of the Court of Appeal upholding the lawfulness of decisions by the Church Property Trustees (the Trustees) in relation to Christchurch Cathedral (the Cathedral). The decisions of the Trustees were taken following damage caused to the Cathedral by the February 2011 earthquake and the subsequent earthquakes in June and December of that year.

On 1 March 2012 the Trustees decided to deconstruct the Cathedral, after receiving notice from the Canterbury Earthquake Recovery Authority requiring works be undertaken to make the building safe. The applicant brought judicial review proceedings and was successful in establishing that, if the Trustees demolished the existing Cathedral, they were obliged to build a new Cathedral on the existing site. The applicant, however, did not succeed on its main argument that the Trustees were obliged to reinstate
the existing Cathedral. The Court of Appeal dismissed an appeal brought by the applicant against the High Court’s judgment.

The judgments of the Court of Appeal and High Court were based on the terms of the trusts on which the Cathedral and its surrounding land are held by the Trustees. The trusts are set out partly in legislation, and partly in the terms of the instruments, including Provincial Council Ordinances, relating to land set aside for building the Cathedral. The applicant contended that trusts also arose from public subscriptions advanced for the building project. In this context the applicant appealed to the Supreme Court (New Zealand’s highest court) to address issues said to arise from alleged errors in the judgment of the Court of Appeal. These were:

- Whether the public donation of funds for the Cathedral created obligations on the Trustees which have continuing force today. The Court of Appeal had decided that these funds had been exhausted on completion of the construction of the Cathedral;
- Whether the obligations of the Cathedral trusts permitted the Trustees to demolish or deconstruct the Cathedral, creating a new cathedral on the site. This is said to turn on whether the original trust expressed to be in relation to ‘a’ Cathedral, became a trust in relation to ‘the’ particular Cathedral that was built;
- Whether the Trustees had an obligation to maintain and sustain the continuing existence of the present Christchurch Cathedral, now badly damaged, and to repair the damage to the structure so that it could continue to function as the Cathedral;
- Whether the Trustees had power to demolish and deconstruct the Cathedral under the terms of the Anglican (Diocese of Christchurch) Church Property Trust Act 2003 (the Church Property Trust Act) and preceding legislation.

The Supreme Court said that no issues of legal principle arose in these questions. Rather the questions concerned the interpretation of particular documents. The Supreme Court went on to say that (at [9]):

We are accordingly satisfied that no legal question of general or public importance arises from the application for leave to appeal. But it may also be in the interests of justice to grant leave to appeal where the underlying circumstances are, or the outcome of the appeal is, of public importance and real doubts have been raised as to whether the decisions of the courts below are correct. We acknowledge that the circumstances giving rise to the application for leave to appeal are of course of great general importance to the citizens of Christchurch. That importance arises from the history, function and iconic nature of the Cathedral. However, in this case nothing that has been raised on behalf of the applicant reaches the threshold of showing that the decisions of the courts below may be in error.

The application for leave to appeal was dismissed.

The case may be viewed at: [http://www.nzlii.org/nz/cases/NZSC/2013/132.html](http://www.nzlii.org/nz/cases/NZSC/2013/132.html)

**Implications of this case**

In a related case, *Church Property Trustees v Attorney-General and the Great Christchurch Buildings Trust* [2013] NZHC 678 [case note below, 2.9.12], an application by the trustees for an order relieving them of liability was deferred. The Courts have been clear that the documentation of the trusts required that ‘a’ Cathedral was required to be on the site rather than ‘the’ Cathedral. Therefore, there was no need to reinstate the original Cathedral, a project for which the cost would be prohibitive. However, ‘a’ Cathedral was required to be on the original site. Unfortunately, the Church Trustees have already
erected an alternative Cathedral (the so-called cardboard cathedral) on another site. A decision is pending on whether this will result in a breach of trust being found.

2.9.2 BAPTIST UNION OF NEW SOUTH WALES V CHIEF COMMISSIONER OF STATE REVENUE [2013] NSWADT 270 (ADMINISTRATIVE DECISIONS TRIBUNAL OF NEW SOUTH WALES, VERICK J, 28 NOVEMBER 2013)

This case dealt with exemption from duty under the Duties Act 1997 (NSW) (the Act). The applicant, Baptist Union of New South Wales (the Baptist Union), is a body corporate incorporated under section 1 of the Baptist Union Incorporation Act 1919. The Baptist Union purchased two villas in 2010 and 2011 for which it sought exemption under section 275(1) of the Act, in respect of duty otherwise payable on a contract for sale, transfer and mortgage.

On 22 February 2012, the Chief Commissioner of State Revenue (NSW) (the Chief Commissioner) made a decision in respect of the two applications confirming that, in each case, the Baptist Union was not exempt from duty under section 275(1) of the Act. On 10 April 2012 the Baptist Union objected to both decisions under section 86(1)(b) of the Taxation Administration Act 1996 (NSW) (TAA). The Chief Commissioner disallowed the objection under section 91(2) of the TAA. In this application, the Baptist Union sought a review of the decisions made by of the Chief Commissioner under section 96 of the TAA.

The applicant's case before the Tribunal was that the Baptist Union purchased the two properties as a trustee for Morling College Limited, a body corporate referred to in section 275(3)(a) of the Act (and the operator of Morling College), and that the Baptist Union in its capacity as trustee was an ‘exempt charitable or benevolent body’ as defined in section 275(3)(c). The relevant provisions of section 275 are as follows:

275 Charitable and benevolent bodies

(1) Duty under the Act is not chargeable on the following:

(a) a transfer, or an agreement for the sale or transfer, of dutiable property to an exempt charitable or benevolent body,

... 

(f) a mortgage given by or on behalf of an exempt charitable or benevolent body.

... 

(3) In this section: "exempt charitable or benevolent body" means:

(a) any body corporate, society, institution or other organisation for the time being approved by the Chief Commissioner for the purposes of this paragraph whose resources are, in accordance with its rules or objects, used wholly or predominantly for:

(i) the relief of poverty in Australia, or

(ii) the promotion of education in Australia, or

... 

(c) any person acting in the capacity as trustee for a body corporate, society, institution or other organisation referred to in paragraph (a) or (b).

Was the Baptist Union acting in the capacity as trustee in this case?

The affairs of the Baptist Union are conducted under by-laws. The Baptist Union had passed by-laws establishing various departments, including the Department of Theological Training, to conduct a Theological and Bible College and to provide training for ministry, missionary activity and other spheres of Christian service. The Theological College was established in 1916 and has been known as Morling...
College since 1985. Prior to September 2008, Morling College was an autonomous part of the Baptist Union.

In November 2006, Morling College Limited was incorporated, with the Baptist Union as its subscribing member and its sole member. Morling College Limited commenced operations on 26 September 2008, when the Baptist Union entered into a Deed with Morling College Limited to transfer the legal and beneficial ownership of 'Morling College' (as it had been) and the property used by the Baptist Union in the operation of 'Morling College' to Morling College Limited for a nominal transfer fee.

Although Morling College Limited is a separate legal entity, its constitution provides that the Baptist Union's Council of the Department of Theological Training is also the Board of Morling College Limited. Moreover, the College is supported by an annual grant from the Baptist Union, and continues to use the bank accounts it had prior to incorporation. The applicant’s position was that the College only incorporated to meet the requirements of the Commonwealth’s Higher Education Support Act 2003, which required that it be incorporated as a higher education provider in order to utilise the Commonwealth FEE-HELP scheme for its students.

Was there any express trust in existence? An intention to create a trust must be clearly established, though a particular form of words is not required. The other certainties which must be established are certainty of subject matter or property, and reasonable certainty as to the identity of the beneficiaries of the trust. Moreover, if a trust of any legal interest in land, freehold or leasehold, is to be created by assignment of that interest to trustees, it must be in writing under section 23C(1)(a) of the Conveyancing Act 1919 (NSW). If the trust property is an equitable interest in land and a trust is to be created by assignment, writing is essential to its validity under both section 23C(1)(a) and section 23C(1)(c). Where the trust property is either a legal or an equitable interest in land, if it is proposed to make it the subject of a declaration of trust, it must also comply with the evidential requirements of section 23C(1)(b). The applicant’s case was that a trust was created by transfer of the two villas to the applicant as trustee of Morling College Limited. The Tribunal did not agree (at [100], [104]):

In the present matter, the Baptist Union had to establish an express or inferred intention to create the alleged trusts. The facts do not go far enough to establish that the Baptist Union held the villas on trust for Morling College Limited, the beneficial owner of the two villas. What emerges from the evidence quite clearly is that it was necessary for the Baptist Union to be the legal owner. But there is no evidence that Morling College Limited was the beneficial owner of both villas....

Here the burden of proof was on the applicant that an intention to create the express trusts could be discerned from the language employed by the parties to the transactions and the relevant circumstances attending the relationships between them. Unfortunately, the applicant has failed to discharge that burden. In these circumstances, I am quite unable to be satisfied that the Baptist Union or Morling College Limited has shown there was an intention that the two villas be held by the Baptist Union as trustee for Morling College Limited.

Since there was no trust established, the decision of the Chief Commissioner was upheld, and duty was payable on the purchase of the two villas.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWADT/2013/270.html
Implications of this case

The issue here was whether there was any evidence or any conduct that showed a sufficiently clear intention on the part of the Baptist Union to create a trust over the two villas in favour of Morling College Limited, because a trust cannot be created unless the settlor intends to create a trust. The Tribunal examined the nature of the transactions and the whole of the circumstances surrounding the relationship between the Baptist Union and Morling College in respect of the purchase of the two villas by the Baptist Union, but could find no words or conduct which pointed to a trust being created.

2.9.3 ATTORNEY GENERAL FOR NEW SOUTH WALES V HOMELAND COMMUNITY LTD & ORS [2013] NSWSC 1748 (SUPREME COURT OF NEW SOUTH WALES, WINDEYER AJ, 27 NOVEMBER 2013)

This case is part of litigation involving a purported trust. The question for decision in this part of the action was whether the first defendant company Homeland Community Limited (Homeland), held land at Thora, near Bellingen in New South Wales, of which it is registered proprietor, together with its other assets, upon certain charitable trusts.

The defendant, Homeland, was the purported trustee of a trust known as the Homeland Foundation Centre of Light (the Trust). Homeland’s principal asset is a property situated in the Thora Valley (the property), on which are located 20 homes and 5 cabins. The property is the permanent home for approximately 27 adults and 13 children. The occupants make contributions to Homeland for their right to occupy the property. The property was purchased in 1977. A community was established there, modelled on the Findhorn community in Scotland, which was a charitable trust. The relevant trust deed in this case was drawn up in 1978. It described the community as ‘charitable Trust known as The Homeland Foundation Centre of Light’, and listed various religious and educational objectives in clause 3 of the document. In 1987, the trustees agreed to transfer the assets of the Trust to a company to be formed by the residents, which became Homeland.

In the main proceeding, the Attorney General has alleged that Homeland was not using the property for the charitable purposes for which the trust was established. Rather, the property was being used for the benefit of the members of Homeland to establish and operate a residential community that subscribes to the objects set out in its memorandum of association. For that reason the Attorney General contended that Homeland should be removed as trustee of the trust. This action proceeded on the basis that:

- if the deed of 2 March 1978 took effect then it created a valid charitable trust for the advancement of religion and the advancement of education;
- if Homeland held the land on trust then it held it on charitable trust;
- if it did hold the land on the charitable trust alleged then there was a breach of that trust.

The purchase of the land and the subsequent Deeds

Terrance Plowright had travelled to Scotland in 1974 to work in a community called the Findhorn Foundation. This was a body which was an educational community with a religious basis directed towards the survival of humanity in light of the coming effects of climate change, environmental degradation, greed and other human failings but which involved a consideration of God as a universal concept. The community did not support any particular religion.

When he returned to Sydney, Plowright founded the Awareness Centre in Chatswood which ran workshops and lectures on ‘scientific, philosophical, psychological, religious and spiritual understandings
and the potential of the human spirit’. This activity brought Plowright into contact with Bruce Davis and Michael Roads who were conducting a community living project in Mildura at that time. Davis and Roads were looking for land for a larger community. They found the property at Thora which was for sale for $65,000. Through his Centre, Plowright raised $23,000 towards the purchase price, with the difference being contributed by several other persons. The land was subsequently purchased in the names of Plowright and Davis on 17 May 1977. On 8 December 1977 Plowright and Davis executed a Declaration of Trust in favour of seven persons (the 1977 Deed). The Deed constituted only Plowright and Davis as trustees. Seven persons including Plowright and Davis were named as the beneficiaries. However, the Deed described the seven beneficiaries as ‘the Trustees of the Homeland Centre of Light’.

Pursuant to that Deed, Plowright and Davis declared that they held the Thora property and all bank accounts held for the Homeland Centre of Light and certain business names on trust for the seven beneficiaries who had provided the funds for the purchase of the land and other property. The 1977 Deed created no power in any person to revoke or terminate the trust. Nor did it vest in any person a power to change the terms of the trust deed. By Deed dated 2 March 1978 six of the seven beneficiaries under the 1977 Deed purported to constitute a charitable trust known as the Homeland Foundation Centre of Light (the Foundation). It was clearly expected that the seventh beneficiary, Bruce Hosken, would be a party to this Deed as, before execution, the Deed named him as a party but his name is crossed out and he did not execute it. This was held to be immaterial in the earlier hearing, and it was also held that there was no question that this was a valid charitable trust.

Therefore, the parties to the 1978 Deed (apart from Hosken) were the trustees of the trust. Various retirements and appointments were made after that date. After some dissension in the group, a further document was agreed to in 1987 (the 1987 Agreement). This led to the establishment of Homeland (the company).

The new company

Homeland Community Limited, the first defendant in this action, was incorporated and registered as a company limited by guarantee on 18 November 1988. The principal objects of the company on incorporation included clause 2(a) of the Memorandum of Association as follows:

The objects for which the Company is established are:

• To take over the present unincorporated association known as the Homeland Foundation including its activities, real property, funds and other assets and liabilities.

By Deed of Appointment of new trustee dated 30 December 1988 the existing trustees appointed Homeland Community Limited as a trustee of the Homeland Foundation Centre of Light. This document was not executed by that company as a new trustee and therefore does not establish its acceptance of the Trust. There is no evidence that any director of Homeland saw this document at the time. Letters of resignation of the five trustees apart from Hosken were apparently received on 30 December 1988, because a minute of meeting of trustees, of that date, includes a resolution to accept those resignations. The letters are undated.

Was the property actually transferred to Homeland? The date of any possible transfer seemed to be in doubt. The then trustees had signed a Statutory Declaration on 23 December 1988 which referred to a ‘transfer’ which was not identified. However, His Honour held that the only document to which this could refer was a transfer of the Thora land from the then five trustees to Homeland Community Limited dated 20 November 1989 (though there was doubt as to the witnessing of the five signatures). The transfer was executed by Homeland Community Limited as transferee under its common seal. The
consideration was expressed to be $1. However, the document did not state that it was pursuant to the appointment of Homeland as new Trustee. The transfer was registered on 1 February 1990.

**Did Homeland ever accept appointment as trustee?**

After a consideration of the history of the property, His Honour found that (at [64]):

The 1978 Deed appears to be a resettlement of, among other things, the whole of the Thora land. The Trustees had no power to resettle under the 1977 Deed. Nor did they have a power to revoke or extinguish the trust. Thus it cannot be effective to create a charitable trust or the charitable trust which the Attorney General seeks to enforce...The deed is void or a nullity. There is no completely constituted trust... Therefore, it is not a deed.

The new trustees who were purported to be appointed in 1978 could not take any better title than their predecessors. When in 1988 the then trustees purported to appoint Homeland as the new trustee, Homeland’s position did not differ from that of the former trustees. His Honour held that Homeland did not accept the appointment as trustee (at [67]–[68]):

If the land was transferred to Homeland pursuant to the 1987 Agreement then Homeland took the legal estate and unless it took by fraud or with knowledge it was taking as trustee and agreed to take it as such it obtained an indefeasible title to the land. If the 1978 Trust was never constituted then if Homeland took subject to any trust it could only be a resulting trust in favour of the 1977 trustees but as it had no knowledge of this it took free of it. The objects of the company in its original memorandum were not themselves charitable, unless acquisition of the trust assets somehow meant that a new owner took those assets under the original - and void - 1978 Deed. In any event, if they were, that is not the claim made here...The pleaded claim relies on there being a charitable trust created by the 1978 instrument not otherwise.

Therefore, did the deed of trust dated 2 March 1978 entitled ‘The Homeland Foundation Centre of Light Incorporating Rules of Committee of Management’ and executed by Terrance Kippax Plowright, Bruce Davis, Michael Joseph Roads, Yvonne Siems, Roger Dunston and Anatole Kononewsky bring into existence a valid charitable trust and, if so, was the first defendant the current trustee of that charitable trust? His Honour’s answer was ‘no’. Therefore, as there was no trust, there could be no breach of trust, and the Attorney-General’s case was dismissed.


**2.9.4 NORMAN V WATCHTOWER BIBLE AND TRACT SOCIETY OF CANADA, 2013 BCSC 2099 (CANLII) (SUPREME COURT OF BRITISH COLUMBIA, WARREN J, 17 OCTOBER 2013)**

This was a summary judgement in response to an application by the administrator of the estate of Lloyd Eugene Norman for:

1. A declaration that all amounts advanced by Lloyd Norman and/or Lily Norman to the defendant, Watch Tower Bible and Tract Society of Canada, pursuant to a July 3, 2011 document titled ‘Conditional Donation Agreement’ and not subsequently converted to outright charitable donations (the Conditional Donations) were testamentary dispositions.
2. A declaration that the Conditional Donations were invalid for their failure to comply with the *Wills Act*, R.S.B.C. 1996, c. 489 (the *Wills Act*).
3. An order that the defendant pay to the plaintiff the sum of $250,000 together with interest under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.
4. An order that the defendant pay the plaintiff’s costs.

The facts of this case were not in dispute. Lloyd Norman and Lily Norman were practising Jehovah’s Witnesses throughout their adult lives. The Normans made regular donations to the defendant, which is the registered charity that represents Jehovah’s Witnesses in Canada. The Normans also financially supported their local congregation of Jehovah’s Witnesses in Abbotsford, British Columbia. In January 1997, the Normans provided a $250,000 no-interest loan to their congregation to assist in the construction of a local place of worship referred to as a Kingdom Hall. The Normans held a mortgage over the Abbotsford Kingdom Hall property as security, specifying a zero rate of interest, $500 monthly payments and a balance due date of 1 February 2002.

On 17 June 1998 the Abbotsford congregation executed a promissory note stipulating three changes to the loan conditions: monthly payments were waived; the principal was to be repaid by 1 May 2000; and the congregation undertook to reassess its ability to make monthly payments once the construction project was completed. The promissory note made clear that in the event of the death of Lloyd or Lily Norman, the balance owing on the loan was to be paid to the survivor, and if both died, the balance owing would be paid to the estate of the survivor.

On 5 June 2001, Lloyd Norman sent a cheque for $200,000 to the defendant. This was stipulated to be for a ‘no-interest demand loan’. Mr Norman indicated in an accompanying letter that he understood that he could get the money back if needed, but that, if he died, it would ‘remain’ with the defendant. In a letter of response dated 18 June 2001, the defendant wrote that both a no-interest loan and a ‘conditional donation’ could be given in a way that meant that the donors could request the money, or some of it, be repaid if they needed it. The difference between the two arrangements was that a no-interest loan would be repayable on the death of the donor, whereas a conditional donation would not. The defendant stated that Mr Norman had indicated that he was giving a conditional donation, and enclosed a Conditional Donation Agreement for the Normans to sign. The Normans returned the signed forms on 3 July 2001, and these were executed by the defendant.

Between 5 June 2001 and 24 November 2009, the Normans advanced $310,000 to the defendant under the Conditional Donation Agreement, of which $60,000 was converted to outright contributions for which they received charitable donation receipts in the year of the conversion. Neither Mr nor Mrs Norman ever requested the return of any portion of the funds provided by them pursuant to the Conditional Donation Agreement. In addition, between May 1987 and April 2011, the Normans made numerous outright charitable donations to the defendant. The defendant issued a charitable donation receipt for each of those donations in the same year the donation was made.

Lily Norman predeceased Lloyd Norman. On the date of Lloyd Norman’s death there was a balance of $250,000 in the Normans’ conditional donation. It is this balance that is referred to as the ‘Conditional Donations’ in this judgment. After Lloyd Norman’s death, the defendant issued a charitable donation receipt in the amount of $250,000. Her Honour held that the conditional donations were not testamentary in effect. There was relevant law on the issue which yielded the following principles:

- The question of whether a disposition is or is not testamentary depends upon the intention of the maker;
- The intention of the maker is a question of fact. In determining the intention, the court is not restricted to the wording of the document alone, but can and should consider extrinsic evidence relevant to the transaction;
- If the document is not intended to have any operation until the maker’s death, it is testamentary;
• If the document is intended to have and does have the effect of transferring some interest in the property or of setting up a trust thereof in praesenti, it is not testamentary;
• The reservation of a right to revoke the transfer or bring a trust to a close does not necessarily have the effect of making the document testamentary;
• Cases where documents are held to be testamentary often include the following factual elements: 1) no consideration passes; 2) the document has no immediate effect; 3) the document is revocable; and 4) the position of the donor and donee does not immediately change;
• Even where an intended disposition is revocable by the maker or where enjoyment of it is postponed until the death of the maker, if, at the time of its execution, the document is legally effective to pass some immediate interest in the property, no matter how slight, the transaction will not be classified as testamentary;
• The level of control the donor exercises over the property during his or her lifetime is a factor to be considered in determining whether a disposition is inter vivos or testamentary and the more control the donor exercises, the more likely the disposition will be considered testamentary;
• The central question is whether the maker of the document intended the document to pass some immediate interest or whether the maker intended the document to have no effect until his death. The degree of control the donor retains over the property during his or her lifetime is relevant to ascertaining that intention. However, if it is clear that the document is intended to have immediate effect it is not testamentary even if the donor retains control, such as the ability to call for the return of the property during his or her lifetime.

Applying these principles to the facts of this case, Her Honour said that the Normans intended the conditional donations to have immediate effect. As such, they were not testamentary in nature. Although Mr Norman usually referred to the donations as ‘conditional loans’, it was clear from his letter of 5 June 2001 that he intended that the money should ‘remain’ with the defendant after his death. The defendant thus had a proprietary interest in the money immediately (at [30]–[31], [33]–[34]):

I agree with the defendant’s submission that the gift vested in the defendant when the cheque was cashed but could be divested if the Normans exercised the right they reserved to personally request in writing the return of all or a portion of their gift.
I also agree with the defendant’s submission that an inter vivos trust is implicit in the Conditional Donation Agreement.

... In my view, it is clear that by signing the Conditional Donation Agreement, the Normans intended the defendant to hold the funds for the benefit of the defendant and also for their own benefit during their lifetime. The language of the Conditional Donation Agreement is sufficient in my view to establish the certainty of intention.
In my view, the other two requirements, certainty of subject matter and certainty of objects, are also established. The subject matter of the trust was clearly the money donated to the defendants pursuant to the Conditional Donation Agreement and the beneficiaries were clearly the defendant and the Normans.

Thus, the conditional donations were a gift with a subsequent condition that created an inter vivos trust. They took immediate effect upon execution, and therefore could not be testamentary. The plaintiff’s application was dismissed with costs.

The case may be viewed at: http://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc2099/2013bcsc2099.html
Implications of this case

The defendant in this case was very clear in its correspondence, carefully explaining what the donors were entering into. They also regularly offered to return any of the money if it was needed. Such careful explanation and dealing with donors illustrates the benefit of a professional relationship with donors. In this case, the donors themselves may not have used correct terminology in relation to their donations, but they had been well-informed of the effect of the various agreements. Nevertheless, it is always advisable for large donors to obtain independent legal advice before entering into donation programs.

2.9.5  YMCA NEW ZEALAND SOLDIERS GREAT WAR MEMORIAL TRUST [2013] NZHC 2516 (NEW ZEALAND HIGH COURT, KÓS J, 25 SEPTEMBER 2013)

In the Great War of 1914–1918 the Young Men’s Christian Association (YMCA) provided invaluable welfare assistance to soldiers of the First New Zealand Expeditionary Force. Libraries, cinemas and canteens were established at camps and hospitals, particularly on the Western Front, and in London and Paris. Soldiers later subscribed money to build the YMCA a memorial hall in gratitude for welfare services provided to them in the Great War. A trust deed was entered and a hall was built in Petone, in the Hutt Valley. However, there is no longer a Petone YMCA, or indeed a Hutt Valley YMCA. The hall fell into disuse in the 1960s, and was later leased out. Eventually the building needed seismic and other maintenance work, so almost a century after the Great War’s end the trustee sold the building. The proceeds were retained in a trust for the purpose of erecting a memorial hall. Since no hall is now needed, the trustee applied to the court for approval of a scheme under Part 3 of the Charitable Trusts Act 1957 (the Act) to vary the existing terms of the trust and to substitute a new trustee. The trustee submitted that the purpose of the trust could be fulfilled by means such as erecting a memorial, establishing an educational trust, or acquiring assets for youth work programs. It sought the flexibility and discretion to apply the trust capital of $430,000 (and income arising) to such ventures as it saw fit to fulfil the trust’s original purpose.

Specifically, the trustee sought orders varying the terms of the trust by substituting a new deed of trust pursuant to sections 32 and 33 of the Act:

(a) to preserve the original charitable purposes but not requiring them to be fulfilled in the same way as originally provided;
(b) replacing the National Council of the YMCA as the trustee with the National Board of the National Council of Young Men’s Christian Associations of New Zealand; and
(c) varying the powers of the trustees to administer the trust by the provision of powers of investment found in contemporary charitable trusts in New Zealand.

The Attorney-General of New Zealand did not oppose the proposed scheme. The three main issues arose under section 32 of the Act. These were:

Issue 1: Was it ‘impossible or impracticable or inexpedient’ (in the words of section 32) to carry out the trust’s original purpose, which was the erection of a memorial building at the site?
Issue 2: Was the proposed new trust deed directed to charitable purposes?
Issue 3: Were the new purposes sufficiently close to the charitable purposes in the original trust deed?

His Honour answered all these questions in the affirmative. On the first issue, the site had been sold to a bona fide purchaser, so it was no longer available. Moreover, the YMCA had no need for a hall at that site or elsewhere. On the second issue, the definition of charitable purposes in the Charities Act 2005 was the common law definition, adopting the long-established classifications of ‘charitable purpose’:
relief of poverty, the advancement of education or religion, and any other matter beneficial to the community.

The National Council of the YMCA in New Zealand is a registered charity, as are most of the constituent member YMCAs. His Honour was satisfied that the original purpose for which the YMCA received the soldiers’ gift was charitable in nature, responding to the charitable services provided by the YMCA during the Great War. The proposed new purpose was to ‘use the capital and income of the Trust for the use and purposes of the YMCA in a manner that recognises the work of the New Zealand branch of the YMCA during the Great War in accordance with the Trustee powers.…’ This respected the original purpose to commemorate those charitable services, but without the unnecessary constraint of doing so in the form of a particular building on a particular site (at [26]).

On the third issue, while the cy-prés doctrine did not apply, the new purposes needed to be sufficiently close to the original purposes. His Honour said that there were ‘notable differences’ between them (at [29]). Nevertheless (at [30]):

The varied purposes will serve the interests of the same class of beneficiaries, being YMCA members and those who benefit from its activities. However, the trustee’s discretion is much wider. It simply requires the capital and income to be used for the purposes of the YMCA in a way that recognises the work of the New Zealand branch of the YMCA during the Great War. This would allow the trust property to be used for whatever purpose the trustee sees as fit, as long as that recognises in some way the contribution of the YMCA to that war effort. It has been suggested that this could take the form of an educational scholarship, a physical memorial or a youth work programme. These are far removed from the original purpose of a memorial building. However, the intentions of the soldier donors must primarily have been recognition and commemoration, and whether that takes the form of a physical building or a memorial scholarship, the wishes of the original donors will be met as best they can in today’s world.

Therefore, the scheme was approved.

The case may be viewed at: http://www.austlii.edu.au/nz/cases/NZHC/2013/2516.html

2.9.6  RE ESTATE OF ENID HELENA RYAN [2013] QSC 203 (SUPREME COURT OF QUEENSLAND, PHILIPPIDES J, 7 AUGUST 2013)

This case concerned charitable gifts in a will. The deceased, a widow without children, died on 29 October 2006. Her last will was dated 8 December 1998. The nominated executors renounced and the Public Trustee of Queensland (the applicant) obtained an Order to Administer on 19 April 2007. All pecuniary legacies were paid, and a family provision claim was settled.

The applicant sought a declaration that, upon the proper construction of the will of the deceased, the executor’s discretion conferred by clause 7 of the will (as to the recipient of charitable gifts) was enlivened. In addition, a direction was sought that the executor’s proposed exercise of that discretion was proper under section 134 of the Public Trustee Act 1978 (Qld).

Under the will, the deceased had given certain instructions as to the establishment of perpetual trusts for charitable purposes. The first trust was to use the proceeds of the sale of certain lands. The charities under that trust were directly named as the Young Animals Protection Society Inc (2/10), Community Aid Abroad (3/10), World Vision of Australia (3/10), and the Anglican Diocese of Sydney (2/10). The second trust was to be established from the residuary of the estate and held by the applicant as trustee for the Queensland Community Foundation. The named beneficiaries were the Anglican Diocese of
Sydney (5/10), the Bible Society in Australia, Queensland (3/10), and the Young Animals Protection Society Inc (2/10).

The Queensland Community Foundation (QCF) was established by a Trust Deed dated 4 February 1997 and designed to operate as a perpetual charitable trust with Public Ancillary Trust fund status under the Income Tax Assessment Act 1997. The Public Trustee is the trustee of the Queensland Community Foundation. Under clause 18(a) of the Trust Deed, the QCF can pay income from money it holds on trust only to ‘Designated Charities’, a term defined in clause 1 to mean charities which have Australian Taxation Office DGR 1 status.

Using the QCF for the trusts in this case met with two difficulties:

1. The Anglican Church Property Trust Diocese of Sydney is the trustee of the Anglican Church Diocese of Sydney, which does not have DGR 1 status. However, the Anglican Church Property Trust Diocese of Sydney also is the trustee of the Anglican Church Diocese of Sydney Christian Education Building Fund, which does have DGR 1 status.
2. The Bible Society in Australia, Queensland does not have DGR 1 status, but the Bible Society Australia operates funds with DGR 1 status.

The issue identified by the applicant for determination in this case was whether the gifts to the charities without DGR 1 status failed and, if so, passed to other charities named in the will, or whether the executor could and should use the power under clause 7 of the will to select charities similar to those which did not have DGR 1 status to receive the gifts. Her Honour agreed that clause 7 should be used to enable the Public Trustee to exercise his discretion as to the recipients of the gifts. It was noted that while the will showed an obvious intention on the deceased’s part to benefit charity and not her next of kin, she had included three clauses dealing with failed gifts. At the same time the deceased, by the wording of her will, had been at pains to avoid dying partially intestate. Accordingly, Her Honour said that the general frame and context of the will favoured a reading of clause 7 which ‘avoided the obvious inconvenience and incongruity of a possible partial intestacy’ (at [16]).

It was submitted by the applicant that the Public Trustee, as executor of the deceased’s estate, had the power under clause 7 of the will to select a charity similar to the ‘Anglican Church Diocese of Sydney’ and to ‘The Bible Society in Australia, Queensland’ to receive the income those entities were to receive. The Public Trustee submitted that this would be achieved if the Public Trustee selected:

(a) The Anglican Church Property Trust Diocese of Sydney as trustee for the Anglican Church Diocese of Sydney Christian Education Building Fund to receive the gifts pursuant to clauses 5.11(d) and 6(a) of the will; and
(b) Bible Society Australia to receive the gift pursuant to clause 6(b) of the will.

Both these charities undertook to use the gift for purposes similar to those envisaged by the deceased.

The case may be viewed at: http://www.austlii.edu.au/au/cases/qld/QSC/2013/203.html

Implications of this case

This case involved a professionally drafted will, which still presented difficulties in its final administration. However, as Her Honour said (at [17]):

...in a professionally drafted will such as this, the court strives to give effect to all of its provisions and thus no provision is regarded as otiose unless it is impossible to give it any meaning, or unless giving it effect violates the overall scheme of the will.
Thus, the applicant executor’s submissions to give effect to the will as drafted were accepted by the court as proper.

2.9.7 MACEDONIAN ORTHODOX COMMUNITY CHURCH ST PETKA INCORPORATED v METROPOLITAN PETAR [2013] NSWCA 223 (COURT OF APPEAL OF NEW SOUTH WALES, BEAZLEY P, MACFARLANE, EMMETT JJA, 18 JULY 2013)

This was an appeal from decisions of Hamilton J, Young CJ in Equity, and Brereton J, concerning the affairs of the Macedonian Orthodox Church St Petka in Sydney. The applicants for leave to appeal in this case were the Macedonian Orthodox Community Church St Petka Incorporated (the Association), five members of the Council of the Association (the Council Members), and Father Dzeparovski, whom the Association purported to appoint as priest of the St Petka parish. The respondents were the Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand, Father Mitrev whom the Bishop appointed as priest of the St Petka parish in 1996, and the Attorney-General of New South Wales in his role as protector of charities.

The underlying (and long-running) dispute related to who had the right to control the affairs of the St Petka Church: the Bishop and his appointed priest (Father Mitrev), representing the hierarchy of the Macedonian Orthodox Church based in Skopje in Macedonia; or those who are presently in charge of the Association and claim to represent the interests of the members of the St Petka parish in Sydney. A central issue in the dispute has been the question of whether the Association is entitled to act in relation to the St Petka church in accordance with its own internal constitution, irrespective of the laws governing the Macedonian Orthodox Church generally.

These proceedings were brought by means of applications for leave to appeal and to cross-appeal. Leave was granted. The remaining issues were:

i.) the terms of the trust or trusts applicable to the property at 65 Railway Street (the Church Site) and other property held by the Association;

ii.) whether the trust applicable to the relevant property was extinguished by the Association’s incorporation in 1992 under the Associations Incorporation Act 1984 (NSW);

iii.) whether the Association has committed any, and if so what, breaches of trust;

iv.) the injunctive relief that should be given in respect of any actual or threatened breaches of trust;

v.) whether the appellant Council Members other than Mr Minovski have accessorial liability for any breaches of trust of the Association in paying emoluments to the priests it appointed;

vi.) whether the Association should have been excused pursuant to section 85 of the Trustee Act 1925 (NSW) for those breaches of trust;

vii.) whether the costs orders made by Brereton J in 2012 should be set aside.

Background to the case

The proceedings of which this appeal was a part were commenced in 1997 by the presiding Metropolitan (bishop) of the Macedonian Orthodox Diocese of Australia and New Zealand, Metropolitan Petar. The bishop was the first plaintiff, and the original parish priest, Father Mitrev, was the second plaintiff. There were nine defendants: the first five were members of the parish executive; the sixth defendant was the Macedonian Orthodox Community Church of St Petka Inc; the seventh and eighth defendants were two subsequent parish priests (Father Despotoski and Father Dzeparovski); and the ninth defendant was the Attorney-General of New South Wales, in his capacity as overseer of charitable trusts.
The Macedonian Orthodox Church is an Episcopal church (i.e. ruled by bishops) and hence hierarchical. The diocesan bishop appoints the priests, and has overall control of his diocese. However, parishes are administered by parish councils, elected by a parish assembly, which consists of all adult parishioners. All members of the parish council take an oath to uphold church law. Day-to-day management of the parish is delegated to a parish committee, of which the priest is an ex officio member.

The Macedonian Orthodox parish of St Petka (the parish) was set up as an unincorporated association in October 1977. In the same month, ownership of church property was transferred to trustees of the association, and later the trustees acquired other properties. The parish was incorporated under the Associations Incorporation Act 1984 (NSW) under which assets held by an unincorporated association vest automatically in the replacement incorporated association. For unknown reasons, the parish had a constitution which differed from the usual mode of management of a Macedonian Orthodox parish. Its constitution provided that its priests were to be appointed by a parish executive, not by the bishop. Father Mitrev was appointed as parish priest by Bishop Petar in 1996, and at first the divergence in rules relating to priestly appointment had no effect. However, in 1997, a faction emerged in the Macedonian Orthodox community in Australia which opposed Bishop Petar. This faction included the parish of St Petka. The dispute escalated through 1997, and came to a head when Father Mitrev complied with diocesan rules to forward moneys raised from baptisms, weddings and funerals at the parish of St Petka to the bishop. In July 1997, the parish committee purported to dismiss Father Mitrev, and to employ Father Dzeparovski, and later Father Despotoski, as parish priests. Neither appointment was sanctioned by Bishop Petar, and both priests were subsequently defrocked.

In earlier proceedings (Metropolitan Petar v Mitreski [2003] NSWSC 262 per Hamilton J), the primary issue was whether the parish held the property vested in it absolutely, or as trustee for the purposes of the Macedonian Orthodox Church, or otherwise on trust. The property held by the parish was divided into two parts: Schedule A property, used for church purposes; and non-Schedule A property, which included investment property. Hamilton J found that the parish held the Schedule A property on trust (as had its predecessor unincorporated association) and that the trust was a valid charitable trust. There was no determination of the status of the non-Schedule A property. Hamilton J did not specify the particular terms of the trust in which the Schedule A property was held, but he did make clear that:

- when property was held upon charitable trust for an organised church, the property must be used in accordance with the doctrines, rituals and practices laid down by the church hierarchy;
- in a hierarchical church, there was a strong presumption in favour of the property being held for the national church, not the local parish, and that this presumption was not affected by the fact that the local parish had bought the property without the financial assistance of the national body;
- when, in Australia, a group of persons of ethnic origin proclaim that they are members of an overseas church with an identical name, there is an assumption that they are members of the overseas body, or that the canon law and discipline of their church is identical to that of the overseas body.

Subsequent litigation dealt with alleged breaches of trust: Metropolitan Petar v Mitreski [2009] NSWSC 106 per Young CJ in Equity. The question was whether any of the breaches of trust were also breaches of terms fundamental to church law. The alleged breaches of trust were:

(a) preventing the Diocesan Bishop from conducting services in the Church Building;
(b) preventing a priest appointed by the Diocesan Bishop as parish priest of the St Petka Parish from conducting religious services in the Church Building;
(c) preventing a priest licensed by the Diocesan Bishop to conduct religious services in the Church Building from doing so;
(d) excluding the priest appointed by the Diocesan Bishop as a parish priest of the St Petka Parish from the executive committee of the body responsible for the administration of the St Petka Parish;
(e) employing a priest not appointed by the Diocesan Bishop to act as the parish priest of the St Petka Parish;
(f) employing a priest under valid ecclesiastical discipline in accordance with Church Law to act as the parish priest of St Petka Parish;
(g) requiring or permitting a priest to conduct religious services upon the Church land when:
   (i) that priest has not been authorised by the Diocesan Bishop to do so; or
   (ii) that priest is under valid ecclesiastical discipline in accordance with Church Law;
(h) any or all of:
   (i) closing the Church Building;
   (ii) removing the Holy Objects from the Church Building;
   (iii) installing Holy Objects;
   (iv) reinstalling Holy Objects;
   (v) carrying out of building works in and upon the Church Building without the authority and blessing of the Diocesan Bishop;
   (i) refusing or failing to accept applications for membership from believers in the doctrines of the Macedonian Orthodox Church who have satisfied the criteria for eligibility specified in the Constitution, the Diocesan Statute and the By-Laws;
   (j) failing to remit to the Diocesan Bishop the contribution from the income of the parish as specified in the Diocesan Statute.

Young CJ in Equity held that the terms of the relevant trust did not justify the exclusion of the bishop from the parish church, or the employment of any priest not authorised by the bishop, nor the closing, alteration or addition to the church building, or its ornaments, without the bishop’s approval. Thus, (a), (b), (c), and (e) were fundamental terms of the trust. Young CJ had doubts about alleged breaches (d), (i) and (j), although he found that they were breaches of church law.

In a 2012 decision (Metropolitan Petar v Mitreski [2012] NSWSC 16), Brereton J dealt with some further questions:

- whether the property of the parish, other than Schedule A property, was held on trust;
- whether there were any breaches of trust established, especially in relation to those breaches found by Young CJ to be terms of the trust;
- whether there were any defences to any breaches of trust that might be established;
- whether the individuals involved (the five committee members and Father Despotoski) were liable as accessories to any breach of trust that might be established (action against Father Dzeparovski was discontinued);
- what relief (if any) should be given to the plaintiffs.

The 2012 decision

- Property held by the parish

Was all the property held by the parish part of the same trust as had been identified by Hamilton J in the earlier litigation? Or was the non-Schedule A property held by the parish free of trust? Hamilton J had identified the Schedule A property as the church land, the child care centre operated by the parish on
adjacent land, and three pre-incorporation investment properties. Any other property was not dealt with. In this case, His Honour identified other pre-incorporation property (holy objects such as icons and candles, ancillary property, and other funds including donations) as subject to the same trust. Further property was acquired after incorporation of the parish as an association, including more holy objects, ancillary property and funds, as well as three further investment properties. His Honour designated this property as post-incorporation property. Was this also trust property?

Brereton J held that all post-incorporation property was trust property. He advanced three reasons: the association was the successor to the unincorporated association; the pre-incorporation property vested in the association after incorporation; and there was no segregation of trust and non-trust assets, income, expenditure or activities. It was all trust property, and all the same trust property.

• **Breaches of trust**

Brereton J considered the earlier decision of Young CJ in Equity, and held that breaches (a), (b), and (c) were established and were continuing on the facts. The bishop had been barred from the church (at least when accompanied by Father Mitrev), as had the properly appointed parish priest, and this was a continuing situation. Moreover, the replacement priests had not been appointed by the bishop, so breach (e) was established. Breach (h) was also established but had not been pursued in the hearing.

In relation to breaches (d), (i) and (j) as to which Young CJ had expressed doubts of their fundamental nature, Brereton J agreed that they were all breaches of church law. He held that breaches (d) and (j) were not fundamental. Breach (i), however, was a fundamental breach of trust which was continuing. Thus, there were substantial breaches of trust established.

• **Defences**

Some of the claims relating to payments to Father Dzeparovski were statute-barred under section 48(a) of the **Limitation Act 1968** (NSW).

Section 85 of the **Trustee Act 1925** (NSW) allows a court to excuse certain breaches of trust, provided the trustee has acted honestly and reasonably. Relief under section 85 does not amount to approval of the breach. Relief was sought in relation to payments made to Fathers Dzeparovski and Despotoski. Brereton J recognised that the committee members were all volunteers, who were not sophisticated. Their English was limited, and they spoke Macedonian at all material times. They were unversed in the law of trusts. Moreover, the trust did not suffer because of the employment of the two priests; they generated more income for the trust than their remuneration took from it. However, Brereton J said (at [148]–[149] of the 2012 decision):

> ...I accept that they honestly believed that the Association was beneficially entitled to its property and did not hold it on trust; and that the parish property was Association property and not trust property. That was a not unreasonable position, as until the decision of Hamilton J, there was doubt as to the trust status of the Association’s property. I further find... that the Association’s decision to employ Fr Dzeparovski and later Fr Despotoski was actuated by a perceived need, consequent on the expulsion of Fr Mitrev, to have a priest in the church to perform priestly duties in order to fulfil the main function of the church and administer the sacraments to parishioners. In itself, this is neither dishonest nor unreasonable. But it is affected by two features. The first is that the Association by its officers also knew that such a course would be opposed to the will of the Bishop. This was in circumstances where, but a few months earlier, those officers had sworn a solemn oath of office by which they undertook... to uphold the constitution of the church, the diocesan statute and the by-laws... The second is
that it is a fundamental proposition of the Macedonian Orthodox faith, that if not known to the Committee Members who had sworn to uphold church law should have been known to them, that it is the Bishop who administers sacraments, albeit via the medium of a duly appointed priest as his agent; the corollary of which is that a priest who has not been duly appointed by the Bishop cannot validly administer the sacraments and from the Church’s perspective achieves nothing. Accordingly, the Association was paying these priests remuneration for performing a role that, in the eyes of the Church, achieved absolutely no purpose.... I cannot reconcile the conduct of the Committee members, having sworn an oath of allegiance to church law, in engaging and remunerating the two priests without the Bishop’s approval, to achieve no useful purpose, with what would commonly be regarded as honest behaviour.... Resort to the provision of the Association’s constitution, in the face of the oath of office, savours of the type of unconscionable insistence on strict legal right on which equity has always frowned.

Thus, Brereton J found that there should be no relief under section 85 from liability of the parish for the pecuniary breaches which had been established.

- **Liability of accessories**

The plaintiffs made a claim of ‘knowing receipt’ of trust moneys (as remuneration) against Father Despotovski. This claim was made under what is known as ‘the first limb in *Barnes v Addy*’. Liability under the first limb of *Barnes v Addy* depends on notice, actual or constructive, that the funds received were trust moneys. Knowledge of circumstances that would put a reasonable person ‘on inquiry’ is enough. Brereton J found that Father Despotovski had the requisite notice. However, His Honour held that as Father Despotovski had given value for his remuneration, and his activities, though not sanctioned by the church hierarchy, resulted in increased revenue for the trust, he should not be liable to account to the trust for the moneys received.

As to liability of the committee members, His Honour stated that there was no authority in relation to the *Barnes v Addy* case which would make the committee members liable to account to the trust. Were there any other grounds for liability established? His Honour held (following on from the discussion in the High Court decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [161]–[165]) that third parties to a trust can still be liable for breach of trust if they knowingly induce or procure a breach of trust. This form of liability does not depend on receipt of trust funds. Brereton J said (at [166] of the 2012 decision):

> For substantially the same reasons that found my conclusion that, for the purposes of s 85, the Association did not act honestly and reasonably, I am compelled to conclude that the Committee Members were conscious of those elements of the engagement of the two priests that made their participation transgress ordinary standards of honest behaviour. They knew, or at the least ought to have known, that what they were doing involved repudiation of a recently sworn undertaking to uphold church law, and yet would achieve no religious purpose in the eye of the Church for want of the Bishop’s approval. While I accept that considerable doubt attended whether the Association would be held to be a trustee, about which minds could reasonably differ, until Hamilton J’s judgment, and that the Committee Members did not understand the niceties of church law, I cannot accept that it accorded with ordinary standards of honest behaviour for them to repudiate their recent oath of office.
Therefore, each of the committee members was found to be liable as an accessory of the parish association to account to the trust for the moneys paid as remuneration to Fathers Dzeparovski (except for the portions statute-barred) and Despotovski while those committee members remained in office.

Brereton J gave the following equitable relief to the plaintiffs, which reinforced the Episcopalian nature of the Macedonian Orthodox Church, and supported Metropolitan Petar’s position as bishop:

(1) a declaration that all the property of the Association other than the litigation funds (some moneys separately identified as being to fund the defendants’ case) were held as trustee on the trust declared by Hamilton J;
(2) declarations to the effect that the Association had, in breach of trust: (a) excluded the diocesan Bishop, (b) excluded the parish priest appointed by the Bishop, (c) prevented a priest licensed by the Bishop to conduct services in the church from doing so, (d) employed priests not appointed by the Bishop, and (e) failed to accept applications for membership from believers in the doctrines of the Macedonian Orthodox Church who have satisfied the criteria for membership specified in the 1994 Church constitution, the diocesan statute and the by-laws;
(3) injunctive relief (an injunction) that had the effect of compelling the Association to comply with the rules of Macedonian Orthodox Church as they apply to parishes of the Macedonian Orthodox Church in respect of not excluding or impeding the Bishop, not excluding or impeding Fr Mitrev, and admitting into membership those who met the requirements of church law for membership of a parish assembly;
(4) an order that the Association account to the trust for the moneys paid to Fr Dzeparovski and Fr Despotoski, except for those paid prior to November 1997 in respect of which the claim was statute-barred;
(5) an order that each of the Committee Members account to the trust for the moneys paid to Fr Dzeparovski and Fr Despotoski while that Committee Member remained in office, except for those paid prior to November 1997 in respect of which the claim was statute-barred.

In a subsequent 2012 judgement (Metropolitan Petar v Mitreski [2012] NSWSC 1610), Brereton J considered further submissions put forward on behalf of the committee members, but still held that the accessorial liability of the committee members was established. His Honour ordered that each of the defendant committee members (other than the third defendant, who was not liable) was liable as an accessory to account to the trust for the emoluments paid to Father Dzeparovski and Father Despotoski while that committee member remained in office, except payments made prior to November 1997 in respect of which the claim was statute barred.

 Costs orders

On the issue of costs, His Honour held after a detailed analysis of the issues that the association should pay 75% of the plaintiffs’ costs of the proceedings not otherwise the subject of a specific costs order, including reserved costs. The first, second, fourth and fifth defendants (who were committee members) were held to be jointly and severally liable with the association for one-third of the costs for which the association is liable i.e. 25% of the plaintiffs’ costs of the proceedings not otherwise the subject of a specific costs order, including reserved costs.
The 2013 appeal decision

- **The first issue on appeal – terms of the trust**

The Court of Appeal held that Hamilton J correctly found at first instance that the trust was one to permit the trust property to be used by The Macedonian Orthodox Church St Petka Rockdale as a site for a church of the Macedonian Orthodox Religion and for other buildings and activities concerned with or ancillary to the encouragement, practice and promotion of the Macedonian Orthodox Religion. Further, the Court held that Hamilton J correctly found that this trust was applicable to both the so-called schedule A and non-schedule A property and to other property acquired by the Association after its incorporation: for the first instance judgement of Hamilton J, see *Metropolitan Petar v Mitreski* [2003] NSWSC 262.

- **The second issue – incorporation of the Association**

The Court of Appeal held that the trust referred to above was not extinguished by the incorporation of the Association under the *Associations Incorporation Act 1984* (NSW). This had also been dealt with by Hamilton J in 2003.

- **The third issue – alleged breaches of trust**

The Court of Appeal held that it was correctly found by Young CJ at first instance that the Association breached the trust described above by excluding the Bishop and the priest he appointed (Father Mitrev), by employing priests not appointed by the Bishop, by taking steps in relation to the Church building and contents without the Bishop’s approval and by limiting the Association’s membership. The comprehensive judgement of Young CJ in Equity is at *Metropolitan Petar v Mitreski* [2009] NSWSC 106. The Court of Appeal could found no error in either Young CJ’s original decision in 2009 or the subsequent findings of Brereton J in 2012 (see above).

- **The fourth issue on appeal – the availability of injunctive relief**

The Court of Appeal held that any challenge to the availability of injunctive relief at first instance should be rejected, saying (at [200]):

> The appellants’ Further Amended Draft Notice of Appeal complains of the mandatory and prohibitory orders made by Brereton J in relation to membership of the Association.... The complaints appear to be founded upon the appellants’ contentions that the terms of the trust incorporate the Association’s Constitution and that that Constitution has primacy over other Church laws or that only church laws with universal operation can form terms of the trust. As I have earlier rejected those contentions, the appellants’ challenges to these orders must fail. So long as the Association asserts its right to use the trust property for the charitable purpose, it needs to conform to fundamental aspects of [Macedonian Orthodox Church (MOC)] law, including as to membership of organisations which conduct local MOC churches. Brereton J’s orders were appropriate to ensure that this conformity was achieved.

The point here was that the Association’s constitution did not have primacy over the rules and authority of the Macedonian Orthodox hierarchy.

- **The fifth issue on appeal – accessorial liability of Council members for breach of trust**

On this issue the appellants were successful. None of the appellant Council Members were held to have accessorial liability for the Association’s breaches of trust in paying emoluments to the priests it
appointed. Brereton J had originally held that the Council Members had accessorial liability (see above). The Court of Appeal disagreed, saying (at [211]–[213]):

Brereton J found that notwithstanding that the Association’s Constitution authorised them to do as they did, the Committee Members, other than Mr Minovski, acted dishonestly for the Purposes of accessorial liability because they knew that the Association was an integral part of the MOC and that the appointment of priests without the Bishop’s approval contravened Church law (Judgment [22]). I do not agree with this finding as this dishonesty (if it is assumed to be that) was not relevant dishonesty because it did not, according to the Committee Members’ beliefs, impact on the trust property. According to their beliefs, the property was not subject to a trust and the Association was free to deal with it in accordance with its Constitution. Whether or not those Committee Members acted dishonestly in the discharge of their duties as such, they could not be said to have knowingly participated in a dishonest breach of trust. For the same reason the dishonesty found by his Honour was not relevant dishonesty for the purpose of the Association’s application for relief under s 85 of the Trustee Act.... To preclude that relief, any dishonesty must have been in connection with the breaches of trust in relation to which relief is sought.

Therefore, the appeal in relation to the finding of accessorial liability succeeded and the judgment entered at first instance against the Council Members other than Mr Minovski was set aside by the Court of Appeal.

- **The sixth issue on appeal – excuse for breach of trust by Council Members**

The Court of Appeal held that the Association should be excused for the breaches of trust found in earlier judgements, and confirmed in this appeal. Section 85 of the Trustee Act 1925 (NSW) did operate to relieve the Council Members of liability, contrary to the findings of Brereton J (see above). This was because the Court of Appeal held that there had been no dishonesty involved in the Council Members’ decisions about appointment and payment of priests (at [227]–[228]):

In my view, a number of unchallenged findings made by his Honour point strongly to the appropriateness of the Association being excused under s 85 for its breaches of trust in paying emoluments to the two priests it appointed, these being the only breaches that Brereton J considered in relation to s 85. First are the findings, expressed or implied, that the Council Members honestly and reasonably believed that the Association was not a trustee, that its Constitution was the ‘paramount authority’ in relation to the way in which the Association’s property was able to be dealt with and that the Association’s actions were effected in conformity with its Constitution. Second is the primary judge’s finding that the Council Members were volunteers – ‘amateurs who were endeavouring to serve their community’ (Judgment of 3 February 2012, [142]). Third is the fact that the employment of the priests, for what was no doubt modest remuneration ‘generated revenue for the trust, which swelled its coffers but rapidly dried up when Fr Despotoski ceased to minister at St Petka in mid-2003’ (ibid at [142]). Fourth is the implicit finding that, whilst they occupied their positions, the priests fulfilled the religious needs of a large number of adherents to the Macedonian Orthodox faith.

Therefore, section 85 of the Trustee Act 1925 applied to relieve the Council Members of liability for the breaches of trust which had occurred.
• The seventh issue on appeal – costs orders

One of the two costs orders made by Brereton J, relating to the liability for costs of Council Members, was set aside. This was because they had been found to have no accessorial liability for the breaches of trust which had occurred. The other, relating to the liability for costs of the Association, was not.


The earlier decisions referred to may be viewed at:

Casenote summaries of those earlier decisions can be found at [https://wiki.qut.edu.au/display/CPNS/Trusts+and+Wills](https://wiki.qut.edu.au/display/CPNS/Trusts+and+Wills)

Implications of this case

This case has now dragged on since 1997, and been the subject of a remarkable number of hearings. As Emmett J in this appeal remarked (at [235]–[236]):

> With the benefit of hindsight, it is easy to be critical of the way in which the proceedings have been managed in the past. However, the proceedings constitute a further example of the difficulties that can be encountered when issues in a proceeding are dealt with at different times by different judges. The proceedings presently before the Court of Appeal arise out of a single proceeding in which three different judges have played a part.... Five judgments of the three judges who dealt with the proceeding at first instance are subject to an appeal, cross-appeal and applications for leave to appeal.

Despite this, the findings have been remarkably coherent across eight years. There is a charitable trust in existence, that trust was breached, and although there was no accessorial liability by individual committee members of St Petka parish on appeal, it seems clear that, in the Court’s view, the hierarchy of the Macedonian Orthodox Church (and no-one else) is the appropriate authority and ruler of the affairs of the parish.

2.9.8 BATH RECREATION GROUND TRUST: SCHEME TO RESOLVE A BREACH OF TRUST (CHARITY COMMISSION FOR ENGLAND AND WALES, MADE 13 JUNE 2013)

The Bath Recreation Ground Trust (the trust) was created to provide sporting and recreational opportunities for the people of the local area. To the date of this scheme the sole trustee had been the Bath and North East Somerset Council (the Council). The 2013 scheme replaced the sole trustee with an independent board of trustees.

A breach of trust had occurred in 2007 because the trust built a Sports and Leisure complex on part of its land near the centre of the city of Bath, and granted a new 75 year lease over part of its land to the Bath Rugby Club (the club), which had used a different part of the trust’s land since 1894. In order to resolve the breach of trust, the trust proposed a trade of land with the club under which the club would lease land to the trust on the outskirts of the city, to be used for a wide range of recreational activities. The Council held a public consultation about this proposed land swap, and feedback suggested that 87% of the people who responded were in support of the swap. When the swap deal was laid before the
Charity Commission it ruled that there must be an independent board of trustees for the swap to go ahead. A draft scheme was drawn up to put this into effect, and was made formal on 13 June 2013.

The new board of trustees is to consist of two nominees from the Council, one from the Fields in Trust, a charity that safeguards recreational spaces in England, one from the Somerset County Playing Fields Association, and not less than three other co-opted trustees. The co-opted trustees must represent the interests of users of the trust land other than the club. The scheme also included a clause to deal with feedback on the draft scheme that related to noise and disruption to neighbours and users of the trust land when rugby matches were played. The new board of trustees is required to resolve the breach of trust by either agreeing to exchange the land with the club, or to consider an alternative strategy. The choice must be made in the best interests of the trust. The operative clause in this respect is clause 11 of the scheme, which provides:

11. Independence
The trustees must:
(1) exercise their own independent judgement solely in the best interests of the charity;
(2) ensure that the charity is independent and exists to pursue its own purposes and not to carry out the policies or directions of the Council or of any other body;
(3) at their first meeting (or as soon as possible thereafter), adopt a conflicts of interest policy (taking account of the guidance issued by the Commission) and adequately manage any conflicts of interest in accordance with that policy.


2.9.9  **BRENNAN V MANSFIELD [2013] SASC 83 (SUPREME COURT OF SOUTH AUSTRALIA, STANLEY J, 6 JUNE 2013)**
This was a family provision case. The plaintiff sought further provision from the will of his deceased partner. In his will, the deceased left $100,000 to the plaintiff, together with his share of the house they had occupied as tenants in common. He also left gifts of $20,000 each to various charities (these were not affected by this decision). The specific gifts, including that to the plaintiff, totalled $225,000. However, the deceased left the residue of his estate, worth approximately $2.5 million, to the third defendant, Prince Alfred College Inc. The College was the deceased’s old school, and a charity.

The plaintiff and the deceased lived together as a couple for 26 years until the deceased’s death. They enjoyed a luxurious life together, largely funded by the deceased, who was a wealthy man. The plaintiff claimed he was not left with adequate provision for his proper maintenance, education and advancement in life, having regard to his moral claim to a greater share of the deceased’s estate. He submitted there were no competing moral claims upon the testator’s bounty.

It was held that the plaintiff’s application should succeed with a declaration made pursuant to section 11B(2) of the *Family Relationships Act 1975* (SA) that the plaintiff was the domestic partner of the deceased and an order made pursuant to section 7 of the *Inheritance (Family Provision) Act 1972* (SA) (the *Inheritance Act*). The plaintiff received an additional $900,000 from the residue of the deceased’s estate (i.e. coming from the share of the estate left to Prince Alfred College Inc), bringing his total inheritance to $1,000,000. The main reason advanced by the court for this decision was the moral obligation the deceased owed to the plaintiff. This finding turned, firstly, on the determination that the plaintiff was the domestic partner of the deceased, as defined in section 11B(2) of the *Family Relationships Act 1975* (SA). The defendants did not oppose this finding.
The second issue the Court had to address was whether it should make an order pursuant to section 7 of the *Inheritance Act* for further provision from the estate of the deceased for the maintenance, education and advancement in life of the plaintiff. As the domestic partner of the deceased, the plaintiff was entitled to claim further provision under the Act: section 6(ba). Pursuant to section 7(1) of the Act, the Court may make such order as it thinks fit out of the estate of a deceased person for the maintenance, education or advancement of a person entitled to claim the benefit of the Act, if the Court is satisfied that person is left without adequate provision for his proper maintenance, education or advancement in life. Prince Alfred College Inc (the College) submitted that the plaintiff failed to demonstrate that he had been left in need of further provision, and that the plaintiff already had substantial assets. The plaintiff, aged 54, worked full-time as a primary school teacher, and had superannuation assets of about $150,000. In addition, the following findings of fact were made:

- At the date of trial the plaintiff owned a property, unencumbered, valued in the vicinity of $900,000 to $1 million.
- When the plaintiff turns 55 he would qualify for a lifetime pension. If he continued to work to 60 years of age the pension amount would be two-thirds of his retirement salary indexed for life.
- The plaintiff currently earned approximately $82,000 per annum from his employment with the Education Department and an additional $2,000 to $3,000 per annum by way of dividend income.
- The plaintiff owned his own car with an approximate value of $37,000.
- The plaintiff owned substantial art, furniture and other collectibles the value of which is difficult to assess but which the court considered to be substantial and probably in excess of $100,000.
- The plaintiff had cash in the bank with a balance of around $90,000 (as at the date of trial).
- The plaintiff had a share portfolio worth approximately $30,000.
- Most of the paintings, furniture and other collectibles owned by the plaintiff were gifts made to him by the deceased during the deceased’s lifetime.

His Honour considered the two-stage process to determine the provision question (at [43]–[44]):

The exercise undertaken by the Court requires it to carry out what has been described as a two-stage process. The first stage calls for a determination of whether the plaintiff has been left without adequate provision for his proper maintenance, education and advancement in life. The second stage, which only arises if that determination be made in favour of the plaintiff, requires the Court to decide what provision ought to be made out of the deceased’s estate for the plaintiff. The first stage has been described as the ‘jurisdictional question’. In deciding whether the deceased failed to make adequate provision out of his estate for the proper maintenance of the plaintiff, consideration must be given to the meaning of the words ‘adequate’ and ‘proper’. They are relative terms. Whether they are satisfied must be decided having regard to all the circumstances of the case. There are no fixed standards, and the Court is left to form opinions and make value judgments upon the basis of its own general knowledge of social conditions and standards.

The plaintiff did not base his claim on lack of adequate provision per se. Rather, he based it on his moral claim to a greater share of the deceased’s estate. The plaintiff submitted that the College had no moral claim on the deceased’s bounty. There were, in effect, no competing moral claims in opposition to his own. His Honour said on this point (at [50]–[51]):
The absence of a moral claim of that kind on the part of the third defendant [the College] does not mean that the entitlement of the third defendant under the terms of the deceased’s will does not constitute a competing claim for the purposes of the determination by the Court of whether adequate provision has been made for the proper maintenance and advancement of the plaintiff from the deceased’s estate. The Court must have regard to any special interest the evidence demonstrates the deceased had in the third defendant. The school may be able to show a strong connection with the deceased and the capacity to make charitable gifts is an important part of freedom of testation... evidence [was given] of the deceased’s interest in the school. [This] evidence was derived entirely from the school’s records. Those records disclose that many years ago, the deceased played golf and tennis for the old scholars. In the last five years of his life, the deceased donated some $1,050 to the school. This is the only evidence of any financial contribution he made in support of the school. Plainly, he demonstrated fondness for his old school. When he commenced to consult...his treating general practitioner, he was pleased to know that [the doctor] was an old scholar. He discussed the school with him occasionally. He kept up with the school’s quarterly magazine. Importantly, in previous wills made in 1985, 2003 and 2007, the third defendant was the residual beneficiary of his estate. I accept that the school cannot establish a competing moral claim on the deceased’s bounty but the evidence demonstrates that he did have a genuine interest in the school, and wished to make substantial provision to it from his estate. I consider his intention was sincere and not motivated by a desire to deprive the plaintiff.

The College submitted that the plaintiff had considerable assets, and would be in receipt of a generous pension upon retirement. This meant that the plaintiff had no moral right to the residuary estate. On this point, His Honour said (at [53]–[54], [59):

But the question is whether, in leaving the school over two-thirds of his estate and leaving the plaintiff with less than one quarter, the deceased failed to make adequate provision for the proper maintenance and advancement of the plaintiff. In my judgment, he failed to do so...I am satisfied the plaintiff has a strong moral claim. The plaintiff and the deceased lived together in a domestic partnership of mutual love and support for 26 years until the testator’s death. There was a very significant age gap between them. At the time their relationship commenced, the plaintiff was 26 years of age. The testator was 64 years of age. I am satisfied that while the plaintiff maintained his own career throughout the period of the relationship, he devoted the time when he was not teaching to their domestic relationship. That included not only cooking, cleaning, and shopping, organising much of their social life, as well as taking time off work to care for the testator during his illnesses and incapacities, take him to medical appointments, and nurse him in a way which allowed him to remain at home.

His Honour said that the plaintiff had a reasonable expectation that he would be the main beneficiary of the deceased’s estate. Moreover, he had previously enjoyed a luxurious lifestyle, and to keep up this standard would need further provision (at [62]):

In my view, the provision made by the deceased in his will for the plaintiff is inadequate to allow him to enjoy anything approximating the lifestyle they enjoyed together over the duration of their 26-year relationship. I am satisfied on the evidence that the costs of maintaining either the [real estate] properties for the balance of the plaintiff’s life, cannot be met from the gift of $100,000 made by the deceased. The costs of maintaining each property is substantial. The evidence does not permit any precise calculation of the costs. The plaintiff gave evidence that the monthly cost of maintaining the properties was in excess of $5,000 each. I accept that these are no more than estimates of a rough kind. Nonetheless, I am
satisfied that these estimates have some basis in fact given the expenses that have been incurred by the first and second defendant in administering the estate since the testator’s death. I am satisfied that the expense of maintaining even one of the properties would see the bequest of $100,000 exhausted long before the plaintiff’s death. Further the bequest makes no provision for the contingencies of life.’

The plaintiff contended that his monthly expenses were in the region of $10,770. His Honour described these as ‘broad-axe’ figures, but not ‘entirely unscientific’ (at [69]). His Honour considered that, given that the plaintiff would now be residing at only one of the two properties, $4000 per month would represent a fair figure for expenses for the one property (at [72]–[73]):

Allowing a figure of $4,000 per month for the expenses associated with the... property, this translates into a figure of $923 per week. Adopting a multiplier of 898, representing the value of the regular loss of $1 per week to a male aged 54 ceasing at death and utilising compound interest of three percent per annum, produces a figure of $828,854. I would then allow $150,000 for contingencies. I adopt this sum on a broad axe basis having regard to the plaintiff’s age and likely life expectancy of 79 years. This produces a figure of $978,854. I round this up to $1,000,000. This will result in a corresponding reduction in the residuary estate bequeathed to the third defendant.

Therefore, the plaintiff was awarded a further provision from the deceased’s estate of $900,000. This amount was taken from the residuary estate, thus reducing the amount given to the College to a total of $1.6 million.

This case may be viewed at: http://www.austlii.edu.au/au/cases/sa/SASC/2013/83.html

Implications of this case

This case is illustrative of the position of charities when it is found that adequate provision has not been made in the will of a deceased for someone who has a claim under the various state and territory Acts relating to family provision from wills. This case turned more precisely on the issue of moral claim. In Vigolo v Bostin [2005] HCA 11, the High Court held that when making the value judgment required on the jurisdictional question of whether adequate provision had been made by a testator in favour of an applicant under the Act, a court should have regard to considerations of moral claim and moral duty. As His Honour said here (at [47], [49]):

It is a consideration which connects the general but value-laden language of the Act to the community standards which inform its practical application....

The principle is equally applicable today to the obligation of a testator to his or her domestic partner.

2.9.10 PLAN B TRUSTEES LIMITED V PARKER [2013] WASC 216 (SUPREME COURT OF WESTERN AUSTRALIA, EDELMAN J, 30 MAY 2013)

This was an application for directions by Plan B Trustees Limited, the trustees of the Martu Idja Banyjima Charitable Trust (the MIB Trust) concerning income the MIB Trust derives from BHP Billiton Iron Ore Pty Ltd (BHPBIO). BHPBIO entered into an agreement with the Martu Idja Banyjima People (MIB People), an Aboriginal group, under which BHPBIO promised to make compensation payments to the group under a native title land claim. On 28 April 2009 BHPBIO suspended payments under the agreement. After
investigations by an external auditor, BHPBIO alleged that a 'suspension event' occurred under the agreement for reasons which included:

(i) that the trustee of the MIB Trust (since replaced) failed to provide BHPBIO with an audit report which confirmed various matters of compliance by the MIB Trust;
(ii) that the audit report did not comply with the MIB Trust Deed; and
(iii) that payments of trust funds by the former trustee were made in breach of trust.

At 23 March 2012, the total of compensation payments suspended by BHPBIO was around $61 million. Other litigation is currently pending concerning the alleged ‘suspension event’. This application asked whether the trustees would be justified in not commencing legal proceedings in respect of three categories of payment from the MIB Trust. His Honour said that the application was ‘properly brought’ (at [5]). The amount of money involved was substantial, and the trustees had expended much time and effort in investigation and remediation of the previous administration of the MIB Trust. The trustees sought directions under section 92 of the Trustees Act 1962 (WA). There were three directions sought, concerning the bringing of legal proceedings in respect of:

(i) payments for legal fees made from the MIB Trust to a firm of solicitors;
(ii) payments, which may not have been in pursuance of a charitable object, made from the MIB trust to certain individuals;
(iii) payments, which may have been in breach of the trust deed and in breach of fiduciary obligations, made to the former trustee of the MIB Trust, Kingsworld Pty Ltd.

His Honour concluded in all three cases that the trustee was justified in not pursuing legal proceedings against the three sets of parties. His Honour discussed the legal issues surrounding whether or not to pursue litigation in a charitable trust case. The factors to be weighed include:

(i) the prospects of success;
(ii) the known means of the other party to satisfy any judgment;
(iii) the potential for the litigation to deplete the trust estate;
(iv) the costs should the application be unsuccessful, and whether those costs are proportionate to the issues and to the significance of the case;
(v) the irrecoverable costs even if the application is successful;
(vi) the nature of the case and issues raised and what will be gained if the action is to succeed; and
(vii) any public interest factors in the case of a charitable trust.

The amount of legal fees in contention (identified by the auditors) was $220,000. This amount related to certain matters underlying the native title claim, and was queried by the auditors. His Honour said that not bringing legal action against the firm of solicitors was justified on the basis of cost and likelihood of recovery. It was possible that an action against the solicitors would cost more than the fees sought to be recovered, and restore very little, if anything, to the MIB Trust. As to the payments made to individuals, the reasons for not pursuing legal action were really the same as above. The individuals had not received more than $20,000 each, and the costs of tracing payments or proving knowing receipt of trust funds were likely to be irrecoverable (and were described by His Honour in both cases as possibly 'horrendous').

In relation to the payments to Kingsworld Pty Ltd, His Honour said that the company’s only assets were insurance policies. Although there may have been breaches of trust, there were good reasons not to pursue legal action against a charitable trustee (at [185]–[186], [189]):
There are two reasons, however, why the strict accounting duties which are imposed upon private trustees might not necessarily provide an easier route to liability of Kingsworld. First, some authorities have suggested that the strict principles of trust accounting do not apply with the same [rigour] to trustees of charitable trusts. It is not necessary for the purpose of these directions to determine the extent to which principles of accountability might differ in the case of charitable trustees. It is enough to observe that those principles do not necessarily apply in the same way....

Secondly, the terms of the insurance policies may not cover any liability upon Kingsworld which is found to be based upon an accounting rather than positive proof of breach of duty.

The insurance policies were extremely limited in effect. Moreover, there were limitation and indemnity clauses in the trust deed which might operate to protect the former trustee. His Honour concluded (at [241]):

To reiterate, it can sometimes involve a highly nuanced assessment to determine whether litigation should be commenced. In the case of a charitable trust the decision is one which must be taken carefully having regard to the best manner in which the charitable purposes of the trust can be furthered. Having regard to all the matters discussed above, including the obstacles to any recovery, and the difficulties and cost of litigation, Plan B Trustees would be justified to conclude that it would not bring legal proceedings against Kingsworld to recover trust property or seek equitable compensation in respect of possible breaches of the Deed and fiduciary obligations while it was a trustee.

Overall, Plan B Trustees were justified in not pursuing legal action in all three instances where directions were sought from the court.

The case may be viewed at: http://www.austlii.edu.au/au/cases/wa/WASC/2013/216.html

Implications of this case

In trust law, a duty to account requires a trustee to prove that the trust funds it received were disbursed in an authorised way. If it could not do so, or if a disbursement which it claims as authorised is disallowed, then the trustee is liable to restore the trust fund to that extent. However, in this case His Honour said (quoting English and Scottish authority) that this duty was less rigorous for charitable trusts than for private trusts (at [187]–[188]):

It has been held that in the case of a public charitable trust, unlike a private trust, the Court has a power to vary the provision in the trust instrument for the mode by which the objects are attained.... The focus is upon looking to ‘the charity which is intended to be created; and you distinguish between it and the means which are directed for its accomplishment’.

... [T]o ‘act on any other principle would be to deter all prudent persons from becoming the trustees of charities’.

2.9.11 RUSSELL V THE NEW SOUTH WALES TRUSTEE AND GUARDIAN [2013] NSWSC 370 (SUPREME COURT OF NEW SOUTH WALES, HALLEN J, 18 APRIL 2013)

This was an application for family provision made by Timothy Russell (the plaintiff) under Chapter 3 of the Succession Act 2009 (NSW) (the Act). The defendant was the executor of the will of Norman Frederick Bunter (the deceased). The application was made on the basis that the plaintiff was an eligible person under the Act, being a person who was a member of the deceased’s household who was wholly or partly dependent on the deceased. The deceased’s will left a pecuniary legacy to a friend (which was
not affected by this application), and the remainder of the estate (estimated at $7,665,817 net) to five named charities. The charities made no representations in this case. However, His Honour said in relation to this (at [19]):

The Defendant did not file any evidence by, or on behalf of, any of the charities. Even so, I am not entitled to disregard the interests of each of the charities as a beneficiary named in the Will of the deceased in the event that the Plaintiff establishes that he is an eligible person and that there are factors warranting the making of an application.

The main issue was whether the plaintiff was an eligible person under the Act. The key provision of the Act on this point is section 59. The court must be satisfied, first (section 59(1)(a)), that an applicant is an eligible person within the meaning of section 57(1). The plaintiff relied on the category of eligibility referred to in section 57(1)(e) of the Act, namely that he was a person who was, at any particular time, wholly or partly dependent on the deceased, and who was, at that particular time, or at any other time, a member of the household of which the deceased was a member. The first limb that must be established is a relationship of dependence, whether wholly or partly, upon the deceased. This is a question of fact. His Honour said that it was clear that whole, or partial, dependency did not have to be at the same time as the applicant was a member of the household of which the deceased was a member (at [26]). On the meaning of ‘dependent’, His Honour held that (at [27]):

Neither the former Act (the Family Provision Act 1982 (NSW)), nor the Act, contains any definition of the words ‘dependent on’. In general, the word ‘dependent’ connotes a person who relies upon support of another, financial and/or emotional. Dependency is not limited only to the class of persons actually in receipt of financial assistance from the deceased. The authorities reveal that the words are wide enough to cover any person who would naturally rely upon, or look to, the deceased, rather than to others, for anything necessary, or desirable, for his, or her, maintenance and support.

The second limb of section 57(1)(e) is being ‘a member of the household of which the deceased person was a member’. The Act does not state any requisite period of time during which an applicant must be a member of the household of which the deceased person was a member. However, as His Honour said, for some period, the applicant and the deceased must be members of the same household. His Honour held that the words ‘member of the household’ and ‘household’ should be given their ordinary meanings (at [37]–[39]).

Where an applicant falls within the definition of eligible person within section 57(1)(e) of the Act, the Court must next consider and be satisfied, having regard to all the circumstances of the case (whether past or present), that there are factors which warrant the making of the application (section 59(1)(b)). It is only if eligibility and factors warranting the making of the application are found, that the court must determine whether adequate provision for the proper maintenance, education or advancement in life of the applicant has not been made by the will of the deceased, or by the operation of the intestacy rules in relation to the estate of the deceased, or both (section 59(1)(c)). If the court is satisfied that the provision made is inadequate, then consideration is given to whether to make a family provision order (section 59(2)).

Section 60(2) of the Act contains a list of 15 matters to be taken into consideration in making the decision for provision. His Honour made a most careful survey of the relevant case law on the issues before him, and of cases dealing with the interpretation of terms used in the Act. On the facts, the plaintiff was not a blood relation of the deceased (the deceased had been married to his mother’s cousin) and claimed to have lived in difficult circumstances, including homelessness, for many years. He
claimed to have lived with the deceased for a period of ‘approximately 9–12 months’ and to have been ‘heavily dependent’ on him. He claimed to have lived in the ‘tool room’ under the deceased’s house, but never upstairs with him. The deceased, although 85 at the time, lived quite independently, although the plaintiff originally claimed to have performed light duties for him from time to time during the time he stayed with him. It emerged in cross-examination that the plaintiff had in fact always gone out very early in the morning and come home to the deceased’s residence very late at night. The plaintiff and the deceased seldom saw each other.

After the alleged period of 9–12 months at the deceased’s house, the plaintiff moved to public housing and still resided there at the time of this application. It emerged further in cross-examination (based on documentation obtained from the NSW Department of Housing) that the plaintiff had in fact moved around during the period in question, spending time in Queensland, Tweed Heads, and other places on the New South Wales north coast, as well as Bali. Affidavit evidence from the neighbours on each side of the deceased’s house was that the deceased had never had anyone living with him, and that the ‘tool room’ was not habitable, but was an open damp area under the balcony of the deceased’s house, with a tool bench, a sink, a concrete floor, and no connection at all to the house itself.

His Honour accepted the neighbours’ evidence. He also accepted the oral evidence of a friend of the plaintiff who once visited the deceased and said she recalled that he had said that he would leave his house to the plaintiff. However, His Honour held that there was no eligibility for family provision (at [172], [178]):

Taking all of the evidence that I have read and heard, the Plaintiff, in my view, was only a part time, impermanent, visitor to the deceased’s tool room...

In my opinion, the Plaintiff was not, at any time, a member of the household of which the deceased was a member. He was no more than a visitor, or a guest, who the deceased permitted to use the tool room as a place to sleep when in Sydney, and until his new accommodation, to be provided by the Department of Housing, became available. In this regard, it was always intended by the Plaintiff to be an impermanent arrangement.

As the plaintiff was held not to be an eligible person under the Act, His Honour said that there was ‘probably no need’ to consider whether he was in any way dependent on the deceased. Nevertheless, His Honour did so, saying (at [183]):

In my view, simply being a ‘close family friend’ and having a relationship that is described to a friend of the Plaintiff as ‘close’, does not make the Plaintiff a natural object of testamentary bounty. A person might provide to such a friend generous assistance, including a place to stay; but neither the person, nor the recipient of his, or her, generosity, nor the community, would necessarily, or even ordinarily, conclude that, as a result of that generosity, the recipient was a natural object of testamentary bounty.

The plaintiff failed in his application for family provision, and the whole estate (except for the pecuniary legacy to his friend) went to the five named charities in the will.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2013/370.html

Implications of this case

It is notable, but not at all unusual in these cases, that the five charities involved did not make any legal representations in relation to their bequests. Nor did the defendant NSW Trustee & Guardian do so on
their behalf. In this case, the estate was substantial, being over $7 million. Charities are often advised to ‘stick up for’ their bequests, but the issue of legal costs is often one which prevents this from happening. Costs are paid from the estate in these cases, which can sometimes mean (particularly in New South Wales) that the estate is drained of assets. This would not have occurred in this case because of the substantial amount available.


(See also the related case in the NZ Supreme Court: Great Christchurch Buildings Trust v Church Property Trustees, above at 2.9.1.)

This was an application by the Trustees of Christchurch Cathedral (the Cathedral) for directions as to the proper application of insurance moneys received after the Christchurch earthquakes of 2011. The Attorney-General was joined as first respondent because of his function to ensure the due administration of charities, including the proper application of funds devoted to charitable purposes. The second respondent, The Great Christchurch Buildings Trust (the Buildings Trust), is an incorporated charitable trust established in August 2012 by a group of concerned Christchurch citizens. Its principal objective is promoting the preservation of heritage buildings damaged during the 2011 earthquakes.

The Trustees of the Cathedral received $38,898,966 from an insurance claim as a result of the earthquake damage sustained by the Cathedral. A sum of $4.5 million was earmarked to pay for the so-called ‘transitional’ Cathedral currently under construction on the site of the former St John’s Latimer Church in Latimer Square. The use of the money for this purpose was questioned on the basis that the Trustees hold the Cathedral on terms of trust that do not permit this expenditure. The Trustees of the Cathedral had earlier proposed to partially deconstruct (and deconsecrate) the Cathedral to a height of 2–3 metres in response to a hazard reduction order issued by the Canterbury Earthquake Recovery Authority. This was successfully opposed by the Buildings Trust in an action in 2012 (see The Great Christchurch Buildings Trust v Church Property Trustees and The Canterbury Earthquake Recovery Authority [2012] NZHC 3045), on the basis of the terms of the trust under which the Cathedral is held. It emerged that it is an essential term of the Cathedral Trust that there always be a Cathedral on the Cathedral Square site in Christchurch, although it need not replicate the original Cathedral exactly, following its reconstruction or repair.

In light of the earlier finding, this application raised three issues:

1. Was the construction of the transitional Cathedral within the purposes of the Cathedral Trust?
2. If not, was there a separate insurance trust whereby the Trustees held the insurance claim proceeds on trust for the Cathedral congregation and its purposes?
3. Were the trustees (if in breach of trust) entitled to relief from personal liability?

Church properties in the Anglican Diocese of Christchurch are owned by the Church Property Trustees (the Trustees), a corporate trustee recognised as such in the Anglican (Diocese of Christchurch) Church Property Trust Act 2003 (NZ) (the Act). The terms of trust on which the Cathedral is held are not defined in the Act. They have their origins in an 1851 deed of the Canterbury Association by which the Cathedral Square site was reserved and appropriated for the establishment of ecclesiastical and educational institutions of the Church of England.

In the earlier finding on the deconstruction of the Cathedral, Chisholm J held that the subsequent Cathedral Square Ordinance 1858 gave rise to an express trust, the purpose of which was the erection of
a Cathedral on the land designated for that purpose. Later in his judgment he summarised the present-day terms of the trust as follows (at [145]):

The [Trustees] hold the Cathedral property for the purposes of the trust created in 1858. As I have already concluded, those purposes involve, first, the erection of a Cathedral on the site and, secondly, the continued existence of a Cathedral on the site indefinitely thereafter.

His Honour in this case pointed out that Chisholm J’s use of the indefinite article ‘a’ in this extract was to indicate that a reconstructed or repaired Cathedral need not be identical to the original. However, this aspect of the decision is currently subject to appeal. The Buildings Trust, though successful in stopping the deconstruction of the Cathedral, has appealed Chisholm J’s decision on the basis that the trust is in fact to the effect that the building will be preserved as it always was, and not replaced by any lesser structure.

The Cathedral, previously a central point in Christchurch life, has not been used for any purpose since the February 2011 earthquakes. Its revenues have suffered accordingly. Worship now takes place in a smaller church and worshipper numbers have more than halved. In response to these effects of the disaster, it had been proposed to erect a temporary Cathedral made from recyclable cardboard materials on the site of a church which had been destroyed in the earthquakes and since demolished. The building was to be paid for from insurance moneys received. The temporary Cathedral was to be in use for a period of 10 years, and the site in Latimer Square and building would then revert to the St John’s Latimer church community for their own use. Various announcements were made about this proposal, including that the Cathedral itself could not be replicated because of cost.

On the issue of the terms of the relevant trust, His Honour said that he agreed with Chisholm J that the terms of the trust were that a Cathedral had to be built on the present site, and not on some other site. Therefore, there should be no temporary Cathedral on the alternative site chosen in Latimer Square, although there could presumably be another ‘Cathedral’ building of some kind erected on the original site (subject to the appeal from Chisholm J’s judgement of 2012). In any event, insurance moneys received from building policies had to be devoted to the reconstruction of the old Cathedral. The ‘parlous’ situation of the Cathedral’s finances was not the relevant issue (at [34]):

The present focus of the Cathedral Trust is upon the continued existence of the building itself. The material damage insurance policy was effected to ensure its ongoing existence. Other policies, including the business interruption policy [which was also paid out], were effected to protect against associated losses.

On the second issue, was there a separate insurance trust for the moneys received from the building policies? Quite complex arguments were advanced on this issue, but His Honour was unequivocal. Whilst he accepted that an identifiable, regular Cathedral congregation existed as an unincorporated association of people, it did have an insurable interest in the buildings because of its use and enjoyment of the buildings. However, there was no separate trust created (at [42]–[44]):

This reflects that the Trustees hold land and buildings as a corporate trustee, with the use and enjoyment of such assets reserved to the beneficial owners, the various parishes and in this case the Cathedral community. But, I do not accept that the insurance arrangements gave rise to a resulting trust, much less an express trust, upon terms wider than Chisholm J found to apply in relation to the Cathedral. In short, any beneficial interest which the Cathedral community, represented by the Chapter, has in the material damage insurance proceeds is subject to the terms of trust applicable to the Cathedral Trust....
For these reasons, the cause of action based on a separate and distinct insurance trust must fail.

The trustees of the Cathedral were therefore in a difficult position. The terms of the Cathedral trust were that the Cathedral should be erected on its original site, if not in its original form (subject to appeal). There was no separate insurance trust for the moneys received from the Cathedral building policy that allowed the trustees of the Cathedral to erect a Cathedral on an alternative site. Moreover, it emerged that the Cathedral was underinsured. As His Honour pointed out, the trustees’ relief from personal liability (the third issue) was found in section 11(1) of the Act, which was not pleaded. Was such relief available? This was also a complex issue given that construction of the temporary Cathedral had commenced, and in light of Chisholm J’s finding. Ultimately, this question was deferred to a further hearing.

This case may be viewed at: http://www.nzlii.org/nz/cases/NZHC/2013/678.html

Implications of this case

The general legal position of churches in New Zealand is that the constitution of a religious body is regarded as a consensual compact binding on the conscience of the individual members. Its provisions are without contractual force and are not justiciable in a civil court, except to the extent that they may be involved in a matter concerning church property governed by statute. Churches are governed by statute if subject to an empowering Act, by their constitution if incorporated, and by their constitution and rules if a voluntary unincorporated organisation. In this case, there was relevant legislation governing the issues raised: the Anglican (Diocese of Christchurch) Church Property Trust Act 2003 (NZ). This Act defines the function, powers and administrative obligations of the Church Trustees, in whose name church properties throughout the Diocese are held, including the Christchurch Cathedral. Section 6(1) of this Act requires the Trustees ‘to hold and administer Trust property in accordance with [the] Act’. In this case, the Trustees had not done so because they had not conformed to the Cathedral terms of trust established through an 1851 deed, and the Canterbury Square Ordinance 1858.


This case concerned construction of the will of Taras Bodlak (the deceased), who died on 2 January 2010, aged 95. The deceased left nine gifts in his 1996 will, as follows:

1. Australian Shevchenko Trust, Ukrainian Studies Foundation in Australia Limited in Lidcombe NSW: 10%.
2. Ukrainian Youth Association of Australia Ltd in Lidcombe NSW: 10%.
3. Ukrainian School in Lidcombe NSW: 10%.
4. Ukrainian Ballet-Dancing Groups, School of Music and Arts in Lidcombe NSW: 10%.
5. Ukrainian Political Prisoners in Ukraine: 5%.
6. Ukrainian War Invalids in Ukraine: 5%.
7. Ukrainian Women Association in Lidcombe: 5%.
8. Renovation of Ukrainian Hall in Lidcombe NSW: 5%.
9. Ukrainian Catholic Church in Canberra: 5%.

Difficulties arose with the interpretation of these gifts. Moreover, there was no setting up of any trusts in the will, or any specification of purposes, but rather outright gifts to institutions, including some that were unincorporated. His Honour said that the basic principles were well-established (at [3]):
Is there any one body which exactly matches the description in the will? If so, that body takes and no further enquiry is made.

If not, the court can receive evidence of surrounding circumstances but not direct declarations of intention to find out who was intended.

If there are two or more bodies which exactly answer the description, then the court can look not only at surrounding circumstances but also direct declarations of intention.

In this case, there were no bodies or organisations which exactly matched gifts 3 to 8 on the list in the will. This called for a cy-près solution. This means that in cases where a testator discloses a general charitable intent (not a specific intention to benefit the named organisation), but the description of the beneficiaries is unclear, the court can authorise a distribution amongst bodies whose names are close to the description used by the testator in his or her will, provided that the Attorney-General (in his role as protector of charities) consents. The parties had been to mediation and the Attorney-General had consented to the mediated arrangements made.

On the issue of general charitable intent, His Honour said that (at [16]–[17]):

The scheme of this will shows an intention to benefit a series of groups with Ukrainian or church connections in a way such that there is clear benefit to the Ukrainian community. Although Lidcombe is specified, it is not uncommon for groups of people coming to Australia from Europe or Asia to group together in particular localities, whose influence nevertheless spreads throughout the State of the Nation. I thus do not see this reference as a barrier to a finding that the gifts may benefit the community generally. It is quite clear that all counsel and solicitors consider that, with the possible exception of the gift in paragraph 7 to the Ukrainian Women Association in Lidcombe and that respecting the hall in paragraph 8, all the gifts in 1 to 9 are charitable as that term is understood in Australian law. I do not need to worry that some of the bodies or most of the bodies appear to be unincorporated associations as the evidence which was dealt with in the mediation shows that either there are corporations or trustees or other reasons why there is no problem in the unincorporated association being designated.

Therefore, there was a general charitable intent shown in the will. The cy-près recipients of the charitable gifts at 3 to 6 of the deceased’s list had been decided at mediation, and were included in His Honour’s orders.

But were the gifts to the women’s association and the Ukrainian hall charitable? For the first of these possible gifts, there were two contenders: Ukrainian Women’s Association, Lidcombe branch and Ukrainian Women’s Association in Australia, State Executive of NSW. His Honour considered the four classic charitable purposes as enunciated in Pemsel’s case. Did the gift fall into one of these? The only possible one was the fourth head of charity, ‘other purposes beneficial to the community’. An organisation that is purely for social or recreational purposes cannot be charitable, though as His Honour noted ‘the trend of authority appears to be moving in the direction of upholding such gifts where there are some additional features’. In this case, the Ukrainian Women’s Association in Australia, Lidcombe branch had objects which His Honour felt had ‘a charitable flavour’ (at [26]). The Lidcombe branch made a large series of donations to Ukrainian based bodies in Australia and overseas including donations to the Ukrainian School at Lidcombe to assist needy children in Sokal Ukraine, to send clothing to the poor of Ukraine, and to donate to the veterans of the Ukrainian Partisan Army living in the Ukraine who do not receive a veteran’s pension and are in poor circumstances. The branch also endeavoured to provide support for elderly past members.
His Honour reviewed the relevant case law, of which there was little, and those that there were contained ‘very few good analogies’ (at [34]). These cases included *Victorian Women Lawyers Association Inc v Federal Commissioner of Taxation* [2008] FCA 983. In that case, the court held that the purposes of the organisation had to be assessed holistically, in the light of the organisation’s formation and history. In this respect, His Honour said (at [30]):

> It would seem to me that within the ambit of what is being considered in forming that list would include a group of women meeting together with the common aim of promoting Ukrainian culture and looking to care for persons of Ukrainian origin in needy circumstances.

He concluded that (at [44]–[45]):

> It must be acknowledged that there is no decision in the common law world which goes quite as far as what I have to decide in the present case. Further, I noted ten years ago in *Radmanovich v Nedeljovic* that this appeared to be an unwholesome gap in charity law. It seems to me now, however, that that gap is gradually being reduced. I now consider, in the light of the material I have reviewed, that in twenty-first century New South Wales a trust in favour of a group of women of a particular ethnicity, who seek more than mere recreation and social intercourse, but also to assist people of the same ethnic group and spread that culture to further the community purposes of a group of Australians of a certain ethnic origin, is a charitable gift.

The gift was divided equally between the two contending recipients.

As to the gift to renovate the hall, the hall was easily identifiable, but there was no charitable purpose attached to the gift. The evidence showed that the hall was principally used as a venue for Ukrainian cultural activities or for activities connected with the local Ukrainian Catholic school. The Attorney-General submitted that the gift was a purpose gift and that with the evidence showing such a close connection with other charitable activities, especially with the school, the gift came into the class of gifts for the maintenance of school buildings which are usually charitable. His Honour agreed.


**Implications of this case**

This case was an example of how not to make a will. The deceased never married and had no children. The will was divided into 100 parts, of which 65 were designated for charity. However, the deceased did not identify the charitable recipients correctly (except 1, 2 and 9), and each had to be decided cy-près by mediation, or by the outcome of this case (where two gifts were doubtful as to their charitable nature). Moreover, there had also been a family provision application which resulted in 10 parts being awarded to a family provision recipient. Costs implications were obvious, and His Honour dealt with the costs issue at the end of this case. Costs of the plaintiff (the executor) and the Attorney-General were awarded out of the estate. Costs for the charities were deducted from their distribution.

**2.9.14 BROWN V THE ATTORNEY-GENERAL OF NEW SOUTH WALES [2013] NSWSC 271**

(SUPREME COURT OF NEW SOUTH WALES, HALLEN J, 25 MARCH 2013)

The plaintiffs in these proceedings were the current trustees of the Carrington Centennial Trust (the Trust), a charitable trust established by a Deed of Gift in 1888. The original gift was a substantial parcel of land in Camden in New South Wales, much of which is still retained by the current trustees and which is now the site of aged care facilities and a retirement village. The plaintiffs sought various orders relating to the Trust, as follows:
Orders as to the substitution of the current trustees by a company limited by guarantee (Carrington Centennial Care Limited) as sole trustee of the Trust;

Orders to vary the cy-près scheme ordered by Powell J in proceedings in 1978 to permit the new trustee to build and operate a residential care facility within the meaning of the Aged Care Act 1997 (Cth) on the Trust property;

Orders to modify the cy-près scheme ordered by Powell J in 1978 to permit the NSW Trustee, with the consent of the Attorney General, to build and operate a retirement village within the meaning of the Retirement Village Act 1999 (NSW) on the Trust property;

Orders to give the new trustee the power to purchase additional land for purposes authorised by the objects of the Trust; and

Orders to amend the Deed of Gift by removing references to a ‘Committee of Management’.

The Attorney-General, named as the defendant as a matter of form, did not oppose the orders sought. The replacement of the individual trustees by a company trustee was sought under section 70(2) of the Trustee Act 1925 (NSW) which provides that the Court may make an order for the appointment of a new trustee in substitution for existing trustees ‘whenever it is expedient to appoint a new trustee ... and it is inexpedient, difficult or impracticable to do so without the assistance of the Court’. His Honour held that in this case the appointment of a company trustee was expedient having regard to the charitable objects of the Trust (at [13]).

The variation of the cy-près scheme was said by His Honour to present a more difficult problem. The orders sought by the plaintiffs altered the objects of the Trust by:

(a) replacing the category of buildings for which Trust property could be applied (without Attorney General approval), being a ‘nursing home within the meaning of the National Health Act 1953 (Cth) or similar institution’ with ‘a facility for the provision of residential care within the meaning of the Aged Care Act 1997 (Cth), or similar institution’; and

(b) replacing the category of buildings for which Trust property could be applied (with the approval of the Attorney General), being a ‘building for the residence of aged persons within the meaning of the Aged Disabled Persons Act 1954 (Cth)’, with ‘a retirement village within the meaning of the Retirement Villages Act 1999 (NSW), or similar institution’.

However, section 9 of the Charitable Trusts Act 1993 (NSW) assisted the alteration. Section 9 of that Act greatly widened the circumstances in which a court could intervene by not requiring that, in a cy-près situation, a charitable purpose be found which was indistinguishable from the original one. Thus, the extension of the charitable objects of the Trust to embrace a retirement village was entirely within the spirit of the Trust.

The original Deed of Gift did not give the power to trustees to purchase additional land. Nor did the orders of Powell J in 1978. The order sought as to the purchase of land widened the powers of the new trustee (the company trustee) to enable the new trustee to purchase land and any facility situated on the land purchased for purposes authorised by the objects of the Trust and relating to those purposes referred to previously. The object of this change was to enable the Trust to expand its aged care operations by purchasing or merging with other aged care operations in the area. His Honour could see no difficulty with granting this order.

The final order sought arose from the appointment of a company trustee. A corporate Trustee would have a Board of Directors to carry out the functions of the Committee of Management referred to in the original Deed of Gift. To maintain a Committee of Management (actually named the Board of Management) in addition to a board of directors of the new Trustee, would lead to a duplication of
roles. The removal of references to the Committee of Management from the Deed of Gift was therefore held by His Honour to be for the purpose of advancing the management and administration of the Trust and of trust property.

Thus, all the orders sought by the trustees were granted.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2013/271.html

Implications of this case

This was an example of a very old trust document needing to be updated to reflect changes in the trust’s operations. The Attorney-General was named as defendant in his role as protector of charities, and did not oppose any of the proposed changes. His Honour noted that modern legislation made the court’s approval of such changes easier.

2.9.15 RE SALVANA; STATE TRUSTEES LTD V ATTORNEY-GENERAL (VIC) [2013] VSC 117 (SUPREME COURT OF VICTORIA, MCMILLAN J, 22 MARCH 2013)

This case dealt with the validity of a gift under a will. Victor Enrico Salvana (the deceased) died on 15 December 1982, leaving a will dated 22 May 1969. His executor is State Trustees Limited (State Trustees). By clause 4 of his will, the deceased left the residue of his estate on trust as follows:

a) to his sister, Alma, a life interest in what had been the deceased’s home at 9 Springvale Road, Nunawading;
b) to Alma and his brother, Louis, a life interest in the net income from the balance of the residuary estate;
c) upon the death of the survivor of Alma and Louis, the net income to his nephew, John, and his niece, Rita, for not more than 15 years from the death of the survivor of Alma and Louis; and
d) upon the expiration of the 15 years UPON TRUST to provide for the purchase or provision of an area of land in the Otway Ranges or the district known as the Little Desert or such similar area as my Trustee may deem appropriate to be used as a park or reservation or sanctuary for the purpose of the preservation and conservation of native Australian flora and fauna.

The deceased was survived by his sister, Alma, his nephew, John, and his niece, Rita. His brother, Louis, predeceased him. John died on 27 January 1987, Rita died on 21 July 1990 and Alma died on 28 August 2009, aged 102 years. The effect of this order of deaths in the family was that the gifts to John and Rita never took effect, as they had predeceased Alma. As at 12 February 2013, the residue of the estate amounted to $948,687.67. State Trustees applied to the court to have the gift in clause 4 of the will declared a gift for charitable purposes, and an order that the net residue of the deceased’s estate be distributed to the Australian Trust for Conservation Volunteers for the purpose of purchasing or providing an area of land in the district known as the Little Desert to be used as a park, reservation or sanctuary for the purpose of the preservation and conservation of native Australian flora and fauna in accordance with the purposes and objects of the trust as set out in clause 4 of the deceased’s will.

Was the gift expressed as being for the ‘preservation and conservation of native Australian flora and fauna’ a gift for charitable purposes? Her Honour reviewed the standard law of charity contained in the Statute of Elizabeth 1601 and the decision in Commissioners for Special Purposes of the Income Tax v Pemsel [1891] UKHL 1. Did the gift fall into the four categories of charitable purpose expressed in Pemsel’s case (trusts for the relief of poverty, the advancement of education, the advancement of religion, or for other purposes beneficial to the community not falling under any of the preceding
heads)? Public benefit is presumed in the first three categories, and must be shown in the fourth by reference to the spirit and intendment of the Preamble to the Statue of Elizabeth.

State Trustees contended that the gift fell within the second and fourth categories, or both. The Attorney-General did not oppose this position. Her Honour agreed, holding that the gift fell within both categories, and was within the spirit and intendment of the Preamble to the Statute of Elizabeth (as required to show public benefit in the fourth category). In reviewing the relevant case law, Her Honour held that the categories of charity were not closed, and that gifts for conservation purposes were charitable in the light of changes in viewpoint on matters of wildlife preservation, and the conservation of high value land. She said that there was a clear intention to benefit the public, and there was also an educative purpose (at [26]–[28]):

The deceased did not limit the ultimate use of the land set aside under the will to any one group or section of the community; the gift is without any limitation and may be enjoyed by the public at large. There is no eligibility criterion for who might enjoy the benefits of the gift.

The fact that the deceased intended there to be a ‘park or reservation or sanctuary’ reinforces the conclusion that the gift was for the public benefit, as these contribute to public recreation and health. Counsel submitted, and I agree, that today there is increased public interest in the preservation of wild life, as increased urbanisation makes it more difficult to see and appreciate a country’s flora and fauna. As regards the second category, the advancement of education, I consider that members of the public will stand to gain a better appreciation of natural ecosystems by observing the natural environment of a park, reservation or sanctuary. The preservation and conservation of native flora and fauna, in areas set aside for that purpose and open to the public at large, constitute an educative purpose, since they promote the enhancement of public learning and knowledge.

The Australian Trust for Conservation Volunteers (the Trust) gave evidence that it would use the gift in one of two ways: first, for the purchase and protection of suitable land in the region for the establishment of a new conservation reserve and, secondly, to extend the protected area within the National Park by linking up two parcels of land already owned by the Trust adjacent to the Little Desert National Park — the ‘Little Desert Lodge’, comprising 117 hectares, and ‘Mallee Fowl wildlife sanctuary’, comprising 295 hectares. If there were any funds remaining after the purchase and establishment of a sanctuary or reserve, then those funds would be spent in further conservation and preservation of the reserve, its flora and fauna. In addition, the Trust would undertake fundraising activities to generate additional funds and resources for the reserve or sanctuary. In the light of this evidence, Her Honour held that the entire net residue of the deceased’s estate should be distributed to the Australian Trust for Conservation Volunteers.

The case may be viewed at: http://www.austlii.edu.au/au/cases/vic/VSC/2013/117.html

2.9.16 DICKMAN V HOLLEY; ESTATE OF SIMPSON [2013] NSWSC 18 (SUPREME COURT OF NEW SOUTH WALES, WHITE J, 31 JANUARY 2013)

This case dealt with the estate of Vera May Simpson who died on 16 September 2005, aged 102. From January 1997 Mrs Simpson (the deceased) was a resident of the Salvation Army Elizabeth Jenkins Place Residential Aged Care Facility (Elizabeth Jenkins Place). On 14 September 1999 the deceased made a will (the 1999 will) that, after revoking prior wills, appointed the financial secretary of the Salvation Army (NSW) Property Trust as her executor and gave the whole of her estate to the Salvation Army Eastern Australian Territory for the use and benefit of Elizabeth Jenkins Place. The defendant, Mr Holley, held the office of financial secretary at the time the application was made for probate of the will. Probate of the 1999 will was granted to him on 5 October 2006. The principal asset of the estate was a house
owned by the deceased in Mona Vale, which was sold. After payment of debts, funeral and testamentary expenses, payments totalling $732,133.76 were made to the Salvation Army on and prior to 5 December 2006.

The plaintiff was unrelated to the deceased, but the deceased regarded him as if he had been her son. By a prior will made on 23 September 1998 (the 1998 will) Mrs Simpson appointed the plaintiff as her executor and left all of her estate to him. He commenced proceedings on 20 July 2010 seeking the revocation of the grant of probate made on 5 October 2006 to the defendant and a grant of probate in solemn form to him in respect of the 1998 will. In addition, and in the alternative, on 25 October 2010 the plaintiff commenced separate proceedings against Mr Holley and the Salvation Army (NSW) Property Trust claiming a declaration that Mr Holley held the net proceeds of the deceased’s estate on constructive trust for him, that the Salvation Army (NSW) Property Trust holds the net proceeds of the estate on constructive trust for him and an order that both defendants account for those proceeds. This case dealt with both applications.

The plaintiff alleged that at the time of making the 1999 will, the deceased lacked testamentary capacity, and that there were suspicious circumstances surrounding the making of the will, and that there had been undue influence used on the deceased by her neighbours and officers of the Salvation Army, who may have included the management of Elizabeth Jenkins Place. The case raised the following issues:

1. Whether Mr Holley held the deceased’s estate on a constructive trust for the plaintiff, and if so whether the trust was enforceable against the Salvation Army (NSW) Property Trust.
2. Whether the plaintiff’s claim to revoke the grant of probate of the 14 September 1999 will is barred by reason of his delay in instituting the probate proceedings.
3. Whether probate of the 14 September 1999 will should be revoked, and probate not be granted of another will of 10 September 1999, on the grounds that Mrs Simpson lacked testamentary capacity, or she was coerced into making these wills, or she did not know and approve of their contents.
4. Whether probate in solemn or common form of the 23 September 1998 will should be granted to the plaintiff.
5. Whether Mr Holley is liable to reimburse the estate that has been distributed to the Salvation Army (NSW) Property Trust.

The plaintiff and the deceased had met in 1965, when he was 19 and she was 65. They formed a close relationship akin to mother and son. The deceased’s husband had died in 1948 and she had no children of her own. Over the years, the plaintiff assisted the deceased with various matters, and she assisted him financially, though he always repaid the amounts lent. Eventually, the deceased moved into aged care, and later made the plaintiff her attorney. At age 95 she had her solicitor prepare a will in favour of ‘her son’, leaving him her entire estate. There were no unusual circumstances surrounding this will. The deceased was attended by a general practitioner who recorded (as at September 1998 and August 1999) that the deceased was ‘mentally alert for a woman of her age, not confused and of sound memory, and who held strong and definite views and was not suffering from delusions, nor easily influenced’ (at [27]).

However, in September 1999 when the 1999 will was made, the deceased had begun to exhibit distress about her financial affairs, including a belief that she was to be moved from Elizabeth Jenkins Place because of unpaid fees. Her fees had always been paid by the plaintiff, who, in His Honour’s finding was always scrupulous about dealing with her money. She also began to exhibit paranoid delusions about her property being stolen by the plaintiff and other matters. His Honour accepted the plaintiff’s version
of events in this respect, and the evidence of an ‘old age’ psychiatrist that this was a recognised set of symptoms in old age referred to as delusional ideation.

The plaintiff continued to complain, expressing false ideas about the plaintiff to former neighbours, who visited her. At some point, the idea had been put about that the plaintiff was untrustworthy and preyed on old ladies for their money. Some witnesses gave affidavit evidence that the deceased had firmly indicated that she wished to leave her estate to ‘the Sallies’, but taking all the affidavit evidence into account, His Honour concluded that someone had slandered the plaintiff, and named two parties (former neighbours of the deceased) who, he said, were the likely culprits (at [43]).

Former neighbours who visited were notified by the management of Elizabeth Jenkins Place that the deceased wanted to make a new will. They attended to be witnesses to the will’s signing on 10 September 1999. That will was prepared by a solicitor for the Salvation Army, who deposed that the deceased seemed to be in possession of her faculties at the time of signing the will. However, his total consultation with the deceased amounted to 5 minutes. A power of attorney document was made and signed in favour of the neighbours, and the unsigned will was left with the deceased by the solicitor who prepared it on behalf of the Salvation Army. He did not witness the signing. The signed will was delivered to his office by one of the neighbours on 13 September 1999.

Early on the morning of 12 September 1999, the deceased telephoned the plaintiff saying that she had ‘done something silly’. She is alleged to have said that she signed some papers which she did not understand, and that it had to do with ‘high-ups’ in the Salvation Army. There followed several confrontations between the neighbours and the plaintiff at Elizabeth Jenkins Place, and the preparation of yet another will by the same solicitor for the Salvation Army. This was the 1999 will which was executed on 14 September 1999. After these events, the neighbours applied for an Apprehended Violence Order against the plaintiff which was ordered until 5 October 1999, and later extended. A relative then applied to the Guardianship Tribunal for a financial management order on 8 October 1999. The Guardianship Tribunal ordered that the estate of Mrs Simpson be subject to management under the Protected Estates Act 1983 (NSW) and committed the management of her estate to the Protective Commissioner. The Tribunal ordered that she be placed under guardianship and ordered that her guardian be the Public Guardian. The functions of the guardian in relation to Mrs Simpson included co-ordinating access arrangements to Mrs Simpson and where access should take place.

Following the appointment of the Public Guardian, the AVO proceedings against the plaintiff were withdrawn. His Honour referred to all the proceedings in the Local Court (regarding the AVO) as ‘an abuse of the process of the court’ (at [89]). Nevertheless, the relationship between the deceased and the plaintiff came to an end at that point. He complied at all times with the authority of the Public Guardian, and always made enquiries about the deceased through the Public Guardian.

The deceased died on 16 September 2005. On 23 March 2006, the solicitor for the Salvation Army (SA) wrote to the plaintiff’s solicitor advising that he acted for Mr Holley who had been appointed as executor under the will of the late Mrs Simpson. The solicitor for the SA was seeking information on another property which the deceased had assisted the plaintiff to buy in the 1970s, and which he had repaid in full. The evidence was provided and accepted, but the plaintiff’s solicitor took the opportunity to question the ethics of the SA’s actions in relation to the deceased’s will, particularly as to conflict of interest of the solicitor, while acting for the SA, also preparing the deceased’s will. The solicitor for the SA replied in a letter which His Honour characterised as at least partly ‘gobbledygook’ (at [122]). His Honour said (at [123]–[124]):
These matters were not raised in the application for probate. The summons seeking a grant of probate was filed on 2 October 2006. The application was supported by an affidavit of Mr Holley that had been sworn on 7 March 2006. Mr Holley deposed, as he was required to do, that ‘I am not aware of any circumstances which raise doubt as to my entitlement to a grant of probate of the will of the deceased.’ There is no reason to doubt that that statement was true at the time the affidavit was sworn. By the time the application for probate was filed, Mr Holley’s statement that he was not aware of any circumstances which raise doubt as to his entitlement of a grant of probate was not the whole truth. His solicitor was aware that the beneficiary of a prior will asserted that the deceased may have executed her will under undue influence, or may not have been aware of the effect of the document she had signed.

Mr Dickman did not lodge a caveat against a grant of probate. Nor did Mr Holley seek a grant of probate in solemn form. The grant was made on 5 October 2006. The estate was distributed to the Salvation Army by 5 December 2006.

On the first issue of constructive trust, His Honour held that no such trust could be found. The claim was based on representations said to be made to Mr Dickman by the deceased in 1991 and 1996, but there was not sufficient evidence to support any trust, and the passage of time made it too difficult to find evidence in support of it.

There was another time issue however. The fact that the grant of probate was in common form (as opposed to solemn form) meant that it was revocable. Did the plaintiff’s delay in pursuing his claim (referred to legally as ‘laches’) mean that the plaintiff’s claim should be barred? Delay can be a bar to such a claim, but there were other considerations in play. His Honour held that delay should not be a bar to the plaintiff’s claim (at [143]):

A mere delay of four years would not bar Mr Dickman’s claim to revoke the grant. The question is whether the delay has occasioned prejudice to Mr Holley or to the Salvation Army (NSW) Property Trust that makes it inequitable for Mr Dickman to pursue his claim. The fact that estate moneys have been distributed and spent by beneficiaries has not been considered as a ground of prejudice that should bar a claim for revocation of a grant of probate or letters of administration. The possibility of such revocation was inherent in the decision to seek only a grant of probate in common form.

Moreover, the plaintiff’s explanation for his delay was accepted by His Honour as ‘satisfactory’ (at [145]). He assumed the SA would seek probate, and was at first unaware of the procedures available to lodge a caveat against probate being granted. He had not located the 1998 will until 2009, since he had separated from his wife in 2006, and been barred from the marital home for some time by apprehended violence proceedings. Although His Honour found some of this questionable, he was more concerned with the actions of the solicitor for the SA (at [148]):

...I do not consider that Mr Dickman’s delay in bringing proceedings for revocation of the grant makes it inequitable for him to pursue his claim. That is all the more so having regard to the fact that Mr Holley, through Mr Hopper [the solicitor for the SA], pursued a claim for a grant of probate in common form, notwithstanding that Mr Hopper knew that Mr Dickman asserted that there were grounds for querying the validity of the will, but did not disclose that on the ex parte application for the grant of probate. Had proper disclosure been made the court may have insisted that the application be for a grant in solemn form and issued a citation to Mr Dickman to appear.

Therefore there was no bar to seeking a revocation of probate.
On the issues of testamentary capacity and duress, His Honour held that although the deceased might have had general capacity, her testamentary capacity was affected by the pressure which was put on her to act in the way she did. Before probate of a will is refused on the ground of undue influence, it must be shown that the will of the testator was overborne, that the testator did not intend and desire the disposition, and that the testator was coerced into making it. In such a case the testator will not have known of and approved the contents of the will. Was that the situation here? His Honour said (at [163]):

In the present case the pressure on Mrs Simpson to make a will in favour of the Salvation Army was substantially applied by [her neighbours]. They did not take a benefit under the will. However, the involvement of the Salvation Army’s solicitor, Mr Hopper, management of Elizabeth Jenkins Place, and the suggestion made to Mrs Simpson that her place in the home was in jeopardy because of non-payment of fees, also brings into play what is known as the doctrine of suspicious circumstances.

His Honour was particularly troubled by the conflict, which he described as a ‘conflict of duties’, in the conduct of the solicitor for the SA (at [165]):

Although Mr Hopper did not perceive that he had a conflict of interest (or more accurately, a conflict between duty and duty), I think he did have such a conflict. The Salvation Army Property Trust was an established client. He worked from its offices. The Salvation Army Property Trust would expect him to do what was proper to document what Mr Hopper was told was Mrs Simpson’s intention to leave her estate to the Salvation Army. His duty to Mrs Simpson included making inquiries relevant to her testamentary capacity, including as to whether she appreciated who had claims on her bounty and was able to evaluate those claims. This would have included inquiring who was or were the beneficiary or beneficiaries of any existing will. Bringing Mrs Simpson’s mind to bear on the question of who, other than the Salvation Army, might have claims on her estate was potentially not in the interests of his established client. It is clear from Mr Hopper’s evidence that he relied upon his ‘own test’ as to testamentary capacity that he did not make the appropriate inquiries. He did not give evidence of making inquiries of Mrs Simpson to ascertain who had claims on her testamentary bounty. He gave no evidence of having asked her about her existing will or of having ascertained that Mr Dickman had been named as her beneficiary in a will made the previous year. He only saw Mrs Simpson alone for about five minutes.

His Honour was satisfied that the deceased was ‘pressured’ into giving over her power of attorney to her two former neighbours. This was suspicious (at [166]–[167]):

The giving of the power of attorney in conjunction with the will is a suspicious circumstance indicating that Mrs Simpson’s own will was being prevailed on. It is also a suspicious circumstance that someone from the Salvation Army had told [the former neighbours] that her security at Elizabeth Jenkins Place was in jeopardy because her fees were unpaid. As might be expected, when this was conveyed to Mrs Simpson it caused her distress. Mrs Simpson was apprehensive when the will was made that she might have to leave Elizabeth Jenkins Place. As noted earlier in these reasons, there was no basis for the concern as to non-payment of fees.

The 1999 will was not read over to the deceased, nor did the solicitor for the SA take any further instructions from the deceased in relation to it. On the evidence, he merely prepared it and had her sign it. His Honour said that he was ‘not satisfied that she did bring a free and voluntary mind to’ the
contents of the will (at [170]). Rather, ‘she was amenable to signing documents under pressure from others that did not reflect her true wishes’ (at [171]). His Honour concluded (at [173]):

For these reasons I conclude that neither the will of 14 September 1999 nor the earlier will of 10 September 1999 should be admitted to probate and that the grant of probate of the will of 14 September 1999 should be revoked. Unusually, in this case that conclusion can be put on each of the grounds of lack of testamentary capacity, undue influence amounting to coercion and lack of knowledge and approval. In the circumstances in which the wills of 10 and 14 September 1999 were signed, Mrs Simpson lacked testamentary capacity because she was unable to evaluate the claims of Mr Dickman on her estate. But this was because of the pressure to which she was subjected and which she was not capable of withstanding. Her signature to the wills of 10 and 14 September 1999 was not ‘the offspring of [her] own volition [but] the record of someone else’s’ (Hall v Hall (1868) LR 1 P & D 481 at 482). There were suspicious circumstances surrounding creation of both wills and notwithstanding that the first will was read over to her, I am not satisfied that she knew and approved of the contents of the wills.

Therefore, the plaintiff was granted probate over the 1998 will in common form. He was not given a grant in solemn form because there were beneficiaries (nine individuals and the Mona Vale District Hospital) of an earlier 1995 will who had not been notified. An order was made for the payment of the estate moneys to the plaintiff because in the absence of statutory protection Mr Holley was liable to account to the plaintiff as the beneficiary entitled to the estate for the moneys distributed to the Salvation Army Property Trust. In His Honour’s view, Mr Holley was not entitled to statutory protection because he was on notice that the estate was, or might be, claimed by Mr Dickman: (at [194]):

I do not think that good faith on the part of the executor can be presumed. The fact that the application for a grant of probate in common form was made without disclosing the notice that had been received from Mr Dickman’s solicitor of grounds for challenge to the will raises a question of honesty of purpose, even if the onus of establishing good faith were not on Mr Holley. The agreed facts that were tendered consequent upon allowing the amendment to the statement of claim do not address the issue of good faith. Good faith was not conceded in the course of argument. In the absence of evidence, the defence of having distributed the estate in good faith provided for by s 40D of the *Wills, Probate and Administration Act* is not made out.

Thus, the plaintiff was successful in all his claims except as to a constructive trust. The Salvation Army (through Mr Holley) was ordered to reimburse the estate for the moneys distributed.


**Implications of this case**

The finding in this case that undue pressure was applied to a very elderly and frail testatrix scarcely reflects well on a charity. Moreover, there was a finding of conflict of duty and duty on the part of a solicitor for the Salvation Army. What can charities do to avoid such problems? If the testator is near death, or is elderly, or is incapacitated physically or mentally, the following measures should be considered:

- Ensure that appropriate policies, informed by specialist legal advice, are in place for bequest solicitation and disputed bequests.
- Make sure there is **independent legal advice** for the will-maker who intends to make a bequest.
• Have an arm’s-length relationship between the charity and the will-maker, without any undue influence, harassment, intimidation or coercion from the fundraiser to the donor while the donor is alive. These things can give rise to a claim in equity under the doctrine of undue influence/unconscionable conduct/unconscionable dealings, or the possibility of a claim of unconscionable bargain which could result in the bequest being invalid and brought back into the estate after the donor’s death.

• In appropriate circumstances, have a family member or legal personal representative present during bequest negotiations to avoid any allegations of undue influence or coercion.

2.10 MISCELLANEOUS

2.10.1 ESCARPMENT BIOSPHERE FOUNDATION INC V WORLD HEALTH INITIATIVES INC., 2013 ONSC 7275 (CANLII) (SUPERIOR COURT OF JUSTICE, ONTARIO, MESBUR J, 22 NOVEMBER 2013)

World Health Initiatives (WHI) is an Ontario corporation, which developed a charity donation program called the Canadian Humanitarian Trust Donation Program (the Program). The Program operated as a registered tax shelter for the benefit of its donors. WHI solicited donations from Canadian taxpayers and then engaged in various transactions with US and Canadian charities, drug companies and lawyers to provide tax receipts to donors for amounts in excess of the original gifts. The applicant, Escarpment Biosphere Foundation (EBF) was a registered charity. EBF’s role was to administer the proceeds of the Program. It used the proceeds to purchase medications for distribution to charities abroad. They were used in the treatment of what were referred to as ‘neglected tropical diseases’. For its role in the Program, EBF was entitled to receive 1% of the proceeds as an administration fee. Under the terms of a Services Agreement, EBF was obliged to pay WHI a commission of 12.5% for its fundraising services. The agreement required WHI to repay the monies advanced at the end of the Program.

In 2008, Canada Revenue Agency (CRA) audited EBF in relation to its participation in the Program. CRA disallowed charitable deductions under the Program which resulted in the effective end of the Program. As a result of CRA’s actions, EBF lost its charitable status, and was required to assign all its assets to another charitable entity. The entity chosen was the Biosphere Preservation Society (BPS).

This case concerned the advance commissions paid by EBF to WHI, which were not repaid as required under the Program. In April of 2008, WHI signed a demand promissory note (a form of bill of exchange) in favour of EBF which acknowledged its debt to EBF for the amounts of commission advanced and agreed to repay those amounts with interest. In late 2010, EBF demanded payment of interest under the promissory note. The parties then entered into a forbearance agreement under which EBF agreed not to pursue collection in exchange for a general security agreement securing WHI’s obligations against its assets. Despite demands for payment, WHI has still not paid. In this application, EBF therefore sought payment of the secured debt. Because EBF was concerned that funds subject to its security were being diverted to fund legal challenges being mounted on behalf of WHI’s clients/investors against CRA, EBF moved without notice for a Mareva injunction on 28 May 2013 before Newbould J. The injunction was granted, and continued (through numerous applications before different judges) to the date of this application. The injunction prevented any WHI monies from being misdirected.

In this application, EBF sought full payment of the debt owing to it. However, WHI contended that EBF owed it a greater amount under their Service Agreement. According to WHI, the evidence revealed that
in the latter part of 2007, CRA began disallowing the charitable tax credits claimed by the thousands of participants in the Program. As a result, WHI ceased marketing the Program in late 2008 but continued to administer the Program for existing participants. In the latter part of 2009, WHI decided not to proceed further with the Program. At the time WHI ceased marketing the Program, it had earned income in excess of $8,000,000 under the Services Agreement, but had yet to bill EBF for those services. WHI's directors claimed that both WHI and EBF expected at the time that the participants would be successful in challenging the CRA's disallowance decision, and that WHI would then resume marketing the Program and providing fundraising and administrative services to EBF under the Services Agreement. EBF's advance to WHI would be paid off by offsetting the amount owing by WHI against services fees invoiced by WHI to EBF.

Her Honour held that this entailed a contractual counter-claim, and not just an equitable set-off (which would not stand against a claim under a bill of exchange such as a promissory note). Moreover, there were other issues that needed a full trial for determination, such as the standing of EBF to bring any action on the matter, given that it had assigned its assets to BPS. Her Honour therefore denied EBF immediate judgement, and ordered a full trial on the issues.

The case may be viewed at:

Implications of this case

This case involved another of the bogus ‘tax credit for charity’ programs which have been so common in Canada in recent years. Both parties had few assets, and were engaged in a very marginal and atypical ‘business’ relationship (particularly given that one party had been a registered charity) which would now go to trial with little prospect of recovery for anyone.

2.10.2 INTERNATIONAL RELIEF FUND FOR THE AFFLICTED AND NEEDY (CANADA) V CANADIAN IMPERIAL BANK OF COMMERCE, 2013 ONSC 4612 (SUPERIOR COURT OF JUSTICE ONTARIO, ALLEN J, 5 JULY 2013)

This was an application by the plaintiff, a former charity (subject to appeal), for an interlocutory injunction restraining the defendant bank, Canadian Imperial Bank of Commerce (CIBC), from terminating its banking relationship with the plaintiff. The International Relief Fund for the Afflicted and Needy (Canada) (IRFAN) is a nonprofit organisation incorporated in Ontario, Canada, in 1997, and had maintained a banking relationship with the defendant since 2001. It had formerly been a registered charity. However, following two audits by the Canada Revenue Agency (CRA), IRFAN’s registration as a charity was cancelled in April 2011. CRA’s decision was influenced by information it acquired from an investigation alleging involvement by IRFAN in supporting or funding Hamas, a Palestinian organisation labelled as a terrorist organisation by the US and Canadian governments. That issue is currently subject to appeal before the Federal Court of Appeal of Canada.

On 15 March 2013, CIBC sent a letter to IRFAN advising of its intention to terminate its banking services in 60 days (on 15 May 2013). CIBC provided no reason for the termination in its termination letter. On 8 April 2013, CIBC granted an extension for the termination until 15 June 2013. It was then extended further to 15 July 2013, amounting to four months notice of termination in total. Banking law in Canada (which is similar to that in Australia) provides that banks are entitled to terminate a banking relationship on reasonable notice. Banks are not required to provide an explanation for the termination so long as reasonable notice is given. The parties agreed that CIBC was entitled to terminate the banking relationship provided it did so with reasonable notice. They disagreed about whether the four months
notice given by CIBC was reasonable and about what evidence the court should consider in determining reasonableness.

The evidence for CIBC was that it gave what in its view was reasonable notice and also later provided an explanation for termination, on IRFAN’s request. CIBC advised IRFAN that in making its decision on termination it took into account the CRA’s decision to revoke IRFAN’s charitable status, the CRA’s audit report findings and the information IRFAN provided to CIBC about its operations. In Canada, reasonable notice in the termination of a banking relationship is to be determined by considering how long it should take for a similarly-situated organisation to obtain comparable banking arrangements. What constitutes reasonable notice is to be decided based on the particular facts of the situation.

IRFAN argued the facts the court should consider in looking at the length of the notice period should include the CRA’s actions and the disastrous effect those actions had had on its operations. This should include the impact of the CRA’s decision on its reputation and finances and the resulting difficulty in obtaining the services of another bank. IRFAN argued that the period of notice should also take into account the particular type of services required by an international nonprofit organisation, such as the need for electronic wiring services and services that can accommodate continuous streams of donations into its accounts. IRFAN submitted that the court should also consider the further damage to its charitable operations (further to that already done by the CRA’s decision) that would result if CIBC terminated its banking services on 15 July 2013.

CIBC argued that the court should not take into account IRFAN’s particular circumstances with the CRA, but rather should consider what would be reasonable in ordinary circumstances. Her Honour agreed (at [17]–[18]):

If the court were to consider IRFAN’s situation with CRA in deciding reasonable notice, this would be to take into account facts that could support termination with cause. This would tend to defeat the bank’s decision to terminate without cause on reasonable notice. CIBC decided to terminate the banking relationship without cause and in doing so was not required to give an explanation. CIBC did not give a reason in the Termination Letter and only explained its actions subsequently at IRFAN’s request and that explanation included concern about CRA’s actions and the results of CRA’s investigation. CRA’s action arose out of IRFAN’s relationship with CRA and hence is not a factor that is relevant to IRFAN’s relationship with CIBC and the assessment of reasonable notice.

Her Honour held that the notice period must be determined on the basis of what would be reasonable in ordinary circumstances, not taking into consideration the CRA’s actions. CIBC argued that four months notice was generous given there was no demand for payment of money with the termination of services. Her Honour said that it was IRFAN’s burden to show that in ordinary circumstances, not taking the CRA matter into account, a four month notice period was not a reasonable period to allow it to organise its affairs and find a new bank. The usual test for an interlocutory injunction was applied:

(a) a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried;
(b) it must be determined whether the applicant would suffer irreparable harm if the application were refused;
(c) an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

In cases of this sort, the plaintiff has the burden to establish there is a serious issue to be tried. The test is more onerous depending on the nature of the injunction sought. A mandatory injunction (to make
someone do something) carries a heavier burden than is the case with a prohibitory injunction (to stop someone from doing something). IRFAN submitted that the injunctive relief sought was prohibitory, while CIBC submitted that it was mandatory. Her Honour agreed with CIBC that the nature of the injunctive relief sought was mandatory. This was evident from the Statement of Claim where in its prayer for relief IRFAN sought a permanent and interlocutory injunction to, amongst other things, ‘...restrain CIBC from withdrawing services...’ and ‘requiring CIBC to process, in the normal course of business, Canadian dollar wire transfers...’. Therefore, IRFAN had a more onerous test to meet than proving ‘a serious issue to be tried’ because a plaintiff seeking mandatory injunctive relief must establish a strong prima facie case.

CIBC contended that IRFAN was actually seeking a permanent interlocutory injunction that amounted to specific performance of a personal service contract, a form of relief courts are reluctant to order because of the personal nature of the services. Specific performance is an equitable remedy ordered on rare occasions where damages would be inadequate to cover a loss. Her Honour said that damages were the appropriate remedy for a plaintiff claiming loss as a result of a bank failing to give sufficient notice before terminating services, and therefore held that IRFAN had failed to meet the test of showing that there was a strong prima facie case involved, and that it accordingly failed in obtaining an injunction in toto.

However, Her Honour went on to consider the irreparable harm issue. IRFAN alleged that irreparable harm would result from the termination of the banking relationship because it would have to default on its obligations, its donor base would be eroded, harm would come to its reputation, and the organisation would cease to exist. Her Honour said that the test for irreparable harm was also a weighty one, and that IRFAN had provided little or no support for its assertions (at [37]):

The Federal Court of Appeal has spoken on this and has described the type of evidentiary support for irreparable harm a plaintiff is expected to adduce when seeking the extraordinary authority of the court. General assertions are not enough; evidence must be at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result; and assumptions and speculation, hypothetical and arguable assertions, unsupported by evidence have no evidentiary value....

IRFAN had also to establish that it would suffer harm that could not be quantified or remedied in damages. IRFAN’s argument was that it would have difficulty obtaining alternative banking services to meet its needs if CIBC were permitted to close its two accounts. Her Honour held that apart from assertions in that regard and lists of banks IRFAN indicated it had approached, there was insufficient particularity to the evidence to substantiate the difficulty. Even if IRFAN were able to establish the difficulty, this is not evidence of irreparable harm that would necessarily support a mandatory injunction. IRFAN pointed particularly to its inability to obtain services to wire funds to the Palestinian territories in Canadian dollars and the increased cost that would result from having to wire funds in another currency. However, IRFAN provided no proof of that assertion, and Her Honour said that, in any event, this evidence suggested a monetary loss that could be compensated in damages, if that had been applicable. Her Honour pointed out that while it was not unforeseeable that CRA’s actions with respect to IRFAN would affect it ability to obtain other banking services, that was a matter between IRFAN and CRA. The irreparable harm must have been caused by CIBC, and it was not. Thus, IRFAN had not established that CIBC’s conduct had caused unavoidable irreparable harm that could not be compensated by damages.
Her Honour also said that the balance of convenience favoured CIBC. Therefore, there was not an appropriate case for the exercise of the court’s equitable powers, and the injunction sought by IRFAN was refused.

The case may be viewed at:

Implications of this case

The outcome of this case means that the former charity (subject to appeal) could not prevent CIBC from terminating the banking relationship between them. The bank had given four months notice to IRFAN which was reasonable notice. The bank had also provided an explanation for the termination though it was not required to do so. Whatever consequences arose from the termination of the banking relationship, these were a matter for IRFAN alone, and would depend on the outcome of IRFAN’s appeal on its deregistration as a charity. That appeal is not listed for hearing in 2013.

2.10.3 UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT V ALLIANCE FOR OPEN SOCIETY INTERNATIONAL INC 570 US 2013 (SUPREME COURT OF THE UNITED STATES, 20 JUNE 2013)

Roberts, C. J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, Alito and Sotomayor, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined. Kagan, J., took no part in the consideration or decision of the case.

This was a case dealing with the First Amendment to the United States Constitution. The court held, in a 6-2 decision given by Chief Justice Roberts, that the First Amendment does not permit the United States Congress (Congress) to require that any group (such as a charity or nonprofit) that accepts funding for treating HIV/AIDS, tuberculosis, or malaria abroad must have a ‘policy explicitly opposing prostitution’. The court recognised that the government does have some power to condition the receipt of federal funds on particular speech, but drew a line between conditions on funds that are internal to the spending program (for example, a requirement that funds, if accepted, must be spent to promote a particular agenda), and conditions that are external to the program (for example, a requirement that in order to receive public health funds, the recipient must state its support for the war on terror). The requirement to explicitly oppose prostitution in all of an organisation’s operations fell outside the proper scope of a public health spending program, and was thus unconstitutional.

In the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the Leadership Act), 22 USC §7601 et seq., Congress authorised the appropriation of billions of dollars to fund efforts by nongovernmental organisations to combat HIV/AIDS worldwide. The Act imposed two related conditions:

(1) No funds ‘may be used to promote or advocate the legalisation or practice of prostitution’ (§7631(e)), and
(2) No funds may be used by an organisation ‘that does not have a policy explicitly opposing prostitution’ (§7631(f)).

This case concerned the second of those conditions, known as the Policy Requirement. To enforce the condition, the Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID) required funding recipients to agree in their award documents that they opposed prostitution.
The respondents were a group of US domestic organisations fighting HIV/AIDS overseas. They expended billions of dollars, including Leadership Act funds, but wished to remain neutral on the issue of prostitution. Their work includes programs aimed at limiting injected drug use in Uzbekistan, Tajikistan, and Kyrgyzstan, preventing mother-to-child HIV transmission in Kenya, and promoting safer sex practices in India. The respondents feared that adopting a policy explicitly opposing prostitution might alienate certain host governments, and might diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS. They are also concerned that under the Policy Requirement they may have to censor their privately funded discussions in publications, at conferences, and in other forums about how best to prevent the spread of HIV/AIDS among prostitutes.

The respondents sought a declaratory judgment that the Policy Requirement violated their First Amendment rights. The District Court issued a preliminary injunction, barring the Government from cutting off the respondents' Leadership Act funding during the litigation or from otherwise taking action based on their privately funded speech. The Second Circuit affirmed that decision, concluding that the Policy Requirement, as implemented by the agencies, violated the respondents' freedom of speech.

The Leadership Act had 29 different objectives to fulfil a ‘comprehensive, integrated’ strategy reflecting a multitude of approaches to the problem of pandemic HIV/AIDS. The strategy included plans to increase the availability of treatment for infected individuals, prevent new infections, support the care of those affected by the disease, promote training for physicians and other health care workers, and accelerate research on HIV/AIDS prevention methods, all while providing a framework for cooperation with international organisations and partner countries to further the goals of the program. Reduction of ‘behavioural risks’ was a priority of the Leadership Act (at §7611(a)(12)). The United States government enlisted the assistance of non-governmental organisations to help achieve the many goals of the program. Since 2003, Congress had authorised the appropriation of billions of dollars for funding the organisations’ fight against HIV/AIDS around the world. However, funded organisations were required to comply with the two conditions listed above.

It had previously been held by the Supreme Court that the First Amendment ‘prohibits the government from telling people what they must say’: see Rumsfeld v Forum for Academic and Institutional Rights, Inc., 547 US 47, 61. Therefore, as a direct regulation, the Policy Requirement would clearly violate the First Amendment. The question then became whether the Government could nonetheless impose that requirement as a condition of federal funding. The Spending Clause of the US Constitution grants Congress broad discretion to fund private programs or activities for the ‘general Welfare’, Art. I, §8, cl. 1, including authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. As a general matter, if a party objects to those limits, its recourse is to decline the funds. In some cases, however, a funding condition can result in an unconstitutional burden on First Amendment rights. The distinction that had emerged from the Supreme Court’s cases was between conditions that define the limits of the government spending program – those that specify the activities Congress wants to subsidise – and conditions that seek to leverage funding to regulate speech outside the contours of the federal program itself.

The court said that Rust v Sullivan, 500 US 173, 195, n. 4. illustrated the distinction. In that case, the Supreme Court considered Title X of the Public Health Service Act, which authorised grants to healthcare organisations offering family planning services, but prohibited federal funds from being ‘used in programs where abortion is a method of family planning’. To enforce the provision, HHS regulations barred Title X projects from advocating abortion and required grantees to keep their Title X projects separate from their other projects. These regulations were valid because they governed only the scope of the grantee’s Title X projects, leaving the grantee free to engage in abortion advocacy through
programs that were independent from its Title X projects. Because the regulations did not prohibit speech ‘outside the scope of the federally funded program’, they did not contravene the First Amendment.

The court said that the distinction between conditions that define a federal program and those that reach outside it ‘is not always self-evident’ (at page 11, B), but held in this case that the Policy Requirement fell on the unconstitutional side of the line. The court said that the Leadership Act’s other funding condition, which prohibited Leadership Act funds from being used ‘to promote or advocate the legalisation or practice of prostitution or sex trafficking’ (§7631(e)), ensured that federal funds would not be used for prohibited purposes. The Policy Requirement went beyond this point. By demanding that funding recipients adopt and espouse, as their own, the government’s view on an issue of public concern, the Policy Requirement by its very nature affected ‘protected conduct outside the scope of the federally funded program’ (at page 12).

The US government case contended that if funding recipients could promote or condone prostitution using private funds, ‘it would undermine the government’s program and confuse its message opposing prostitution’. But the court said that the Policy Requirement went beyond preventing recipients from using private funds in a way that would undermine the federal program. It required them to pledge allegiance to the government’s policy of eradicating prostitution, and that condition on funding violated the First Amendment (at page 12):

A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient.

The government case suggested that its guidelines to use of funds received under the Leadership Act alleviated any unconstitutional burden on the respondents’ First Amendment rights by allowing them to either: (1) accept Leadership Act funding and comply with the Policy Requirement, but establish affiliates to communicate contrary views on prostitution; or (2) decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose was to receive and administer Leadership Act funds, thereby ‘cabin[ing] the effects’ of the Policy Requirement within the scope of the federal program. The court said that neither approach was sufficient (at page 13):

Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the recipient to express its beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy. The guidelines themselves make that clear…. The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained.

The case may be viewed at: http://www.supremecourt.gov/opinions/12pdf/12-10_21p3.pdf

Implications of this case

US nonprofits using federal funds to deal with HIV/AIDS in overseas countries will not be required to comply with the condition on funding that no funds may be used by an organisation ‘that does not
have a policy explicitly opposing prostitution’ (§7631(f) of the Leadership Act). This decision followed a long line of cases in the United States that held that ‘no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein’ (at page 14, quoting Justice Jackson in Barnette, 319 US, at 642).

2.10.4 STOWE V THE CHARITY COMMISSION FOR ENGLAND AND WALES (FIRST TIER TRIBUNAL (CHARITY), GENERAL REGULATORY CHAMBER, MCKENNA J, 17 JUNE 2013)

The applicant appealed to the Charity Tribunal (the Tribunal) about the West Deeping Educational Foundation (the charity). On 22 April 2013, he had emailed the Charity Commission for England and Wales (the Commission), attaching a 150 page folder of material on which he based his request for the Commission to inquire into the charity and its trustees. On 23 April 2013, the Commission replied that it was ‘aware of issues associated with this charity, and we are working with the trustees to find an appropriate solution’. The applicant was dissatisfied with the Commission’s response and asked the Tribunal to review it. His ultimate aim was the removal of the charity’s trustees. The question before the Tribunal was one of jurisdiction. The Tribunal is a creature of statute. A right of appeal to the Tribunal can only arise if the issue concerns one of the matters listed in column 1 of Schedule 6 of the Charities Act 2011 (the Act). The parties were invited to make submissions on whether the matter was one within column 1 of Schedule 6 of the Act.

The Commission submitted that the matter was outside the Tribunal’s jurisdiction. One of the matters listed in column 1 of Schedule 6 was an appeal against the removal of a trustee of a charity, but there was no basis for an appeal against a decision not to remove a trustee. The applicant made no submissions as such, but reiterated his assertions concerning the charity and the Commission’s failure to exercise its statutory functions and obligations in the conduct of the case.

The Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009 provide at rule 8(2) that:

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
   (a) does not have jurisdiction in relation to the proceedings or that part of them;

The Tribunal ruled that the Commission’s emailed response to the applicant’s email and dossier of material constituted a decision not to remove the trustees of the charity. This fell outside the matters listed in column 1 of Schedule 6, and so was outside the Tribunal’s jurisdiction. Nor did the Tribunal have jurisdiction to review the applicant’s complaint to the Commission, to direct the Commission to take action, to direct the Commission to review the decision at a senior level, or to give an opinion as to whether the Commission had followed its own complaint procedures. Therefore, the application was dismissed.

The case may be viewed at: http://www.charity.tribunals.gov.uk/documents/decisions/ian-stowe-decision-17June2013.pdf

Implications of this case

The charity in this case is an exempt educational charity. It had operated a Church of England school in the village of West Deeping, Lincolnshire, from 1899 to 1971. The Commission has been in discussion with the charity and local residents since 2012, after the Commission refused permission to the charity to gift one of its buildings to the residents of the village for use as a village hall. The case did not deal with the reasons why the applicant wanted the trustees of the charity removed. However, the
Commission stated outside the Tribunal that it would only deal with complaints about trustees in the most serious of cases.

2.10.5 FISH & FISH LTD V SEA SHEPHERD UK AND ORS [2013] EWCA CIV 544
(ENGLAND AND WALES COURT OF APPEAL, MUMMERY, MCCOMBE, BEATSON LLJ, 16 MAY 2013)

This appeal dealt with the issue of whether a charity, Sea Shepherd UK (SSUK), was liable as a joint tortfeasor (wrongdoer) in a situation where the property of the appellant was damaged in an action which was designed to stop what the respondent regarded as illegal fishing of blue fin tuna.

SSUK is a company limited by guarantee, and a registered charity. It was the first defendant in the proceedings at first instance. The second and third defendants (both served outside the jurisdiction) were the Sea Shepherd Conservation Society (SSCS) and Paul Watson, the founder of SSCS, and a director of SSUK. The appellant operates a fish farm off the coast of Malta which is authorised by the International Conference for the Conservation of Atlantic Tuna (ICCAT). ICCAT and European Council Regulation (EC) No. 302/2009 regulate the fishing of Atlantic blue fin tuna. Fishing is only permitted during a limited period each year and a quota system restricts catches. The appellant was not operating outside any official guidelines.

On 17 June 2010 two of the appellant’s vessels were towing cages containing live blue fin tuna from Libya to its fish farm, when, as part of ‘Operation Blue Rage’, a campaign by SSCS, one of them was rammed by another vessel, the ‘Steve Irwin’. A cage was damaged and some 33 tonnes of the total catch of 64 tonnes of fish were released into the sea by divers from the ‘Steve Irwin’. The appellant claimed €760,148 in damages for trespass to and/or conversion of its property. SSUK is the registered owner of the ‘Steve Irwin’, which it purchased in 2006 with funds provided by SSCS. The ship is registered in The Netherlands.

SSCS is a conservation charity based in the United States of America. It was founded in 1977 following a split from Greenpeace. It is an Oregon corporation, and is now based in Washington State. In 2010, it launched ‘Operation Blue Rage’, a campaign aimed at preventing fishing of Atlantic blue fin tuna contrary to the ICCAT’s Regulations and Council Regulation (EC) No. 302/2009. A posting on SSCS’s website dated 23 January 2010 stated that ‘the objective will be to intercept and oppose the illegal operations of blue fin tuna poachers’ and that ‘Sea Shepherd intends to confront the poachers and will not back down to threats and violence from the fishermen’. Watson is the founder and organisational head of SSCS. He is a director, but not an employee, of SSUK. On 17 June 2010, Watson was the Master of the ‘Steve Irwin’.

Were the Sea Shepherd parties all joint tortfeasors? Was there a common design underlying their actions? The judge at first instance said no. The judge rejected the appellant’s case that Watson was the controlling mind behind all the Sea Shepherd entities and acted on behalf of them all. The judge accepted the evidence of the witnesses called on behalf of SSUK that the international organisation is SSCS, to which the national charities, such as SSUK provide support. He stated (at [30] of the original judgement):

...while it is correct that there is a close connection between the various Sea Shepherd entities worldwide, the different entities are separate legal bodies and the operational reality is that SSCS is the global organisation which utilises the resources of other Sea Shepherd entities when it is convenient.
The judge also held that although the ‘Steve Irwin’ was legally owned by SSUK, it was, at all material times, beneficially owned by SSCS. The ship was being used in an SSCS campaign, for SSCS purposes. In addition, Watson’s title as a director of SSUK was merely honorary, and had no real substance. On the evidence, SSUK did not facilitate the campaign, although the facts showed that it made the ship available to SSCS, and was involved in fundraising and other activities attached to the campaign. However, it was held that SSUK was not part of the tort.

On appeal, only the common design issue was in contention. The requirement of a common design in tort law is one that provides protection against indeterminate and uncertain liability. The current legal position on common design in tort is that there are two requirements:

1. there must be a common design that the acts relied on as tortious should be done by one or more of the alleged joint tortfeasors, who are the actual perpetrator or perpetrators;
2. the other alleged joint tortfeasor, the alleged participator, itself did acts in furtherance of the common design. There is, however, no need for the participator to commit an independent tort.

Thus, once a common design has been established, the question becomes whether the defendant who is said to be a joint tortfeasor has done something that has furthered that common design. In modern terms, providing that the act furthering an undoubted common design is more than minimal, it will be sufficient for determining joint liability. There is no longer any need for the act to have been an essential part of, or of real significance to the commission of the tort.

Was the trial judge correct to say that there was no common design in this case? Did the judge err in finding that SSUK’s participation was ‘of minimal importance and played no effective part in the commission of the tort’? Beatson LJ (in the leading judgement of the Court of Appeal) said on this point (at [71]):

I have concluded that, in the context of a common purpose which included action to free blue fin tuna from nets and cages by intercepting the fishermen, even leaving aside acts by SSUK which were done for SSCS but not specifically for the ‘Blue Rage’ campaign and what was said during the court proceedings in Seattle, the action of SSUK showed that it had ‘joined in’ the common design by doing acts in furtherance of it. It does not follow from this that the volunteers who drove to France with parts for the vessel, or who supported the campaign by donating small amounts of money, would become joint tortfeasors. It would be necessary to show, in respect of any of them, that their actions amounted to more than facilitation of the tort. Absent evidence about them showing that they made the wrongful act their own, such as the evidence about SSUK, for instance in the Trustees’ Report, their cases appear analogous to those of the seller of goods who knows that they will be imported into the United Kingdom and sold in breach of a patent or copyright....

Therefore, the requirements for a common design were met:

1. SSCS and Watson were the perpetrators of the plan of action; and
2. SSUK was the participator who assisted the plan to come to fruition

McCombe and Mummery LLJ agreed on the common design point, with McCombe going further and saying that the appeal should have been allowed on the other point in contention, that of capacity (at [75]–[76]):
In my view, it is difficult to see how Mr Watson could discard his position as a director of SSUK and say he was merely acting, on the occasion in question, only for SSCS. He was a director of SSUK, which was not merely a ‘shell company’. It had its own independent activities within the global Sea Shepherd organisation. With respect to the judge, I do not know what an ‘honorary’ director of a company is. Either he was a director of SSUK or he was not. SSUK remained the legal owner of the vessel and, while it may not have been (on the judge’s finding) in possession or control of the vessel or its beneficial owner, it retained that status and had left the vessel in the control of SSCS for the purposes of, what this court finds, was the ‘common design’ of the two entities. Mr Watson’s name appears as a trustee and director in SSUK’s report to June 2010 in which SSUK’s public benefit role could not have been more clearly stated. That report, as Beatson LJ notes, was issued with the company’s authority. When the vessel and its crew, including Mr Watson, embarked upon the attack about which complaint is made, he was still a director of that company – a status which he could not shake off – carrying out one of SSUK’s express corporate objects. Was it open for him to choose, from minute to minute, the capacity in which he was acting? Both SSCS and SSUK wanted such attacks to occur, where required in furtherance of their common objectives. Mr Watson, it is accepted, was the overall directing mind of the operation and, in my judgment, might well be said to have been acting with the status in each organisation which, in fact, he held.

Therefore, although the actual perpetrators of the tort were SSCS and Watson, SSUK was held to have participated by doing actual acts which furthered the common design. The appeal was allowed, and all three respondents were held to be joint tortfeasors, and jointly liable in damages yet to be determined.

The case may be viewed at: http://www.bailii.org/ew/cases/EWCA/Civ/2013/544.html

Implications of this case

The Court of Appeal rejected the findings of the trial judge on the issue of a common design involving all the Sea Shepherd parties in a joint tort. The Court of Appeal held that they were all involved. However, joint responsibility in the law of tort is more restricted than it is in the criminal law. The law of tort does not recognise true accessory liability, only joint liability where the person who can be termed the actual perpetrator is the agent of another person. Nevertheless, a joint tortfeasor is fully liable for the claimant’s loss. This could represent a substantial liability for a charity found to be a joint tortfeasor, even as a mere ‘participant’ (which SSUK was found to be in this case).

(A case regarding the DGR status of Sea Shepherd Australia is noted above: see Sea Shepherd Australia Ltd v Commissioner of Taxation at 2.1.8.)

2.10.6 EVERYTHING KOSHER INC V JOSEPH AND WOLF LEBOVIC JEWISH COMMUNITY CENTRE AND ANOR, 2013 ONSC 2057 (SUPERIOR COURT OF ONTARIO, MORGAN J, 9 APRIL 2013)

This Canadian case dealt with the nature of a putative contract made by the plaintiff with two charities. As His Honour said, the central question was: ‘Can a Request for Proposals that specifically states that it does not form a binding contract nevertheless form a binding contract?’

The plaintiff is a kosher catering service. The two defendant charities were the Joseph and Wolf Lebovic Jewish Community Centre Campus (the Campus), a registered charity, and the Anne and Max Tanenbaum Community Hebrew Academy of Toronto (CHAT), a private Jewish high school and registered charity. CHAT is a part of the larger Campus. The parties to the alleged contract had been negotiating for some years for the provision of catering services to the Campus. In June 2006, the
plaintiff responded to a Request for Proposals (the 2006 RFP) in which the Campus sought proposals (tenders) for the provision of food services and the lease of a kitchen at a new community centre being developed on a large site north of Toronto. At the time the 2006 RFP was issued, the Campus was still in the design phase, and construction on it had not yet begun. Therefore, although the 2006 RFP contained detailed information on the food services it sought to engage, numerous specifics regarding the service contract and lease of the kitchen were noted as being subject to design changes. These included the length of term, the size, location and pricing of the kitchen premises.

The 2006 RFP had various clauses in it which indicated that it did not form an offer for a valid contract, including the following:

....The submission and acceptance of any proposal does not obligate [the Campus] to enter into a binding legal contract with the successful proponent, nor does acceptance of the proposal imply that a contract has been entered into with [the Campus]. The implementation of the project by the successful proponent is dependent upon entering into a separate legal contract with [the Campus], to be negotiated and signed prior to implementation of the project.

The plaintiff submitted a proposal that was ‘favoured’ by the defendants. The parties entered into a 90 day negotiation period, but no agreement emerged. After the 90 day period, the parties continued to negotiate, exchanging draft contracts until October 2007. No contract was formed. However, the parties continued to communicate with each other, and the plaintiff commenced providing food services for CHAT, which had by then established itself on the Campus site. CHAT was not a party to the 2006 RFP, or to the subsequent negotiations or draft contracts. It engaged the plaintiff to provide food services for the school year 2007–08, renewable yearly. CHAT stated that the provision of food services was on the basis of a Memorandum of Understanding (MOU) which the plaintiff said it had never signed or agreed to. The plaintiff had expended $68,000 on kitchen equipment for the CHAT service, which it ran at a loss. Nevertheless, the plaintiff continued to provide the service to CHAT until the end of the 2011–12 school year, each time on a yearly renewal basis.

The Campus issued a second RFP in June 2011 (the 2011 RFP). There were significant differences in the requirements of the 2011 RFP, and the plaintiff did not submit a proposal in response to it. The Campus contract was let to another provider. His Honour made the following points:

- The 2006 RFP made it clear that it was not an offer which would lead to a firm acceptance – it was a request for proposals and nothing more (at [29]);
- The 2006 RFP did contain an obligation to negotiate for 90 days, but this did not make it binding (at [30]);
- The exchange of draft contracts after the 90 day period did not result in any binding outcome (at [31]);
- There had been no ‘meeting of the minds’ in relation to the alleged contract – the plaintiff had not responded to the 2011 RFP which indicated to others that there was no contract already in existence (at [36]).

On the issue of alleged bad faith on the part of the defendants, His Honour said that the plaintiff had misapplied the notion of good faith in contracting. His Honour said (at [42]–[44]):

In the present case, there is no serious allegation that there was a material misrepresentation by the Campus, and there are no facts in the record that would support such an allegation. What the Plaintiff’s complaint really amounts to is a contention that the Campus and CHAT, as
Charitable organizations and as community institutions, should have approached the negotiations with a kinder, gentler touch.... Charitable organizations must comply with all legal norms in their business dealings, but they need not go above and beyond the standards applicable to everyone else. For registered charities, as for all other persons operating within the legal system, ‘there is no duty to be nice, however desirable that may be as a matter of good practice.’ *Pratt v The Scottish Ministers*, [2013] CSIH 17, at para 56 (Scott Ct Sess).... The Plaintiff may have some basis in morality for its negative view of the Defendants’ conduct – I leave that to much higher authority – but it has no basis in law. It is trite to say that law and morality do not directly overlap in this way.

Therefore, although His Honour was critical of the defendants’ conduct, referring to it as ‘playing a strictly legal form of hard ball’ (at [45]) by capitalising on the plaintiff’s wish to conclude the larger contract with them, there had been in fact no contract formed between the parties. The action was dismissed with costs.

The case may be viewed at: [http://www.canlii.org/en/on/onsc/doc/2013/2013onsc2057/2013onsc2057.html](http://www.canlii.org/en/on/onsc/doc/2013/2013onsc2057/2013onsc2057.html)

**Implications of this case**

A party may not misrepresent material matters to the opposite party during the course of negotiating an agreement. However, His Honour noted recent case law in the UK relating to the issue of bad faith raised in this case. The English Court of Appeal has recently confirmed that there is no general duty in contract law, such as that suggested by the plaintiff in this case, that would compel a party engaged in negotiations over a proposed agreement to act in anything other than its own self-interest: see *Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 at [92]–[95]. In this respect, charities owe no higher duty than any entity to an opposite party in contractual negotiations: see *Pratt v The Scottish Ministers* [2013] CSIH 17 at [56].

**2.10.7 ASTONBROOK HOUSING ASSOCIATION LTD (INVESTIGATION REPORT BY THE CHARITY COMMISSION FOR ENGLAND AND WALES, 28 MARCH 2013)**

The Astonbrook Housing Association Ltd (the charity) was a registered charity in England which provided housing and support for refugees and asylum seekers in the West Midlands, Wales and Southwest England. It operated by obtaining contracts to provide shelter and assistance to its clients, from government authorities (the Home Office, Border and Immigration Agency, Birmingham City Council and Bristol City Council). Collectively, the contracts were worth over £16 million a year.

The charity was formed as a company and governed by a Memorandum and Articles of Association. It owned five residential properties, had six leased offices, situated in Bristol, Wales, Birmingham and the South West of England, and employed over 120 people. It provided accommodation and related services to some 3,500 asylum seekers in over 1,000 rented properties. In 2007, other agencies notified the Charity Commission for England and Wales (the Commission) of concerns relating to the operation and management of the charity. Issues of concern included substantial sums having been paid to staff without properly supported receipts, inappropriate delegation to the charity’s CEO, and substantial funds being transferred to bodies connected with trustees or employees of the charity. The Commission opened an inquiry, froze the charity’s bank accounts and appointed an interim manager who took complete control of the management of the charity. The charity was subsequently placed into liquidation in 2009. The liquidation continues to date.
The Commission’s inquiry examined several issues, including:

- the extent of risk faced by the charity’s vulnerable beneficiaries;
- whether the charity had adequate management controls and financial systems in place;
- whether the trustees had received inappropriate private benefit; and
- whether there were unmanaged conflicts of interests.

The inquiry report was published on 28 March 2013. The inquiry found serious and systematic mismanagement and misconduct by the trustees. The trustees repeatedly failed to put in place and monitor proper management systems and financial controls, manage substantial and detrimental conflicts of interest, or to manage the charity’s services properly. In addition, the interim manager appointed by the Commission found evidence of serious financial abuse within the charity, including evidence of:

- the use of cheques, raised in payment of fictitious invoices, made out to trustees and staff members of the charity, as well as to their extended family members;
- the creation of ghost employees, some of whom were members of the CEO’s family, listed on the charity’s payroll even though they had never worked for the charity;
- trustees and senior staff using charity funds to buy residential properties which were subsequently used as personal housing or rented back to the charity;
- misuse of petty cash, including taking amounts of £10,000 at a time.

The substantial fraud at the charity, involving some of the charity’s staff and trustees, was proven in subsequent criminal trials. Allegations of potential serious fraud were reported to the police, whose investigation was conducted alongside the Commission’s inquiry. The criminal proceedings concluded in September 2012, when six people, including the CEO, were convicted of fraud and money laundering offences. The total loss to the charity appears to have been around £1.8 million, of which only £252,000 had been recovered to date.

The report may be viewed at:

http://www.charitycommission.gov.uk/Our_regulatory_activity/Compliance_reports/inquiry_reports/astonbrook_housing_association.aspx

Implications of this report

This was a serious case of fraud committed against a charity. The charity was registered in 2002 but between 2002 and 2007 when the inquiry began, it had submitted no financial or other returns to the Commission. The inquiry only began when other agencies in the sector reported the allegations of financial abuse and fraud to the Commission. The inquiry found that the charity was being run by its CEO and not by its trustees, as is required in the UK. In English charity law, trustees must take ultimate responsibility for directing the affairs of a charity, and ensuring that it is solvent, well-run, and delivering the charitable outcomes for the benefit of the public for which it has been set up. They must act with integrity, and avoid any personal conflicts of interest or misuse of charity funds or assets. (The same applies to governing bodies of nonprofit organisations in Australia.) None of these was present in this case.

2.10.8 AUSTRALIAN VACCINATION NETWORK INC, INTERIM ORDER (ADMINISTRATIVE DECISIONS TRIBUNAL OF NEW SOUTH WALES, O’CONNOR J, 22 MARCH 2013)

The Australian Vaccination Network (AVN) is an incorporated association formed in northern New South Wales in 1994 to offer information and advice sceptical of the benefits of vaccination. Its main vehicle
for dissemination of information is a website, with associated blogs and posts to Facebook and Twitter. As part of continuing litigation against the AVN, NSW Fair Trading was successful in obtaining an interim order placing conditions on the AVN until the substantive case dealing with an order to change the organisation’s name is heard on 13 and 14 June 2013.

In this proceeding on 22 March 2013, the Administrative Decisions Tribunal of New South Wales (the Tribunal) ordered that the AVN must place a consumer warning on its web page (www.avn.org) and Facebook page which states:

Consumer warning: NSW Fair Trading has directed the AVN to change its name because it regards the name to be misleading. The AVN is challenging this direction and the challenge is currently before the NSW Administrative Decisions Tribunal.

Previous litigation in February 2012 (see Australian Vaccination Network Inc v Health Care Complaints Commission [2012] NSWSC 110) resulted in a finding that two complaints made against the AVN to the Health Care Complaints Commission (HCCC), alleging misleading and deceptive conduct surrounding advice given about vaccination, were not validly made. In that case, the HCCC, after assessing the two complaints, decided to investigate them. The investigation involved a review of the content of the plaintiff’s website. After it had completed its investigation, the HCCC released a final report on 7 July 2010 (the Investigation Report) in which it made a recommendation that the plaintiff publish a disclaimer on its website. When the plaintiff did not do so, the HCCC issued a public warning in respect of the plaintiff on 26 July 2010 pursuant to section 94A of the Health Care Complaints Act 1993 (Cth) (the Act). The public warning stated:

The AVN’s failure to include a notice on its website of the nature recommended by the Commission may result in members of the public making improperly informed decisions about whether or not to vaccinate, and therefore poses a risk to public health and safety.

The Investigation Report, its recommendation and the public warning were then relied upon by the Minister for Gaming and Racing (the minister administering the Charitable Fundraising Act 1991 (NSW)) to revoke the plaintiff’s fundraising capacity. This has since been reinstated.

It was important to the outcome of the case that the ‘complaints’ were within the meaning of the Act. Section 7 of the Act provides:

(1) A complaint may be made under this Act concerning:
(a) the professional conduct of a health practitioner (including any alleged breach by the health practitioner of Division 3 of Part 2A of the Public Health Act 1991 or of a code of conduct prescribed under section 10AM of that Act), or
(b) a health service which affects the clinical management or care of an individual client.

(2) A complaint may be made against a health service provider.

(3) A complaint may be made against a health service provider even though, at the time the complaint is made, the health service provider is not qualified or entitled to provide the health service concerned.

The AVN contended that the matters complained of were not within section 7(1)(b) or 7(2). Although it admitted that is was a health service provider, it did not offer clinical advice to individuals. The HCCC submitted that the information published on the AVN’s website had affected the decisions of individuals on whether to vaccinate themselves or their children against various diseases. His Honour accepted that the complaints concerned a health service provided by a health service provider. However, was there any causal connection between the advice given and any individual? His Honour held that section 7(2)
Under section 7(1)(b), the evidence was not sufficient to establish any causal link between the website information and any individual. Therefore, there was no basis for the actions of the HCCC, and they were ultra vires (beyond its power). The AVN was thus successful in its challenge to the complaints made to the HCCC. This has resulted in two further actions:

1. In December 2012, NSW Fair Trading ordered the AVN to change its name or be deregistered as an incorporated association. It was alleged that the AVN’s name was misleading to the public. That direction is the subject of the substantive case underlying this decision, which is yet to be heard in the Tribunal.

2. Legislation is currently before the NSW parliament to give the HCCC the required power to investigate organisations which could pose a threat to public health: see the Health Legislation Amendment Bill 2013 which will amend the *Health Care Complaints Act 1993* (NSW). This legislation would overturn the case decision from 2012.

Another recent case involving the AVN was the *Australian Vaccination Network Inc v Department of Finance and Services* [2013] NSWADT 60. That case dealt with the release into the public domain of documents relating to the annual general meetings and minutes of the AVN. The AVN opposed the release, which was made under the *Government Information (Public Access) Act 2009* (NSW) (GIPA). Montgomery J upheld the release on the basis that section 5 of GIPA provides that there is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure.

The AVN’s opposition to the release was based on alleged harassment and threats made towards its officers, particularly by a group calling itself ‘Stop the AVN’: see at www.stopavn.com His Honour held that disclosure of the information in question could not expose the AVN officers to any greater risk than already existed. Nor could it reasonably be expected to prejudice any person’s legitimate business, commercial, professional or financial interests. Therefore, the decision to release was affirmed.

This release of information case may be viewed at:


The 2012 case referred to may be viewed at:


2.10.9 ST JOSEPH ABBEY V CASTILLE (UNITED STATES COURT OF APPEAL, 5TH CIRCUIT, 20 MARCH 2013)

St Joseph Abbey (the Abbey) is an abbey of the Benedictine Order of the Catholic Church in Louisiana, USA. The Abbey challenged rules granting funeral homes in Louisiana an exclusive right to sell caskets as unconstitutional. The Abbey was successful in the District Court of Louisiana, which found that the rules in question denied equal protection and due process of law. The case then moved to the US Court of Appeal. The case arose because of the monks’ traditional use of burial caskets (coffins) made from their own timber in their own workshop. The caskets attained a measure of popularity after being used for the burial of two bishops, and being given publicity in the media. The caskets were sold for either $1500 (monastic model) or $2000 (traditional model), an amount considerably lower than the amounts charged for caskets by registered funeral homes in Louisiana. Hurricane Katrina caused the destruction of the Abbey’s timber stocks. However, the Abbey continued to sell caskets, but in doing so ran into a plethora of regulatory burdens. These included:

- intrastate sales of caskets to the public may be made only by a state-licensed funeral director and only at a state-licensed funeral home;
• a casket retailer must become a licensed funeral establishment. This requires building a ‘layout parlor’ for thirty people, a display room for six caskets, an arrangement room, and embalming facilities;
• the establishment must employ a full-time funeral director. A funeral director must have a high school diploma or GED, pass thirty credit hours at an accredited college, and complete a one-time apprenticeship;
• The apprenticeship must consist of full-time employment and be the apprentice’s ‘principal occupation’;
• A funeral director must also pass a test administered by the International Conference of Funeral Examining Boards. The exam does not test Louisiana law or burial practices;
• In Louisiana, funeral directors are the only individuals authorised by law to provide funeral services.

The District Court found the State’s scheme to be the last of its kind in the nation. The State Board of Embalmers and Funeral Directors (the State Board) had never succeeded in any enforcement action against a third party seller prior to its effort to halt the Abbey’s consumer sales. The Court of Appeal identified that there were in fact no rules relating to caskets in Louisiana. The state did not regulate the use of a casket, container, or other enclosure for the burial remains; had no requirements for the construction or design of caskets; and did not require that caskets be sealed. Individuals could construct their own caskets for funerals in Louisiana or purchase caskets from out-of-state suppliers via the internet. Indeed, there was no Louisiana law that even required a person to be buried in a casket.

The Court of Appeal then reviewed the Federal law regulating the funeral industry, referred to as the Funeral Rule. This Rule was developed by the Federal Trade Commission (FTC) in the early 1980s to overcome misleading and deceptive practices in the funeral industry in the US. One particular aspect of the Funeral Rule was that it was supposed to encourage competition in the industry. After the Funeral Rule forced funeral homes to disclose actual casket prices, the significant mark-ups charged by the funeral homes became apparent to the public, and a market for third-party casket sales emerged. Funeral directors responded to this growing competition by refusing to use third-party caskets unless consumers paid large ‘casket-handling’ fees. The FTC responded by amending the Funeral Rule to ban casket-handling fees.

In Louisiana, although the Funeral Rule applied, consumers were unable to buy third-party caskets within the state because of the state rules. Moreover, funeral homes charged large fees (around $3000–$4000) for advice on the funeral, including casket choice (this fee did not include the casket itself). This was a ‘non-declinable’ fee which was charged whether the casket was one from the funeral home, one from inter-state bought on the internet, or a home-made casket. In December 2007, the State Board banned the Abbey from selling its caskets. It then initiated a formal complaint against the Abbey which ultimately led to this appeal. In 2008 and 2010, the Abbey petitioned the legislature to change the law. Although two Bills to amend the law were drafted, it appears neither made it out of the committee stage. No member of the public had opposed the Bills.

The Court of Appeal reviewed the District Court’s decision, and agreed that it was doubtful that the State’s rules under review were constitutional. The State Board argued first on a consumer protection basis. In this respect, the Court of Appeal said (at IV B1):

Moreover, like the district court and consistent with its findings, we find it doubtful that the challenged law is rationally related to policing deceptive sales tactics. In declining to expand the Funeral Rule’s scope to cover third-party sellers of caskets and urns, the FTC found ‘there is
insufficient evidence that third-party sellers of funeral goods are engaged in widespread unfair or deceptive acts or practices.’ In fact, the Commission found the record ‘bereft of evidence indicating significant consumer injury caused by third-party sellers’ and recognized that third-party sellers do not have the same incentive as funeral home sellers to engage in deceptive sales tactics.

The State Board’s second ground was public health and safety. The Court of Appeal could find no rationality in this argument, given that Louisiana law did not even require a casket for burial. The Court said (at IV B2):

Rather, this purported rationale for the challenged law elides the realities of Louisiana’s regulation of caskets and burials and causes us to doubt its rationality. That Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets makes us doubt that a relationship exists between public health and safety and limiting intrastate sales of caskets to funeral establishments.

The real constitutional issue in the case was the importance of giving deference to state economic regulation. Historically, this has been something of a ‘sacred cow’ in the US. However, the Court of Appeal was not impressed with arguments on this point by the respondents (at V):

The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for naked transfers of wealth. We insist that Louisiana’s rules not be irrational – the outer-most limits of due process and equal protection – as Justice Harlan put it, the inquiry is whether ‘[the] measure bears a rational relation to a constitutionally permissible objective’.

The Court could see no valid rationale in the economic protection of a ‘pet industry’ in any state of the US. This was not a legitimate government purpose.

The Court of Appeal went on to consider the relevant state law. It found that the state law relating to the exact extent of the State Board’s authority to control the funeral industry was in need of review, saying (at V):

Resolution of the statutory uncertainty surrounding the State Board’s authority must come at the hand of the Louisiana Supreme Court, whose determination of state law is supreme. When constitutional avoidance requires interpretation of a state statute, federalism concerns mandate ‘that state courts provide the authoritative adjudication of questions of state law’ and thus ‘a federal court should await a definitive construction by a state court.’ Therefore, we conclude that this appeal presents a critical issue of Louisiana law which is appropriate for resolution by certification to the Supreme Court of Louisiana and, in the interest of federalism and constitutional avoidance, defer final decision in this matter to allow the Louisiana Supreme Court to rule on the statutory uncertainty.

Therefore, the Court of Appeal certified the case on its own motion for further consideration by the Supreme Court of Louisiana, under Rule 12 of the Rules of the Louisiana Supreme Court. The Court of Appeal did this in the interests of federalism, saying that (at V) ‘it is not within our province to here decide state law’. Thus, it was a matter for the Louisiana Supreme Court to reconsider the state law on the power of the State Board. The Court of Appeal remitted the following question to the Louisiana Supreme Court for decision:
Whether Louisiana law furnishes the Louisiana State Board of Embalmers and Funeral Directors with authority to regulate casket sales when made by a retailer who does not provide any other funeral services.

The case may be viewed at: http://caselaw.findlaw.com/us-5th-circuit/1614637.html

Implications of this case

This case outcome allows the monks to continue to sell their hand-made wooden caskets, despite state law. The constitutional issue of the untouchability of economic regulation by a state was unsuccessful for the respondents, as were their other arguments based on consumer protection and public health and safety. Moreover, the case remits to the state courts the question of necessary revision of state law on the issue.

2.10.10 ASSISTANT COMMISSIONER MICHAEL JAMES CONDON V POMPANO PTY LTD

[2013] HCA 7 (HIGH COURT OF AUSTRALIA, FRENCH CJ, HAYNE, CRENNAN, KEIFEL, BELL, GAGELER JJ, 14 MARCH 2013)

This was an appeal which dealt with the constitutionality of certain sections (sections 10, 63–66, 70, 71, 76–78, 80, 82, 106) of the Criminal Organisation Act 2009 (Qld) (the Act). The Act aims to deal with restriction of the activities of criminal organisations and their members and associates. It imposes upon the Supreme Court of Queensland requirements for closed hearings and the use of secret evidence known only to the judge and one of the parties to the action, that is, the government party which seeks to tender it. The main questions were concerned with the validity of the impugned sections, under Chapter III of the Constitution of Australia. These provisions concern the use of information designated as ‘criminal intelligence’, in proceedings under the Act, and the way in which the Supreme Court of Queensland is required to decide whether information falls into that category. The question going to validity was whether those provisions substantially impair the defining or essential characteristics of the Supreme Court of Queensland as a court. The questions before the High Court were:

(i) Is section 66 of the Criminal Organisation Act – by requiring the Court to hear an application that particular information is criminal intelligence, without notice of the application being given to the person or organisation to which the information relates – invalid on the ground that it infringes Chapter III of the Constitution?

(ii) Is section 70 of the Criminal Organisation Act – by requiring the Supreme Court to exclude all persons other than those listed in section 70(2) from the hearing of an application for a declaration that particular information is criminal intelligence – invalid on the ground that it infringes Chapter III of the Constitution?

(iii) Is section 78 of the Criminal Organisation Act – by requiring a closed hearing of any part of the hearing of the substantive application in which the court is to consider declared criminal intelligence – invalid on the ground that it infringes Chapter III of the Constitution?

(iv) Is section 76 of the Criminal Organisation Act – by providing that:
   • an informant who provides criminal intelligence to an agency may not be called or otherwise required to give evidence;
   • an originating application and supporting material need not include any identifying information about an informant; and
   • identifying information can not otherwise be required to be given to the court – invalid on the ground that it infringes Chapter III of the Constitution?

(v) Is section 10 of the Criminal Organisation Act – insofar as it requires the Court to have regard to information that is declared criminal intelligence which a respondent or a respondent’s legal
representative has not heard or received because of the effect of sections 66, 70, 76, 77, 78, 82 and 109 of the Criminal Organisation Act, and when read with sections 63(5), 64(2), 64(8), 65(4), 71(2) and 80(2) – invalid on the ground that it infringes Chapter III of the Constitution?

(vi) Is section 10(1)(c) of the Criminal Organisation Act invalid on the ground that it infringes Chapter III of the Constitution because of the nature of the judgment that it requires the Court to make?

(vii) Is section 9 of the Criminal Organisation Act, when read with section 8(5) and section 106, invalid on the ground that it infringes Chapter III of the Constitution?

(viii) Who should pay the costs of the special case?

In a unanimous judgement, questions (i) to (vii) were answered in the negative, with the costs of the case borne by the respondent.

Circumstances leading up to the case

On 1 June 2012, the Assistant Commissioner of the Queensland Police Service filed an application in the Supreme Court under section 8 of the Act seeking a declaration under section 10 of the Act that the Finks Motorcycle Club, Gold Coast Chapter, and Pompano Pty Ltd, said to be ‘part of’ that Chapter (together referred to as ‘the Organisation’), constituted a criminal organisation. A list of persons said to constitute the current members of the Gold Coast Chapter was set out in the application together with a list of former members and nominee members of the Chapter, and the office-bearers and shareholders of Pompano Pty Ltd. The application was required by section 8 of the Act to state the grounds on which the declaration was sought and information supporting those grounds. It was required to be accompanied by any affidavit the applicant intended to rely on at the hearing of the application (there were 135 affidavits). The grounds on which the declaration was sought were that:

1. The organisation consisted of a group of more than three people based inside Queensland;
2. The members associated for the purposes of engaging in or conspiring to engage in serious criminal activity as defined in sections 6 and 7 of the Act;
3. The organisation was an unacceptable risk to the safety, welfare and order of the community.

Information supporting the grounds of the application was set out at length, and consisted of:

1. a list of members, nominee members and former members of the Gold Coast Chapter, each of whom was said to have a criminal history in Queensland and/or other parts of Australia;
2. information, under a heading which read:

   The members associate for the purpose of engaging in or conspiring to engage in serious criminal activity and the Organisation is an unacceptable risk to the safety, welfare and order of the community.

That information consisted of a list of members of the Gold Coast Chapter with details of their criminal convictions. Those convictions were for offences said to have been committed singly or in combination with others. At paragraph 613 of the application, the following statement appeared:

Information supporting the grounds of this application is also contained in information which has been declared criminal intelligence.

Prior to the filing of the application on 1 June 2012, the applicant had applied ex parte to the Supreme Court, under section 63 of the Act, for a declaration, under section 72, that particular information was ‘criminal intelligence’ within the meaning of section 59 of the Act. As required by sections 66 and 70 of
the Act, the Supreme Court considered that application without notice to the respondents in a special closed hearing. The application was granted. On 26 October 2012, with the substantive case as to whether the respondents are a criminal organisation still pending in Queensland, the validity issue was listed for hearing by the High Court.

The issues as defined by the High Court

The following issues emerged from the questions in the Special Case (set out above):

1. The effects of the Act on the defining characteristics of the Supreme Court, insofar as it requires that an application for a declaration of criminal intelligence be heard ex parte in a closed court, the use of declared criminal intelligence in a closed court in substantive proceedings coupled with the exclusion of the respondent in that part of the proceedings, and the non-identification and non-compellability of informants providing such intelligence (questions (i) to (v)).

2. The nature of the function conferred on the Supreme Court in determining whether to make a criminal organisation declaration and whether that function is compatible with its institutional integrity (question (vi)).

3. The effect on procedural fairness of the limited time within which a respondent is required to file a reply to an application for a criminal organisation declaration (question (vii)).

These issues were exclusively constitutional in nature. The respondents invoked the general principle that a State legislature cannot confer upon a court of a State a function which impairs its institutional integrity and which is therefore incompatible with the role of that court as a repository of federal jurisdiction. The ‘institutional integrity’ of a court is said to be distorted if it no longer exhibits in some relevant aspect the defining characteristics which set a court apart from other decision-making bodies.

The defining characteristics of courts include, but are not limited to:

- the reality and appearance of decisional independence and impartiality;
- the application of procedural fairness;
- adherence as a general rule to the open court principle;
- the provision of reasons for courts’ decisions.

Were any of these defining characteristics altered by the Act? French CJ said on this point (at [68], [70]):

The defining or essential characteristics of courts are not attributes plucked from a platonic universe of ideal forms. They are used to describe limits, deriving from Ch III of the Constitution, upon the functions which legislatures may confer upon State courts and the commands to which they may subject them. Those limits are rooted in the text and structure of the Constitution informed by the common law, which carries with it historically developed concepts of courts and the judicial function. Historically evolved as they are and requiring application in the real world, the defining characteristics of courts are not and cannot be absolutes. Decisional independence operates within the framework of the rule of law and not outside it. Procedural fairness, manifested in the requirements that the court be and appear to be impartial and that parties be heard by the court, is defined by practical judgments about its content and application which may vary according to the circumstances. Both the open court principle and the hearing rule may be qualified by public interest considerations such as the protection of sensitive information and the identities of vulnerable witnesses, including informants in criminal matters....
The ordinary rule of open justice in the courtroom may give way to the need for confidentiality in order to avoid prejudice to the administration of justice in cases in which publicity would destroy the subject matter of the litigation.

French CJ held that the enquiry as to the nature of criminal intelligence set out in the Act did not change the Supreme Court of Queensland’s status as an independent and impartial tribunal. Nor did the closed ex parte hearings and the use of anonymous informants in the substantive application still before the Queensland court. The impugned sections did represent an incursion ‘on the open court principle and the normal protections of procedural fairness’, but they did not ‘so impair the essential or defining characteristics of the Supreme Court as a court as to be beyond the legislative power of the Queensland Parliament’ (at [89]).

Hayne, Crennan, Keifel and Bell JJ, in a joint judgement, said that the respondents had also raised two other issues treated as subsidiary to the main issues for determination. The first of these subsidiary issues was that the Act requires the Supreme Court to decide, in determining whether to declare an organisation to be a criminal organisation, whether that organisation is ‘an unacceptable risk to the safety, welfare or order of the community’. Their Honours asked whether that was a question suitable for judicial determination? The second subsidiary issue was that the Act gives a respondent to an application for a declaration that it is a criminal organisation little time to respond to that application. Their Honours asked whether that requires such a departure from judicial processes that it impairs the institutional integrity of the Supreme Court of Queensland? Their Honours said that ‘the rules of procedural fairness do not have immutably fixed content’ (at [156]). They quoted examples relating to cases involving trade secrets and children. Was there procedural unfairness in denying the respondents any opportunity to test the ‘criminal intelligence’ presented against them? Their Honours thought not, saying (at [163]–[165]):

If, as must always be the case, the Commissioner alleges that the organisation should be declared to be a criminal organisation because some or all of its members associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity, the Commissioner will have had to provide particulars of the activity upon which the Commissioner relies, of those who are alleged to have engaged in that activity and of whether those persons are alleged to be or to have been members of the organisation. For all practical purposes, demonstration of association for the purposes described would be possible only if persons alleged to have then been members of the organisation were alleged to have engaged in relevant acts or omissions constituting serious criminal activity before the application for declaration of the organisation was made. Thus the Commissioner must allege and prove not only the occurrence of past serious criminal activity by persons who then were members of the organisation but also that members of the organisation associate for one or more of the identified purposes relating to that activity. The criminal activity upon which the Commissioner relies could be demonstrated by proof of the previous prosecution and conviction of members for conduct constituting activity of the kind alleged. To the extent that it is, the respondent can dispute the conclusions which the Commissioner seeks to draw from those facts. (The respondent could also seek to dispute the fact that convictions were recorded but that possibility can be dismissed from consideration as unlikely to be practically relevant.) And to the extent that prior criminal activity is not established by proving the prior convictions of persons shown to have been members of the organisation at relevant times, the respondent, its members and its representatives would know that the case to be met is founded on assertions and allegations not yet made and established in a court.

Thus, there was no procedural unfairness. Their Honours added (at [167]):
Contrary to a proposition which ran throughout the respondents’ submissions in this case, noticing that the Supreme Court must take account of the fact that a respondent cannot controvert criminal intelligence does not seek to deny the allegation of legislative invalidity by asserting that the Supreme Court can be ‘relied on’ to remedy any constitutional infirmity or deficiency in the legislative scheme. Rather, it points to the fact that under the impugned provisions the Supreme Court retains its capacity to act fairly and impartially. Retention of the Court’s capacity to act fairly and impartially is critical to its continued institutional integrity.

Gageler J, in a separate judgement, agreed with French CJ that all the questions put to the High Court should be answered in the negative, but added some remarks of his own expressing some disquiet with the scheme of the Act (at [177]–[178]):

My view, in short, is that Ch III of the Constitution mandates the observance of procedural fairness as an immutable characteristic of a Supreme Court and of every other court in Australia. Procedural fairness has a variable content but admits of no exceptions. A court cannot be required by statute to adopt a procedure that is unfair. A procedure is unfair if it has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without affording that person a fair opportunity to respond to evidence on which that order might be made. The criminal intelligence provisions of the COA (the Act) have the potential to result – in some but not all cases – in the Supreme Court of Queensland making a declaration of a criminal organisation or a control order or other order without the organisation or individual affected being afforded a fair opportunity to respond to evidence on which the declaration or order might be made. The criminal intelligence provisions are not rendered compatible with the constitutional requirement for procedural fairness by the presence of the criminal organisation public interest monitor (‘the COPIM’), nor by the ability of the Supreme Court of Queensland to determine the weight to be given to declared criminal intelligence, nor by the width of the discretion allowed to the Supreme Court of Queensland in making a declaration of a criminal organisation or a control order or other order under the COA. The criminal intelligence provisions are saved from incompatibility with Ch III of the Constitution only by the capacity for the Supreme Court of Queensland to stay a substantive application in the exercise of inherent jurisdiction in a case where practical unfairness becomes manifest.

Therefore, Gageler J, while agreeing that there was no ultimate incompatibility of the Act with Chapter III of the Constitution, held that (at [212]):

The solution lies in the capacity of the Supreme Court of Queensland to stay a substantive application in the exercise of its inherent jurisdiction in any case in which practical unfairness to a respondent becomes manifest. The criminal intelligence provisions are saved from incompatibility with Ch III of the Constitution only by the preservation of that capacity.

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/HCA/2013/7.html

Implications of this case

This case dealt only with the constitutional issues set out in the Special Case to be answered viz. did the Criminal Organisation Act 2009 (Qld) render the Supreme Court of Queensland somehow less than it should be as an independent and impartial court? It did not deal with the substantive case before the Supreme Court of Queensland as to whether the Finks Motorcycle Club is a criminal organisation as defined by the Act. That is yet to be determined, and contains within it some aspects relating to the right of association in Australia.
This appeal related to a special condition imposed by a magistrate on an undertaking for release. When adjourning a proceeding and releasing a defendant on an undertaking, the magistrate had imposed a special condition requiring the defendant to make a payment to a charity. Mr Brittain, an Environmental Officer with the City of Melbourne, appealed on a question of law pursuant to section 272 of the Criminal Procedure Act 2009 (Vic), from the magistrate’s decision made on 30 August 2011. The question was whether any penalty ordered should properly have been paid to the City of Melbourne (the local authority).

The defendant, Mansour, is the director of Melbourne Chef (Aust) Pty Ltd, a processor and manufacturer of prepared/packaged meats. He was prosecuted for an offence under the Food Act 1984 (Vic), and pleaded guilty. The hearing was then adjourned under section 75 of the Sentencing Act 1991 (Vic) on an undertaking given to the court by the defendant to be of good behaviour. As a special condition of that undertaking, the defendant was required to pay the sum of $2,500 to St Vincent de Paul Society (a charity) for its food van service to the homeless. No conviction was recorded for Mr Mansour, although the company was convicted and fined $5,000. Neither the prosecutor nor the defendant suggested the charitable donation condition to the magistrate, but it was nevertheless agreed and subsequently paid. The two grounds of appeal were:

1. Does section 75 of the Sentencing Act 1991 (Vic) authorise the court, when adjourning the proceeding and releasing the offender, to impose a condition on the undertaking that an offender make a payment of $2,500 to St Vincent de Paul?; and
2. If the court is empowered to require a payment as a condition of such an undertaking, does section 57 of the Food Act 1984 (Vic) require that the payment be made to the prosecuting authority, in this case, the Melbourne City Council?

His Honour reviewed the relevant legislation. Section 3 of the Sentencing Act defines a ‘fine’ as:

the sum of money payable by an offender under an order of a court made on the offender being convicted or found guilty of an offence and includes costs but does not include money payable by way of restitution or compensation or any costs of or incidental to an application for restitution or compensation payable by an offender under an order of a court.

Section 3 of the Magistrates Court Act 1989 (Vic) states that a ‘fine’:

includes any penalties, forfeitures, sums of money and costs ordered to be paid by the person fined.

His Honour noted that section 5(1) of the Sentencing Act sets out the purposes for which sentences may be imposed, saying (at [15]):

Section 5(7) provides that a fine must not be imposed unless the court has been satisfied that the purpose for which the sentence has been imposed cannot be achieved by a dismissal, discharge, or adjournment. The Act distinguishes fines and adjournments as sentences. An order made, without recording a conviction, that the offender pay a fine is distinct to circumstances where an order is made, without recording a conviction, that the offender enter into an adjourned undertaking on conditions. This distinction, when it came into force under predecessor legislation, affected the range of sentencing dispositions available to magistrates.
seeking to avoid imposing consequences that followed on the fact of conviction, while still imposing a penalty.

His Honour also said that (at [19], [24]–[25]):

The term ‘special condition’ is not defined by the Act, but the term itself neither precludes, nor implicitly authorises, a financial penalty in the form of a condition that is an imposed obligation to pay money to a third party....

If the payment required to be made to St Vincent de Paul is, on the proper construction of the statute, a fine, then the penalty must be imposed in compliance with the relevant provisions of the Sentencing Act and the City of Melbourne municipal fund is entitled to the revenue from recovered fines. In most cases of release on adjournment without conviction on an undertaking, where the court requires a monetary payment to be made to a nominated charity or to the court fund as a special condition of the undertaking, the Consolidated Fund is deprived of the revenue. In a Food Act prosecution, the local council’s municipal fund sustains the loss of revenue. On the other hand, funds that are diverted from the Consolidated Fund or from a municipal fund are directed to charitable purposes by such conditions. If such payments, as fines, must be paid to the Consolidated Fund or a municipal fund, charitable beneficiaries are likely to sustain a loss of revenue.

The evidence was that substantial sums of money were involved, though no proper accounting had ever been made. His Honour said that (at [27]):

I suspect that many hundreds of thousands, possibly millions, of dollars are contributed annually to the court fund and charities by offenders released on adjournment without conviction. I believe dispositions of summary offences in this manner are a common practice of long standing. The court fund is distributed to not-for-profit organisations that provide charitable or community services for the benefit of Victorians in need or at a disadvantage within local communities. It is often the case that a charity expressly nominated by a magistrate to receive the payment provides relief from the disadvantages that flow from the offending conduct. As will become apparent, negative and possibly unintended consequences, for beneficiaries of the court fund and charities, may follow if the construction of the Sentencing Act contended for by Mr Brittain is correct.

However, His Honour said that this should not influence the court’s task which was to properly construe the applicable legislation. He said that he could not accept a submission that a special condition to make a payment to a charity would not be a fine, holding (at [44]):

A payment required by a special condition is a payment made ‘under an order of a court’ that is made on the offender being found guilty of an offence. The payment is not payable by way of restitution or compensation. Such a payment is, by definition, a fine. The fact that the offender has submitted to the obligation does not alter that characterisation.

The power to impose a special condition could only apply to restitution or compensation, and nothing else. The special condition that the offender pay an amount to the St Vincent de Paul Society was not directed at satisfying any of the purposes set out in section 70 of Part 3B of the Sentencing Act 1991. These purposes were:

a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised;
b) to take account of the trivial, technical or minor nature of the offence committed;
c) to allow for circumstances in which it is inappropriate to record a conviction;
d) to allow for circumstances in which it is inappropriate to inflict any punishment other than a nominal punishment;
e) to allow for the existence of other extenuating or exceptional circumstances that justify the court showing mercy to an offender

Thus, the payment to the St Vincent de Paul Society was in fact a fine, and as such must comply with the requirements of Part 3B of the *Sentencing Act*. His Honour held that (at [57]):

I am satisfied that the magistrate erred when he required Mr Mansour to make a payment to St Vincent de Paul as a condition of the undertaking because such a condition was beyond his powers and was not a sentence passed in accordance with Part 3BA Division 1 (Adjournment) or Part 3B (Fines) of the *Sentencing Act*. I will allow the appeal and declare that the *Sentencing Act 1991* (Vic) did not in this proceeding authorise the magistrate to impose on Mr Mansour a condition on his undertaking that he make a payment of $2,500 to St Vincent de Paul when adjourning the proceeding and releasing Mr Mansour.

Therefore, the payment to a specified charity was an inappropriate use of the magistrate’s powers, and the appeal by the City of Melbourne’s representative succeeded. The City of Melbourne did not seek costs, nor did it require the repayment of any money previously donated to the St Vincent De Paul Society in similar circumstances.


**Implications of this case**

This decision was unwelcome news for Victorian charities. The practice of requiring payments to charity in lieu of fines had been long established in Victorian local courts. As His Honour pointedly said (at [56]):

Having regard to the history and significance of the court fund and the support provided by local courts to their communities, it may be that the absence of power to impose on an offender a monetary payment obligation to a charity as a condition of release on adjournment to be of good behaviour is an unintended consequence of reforms to sentencing, but that is a matter for others.

This was His Honour’s way of saying that the ball was now in the parliament’s court. The Victorian parliament responded by amending the *Sentencing Act 1991* (Vic), via the Justice Legislation Amendment Bill 2013. The Bill amended sections 72 and 75 of the *Sentencing Act* to empower the court to set a condition on release requiring an offender to make a payment to a charity, and the definition of ‘fine’ was amended to make clear that ordering an offender to make a payment to a charity does not constitute a fine.

**2.10.12 HORESH V SEPHARDI ASSOCIATION OF VICTORIA (NO. 2) [2013] VSCA 15**

(COURT OF APPEAL OF VICTORIA, REDLICH, OSBORN JJA, CAVANOUGH AJA, 14 FEBRUARY 2013)

This case involved the naming of a building in a worship complex, and had been the subject of previous hearings. This hearing followed on from a judgement made in the Court of Appeal of Victoria on 13 December 2012: see *Horesh v Sephardi Association of Victoria* [2012] VSCA 308. At that time, a form of

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5 Thanks to Nathan MacDonald and colleagues at JusticeConnect for bringing this to our attention.
...a declaration that the inscribing and maintaining by the Sephardi Association of Victoria Inc (the Association) of the name ‘Lyndi and Rodney Adler Sephardi Centre’ over the front entrance to the building at 79 Hotham Street, East St Kilda amounts to a breach by the Association of the deed of agreement dated 9 November 1990 between the Association and Albert Sassoon Yehuda; (b) an order that as soon as practicable the Association remove the name ‘Lyndi and Rodney Adler Sephardi Centre’ presently appearing over the front entrance to the building at 79 Hotham Street, East St Kilda... (c) an order that there be liberty to apply within three months to a judge of the Trial Division...

The Association submitted that it found the order appropriate. The appellant agreed but sought a further order, as follows:

The Association shall forthwith—
(a) re-name the Extended Building ‘The Sassoon Yehuda Sephardi Centre’; and
(b) shall erect or affix outside at the front of the Extended Building, an appropriate sign duly visible to the public, of a suitable size and format to indicate such name to be the name of the Extended Building, in an appropriate position to be agreed by the parties, the lettering on such sign to be of the same font, colour, and depth of colour as the sign referring to the Adlers and be at least 10% larger in size.

The Association opposed the making of this further order. The Court agreed that it would be inappropriate, saying (at [10]–[12]):

The form of the additional order sought by the appellant assumes that the Association will, after removing the present inscription, put up another inscription or sign at the front of the building referring to the Adlers. We cannot make an order based on such an assumption. We do not know what arrangements the respondent has made, or might make, with the Adlers. In the end the Association might not put up any replacement inscription or any sign at all on the outside of the building or in front of it. To take that course would be within the legal rights of the Association, as the appellant has twice conceded previously. ... Many other things are possible. Without knowing precisely what the Association may do or propose by way of any new signage, we could not say whether an infringement of the appellant’s rights would necessarily be involved.

... We can do no more than give effect to what we understand to be the rights of the parties under the relevant contract, on its proper construction. We are not an arbitral body. We can give no further advance guidance to the parties than we have already given in our substantive judgment.

Further, ...[the] proposed form of additional order is out of line with our substantive judgment because it assumes that the appellant now has a right to have the extended building named ‘The Sassoon Yehuda Sephardi Centre’, as distinct from ‘The Sassoon Yehuda Synagogue’. No such right arises from the settlement deed itself. No case was put to the trial judge or to this Court alleging an agreement based on custom and practice arising subsequent to the execution of the deed.

The court was concerned that it should perhaps withdraw the liberty to apply which it had proposed in the original draft orders. After commenting that the case had already taken up ‘a great deal of court
time’, and that they needed to take into account the ‘position of other litigants waiting to be heard’, they withdrew the liberty to apply from the draft orders. The Court also considered costs in this hearing and concluded that the Association should pay 50% of the appellant’s costs of the appeal.


**Implications of this case**

This case involved substantial costs of which the Association was obliged to pay half, since both parties had been partially successful in the main appeal. The court was clearly impatient with the length of the litigation and so withdrew the part of the draft order which said that parties had ‘liberty to apply within three months to a judge of the Trial Division for any further orders necessary or desirable for the working out of the judgment of this Court’. This meant that the parties are no longer permitted to make a further application to a lower court regarding the order of the Court of Appeal – the matter should be complete and the parties must abide by the orders.

**2.10.13 LLOYDS TSB FOUNDATION FOR SCOTLAND (RESPONDENT) V LLOYDS BANKING GROUP PLC (APPELLANT) (SCOTLAND) [2013] UKSC 3 (SUPREME COURT OF THE UNITED KINGDOM, LORDS HOPE, MANCE, CLARKE, REED, CARNWATH, 23 JANUARY 2013)**

This case concerned the construction of a covenant in a Deed agreed and executed in 1997 between the appellant, then known as Lloyds TSB Group plc and now known as Lloyds Banking Group plc (Lloyds Bank), and the respondent, Lloyds TSB Foundation for Scotland (the Foundation). The 1997 Deed replaced an earlier Deed executed in 1986 and varied by agreement between the parties in 1993. The 1986 Deed was one of four entered into upon the flotation of the TSB Group plc (TSB) and intended to provide four charitable foundations with payments totalling 1% of the pre-tax profits of the TSB. Under Clause 2 of the 1997 Deed, Lloyds Bank covenanted to pay the Foundation the greater of ‘(a) an amount equal to one-third of 0.1946 per cent of the Pre-Tax Profits (after deducting Pre-Tax Losses)’ for the relevant Accounting Reference Periods and ‘(b) the sum of £38,920’. Clause 1 defined ‘Pre-Tax Profit’ and ‘Pre-Tax Loss’ as meaning:

...in relation to any Accounting Reference Period ... respectively the ‘group profit before taxation’ and the ‘group loss before taxation’ (as the case may be) shown in the Audited Accounts for such period adjusted to exclude therefrom any amounts attributable to minority interests and any profits or losses arising on the sale or termination of an operation, such adjustment to be determined by the Auditors on such basis as they shall consider reasonable, which determination shall be conclusive and binding on the parties hereto.

The words ‘and any profits or losses arising on the sale or termination of an operation’ were added to the 1986 Deed by the amendments mutually agreed in 1993, and were maintained in the replacement Deed mutually agreed and executed in February 1997. Clause 1 further defined ‘Audited Accounts’ as meaning, in relation to any Accounting Reference Period, ‘the audited accounts of the Company and its subsidiaries for that period’.

The Global Financial Crisis (GFC) resulted in a novel legal and accounting issue arising. In 2009, the Lloyds Bank Group’s audited accounts included in the consolidated income statement a figure for ‘gain on acquisition’ of over £11 billion, converting a loss of over £10 billion into a figure for profit before taxation of over £1 billion. This unrealised gain on acquisition related to the rescue of Halifax Bank of Scotland (HBOS) mounted by Lloyds Bank in 2008. In this appeal, Lloyds Bank maintained a position that the ‘gain on acquisition’ should not be taken into account for the purposes of the 1997 Deed when
ascertaining the group's profit or loss before taxation by reference to the audited accounts, while the Foundation contended that it was no more than one of many items making up a bottom line figure for pre-tax profit or loss, with the result that the group made for those purposes a profit of over £1 billion, rather than a loss of over £10 billion, before taking into account minority interests.

Mance LJ (with whom all the judges ultimately agreed) said that (at [22], [25]):

Here, the landscape, matrix and aim of the 1997 Deed as well as its predecessors could not be clearer. They were, when made, and could only have been, concerned with and aimed at realised profits or losses before the taxation which would fall on group companies....

The proper approach as a matter of construction is to identify and use the figures in the consolidated income statement which show the group profit or loss before taxation in the sense intended by the Deed. That means realised profit or loss before taxation, and it excludes a wholly novel element which was included in the income statement by a change which was neither foreseen nor foreseeable and which, had it been foreseen when the Deeds were executed, would not have been accepted as part of the computation of profit or loss. The unrealised ‘gain on acquisition’ thus falls out of account and the balance is the relevant group profit or (on the facts of this case) loss before taxation. In respect of the Accounting Reference Period to which the 2009 accounts relates, it follows that the Foundation receives only the minimum sum of £38,920, rather than the £1 billion which on their case results from the unrealised gain (after taking into account £135 million attributable to minority interests in the group).

Their Lordships had little time for the Foundation’s contentions (at [28]–[29]):

In contrast, the Foundation’s case involves striking irrationality. On the Foundation’s case, the Foundation is entitled to have the unrealised gains on acquisition of HBOS taken into account in looking for an appropriate figure for ‘group profit before taxation’ in the 2009 accounts... the unrealised gain was made on the acquisition of all of HBOS. It is logical therefore to examine the position which would arise if all or part of HBOS were sold a year or more later – a classic case of actual realisation of an asset. It is inconceivable that the parties could have intended the Foundation to derive from an unrealised gain a benefit it could not derive from a realised profit. Yet this is precisely what the Foundation’s case achieves. If HBOS was sold at a profit over and above the ‘fair price’ which led to the ‘gain on acquisition’ in the 2009 accounts, the Foundation would not be able to take advantage of that actual realised gain, but the exclusion in clause 3 of ‘any profits or losses arising on the sale or termination of an operation’ would mean that it could keep the advantage of the covenanted payment due, on its case, at the earlier stage of the unrealised ‘gain on acquisition’ of HBOS. Similarly, if the (probably much more likely) scenario arose of a disposal of all or part of HBOS at a price less than the ‘fair price’ which led to the gain on acquisition, the exclusion would mean that the Foundation would not have to bring into account any part of the realised loss which had now replaced all or part of the unrealised ‘gain on acquisition’ of HBOS. These incongruous consequences make to my mind completely untenable the Foundation’s case that the phrase ‘group profit before taxation’ must or can refer to a figure derived from an unrealised gain on acquisition.

When the Deed was made in 1997, the idea of including negative goodwill (an unrealised gain) in a profit and loss statement was unthinkable. The words of the Deed had to be read as by a ‘reasonable person’. Would such a person consider unrealised gains as profit? They would not. Therefore, the court found in favour of Lloyds Bank. An unrealised gain was not the same as a realised profit, and could not
be counted towards the Foundation’s payment for 2009. The court held that the relevant clause in the Deed should just be given its ordinary meaning. Although the bank claimed a ‘group profit before taxation’ of over £1 billion, which would have resulted in a payment to the Foundation of £3,543,333, the court held that the Foundation was only entitled to the minimum payment under the Deed, i.e. £38,920. This was because the group profit before taxation was totally unrealised, and therefore not a ‘real’ (realised) profit. The bank had in fact made a loss. The unrealised gain could not be distributed as dividends and was not taxable income.

The case may be viewed at: http://www.bailii.org/uk/cases/UKSC/2013/3.html

Implications of this case

This case arose because of the circumstances surrounding the serious bank collapses in the UK in 2008–09. The situation was ‘novel’, and ‘unthinkable’ in the context of the original drafting of the Deed in question. But the application of a ‘reasonable person’ test and an ‘ordinary meaning’ test resulted in the finding that ‘profit’ meant ‘realised profit’, and not an unrealised gain. If the unrealised gain led to realised profit at some future time, the Foundation would benefit from that profit at that time.
3.0 LEGISLATION

3.1 COMMONWEALTH

The relevant Acts and Regulations in the Commonwealth (federal) jurisdiction include:

- Corporations Act 2001
- Corporations (Aboriginal and Torres Strait Islander) Act 2006
- Charities Act 2013
- Charities (Consequential Amendments and Transitional Provisions) Act 2013
- Extension of Charitable Purpose Act 2004
- Income Tax Assessment Act 1997
- Australian Charities And Not-for-profits Commission Act 2012
- Not-for-profit Sector Freedom to Advocate Act 2013

In addition, many other federal laws apply to nonprofit organisations, such as those governing employment of staff, anti-discrimination, use of digital communication, sending funds overseas and being in receipt of government agency funding.

The main developments for 2013 were the passing of the Charities Act 2013 and related legislation, and the Not-for-profit Sector Freedom to Advocate Act 2013.

CHARITIES ACT 2013

The Charities Act 2013 commenced on 1 January 2014. The purpose of this Act is to provide a statutory definition of charity and charitable purpose in Australia. Until now, the definition of charity in Australia has been dependent on the common law and on the Statute of Charitable Uses 1601. The definition of charity is in section 5 of the Act. An entity is charitable if it is a charity. A charity is an entity:

(a) that is a not-for-profit entity; and
(b) all of the purposes of which are:
   (i) charitable purposes... that are for the public benefit...; or
   (ii) purposes that are incidental or ancillary to, and in furtherance or in aid of, purposes of the entity covered by subparagraph (i); and...
   (c) none of the purposes of which are disqualifying purposes...; and
   (d) that is not an individual, a political party or a government entity.

Under section 3(1), not-for-profit entity has the same meaning as in the Income Tax Assessment Act 1997 (Cth).

Purposes for the public benefit are dealt with in section 6. The purpose must be directed to a benefit which is available to members of the general public or a sufficient section of the general public: section 6(1)(b). Sufficiency is to be measured by the surrounding circumstances including the numerical size of the section of the general public involved: section 6(4).

The public benefit test in section 6(1)(b) does not apply to:

- Relief of persons in necessitous circumstances (who may number only one or a few): section 8;
• The special presumption of public benefit for indigenous groups (e.g. who may all be related by blood): section 9(1). These groups must be in receipt of an amount (cash or non-cash) under the provisions of the Native Title Act 1993 (Cth), or relating to traditional indigenous rights of ownership, occupation, use or enjoyment of land: section 9(2);

• Open and non-discriminatory self-help groups: section 10(1). These groups must:
  – have an open and nondiscriminatory membership; and
  – have the purpose of assisting individuals affected by a particular disadvantage or discrimination, or by a need that is not being met; and
  – be made up of, and controlled by, individuals who are affected by the disadvantage, discrimination or need; and
  – have all of the entity’s criteria for membership related to its purpose; and
  – have the entity’s membership open to any individual who satisfies the criteria;

• Closed and contemplative religious orders who offer prayerful interventions at the request of members of the general public: section 10(2).

Certain purposes are presumed to be for the public benefit: section 7. These are:

  a) the purpose of preventing and relieving sickness, disease or human suffering;
  b) the purpose of advancing education;
  c) the purpose of relieving the poverty, distress or disadvantage of individuals or families;
  d) the purpose of caring for and supporting:
     i.) the aged; or
     ii.) individuals with disabilities;
  e) the purpose of advancing religion.

Charitable purposes are defined in section 12. The purposes in this section also embrace those in section 7 (see note to section 7). The purposes, which are further elaborated upon in sections 14-17, are:

  a) advancing health;
  b) advancing education;
  c) advancing social or public welfare;
  d) advancing religion;
  e) advancing culture;
  f) promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia;
  g) promoting or protecting human rights;
  h) advancing the security or safety of Australia or the Australian public;
  i) preventing or relieving the suffering of animals;
  j) advancing the natural environment;
  k) any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j);
  l) promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:
     i.) in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or
ii.) in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.

These purposes can be directed to something in Australia or overseas: section 12(3).

In the case of a purpose that was a charitable purpose before the commencement of the Charities Act 2013 and to which the paragraphs of this definition do not apply, these are also charitable under Schedule 2, item 7 of the Charities (Consequential Amendments and Transitional Provisions) Act 2013 (Cth). Schedule 2 also commenced on 1 January 2014.

A disqualifying purpose is dealt with in section 11. Such a purpose is:

- a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or
- b) the purpose of promoting or opposing a political party or a candidate for political office.

In relation to paragraph (a), public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security. However, activities are not contrary to public policy merely because they are contrary to government policy. Paragraph (b) does not apply to the purpose of distributing information or advancing debate about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies).

NOT-FOR-PROFIT SECTOR FREEDOM TO ADVOCATE ACT 2013

This Act, assented to on 13 June 2013, prohibits government agreements with nonprofits from containing any prevention or restriction on commentary about government policy, law or practice. It applies to all entities that are entitled to be registered under the Australian Charities and Not-for-profits Commission Act 2012 (Cth) or a nonprofit body (within the meaning of the Electronic Transactions Act 1999 (Cth)). Prohibited content (defined in section 5) is any measure of prevention or restriction in a government agreement with a nonprofit which applies to advocacy (supporting or opposing) regarding government policy, law or practice which is not confidential information or private information (as defined in the Privacy Act 1988 (Cth)). The latter matters can be restricted.

NATIONAL DISABILITY INSURANCE SCHEME ACT 2013

The National Disability Insurance Scheme Act 2013 was assented to on 28 March 2013. Minor amendments were made on 28 May 2013. The NDIS Act creates the framework for a national scheme, including eligibility criteria, age requirements, and what constitutes reasonable and necessary support. It establishes the NDIS Launch Transition Agency in section 117 as an independent body, working with people to identify their goals and aspirations, and providing them with the support they need to help them reach their full potential. This Agency is to work with service providers and other organisations to make sure people with disability can access the kind of care and support they need to pursue their goals, including supporting carers in their important role. This Act is supported by the Disability Care Australia Fund Act 2013 which commenced on 28 May 2013. For details on this legislation, see www.ndis.gov.au

All Acts and Regulations for the Commonwealth jurisdiction can be found at http://www.comlaw.gov.au/
3.2 NEW SOUTH WALES

The relevant Acts and Regulations in New South Wales are:

- **Associations Incorporation Act 2009**
- **Association Incorporation Regulation 2010**
- **Charitable Fundraising Act 1991**
- **Charitable Fundraising Regulation 2008**
- **Charitable Trusts Act 1993**
- **Co-operatives Act 1992** – to be repealed on commencement of section 25(a) of the Co-operatives (Adoption of National Law) Act 2012 (see below)
- **Co-operatives (Adoption of National Law) Act 2012** – scheduled to commence on 3 March 2014 (see below)
- **Lotteries and Art Unions Act 1901**
- **Lotteries and Art Unions Regulation 2007**

Several of these Acts were amended by the **Civil and Administrative Legislation (Repeal and Amendment) Act 2013** which allowed for the introduction of the Civil and Administrative Tribunal (CAT) (replacing the Administrative Decisions Tribunal (ADT)) in New South Wales. Where decisions were made previously by the ADT, they will now be made by the CAT: see Civil and Administrative Legislation (Repeal and Amendment) Act 2013 Schedule 2 at: 2.11 (Associations Incorporation Act amendments); 2.20 (Charitable Fundraising Act amendments); 2.39 (Co-operatives (Adoption of National Law) Act 2012 amendments); 2.92 (Lotteries and Art Unions Act 1901 amendments).

The **Co-operatives (Adoption of National Law) Act 2012** was assented to on 18 May 2012, and came into force in New South Wales on 3 March 2014.\(^6\) This Act is part of the process of developing uniform laws for co-operatives, provided for in the Australian Uniform Co-operative Laws Agreement (AUCLA). The principal legislation for regulating co-operatives under the AUCLA is the Co-operatives National Law (CNL). All States and Territories are intending to apply the CNL or alternative consistent legislation in their jurisdiction. The CNL will be supported by national and local regulations:

- National regulations will deal with matters that it has been agreed will be uniform for all the States and Territories;
- Local regulations will contain matters that may vary between the States and Territories, such as procedural arrangements and fees. Each State and Territory will make its own local regulations that will apply in its jurisdiction.

Comments on the draft Co-operatives (New South Wales) Regulation 2013 closed on 20 December 2013. These will be local regulations applying in New South Wales only. Draft National Regulations have also been prepared, but not applied as yet.

It had been agreed that jurisdictions would have until 18 May 2014 to secure proclamation of the CNL or alternative consistent law. To date, only New South Wales, Victoria, and South Australia have passed relevant legislation. However, other States and Territories have agreed to pass the template or consistent legislation (see below, where applicable).


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3.3 VICTORIA

The relevant Acts and Regulations in Victoria are:

- **Associations Incorporation Reform Act 2012**
- **Charities Act 1978 - no updates**
- **Charities Regulations 2005 - no updates**
- **Cooperatives Act 1996 - see below**
- **Fundraising Act 1998 - no updates**
- **Fundraising Regulations 2009 - no updates**
- **Gambling Regulation Act 2003 - see below**
- **Gambling Regulation Regulations 2005 - no updates**

**ASSOCIATIONS INCORPORATION REFORM ACT 2012**

The **Associations Incorporation Reform Act 2012** (Vic) commenced on 26 November 2012, and repealed the previous **Associations Incorporation Act 1981** (Vic). New Regulations and Model Rules also came into effect on that date. Key reforms introduced by the new Act include:

- revised annual reporting requirements and the introduction of a three-tiered approach to reporting, based on total revenue for the organisation’s financial year;
- enhanced governance arrangements for incorporated associations, including a codification of legal duties owed by office holders, modelled on directors’ duties found in the **Corporations Act 2001** (Cth);
- legislative defences and protections for office holders, including the business judgment rule, a defence based on reasonable reliance on information or advice and a statutory right to be indemnified against any liability incurred in good faith by an office holder on behalf of the association in the course of performing his or her duties;
- abolition of the prohibition on trading, allowing associations to engage in trade or trading activities consistent with their purposes, whilst maintaining the general prohibition on securing pecuniary profits for members;
- replacement of references to ‘public officer’ with ‘secretary’ - the secretary will, in most cases, assume the responsibilities of the public officer. The requirement that this role be undertaken by a Victorian resident has also been removed (the secretary now must be a resident of Australia);
- the ability for associations to hold committee and general meetings via new technology (e.g. teleconference) provided that the technology allows meeting participants to ‘clearly and simultaneously communicate with each other’;
- new matters to be included in the rules of an association, including in relation to the keeping of, and access to, minutes of meetings; and
- clarification of the rights of members and enhanced transparency of a member’s right of access to information held by the association.

Minor amendments were made to the Act during 2013, which sought to rectify a transitional oversight and technical drafting errors.

**CO-OPERATIVES NATIONAL LAW APPLICATION ACT 2013**

In March 2013, the **Co-operatives National Law Application Act 2013** was passed by the Victorian Parliament, providing for the application of a national law relating to the formation, registration and
operation of cooperatives.

The Act will bring the State in line with the nationally uniform set of laws for co-operatives proposed for all States and Territories. Victoria has elected to adopt the template Cooperatives National Law, which introduces a number of changes to the laws applying to co-operatives, including:

- the removal of cross-border trading barriers;
- the legal duties of directors provisions to align with the Corporations Act 2001 (Cth);
- simplification of financial reporting for smaller co-operatives;
- renaming of trading and non-trading cooperatives as distributing and non-distributing cooperatives.

New model rules will be introduced together with new regulations. The new legislative framework commenced as scheduled on 3 March 2014.

**GAMBLING REGULATION ACT 2003**

The Gambling Regulation Act 2003 (Vic) was amended by the Gambling Regulation Amendment Act 2013 (Vic). The amending Act introduced a number of miscellaneous amendments, including to the definition of ‘nominee’ which now includes a person nominated under section 8.4.2A(2)(c) or 8.4.2B(2)(a) by community or charitable organisations conducting bingo.

Earlier amendments (made by the Gambling Legislation Amendment (Responsible Gambling and Other Measures) Act 2008) removed the requirement to hold a minor gaming permit in relation to bingo. A community or charitable organisation must nominate a natural person (the nominee) to be responsible for the organisation’s compliance with the Gambling Regulation Act 2003. When the requirement to hold a minor gaming permit was removed in relation to bingo, the definition of nominee was not updated to include a person nominated by a community or charitable organisation under section 8.4.2A(2)(c) or 8.4.2B(2)(a).

The definition was amended to remove an incorrect reference to minor gaming permits in relation to bingo pooling schemes. Obsolete references to minor gaming permits in relation to bingo pooling schemes were also removed by the amending Act.


### 3.4 QUEENSLAND

The relevant Acts and Regulations in Queensland are:

- **Associations Incorporation Act 1981**
- **Associations Incorporation Regulation 1999**
- **Collections Act 1966**
- **Collections Regulation 2008**
- **Charitable Funds Act 1958**
- **Charitable and Non-Profit Gaming Act 1999**
- **Charitable and Non-Profit Gaming Regulation 1999**
- **Cooperatives Act 1997**
During 2013, the Directors’ Liability Reform Amendment Act 2013 (Qld) (DLRA) made amendments to the:

- Charitable and Non-Profit Gaming Act 1999 – in Part 6 of DLRA
- Cooperatives Act 1997 – in Part 9C of DLRA

The main purpose of the various directors’ liability Acts passed in Australian jurisdictions has been to remove or modify liability of directors of corporations covered by the Acts. For example, the DLRA amended the Cooperatives Act 1997 by removing the ‘offences by officers of a cooperative’ section of the Act completely. However, the DLRA makes clear that when an offence is committed by a corporation under the Charitable and Non-Profit Gaming Act 1999, the executive officer of that corporation is also taken to have committed the offence (at new section 170 of the Charitable and Non-Profit Gaming Act 1999).

There were no other material changes to the relevant Acts and Regulations in Queensland.

All Queensland Acts and Regulations can be found at: https://www.legislation.qld.gov.au/OQPChome.htm

3.5 WESTERN AUSTRALIA
The relevant Acts and Regulations in Western Australia are:

- Associations Incorporation Act 1987
- Associations Incorporation Regulations 1998
- Charitable Collections Act 1946
- Charitable Trusts Act 1962
- Cooperatives Act 2009
- Gaming and Wagering Commission Act 1987
- Gaming And Wagering Commission Regulations 1988
- Street Collections (Regulation) Act 1940
- Street Collections Regulations 1999

No material changes were made to this legislation during 2013. The review of Western Australia’s associations incorporation legislation, originally commenced with the Associations Incorporation Bill 2006, is still ongoing: see at http://www.commerce.wa.gov.au/ConsumerProtection/Content/Business/Associations/Act_Review/Background_.html

All Acts and Regulations for Western Australia can be found at http://www.slp.wa.gov.au/legislation/statutes.nsf/default.html

3.6 SOUTH AUSTRALIA
The relevant Acts and Regulations in South Australia are:

- Associations Incorporation Act 1985
- Associations Incorporation Regulations 2008
- Collections for Charitable Purposes Act 1939
- Gaming Machines Act 1992
- Health Services Charitable Gifts Act 2011
- Health Services Charitable Gifts Regulations 2011
• *Lottery and Gaming Act 1936*
• *Lottery and Gaming Regulations 2008*
• *Not-for-Profit Sector Freedom to Advocate Act 2013*

**CO-OPERATIVES NATIONAL LAW (SOUTH AUSTRALIA) ACT 2013**

This Act was passed as part of the national scheme for co-operatives law (see above in New South Wales and Victoria), but has not as yet commenced. The Act adopts the Co-operatives National Law in Schedule 1.

**DIRECTORS’ LIABILITY**

The *Statutes Amendment (Directors’ Liability) Act 2013* was passed as part of a Council of Australian Governments (COAG) process under which both the Commonwealth and the States were obligated to amend legislation which affected the criminal liability of directors of corporations as a consequence of the corporation having committed an underlying offence.

The South Australian Act amends the *Collections for Charitable Purposes Act 1939* section 15(7) (as to imputing liability to certain officers of relevant bodies corporate or unincorporated) and the *Gaming Machines Act 1992* section 85 (as to vicarious liability of persons in authority of a relevant body corporate).

**FREEDOM TO ADVOCATE FOR NONPROFITS**

The *Not-for-Profit Sector Freedom to Advocate Act 2013* commenced on 21 November 2013. The purpose of the Act 2013 is to prohibit State agreements from restricting or preventing not-for-profit entities from commenting on, advocating support for or opposing changes to State law, policy, or practice. In the Act, a ‘not-for-profit entity’ is an organisation which is registered, or entitled to be registered, under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), or any other entity that is not carried on for the purposes of profit or gain to its individual members and is, by the terms of its constitution, prohibited from making any distribution, whether in money, property or otherwise, to its members (section 3).

A State agreement is a legally binding agreement between a government agency (made on behalf of the State) and a not-for-profit entity as defined. Such an agreement must not contain ‘prohibited content’ (section 4) which is a statement that restricts or prevents the not-for-profit entity or staff of a not-for-profit entity from commenting on, advocating support for, or opposing a change to, any matter established by law, policy or practice of the State government or a government agency, but does not include a requirement that restricts or prevents the disclosure of confidential information or personal information (section 3). The latter two matters can be restricted.


### 3.7 TASMANIA

The relevant Acts and Regulations in Tasmania are:

• *Associations Incorporation Act 1964*
• *Associations Incorporation Regulations 2007*
• *Associations Incorporation (Model Rules) Regulations 2007*
• *Collections for Charities Act 2001*
• *Cooperatives Act 1999*
- Gaming Control Act 1993
- Gaming Control Regulations 2004

The Gaming Control Act 1993 was amended by the Gaming (Miscellaneous Amendments) Act 2013. The amendments were technical in nature. There were no other material changes to the relevant Acts and Regulations in 2013.

The Directors' Liability (Miscellaneous Amendments) Bill 2012 is still pending, having had its first reading on 11 November 2012. This Bill was a response to the COAG undertaking by States to reform their legislation relating to directors' liability, but has not progressed to date. However, the Tasmanian Bill does not reference any of the above Acts.

Another relevant Bill is the Co-operatives National Law (Tasmania) Bill 2013 which had its third reading in the House of Assembly on 14 November 2013.

All Acts and Regulations for Tasmania can be found at http://www.legislation.tas.gov.au/index.w3p

3.8 AUSTRALIAN CAPITAL TERRITORY
The relevant Acts and Regulations in the ACT are:

- Associations Incorporation Act 1991
- Associations Incorporation Regulation 1991
- Charitable Collections Act 2003
- Charitable Collections Regulation 2003
- Cooperatives Act 2002
- Gaming Machine Act 2004
- Gaming Machine Regulation 2004
- Lotteries Act 1964
- Unlawful Gambling Act 2009
- Unlawful Gambling Regulation 2010

The Directors Liability Legislation Amendment Act 2013 came into effect on 22 February 2013. Of the above Acts, only the Unlawful Gambling Act 2009 was affected by the Act, which amended section 34. There were also several minor amendments to gaming legislation during 2013: see Gaming Machine Amendment Act 2013, Statute Law Amendment Act 2013, Part 3.23, and the Gaming Machine Amendment Act 2013 (No. 2).

All Acts and Regulations for the ACT can be found at http://www.legislation.act.gov.au/

3.9 NORTHERN TERRITORY
The relevant Acts and Regulations in the Northern Territory are:

- Associations Act
- Associations Regulations
- Associations (Model Constitution) Regulation
- Cooperatives Act
- Gaming Control Act
- Gaming Control (Community Gaming) Regulations
- Gaming Machine Act
- Gaming Control (Gaming Machines) Regulations
- **Gaming Machine Rules**

There were no material changes to relevant legislation in the Northern Territory during 2013.

ENGLAND & WALES

The closing of 2013 brought to an an end a damaging year for the Charity Commission for England and Wales and one which may have implications for its future regulatory capacity. Some legislative developments are also likely to impact upon its future role.

The Charity Commission

Guidance and support functions

Following on from the Tribunal’s ruling relating to public benefit and fee-charging charities in Independent Schools, the Commission issued its long awaited new guidance in 2013. This retracted its 2008 guidance and instead offered a three-part guide: dealing with what it means to be a charity; examining the necessary operational requirements of a charity; and addressing how a charity reports on its public benefit. However, by far the most significant aspect of the new guidance is that it avoids reference to the ‘public benefit principle’ which had hitherto been at the heart of charity, the essential determinant of charitable status. Instead of ‘principle’ it now refers to ‘aspects’ and ‘factors’. The new guidance gives much greater freedom to fee-charging charities as to how they meet their public benefit requirements, advising trustees of charities that charge fees or offer services that ‘the level of provision that trustees make for the poor must be more than minimal or token’, but that it is for trustees, not the Commission or the courts, to decide how to do this.

The shift is one which reflects the Commission’s new approach, adopted in the light of the Tribunal ruling, that no longer asserts an absolute measure as applied by the Commission to determine what constitutes public benefit, indicating that in future it will apply a less prescriptive, more nuanced interpretation when analysing charitable status. This move away from its previous quasi-judicial role is reinforced by the declaration that in future it will focus on how trustees are giving effect to their charity’s stated purpose and will expect annual reports to give a full account of how this has been pursued. In all, a significant change of tack and one which reveals that it has taken on board the charge of inappropriately assuming a judicial role in making rather than administering law.

Registration and determining charitable status functions

The Commission had attracted a good deal of criticism earlier in the year when it refused to accept an application by the Preston Down Trust to be registered as a charity as it was unconvinced that the Trust was established for the advancement of religion for public benefit. By the end of the year, however, that decision was revised and the Commission had announced that it would accept an application for

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7 R (Independent Schools Council) v. Charity Commission for England and Wales [2012] Ch 214,
9 Preston Down Trust (Exclusive Plymouth Brethren) v Charity Commission for England & Wales, June 2012.
charitable status as the Trust had agreed certain changes to its governing documents. In truth, the Commission had little option following the Supreme Court decision in Hodkin\textsuperscript{10} when, overturning Segerdal,\textsuperscript{11} it unanimously decided that a Scientologist chapel is ‘a place of meeting for religious worship’. In a finding that will have significant future consequences for the law relating to religion and to religious charities, the court held that the phrase ‘has to be interpreted in accordance with contemporary understanding of religion and not by reference to the culture of 1855’.\textsuperscript{12} The court found that to recognise Scientology as a religion but to then deny its chapel registration as a place of worship would be ‘illogical, discriminatory and unjust’.\textsuperscript{13} Notwithstanding the Supreme Court ruling, the Commission has not yet granted Scientology charitable status, though this must now be inevitable.

**Regulatory inspection and policing functions**

Although the Commission had earlier come in for sustained media criticism regarding various scandals relating to the financial abuse and irregularities of some charities,\textsuperscript{14} this was nothing in comparison to the formal charges of ineffectiveness and regulatory incompetence that were laid against it in Parliament over its handling of the Cup Trust affair. Essentially, the Cup Trust operated as a tax avoidance scheme. Since its registration as a charity in 2009 it had claimed £46 million in Gift Aid on £176 million of payments made by participants, but had disbursed no more than £152,292 to charities. In 2010, the relevant financial irregularities were brought to the attention of the Charity Commission by the Inland Revenue (HMRC). In June 2011, the Commission wrote to the Cup trustee expressing its concerns. On receiving assurances from the trustee it decided not to open an inquiry and closed its investigation in March 2012. The Commission did not commence formally monitoring the Trust until 2013 following new information from HMRC, an approach later criticised by the First Tribunal as mistaken.

In June 2013 the Committee of Public Accounts brought a report to Parliament which demonstrated that: the Cup Trust was nothing more than a tax avoidance scheme which had never met the legal criteria for registration as a charity; and that the Commission had behaved unacceptably in failing to intervene effectively to stop the abuse.\textsuperscript{15} This was followed in Dec 2013 by: a report published by the Comptroller and General Auditor entitled ‘The Regulatory Effectiveness of the Charity Commission’ which criticised the Charity Commission for failing to regulate the charitable sector effectively;\textsuperscript{16} and by the launching of a consultation process by Nick Hurd, the Minister for Civil Society, on strengthening the

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\textsuperscript{10} R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages [2013] UKSC 77; see case note 2.1.3 above.

\textsuperscript{11} R v Registrar General, ex p Segerdal [1970] 2 QB 697.

\textsuperscript{12} R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages, per Toulson LJ at para 34. Citing in support the judgment of Adams CJ in Malnak v Yogi 592 F.2d 197 (1979) and Church of the New Faith v. Comr of Pay-Roll Tax (Victoria) (1983) 154 CLR.

\textsuperscript{13} Ibid, per Toulson LJ, at para 64.

\textsuperscript{14} See, for example: the Manor Residents Association scandal which saw the charity’s manager and daughter arrested and charged with conspiracy to steal and false accounting, at: http://www.charitycommission.gov.uk/news/regulator-opens-statutory-inquiry-into-hartlepool-charity/#sthash.pNY4de7F.dpuf. Also see, the Dove Trust financial irregularities at: http://www.thirdsector.co.uk/Finance/article/1225914/charity-commission-stands-its-dove-trust-decisions/ Again, in the Spiritualist Association of Great Britain affair which involved trustees who had disposed of charity property for £6m to a company based in the British Virgin Islands which later sold it to another company based there for £21m, at: http://www.charitycommission.gov.uk/news/charity-commission-opens-statutory-inquiry-into-the-spiritualist-association-of-great-britain-(formerly-the-marylebone-spiritualist-association)-limited-090813/

\textsuperscript{15} See, further, at: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/138/13802.htm

\textsuperscript{16} See, further, at: https://www.nao.org.uk/report/regulatory-effectiveness-charity-commission/
powers of the Charity Commission. This consultation was set to run until 12 February 2014 and examine how the Charity Commission tackles serious abuse and how the range of criminal offences that disqualify people from being a charity trustee could be extended.

**New Legislation**

While there has been no new legislation directly relevant to charities or the nonprofit sector more generally, one statute can be anticipated to impact upon religious charities. The *Marriage (Same Sex Couples) Act 2013* received Royal Assent on 17 July 2013 and, subject to the approval of Parliament, will enable the first same sex weddings to take place from Saturday 29 March 2014. Accompanied by amendments to the *Equalities Act 2010*, this new legislation will be problematic in human rights terms for religion generally, for the Church of England and for religious charities. The statutory breaking of the traditional definition of ‘marriage’ is a red line issue for Christianity (and other religions) the long-term implications of which are difficult to foresee. More immediately the fact that the Church of England, specifically, is to be relieved of any duty to conduct gay marriages will thereby handicap it relative to other religions, its functional capacity diminished by the State; it may also give rise to a charge that the law operates in a discriminatory fashion to the clear detriment of Anglican same gender couples and to any other religion which may have wished for a similar exemption; and it questions the future tenure of Anglicanism as the established Church of England. For religious charities in general the legislation will harden the downstream issues relating matters such as the provision of adoption services, marriage guidance counselling etc.

**Other**

The status of charitable incorporated organisations (CIOs) finally became available to charities in England and Wales on 4 March 2013 on which date the Commission enabled an existing charity, Challenge to Change, to convert from a charitable trust to a CIO. It later reported some difficulties in transferring assets and long-term grant agreements to the new legal entity. Another charity converted but then reverted to its old status because of the cost and inconvenience of changing its registration number.

**SCOTLAND**

The major statute is the *Charities and Trustee Investment (Scotland) Act 2005* which has been up and running for some years.

**Cases**

In January 2013, the Office of the Scottish Charity Regulator (OSCR) ruled that the policy of St Margaret’s Children and Family Care Society in Glasgow (a Catholic adoption charity) of giving preference to placing children with a married couple had a negative impact on cohabiting and same-sex couples. In September, it was confirmed that the adoption agency would seek to have the ruling overturned at the Scottish Charities Appeal Tribunal and if not then resolved, the case will move to the Court of Session. This is yet another instance of an adoption agency being held to have failed the charity test because it discriminated unlawfully on grounds of religion or belief and sexual orientation in breach

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17 Primary legislation to introduce the CIO was included in the Charities Bill in 2004, enacted in the Charities Act 2006, with guidance issued in May 2011.
19 See above, case note 2.2.3.

**New Legislation**

No new legislation was introduced with direct relevance to charities or the sector but some statutes had provisions that will influence practice. The Land and Buildings Transaction Tax (Scotland) 2013, which received Royal assent on 31st July 2013 and takes effect in April 2015, for example, makes provision for charities to be exempted from this tax when they purchase property subject to certain qualifying conditions.\(^\text{20}\)

**Other**

A major trend in the charities sector in 2013 has been the successful take-up of the new legal status of Scottish Charitable Incorporated Organisation (SCIO). In March 2013, the OSCR registered its 500\(^{th}\) SCIO and reports that about 34% of new charities are being formed as SCIOs.\(^\text{21}\)

**NORTHERN IRELAND**

This has been a year for making up lost ground and finally putting into place key aspects of the regulatory framework provided by the Charities Act (Northern Ireland) 2008.

**New Legislation**

The Charities Act (Northern Ireland) 2013 was assented to on 18 January 2013, allowing consultation for the Charity Commission for Northern Ireland’s draft public benefit and registration guidance to begin on 4 February 2013. In June 2013, the Charities (2008 Act) (Commencement No. 4) Order (NI) 2013 was introduced, bringing various sections of the 2008 Act into operation. Provisions relating to the application of property cy-pres, charity mergers, and disclosure of charitable status are among some of the powers and requirements which then came into effect. This also meant that finally, five years after the introduction of the Charities Act (Northern Ireland) 2008, registration of charities in Northern Ireland could begin on Monday 16 December 2013.

**Other**

On 5th August 2013, following a public consultation earlier in the year, the Charity Commission for Northern Ireland published its statutory guidance on the public benefit requirement. This requires charities to explain how they meet the public benefit requirement on their application for registration. In the autumn, the Commission launched a public consultation on its interim reporting proposals for all registered charities, with a closing deadline of 13 December 2013.

**IRELAND**

While the reforming provisions of the Charities Act 2009 remain in abeyance, the Charities Acts of 1961 and 1973 together with the Street and House-to-House Collections Act 1962 continue to provide the framework within which religious charities must operate. By the end of 2013, only seven sections of the

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\(^\text{20}\) See, the Land and Buildings Transaction Tax (Scotland) Act 2013, s.27(1), and Schedule 13.

2009 Act had been commenced leaving 92 sections still awaiting Ministerial commencement.

Regulatory bodies

In particular, as provisions of the 2009 Act relating to the new Charities Regulatory Authority (CRA) have yet to be implemented, the Charities Section of the Revenue Commissioners maintains its traditional role as the lead regulatory body for charities in Ireland. Similarly, provisions providing for the winding up of the Commissioners of Charitable Donations and Bequests, in existence since 1845 with a brief to provide support mainly to religious bodies (which were always heavily involved in the work of Irish charities), remain unactivated and this organization continues its customary administrative functions. The longstanding deficiencies of this regulatory regime – the absence of both a mandatory register of charities and a lead regulatory body with charity specific supervisory duties – persist, with reliance instead being placed on a voluntary code of practice intended to encourage charities to publish annual accounts and information in the public domain. The law has continued to be framed by the four Pemsel heads. Not until the relevant provisions of the 2009 Act are implemented will a charitable purpose be defined as: the prevention or relief of poverty or economic hardship; the advancement of education; the advancement of religion; or any other purpose that is of benefit to the community; and include the 12 specific new charitable purposes listed under section 3(11).

New legislation

In April, the Constitutional Convention (established to consider whether provision should be made for same sex marriage) recommended that the Constitution be changed to allow for civil marriage for same-sex couples. This has cleared the way for the probable introduction of legislation by 2015 which will undoubtedly include exemption provisions for religious charities.

A new statute with implications for religious charities, the Protection of Life During Pregnancy Act 2013, was signed into law by President Higgins on 30 July. This very limited set of provisions provides for termination of pregnancy in cases where there is the risk of loss of life from physical illness, risk of loss of life from physical illness in an emergency or risk of suicide, but it does not provide directly for the termination of pregnancy as a result of rape or incest.

The referendum on Thirty-first Amendment of the Constitution (Children) Bill 2012, which approved proposed legislative measures to safeguard children’s rights but was challenged by the plaintiff in McCrystal v Minister for Children, remained unimplemented throughout 2013 much to the frustration of many children’s charities.

Case law

There has been a dearth of Irish charity related case law in 2013 but one case of peripheral interest was

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22 Charities Act 2009, ss. 1, 2, 4, 5, 10 (other than subsections 3 and 4), 90 and 99, as commenced by SI 284 of 2009 and SI 315 of 2010.
23 Note that a list of bodies accepted as charitable organisations for the purposes of Section 11 of Table 2 of Schedule 3 of the Social Welfare Consolidation Act 2005 (as amended), is kept by the Dept of Social Protection. See, further, at: http://www.welfare.ie/EN/OperationalGuidelines/pages/meanslist.aspx
24 Developed by the Irish Charities and Tax Research association, the industry’s co-ordinating body.
25 This statute can be seen as a legislative response to the ECtHR’s judgment in A, B and C v Ireland [2010] ECHR 2032 on the right to an abortion in the case of a risk to the life of a pregnant woman and to the scandal associated with the tragic death of Savita Halappanavar at the University Hospital Galway in 2012 when she was reportedly advised that an abortion was not possible because Ireland was a Catholic country.
Cork Institute of Technology v An Bord Pleanála & Anor\textsuperscript{27} which considered the issue: can it be said that a third-level educational institute possessing charitable status is a ‘voluntary organisation’ so that it enjoys an exemption from the payment of planning fees and, by extension, by reason of the terms of a scheme drawn up by the planning authority pursuant to statute, from the payment of a development contribution levy under a scheme operated by Cork City Council? The Inspector’s report indicated that he was troubled by the question of what constituted a ‘voluntary organisation’ for this purpose. Noting that the Institute was a charity, he then posed the question of whether a charitable organisation could also be a voluntary organisation. With the exception of some smaller privately established institutions, these are nearly all established or governed by statute, so the Institute could not be regarded as ‘voluntary’ in the sense given that its establishment, powers and functions are mandated and regulated by statute. However, notwithstanding the fact that the Institute’s work was substantially subvented from public funds and its activities regulated by statute, the core of its work was charitable. It was concluded that the Institute was a voluntary organization.

Other

The appointment of Pat Storey as bishop in September 2013 was the first such appointment in these islands which, in the light of the tiny minority of female clergy in this country, is quite a significant step.\textsuperscript{28}

For the Irish nonprofit sector as a whole, and charities in particular, the scandal associated with the Central Remedial Clinic has probably been the most significant development of 2013. The CRC is Ireland’s largest and most prestigious charity which has long provided services for those with a disability. It was forced to admit that it was using charitable funds to top up the salaries of senior staff members (almost €250,000 in allowances being paid annually to six senior staff members, in addition to their state-funded salaries). When, in June 2013, the media discovered that the CEO was stepping down with a golden handshake of almost €500,000, there was a good deal of public outrage.

Of considerable and probably related significance was the subsequent announcement by the Minister for Justice and Equality, Alan Shatter, that the government has now approved plans to proceed with the establishment of a Charities Regulatory Authority as provided for in the \textit{Charities Act 2009}. The press release states that the Authority will come into operation in 2014 and will have a staff of approximately 20. The fact that charities will make a contribution to the cost of setting up the regulator through the proposed registration fee is cited as the reason it is now possible to move ahead with putting the regulatory system in place.

4.2 A 2013 CALENDAR OF DEVELOPMENTS IN NEW ZEALAND

\textit{Dr Michael Gousmett and Susan Barker}

8 March 2013

Greenpeace of New Zealand Incorporated (Greenpeace) was granted leave to appeal to the Supreme Court of New Zealand, New Zealand’s highest court. Greenpeace’s original application for registration as

\textsuperscript{27} [2013] IEHC 3.

a charitable entity was declined on the basis of its advocacy work. Greenpeace appealed this decision to
the High Court which upheld the Charities Commission’s decision ‘albeit with a degree of reluctance’
(paragraph [59]). Greenpeace appealed to the Court of Appeal, which allowed the appeal and referred
the matter back to the charities regulator (now the Department of Internal Affairs and the Charities
Registration Board) for reconsideration. However, Greenpeace applied for leave to appeal to the
Supreme Court, in relation to aspects of the Court of Appeal’s decision, relating to advocacy and
illegality. The Supreme Court appeal was heard on 1 August 2013. A decision is still awaited.

April 2013

10 months after the disestablishment of the Charities Commission, the new charities regulator, a
division of the Department of Internal Affairs, was given a new name: Charities Services – Ngā Rātonga
Kaupapa Atawhai. In the original Charities Bill, introduced in March 2004, the charities regulator had
been structured as a Crown agent. Of the three types of Crown entity established by the Crown Entities
Act 2004 (independent Crown entities, autonomous Crown entities, and Crown agents), Crown agents
are the least independent from Government. A large number of submitters on the original Charities Bill
had expressed concern that the Crown agency classification might allow the Government to interfere
with, direct, or control the Charities Commission, and would not reflect the independence from the
Government of the charitable sector (report, page 2). In light of those concerns, the select committee
recommended that the Commission instead be classified as an autonomous Crown entity (an ACE). ACEs
are not as independent from Government as independent Crown entities, but they are more
independent than Crown agents. It is therefore interesting that, in the controversial 2012 move to
disestablish the Charities Commission, the charities regulator has been moved even closer to
Government, to a Government Department, albeit with registration and deregistration decisions moved
to a three person Charities Registration Board, which is required to act independently, by virtue of
section 8(4) of the Charities Act 2005.

In High Court proceedings brought towards the end of 2013, the practical independence of the Board
from the Department of Internal Affairs has been questioned, as has the process by which decisions of
the charities regulator are challenged: of particular concern is the fact that, under the regime
established by the Charities Act as it is currently being interpreted, charities in New Zealand are denied
the opportunity to have any hearing of evidence whatsoever. A decision in the proceedings is expected
in 2014.

19 April 2013

The National Council of Women of New Zealand Incorporated, controversially deregistered in 2010 on
the basis of its advocacy work, regained registered charitable status. Tax issues relating to the period for
which it was off the charities register continue.

By contrast, on 9 May 2013, Family First New Zealand (Family First) was deregistered on the basis of its
advocacy work, a decision the group blamed on a single complaint which coincided with the same-sex
marriage debate and the passing of the Marriage (Definition of Marriage) Amendment Bill on 17 April
2013. The charities regulator considered that Family First’s main purpose is to promote particular points
of view about family life, and that ‘promotion of a controversial point of view is a political purpose’.
Family First lodged a High Court appeal against its deregistration on 27 May 2013. It can remain a
registered charity until the outcome of its appeal, which is currently stayed, pending the decision of the
Supreme Court in the Greenpeace case.
30 June 2013

On 30 June 2013, the Anti-Money Laundering and Countering Financing of Terrorism Act Commencement Order brought the full regime established by the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 into force. Charities that fall within the definition of ‘reporting entity’ in section 5 of the AML/CFT Act (e.g. because they accept deposits or other repayable funds from the public; lend to customers; manage individual or collective portfolios; invest, administer or manage funds or money on behalf of others, etc) must therefore comply with the regime or seek a Ministerial exemption. On 3 December 2013, in response to a Parliamentary question from the Green Party, Justice Minister Judith Collins stated that she had granted 30 Ministerial exemptions under the AML/CFT Act, with 61 applications yet to be determined.

17 July 2013

The Taxation (Livestock Valuation, Assets Expenditure, and Remedial Matters) Act 2013 was passed on 17 July 2013. This Act amends section CX 25(3) of the Income Tax Act 2007 to make it clear that vouchers for goods such as groceries and petrol are a form of ‘short-term charge facility’ and so would be subject to fringe benefit tax (FBT), even if provided by a charitable organisation. Although charities are not generally required to pay FBT on goods and services they provide to employees, a long-standing exception applies for benefits provided by way of short-term charge facilities above a certain minimum. The minimum was previously where the benefits exceed 5% of an employee’s salary or wages, however, new section CX 25(2) modifies the existing minimum to the lower of $1,200 or 5% of an employee’s salary or wages. The value of any such vouchers that are subject to FBT are also now included in the employee’s family scheme income (the definition of income used for calculating Working for Families tax credits).

The Act also amends section 41A of the Tax Administration Act 1994 to change the time period for claiming refunds: for donations tax credits, the refund must be made within 4 years from the end of the tax year in which the donation is made.

8 August 2013

The Plumbers, Gasfitters and Drainlayers Board were successful in their appeal to the High Court against the charities regulator’s decision to deregister them (The Plumbers, Gasfitters and Drainlayers Board v The Charities Registration Board [2013] NZHC 1986). The charities regulator had considered that, despite the public benefit inherent in the protection of the health and safety of the public through the regulation of the plumbing, gasfitting and drainlaying industries, the Board had an independent non-ancillary purpose to regulate the subject industries for the benefit of plumbers, gasfitters and drainlayers. The High Court disagreed, holding that the Board’s main purpose is to maintain standards for the safety of the public, and that any flow-on benefits to individuals were purely collateral and incidental consequences inherent in a system of registration. Applying the Court of Appeal decision in Commissioner of Inland Revenue v Medical Council of New Zealand [1997] 2 NZLR 297 (CA), the High Court also held that the provision of services by the subject industries had the potential to pose a substantial risk to the public if not performed competently. Accordingly, the Board’s main purpose was considered to be for the benefit of the public. The Board’s purposes were therefore found to be exclusively charitable and its registration was reinstated. This decision is significant for being only the second decision (excluding Greenpeace, which is yet to be finally decided) in which a decision of the charities regulator under the new regime established by the Charities Act 2005 has been overturned on appeal (the first being Liberty Trust v Charities Commission [2011] 3 NZLR 68 (HC), a mortgage lending scheme based on biblical financial principles, which was found to advance religion).
21 August 2013

The Report of the Law Commission, A New Act for Incorporated Societies (NZLC R129) was tabled in Parliament on 21 August 2013. The Report recommends that the Incorporated Societies Act 1908 be repealed and replaced by a modern statute. The new statute should provide guidance common to other statutes, including:

- statutory duties for the officers of societies;
- requirements for dealing with conflicts of interest;
- a requirement to include dispute resolution procedures in every constitution; and
- a model constitution.

Alongside these broader recommendations, the Law Commission makes a number of more specific recommendations, including:

- the statute should make it clear that members should have no ownership interest in the society;
- the minimum number of members of a society should be reduced from 15 to 10 (it is not clear why the number 15 was originally chosen, but appears to have something to do with the number required to form a rugby team);
- societies should be required to have a statutory officer and a committee of at least 3 members;
- societies should be required to prepare and file at least simple annual financial reports.

The Government will consider the recommendations and respond to them in due course.

21 September 2013

The Report of the Law Commission, Review of the Law of Trusts: A Trusts Act for New Zealand (NZLC R130) was tabled in Parliament on 21 September 2013. The Report recommends the introduction of a statute to replace the Trustee Act 1956. The new Act would be a comprehensive statute that modernises the law of trusts in a number of areas and addresses key matters that are currently only governed by case law.

The Report contains 51 recommendations addressing a wide range of matters relating to the roles of the different parties involved in a trust and the powers of the Courts. The matters addressed by the recommendations include:

- setting out the characteristics of a trust and how a trust is created;
- setting out the duties of trustees;
- modernised trustee powers provisions;
- improved procedures for the appointment and removal of trustees;
- more comprehensive and useful provisions on the variation and revocation of trusts;
- a refined approach to the power of the courts to review the actions of trustees; and
- the replacement of the rule against perpetuities and Perpetuities Act with a new rule limiting the maximum duration of the trust.

The Government will consider the recommendations and respond to them in due course. If enacted, the new Trusts Act would be relevant to the 300,000 to 500,000 trusts used for a variety of purposes ranging from owning the family home, through to use in business, by charities, and by many, including Maori, to hold land and other assets collectively. Following the issue of the report, the Law Commission
intends to continue to look at more specialised areas of trust law, including the Charitable Trusts Act 1957.

September 2013

The Inland Revenue Department began consultation on the issue of what is a gift for tax purposes. Particularly at issue is the question of payments made to attend charity events, and payments made to participate in supporter programmes of charities – do such payments qualify as gifts for the purposes of the approved donee regime (the regime which provides tax deductions or credits to donors for gifts made to approved donee organisations)? The issue appears to be reciprocity: if something, no matter how small, is received in return for a payment, should that factor render the entire payment outside the concept of a gift, with no apportionment, and no de minimis threshold. Consultation does not appear to have progressed beyond the initial stage at the time of writing.

October 2013

Towards the end of 2013, the Government gave the green light for a social bonds pilot with the Ministry of Health announcing in December 2013 that it is hosting the Social Bonds Pilot Procurement on behalf of the New Zealand Government. The Ministry describes Social Bonds as an ‘innovative method of social outcome purchasing that encourages social service providers, government agencies and the investment community to work together to deliver outcomes to New Zealanders’. The Ministry states that the pilot outcome may be ‘any social sector outcome’. The first step in the procurement process is to identify providers and an outcome area for future investment. To that end, Registrations of Interest (ROI) have been issued, to identify potential Service Outcomes and Service Providers for the upcoming Social Bonds Pilot. In early 2014, the Ministry proposes to move to identify an intermediary and investors, through a competitive process.

22 November 2013

The Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill, introduced into Parliament on 22 November 2013, proposes to implement tax changes for charities that are removed from the register of charities. These changes follow the officials’ issues paper, Clarifying the Tax Consequences for Deregistered Charities, issued in July 2013. A key proposal is that, from 1 April 2015 (or from 1 April 2014 for charities that voluntarily deregister), charities that are deregistered from the charities register will have to distribute their assets and income to charitable purposes within 12 months of being deregistered, or pay tax on the value of net assets on hand. However, provided they comply with their constituting document, deregistered charities are proposed to remain exempt from income tax as a ‘tax charity’ until they have finalised or exhausted all appeal rights in relation to their charitable status.

The Bill also proposes what is effectively a statutory override of the High Court decision in Re Queenstown Lakes Community Housing Trust [2011] 3 NZLR 502 (HC), by means of a specific income tax exemption for ‘community housing entities’ in proposed new section CW 42B of the Income Tax Act 2007. This proposed amendment coincides with reform of the framework for the provision of social housing in New Zealand, as set out in the Social Housing Reform (Housing Restructuring and Tenancy Matters Amendment) Act 2013 (which received Royal assent on 27 November 2013). From a future date, possibly 14 April 2016, community housing entities will need to be registered under the Housing Restructuring and Tenancy Matters Act 1992 in order to be eligible for the proposed new income tax exemption.
Submissions on the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill close on 5 February 2014.

1 December 2013

The Financial Markets Authority (the FMA) has conducted a review on the extent of exemptions for charities from Securities Laws. The Securities Act (Charitable and Religious Purposes) Exemption Notice 2003, which expired on 30 November 2013, provided exemptions from standard compliance requirements in relation to 2 distinct types of offers:

- offers of debt securities, facilitating fundraising for charitable and religious purposes; and
- offers of participatory securities which give members a right to use assets or other property of a non-profit organisation.

With respect to the former, ‘charitable organisations’ as defined were able to issue debt securities up to $2 million (with a cap of $500,000 in any 12-month period) without the need for a trust deed, investment statement or prospectus, provided that investors received an information document prior to subscription. The information document required a prominent warning statement explaining that the organisation was not subject to standard offer document requirements. The financial limits did not apply to religious organisations raising funds for religious purposes. Neither exemption applied to retirement villages.

Following the review, the FMA has issued 2 new exemption notices, which came into force on 1 December 2013:

- the Securities Act (Charity Debt Securities) Exemption Notice 2013 now exempts only registered charities from the trustee, registered prospectus, investment statement, and advertising certificate requirements in respect of offers of debt securities. Charities are also now limited to having a cumulative total of $15 million in debt securities (except certain excluded securities) outstanding at any time. Religious organisations have until 1 April 2015 to transition to the new regime. Before offering debt securities, the charity must provide the FMA with written notice that it intends to rely on the exemption notice, and must provide information about its directors and senior managers who are responsible for the offer and management of the securities, and about the procedures in place for the management and oversight of the subscriptions. This information must be updated annually. The charity must also include information such as a statement of its charitable purpose and its most recently audited financial statements.

- the Securities Act (Community and Recreational Purposes) Exemption Notice 2013 is substantially the same as its predecessor, exempting all not-for-profit organisations such as community-based recreational clubs from the statutory supervisor, registered prospectus, investment statement and advertising certificate requirements in respect of offers of participatory securities that give holders a right to use or enjoy assets or other property on the basis of payment of membership subscriptions or other fees.

The specific exclusion for retirement villages has been removed.

The exemptions expire on 30 November 2016. In the meantime, the Financial Markets Conduct Act 2013, which constitutes a once in a generation rewrite of New Zealand capital markets law, will progressively come into force. The exemptions may not be needed under the new regime, as the FMA considers the interests do not fall within the definition of schemes that are regulated by the new Act.
However, this will be considered specifically in the context of consultations on any new exemptions proposed from the new regime.

1 December 2013

In parallel with the FMA’s review of Securities Act exemptions, and with the passing of the Non-bank Deposit Takers Act 2013 (which now requires all non-bank deposit takers (NBDTs) to be licensed), the Reserve Bank of New Zealand (the Reserve Bank) has conducted a review of the exemption from aspects of the NBDT regime for charitable and religious organisations. The Deposit Takers (Charitable and Religious Organisations) Exemption Notice 2010 exempted charitable and religious organisations, as defined, from having to comply with certain aspects of the NBDT regime (namely, the credit rating, governance, capital ratio, related party exposure, and liquidity requirements, but not the requirement to have a risk management programme). Following the review, from 1 March 2014, smaller charities (that is, with outstanding debt securities offered to the public of under $15 million, or over $15 million but with outstanding loans under $5 million) that are registered with the charities regulator, will be exempted from the requirements of the NBDT regime. Registered charities above these thresholds will have until the date by which all NBDTs are required to be licensed under the new Act (expected to be 1 May 2015) to move to compliance with the credit rating, governance, and risk management requirements of the regime, and be licensed under the NBDT Act. A decision will be made on the application of capital ratio, liquidity, and related party exposure requirements of these entities at a later date, once the treatment of charitable and religious organisations under the new Financial Markets Conduct Act 2013 has been determined.

2 December 2013

The Charities Act does not currently require accounts to be audited. However, the Accounting Infrastructure Reform Bill, introduced into Parliament on 2 December 2013, proposes to require charities with total operating expenditure of $1 million or more to have their financial statements audited by a qualified auditor. Charities with total operating expenditure of $500,000 or more will be required to have their financial statements audited or reviewed. It is not clear at this stage what exactly will constitute ‘total operating expenditure’ or how, if at all, it will differ from total operating payments in the definition of ‘specified not-for-profit entity’, discussed above.

3 December 2013

The Financial Reporting Act 2013 and the Financial Reporting (Amendments to Other Enactments) Act 2013 were enacted on 3 December 2013. The latter amends the Charities Act 2005 to require registered charitable entities to prepare financial statements in accordance with financial reporting standards issued by the External Reporting Board (the XRB). Although the Charities Act has required registered charities to file an annual return, including a copy of their financial accounts and a statement of financial performance, since February 2007, it is fair to say that there has been widespread dissatisfaction with the quality and consistency of charities’ financial reporting. Stories have even emerged of some charities filing bank statements in place of financial statements with their annual returns under the Charities Act.

It is proposed that these new standards will apply from 1 April 2015 (although not-for-profit entities may adopt them before then if they wish). Charities with total operating payments of $125,000 or more (such charities being defined as ‘specified not-for-profit entities’), will be required to prepare financial statements in accordance with generally accepted accounting practice; smaller charities have the option of a ‘non-GAAP standard’, as that term is defined in section 5 of the Financial Reporting Act 2013. The financial reporting standards issued by the XRB may define what constitute ‘operating payments’ for the purposes of the definition of ‘specified not-for-profit entity’. If a charitable entity knowingly fails to
comply with an applicable financial reporting standard, the charitable entity and all of its officers will commit an offence and be liable on conviction to a fine of $50,000.

A suggestion that New Zealand adopt a National Standard Chart of Accounts (NSCOA) in order to provide a common approach to the capture of accounting information by the not-for-profit sector, unfortunately does not appear to have found favour here.

4.3 RECENT DEVELOPMENTS IN CANADA – 2013

Peter Broder, Muttart Foundation

Although in most respects Canadian charity law remains relatively stable, 2013 saw minor regulatory and judicial developments in some areas.

In Canada, there are both common law charities (subject to regulation by the province or provinces in which they operate) and registered charities, which are also subject to specific provisions of the federal Income Tax Act.

Budgetary measures

A temporary First-Time Donor’s Super Credit to encourage new donors to give to charity was introduced. It enhances by 25% the value of the current federal tax credit on donations to registered charities by individuals, where neither taxpayers nor their spouses have claimed the credit in the previous five years. The credit was introduced for a trial five-year period and can be claimed only once. Also introduced was a measure to strengthen the government’s ability to collect disputed amounts with respect to assessments of individual taxpayers, related to their participation in donation tax shelters.

Canada Revenue Agency (CRA) regulatory changes

CRA introduced additional reporting requirements in the T3010 annual filing for registered charities funding or undertaking political activities and for those receiving funding from outside Canada. It also moved to implement 2011 Income Tax Act amendments with respect to “ineligible individuals” participation in registered charities. These rules enable CRA to sanction a registered charity if someone with a criminal record or someone who has engaged in certain other impugned behaviour assumes a governance or senior management role with the entity.

CRA introduced new or revised guidance in the areas of: Charitable Purposes and Activities that Benefit Youth; Promotion of Health and Charitable Registration; Model Purposes; and, How to Draft Purposes for Charitable Registration.

Case law

Prescient Foundation v M.N.R., 2013 FCA 120 dealt with revocation of a registered charity by the CRA Minister on the basis of its having participated in a tax planning arrangement that resulted in a private benefit; its having made a non-charitable gift in connection with the tax planning arrangement; its having made a gift to a non-qualified donee; and, the inadequacy of its books and records. The Court held that a standard of correctness, rather than a standard of reasonableness, applied to the aspects of Minister’s decisions that raised extricable questions of law. It found that, given the nature of the tax

29 The law is at 29 January 29, 2014
30 See above, case note 2.1.13.
planning arrangement, the Foundation was not being operated for exclusively charitable purposes and that this was grounds for revocation. It further held, however, that an impugned transaction within the tax planning arrangement could not be characterized as a non-charitable gift and that a statutory provision prohibiting gifts to non-qualified donees, which was pending but not yet enacted during the period in question, could not be relied on for revocation by CRA. Finally, although revocation for inadequate books and records by the Minister was ruled reasonable, it was stated that where inadequate books and records were asserted as a reason to revoke registered charity status the particulars of the alleged breach must be disclosed to the charity, and the CRA could not simply rely on the general statutory requirement for books and records to be kept.

*The Queen v Guindon* 2013 FCA 153[^31] was an appellate decision dealing with *Income Tax Act* advisor penalties. The Court considered a Tax Court finding that the severity of potential penalties under *ITA* provisions for promoters of tax plans who engage in “culpable conduct” warranted their being treated as criminal offences, and thus attracted certain protections under the *Charter of Rights and Freedoms*. It overturned the Tax Court ruling and held the penalties were administrative, and therefore the provisions were not subject to the *Charter* provisions in issue. It re-instated the original penalties.

*Kossow v The Queen*, 2013 FCA 283[^32] was an appellate decision concerning a donation tax credit reassessment linked to the taxpayer’s participation in a leveraged charitable donation program. The program saw the taxpayer receive a 25-year interest-free loan to help fund a donation to an art gallery. The interest-free loan was held to confer a significant financial benefit on the taxpayer, and resulted in the portions of the transaction related to the loan not being considered to be a gift. The Federal Court of Appeal upheld the original disposition of the case made by the Tax Court. It also re-affirmed the holding in an earlier Federal Court of Appeal case that for *ITA* purposes a gift may be vitiated by if there is a benefit received in return for making it whether the benefit comes from the donee or another person.

*Norman v Watchtower Bible and Tract Society of Canada*, 2013 BCSC 209[^33] concerned whether a series of transfers constituted a conditional donation or a testamentary disposition. Some of the transfers were described as no-interest loans. Based on the full documentation and correspondence between the parties, the transfers were held to be a conditional donation (with the donor reserving the right to revoke the donation), rather than testamentary.

*Chabad v Minister of National Revenue*, 2013 FCA 196 was an application for an order prohibiting the CRA Minister from publishing a notice of revocation pending determination of objection. The registered charity in issue ran a school that offered both secular and religious instruction. The particular religious instruction offered was not readily available elsewhere. Based on a balance of convenience taking into account both the interests of the students and the general public interest in the integrity of the charitable sector an order was made not to publish the revocation notice until the end of the school’s fall semester.

**Corporate statutes**

Federally, and in a number of provinces, reform of statutes under which non-share capital corporations are constituted is underway or has already occurred. Although many charities are not constituted as corporations, those that are will be subject to new rules in a number of areas. Legislation varies from jurisdiction to jurisdiction, but broadly the reformed statutes usually feature a move to the objective standard of care for directors, increased financial assurance and disclosure obligations and enhanced

[^31]: See above, case note 2.8.10.
[^32]: See above, case note 2.8.1.
[^33]: See above case note 2.9.4.
member rights and remedies. Numerous charities are already operating under the new federal legislation. By October 2014 Canada Corporations Act corporations must transition to the new Canada Not-for-profit Corporations Act or other legislation, or face dissolution. Similar transition requirements are underway or foreseeable in several jurisdictions.

4.4 RECENT DEVELOPMENTS IN JAMAICA

Frances Hannah, The Australian Centre for Philanthropy and Nonprofit Studies

Jamaica has recently restructured its laws relating to charity by passing two pieces of legislation:

1. The Charitable Organisations (Tax Harmonisation) (Miscellaneous Provisions) Act 2013 (the Harmonisation Act), which commenced operation on 15 July 2013; and

The Harmonisation Act is administered by Tax Administration Jamaica (TAJ). The object of the legislation was to gather all tax laws relating to charity into one piece of legislation. Previously, charities had had to refer to numerous Acts viz. the Companies Act, the Customs Act, the General Consumption Tax Act, the Income Tax Act, the Property Tax Act and the Stamp Duty Act. This had required submission of documentation to several ministries. Under the Harmonisation Act, there should be only one application for all the relevant tax exemptions available to charities in Jamaica.

The second step in the reorganisation of charity law in Jamaica was the passage of the Charities Act 2013 (the Act). This step was required by the International Monetary Fund (IMF) as part of arrangements for continued support of Jamaica by the IMF. Debate on the Act began in the House of Representatives on 22 October 2013. The House passed the legislation (with three amendments) on 29 October 2013, and it was passed without amendment by the Upper House on 28 November 2013.

Prior to the Act, recording of charitable status of organisations was piecemeal in Jamaica. Some information was kept by the Companies Office, some by the Department of Cooperative and Friendly Societies, and some by the Clerk of the Houses of Parliament. Therefore, the purpose of the Act is one of transparency and control. Section 5 states that the objects of the Act are to:

(a) maintain, protect and enhance public trust and confidence in charitable organisations in Jamaica;
(b) promote compliance by governing board members with their legal obligations in relation to the management of charitable organisations; and
(c) enhance the accountability of charitable organisations to donors, beneficiaries and the general public.

The Act establishes a Charities Authority, a body which is to be responsible for maintaining a register of all registered charitable organisations in Jamaica. Most of the Act deals with the operation of the Charities Authority and the registration and reporting requirements which will be asked of charitable organisations in Jamaica after the commencement of the Act. A Charities Appeal Tribunal is also established in Part VI and the Fourth Schedule. The Act streamlines definitions relating to charity in section 2. A ‘charitable organisation’ is defined as:

(a) a charitable trust; or
(b) any institution, whether incorporated or not, which is –
   (i) established for a charitable purpose exclusively;
(ii) is intended to and does operate for the public benefit; and
(iii) has no part of its net income or assets enuring to the personal benefit of any governing
board member or settler of the organisation, or any other private individual,
but shall not include an excluded body.

An ‘excluded body’ includes a political party, a trade union, a representative body of employers, a
chamber of commerce or similar body, and any body which pursues an illegal purpose, one prejudicial to
public order and safety, or which is for the purpose of terrorism inside or outside Jamaica.

‘Charitable purpose’ is defined in section 2 as having the meaning in section 3. Section 3(1) states that a
charitable purpose is as listed in the First Schedule, and that is for the public benefit. Section 4 defines
‘public benefit’ as a benefit available to the public at large, or to a section of the public ascertained by
reference to a specified geographic area. The First Schedule lists the following charitable purposes:

1. the prevention or relief of poverty;
2. the advancement of education;
3. the advancement of religion;
4. the advancement of health or saving of lives;
5. the advancement of good citizenship or community development;
6. the advancement of the arts, culture heritage or science;
7. the advancement of amateur sport;
8. the advancement of human rights, conflict resolution or reconciliation;
9. the promotion of religious harmony or equality and diversity;
10. the advancement of environmental protection or improvement;
11. the relief of those in need because of youth, advanced age, ill-health, disability, financial
   hardship or other disadvantage (including temporary disadvantages such as the effects of a
   public disaster or public emergency);
12. the promotion of the efficiency of the armed forces or the efficiency of the police forces;
13. the advancement of animal welfare;
14. a purpose specified by the Minister, by order, subject to negative resolution by the House of
   Representatives, as being analogous to a purpose in paragraphs 1 to 13.

This list of purposes is modelled on the list in the Charities Act 2006 (UK). Section 3 also deals with
ancillary, subordinate or incidental purposes which are permitted where there is a main charitable
purpose, and where they are not themselves independent purposes of the registered organisation.

These streamlined definitions also apply to the Income Tax Act, which previously contained its own
definitions relating to charity, including under the Harmonisation Act (which was a transitional position).
These definitions have been repealed because the Harmonisation Act is intended to mesh with the
Charities Act to provide a more seamless process for charities in Jamaica. The Income Tax Act now
provides in section 2(1) that:

‘registered charitable organisation’ has the meaning given to it under the Charities Act;
‘charitable purpose’ has the meaning given to it under the Charities Act.

In addition, where exempt income was previously defined separately in section 12(h) of the Income Tax
Act, section 12 now provides that exempt income is: ‘(h) the income of a registered charitable
organisation’.

All existing charitable organisations will be required to reapply for charitable status under the new
Charities Act. For further information see: www.jamaicatax.gov.jm
5.0 SPECIAL ISSUES

5.1 WHEN (OR WHERE) IS A CHARITABLE TRUST CHARITABLE – AND OTHER ISSUES FOR CHARITABLE TRUSTS GIVING TO GOVERNMENT ENTITIES AFTER 1 JANUARY 2014.

Alice Macdougall Herbert Smith Freehills

The law relating to charitable trusts can be confusing and particularly so after 1 January 2014. The information in this short article is general only and each trust instrument needs to be considered carefully, to ascertain how these issues may apply to that trust. The Charities Act (Cth) 2013 and the legislative instrument adding to the definition of ‘government entity’ may have changed or been repealed since this paper was written. Please take care and investigate the laws relevant to each trust before applying any statements made in this paper!

State and territory laws govern whether a trust is charitable and therefore able to exist in perpetuity, as well as be entitled to State or Territory tax or duty exemptions. Commonwealth laws govern the trust’s entitlement to federal tax concessions. Due to the changes over the last few years there are a number of inconsistencies which arise depending on the governing law, the type of charitable trust (including whether it is a private or public ancillary fund – both referred to in this paper as PAFs) and the date it was created, or whether the trustee elects to use certain powers under relevant State legislation (where available). I outline some of these issues to highlight the difficulties which arise for trustees of charitable trusts, for government entities seeking grants, for State and Commonwealth regulators and for advisers.

Grant making trusts (including PAFs) need to be aware of the relevant definitions of ‘charitable’ to ensure compliance with both State/Territory and Commonwealth laws. Meanings are given to the term ‘charitable’ under the common law, the Charities Act 2013 (Cth), and relevant state or territory legislation. The starting point is the common law which provides that, in order to be charitable, a grant-making trust can only make distributions to charities and have charitable purposes. This is the only option available to trusts in Tasmania, the Australian Capital Territory and Northern Territory, and it is still possible to keep this simplified option in the other States. Victoria, New South Wales, Western Australia and Queensland made amendments to relevant state Acts36 to allow charitable trusts to remain charitable if the trustees ‘opt in’ by declaring by deed, that the trustees have the power to give to certain non-charitable entities. NSW, WA and Queensland adopted the same wording but the Victorian and South Australian Acts have different wording. SA does not have an ‘opt in’ declaration but the Act makes a trust charitable if the purpose includes giving to an entity that would be a charity but for its connection to government.37

Prior to 1 January 2014, section 50-20 of the Income Tax Assessment Act 1997 (ITAA 1997) provided for ‘funds contributing to other funds’ to be income tax exempt. These became known as Income Tax Funds Contributing to Other Funds (ITFA).

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34 This article is based on the law in February 2014.
36 Section 7K Charities Act 1978 (Vic); part 4A Charitable Trusts Act 1993 (NSW); part 9 Trusts Act 1973 (Qld); part VA Charitable Trust Act 1962 (WA).
37 Section 69D Trustee Act 1936 (SA).
Exempt Funds (ITEFs). ITEFs had to be trusts (generally that meant PAFs, as the purposes had to be restricted to only giving to item 1 DGRs) which were able to give to non-charitable item 1 DGRs which are exempt entities. This provision in the ITAA 1997 was necessary to enable those PAFs which had opted in under the relevant State legislation to still be income tax exempt. Even though the State legislation deemed the trusts to still be charitable, this was effective at State law only and not for Commonwealth purposes. Prior to 1 January 2014, the Commonwealth relied on the common law definition of charitable, which meant that these trusts were no longer charitable (and therefore no longer tax exempt as charities) because at common law a trust that is able to make grants to non-charitable entities is not deemed charitable.

From 1 January 2014, section 50-20 of the ITAA 1997 has been repealed, and trusts which were ITEFs are now treated as having been registered by the ACNC as charities (with effect from 1 January 2014), and exempt from income tax as charities (also from 1 January 2014). Further, the purposes of the PAFs are treated as being charitable under Commonwealth law. The PAFs which were ITEFs must remain entitled to be an ITEX under the pre-January 2014 law in order to remain charitable. Therefore they must continue to comply with the state Acts and the ITAA 1997 requirement that they only make grants to eligible item 1 DGRs which are ‘exempt entities’.

From 1 January 2014, section 13 of the Charities Act 2013 (Cth) (Charities Act) applies to a fund that contributes to a ‘charity-like’ government entity (other than a PAF which was an ITEX prior to 1 January 2014 and continues to comply with the ITEF requirements). That is, if the contributing fund’s purposes include providing money, property or benefits to a government entity or towards establishing a government entity, and the government entity would be a charity if it were not government, then the contributing fund’s purpose is deemed to be a charitable purpose, because the government entity is treated as not being a government entity.

Note that the Charities Act refers to ‘purpose’ in section 13 whereas the various state Acts (other than SA) refer to giving the trustees the ‘power’ to distribute to non-charitable entities. The ATO and the ACNC seem to take ‘purpose’ and ‘power’ as being the same: clause 4 of the model deed outlines the ‘trust purpose’ to apply property to or for an Eligible Entity, which is given alternative definitions for different jurisdictions. The alternative applying to Victoria (Example 1) refers to section 7K of the Charities Act 1958 (Vic), which governs ‘powers’ of trustees, and enables them to make a declaration to include giving to an eligible entity ‘that, but for a connection to government, would be a charity’. By this, the ATO and the ACNC seem to accept that making the declaration under Victorian law is sufficient to bring the trust within section 13 of the Charities Act.

Section 13 of the Charities Act only relates to the definition of a charitable purpose for Commonwealth law (which includes income tax purposes), not State law. Therefore this provision cannot apply in the Territories or Tasmania where no legislation allows charitable trusts to give to non-charitable entities, and trustees in the other States must still ensure they have correctly made a declaration and amended the trust deed (where required and able to). PAFs created before 1 January 2014, which were not ITEFs prior to that date, but want to use the powers under their relevant State law to give to non-charitable entities after 1 January 2014, will be restricted by section 13 if they wish to remain income tax exempt.

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38 Entities which are covered in item 1 of the table in section 30-15 Income Tax Assessment Act 1997 as deductible gift recipients.
40 Division 2 of Schedule 2 of the Charities (Consequential Amendments and Transitional Provisions) Act 2013 (Cth)
This means that in WA, NSW and Queensland, the declaration may need to be modified (if possible) and the trust deed amended (where permitted under the terms of the deed) to limit the possible grant making to item 1 DGRs which either are charitable or would be charitable if they were not government entities. Victoria and South Australia need to incorporate the differing limitations, e.g. would be charitable ‘if it were not a government entity’, and would be charitable ‘but for its connection to government’. The expressions are defined differently and though there will be some overlap, it is possible there will be some differences.

Section 13 of the Charities Act is not limited to PAFs. However, the relevant legislation in WA, Queensland and NSW is limited to PAFs, although it is possible in those States to broaden the definition of ‘prescribed trust’ in the Acts to include other charitable trusts. The Victorian and South Australian Acts are not restricted to PAFs. By making a declaration under the Victorian Act and opting in, the trustee’s powers include the power to provide money, property or benefits to any deductible gift recipient (whether item 1 or item 2) which would be a charity but for its connection to government, provided this is consistent with the trust instrument. The South Australian Act is not limited to DGRs, but covers any entity that would be a charity but for the connection with government.

It will be difficult to identify the various differences in grant making charitable trusts from the publicly available information, as all pre-January 2014 ITEFs will appear on the ACNC register, and on the ABR, as charities. Anyone seeking to find this information will have to review the governing documents lodged with the ACNC. The ACNC considers the declarations to be part of the governing documents, and making a declaration to be a change to the governing documents, therefore the declarations should be lodged with the ACNC.

It will be absolutely essential for trustees to ensure the declarations opting into the relevant State legislation are kept with the Trust Deed as this document will be the only means of establishing charitable status under both State and Commonwealth law. It will also show that the trustees are not in breach of the trust deed or the applicable laws. For trusts giving to entities which must be charitable under both State/Territory law and Commonwealth law there will be some differences e.g. native title entities will show as charities on the ACNC but may not be charitable under State or Territory laws.

For trusts which can only give to charities or ‘charity-like government entities’, trustees must know the entity is a government entity and that it would be a charity if it were not a government entity. Trustees will need a letter from the ACNC confirming this, unless the ACNC issues some specific guidance which trustees can rely on.

Following is a summary of the different applications (and argument for all states and territories adopting the Charities Act to provide consistency):

**ACT, NT and Tasmania:**

Trusts can only give to entities considered charitable at both Commonwealth law and under the relevant State or Territory laws (including common law and statute). Section 13 of Charities Act cannot apply to these trusts. Care will need to be taken with distributions to native title bodies which may be charitable on the ACNC register under the Charities Act but not charitable under State or Territory laws.

**Victoria:**

PAFs which had made a declaration under the Charities Act 1978 (Vic) and become ITEFs before 1 January 2014:
• trustees can distribute to item 1 DGRs which are exempt entities and which are either charitable (under both Victorian and Commonwealth laws) or would be charitable but for their connection with government.

**PAFs which were created before 1 January 2014 and were not ITEFs, or are created after 1 January 2014:**

• trustees may make a declaration to enable distributions to be made to item 1 DGRs which are either charitable (under both Victorian and Commonwealth laws) or are government entities under the meaning of the *Charities Act* but would be charities if they were not government entities (‘charity-like government entities), and would be charitable but for their connection with government as defined under the *Charities Act 1978* (Vic). The trust deed (if a pre-January 2014 model deed was used) will need to be amended to limit the eligible recipients (see clause 4.1(c) of the ATO’s current PAF model deed).

**Charitable trusts (which are not PAFs) created before or after 1 January 2014:**

• the trustees may make a declaration to enable distributions to be made to DGRs which are charity-like government entities, and would be charitable but for their connection with government as defined in the *Charities Act 1978* (Vic). The exercise of this power in the *Charities Act 1978* (Vic) must be consistent with the trust deed. The trust deed may need to be amended (if permitted) to ensure the eligible recipients are within the *Charities Act*.

**NSW, WA and Queensland:**

*PAFs created with the wording in the model trust deed including in the definition a reference to the Eligible Recipient within the meaning of the relevant State Act, or had made a declaration under the relevant State Act, and were ITEFs before 1 January 2014:*

• trustees can give to any item 1 DGR which is an exempt entity (this will include native title entities which are DGRs as PBIs under Commonwealth law, but are not charitable under State law).

*PAFs which were created before 1 January 2014 and were not ITEFs, or are created after 1 January 2014 as charitable trusts:*

• trustees may make a declaration to enable distributions to be made to item 1 DGRs which are either charitable (under both the relevant State and Commonwealth laws) or are charity-like government entities. The trust deed will need to be amended to limit the width of the declaration.

*PAFs created after 1 January 2014 using the specific wording in the ATO’s model trust deeds in Option B of the definition of Eligible Entity:*

• trustees can give to item 1 DGRs which are either charitable (under both the relevant State and Commonwealth laws) or are charity-like government entities.

**Charitable trusts which are not PAFs:**

• trustees cannot make a declaration or utilise section 13 of the *Charities Act*. 
South Australia:

PAFs created with wording referring to specific entities that would be charities but for their connection with government or general wording including entities referred to in section 69D Trustee Act 1936 (SA) as in the pre 1 January 2014 ATO model deed, and were ITEFs before 1 January 2014:

- trustees can give to item 1 DGRs which are exempt entities and which are either charitable (under both SA and Commonwealth laws) or would be charitable but for their connection with government.

PAFs which were created before 1 January 2014 and were not ITEFs, or are created after 1 January 2014:

- the trustees may be able to amend the trust deed to enable distributions to be made to item 1 DGRs which are either charitable (under both SA and Commonwealth laws) or are charity-like government entities, and would be charitable but for their connection with government as defined under the Trustee Act 1936 (SA). The trust deed must be amended (if permitted).

Charitable trusts (which are not PAFs) created before or after 1 January 2014:

- the trustees may amend the trust deed to enable distributions to be made to charity-like government entities, and would be charitable but for their connection with government as defined under the Trustee Act 1936 (SA).

5.2 THE FAIR WORK COMMISSION’S JURISDICTION TO DEAL WITH WORKPLACE BULLYING

Tim Longwill, McCullough Robertson

On 1 January 2014 the Fair Work Commission (FWC) launched its new bullying jurisdiction, following a number of recommendations made in a report tabled by the House of Representatives Standing Committee on Education, Employment, and Workplace Relations. In a world-first jurisdiction, the FWC now has powers under Part 6-4B of the Fair Work Act 2009 (Cth) (FWA) to intervene and seek to resolve workplace bullying disputes, subject to some restrictions. Under the new regime any worker who reasonably believes that he or she has been bullied at work may apply to the FWC for relief, so long as there remains an ongoing risk that the worker making the application will continue to be bullied.

The primary focus of the jurisdiction is on preventative measures, rather than compensation or punishment. In line with their stated objectives, remedies provided by the FWC will include issuing any orders it considers appropriate to stop bullying. According to the anti-bullying benchbook released by the FWC to assist claimants, such orders ‘are directed at the conduct leading to the finding of bullying behaviour and this would mean that the applicant and the individuals concerned could be subject to such an order’.

The Explanatory Memorandum to the legislation contemplates potential orders the FWC may issue, such as: that a group or individual stop bullying, regular monitoring of behaviour by employers, provision of training and support to workers, and a review of the employer’s workplace bullying policy. The FWC has made clear that the paramount objective of the new powers is to restore and repair
working relationships, and as a result reinstatement or payment of compensation will not be available remedies under any circumstances.

Under section 789FD(1) of the FWA, a worker is ‘bullied at work’ if:

- while the worker is at work in a constitutionally covered business:
- an individual; or
- a group of individuals;
- repeatedly behaves unreasonably towards a worker or a group of workers at work; and
- that behaviour creates a risk to health and safety.

**Who is a ‘worker’?**

For the purposes of the FWA the term ‘worker’ retains a broad meaning, including employees, contractors / subcontractors and their employees, apprentices, work experience students and even volunteers. Importantly, the FWA does not seek to define an ‘individual’ exhaustively, for the purposes of identifying classes of people against whom orders may be made. As a result employers may be subject to orders in respect of the behaviour of any person in the workplace, which may include clients, union officials or any other temporary visitors. The FWC acknowledges that the scope of the orders could conceivably extend to behaviour such as threats outside the workplace, should those threats relate to work.

**Constitutionally covered business**

As the bullying regime only applies to constitutionally covered businesses, it is especially critical that employers be aware of whether their organisation falls within that definition. For the purposes of the legislation a constitutionally covered business or undertaking is one in which either:

- the ‘person conducting a business or undertaking’ (as defined in the Work Health and Safety Act) is also a constitutional corporation, or the Commonwealth, or a Commonwealth authority, or a body corporate incorporated in a territory; or
- the business or undertaking is conducted principally in a territory or a Commonwealth place.

Whether your business is constitutionally covered will largely be determined by characterising the nature of the entity and the services performed. Even in circumstances where a person or corporate entity is not conducting a business or undertaking for profit or gain, it may still be constitutionally covered.

One of the primary exemptions from workplace bullying claims is for volunteer associations, provided that the association does not employ any person to carry out work for it, and that the members are ‘acting together for one or more community purpose’. A community purpose includes a philanthropic or beneficial purpose, and although such an organisation loses its exemption if it hires a person characterised as an employee, voluntary associations may still hire workers on contractor or subcontractor arrangements (e.g. someone to do the bookkeeping for a fee).

**Repeated unreasonable behaviour creating a risk to health and safety**

In the lead up to the commencement of the new provisions in the Act, some concerns were raised in respect of what constitutes ‘unreasonable behaviour’ towards another worker. In issuing their report on bullying in Australian workplaces, the dissenting members of the House Standing Committee voiced concerns that ‘there is frequently great difficulty in determining whether workers have been targeted
for unfair abuse or whether those who claim injury have an unreasonably low threshold to legitimate criticism’. In an effort to address this concern, the FWC applies an objective test in assessing whether the behaviour was unreasonable – that is, how a reasonable person would view the behaviour. Some guiding examples of ‘unreasonable behaviour’ given by the House Standing Committee include behaviour that is victimising, humiliating, intimidating, or threatening. For such behaviour to amount to bullying at work it must also create a risk to health and safety. This requirement is significant in that, not only must the behaviour directly create that risk, the threshold is merely that the behaviour creates a ‘possibility of danger to health and safety’, rather than actual danger.

**Reasonable management action**

An important point for employers is the express exclusion of reasonable management action from the definition of bullying. Under the FWA, for behaviour to be reasonable management action:

(a) the behaviour must be management action;
(b) it must be reasonable for the management action to be taken; and
(c) the management action must be taken in a manner which is reasonable.

Some examples of management action include meetings to address performance, investigating alleged misconduct, modifying a worker’s duties or otherwise counselling or disciplining a worker. A similar objective test is to be applied in assessing the reasonableness of the management action and its application, and will depend on the facts of each case.

**Dealing with bullying complaints**

The effectiveness and operation of the new workplace bullying regime has yet to be borne out in the statistics; however it is unique in the sense that it provides an avenue of recourse for employees who remain employed within the organisation, as opposed to the traditional occurrence of disputes being post-termination. Managing an employee still within the employment relationship requires a sensitive approach, and a thorough understanding of how this new regime operates will assist employers to put effective strategies in place to cope with any potential claims.

**5.3 PRIVACY ACT AMENDMENTS**

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Privacy law is the law governing the collection, storage and use of personal information about individuals by organisations. This law is currently codified in the *Privacy Act 1988* (Cth) (the Act). On 29 November 2012, the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) (Amending Act) was passed by Parliament, introducing a total of 197 amendments to the existing Act. The changes introduced by the Amending Act will come into effect on 12 March 2014.

Organisations are currently required to adhere to a set of principles – the National Privacy Principles (NPPs) – which outline their obligations in relation to privacy. From 12 March 2014, the Amending Act replaces the NPPs with a more streamlined set of rules called the Australian Privacy Principles (APPs). The Amending Act also introduces a new civil penalty, for organisations that repeatedly and seriously interfere with an individual’s privacy – the penalty may go up to $340,000 (if the entity is an individual).

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42 *Privacy Act 1988* (Cth) Schedule 3.
43 The APPs will replace Schedules 1 and 3 to the *Privacy Act 1988* (Cth) with Schedule 1 only.
or $1,700,000 (if the entity is a body corporate). There are some notable exclusion provisions: organisations with an annual turnover of $3 million or less are excluded from the scope of the APPs; and certain acts or practices relating to employee records are also excluded. This article will outline the laws surrounding the life cycle of collected information in terms of the incoming legislation, focusing on some of the changes that may be relevant to not for profit (NFP) organisations to which it applies.

There will be no transition period for these reforms, so it is important that organisations prepare prior to 12 March 2014 to ensure that they are in compliance with the APPs at that date. This will involve reviewing your existing privacy policies and procedures, to ensure that they comply with the amended Act and APPs and are implemented appropriately. Specific advice relating to your organisation’s compliance with privacy law is recommended.

**Collection of Personal Information (APP 3)**

Organisations will frequently collect information from individuals during the course of their activities. Information about an individual whose identity is apparent is categorised as ‘personal information’. ‘Sensitive information’ is a sub-category of personal information.

**Personal Information** is information or an opinion that enables an organisation to identify an individual. This includes general information such as name and date of birth. From 12 March 2014, the ability to identify the individual will be sufficient to fit the definition of personal information. Organisations may only collect personal information that is reasonably necessary for one or more of the organisation’s functions or activities.\(^44\)

**Sensitive information** is subject to stricter rules of disclosure, being information of a more personal nature, such as racial origin, religious beliefs, sexual orientation, political opinions, health information and genetic information. Organisations cannot collect sensitive information unless the individual concerned consents to its collection and the information is reasonably necessary for one or more of the organisation’s functions or activities.\(^45\) There are exceptions that permit an organisation to collect sensitive information in the absence of consent, e.g. if an organisation is required or authorised by a court or tribunal to collect such information, or where a ‘permitted general situation’ exists, such as a serious threat to life, health or safety or to locate a missing person.\(^46\)

Personal information about an individual must only be collected from the individual concerned unless it is unreasonable or impracticable to do so.\(^47\) APP 5 requires that before, or as soon as practicable after, collecting personal information, an organisation must take reasonable steps to notify the individual of relevant matters referred to in APP 5.2, e.g. the organisation’s contact details, the purpose of collection, any other organisations to which it might be disclosed, information about accessing and correcting the information under the organisation’s privacy policy. To ensure that they have taken ‘reasonable steps’, an organisation should develop procedures that are uniformly applied prior to collecting information. This may take the form of a standard notice accompanying information collections forms, to alert individuals that their personal information is being collected and matters that it is reasonable to notify them of.

\(^44\) *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) Sched 1, APP 3.2.

\(^45\) Ibid, Sched 1, APP 3.3(a)(ii).

\(^46\) Ibid, Sched. 1, APP 3.3(b).

\(^47\) Ibid, Sched. 1, APP 3.5, 3.6.
Use and Disclosure of Personal Information (APP 6)

An organisation can only use and disclose personal information for the purpose for which it was collected (the ‘primary purpose’). However, it can be used for a purpose other than its primary purpose (the ‘secondary purpose’) in certain circumstances, e.g. where the individual consents to the use or disclosure and that secondary purpose is related to the primary purpose (for sensitive information, the secondary purpose must be directly related to the primary purpose).

Storage and Privacy Policies

The Amending Act introduces APP 1, which aims to ensure that organisations are transparent and accountable for their personal information handling practices. APP 1 places three major obligations on organisations:

1. Procedures and compliance — Organisations must take proactive steps to implement new practices, procedures and systems that will:
   - ensure that the organisation complies with the new APPs; and
   - ensure that the organisation is able to deal with privacy inquiries and complaints from individuals.

   This obligation is measured by a ‘reasonable steps’ test. Whether an organisation has taken reasonable steps will be determined objectively, based on its circumstances, including factors such as the organisation’s size, resources and business model and the nature of the personal information held.

2. Developing an APP Privacy Policy — By 12 March 2014, organisations should have a Privacy Policy that is up-to-date and clearly expresses how they handle personal information. The APPs stipulate the detail of what must be in the Policy, including:
   - statements on the processes involved in collecting information;
   - what will happen to the information after it has been collected by the organisation;
   - how an individual can access information the organisation holds about them;
   - how an individual may make a complaint against the organisation about an alleged breach of the APPs and how the organisation will deal with such a complaint.

Organisations should have their existing Privacy Policy formally reviewed by a person familiar with privacy law to ensure compliance.

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49 Ibid, Sched. 1, APP 6.2(a).
51 Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth) Sched. 1, APP 1.2.
52 Ibid, Sched. 1, Item 104 (APP 1.2(b)).
53 Ibid, Sched. 1, APP 1.3, 1.4.
54 Ibid, Sched. 1, APP 1.4.
3. **Availability of Privacy Policy**—Organisations will be required to make their Privacy Policies available free of charge in an appropriate form. A suitable way to comply with this obligation is to make it accessible on the organisation’s website.

The recent shift to **cloud computing** introduces additional hazards for organisations to be aware of. Cloud computing is the virtual storage of information by a third party storage provider. Often these providers are located overseas, resulting in the disclosure of personal information over international borders. **APP 8** imposes an obligation on organisations to take reasonable steps to ensure that the overseas entity does not breach the APPs; this can include overseas backups.

**Destruction or De-identification**

Once information is collected and has been used, reasonable steps must be taken to ensure the information remains up-to-date, and a valid purpose still exists for keeping it. If not, and where it is reasonable to do so, the collected information should be destroyed or de-identified.

Particular care may be needed by organisations that use social media platforms such as Facebook, or networks with third parties, as they may accumulate personal or sensitive information through those channels. The main step that an organisation must take when they become aware of holding this information is to consider whether or not they could have solicited it through their normal information collection process (APP 3). Information that they could not have collected in compliance with APP 3 must be destroyed or de-identified as soon as practicable, unless there is a law or legal order preventing it from being destroyed. Information that could have been collected in compliance with APP 3 is to be treated in the same way as if it had been collected under that APP.

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55 Ibid, Sched. 1, Item 104 (APP 1.5).
56 Ibid, Sched. 1, APP 8.
57 Ibid, Sched. 1, APP 10.
58 Ibid, Sched. 1, APP 11.2.
59 Ibid, Sched. 1, Item 104 (APP 4.1).
60 Ibid, Sched. 1, Item 104 (APP 4.3).
6.0 WHAT DOES 2014 HOLD?

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Fate of Gillard/Rudd Taxation Bills on change of federal government

On the 12 December 2013, the Assistant Treasurer announced the fate of a number of Bills that parliament had not considered before the 2013 election.62 The ‘in Australia’ requirement intended to apply to income tax exempt charities and deductible gift recipients, which was announced in the 2009–10 Budget, was marked to proceed under the new government (see below). However the 2011–12 Budget proposal for a measure to ‘better target’ concessions for nonprofit entities – i.e. to deal with the unrelated business income of nonprofit entities – will not proceed. Instead, the government indicated that it would ‘explore simpler alternatives to address the risks to revenue’.63

Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014

The Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014 (the No. 1 Bill) starts an unusual two stage process to repeal the ACNC Act and associated legislation. Reference is made in the No. 1 Bill to an Australian Charities and Not-for-profits Commission (Repeal) (No. 2) Bill 2014 (the No. 2 Bill) to be introduced at some later date. Part 1, Schedule 1 of the No. 1 Bill repeals the ACNC Act, but will not come into effect until Schedule 1 to the No. 2 Bill commences. As the No. 2 Bill is yet to be introduced, the timing of this is uncertain.

This presents a paradox, given the current government’s intention to reduce obsolete legislation on the statute books by adopting a two stage legislative process. Such a convoluted legislative process inevitably creates uncertainty among charities as to their future obligations to, and reporting requirements for the Commonwealth government. The unclear situation makes good administration by the current ACNC extremely difficult, which is surely an unnecessary outcome. Informed debate on the No. 1 Bill is effectively impossible as many of the issues necessarily raised cannot be considered in isolation, and cannot be addressed adequately without analysing the No. 2 Bill. This appears to add ‘red tape’ to a sector already suffering from reform fatigue.

Social Services and Other Legislation Amendment Bill 2013

This omnibus Bill, introduced into parliament on 20 November 2013, was divided into 13 schedules providing for distinct measures and amendments. Originally 12 schedules, government amendments to the Bill, passed by the House of Representatives on 4 December 2013, inserted an additional schedule which proposed to delay the commencement of the Charities Act 2013 from 1 January 2014 to 1 September 2014. The Charities Act 2013 provides a definition of charity, including an exploration of what purposes are for public benefit and what constitutes a ‘disqualifying purpose’, as well as various definitions of a ‘charitable purpose’. The Supplementary Explanatory Memorandum to this Bill stated that the delayed commencement would ‘allow for further consultation on the legislation in the broader context of the Government’s other commitments in relation to the civil sector’.64

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63 Ibid, ‘Do not proceed item 33’.
64 Supplementary Explanatory Memorandum, Social Services and Other Legislation Amendment Bill 2013.
The Act was passed on 25 March 2014 without Schedule 13.

**Tax and Superannuation Laws Amendment (2014 Measures No. 3) Bill 2014: ‘in Australia’ special conditions**

The Government is consulting on draft legislation, draft regulations and explanatory materials to implement the 2009–10 Budget measure to reinstate and centralise the special conditions for tax concession entities. The *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012* had not been passed before the 2013 election; and in a review of all outstanding taxation bills the new government decided to review and resubmit the Bill.65

The High Court of Australia decided, in *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* that, under current tax law, charities could be regarded as pursuing their objectives principally ‘in Australia’, if they merely operate to pass funds within Australia to another charity that conducts its activities overseas.66 The Explanatory Memorandum to this Bill states that the intention of the proposed law is to reverse the effect of the High Court’s decision and give full effect to the current policy to limit the extent to which charities and other income tax exempt entities can direct funds to overseas projects without compromising the tax integrity rules.

Another policy objective which the Bill seeks to achieve, is in line with Australia’s membership of the Financial Action Task Force (FATF), an inter-governmental body which develops and promotes policies to combat ‘money laundering, terrorist financing and other related threats to the integrity of the international financial system’.67 So restating the ‘in Australia’ rules for income tax exempt entities and codifying the ‘in Australia’ rules for Deductible Gift Recipients is intended to address possible abuse of nonprofit entities for the purposes of money laundering and terrorist financing.

The Bill also seeks to centralise and simplify the other special conditions entities must meet to be income tax exempt under section 50-50 of the *Income Tax Assessment Act 1997* (ITAA 1997). This includes Schedule 11 of *Tax Laws Amendment (2013 Measures No. 2) Act 2013* which inserted the following into a host of exempt body provisions in the ITAA 1997.68

   The entity must:
   (a) comply with all the substantive requirements in its governing rules; and
   (b) apply its income and assets solely for the purpose for which the entity is established.

This has become known widely as the ‘sneaky amendment’ because of the lack of publicity given to it prior to its passing.

**New South Wales – Improving governance within incorporated associations**

The NSW Minister for Fair Trading released a discussion paper relating to the proposed reform of the governance of incorporated associations. The paper notes that, despite previous reforms, including a mandatory dispute resolution procedure in associations’ constitutions there are still serious allegations about association governance defaults.

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The paper proposes 10 options for consideration:

- An independent returning officer;
- Giving the Department power to publicise convictions under the Act;
- Mediation to be included as a part of the mandated dispute resolution;
- The Department may give Practice Directions to associations or various members;
- The Department may be able to ban certain members from holding office;
- Applications to enforce an association’s constitution may be brought before the Local Court rather than the Supreme Court;
- Legislative amendments to allow for an oppressive conduct remedy;
- Additional requirements in relation to disclosure of conflicts of interests;
- The Department may be able to cancel the registration of associations;
- Measures to prevent associations from engaging in misleading or deceptive conduct.
7.0 CONTRIBUTING ORGANISATIONS

THE AUSTRALIAN CENTRE FOR PHILANTHROPY AND NONPROFIT STUDIES

The Australian Centre for Philanthropy and Nonprofit Studies (ACPNS) is part of the QUT Business School which is internationally recognised for its high quality teaching and research.

ACPNS brings together academics and research students from a wide variety of disciplines, however all have expertise in philanthropy, nonprofit organisations, and the social economy.

The Centre’s research activities incorporate a wide range of issues of interest and concern to philanthropic and nonprofit organisations and government including:

**Accounting and Finance**
- QUT Standard Chart of Accounts
- Reserves
- Management ratios

**Nonprofit Governance**
- Governance and management research
- Nonprofit board evaluation

**Nonprofit Regulation**
- Law reform
- Taxation
- Liability of nonprofit organisations and key personnel
- Human services contracts and partnerships

**Philanthropy and Fundraising**
- High net worth giving
- Professional advisers’ role in philanthropy
- Philanthropy for Indigenous and Torres Strait Islanders’ causes
- Planned giving

**Social Enterprise**
- Mapping and scoping the sector
- Strategic management of social enterprises
- Social enterprise and public policy
- Legal issues affecting social enterprise

Apart from the research activities of its members, staff associated with the Centre also teach programs designed for students interested in following careers in the management of philanthropic and nonprofit organisations or in public administration associated with nonprofit organisations.
The Graduate Certificate in Business (Philanthropy and Nonprofit Studies) comprises eight core units which provide the basis for articulation into the Master of Business (Philanthropy and Nonprofit Studies). The Graduate Certificate is available to students based outside of Brisbane via flexible delivery mode.

The Centre has an active community service and continuing professional education program and has conducted public and specialist seminars for several years. The Centre also publishes working papers, manuals and monographs.

**Mission**

...to bring to the community the benefits of teaching, research, technology and service relevant to philanthropic and nonprofit communities.

**History**

Established in 2001, the Centre builds on the former Program on Nonprofit Corporations (PONC), which commenced in the School of Accountancy, Faculty of Business in 1991. PONC involved various staff within the Faculty of Business in research, consultancy and community service in the areas of law, tax, management, marketing, fundraising and ethics for nonprofits organisations.

The Program developed a strong reputation for research and community service in the legal, accounting, taxation and public policy aspects of philanthropic and nonprofit entities.

In 2001, generous support was received from The Myer Foundation and the Reid Family Charitable Trusts. This support was matched by QUT. In 2007, the Centre became a fully accredited member of the Nonprofit Academic Centers Council.

**NOT-FOR-PROFIT LAW**

Not-for-profit Law (previously PilchConnect) is a specialist community legal service established to provide free and low cost legal assistance to not-for-profit organisations in Victoria and New South Wales. It operates as a program of Justice Connect, a community legal centre committed to improving access to justice through pro bono, and aims to develop a sector-based hub of not-for-profit legal expertise and support.

Not-for-profit Law ‘helps the helpers’ by providing tailored legal information, advice and training to not-for-profit community organisations. Its focus is on improving access to legal help for not-for-profit community organisations, and on improving the legal landscape in which they operate. Not-for-profit Law’s policy and law reform work is focused on reducing red tape for the not-for-profit sector, helping not-for-profits be more efficient and better run, and ensuring that reform takes into account impacts on the not-for-profit sector.

By relieving the burden of legal issues, Not-for-profit Law aims to empower organisations to better focus their time and energy on achieving their mission - whether that’s supporting vulnerable people, delivering community services, enhancing diversity or bringing together the community. Not-for-profit Law works with a range of community peak bodies, including a formal partnership with the Australian Centre for Philanthropy and Nonprofit Studies, and are grateful to the ACPNS for their tremendous support and encouragement.
THE AUSTRALIAN CHARITY LAW ASSOCIATION

The Australian Charity Law Association was established in 2009 in response to the emerging need for accountable, charity-related legal services in Australia. The Association is registered as a charity with the Australian Charity and Not-for-profit Commission (ACNC).

The Association’s aim is to provide a forum for professionals, academics and charity and not-for-profit (NFP) employees or volunteers who have an interest in charity and NFP law to increase their knowledge in this area and, as a consequence, raise the standard of legal assistance provided to charities and NFP organisations. This education is provided through seminars and conferences conducted by members as well as international and Australian guest speakers.

The many recent reforms targeting the charity and NFP sector serve to highlight the importance of education to keep abreast of current legislative requirements, whether from a compliance or advisory perspective. Recent events hosted by the Australian Charity Law Association have included a conference in September 2012, focusing on changes in governance and the, then, up-coming implementation of the ACNC, and seminars in March 2013 on changes to the School Building Fund Regulation for school and church employees and volunteers. The 2013 Conference was held in Melbourne in July 2013 and included presentations on Tax Reforms, the Definition of “Charity” and Freedom of Religion. In addition, a website which will provide a forum facility for members to exchange information is planned to be operational in early 2014.

The current Board members of the Australian Charity Law Association are:

- Anne Robinson (Solicitor Director, Prolegis Lawyers) (Chair)
- Jennifer Batrouney SC (List A Barristers, Melbourne)
- Matthew Harding (Associate Professor, Melbourne University Law School)
- Elaine Leong (Partner, Applebee Legal)
- Dr Matthew Turnour (Partner, Neuman & Turnour Lawyers)

How you can get involved

- Become a member – Membership is open to anyone with an interest in charity law. Benefits of membership include information about events and legislative changes, access to the forums on the website and discounted fees for seminars and conferences. Applications for Membership are available from the Administrator: Merrin Marks admin@charitylawassociation.org.au ph. 0401 486 844
- Assist with the organisation of or participate in meetings, seminars and conferences relating to charity and NFP law issues either as a presenter or an attendee.