

DOES FREEDOM OF RELIGION IMPLY FREEDOM OF RELIGIOUS TRADE?

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ABSTRACT

Australia's legal relationship with religious institutions and their corporate enterprises is one of mixed blessings. The High Court unanimously affirmed in *Scientology* that despite no evidence for the supernatural, there should be no legal impediment to religious leaders obtaining 'the financial and other privileges which come with religious status', even suggesting 'charlatanism is a necessary price of religious freedom'. But is the price too high? Religious trade — the art of converting public worship into private wealth — has become a billion-dollar secret cottage industry, falling between the gaps of charitable and corporate legal governance. To achieve greater equity and accountability regarding religious charities and especially their trading enterprises compared to the rest of the corporate and charitable sector, this paper prosecutes the need for a suite of simple but audacious governance reforms. These legislative reforms establish a nexus between s 116 Religious Freedom and s 51(xx) constitutional trading corporations as intended by the *Australian Constitution* and now afforded in the *Work Choices* ruling.

I INTRODUCTION

The High Court ruling in *The Church of the New Faith v Commissioner of Pay-roll Tax (Vic)*¹ uniquely but unintentionally afforded special privileges to religious institutions and in particular, their trading corporations. This paper explores how the ruling clarified s 116 Freedom of Religion, but ignored the trading corporation constraints intended by s 51(xx) of the Australian Constitution.² It discusses the legal and equitable dissonance between a 'reasonable religious person' and a 'reasonable atheist',³ between legal and economic jurisprudence and between public and private interests, as different classes of charities compete for the scarce resources of the public purse.⁴

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¹ (1983) 154 CLR 120 ('*Scientology*').

² See *Commonwealth of Australia Constitution Act 1900* (Imp) s 9 ('Australian Constitution')

³ William Lobdell, 'On Losing His Religion' *ABC Online* (12 June 2009)

<<http://www.abc.net.au/tv/bigideas/stories/2009/06/12/2596712.htm>>.

⁴ Peter Karsten, 'Recognizable Law and Economics Jurisprudence — How Much Wealth — and Welfare-Maximizing Took Place in the Courts, Legislatures, and Customs of Eighteenth and Nineteenth-Century Common-Law Domains' (2004) 8 *Australian Journal of Legal History* 21.

First, the paper will examine the High Court's historical separation between church and state in Australia. Secondly, it will then explore the developing judicial treatment of religious institutions and associated corporate and charitable governance standards alike. Thirdly, the paper investigates how registered religious charities are uniquely qualified for a suite of unparalleled tax benefits as well as exclusive exemptions from government charges and from most accountability measures.⁵ It concludes with a discussion about legislative governance reforms that ensure a more 'level playing field' between churches, charities and corporations in our ever increasingly transparent and pluralistic future.⁶

II HISTORICAL BACKGROUND — SEPARATION OF CHURCH AND STATE

A Religion since Settlement

After the American Revolution, England needed somewhere else to 'warehouse' its convicts.⁷ Consequently, Australia became a transplanted nation, inheriting England's laws and its religion — the Church of England.⁸ So imbedded was the church in our early culture, Governor Bourke's *Church Act 1836* (NSW),⁹ promoted the building of churches and provided maintenance for clergy.¹⁰ This immediately created bureaucratic challenges for convicts and public servants alike. For example, the validity of marriages certified by non-Anglican clergy was not completely resolved until 1855.¹¹ Likewise, convicts were forced to attend Anglican services, whatever their faith.¹²

At federation in 1901, s 116 of the Australian *Constitution* institutionalised three positive obligations to ensure the government does not impose any religion or observance on any person, or prohibit the free exercise of any religion. The one negative obligation is to not impose religious tests on public officers.¹³ Despite this, the first sentence of the *Australian Constitution*'s preamble is a prayer, which provides that we as one nation, 'humbly (rely

⁵ *Scientology* (1983) 154 CLR 120 [25] (Mason ACJ and Brennan J), [44]–[45] (Murphy J).

⁶ *Corporate Law Economic Reform Bill 1998* (Cth); *Managed Investments Act 1998* (Cth); *Company Law Review Act 1998* (Cth); Peter Costello, 'Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA)' (Speech delivered at the launch of ASIC and APRA, 1998) <<http://www.petercostello.com.au/speeches/1998/2002-address-on-the-launch-of-the-new-corporate-and-financial-regulatory-framework>>.

⁷ Anthony Vaver, *Bound with an Iron Chain: The Untold Story of How the British Transported 50,000 Convicts to Colonial America* (Pickpocket Publishing, 2011) 88; Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995) 3–21.

⁸ Alex Cuthbert Castles, *An Australian Legal History* (Lawbook Company, 1982); Manning Clark, 'The Origins of the Convicts Transported to Eastern Australia', 1787–1852 (1956) 7.27 *Australian Historical Studies* 314–327.

⁹ Enabling a 'pound for pound' government subsidy scheme to buy land and build churches.

¹⁰ J S Gregory, *Church and State: With Particular Reference to Victoria Since Separation* (Cassell, 1973) 39.

¹¹ *Ibid* 29; NSW Anti-Discrimination Board, *Discrimination and Religious Conviction* (1984) 38.

¹² New South Wales Government, *Anti-Discrimination Board – Discrimination and Religious Conviction* (1984) 38.

¹³ *Australian Constitution* s 116; Tony Blackshield and George Williams, *Australian Constitutional Law & Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 8–12.

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on the blessing of Almighty God'.¹⁴ Federation marked a 'clear demarcation between secular and religious law', and between the church and the state.

This secularist approach to law meant that the organising of political, legal and constitutional matters excluded religion from public affairs.¹⁵ 'Liberal secularism' has its practical application in s 116,¹⁶ sitting comfortably alongside Article 18 of the International Covenant on Civil and Political Rights (enforceable in Australia under the provisions of the *Australian Human Rights Commission Act 1986* (Cth))¹⁷, ensuring all Australians enjoy freedom of thought, conscience, religion and belief.¹⁸ This single, declaratory, natural law provision¹⁹ protects theistic, non-theistic and atheistic beliefs alike. Advancing our new-found pluralist values, in stark contrast to the federation era 'White Australia Policy',²⁰ from the 1950s onwards, migrants and refugees have continued to settle here from the Middle East, South East Asia and Southern Europe, expanding our social and religious diversity.

B Current Statistics and Status

In 2011, 74 per cent of Australians aged 18 years and over reported affiliating with a religion. In the following year, 23 per cent reported participating in religious activities in the previous three-month period. However, 4.8 million (22 per cent of Australians) said they do not have any religion at all. Moreover, 132 600 respondents identified themselves as 'cosmopolitan'; 'infidel'; 'single taxer'; 'callithumpian'; 'idolater' and 'wowser'.²¹ Notwithstanding the fact that in 2013, 84 per cent of people surveyed agreed with the statement that 'religion and politics should be separate',²² successive governments continue to subsidise this sector directly and indirectly without any 'express legislation' or explicit overarching public policy.²³ Currently, religious trading corporations such as Sanitarium, for example, continue to contribute hundreds of millions of dollars to their

¹⁴ *Commonwealth of Australia Constitution Act 1900* (Imp) (preamble).

¹⁵ Hosen Nadirsyah and Richard Mohr (eds), *Law and Religion in Public Life: The Contemporary Debate* (Taylor and Francis, 2011).

¹⁶ Holly Randell-Moon, *Religion, Spirituality and the Social Sciences* (The Policy Press, 2008) 51–62.

¹⁷ *Australian Human Rights Commission Act 1986* (Cth), s 3 and Sch 2.

¹⁸ Australian Human Rights Commission, Freedom of thought, conscience and religion or belief <<https://www.humanrights.gov.au/freedom-thought-conscience-and-religion-or-belief>>.

¹⁹ Michael S Moore, 'Justifying the Natural Law Theory of Constitutional Interpretation' (2000) 69 *Fordham Law Review* 2087.

²⁰ *Immigration Restriction Act 1901* (Cth).

²¹ Australian Bureau of Statistics, *Australian Standard Classification of Religious Groups* (18 July 2013) 1266.0.

²² Meredith Doig, 'Measuring Political Bias' (Media Release, 26 August 2013). Dr Doig is President of the Rationalist Society of Australia.

²³ *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204 (Kirby J) ('*Word Investments*').

wholly owned religious institutional owners,²⁴ all the while enjoying special privileges later discussed by Murphy J in the *Scientology* ruling in Part III below.²⁵

In 2014, religious charities received \$31 billion in financial assistance.²⁶ Ironically many of these same institutions contributed to \$4.3 billion in public harm associated with the treatment of victims abused by religious leaders.²⁷ The combined annual cost to the nation is slightly more than our net national deficit, or aged pension scheme, or defence, or the Australian Public Service.²⁸ Despite these apparent disparities and systemic failures, religious charitable institutions comprise 'nearly three quarters of all small charities', employing around 133 000 staff, ensuring their ongoing participation in modern society.²⁹ The faith and fortune of the religious sector is flourishing, so much so that the 2016 Australian Bureau of Statistics census for survey purposes included '131 religious groups'.³⁰ This begs the question, other than recognisable world religions, who decides what is religion and or a religious organisation and on what authority?

III THE AUSTRALIAN CONSTITUTION AND RELIGIOUS TRADE

A *The High Court's development of ecclesiastical (corporate) jurisprudence*

While the judicial 'apex' of the High Court is paramount,³¹ it remains subject to parliamentary supremacy.³² Both entities, as well as the Executive, are separately subject to the *Australian Constitution*, thereby affording 'power to the people', 'by the people', and 'for the people'.³³ To appreciate the unique importance religious institutions play in

²⁴ Christopher Adams, 'Sanitarium Safe from Charity Crackdown', *NZ Herald* (Online) 23 February 2015 <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11406105>.

²⁵ *Scientology* (1983) 154 CLR 120, [2]–[50] (Murphy J). See also *E v Australian Red Cross Society* (1992) 31 FCR 299 [16] ('*Red Cross*'). The size of the charity's operation enabled the deeming of Red Cross's commercial activity a constitutional trading corporation under s 51(xx) in applying the *Adamson* Test.

²⁶ ABC Television, 'Religion Continues its Free Ride Without Our Blessing' *ABC The Drum*, 29 August 2013 (Chris Fotinopoulos) <<http://www.abc.net.au/news/2013-08-29/fotinopoulos-why-does-the-church-still-get-a-free-ride/4918626>>; John Daley, Cassie McGannon and Amélie Hunter, *Budget Pressures on Australian Governments* (Grattan Institute, 2014) <www.grattan.edu.au/publications/reports/post/budget-pressures-onaustrian-governments-2014>.

²⁷ Community Services Victoria, *Report on Government Services to the Productivity Commission*, (4 February 2016) 285, 301. <<https://aifs.gov.au/cfca/bibliography/costs-child-abuse-and-neglect>>.

²⁸ Treasury, Commonwealth of Australia, 2014–2015 Budget Overview <<http://budget.gov.au/2014-15/content/overview/html/index.htm>>.

²⁹ Myles McGregor-Lowndes and Marie Crittall, 'Basic Religious Charities' (Current Issues Information Sheet 2015/2, ACPNS, 2015).

³⁰ Australian Bureau of Statistics, above n 21.

³¹ *Australian Constitution* ss 71–75; *High Court of Australia Act 1979* (Cth); *Judiciary Act 1903* (Cth); The Hon Justice Michael Kirby, 'Precedent — Report on Australia' (Paper presented at the International Academy of Comparative Law Conference, The Netherlands 17 July 2006) 2.

³² Albert Venn Dicey, Emlyn Capel and Stewart Wade, *Introduction to the Study of the Law of the Constitution* (Macmillan, 9th ed, 1945); *Australian Constitution* s 109 'Dealing with inconsistency of laws by the States'.

³³ *R v Kirby ex p The Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 ('*Boilermakers' Case*'). Also relied on in *Hilton v Wells* (1985) 157 CLR 57; Blackshield and Williams, above n 13, 8–12, 598,

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society, it is important to understand how the High Court has evolved in its thinking over the last century with respect to the *Australian Constitution* s 116.

Each Chief Justice since the High Court's inception has stamped their own authority on the Court. The Griffith Court legally bound the States to the Commonwealth regarding legal conflicts as afforded in s 109.³⁴ Griffith rulings telegraphed a strict narrow interpretation of centralised power so as to not impose on the States, specifically regarding s 116 — guaranteeing religious freedom.³⁵ It must also be noted that s 116 does not actually apply to the States, although it sits within Chapter V of the *Australian Constitution* regarding 'The States'.³⁶ This is possibly a drafting omission as a result of fatigue and time constraints.³⁷ Legal commentators such as Quick and Garran also argue that the Commonwealth has no legislative power under s 51 of the *Australian Constitution* to prohibit or establish a religion, therefore rendering s 116 redundant.³⁸

The Latham Court, during World War II, upheld legislation declaring the pacifist Jehovah's Witnesses Church a 'subversive organisation' (enabling police occupation of their premises)³⁹ and later dismissed the Menzies government's legislation outlawing the Communist Party.⁴⁰ Latham CJ concluded it was impossible to satisfy all of the people all of the time, in trying to define religion when addressing the vexed question of comparative faiths.⁴¹ The challenge was not one of inclusion, but rather one of 'forming a workable legal policy'.⁴²

Dixon's 23-year 'golden era' as Chief Justice⁴³ fortified the doctrine of separation between the church and state and the judicial separation of powers in the *Boilermakers' Case* in 1956.⁴⁴ The High Court's authority, bolstered by the abolition of appeals to the Privy Council in 1975,⁴⁵ was galvanised by the *Australia Act 1986* (Cth).⁴⁶ It was during this

604, 606–610, 622–630; Power to the people and by the people being the theme in Sékou Touré, 'Unionism and Revolution' (1972) 3.9 *The Black Scholar* 2.

³⁴ See specifically *Peterswald v Bartley* (1904) 1 CLR 497; *R v Barger* (1908) 6 CLR 41.

³⁵ *Australian Constitution* ss 116–117 preventing state-based discrimination; Blackshield and Williams, above n 13.

³⁶ *Australian Constitution* Ch V — The States. This includes ss 106–120; John Alati, *Hanks Australian Constitutional Law: Materials and commentary* (Ethos: Official Publication of the Law Society of the Australian Capital Territory, 2009) 1207; Note Tasmania has a similar inclusion *Constitution Act 1934* (Tas) s 46.

³⁷ *Ibid* 228.

³⁸ John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1976) 952.

³⁹ (1943) 67 CLR 116.

⁴⁰ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁴¹ *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116, 123 ('*Adelaide Company*').

⁴² *Ibid*.

⁴³ Leslie Zines, *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2010).

⁴⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁴⁵ *Privy Council (Appeals from the High Court) Act 1975* (Cth) which terminated all appeals from the High Court to the Privy Council.

⁴⁶ *Australia Act 1986* (Cth) s 6.

time of transition from ‘absolutism to liberalism’,⁴⁷ that religious jurisprudence took on a broader more contextual legal colour.⁴⁸

Parallel to the maturation of the *Australian Constitution* s 116, Barwick CJ began to broaden the traditionally narrow approach in s 51(xx) of the Constitution regarding trading corporations in *Strickland v Rocla Concrete Pipes Ltd*,⁴⁹ a provision that had not received judicial attention for over 60 years.⁵⁰ Section 51(xx) was later given further dimension when Barwick CJ held that it was open to find that a corporation was a trading corporation if ‘trading is a substantial and not a merely peripheral activity’.⁵¹

Eventually, it was Acting Chief Justice Mason who embedded legal realism into the High Court in the *Scientology* ruling in 1983.⁵² The unanimous decision heralded ‘a willingness to overturn established doctrines and precedents perceived to be no longer working’,⁵³ contrasting it with the Griffith CJ ruling in *Adelaide Company*.⁵⁴ Likewise, Mason’s Court then gave us *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (‘*Mabo*’), abandoning the historical legal ‘fiction of terra nullius’.⁵⁵

However, it was Gibbs CJ who finally abandoned the historically narrow judicial positivist approach,⁵⁶ and opted for Aristotle’s ‘natural law’⁵⁷ jurisprudence regarding vexed matters of the metaphysical.⁵⁸ Natural law here relies on the notion of natural justice and human reason as skilfully stated in Latin: *lex iniusta non est lex* meaning, an unjust law is no law at all.⁵⁹ In addressing the homophobic, racist, sexist and offensive ‘hate speech’ of

⁴⁷ Jodi Dean, *Sovereignty of the People — Radical Democracy and Collective Movements Today (The Biopolitics of the Multitude Versus the Hegemony of the People)* (Farnham, 2014) 73.

⁴⁸ Geoffrey de Q Walker, ‘The Seven Pillars of Centralism: Federalism and the Engineers’ (2002) 76 *The Australian Law Journal* 678–715. This article highlighted the emergence of legal jurisprudence manifesting in the new no-fault divorce statutes.

⁴⁹ (1971) 124 CLR 468.

⁵⁰ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 (‘*Moorehead*’).

⁵¹ *R v Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190, 208 (‘*Footballers Case*’); Later relied on in *Quickenden v Commissioner O’Connor of the Australian Industrial Relations Commission* [2001] FCA 303, [44] (‘*Quickenden*’).

⁵² *Scientology* (1983) 154 CLR 120 [26] (Mason ACJ and Brennan J).

⁵³ Blackshield and Williams, above n 13; *Scientology* (1983) 154 CLR 120, [26].

⁵⁴ Mark Darian-Smith, ‘Church of the New Faith v Commissioner for Pay-Roll Tax’ (1983) 14 *Melbourne University Law Review* 539, 545; see also *Adelaide Company* (1943) 67 CLR 116.

⁵⁵ *Native Title Act 1993* (Cth); Kathy Butler, ‘Overcoming Terra Nullius: Aboriginal Perspectives in Schools as a Site of Philosophical Struggle’ (2000) 32.1 *Educational Philosophy and Theory* 93.

⁵⁶ *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 205; Blackshield and Williams, above n 13; Nicholas Aroney, ‘Reasonable Disagreement, Democracy and the Judicial Safeguards of Federalism’ (2008) 27(1)1 *University of Queensland Law Journal* 129.

⁵⁷ Tim J Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge University Press, 2000) vol 58, 22.

⁵⁸ John Brigham and Christine B Harrington, ‘Realism and its Consequences’ (1989) 17(1) *International Journal of the Sociology of Law* 43.

⁵⁹ Robert E Asher and James M Y Simpson, *The Encyclopaedia of Language and Linguistics* (Oxford, 1993) 348; Originating with St Augustine and championed and used by Martin Luther King Jr. See Martin Luther King Jr, ‘Letter from Birmingham Jail’ (1992) 26 *UC Davis Law Review* 835.

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Adelaide street preachers,⁶⁰ the High Court in *Lange*,⁶¹ held statutory reforms in this area must be 'reasonably appropriate and adaptive'.⁶² All these issues were central in *Scientology* in defining religion while considering the notion of religious commercial enterprise.

B *Scientology — Defining s 116 Freedom of Religion*

1 *Background facts*

In the early 1950s, Lafayette Ronald Hubbard, an American science fiction author, introduced the mental health pseudoscience movement known as 'Dianetics'.⁶³ Hubbard's New York Times best-seller⁶⁴ about 'cleansing the mind of harmful mental images',⁶⁵ and subsequent 'Research Foundation',⁶⁶ were born out of a hallucinogenic, nitrous-oxide-induced dental extraction gone wrong.⁶⁷ Nonetheless, soon after commencing the foundation, Hubbard filed for bankruptcy following the withdrawal of its tax-exempt status⁶⁸ for teaching medicine without a licence.⁶⁹ Hubbard's demise resulted in the loss of his rights to all of his publications.⁷⁰ To avoid copyright infringements, Hubbard repackaged 'Dianetics' as a religion, renamed the movement 'Scientology', and called the foundation a 'Church'.⁷¹ Hubbard befriended, lived with and collaborated with occultists, magicians and hypnotists, all the while indulging in ritualistic 'sex magic' ceremonies;⁷² he even posed as a Hollywood swami for a movie.⁷³ Hubbard later

⁶⁰ Rosalind Dixon, 'The Functional Constitution: Re-reading the 2014 High Court Constitutional Term' (2015) 43 *Federal Law Review* 455. Confirmed in the street preacher case: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

⁶¹ *Lange* (1997) 189 CLR 520.

⁶² George Williams, *A Bill of Rights for Australia* (University of New South Wales Press, 2000); Blackshield and Williams, above n 13; Peter Radan, Denise Meyerson and F Rosalind Croucher, *Law and Religion: God, the State and the Common Law* (Routledge, Taylor and Francis Group, 2004) 75, 166; *Australian Constitution* s 116; Australian Electoral Commission 'Referendums Overview' (6 June 2011) <http://www.aec.gov.au/elections/referendums/Referendums_Overview.htm>.

⁶³ Dick Anthony, 'Pseudoscience and Minority Religions: An Evaluation of the Brainwashing Theories of Jean-Marie Abgrall' (1999) 12.4 *Social Justice Research* 421.

⁶⁴ James R Lewis, *Scientology* (Oxford University Press, 2009) 21.

⁶⁵ Angus Stevenson, *Oxford Dictionary of English* (Foreign Language Study, 2010) 484.

⁶⁶ David G Bromley and Mitchell L Brace Jr, *The Church of Scientology: A Quasi-Religion* (Praeger, 1998) 141.

⁶⁷ Jon Atack, *A Piece of Blue Sky: Scientology, Dianetics, and L Ron Hubbard Exposed* (Lyle Stuart, 1990).

⁶⁸ Lewis, above n 64, 24. Detailing an increasing investigation, civil actions and enforcement measures by the Federal Bureau of Investigation, Internal Revenue Service, Food and Drug Administration and the American Medical Association.

⁶⁹ Thomas Streissguth, *Charismatic Cult Leaders* (The Oliver Press Inc, 1996) 70.

⁷⁰ Atack, above n 67.

⁷¹ Gordon Melton, *Encyclopaedic Handbook of Cults in America* (Garland Publication, 1992) 70, 190; Stephen A Kent, 'Scientology – "Is This a Religion?"' (1999) 4(1) *Marburg Journal of Religion* 1; *Scientology* (1983) 154 CLR 120, [1].

⁷² Hugh B Urban, *Magia Sexualis: Sex, Magic, and Liberation in Modern Western Esotericism* (University of California Press, 2006) 137; See also William Vaughn McCall, 'Psychiatry and Psychology in the Writings of L. Ron Hubbard' (2007) 46 (3) *Journal of Religion and Health* 437.

⁷³ Urban, above n 72.

proselytised the belief in infinite reincarnation and the existence of the Galactic Federation Overlord, Xenu.⁷⁴

In 1961, Dr Eric Dax became increasingly concerned by reports reaching the Victorian Mental Health Authority about individuals paying significant amounts of money for ‘Scientology’ courses, referring to it as a ‘profoundly evil movement’.⁷⁵ By 1963, concerns of ‘blackmail and intimidation’, as well as possible suicides had reached the Victorian Legislative Council, resulting in the submission of a private member’s bill to outlaw Scientology.⁷⁶ The Bill resulted in the ‘Anderson Inquiry’,⁷⁷ with the 1965 Victorian Board of Inquiry concluding that the Church of Scientology should be restricted from registration.⁷⁸ However, Scientology ‘phoenixed’ itself by ‘rising from the ashes’⁷⁹ as a foreign company known as the ‘Church of the New Faith’ pursuant to the *Companies Act 1961* (Vic).⁸⁰

In 1983, Crockett J in the Supreme Court of Victoria, upholding the Commissioner’s ruling to the effect that Scientology was not a religious institution within the meaning of the *Pay-roll Tax Act 1971* (Vic) and that it did not display any of the indicia of a religion, ordering it to pay the \$897.80 pending payroll tax.⁸¹ In making that determination he referred to the organisation both as ‘no more than a sham’ and ‘no more than a mockery of religion’.⁸² Various states legislated versions of the *Scientology (Prohibition) Act 1968* (SA)⁸³ and its legislative cousin, the *Psychological Practices (Scientology) Act 1982* (Vic),⁸⁴ in order to stop the ‘dangerous cult’.⁸⁵ Meanwhile, Germany classified Scientology as *verfassungsfeindliche Sekte*, an ‘anti-constitutional sect’,⁸⁶ as did the French.⁸⁷ In the same year, the High Court, on special leave to appeal, reviewed the issue of religion and associated commercialism as follows.

⁷⁴ Mikael Rothstein, *His Name was Xenu: Aspects of Scientology’s Founding Myth* (Scientology, 2009) 365.

⁷⁵ *Church of the New Faith v Commissioner of Payroll Tax* [1983] 1 VR 97, 170.

⁷⁶ Omar V Garrison, *The Hidden Story of Scientology* (Citadel Press, 1974) 145.

⁷⁷ Kevin Victor Anderson, ‘Report of the Board of Enquiry into Scientology’ (*The Canberra Times*, National Library of Australia, 26 November 1963. Archived from the original State of Victoria on 9 February 2014).

⁷⁸ Geoffrey White, ‘Direction on Scientology’ (*The Canberra Times*, National Library of Australia. 16 October 1965, Retrieved 13 August 2013) 3.

⁷⁹ *Corporations Amendment (Phoenixing and Other Measures) Act 2012* (Cth). An Act brought in to ensure entitlements of employees of previous wilfully defunct entity — thus outlawing the practice.

⁸⁰ *Companies Act 1961* (Vic), Div 3 of Part XI.

⁸¹ *Scientology* [1983] 1 VR 97.

⁸² *Ibid* 108.

⁸³ *Scientology (Prohibition) Act 1968* (SA).

⁸⁴ *Psychological Practices (Scientology) Act 1982* (Vic).

⁸⁵ Liam Houlihan, ‘MP: No Science in Scientology’ *The Daily Telegraph* (London) 14 September 2006. Where the federal government’s parliamentary secretary for mental health Christopher Pyne campaigned against Scientology rejection of psychiatry and associated psychiatric medication.

⁸⁶ Reuters, ‘Hubbard’s Church “Unconstitutional” — Germany Prepares to Ban Scientology’, *Spiegel* (online), 7 December 2007 <<http://www.spiegel.de/international/germany/hubbard-s-church-unconstitutional-germany-prepares-to-ban-scientology-a-522052.html>>.

⁸⁷ Conseil constitutionnel [French Constitutional Court], decision no 2468, 4 October 1958 reported in JO, 22 December 1995.

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2 *Mason ACJ and Brennan J*

As the appeal to the High Court involved both human rights and taxation, complete subjectivity was not appropriate.⁸⁸ The question of religious freedom was at stake but not the protection of the tenets of any particular religion.⁸⁹ Mason ACJ and Brennan J in the Australian High Court overruled the decision of the Victorian Full Court (Young CJ and Kaye and Brooking JJ), declaring that ‘charlatanism is a necessary price of religious freedom’.⁹⁰ Their Honours, referring to Judge Augustus Hand in *United States v Kauten*,⁹¹ held that the basic essence of religion was faith in the supernatural, transcending ordinary reason. A secondary role of government was to superimpose a legal framework that would regulate the practice of religious belief.⁹² They noted that a government’s ability was limited to monitoring and regulating at best, and stated that ‘the State can neither declare supernatural truth nor determine the paths through which the human mind must search’.⁹³

Their Honours concluded that religion encompasses both belief and a corresponding code of conduct that defines the relationship between human adherents and the supernatural.⁹⁴ Such religious observances would be unambiguously subject to legal protections conferred by the freedom of religion provisions, within the law.⁹⁵ Their Honours explained that ‘[r]eligious conviction is not a solvent of legal obligation’,⁹⁶ specifically citing *Jehovah’s Witnesses* regarding subversive activity in a time of war,⁹⁷ and the Mormons’ practice of polygamy.⁹⁸ Finally, the test for religion must also involve a ‘group of adherents’.⁹⁹

The finding specifically rejected the broad United States ruling regarding Maharishi Mahesh Yogi’s transcendental meditation in *Malnak v Yogi* as a religion.¹⁰⁰ Their Honours held that while the practice may have its roots in Hinduism, it had evolved to exclude theism and even the supernatural, and was instead more a non-religious practice of self-development.¹⁰¹ Their Honours also rejected the narrow test from the United Kingdom in *Re South Place Ethical Society, Barralet v Attorney-General*,¹⁰² which relied on theism.¹⁰³ Their Honours held that such a position would ‘exclude Theravada Buddhism and other acknowledged religions’.¹⁰⁴

⁸⁸ *Scientology* (1983) 154 CLR 120 [10] (Mason ACJ and Brennan J): ‘The mantle of immunity would soon be in tatters if it were wrapped around beliefs, practices and observances of every kind whenever a group of adherents chose to call them a religion’.

⁸⁹ *Ibid* [28]–[30] (Mason ACJ and Brennan J).

⁹⁰ *Ibid* [26] (Mason ACJ and Brennan J).

⁹¹ 133 F 2d 703 (2nd Cir, 1943), 708.

⁹² *Scientology* (1983) 154 CLR 120, [47] (Mason ACJ and Brennan J); [18], [23] (Wilson and Deane JJ); [7], [9], [40], [45] (Murphy J).

⁹³ *Ibid* [13] (Mason ACJ and Brennan J).

⁹⁴ *Ibid* [17].

⁹⁵ *Ibid* [14], [16] (Mason ACJ and Brennan J).

⁹⁶ *Ibid* [16] (Mason ACJ and Brennan J).

⁹⁷ *Adelaide Company* (1943) 67 CLR 116.

⁹⁸ *Reynolds v United States*, 98 US 145 (1878).

⁹⁹ *Scientology* (1983) 154 CLR 120 [11].

¹⁰⁰ 592 F (2d) 197 (3rd Cir, 1979), 207–10 (Adams J) (‘*Yogi*’).

¹⁰¹ *Scientology* (1983) 154 CLR 120.

¹⁰² *Re South Place Ethical Society, Barralet v Attorney-General* [1980] 1 WLR 1565.

¹⁰³ *Scientology* (1983) 154 CLR 120 [7] (Mason ACJ and Brennan J).

¹⁰⁴ *Ibid* [24] (Mason ACJ and Brennan J).

3 *Wilson and Deane JJ*

In rejecting the Victorian Full Court's finding, Wilson and Deane JJ, crudely proposed that it was the gullibility of the adherents, and the unethical and shambolic nature and conduct of its leadership, that made Scientology a religion.¹⁰⁵ Their Honours concurred with Mason ACJ and Brennan J's similar views regarding the need for a belief in, and relationship with, the supernatural, and that adherents be encouraged to comply with distinctive observances of supernatural significance and be identifiable as a group.¹⁰⁶ Their Honours went further and stated that a religious organisation may exist 'regardless of whether the members of the applicant are gullible or misled, or whether the practices of religion in general are harmful or objectionable'.¹⁰⁷

4 *Murphy J*

Murphy J took the spirit of that thinking further, declaring that anybody claiming a belief in the supernatural could establish a religious institution, specifically including those involved in astrology and aboriginal spirituality; provided it 'offers a way to find meaning and purpose in life, it is religious'.¹⁰⁸ His Honour concluded that legal equality by its very essence demands a 'one in, all in' approach, and that '[i]n the eyes of the law, religions are equal', regardless of whether their practices are 'absurd, fraudulent, [or] evil'.¹⁰⁹ In fact, his Honour warned judges and administrators to 'resist the temptation' of denying religious status in the presence of these disturbing elements, or on the size of membership, or even the leadership's unscrupulous intention to exploit the 'financial benefits and other privileges which come with religious status'.¹¹⁰ The reasoning for this legal grace was that '[i]f each purported religion had to show that its doctrines were true, then all might fail'.¹¹¹

His Honour's apparent endorsement of religious entrepreneurialism is a reflection of the status religion plays in our society. It is a lineal and logical consequence of constitutional interpretation regarding the Freedom of Religion inherent in s 116. However, religious trade is contrary to the explicit constraints in s 51(xx) regarding trading corporations within the meaning of that *placitum* ('constitutional trading corporations') within the *Australian Constitution*.

¹⁰⁵ Ibid [10], [12], [19] (Wilson and Deane JJ).

¹⁰⁶ Ibid [21] (Wilson and Deane JJ).

¹⁰⁷ Ibid [22] (Wilson and Deane JJ) (emphasis added).

¹⁰⁸ Ibid [9] (Murphy J).

¹⁰⁹ Ibid [7] (Murphy J).

¹¹⁰ Ibid; *E v Australian Red Cross Society* (1992) 31 FCR 299 [16] ('*Red Cross*'). There, the size of the charity's operation deemed the Red Cross a constitutional trading corporation under s 51(xx) in applying the *Adamson* Test.

¹¹¹ *Scientology* (1983) 154 CLR 120 [7] (Murphy J).

IV RELIGIOUS TRADE AND CHARITY LAW

A *Religious Entrepreneurialism*

1 *Catholic Church: History of Religious Entrepreneurialism*

Religious entrepreneurialism has been practised by the Catholic Church for centuries under the canon law doctrine of ‘indulgences’,¹¹² enabling followers to buy their way out of purgatory and into heaven.¹¹³ Such laws encouraged followers to ‘donate’ money to the church for public works, including hospitals, schools and the construction of many of the world’s most famous cathedrals.¹¹⁴ The Catholic Church in Australia owns indirectly, but directly controls, over \$100 billion in properties and other assets, employs around 180 000 people, and generates \$15 billion in its education, health and welfare enterprises each year.¹¹⁵ The real ‘miracle’ here is not of turning ‘water into wine’,¹¹⁶ but rather turning *worship into wealth*,¹¹⁷ and as Courtin argues, all the while showing a ‘pathological lack of compassion and cruelty to thousands of clergy sex abuse victims’, adding to the ‘net public detriment’.¹¹⁸ Today, the Government faces the practical burden of trying to balance

¹¹² Robert Norman Swanson, *Indulgences in Late Medieval England: Passports to Paradise?* (Cambridge University Press, 2007). See also Joseph Cardinal Ferretto, *The Enchiridion of Indulgences Issued by the Sacred Apostolic Penitentiary* (Liberia Editrice Vatican, Vatican City, 1968) 468, s 2 (Code of Canon Law).

¹¹³ Timothy J Wengert, *Martin Luther’s Ninety-Five Theses: With Introduction, Commentary, and Study Guide* (Fortress Press, 2015) 32; Alberto Cassone and Carla Marchese, ‘The Economics of Religious Indulgences’ (1999) 16.1 *Journal of Institutional and Theoretical Economics* 429.

¹¹⁴ Adrian R Bell and Richard S Dale, ‘The Medieval Pilgrimage Business’ (2001) 12.03 *Enterprise and Society* 601.

¹¹⁵ Judy Courtin, ‘What Place for the Catholic Church in 21st Century Australia?’, *The Conversation* (online), 20 June 2013 <<http://theconversation.com/what-place-for-the-catholic-church-in-21st-century-australia-15242>>; Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Report of Case Study (2015) no 8 [6.24]. See John Ellis’s experience of the Towards Healing process and civil litigation. The report revealed the Archdiocese of Sydney held over \$1.2 billion in assets and funds but only paid sex abuse victims since 2001 \$6.832 million in compensation — averaging around \$50 000 per case; See also Janet Fife-Yeomans, ‘Royal Commission Into Child Sex Abuse Told of Incredible Wealth of Sydney’s Catholic Church, But No Cash For Alleged Victims of Sex Abuse’, *The Daily Telegraph* (online), 25 March 2014 <<http://www.dailytelegraph.com.au/news/royal-commission-into-child-sex-abuse-told-of-incredible-wealth-of-sydneys-catholic-church-but-no-cash-for-alleged-victims-of-sex-abuse/news-story/425c24da361d2f43ae769b9acb89ca7b>>; See also Meredith Doig, *Religious Tax Privileges* (3 January 2015) Rationalist Society of Australia <<https://www.rationalist.com.au/religious-tax-privileges-as-concessions>>.

¹¹⁶ Robert Houston Smith, ‘Exodus Typology in the Fourth Gospel’ (1962) 81.4 *Journal of Biblical Literature* 329. Referring to the Bible passage regarding John’s Gospel, chapter 2, verses 1–11 where ‘Jesus Changes Water into Wine’ frequently recited along with Psalm 37:4 ‘Take delight in the Lord, and he will give you the desires of your heart’.

¹¹⁷ Bernard Zuel, ‘Hillsong United: Hillsong Beats Daniel Johns to Number One on ARIA Chart — But No One’s Celebrating’, *Sydney Morning Herald* (online) 3 June 2015 <<http://www.smh.com.au/entertainment/music/hillsong-beats-daniel-johns-to-number-one-on-aria-chart-but-no-ones-celebrating-20150603-ghfl34.html>>.

¹¹⁸ Courtin, above n 115; Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made With Respect to Catholic Church Institutions in Australia* (2017).

private and public rights and obligations of religious institutions that provide benefit, against the systemic harm they inflict on the community.¹¹⁹

2 Hillsong — Modern Case Study

As with the High Court's rejection of the broad United States ruling in *Yogi*,¹²⁰ it is the perceived obsession with one's self which is the very criticism of some new generation Pentecostal institutions in Australia.¹²¹ Social researcher, Hugh Mackay, states that religious belief is different to religious faith,¹²² citing Hillsong and other 'so-called megachurches'. Mackay argues that these religious institutions are more about 'belonging to a thriving supportive community, than about embracing specific doctrinal beliefs',¹²³ suggesting this brand of religion is 'self-righteous and self-absorbed'.¹²⁴ According to Mackay, this new generation 'all about me, my wellbeing, my happiness, my prosperity, my comfort, my entitlement and in a religious context, my salvation' faith is the 'polar opposite' of an 'altruistic, self-sacrificial life', akin to religion.¹²⁵

The Sydney Hillsong 'empire' generated \$80 million in tax-free revenue in 2015 by selling and broadcasting its songs and sermons to 160 nations worldwide.¹²⁶ However, it does not operate on a 'level playing field' to that of listed companies on the stock exchange or private trans-national conglomerates.¹²⁷ Nor for that matter, do any of the 'big four'¹²⁸ religious denominations (Catholic, Uniting, Anglican and Baptist) that have corporate asset holdings worth 'billions' of dollars.¹²⁹ Hillsong, while registered as a Basic Religious Charity, operates under 16 different trading names.¹³⁰ Its music sales annually top the

¹¹⁹ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2015) vol 1, 2.

¹²⁰ *Yogi* 592 F (2d) 197 (Adams J) (1979); *Scientology* (1983) 154 CLR 120, [7], [18], [20] (Mason ACJ and Brennan J).

¹²¹ Anthony Sargent, *In for a Penny—In for a Pound* (17 August 2013) <<http://www.cwm.org.au/3/14-58/67-in-for-a-penny-in-for-a-pound>>.

¹²² Hugh Mackay, *Beyond Belief* (Macmillan Publishers, 2016) 7.

¹²³ *Ibid* 7, 37, 38, 195. Regarding Hillsong Church specifically.

¹²⁴ *Ibid*.

¹²⁵ *Ibid*.

¹²⁶ Jess Daly and Helen Grasswill, 'Behind the Hillsong Phenomenon' *ABC News* (online) 1 August 2005 <<http://www.abc.net.au/news/2005-08-01/behind-the-hillsong-phenomenon/2071146>>.

¹²⁷ Costello, above n 6.

¹²⁸ ABC TV, 'Standing in the Way of National Marriage Equality' *ABC The Drum*, 22 October 2013 (Peter Norden) <<http://www.abc.net.au/news/2013-10-22/norden-standing-in-the-way-of-national-marriage-equality/5037832>>.

¹²⁹ Adele Ferguson, 'Prophet-minded' (2005) 27.20 *Business Review Weekly* 34; Deborah Snow, 'Inside the Hillsong Church's Money-Making Machine', *Sydney Morning Herald* (online) 14 November 2015 <<http://www.smh.com.au/good-weekend/inside-the-hillsong-churchs-moneymaking-machine-20151026-gkip53.html>>.

¹³⁰ Australian Business Register, Australian Government, *ABN Lookup* (22 October 2017) Australian Business Register <<http://abr.business.gov.au/SearchByAbn.aspx?abn=37002745879>>. Including: Green Door Production Music; Shout! Music; Shout! Music Publishing; Hillsong Network; Hillsong Foundation; The Colour Sisterhood; Hillsong Publishing; Hillsong Music Australia; Hillsong United; Faith Works College; Hills Christian Centre; Hillsong; Hillsong International Leadership College; Hillsong Australia; Power Ministries International; Shout Publishing.

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Australian Recording Industry Association (ARIA) charts, selling over '12 million albums worldwide'.¹³¹

However, Hillsong's 'Mercy Ministries' welfare initiative was shut down after an extended Australian Competition and Consumer Commission (ACCC) investigation, as well as subsequent financial challenges.¹³² In 2009, the ACCC charged the ministry directors with misleading or deceptive conduct for promoting 'free' housing and 'rehabilitation', and promising 'professional support', when in fact it delivered neither free nor professional services at all. Disciplinary measures against the ministry's directors (but not Hillsong's 'Executive') included an acknowledgement of its false, misleading or deceptive conduct, a joint letter of apology, a payment of \$1,050 to each of the past residents in the relevant period and an undertaking to attend annual trade practices compliance training for three years.¹³³

The protection of the vulnerable is inherently problematic where personal wealth, power and social services are combined. As evidenced in the Royal Commission into Institutional Responses to Child Sexual Abuse (Child Abuse Royal Commission) ('*Royal Commission*'), such services are sometimes used for the grooming of victims for sexual abuse.¹³⁴ For example, Hillsong's religious neoliberalism manifested when founder, Pastor Frank Houston signed an offer of 'compensation' to one of his sexual abuse victims on a napkin at a Sydney MacDonald's restaurant for \$10 000, in exchange for the victim's silence and forgiveness. Two months later, Houston's son and a former window cleaner, Brian Houston, reluctantly transferred the funds.¹³⁵ Consistent with Archbishop Hollingsworth's protectionist attitudes,¹³⁶ the victim was accused of having 'tempted' his father, resulting in the sexual offence in the first place.¹³⁷

¹³¹ Zuel, above n 117; *Australian Constitution* s 51(xx).

¹³² Meredith Griffiths, 'Bad PR Forces Hillsong Counselling Closure' *ABC News* (online) 28 October 2009 <www.abc.net.au/news/2009-10-28/bad-pr-forces-hillsong-counselling-closure/1120536>. *ACCC Act 2010* (Cth) Sch 2.

¹³³ Australian Competition and Consumer Commission, 'Undertakings remedy Mercy Ministries misleading conduct' (Media Release, NR 311/09, 16 December 2009) <www.accc.gov.au/media-release/undertakings-remedy-mercy-ministries-misleading-conduct>. *Trade Practices Act 1974* (Cth) ss 52, 53(aa), 53(e).

¹³⁴ Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse* (2015) Queensland Case Study 34 [9.11.15] Case [BSG].

¹³⁵ Amy Ziniak and Nelson Groom, 'Hillsong church founder offered sex abuse victim \$10,000' *Daily Mail Australia* (online) 7 October 2014 <<http://www.dailymail.co.uk/news/article-2783128/Hillsong-church-founder-offered-sex-abuse-victim-10000-meeting-McDonalds-restaurant.html>>.

¹³⁶ The author is cited by another former victim regarding Governor General Hollingsworth's Heads of Churches meeting statement where the author co-attended. See Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse* (2015) Queensland Case Study 34 (9.11.15). Hollingsworth stated 'people who make these complaints and these allegations, are often deviates and misfits and can't be trusted'; Patrick Parkinson, 'Child Sexual Abuse and the Churches: A Story of Moral Failure?' *ABC Religion and Ethics* (online), 25 October 2013 <<http://www.abc.net.au/religion/articles/2013/10/25/3877103.htm>>.

¹³⁷ Ziniak, above n 135. Houston denied this accusation at the Royal Commission.

In our increasingly postmodern, political and legal environment,¹³⁸ there appears to be an institutionalised resistance to moving away from the notion of ‘religious entitlement’.¹³⁹ Yet, the universal doctrine of ‘equality under the law’¹⁴⁰ sits deep in the psyche of Australians, colloquially known as a ‘fair go’.¹⁴¹ While Williams argues that ‘Christianity seems to be perceived by more Australians than ever as implausible, undesirable or irrelevant’,¹⁴² a post Christian nation does not mean a non-religious nation. Magnay suggests that an emerging Islamic faith poses a different risk by trying to impose sharia law for example, thus replacing one problem with another.¹⁴³ As the then New South Wales Premier Bob Carr, Australian Treasurer Peter Costello and 20 other Federal Members of Parliament asserted at the 2005 Hillsong conference, it is the belief in divine intervention, the promise of personal prosperity and the hope of eternity that is worth every privilege, every exemption and every vote.¹⁴⁴ Nevertheless, the governance of religious institutions continues to be a legislative no-go zone.

B Basic Religious Charities (BRC)

1 New Charity Legislation — 400 Years in the Making

Statutory tectonic plates in charity law have been shifting over recent years.¹⁴⁵ The preamble of the *Charities Act 2013* (Cth) suggests that the 400-year-old laws that recognise and govern charities are redundant.¹⁴⁶ Today, if an organisation meets the definition of a charity in the *Charities Act* s 12, it can register as a charity under the *Australian Charities*

¹³⁸ Edwin Scott Fruehwald, *When Did Ignorance Become a Point of View?—Postmodern Legal Thought and Behavioral Biology* (Social Science Electronic Publishing, 24 February 2011). Moral relativism resulting in questions and inconsistencies and not answers or guidelines.

¹³⁹ J K Nelson, A Possamai-Inesedy and KM Dunn, ‘Reinforcing Religious Inequality: The AHRC Inquiry into Religious Freedom and Australia’s Vexed Religious Landscape’, *ABC Religion and Ethics* (online) (28 August 2013) <<http://www.abc.net.au/religion/articles/2013/08/28/3835955.htm>>.

¹⁴⁰ Dicey, above n 32; Gareth Evans, ‘An Australian Bill of Rights?’ (1973) 45.1 *The Australian Quarterly* 4; Ian Brownlie, ‘Rights of Peoples in Modern International Law’ (1985) 9 *Bulletin of the Australian Society of Legal Philosophy* 104. Dealing with religious, human and economic rights, as identified under UNESCO.

¹⁴¹ Urban Dictionary Online (15 June 2009) (definition of ‘fair shake of the sauce bottle’) <[http://www.urbandictionary.com/define.php?term=fair%20shake%20of%20the%20sauce%20bottle](http://www.urbandictionary.com/define.php?term=fair%20shake%20of%20the%20sauce%20bottle;)>; ABC Television, ‘Ruddisms and Shaky Language Under Scrutiny’ Fair shake of the sauce bottle, 11 June 2009 (Barbara Miller) <<http://www.abc.net.au/worldtoday/content/2008/s2595423.htm>>.

¹⁴² Roy Williams, *Post-God Nation: How Religion Fell Off the Radar in Australia and What Might Be Done to Get It Back On* (Harper Collins, 2015).

¹⁴³ Jacquelin Magnay, ‘Community Under Siege: Sharia Law Used to Settle Divorces in Muslim Community’, *The Australian* (online) 23 December 2015 <<http://www.theaustralian.com.au/in-depth/community-under-siege/sharia-law-used-to-settle-divorces-in-muslim-community/news-story/c138bc650967b9f51d1bd62a31d64f18>>.

¹⁴⁴ Jason Koutsoukis, ‘Costello’s Hillsong’ *The Age Canberra* (online) 6 July 2005 <<http://www.theage.com.au/articles/2005/07/05/1120329450900.html>>.

¹⁴⁵ The following statutes are directly relevant to the execution of the Commission’s role including the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (‘ACNCA’); *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) (‘ACNCR’); *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Regulation 2016* (Cth); *Charities Act 2013* (Cth) (‘Charities Act’); *Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth);

Charities (Definition of Government Entity) Instrument 2013 (Cth) made under s 4(2) of the *Charities Act*.¹⁴⁶ *Charities Act 2013* (Cth).

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and *Not-for-profits Commission Act 2012* (Cth) ('ACNCA'), s 25-5. The Australian Charities and Not-for-profits Commission (ACNFP) provides a more efficient but less evidence-based process of claiming charity exemptions at a Commonwealth level, as it is an administrative and non-judicial process only. However, the expensive 'case by case' litigious approach to resolving these issues still operates at a State level. Public governance of private registered charities is a utilitarian, social control mechanism, ensuring conformity and universal compliance within the charitable and not-for-profit sector.¹⁴⁷ It is a process of declaring sanctions and responses regarding problematic, organisational behaviour, in exchange for the unique benefits they enjoy.¹⁴⁸ The Australian Government Data Repository¹⁴⁹ states approximately 44 000 charities registered with the new Commission in 2014 (now 60 000).¹⁵⁰ Of these, about 11 000 or 25 per cent classified themselves as Basic Religious Charities (BRCs).¹⁵¹ Importantly, the entire not-for-profit sector involves more than 600 000 entities in total.¹⁵²

2 *Defining Basic Religious Charities*

The definition of a charitable 'entity' takes its meaning from the *ACNCA*.¹⁵³ BRCs are generally unincorporated religious congregations¹⁵⁴ that receive little or no direct government subsidies.¹⁵⁵ They only exist to advance religion; they cannot be registered as any other subtype of charity for Commonwealth purposes;¹⁵⁶ they are neither a company nor an incorporated association and are unable to report as part of a group, and are not endorsed as a Deductible Gift Recipient to issue tax-deductible receipts for contributions.¹⁵⁷ BRCs are 'granted a lower reporting burden and [are] exempt from certain mandatory governance arrangements for charities', as it is considered 'inappropriate' for the Commission to 'interfere in the governance of small religious bodies' due to the lack

¹⁴⁷ Jeremy R Carrette and Richard King, *Selling Spirituality: The Silent Takeover of Religion* (Psychology Press, 2005) 166.

¹⁴⁸ Australian Charities and Not-for-profits Commission, Basic Religious Charities <https://www.acnc.gov.au/ACNC/Manage/ManageType/Basic_rel_ent/ACNC/Edu/Basic_rel_char.aspx>; G E Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) 238; *Income Tax Assessment Act 1997* (Cth) pt 2-15, div 50-5 ('ITAA97'); *Duties on Income Act 1799* (UK) 39 Geo 3, c 13, s 5.

¹⁴⁹ The Community Services Industry Alliance (CSIA) <<http://data.gov.au>>.

¹⁵⁰ McGregor-Lowndes and Crittall, above n 29. See also Liberal Party of Australia and the Nationals, The Coalition's policy to boost productivity and reduce regulation, Coalition policy document Election 2013, *Bills Digest*, No 68, 2013-14, 12 May 2014, 3 noting 60 000 registrations the following year of the repeal Bill.

¹⁵¹ McGregor-Lowndes and Crittall, above n 29.

¹⁵² Productivity Commission Research Report, Contribution of the Not-for-Profit Sector, January 2010, p xxvi; see also Treasury, 'Better Targeting of Not-for-profit Tax Concessions' (Consultation Paper, 27 May 2011).

¹⁵³ *ACNCA* (Cth) s 60-60 (definition of 'Basic Religious Charities').

¹⁵⁴ Generally religious organisations not incorporated under the *Corporations Act 2001* (Cth) ('*Corporations Act*') or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), or *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 2009* (NSW); *Associations Incorporation Act 1991* (ACT); *Associations Incorporation Act 1981* (Vic); *Associations Incorporation Act 1964* (Tas); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 2015* (WA); *Associations Act 2003* (NT); *ACNCA* s 205-35.

¹⁵⁵ Defined in the *ACNCA* s 205-35.

¹⁵⁶ *Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth) reformed this definition and reporting will occur in future years on 14 subtype classifications of charities.

¹⁵⁷ *ITAA97* (Cth) s 30-228 Content of receipt for gift or contribution.

of direct government funding.¹⁵⁸ Just over 80 per cent of BRCs operate with less than a \$250 000 annual turnover,¹⁵⁹ leaving a significant 2200 BRCs in the large category.

Generally, BRC community services are ‘infrequent’ and ‘incidental’ and primarily undertaken as a public relations exercise for the advancement of religion¹⁶⁰ — typical of many Pentecostal and Evangelical churches.¹⁶¹ This is fundamentally different to ‘the big four’ religious charities¹⁶² that also register their services under broader charitable categories and provide residential aged care, hospitals, rehabilitation and mental health services.¹⁶³ Interestingly, BRCs generally target children and youth, a characteristic of their evangelistic agenda, rather than targeting qualified socio-demographic need areas.¹⁶⁴ Foster argues this targeted marketing is typical exploitation of the ‘vulnerable’, and opportunistically preying on the ‘impressionable’.¹⁶⁵

C Public Incentives for Private Religious Charities

1 Indirect Financial Benefit

According to Dal Pont, the principal appeal of BRC registration is the eligibility for diverse financial benefits.¹⁶⁶ Every religious institution can take advantage of income tax exemptions,¹⁶⁷ enabling them to eliminate personal and or organisational tax imposts entirely,¹⁶⁸ and provide access to perpetual charitable trust distributions.¹⁶⁹ Religious duties, while broadly codified, are self-assessed by applying the Adamson activities.¹⁷⁰ For example, with some ‘evangelistic’¹⁷¹ reporting of the practitioner’s activities, the entire salary, including very generous ‘gifts and offerings’ as well as royalties and merchandise sales could be recycled into the practitioner’s home mortgage as a fringe benefit. The net result of the fringe benefit is that it is ‘not reportable to the Tax Office by the employer, or

¹⁵⁸ McGregor-Lowndes and Crittall, above n 150, 2.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.* For example, occasionally provides clothes and food vouchers to families that attend their church services; See also the Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 (Cth) [13.79] (emphasis added).

¹⁶¹ Spencer, above n *; See also Mackay, above n 122.

¹⁶² Norden, above n 128.

¹⁶³ Stephen Mugford and Stephen Rohan-Jones, *Weaving the Net — Promoting Mental Health and Wellness Through Resilient Communities* (Mental Health Council of Australia, 2006).

¹⁶⁴ McGregor-Lowndes and Crittall, above n 29, 10–12.

¹⁶⁵ Tim Forster, ‘Selling the Toxic Hillsong to the Young of the World’ (2010) 85 *The Australian Rationalist* 5.

¹⁶⁶ G E Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) 100–26 (emphasis added).

¹⁶⁷ *ITAA97* Pt 2-15 Div 50-5. See also *Duties on Income Act 1799* (UK) s 39 Geo 3, c 13, s 5.

¹⁶⁸ Also noted by Spencer above n *; Commissioner of Taxation, *Income Tax and Fringe Benefits Tax: Exemptions For ‘Religious Institutions’*, TR 92/17, 10 December 1992.; *YMCA of Melbourne v FC of T* (1926) 37 CLR 351 and later in *Stratton v Simpson* (1970) 125 CLR 138; *Income Tax Assessment Act 1936* (Cth) s 23(e) (‘*ITAA36*’).

¹⁶⁹ *Trusts Act 1973* (Qld). Of less importance now with regards to new incorporation status.

¹⁷⁰ *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; Applied in *Quickenden* (2001) 109 FCR 243.

¹⁷¹ Spencer, above n *. Evangelistic being a parody mix of words ‘evangelistic’ and ‘elastic’ which is a common jovial Pentecostal term when a Pastor exaggerates to make a point.

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subject to income tax in the hands of the employee'.¹⁷² Further underwriting the public cost, subject to common law, the definition of a religious practitioner is similarly broad, including itinerates, part-time employees, students and lay members.¹⁷³

In a comprehensive international study involving Australia, the United Kingdom, France, New Zealand, Mexico and Japan, which included 75 charitable organisational statutes, it was found that Australia enjoys one of the most 'unique' and diverse' charitable tax environments in the world.¹⁷⁴ Australia is the only jurisdiction that affords these unlimited tax exemptions and reporting exclusions,¹⁷⁵ specifically for BRCs.¹⁷⁶ This substantial and disproportionate untaxable income, creating a new generation of millionaire ministers,¹⁷⁷ is what Wallace terms the 'purple economy'.¹⁷⁸ Federal exemptions include 'GST, income tax, fringe benefits tax'; State exemptions include 'land tax, stamp duty, payroll tax and car registration'; and local government exemptions include 'rates, and some power and water charges'.¹⁷⁹ The prospect of society's perceived endorsement of a body as a religious charity cannot be underestimated when it comes to fundraising and tax benefits.¹⁸⁰ Could it be that the best tax haven is not the Mossack Fonseca office in Panama, but right here within our religious governance framework in Australia?¹⁸¹ So appealing are the general provisions for religions in western liberal democracies, that the 'Church of the Flying

¹⁷² Corney and Lind, 'Church / Religious Practitioners – Fringe Benefits and Centrelink Payments' (2007) <<http://www.corneyandlind.com.au/resource-centre/not-for-profit/churches/fringe-benefits-centrelink/>>; *Taxation Administration Act 1953* (Cth) sch 1; Taxation Ruling 92-17; See also *Fringe Benefits Tax Assessment Act 1986* (Cth) ss 57,136(1) ('FBTAA'); *Stratton v Simpson* (1970) 125 CLR 138; *Income Tax Assessment Act 1936* (Cth) ss 51AEA–51AEC, 51AJ, 109ZB, 221A(1), 251Z.

¹⁷³ *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323.

¹⁷⁴ M Sharon Jeannotte, *Taxes and Charities: An International Comparison* (International Comparative Research Group, 1996) 17.

¹⁷⁵ Add-Ministry Inc, *Model Fringe Benefits Policy* (Add-Ministry Inc, February 2011) <http://www.addministry.org.au/Documents/Papers/Model_FB_Policy_2011.pdf>.

¹⁷⁶ Treasury, *Tax Expenditures Statement* (CanPrint Communications, 2016) 73 <http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2016/Tax%20Expenditures%20Statement%202015/Downloads/PDF/2015_TES.ashx>.

¹⁷⁷ In regard to Pastor Pat Mesiti, see Patrick Begley, 'Former Hillsong Pastor Pat Mesiti Faces Domestic Violence Charges', *Sydney Morning Herald* (online), 3 January 2016 <<http://www.smh.com.au/nsw/former-hillsong-pastor-pat-mesiti-faces-domestic-violence-charges-20160101-gly2ld.html>>.

¹⁷⁸ A term used by UNESCO, OECD, European Parliament and the European Commission to describe the economics of religious and cultural contribution. First referenced by The Collective, 'The Purple Economy, A New Alliance Between Culture and Economy' *The Monde* (online) 19 May 2011 <http://www.lemonde.fr/idees/article/2011/05/19/l-economie-mauve-une-nouvelle-alliance-entre-culture-et-economie_1524674_3232.html#74pQD0qecPT97rvX.99>. See also Max Wallace, *The Purple Economy — Supernatural Charities, Tax and the State* (Australian National Secular Association, 2007).

¹⁷⁹ Barney Zwartz, 'Churches "Reap the Benefits of Belief: \$500 Million in Tax Exemptions"', *The Age Newspaper* (online) 29 April 2006 <<http://www.theage.com.au/news/national/churches-reap-the-benefits-of-belief-500-million-in-tax-exemptions/2006/04/28/1146198351877.html>>. See also *Inland Revenue Commissioners v Baddeley* [1955] 1 All ER 525; See also Doig, above n 115.

¹⁸⁰ Faith and Social Cohesion Unit, 'Charity Commission for England and Wales', *Faith in Focus* (Issue 2, 2009) 4. Where the secretary of a mosque stated: 'Being a registered charity shows everyone that we're open, transparent and accountable. We've also been able to apply for more funding since registering, and we've even put our charity number on our letterhead!'

¹⁸¹ ABC Television, 'Panama Papers: Tax Office Investigating 800 Australians Identified in Financial Record Leak' *ABC Four Corners*, 4 April 2016 (Elise Worthington and Lisa Main).

Spaghetti Monster' also known as 'Pastafarianism' has even been registered in other countries to exploit such provisions.¹⁸²

Not surprisingly, BRC solicitors such as Corney and Lind Lawyers complained that with the Australian Tax Office's (ATO) mission to maximise the public purse,¹⁸³ it would be a 'clear conflict of interest' if it were to arbitrate BRC concessions.¹⁸⁴ Typical of the legal dissonance and protectionism mentioned earlier, the Government, via the ATO, already has every right to arbitrate all BRC benefits under the *ITAA97*.¹⁸⁵ The ATO must apply s 50-50(2)(b) to ensure each BRC 'appl[ies] its income and assets solely for the purpose for which the entity is established'. The same statutory review provisions apply to a religious practitioner's use of fringe benefit exemptions under the *Fringe Benefits Tax Assessment Act 1986* (Cth) ('*FBTAA*') s 57.

2 Increased Secrecy

Once a BRC confirms its 'advancing religion' charitable purpose with the Commission and nominates who the entity's 'responsible persons' are, and submits its 'governing documents', there is comparatively limited ongoing reporting required.¹⁸⁶ BRCs have to notify the Commission of certain changes and submit an annual information statement, but are not required to answer financial questions or submit annual financial reports, regardless of size.¹⁸⁷ Furthermore, the Commission has limited powers to suspend or remove a member of the governing body for any 'breach' of conduct of the ACNC guidelines, as the guidelines simply do not apply.¹⁸⁸

3 Presumption of Honesty

The ACNC's regulatory approach advocates five core operational values: 'fairness; accountability; independence; integrity and respect', which have been nicely packaged as 'FAIR'.¹⁸⁹ The regulatory guidelines afford the 'presumption of honesty', stating that the Commission 'understands that most people involved in charities are honest, acting in good faith and trying to do the right thing'.¹⁹⁰ The preamble of the *ACNCA* expressly states that its objective is to 'promote good governance, accountability and transparency for not-for-profit entities ... [and] to maintain, protect and enhance public trust and

¹⁸² New Zealand, *Gazette: Marriage (Approval of Organisations)*, No 22, 10 December 2015; Nathan Glover, 'Church of Flying Spaghetti Monster Finally an Official Denomination in Netherlands', *World Religion News* (online) 3 February 2016 <<http://www.worldreligionnews.com/religion-news/church-of-flying-spaghetti-monster-finally-an-official-denomination-in-netherlands>>.

¹⁸³ *ITAA97* s 50-5(1)-(2).

¹⁸⁴ Andrew Lind, Who's the Umpire? Who Decides Who's In and Who's Out? The Parliament, the Courts, the Regulator, the Administrator (ATO)?, *Senate Economics Committee* (June 2010)

<http://www.corneyandlind.com.au/resource-centre/not-for-profit/nfp-general-reforms/senate_economics_committee_appearance/>.

¹⁸⁵ *ITAA97* s 1-7.

¹⁸⁶ Australian Charities and Not-for-profits Commission Factsheet: Religious Charities <http://www.acnc.gov.au/ACNC/Pblctns/Factsheets/ACNC/FTS/Fact_RelChar.aspx>.

¹⁸⁷ Australian Charities and Not-for-profits Commission, 'ACNC Regulatory Approach' (Regulatory approach statement, November 2015).

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

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confidence'.¹⁹¹ Yet dishonesty remains prevalent, including for example: a \$300 million money-laundering and fraud scheme;¹⁹² fraudulent fundraising to compensate sex addiction¹⁹³ and public apprehension about Halal Certification funding of Jihad.¹⁹⁴

In 2012, the High Court ruled against the Howard Government's School Chaplains' funding under the nebulous 'Nation Building' emergency provisions.¹⁹⁵ However, relying on s 61 of the *Australian Constitution*,¹⁹⁶ the Executive then accessed 'external affairs' appropriations provisions under s 51(xxix) of the *Australian Constitution*¹⁹⁷ to ensure continued funding, whilst conveniently avoiding annual Senate reviews.¹⁹⁸ Despite the 'high level of community support', a Commonwealth Ombudsman's report revealed gross mismanagement of the \$430 million allocated to indirectly employ private religious chaplains in our public schools.¹⁹⁹ Cordery and Baskerville suggest the statutory doctrine of presumed honesty in Australia is 'out of sync' with other countries within the Commonwealth, including New Zealand and the United Kingdom.²⁰⁰

4 *Preferential Trading Conditions*

In *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204 ('*Word Investments*'), the majority held that exemptions should apply to religious charitable purposes including commercial activities, as the benefit was applied to allied

¹⁹¹ *ACNCA* preamble.

¹⁹² Neil Chenoweth, 'Unholy Mess as \$300 Million Tax Scandal Plays Out Across Sydney', *Financial Review* (online) 16 May 2015 <<http://www.afr.com/personal-finance/tax/unholy-mess-as-300-million-tax-scandal-plays-out-across-sydney-20150512-ggzye8#ixzz4LiU7cOKx>>.

¹⁹³ Kim Wheatley, 'Porn Pastor Who Faked Cancer Tells of His Addiction', *The Advertiser* (online) 4 August 2008 <<http://www.adelaidenow.com.au/news/cancer-faking-pastor-tells-all/story-e6frea6u-1111117292889>>.

¹⁹⁴ Chris Johnston, 'Why halal Certification is in Turmoil: The Booming International Halal Certification Industry for Food and Other Products, Including in Australia, is in Turmoil', *Sydney Morning Herald* (online), 28 December 2014 <<http://www.smh.com.au/national/why-halal-certification-is-in-turmoil-20141222-12cmd3.html>>.

¹⁹⁵ *Williams v Commonwealth* (2012) 248 CLR 156 ('*Williams [No 1]*').

¹⁹⁶ *Ibid*; *Australian Constitution* s 61.

¹⁹⁷ *Australian Constitution* s 51(xxix).

¹⁹⁸ *Williams [No 1]* (2012) 248 CLR 156; *Williams v Commonwealth [No 2]* (2014) 252 CLR 416 ('*Williams [No 2]*'); Cheryl Saunders, 'The Scope of Executive Power' (Papers on Parliament, no 59, Parliamentary Library, Parliament of Australia April 2013) 15–34; Commonwealth, Parliamentary Debates, Senate, 19 June 2014, 3412 (George Brandis), 23 June 2014, 3555 (George Brandis).

¹⁹⁹ Allan Asher, 'Administration of the National School Chaplaincy Program' (Report No 6, Commonwealth Ombudsman, The Department of Education, Employment and Workplace Relations, July 2011) citing systemic mismanagement; ABC Radio, 'Controversy Over School Chaplaincy Claim' *The World Today*, 13 May 2011 (Liz Hobday) <www.abc.net.au/worldtoday/content/2011/s3216132.htm>. Parent Tim Hensley complained of dishonesty regarding declared generic intentions versus actual religious practice.

²⁰⁰ Carolyn J Cordery and Rachel F Baskerville, 'Charity Financial Reporting Regulation: A Comparative Study of the UK and New Zealand' (2007) 12.1 *Accounting History* 7–27; Mark Lyons and Andrew Passey, 'Need Public Policy Ignore the Third Sector? Government Policy in Australia and the United Kingdom' (2006) 65.3 *Australian Journal of Public Administration* 90–102.

charitable interests.²⁰¹ As a result of this decision, '[i]nterest in altruistic entities operating unrelated commercial activities has increased'.²⁰² Kirby J, in dissent, stated that:

[T]o the extent that such institutions engage in investment and commercial business undertakings with a view to profit, they invite upon themselves a strict scrutiny. In such a case, they are in competition with others in the marketplace who do not enjoy any of the economic advantages that the exemption.²⁰³

Furthering Kirby J's concerns, the Industry Commission advised that the indirect funding of charities has had an adverse and unfair competition effect on for-profit service providers.²⁰⁴ Subsidies are seen as an 'unmeritorious use of taxpayers' funds'.²⁰⁵ Conversely, the Henry Review, argues that competitive neutrality is not contravened by religious groups maximising their profits.²⁰⁶ This then raises the question of how a net public benefit should be measured.

D Public Benefit Test

A broad definition of public benefit is laid down in the *Charities Act* s 6, which expressly considers the number of beneficiaries and the level of engagement with the public.²⁰⁷ This is a statutory conflict with Murphy J's obiter dictum warning to administrators regarding size of membership in *Scientology*.²⁰⁸ Basically, the public means the unrelated public,²⁰⁹ and benefit means any identifiable benefit that would not have been otherwise available, whether tangible or intangible.²¹⁰ However, in the *Charities Act* s 7(e), the public benefit of BRCs is presumed,²¹¹ as it is collectively for all other forms of charity for Commonwealth purposes. Public benefit also has its meaning enunciated in *Gilmour v Coats* [1949] AC 426 ('*Gilmour v Coats*'), comprising of tangible benefits manifestly susceptible of proof in a court of law. *Gilmour v Coats* still applies for State law purposes, but has been overridden by s 10 of the *Charities Act* for Commonwealth purposes, in that no public benefit for cloistered monastic religious groups' needs to be demonstrated. The

²⁰¹ *JTAA97* Div 50.

²⁰² Treasury Philanthropy and Exemptions Unit, 'Better Targeting of Not-for-profit Tax Concessions, Consultation Paper 077' (27 May 2011) 14.31 <<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2056>>.

²⁰³ *Word Investments* (2008) 236 CLR 204, [117]–[120] (Kirby J).

²⁰⁴ Myles McGregor-Lowndes and Sandra Rodman, 'The Industry Commission's Final Report on the Taxation of Charities' (Working Paper No 62) 3; B M Dalton, J P Casey and J Green, 'Sweet Charity and Filthy Lucre: The Social Construction of Nonprofit Business Venturing in Australia, the United Kingdom and the United States' (International Conference on Contemporary Business Discussion Paper, Charles Sturt University, 2006); Joyce Chia and Miranda Stewart, 'Doing Business to Do Good — Should We Tax the Business Profits of Not-for-profits' (2012) 33 *Adelaide Law Review* 335.

²⁰⁵ Nick Renton, 'Taxpayers Sacrifice to the Churches', *The Age* (Melbourne), 6 May 2008, 1; Opinion, 'Freedom of Religion Should Not Mean Freedom from Scrutiny', *Sydney Morning Herald* (Sydney), 20 May 2008, 12.

²⁰⁶ Review Panel, Australia's Future Tax System: Report to the Treasurer — Part Two: Detailed Analysis (2009) 1, 205–13; Carrette and King, above n 147.

²⁰⁷ *Charities Act* s 6(4)(a)-(b) regarding size of membership and size of public engagement.

²⁰⁸ *Scientology* (1983) 154 CLR 120 [38]–[40] (Murphy J). See also *Red Cross* (1992) 31 FCR 299 [16] considering the size of commercial trade.

²⁰⁹ *Charities Act* ss 6(2)(b)(i)-(ii).

²¹⁰ *Ibid* s 6(3)(a).

²¹¹ *Ibid* s 7.

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public benefit test is no longer judicial, but administrative, having satisfied the objects of a charity,²¹² principally based on *Income Tax Special Commissioners v Pemsel* [1891] AC 531 (*Pemsel's case*). Section 5(b)(i) of the *Charities Act* requires the 'public benefit' presumption to consider two questions – who is the public and what is the benefit?²¹³

1 *Who is the public?*

Firstly, the recipient being an adherent in the religious organisation denotes inclusivity and not exclusivity as in *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297. Ridge explains that 'religious practices restricted to a familial group (such as Chinese ancestor worship) cannot be charitable' as there is no 'public advantage, and [they] can benefit or solace only the family itself'.²¹⁴ Yet despite the exclusive 'cultish' segregated commercial trading community of the Exclusive Brethren Church, they enjoy the tax benefits notwithstanding the requirement of public benefit.²¹⁵ In *Neville Estates Ltd v Madden* [1962] 1 Ch 832 (*Madden*) a case regarding the construction of a private Jewish synagogue, it was held that 'some benefit accrues to the public from the attendance at places of worship of persons who ... mix with their fellow citizens'.²¹⁶

2 *What is the benefit?*

The second limb requires that the benefit must not only service the members of the BRC, but also the community in general. After *Gilmour v Coats*, and possibly due to the changing political attitude toward Catholicism at the time,²¹⁷ religious institutions had to demonstrate public benefit in the United Kingdom.²¹⁸ As an enduring principle relevant mainly to state laws but of interest federally regarding the fundamental role and perceived benefit of religious institutions, Gobbo J in *Crowther v Brophy* proposed that society should not look for the public benefit or 'success' of intercessory prayer, but to 'the enhancement in the life, both religious and otherwise, of those who found comfort and peace of mind' through participation.²¹⁹ This remains the rule today in Ireland as well.²²⁰

The broad definition of 'benefit' in *Madden* suggests that the second tier of derived benefit to the worshipers themselves is entirely acceptable, in lieu of no evidence of the first tier, being faith or God.²²¹ This abstraction of secondary benefit to the worshiper as part of the public was also applied by the High Court in *Aid/Watch Incorporated v Federal*

²¹² *Charities Act* s 12; *ACNCA* ss 25, 30.

²¹³ *Ibid*; Jeffrey Hackney, 'Charities and Public Benefit' (2008) 124 *Law Quarterly Review* 347.

²¹⁴ Pauline Ridge, 'Religious Charitable Status and Public Benefit in Australia' (2011) 35(3) *Melbourne University Law Review* 1071, 1075; *ACNCA* s 7(e); *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381, 396.

²¹⁵ Quentin McDermott, 'Separate Lives', *Four Corners* (online), 25 September 2006 <<http://www.abc.net.au/4corners/content/2006/s1748441.htm>>.

²¹⁶ Toby Haddock, 'Charitable Trusts for the Advancement of Religion: Judicial Rejection of Metaphysical Benefits and the Emergence of Public Interaction' (2001) 7 *Charity Law and Practice Review* 151, 156.

²¹⁷ Ridge, above n 2144, 4.

²¹⁸ *Baker v Sutton* (1836) 1 Keen 224; 48 ER 292.

²¹⁹ [1992] 2 VR 97 [100] (Gobbo J).

²²⁰ *O'Hanlon v Logue [No 2]* [1906] 1 IR 247; *Nelan v Downes* (1917) 23 CLR 546, 571. A testamentary gift for a religious act that involves the utmost piety towards the Supreme Being; *Maguire v Attorney-General* [1943] IR 238.

²²¹ *Scientology* (1983) 154 CLR 120 [13] (Mason ACJ and Brennan J). Regarding proof in adopting Judge Douglas in *United States v Ballard* USSC 72 [1944].

Commissioner of Taxation,²²² regarding political lobbying to enhance foreign aid. The efficient removal of proof by way of presumption is similar to the removal of blame in no-fault compensation schemes in tort law.²²³ In the United Kingdom, charity legislation however requires religious bodies to provide quantitative evidence of public benefit,²²⁴ including intangible benefits,²²⁵ in exchange for the financial benefit sought.²²⁶

E Charitable Governance – Balancing Private and Public Interests

1 Balancing Charity Governance

Ridge argues that a ‘conferral of charitable status means that a religious group comes under ongoing State control’.²²⁷ Charitable governance is the pursuit of legal accountability,²²⁸ in an endeavour to normalise human affairs through State control²²⁹ of non-government organisations known as the ‘third sector’.²³⁰ Ultimately, social exchange frameworks function because of genuine altruism and the pursuit of social norms for others, especially the disadvantaged.²³¹ It is this mix of cross-sector collaborations that manifests in an expansive range of legal regimes from unincorporated religious and community associations, through to incorporated associations and corporations limited by guarantee, and many others.²³² While preserving common law fiduciary duties,²³³ different governance structures have different statutory duties,²³⁴ which enable differential enforcement regimes²³⁵ of fines,²³⁶ directorship disqualifications²³⁷ and criminal

²²² (2010) 241 CLR 539.

²²³ *Safety, Rehabilitation and Compensation Act 1988* (Cth); *Work Australia Act 2008* (Cth).

²²⁴ *Charities Act 2006* (UK) c 50, s 3(2); *Independent Schools Council v Charity Commission for England and Wales* [2012] Ch 214, [58]–[61]. Warren, McKenna and Ovey JJ stating public benefit could be taken for granted.

²²⁵ Charity Commission for England and Wales, *Church Mission Society — A Public Benefit Assessment Report* by the Charity Commission (July 2009) 2.

²²⁶ Charity Commission for England and Wales, *The Advancement of Religion for the Public Benefit* (December 2011) 11. ‘Objective and informed evidence.’

²²⁷ Ridge, above n 214, 7.

²²⁸ Christopher Koliba, Jack W Meek and Asim Zia, *Governance Networks in Public Administration and Public Policy* (CRC Press, 2010) 247.

²²⁹ *ACNCR* s 3.

²³⁰ Lyons and Passey, above n 200; See also Brian Lucas and Anne Robinson, ‘Religion as a Head of Charity’ in Myles McGregor-Lowndes and Kerry O’Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar, 2010) 187.

²³¹ Di Domenico et al, ‘The Dialectic of Social Exchange: Theorizing Corporate-social Enterprise Collaboration’ (2009) 30.8 *Organization Studies* 887–907.

²³² *Ibid*; *Corporations Act* s 45B, s 285A. See also reporting requirements in ss 292, 298, 300B, 301 and 316A.

²³³ *Corporations Act* s 179; *Johnson v Buttress* (1936) 56 CLR 113; *Hartigan v International Society for Krishna Consciousness Inc* [2002] NSWSC 810 (Unreported, Bryson J, 6 September 2002) [81]; *Janson v Janson* [2007] NSWSC 1344.

²³⁴ *Corporations Act* ss 180–184.

²³⁵ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1985) 35. Earlier detailed in John Braithwaite, *To Punish or Persuade* (State University of New York, 1985) 142.

²³⁶ *Corporations Act* s 1317G regarding fines.

²³⁷ *Ibid* s 206C regarding disqualification.

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penalties.²³⁸ While both charitable and corporate sectors require profits to achieve their objectives, charities generate a profit for the benefit of third party beneficiaries. This requires different governance legislation, performance expectations and management behaviour.²³⁹ However, the third sector has historically demonstrated a ‘lack of internal and external accountability, as well as weak internal organisational structures’.²⁴⁰ Directorship liability in this sector directly correlates to a decrease in organisational accountability and transparency.²⁴¹

However, human rights discrimination objections persist on the grounds that religious institutions simply cannot and do not satisfy any public benefit test generally.²⁴² This may involve discrimination by religious groups of the public, by the public of the religious groups, or between religious groups themselves. This occurs, for example, when Islamic fundamentalist groups treat non-Muslims as infidels²⁴³ or the State resumes religious assets as discussed in Jehovah’s Witnesses.

The Commission, as with all regulatory bodies, must also concern itself with compliance costs. BRCs significantly rely on volunteers and any compliance costs might be seen as an unfair burden. However, this argument would garner little sympathy from businesses which have to complete monthly business activity statements²⁴⁴ to collect and pay the very taxes that underwrite the potentially unlimited religious leaders’ fringe benefit tax exemption schemes.²⁴⁵ Alternatively, it could maintain the presumption of the public benefit, but revoke it in the light of any evidence of public harm, as was applied after Ireland’s sexual abuse ‘Ryan Commission’.²⁴⁶ However, the existing ACNCA Div 35 revocation powers have little effect on BRCs, especially when the guidelines do not apply and it does nothing for State law challenges.²⁴⁷ Alternatively, BRCs could simply opt out and operate as a company and seek tax exemptions independently, regardless of registration status.²⁴⁸

²³⁸ *Criminal Code 1899* (Qld) s 498B(9) Civil penalty proceedings and criminal proceedings ss 486A–486D, 495 Criminal liability of executive officers of bodies corporate, s 496C Criminal liability of landholders; *Corporations Act* s 596; ACNC Act 2012 (Cth) Pt 4–2 Enforcement. See also Thomas Middleton ‘Banning, Disqualification and Licensing Powers: ACCC, APRA, ASIC and the ATO – Regulatory Overlap, Penalty Privilege and Law Reform’. (2015) 33(8) *Company and Securities Law Journal* 555–580.

²³⁹ Robert G Picard et al, *The Impact of Charity and Tax Law and Regulation on Not-for-Profit News Organizations* (Reuters Institute for the Study of Journalism, 2016).

²⁴⁰ Kim Junki, *Accountability, Governance, and Non-governmental Organizations: A Comparative Study of Twelve Asia-Pacific Nations* (International Society for Third-Sector Research, 2004) 11–14.

²⁴¹ *Ibid.*

²⁴² Article 2(1) and 26 International Covenant on Civil and Political Rights). Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*ICCPR*).

²⁴³ Rise Up Australia, *Sharia law – Why Are You Against Sharia Law and the Muslim People?*, Advocated by Rise Up Australia, <<http://riseupaustrialiaparty.com/faq/islamic-issues/>>.

²⁴⁴ *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

²⁴⁵ *Ibid*; *FBTAA* s 57; Rametse, Nthathi and Sue Yong, ‘Small Business Taxpayers Attitudes to Complying With a Tax System: Lessons and Experiences From Australia and New Zealand’, (2009) *Journal of Applied Law and Policy* 83.

²⁴⁶ Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse* (2015) vol 1, Ch 2; Ridge, above n 214.

²⁴⁷ ACNCA Div 35 (revoking registration provisions).

²⁴⁸ *ITAA97* s 50-50(2)(a)–(b); *FBTAA* s 57.

2 *Balancing Religious Governance*

At the centre of religious governance is the balance between ownership and control of assets and revenue generation for either private or public purposes.²⁴⁹ For several ‘mega-churches’, there is a ‘dynastic streak’ of apparent divine appointment, affording multiple generations of families’ personal dominion over assets and funds.²⁵⁰ ‘Ownership’ per se may not satisfy the modern legal definition,²⁵¹ but the cultural and traditional notion of absolute control definitely applies.²⁵² But as mentioned above, with hundreds of thousands of employees involved and billions of dollars in assets, how far should public governance reach into private religious endeavours?

3 *The Role of The Australian Charities and Not-for-profit Commission*

Submissions, research, public discussion forums and various parliamentary Senate enquiries into the not-for-profit sector over 17 years formed the definitive Productivity Commission’s Working Paper on charitable governance in 2010.²⁵³ This Working Paper resulted in the subsequent ACNC Bill in 2012.²⁵⁴ The *ACNCA* was passed, amending and consolidating 35 other Acts.²⁵⁵ It was voted for in the Senate according to party political lines 34:28.²⁵⁶ Notwithstanding the promise of the *ACNCA* becoming a ‘one-stop-shop’ for all governance requirements for all charities, there remains serious concern about the complexity and incoherency of the patchwork of regulations at both state and Commonwealth levels.²⁵⁷ Despite efforts in 2014 to abolish the Commission due to complaints of ‘excessive bureaucracy’; ‘limited staffing’; ‘inadequate oversight’; and lack of ‘public transparency’ on top of the residual complaint of limited statutory reach regarding state-based charities and churches,²⁵⁸ the Commission remains.²⁵⁹ When it comes to the governance of BRCs, maybe Minister Christopher Pyne’s recommendation

²⁴⁹ Bob Tricker, *Corporate Governance: Principles, Policies and Practices* (Oxford University Press, 2015) 242.

²⁵⁰ Bagnall Diana, “‘The New Believers’”, *Australasian Dictionary of Pentecostal and Charismatic Movements* 118(6219) *The Bulletin* (online) (11 April 2000) <<http://webjournals.ac.edu.au/ojs/index.php/ADPCM/article/view/150/147>>.

²⁵¹ *Breskvar v Wall* (1971) 120 CLR 376; *Land Title Act 1994* (Qld); *Personal Property Securities Act 2009* (Cth) s 13.

²⁵² Moritz Thorsten, Craig G Bartholomew, *Christ and Consumerism: Critical Reflections on the Spirit of Our Age* (Paternoster, 2000); see also Robert Dodaro, ‘Augustine on the Roles of Christ and the Holy Spirit in the Mediation of Virtues’ (2010) 41.1 *Augustinian Studies* 145-163.

²⁵³ Industry Commission Inquiry Report Charitable Organisations in Australia (16 June 1995); Final Report on the Scoping Study for a NFP Regulator in 2011; Senate Standing Committee on Economics, Inquiry into the Disclosure Regimes for Charities and Not-for-profit Organisations (2008); Senate Standing Committee on Economics: Tax Laws Amendment (Public Benefit Test) Bill 2010.

²⁵⁴ Commonwealth, Parliamentary Debates, Senate, 31 October 2012, 8570 (Ian MacDonald).

²⁵⁵ *ACNCA* s 2.

²⁵⁶ Commonwealth, Parliamentary Debates, Senate, 31 October 2012, 8565 (Ian MacDonald).

²⁵⁷ Commonwealth Treasury, Treasury’s Not-for-profit Reform (Factsheet, 9 December 2011) <https://static.treasury.gov.au/uploads/sites/1/2017/06/ACNC_Advisory_Board-1.pdf>. Referring to the purpose of the Act being a ‘one-stop-shop’.

²⁵⁸ Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014 (Cth). Not passed.

²⁵⁹ Kelly O’Dwyer, Minister for Small Business, Assistant Treasurer and Minister for Social Services, ‘Retention of the Australian Charities and Not-for-profits Commission’ (Media Release, 4 March 2016).

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should apply: ‘creating laws [is] like making sausages ... it’s best the public doesn’t see them’.²⁶⁰

4 Wholesale Exemptions for BRCs

Section 200-5 of the *ACNCA* enables the Parliament to make regulations with subsection 45–10(1) specifying ‘governance standards’ with which charities must comply.²⁶¹ The Australian Charities and Not-for-profit Commission must register, regulate and enforce all governance standards for all charities.²⁶² The *Charities Act* recognises 14 categories or ‘subtypes’ of charity, including 12 charitable purposes, as well as public benevolent institutions and health promotion charities,²⁶³ to whom the ACNC standards apply. The Australian Charities and Not-for-profit Commission released a ‘Governance for Good’ guide — a best practice manual for all charities alike,²⁶⁴ however, it affords BRCs comprehensive exclusion from all of these standards.²⁶⁵ No explanation is furnished for this policy decision, despite the immediate reference after the exemption statement: ‘[t]hese are a set of core, minimum requirements for the governance of charities’.²⁶⁶

The legal compliance arsenal at the Commission’s disposal includes warnings, directions, enforceable undertakings, injunctions, suspensions and removal of responsible persons.²⁶⁷ The enforcement model does, however, lack punitive civil fines and criminal sanctions reserved for the corporate sector. Furthermore, religious institution compliance is limited to registration disclosure requirements only.²⁶⁸ In comparison, all other charitable sectors operate under incremental public standards of accountability and transparency in exchange for direct and indirect funding. Alternatively, corporate legislation could provide religious corporate enterprises, meaningful governance standards where charitable reforms have either ignored and or failed to do so.

²⁶⁰ Tony Wright, ‘Sketch: Christopher Pyne and the Magical Sausage Machine’, *Sydney Morning Herald* (online) 16 March 2015. <<http://www.smh.com.au/federal-politics/political-opinion/sketch-christopher-pyne-and-the-magical-sausage-machine-20150316-1m0jfb.html>>. The quote is generally attributed to Otto von Bismarck; Ambrose Bierce, *The Devil’s Dictionary* (Wordsworth Editions, 1996) 17, 194; See also J Gordon Hylton, ‘The Devil’s Disciple and the Learned Profession: Ambrose Bierce and the Practice of Law in Gilded Age America’ (1990) 23 *Connecticut Law Review* 705–706.

²⁶¹ *ACNCA* s 45-10(1).

²⁶² *Ibid* s 45-10.

²⁶³ *Charities Act* Div 2 (Types of charitable purposes).

²⁶⁴ Australian Charities and Not-for-profits Commission, *Governance for Good — The ACNC’s Guide for Charity Board Members*

<http://www.acnc.gov.au/ACNC/manage/tools/ACNC/edu/tools/GFG/GFG_Intro.aspx>.

²⁶⁵ *ACNCA* s 45-10(5) (Regulations establishing governance standards).

²⁶⁶ Australian Charities and Not-for-profits Commission, *Commonwealth Government, Governance For Good — ACNC Governance Standards* (2013) 12. *Emphasis added.*

²⁶⁷ *ACNCA* Pt 4-2; *Criminal Code 1899* (Qld); *Corporations Act*.

²⁶⁸ *ACNCR* s 40-1 (Additional information that must be included on the register).

V RELIGIOUS TRADE AND CORPORATE LAW

A Defining s 51(xx) Trading Corporations

With respect to religious trading endeavours, ‘if it looks like a duck, walks like a duck ... it probably is a duck’.²⁶⁹ Section 51(xx)²⁷⁰ of the *Australian Constitution* is reflected in Hilmer’s doctrine of ‘competitive neutrality’,²⁷¹ enabling the judiciary to recognise corporate opportunism and treat ‘like with like’,²⁷² thus levelling the playing field as the former Commonwealth Treasurer Costello intended.²⁷³ It enables the Parliament to ‘have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth’.²⁷⁴ But how are constitutional trading corporations characterised?

1 Substance Matters

In the pioneering case of *Salomon v Salomon*,²⁷⁵ the legal notion of a separate corporate personality was unanimously recognised. The Courts and modern corporate legislation ensures a corporation’s status is not restricted just to registration under statute,²⁷⁶ but subject to its actual activity.²⁷⁷ In the 1909 form-over-substance positivists’ judgment in *Huddart, Parker & Co Pty Ltd v Moorehead*,²⁷⁸ the High Court by a small majority, held that a ‘trading corporation’ existed according to its stated purpose only.²⁷⁹ This narrow test examined the organisation’s articles of association to determine whether its purpose was to actually trade or not. However, more recently in *Scientology*, the church’s spiritual *raison d’être* was questioned due to its overt and substantial corporate trading activity.²⁸⁰

In *Actors v Fontana Films Pty Ltd* ‘trading’ was held to mean just that, ‘trading’.²⁸¹ By contrast, in *E v Australian Red Cross Society* (1991) 27 FCR 310 (*Red Cross*) regarding

²⁶⁹ Philip M Nichols, ‘Outlawing Transnational Bribery Through the World Trade Organization’ (1996) 28 *Law and Policy in International Business* 310.

²⁷⁰ *Australian Constitution* s 51(xx).

²⁷¹ Commonwealth Treasury, Better Targeting of Not-for-profit Tax Concessions, (Consultation Paper, 27 May 2011) 1 <<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2056>>; Stephen P King, ‘National Competition Policy’ (1997) 73.222 *Economic Record* 270–284; Frederick G Hilmer, National Competition Policy Review (25 August 1993). Hilmer was chairman of the Prime Minister Paul Keating’s 1992 independent committee of inquiry into competition policy.

²⁷² John Colombo and Mark Hall, *The Charitable Tax Exemption* (Westview Press, 1995) 58; David Richardson, *The Taxation of Capital in Australia: Should it be Lower?* (Springer Berlin Heidelberg, 2014) 181–199.

²⁷³ Costello, above n 6.

²⁷⁴ *Australian Constitution* s 51(xx).

²⁷⁵ [1897] AC 22 (*Salomon*). Unanimously holding the doctrine of a separate corporate personality.

²⁷⁶ *Corporations Act 2001* (Cth).

²⁷⁷ *Salomon* [1897] AC 22; *R v Federal Court of Australia; Ex parte The Western Australian National Football League (Inc)* (1979) 143 CLR 190, 239 (Murphy J); *Quickenden* [2001] FCA 303.

²⁷⁸ (1909) 8 CLR 330 (*Moorehead*).

²⁷⁹ *Ibid*; See also *R v Trade Practices Tribunal; Ex Parte St George County Council* (1974) 130 CLR 533.

²⁸⁰ *Scientology* (1983) 154 CLR 120 [43] (Mason ACJ and Brennan J) [44]-[45] (Mason J).

²⁸¹ (1982) 150 CLR 169, 183. Addressing issues of harm to trading organisations under secondary boycott provisions of the *Trade Practices Act 1974* (Cth). Now addressed by the *Competition and Consumer Act 2010* (Cth) s 45D.

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AIDS contamination and the merchantable quality of blood plasma products,²⁸² the hospital was held not to be liable under the former *Trade Practices Act 1974* (Cth) ('*TPA*') (now the *Competition and Consumer Act 2010* (Cth)).²⁸³ This was due to the hospital providing specific products and services 'free of charge or gratuitously'. If the hospital were supplying such goods or services in 'trade or commerce', as required by s 52 of the *TPA*, they would have been liable.²⁸⁴ In *Plimer v Roberts*,²⁸⁵ comments by a clergy member regarding fund-raising for the supposed location of Noah's Ark were held not to be misleading or deceptive in the context of the *TPA*, because they were not made 'in trade or commerce'. To be deemed a constitutional trading corporation, any organisation must do exactly that — trade — regardless of their stated intentions,²⁸⁶ actual profit,²⁸⁷ or ownership.²⁸⁸ Wilcox J in *Red Cross*,²⁸⁹ relying on Mason J elaborated: '[a] trading corporation may also be a sporting, religious, or governmental body. As long as the trading is not insubstantial, the fact that trading is incidental to other activities does not prevent it being a trading corporation'.²⁹⁰

2 *Size Matters*

Sixty years after *Moorehead*, in *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 ('*Adamson's case*'), s 51(xx) of the *Australian Constitution* assumed a more legal realist colour when the Court applied the 'activities test'. Here, the scope of the commercial activity was entirely relevant.²⁹¹ In *State Superannuation Board v Trade Practices Commission*, while commercial activity was only 'incidental' and 'insubstantial', it was sufficient to deem the Board a constitutional 'financial corporation'.²⁹²

In 1991, this new generation of realist jurisprudence was further applied in *Red Cross*²⁹³ when Wilcox J held that Sydney's Royal Prince Alfred Hospital was a constitutional trading corporation.²⁹⁴ This was despite the fact the hospital commenced as an 'emanation of the New South Wales Crown' and received \$112 million in Government subsidies. With annual transactions of over \$14 million in fees and \$4 million from other business

²⁸² *Red Cross* (1991) 27 FCR 310, [2].

²⁸³ *Competition and Consumer Act 2010* (Cth).

²⁸⁴ *Ibid* [119]–[120]. This is now the *Competition and Consumer Act 2010* (Cth) Sch 2 s 18.

²⁸⁵ (1997) 80 FCR 303.

²⁸⁶ [2001] FCA 303.

²⁸⁷ *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 ('*Adamson's case*').

²⁸⁸ *Ibid*.

²⁸⁹ *Red Cross* (1991) 27 FCR 310 [120].

²⁹⁰ *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533; [1974] HCA 7 [239] (emphasis added), Mason J relying on Murphy J in *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533.

²⁹¹ Barwick CJ 'once it is found that trading is a substantial and not merely a peripheral activity not forbidden by the organic rules of the corporation, the conclusion that it is a trading corporation is open.' [208]; (Mason J) 'sufficiently significant proportion' [233].

²⁹² (1982) 150 CLR 282; Rule earlier applied regarding foreign corporations in *R v Judges of the Federal Court of Australia* (1979) 143 CLR 190. (Murphy J) [8]–[11], Mason ACJ and Brennan J, with whom Jacobs J agreed, defined the term 'trading corporation' [29]–[31].

²⁹³ *Red Cross* (1991) 27 FCR 310.

²⁹⁴ *Ibid* [18]–[19].

activities,²⁹⁵ the net total of almost 16 per cent of trading revenue was deemed ‘substantial’, thus satisfying constitutional trading corporation status. Later in 1998, it was held that just over five per cent of commercial revenue was sufficient to satisfy constitutional trading corporation status in *United Firefighters’ Union v Metropolitan Fire and Emergency Services Board*.²⁹⁶ But which governance framework applies to religious trading enterprises when the ‘legal s*** hits the fan’, as it invariably does?²⁹⁷ It is vital therefore to ensure governance standards apply to an entity’s activity and not just its registration, regardless to it being a church, charity or a corporation.

B Corporate Governance

The thirteenth century Pope Innocent IV first incarnated the corporate *persona ficta* ‘legal person’ to hold property, manage succession and by default, protect recalcitrant monks from unpaid debts.²⁹⁸ Ecclesiastical Enterprises have subsequently but arguably enjoyed more statutory protections than ‘natural persons’.²⁹⁹ By contrast today, the Royal Commission Chair, Peter McClellan,³⁰⁰ asked Cardinal Pell if modern management systems needed to be implemented to better supervise its 200 parishes. Pell replied:

There’s no need to change the centuries-old management structure of the Catholic Church. The church has been going for a couple of thousand years and our patterns of organisation predate modern corporations and as a matter of fact are a bit similar to the ... Roman empire ... (attracting) bigger congregations than football crowds in the 1970s and 1980s.³⁰¹

American macroeconomist and Nobel Laureate Milton Friedman stated, ‘money matters ... only money matters’.³⁰² Friedman also championed the mantra, ‘the business of business is business’.³⁰³ Living Gordon Gekko’s ‘greed is good’ ideology³⁰⁴ and Hillsong’s ‘you need more money’ prosperity theology,³⁰⁵ evangelist, Pastor Pat Mesiti was suspended in

²⁹⁵ Ibid [132].

²⁹⁶ [1998] 83 FCR 346.

²⁹⁷ Barry Thomsen, *When the Shit Hits the Fan!: How to Keep Your Business Afloat for More Than a Year* (Career Press, 2007).

²⁹⁸ Alban Butler and Paul Burns, *Butler’s Lives of the Saints* (Liturgical Press, 2000) 131; See also John Dewey, ‘Historic Background of Corporate Legal Personality’ (1926) 35 *Yale Law Journal* 655. Dewey notes corporate protection was required for monks ‘since individuals were considered to have a soul and therefore capable of being guilty of negligence and excommunicated.’

²⁹⁹ Anna Grear, ‘Human Rights—Human Bodies? Some Reflections on Corporate Human Rights Distortion, The Legal Subject, Embodiment and Human Rights Theory’ (2006) 17.2 *Law and Critique* 171.

³⁰⁰ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report* (2015) vol 1, 2.

³⁰¹ APP 2016, ‘No need to change church structure: Pell’, *9news.com.au* (online), 2 March 2016, <<http://www.9news.com.au/national/2016/03/02/17/37/no-need-to-change-church-structure-pell#giyxijqblrivyr36.99>> Emphasis added.

³⁰² Milton Friedman, *A Theoretical Framework for Monetary Analysis* (Chicago University Press, 1974) 27.

³⁰³ Milton Friedman, *The Philosophy of Economics – An Anthology* 2 (Cambridge University Press, 1953) 180.

³⁰⁴ David E McClean, *Wall Street, Reforming the Unreformable: An Ethical Perspective* (Routledge, 2015) 123.

³⁰⁵ Brian Houston, *You Need More Money: Discovering God’s Amazing Financial Plan for Your Life* (Leadership Ministries Incorporated, 1999).

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disgrace after his ‘Thompsonsque’ procurement of prostitutes on Hillsong’s credit card,³⁰⁶ only to establish ‘The Millionaire Mindset Club’,³⁰⁷ all the while enjoying the tax benefits exclusive to ‘the ministry’. It is suggested that if the Macquarie Bank is the ‘millionaire factory’ for bankers,³⁰⁸ then Hillsong is the millionaire factory for ministers.

To manage the separate nuances of corporate enterprises, modern corporate governance proposed to Pell involves a narrow application of ‘codified rights, duties and roles between organs and agents’ of an organisation.³⁰⁹ Corporations, small or large, private or public, are registered with the Australian Securities and Investments Commission (ASIC)³¹⁰ and are independently subject to various separate regulatory and investigative commissions,³¹¹ to enforce compliance with their statutory duties.

1 *Corporate Duties*

Only religious bodies that elect to use a corporate structure, for example a Limited by Guarantee entity, would obtain the external governance advantages of the *Corporations Act*.³¹² This would specifically apply regarding ss 180–184, directors’ statutory duties. Internally, the company could sue its own directors for breach of ‘strict’ fiduciary duty.³¹³ Externally, even if the company refuses to comply, ASIC would have the independent power to sue directors for breaches of statutory duty. Only ASIC has the standing to seek civil penalty orders³¹⁴ and it is highly unlikely to succumb to pressure from religious leaders to take no action, as members of a religious organisation may. ASIC would sue to promote public interest as per its regulatory objectives in s 1(2) of *Australian Securities and Investments Commission Act 2001* (Cth).

Fiduciary duties between spiritual leaders and members are well established, especially regarding the presumed, but rebuttable, doctrine of undue influence.³¹⁵ Such duties are co-extensive with statutory duties and are preserved by s 179 of the *Corporations Act*, denoting a relationship of trust, which applies to all directors, all of the time.³¹⁶ These

³⁰⁶ *General Manager of the Fair Work Commission v Thomson [No 4]* [2015] FCA 1433; Katherine Towers, ‘Disgraced Craig Thomson to be Questioned Over Prostitutes in Civil Case’, *The Australian* (online) 11 February 2015 < <http://www.theaustralian.com.au/news/nation/disgraced-craig-thomson-to-be-questioned-over-prostitutes-in-civil-case/news-story/4e31f20776c61521055d02f3031cf016>>.

³⁰⁷ Begley, above n 1777.

³⁰⁸ Gideon Haigh, *Who’s Afraid of Macquarie Bank?: The Story of the Millionaires’ Factory* (The July Monthly, 2007) 30.

³⁰⁹ Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 2nd ed, 2015) (definition of ‘corporate governance’).

³¹⁰ *Australian Securities and Investments Commission Act 2001* (Cth) (‘ASIC Act’); *Corporations Act* s 117; *Business Names Registration Act 2011* (Cth).

³¹¹ *Fair Work Act 2009* (Cth) (Fair Work Commission); *Productivity Commission Act 1998* (Cth) (Productivity Commission); *Competition and Consumer Act 2010* (Cth) (Corporate Affairs Commission); *ASIC Act 2001* (Cth) (Australian Securities and Investments Commission).

³¹² *Corporations Act* s 45B.

³¹³ Joseph A McCahery and Erik PM Vermeulen, *Corporate Governance of Non-Listed Companies* (Oxford University Press, 2010) 120.

³¹⁴ *Corporations Act* ss 1317J, 206C, 1317G.

³¹⁵ *Johnson v Buttress* (1936) 56 CLR 113; *Hartigan v International Society for Krishna Consciousness Inc* [2002] NSWSC 810 [81]; *Janson v Janson* [2007] NSWSC 1344.

³¹⁶ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

duties require that directors place the interests of their members above their own,³¹⁷ thereby avoiding profiteering from their positions.³¹⁸ Furthermore, directors' statutory duties such as the duty of care and diligence and the duty to act in good faith and with a proper purpose for the benefit of the organisation³¹⁹ are codified in the *Corporations Act*.³²⁰

2 Breaches of Duty

If a director or even an officer breaches his or her duties of good faith, abuses his or her position for personal gain, or is wilfully dishonest and reckless, that conduct may result in fines, disqualification and even imprisonment. These measures incrementally correlate with Braithwaite's motivational and regulatory enforcement pyramid.³²¹ The enforcement model starts with administrative (non-judicial) proceedings by ASIC, progressing to civil remedies like injunction and compensation, then civil penalties such as fines and director disqualification, and finally, criminal sanctions.³²²

In the signature case regarding the leadership oppression of minority members in *Foss v Harbottle*, the legal purpose and the actual purpose of the organisation's misappropriated assets did not align.³²³ The Court applied the narrow 'dominant purpose test', and the 'substantial object test' regarding the interests of the members and shareholders to the five directors.³²⁴ The enduring rule is that corporations are separate legal persons, and as such, the 'proper plaintiff' in any misconduct is the company itself, not the members.³²⁵ Minority members do not have the standing to sue the directors.³²⁶ Essentially, the majority can simply ratify their misconduct and protect themselves, automatically defeating any claim against them. The same limitation applies regarding fiduciary law — a company cannot effectively sue itself for common law fraud if delinquent directors or religious leaders control that entity. By contrast, s 184 of the *Corporations Act* makes it a criminal offence where a director is reckless and or dishonest.³²⁷ Furthermore, protective statutory derivative provisions also now exist but only expressly apply to corporations.³²⁸

As a case example, in 2008, Hillsong Youth Pastor Michael Guglielmucci released an album called 'Healer', which debuted at number two on the ARIA charts.³²⁹ He and his father, Senior Pastor Danny Guglielmucci, appealed for finance from members regarding his son's miracle cure from a rare bone cancer on which the album was based. The sickness was subsequently exposed as a fraudulent pretence, concealing Pastor Guglielmucci

³¹⁷ *Corporations Act* ss 181(1)(b)–(1)(c); *Howard Smith v Ampol Petroleum Ltd* [1974] AC 821.

³¹⁸ *Chan v Zacharia* (1984) 154 CLR 178.

³¹⁹ *Corporations Act* ss 180–184; *Daniels v Anderson* (1995) 37 NSWLR 438.

³²⁰ *Corporations Act* ss 180–184; *Foss v Harbottle* (1843) 67 ER 189.

³²¹ *Corporations Act* ss 184, 1041F; Ayres and Braithwaite, above n 2355.

³²² *Ibid.*

³²³ (1843) 2 Hare 461; 67 ER 189.

³²⁴ *Corporations Act* s 181.

³²⁵ *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 Where a remedy for corporate misconduct can only be taken by the company itself with the exception of minority shareholders through 'derivative action' provisions. Now codified in the *Corporations Act* s 236–242; See also *Salomon v Salomon & Co Ltd* [1897] AC 22.

³²⁶ *Ibid.*

³²⁷ *Corporations Act* s 184.

³²⁸ *Ibid* ss 236–242.

³²⁹ Wheatley, above n 193.

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Junior's addiction to pornography.³³⁰ Yet no action was or could be brought against Guglielmucci or the church for breaches of 'proper purpose' under s 181, or 'good faith' under s 184 of the *Corporations Act*, or for criminal or common law fraud. Whereas, under the corporate enforcement pyramid,³³¹ the Commonwealth Department of Public Prosecution could have pursued prosecutions regarding financial matters,³³² and breaches of statutory duties according to its published prosecutions policy and referrals from ASIC.³³³

Under the *ACNCA*, the religious charitable presumption of public benefit and the presumption of honesty are both rebuttable.³³⁴ Under the *Corporations Act*, good intentions and honest belief are considered by the courts as a defence, but only in civil claims regarding breaches of 'good faith'³³⁵ and 'proper purpose',³³⁶ insolvent trading³³⁷ and negligent breaches of duties.³³⁸ Here, the court objectively considers all the circumstances of the case,³³⁹ but not in criminal financial matters.³⁴⁰

Unfortunately, religious history is littered with human and institutional carcasses of this unresolved conflict regarding faith, funds and fraud.³⁴¹ When Jesus 'made a whip' and 'turned the [temple] tables over' in a fit of rage, he declared to the world that worship and wealth creation at worshippers' expense is abhorrent. Section 205-35 of the *ACNCA* recognises the difference, specifically distinguishing BRCs religious activity from constitutional corporate trading activity.³⁴² This raises the question, if the courts do not deem an organisation to be a constitutional trading corporation on a case-by-case basis, what default provisions exist?

C Corporate Governance by Default

Religious corporate entrepreneurship thrives where 'special treatment' is assumed, creating an amorphous governance conduit between spiritual and corporate activities.³⁴³ In 2015,

³³⁰ *Ibid.*

³³¹ *Corporations Act* ss 184, 1041F; Ayres and Braithwaite, above n 235.

³³² *Australian Securities and Investments Commission Act 2001* (Cth) s 12GXA.

³³³ *Ibid* s 49; *Corporations Act* s 1315; *Director of Public Prosecutions Act 1983* (Cth) s 49.

³³⁴ *Hogg v Cramphorn Ltd* [1967] Ch 254, 262. Discussing the difference between good intentions and honest belief.

³³⁵ *Corporations Act* s 181.

³³⁶ *Ibid* s 1318.

³³⁷ *Ibid* s 1317S(2)(b)(i).

³³⁸ *Ibid* s 1318.

³³⁹ *Ibid.*

³⁴⁰ *Ibid* s 1317S(1)(b).

³⁴¹ Moritz Thorsten and Craig G Bartholomew, *Christ and Consumerism: Critical Reflections on the Spirit of Our Age* (Paternoster, 2000) 5; David M Perry, *Sacred Plunder: Venice and the Aftermath of the Fourth Crusade* (Penn State Press, 2015) 3. Discussing the splitting of wealth plundered on holy crusades among church leadership; Edward J Janger, 'Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design' (2001) 43.3 *Arizona Law Review* 1.

³⁴² *ACNCA* s 205-35(2)(a).

³⁴³ Max Wallace, Humanist Society of Queensland Inc, Submission No 22 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Conviction with Compassion: A Report on Freedom of Religion and Belief*, 6 March 2000, 368–369
<aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jfadt/Religion/Relch_11>;

the Seventh-day Adventist Church's income from its wholly owned Sanitarium Corporation was more than \$204 million which included over \$4 million in government grants and nearly \$6 million in donations.³⁴⁴ The issue of direct ownership and control and even unlawful shadow directorship under s 729 of the *Corporations Act* could become problematic if Sanitarium were to be wound up, for example, consequently affording liquidators the 'right to recover for loss or damage resulting from contravention'.

It is not until an organisation is charged with corruption, or in liquidation, that a full financial autopsy can be undertaken and corporate recovery laws are enlivened.³⁴⁵ For example, when a televangelist files for bankruptcy owing more than \$40 million,³⁴⁶ or when a religious leader like Pentecostal Pastor David Yonggi Cho (leader of the world's largest single church, in Seoul, South Korea) is convicted of criminal tax offences,³⁴⁷ the true financial conduct and purpose of the religious institution is revealed in the liquidator's financial post-mortem, enabling the recovery of losses from the appropriate entities and persons.

The legal validity and characterisation of constitutional corporations under s 51(xx) of the *Australian Constitution* has been a contentious issue for many years.³⁴⁸ The 'object of command test' ordering corporations to do or not do something was considered in *New South Wales v Commonwealth of Australia*,³⁴⁹ though opposed by every (Labor) State government and various Trade Unions.³⁵⁰ Upholding the legislation in the High Court, the majority decision in a single judgment by Gleeson CJ, Gummow, Heydon, Hayne, and Crennan JJ, adopted the 'object of command test', enabling the Commonwealth to modify corporation rights and obligations externally and now internally.³⁵¹ Their Honours held, with reference to other cases mentioned above,³⁵² the 'object of command test' is valid law, applicable only to deemed constitutional trading corporations.³⁵³

The plaintiff States and Trade Unions, argued that s 51(xx) of the *Australian Constitution* should be 'read down', essentially limiting the Commonwealth powers to external public

See also *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948). ; *Treaty on the International Covenant on Economic, Social and Cultural Rights*, open for signature 16 December 1966, 2200A (XXI) (entered into force 3 January 1976) art 27.

³⁴⁴ Adams, above n 24.

³⁴⁵ *Corporations Act* s 477. Powers of liquidator.

³⁴⁶ Rebecca Cathcart, 'California's Crystal Cathedral Files for Bankruptcy', *The New York Times* (online), 18 October 2010 <<http://www.nytimes.com/2010/10/19/us/19crystal.html>>.

³⁴⁷ Special Report on Religion and Public Life, 'O Come All Ye Faithful: God is Definitely Not Dead, But He Now Comes in Many More Varieties', *The Economist* (online) 11 March 2003, 6 <<http://www.economist.com/node/10015239>>.

³⁴⁸ *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323; *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309; *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

³⁴⁹ (2006) 229 CLR 1 (Gleeson CJ and Gummow, Hayne, Heydon, Crennan JJ) ('*Work Choices*').

³⁵⁰ *Ibid* [229].

³⁵¹ *Ibid* [121]. Accepted reasoning of Gaudron J (dissent) in *Re Pacific Coal Pty Ltd; Ex parte*

Construction, Forestry, Mining and Energy Union (2000) 203 CLR 346, 375.

³⁵² *Moorehead* (1909) 8 CLR 330 [409] (Higgins J); *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 [202] (Latham CJ); *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 [182] Gibbs CJ; *The Tasmanian Dam Case* (1983) 158 CLR 1 [315] Dawson J.

³⁵³ *Work Choices* (2006) 229 CLR 1 [187] (Gleeson CJ and Gummow, Hayne, Heydon, Crennan JJ).

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matters and interstate purposes only.³⁵⁴ However, the majority after reading the pre-federation Convention Debates drafting history could not see any distinction between internal or external obligations and rules for constitutional corporations.³⁵⁵ Arguably, this seismic shift in constitutional corporate jurisprudence affords the Commonwealth the right to draft legislation for religious corporate enterprises, and the States cannot legislate around it.

Craven has suggested that the ruling in *Work Choices* is the ‘constitutional equivalent of a dirty bomb’, suggesting the ‘substantive legal implications of the decision are almost unquantifiable’ ... ‘effectively [giving] Canberra power over any area involving a corporation’.³⁵⁶ Referring to our ‘new Australian bastard federation’, Craven’s tirade against the majority ruling declared it:

[T]he most constitutionally autistic in the High Court’s long history of literalistic misinterpretation ... a shipwreck of Titanic proportions ... the greatest constitutional disaster to befall the states in 80 years ... [t]he court has given Canberra the key to the Constitution ... [t]he High Court has dropped federalism like a used tissue and the states are entirely on their own.³⁵⁷

Thanks in part to the Council of Australian Governments (COAG)³⁵⁸ as demonstrated by the extensive reach of the *Corporations Act*, the *Fair Work Act 2009* (Cth) and ten other substantive Commonwealth Acts are examples of corporate legislative reform where the ‘Commonwealth has waxed’, while the ‘States have waned’.³⁵⁹ Although the *Work Choices Act 2006* (Cth) may have cost the Howard Government office,³⁶⁰ the High Court’s revival of the ‘object of command test’³⁶¹ enables the Commonwealth to legislate religious trading enterprises for what they are — trading corporations.

But how reforms are made is just as important as what reforms are made and who makes them. Section 128’s doctrine of responsible government requires a ‘double majority’ to amend the *Australian Constitution*,³⁶² modelled on the Federal United States and Swiss Constitutions.³⁶³ Conversely, *Work Choices* truncates the need for ‘double majority’ referendums or court rulings for the purpose of deeming constitutional (religious) trading

³⁵⁴ Ibid [75].

³⁵⁵ Ibid [78].

³⁵⁶ Greg Craven, ‘Struggle Ahead for the States: The High Court’s Decision Hands Inordinate Power to Canberra’, *The Australian* (online), 16 November 2006 <<http://www.theaustralian.com.au/opinion/greg-craven-struggle-ahead-for-the-states/story-e6frg6zo-111112528642>>. Craven was then Professor of Government and Constitutional Law at Curtin University in Perth.

³⁵⁷ Ibid.

³⁵⁸ Martin Painter, ‘The Council of Australian Governments and Intergovernmental Relations: A Case of Cooperative Federalism’ (1996) 26.2 *Publius: The Journal of Federalism* 101; Martin Painter, ‘Multi-level Governance and the Emergence of Collaborative Federal Institutions in Australia’ (2001) 29(2) *Policy and Politics* 137.

³⁵⁹ Jennifer Clarke et al, *Australian Constitutional Law: Materials and Commentary* (Butterworths, 9th ed, 2013) 61, 65. See also Gregory J Craven, ‘Few Fragments of State Constitutional Law’ (1990) 20 *University of Western Australia Law Review* 353.

³⁶⁰ Kathie Muir and David Peetz, ‘Not Dead Yet: The Australian Union Movement and the Defeat of a Government’ (2010) 9.2 *Social Movement Studies* 215.

³⁶¹ *Work Choices* (2006) 29 CLR 1.

³⁶² John Uhr, ‘Testing Deliberative Democracy: The 1999 Australian Republic Referendum’ (2000) 35.02 *Government and Opposition* 189.

³⁶³ Cheryl Saunders, ‘The Parliament as Partner: A Century of Constitutional Review’ (Parliament of Australia, Parliamentary Library, 15 August 2000).

corporations. Even though distinguished constitutional historian Dicey fervently rejected proportional representation, women's suffrage, even advocating 'the negro vote ... a sham and a fraud',³⁶⁴ he did however efficaciously campaign that 'constitutional law' is all about 'parliamentary sovereignty' supported by judicial impartiality, as comprehensively demonstrated here in *Work Choices*.³⁶⁵ Parliament is the 'absolute sovereign legislature', with the 'right to make or unmake any law' under the Constitution.³⁶⁶ *Work Choices*, like it or loathe it, was an exercise in sovereignty 'by the people and for the people',³⁶⁷ as reflected in the architecture of the Parliament House itself where the people can walk around and on top of the building.³⁶⁸ Aristotle's 'deliberative democracies' remains an ever 'corrective' work in progress, never a destination in itself.³⁶⁹ While reformation of religious corporate governance has been centuries in the making, by legislatively treating like with like, we only now may have an equitable and sustainable solution for charities, churches and corporations alike.

VI LEGAL REFORMATION OF RELIGIOUS TRADE

Although the ATO, ASIC and ACCC all play a part supplementing the governance objectives of the *ACNCA*, the ad hoc mishmash of registrations, exemptions and taxation benefits have made governance compliance for religious trading endeavours the problem it is today, not the answer. The proposed overarching federal law reforms discussed below have state and local government implications. They do not, however, challenge the definition of religion itself in *Scientology*,³⁷⁰ or directly challenge the rebuttable presumption of public benefit as recently adopted in Ireland.³⁷¹

It is suggested that the corporate principle of a threshold test could apply where religious trade exceeds an annual consolidated revenue of \$5 million, for example, or where assets exceed \$2.5 million, or where there are more than 25 employees,³⁷² — after which the corporate activity of BRCs should operate mutually and exclusively under ASIC's control.³⁷³ An alternate corporate entity should therefore operate to manage the corporate activity, possibly as a Limited by Guarantee entity for example.³⁷⁴ Such a structure is 'formed on the principle of having the liability of its members limited to the respective

³⁶⁴ Albert Venn Dicey, *Letters to a Friend on Votes for Women* (London, 1909) 73.

<<https://archive.org/stream/letterstofriend00diceuoft#page/72/mode/2up>>. From <<https://archive.org/index.php>>.

³⁶⁵ George Williams, *Australian Constitutional Law and Theory* (Federation Press, 2010) 2.

³⁶⁶ *Ibid*.

³⁶⁷ Touré, above n 33.

³⁶⁸ Scott Bennett, 'Parliament House and the Australian people' (Research Paper No 29, Parliamentary Library, Parliament of Australia, 2008)

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP0708/08rp29>.

³⁶⁹ John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) 3, 4.

³⁷⁰ *Scientology* (1983) 154 CLR 120.

³⁷¹ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report* (2015) vol 1 Ch 2; Ridge, above n 214; *Charities Act 2009* (Ire) and *Charities Act 2006* (UK) s 50.

³⁷² Corporations Act s 45A(3).

³⁷³ *Ibid* s 601BA.

³⁷⁴ *Ibid*.

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amounts that the members undertake to contribute ... if wound up'.³⁷⁵ Registration could be either as a company or as an incorporated association. This would ensure better corporate governance of the separate corporate activity by the mandatory appointment of three independent directors, a governing constitution, proper financial records and audited financial reporting.³⁷⁶ By default, all tax exemptions under Part 2-15 'Non-Assessable Income' of the *ITAA97* would apply to the trading enterprise, leaving the BRC to be treated consistently with other non-BRC charities.

Excessive payments to clergy could be caught by the related party benefit provisions in ss 208–209 of the *Corporations Act*, as applied in *HIH Claims Support Limited v Insurance Australia Limited* (2011) 244 CLR 72 to encompass all directors, associates and family members.³⁷⁷ Furthermore, it would be an improper use of position and a breach of their fiduciary duty for leaders to use their positions for unfair gain under s 182(1) of the *Corporations Act*.

Limited by Guarantee structures promote the protection of member's rights and interests, as they have standing under the *Corporations Act* for remedies such as oppression in ss 232 and 234, derivative actions in ss 236 and 237, winding up under s 461 in drastic cases, and injunctions in s 1324.³⁷⁸ It also assists to protect creditors who deal with BRCs by opening up remedies for insolvent trading under s 588G. In a collapse, independent liquidators and receivers have statutory duties to report suspected breaches to ASIC under ss 422 and 533 of the *Corporations Act*. Furthermore, private litigation shifts law enforcement costs from the public purse to private litigants.

It is suggested that in regard to charitable reforms, the nature and value of all direct and indirect tax benefits should be recognised through mandatory reporting for all BRCs, regardless of their status and size.³⁷⁹ Mandatory reporting enables the overarching and independent control mechanism of tax legislation to enforce governance compliance and the strict objective allocation of funds and assets to be applied back to the charities.³⁸⁰ Transparency also mitigates national security risks and money laundering schemes.

Sections of the *FBTAA*,³⁸¹ which afford potentially unlimited '[e]xempt benefits' for 'employees of religious institutions' should be removed. Instead, *FBTAA* s 65J, which provides for a '[r]ebate for certain non-profit employers etc', should apply universally to all charitable employees, capping the annual benefit at \$30 000.³⁸²

³⁷⁵ *Ibid* s 9.

³⁷⁶ Australian Charities and Not-for-profits Commission, Registering Not For Profit or Charitable Organisations (2016) <<http://www.asic.gov.au/for-business/starting-a-company/how-to-start-a-company/registering-not-for-profit-or-charitable-organisations/>>.

³⁷⁷ *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253, [453]. Recently applied in *Registrar of Aboriginal and Torres Strait Islander Corporations v Monaghan [No 2]* [2016] FCA 1143, [360].

³⁷⁸ A third of all actions taken against a company rely on derivative action provisions. See Ian M Ramsay and Benjamin B Saunders, 'Litigation by Shareholders and Directors: An Empirical Study of The Statutory Derivative Action' (2006) 6(2) *Journal of Corporate Law Studies* 397.

³⁷⁹ *ACNCA* s 60-10 to 60-55.

³⁸⁰ *ITAA97* s 50-50(2)(a)–(b).

³⁸¹ *FBTAA* ss 57, 58, 58T, 58V(c).

³⁸² *Ibid* s 65J. Rebate for certain non-profit employers.

Actual and not presumed honesty is integral to transparency and accountability³⁸³ and is the first line of attack against corruption.³⁸⁴ Without this core value being legislatively enshrined, whistle-blowers put themselves in harm's way.³⁸⁵ This paper provides many examples of instances where the tribalism and 'corporate group-think' culture of BRCs has taken over, protecting private corruption from public scrutiny.³⁸⁶ The presumption of honesty,³⁸⁷ though rebuttable under the *ACNCA*,³⁸⁸ should be replaced by s 181 of the *Corporations Act* — the duty of good faith.³⁸⁹

By extending Tracey J's ruling in *Health Services Union v Jackson (No 4)* [2015] FCA 865, the sui generis nature of an 'officer' should be defined and applied within the *ACNCA*, adopting recommendation 25 of Heydon's Trade Union Royal Commission report,³⁹⁰ to include any person who makes decisions that substantially affect an organisation.³⁹¹ While the recommendation was limited to financial matters to invoke the duty provisions under ss 180–184 of the *Corporations Act*, the *ACNCA* should also adopt the definition of 'officer' from s 9 of the *Corporations Act* for all charity leaders.³⁹² This automatically includes de jure directors as well as shadow and de facto directors, and other professionals such as the lawyers and accountants who make a living from religious charities, giving advice and direction.³⁹³

Such macro reforms do not come easily however. Royal Commissions are reactive and traditionally offer little real-world systemic reform.³⁹⁴ Neither COAG nor the Australian Law Reform Commission have gazetted any specific reforms in this area.³⁹⁵ Moreover, private Member's Bills generally lack the votes in Parliament to achieve outcomes.³⁹⁶ Our courts, at best, refine and define laws but do not reform them.³⁹⁷ Likewise, *comitas gentium*

³⁸³ Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) *European Journal of International Law* 187.

³⁸⁴ Claes Sandgren, 'Combating Corruption: The Misunderstood Role of Law' (2005) 39(3) *The International Lawyer* 717.

³⁸⁵ Robert G Vaughn, *The Successes and Failures of Whistleblower Laws* (Edward Elgar Publishing, 2012).

³⁸⁶ Michael L Budde and Robert Brimlow, *Christianity Incorporated: How Big Business is Buying the Church* (Wipf and Stock Publishers, 2007) 25.

³⁸⁷ *ACNCA* s 7; Australian Charities and Not-for-profits Commission, above n 187.

³⁸⁸ *Hogg v Cramphorn Ltd* [1967] Ch 254, 262. Discussion good intentions and honest belief.

³⁸⁹ *Corporations Act* s 181.

³⁹⁰ Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015) vol 5 [48] Recommendation 25.

³⁹¹ *Fair Work (Registered Organisations) Act 2009* (Cth) s 27.

³⁹² *Corporations Act* as listed in s 601BA.

³⁹³ *Ibid* s 9.

³⁹⁴ Commonwealth, Royal Commission into Aboriginal Deaths in Custody (RCIADIC) (1987–1991); Patricia O'Shane, *Aborigines and the Criminal Justice System*, (Sydney University Press, 1992) 3–6.

Where only two of the 72 recommendations were implemented; Paul R Carr and David Zyngier, 'Introducing the Global Doing Democracy Research Project: Seeking to Understand the Perspectives, Experiences and Perceptions of Teachers in Relation to Democracy and Education' (Information Age Publishing, 2012) 86.

³⁹⁵ Australian Law Reform Commission, *Inquiries Search* (25 October 2017)

<<http://www.alrc.gov.au/inquiries>>.

³⁹⁶ Tax Laws Amendment (Public Benefit Test) Bill 2010 (Cth); Commonwealth, *Parliamentary Debates*, Senate, 13 May 2010, 2843 (Nicholas Xenophon).

³⁹⁷ Michael D Kirby, 'Judicial Activism' (1997) 23(3) *Commonwealth Law Bulletin* 1224. Speaking extrajudicially to the Bar Association of India.

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or international comity regarding Ireland's 'Ryan Commission' recommendations, for example,³⁹⁸ relying on *courtoisie internationale* 'good will' is persuasive but powerless.³⁹⁹ Canon law reform to meet community standards is quasi self-regulation and has proven to be comprehensively ineffective, if not actively resisted. Kelsen's legal *grundnorm*⁴⁰⁰ for religious entrepreneurship is best articulated by Kirby J's dissent in *Word Investments*,⁴⁰¹ suggesting private worship should not be subsidised by the public purse, directly or indirectly, and that any competitive advantage obtained by religious trading should be subject to strict scrutiny and robust public policy.⁴⁰²

VII CONCLUSION

Since federation, s 116 Freedom of Religion has inadvertently implied religious trading enterprises be granted general immunity from corporate accountability and commercial equity intended under s 51(xx) of the *Australian Constitution*.⁴⁰³ Murphy J's obiter dictum in *Scientology*, encouraging the exploitation of the special 'benefits and other privileges' afforded BRCs may have been a little too generous.⁴⁰⁴ This unfair advantage has come at a cost to the nation and continues despite the substantial public harm suffered by many in the community. Notwithstanding a generation of political,⁴⁰⁵ academic⁴⁰⁶ and policy agitation, religious corporate trade remains a legislative 'blind spot'.⁴⁰⁷ The ruling in *Work Choices* affords the Commonwealth a once-in-a-generation opportunity to draw a legislative nexus between ss 116 and 51(xx) in the *Australian Constitution*,⁴⁰⁸ treating like with like. But beware, any loss of control or benefit to BRCs may be seen as an act against the very sovereignty of God.⁴⁰⁹

³⁹⁸ Treasury, 'Better Targeting of Not-for-profit Tax Concessions' (Consultation Paper, 27 May 2011) 26; *Taxes Consolidation Act 1997* (Ire) s 16 [7.1.6], s 207, 208 Tax & Duty Manuals.

³⁹⁹ Even despite conventions and customs among the Commonwealth. *Charities Act 2009* (Ire) and *Charities Act 2006* (UK) c 50.

⁴⁰⁰ Hans Kelsen, *Pure Theory of Law, Its Method and Fundamental Concepts* (University of California Press, 1934) 341. Promoting a 'basic (legal) norm' or 'ultimate (legal) reason'; legal 'basic norm' or 'ultimate reason'; See also John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012) 10–15.

⁴⁰¹ *Word Investments* (2008) 236 CLR 204; [117]–[120] (Kirby J); See also Paul Memmott and Peter Blackwood, 'Freedom of religion and belief in 21st century Australia' (Research Report, Australian Human Rights Commission, 2011) 25, 38–39, 55.

⁴⁰² *Ibid.*

⁴⁰³ *Australian Constitution* ss 51(xx), 116.

⁴⁰⁴ *Scientology* (1983) 154 CLR 120 [7] (Murphy J)

⁴⁰⁵ Treasury, 'Better Targeting of Not-for-profit Tax Concessions' (Consultation Paper, 27 May 2011) 26.

⁴⁰⁶ See, eg, Wallace, above n 178, 362.

⁴⁰⁷ Francis Sullivan, 'What Have We Learned? What Must Be Done? The Royal Commission and the Challenges for the Catholic Church', *ABC Religion and Ethics* (online), 23 October 2015 <<http://www.abc.net.au/religion/articles/2015/10/23/4337562.htm>>.

⁴⁰⁸ *Moorehead* (1909) 8 CLR 330; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

⁴⁰⁹ Jane Robbins, 'Playing a Symphony or Playing a Market? A South Australian Perspective on Contracting for Care' (1997) 3(76) *Third Sector Review* 1; Francis August Schaeffer, *A Christian Manifesto* (Pickering and Inglis, 1982) 111 [3]; Abu Umar Faruq Ahmad and M Kabir Hassan. 'Legal and Regulatory Issues of Islamic Finance in Australia' (2009) 2.4 *International Journal of Islamic and Middle Eastern Finance and Management* 305.

