

# **CELEBRITY FUNDRAISING, HUMAN GENEROSITY AND CONSUMER PROTECTION**

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## **CHARITIES AND SOCIAL CHANGE**

The concept of charitable support of those in need grew out of the feudal ages and was seen as a moral and religious obligation of the king to protect the aged and the infirm. Later, during the Reformation period, the concept developed away from its religious base to what came to be understood as the concept of public purpose. In the 20th Century, the English cases developed the law such that public purpose came to be the primary objective in charitable trust cases. In the latter part of the 20th Century and into the 21st Century, the cases considered in the courts moved away from preoccupation with traditional charitable trust cases<sup>1</sup> The focus became that of taxation law and the eligibility of a charity for tax deductibility purposes<sup>2</sup>.

These days, when courts are called upon to consider aspects of charitable trusts, the principles are well established. However, modern life reveals that some ancient legal principles do not necessarily fit modern circumstances especially in the digital age. In this paper, the phenomenon of celebrity fundraising will be discussed in the context of the modern approach to consumer protection. Humankind is generally kind, gentle and compassionate. Those qualities will lead to generosity when people are confronted by the catastrophic problems of others in a difficult plight. This harks

back in part to the circumstances touched on earlier, in feudal times, and the Reformation period when looking after the aged and the infirm was an important community responsibility. It also reflects greater wealth and higher levels of disposable income in the modern community. It further reflects social responsiveness to the ready availability of information and communication through social media.

These days, charitable provision for those in need presents a much more expanded set of fund collection methods and a variety of donor opportunities. One need only reflect on modern-day charitable funds promotion and collection methods relating to the blind, children's hospitals and educational institutions. Traditional fundraising methods are still pursued – street collections, coin tins, special annual appeals e.g. Good Friday, Remembrance Day and Christmas. These types of methods have been long accepted by the community. However, one recent phenomenon that has occurred is the development of celebrity fundraising. Most recently, that type of fundraising has come to the fore in circumstances of very significant, national and international natural disasters. Furthermore, in the context of climate change, it may be readily anticipated that there will be more frequent disasters, such as bushfires and floods, where the human plight will be played out through the media and be attractive to celebrities and others wishing to demonstrate compassion and humanity.

## **BLACK SUMMER FIRES AND HUMAN GENEROSITY**

An example most recently occurred in Australia over the 2019-2020 summer. It came to be known as *Black Summer*. Australians witnessed catastrophic bushfires along the east and southeast coast

of the continent. At one point, it seemed as if southeastern Australia was wholly ablaze. There were fires on King Island off South Australia and raging fires in Gippsland, Victoria and southern New South Wales. Bushfires are part of life for Australians, having witnessed, particularly in the southeast, dramatic bushfires with terrible loss of life. One need only recall the *Black Friday* fires in Victoria in 1939 when 71 died, the *Ash Wednesday* fires along the South Australian and Victorian coast in 1983 when 75 died and the fires, in Victoria, of *Black Saturday* in 2009 when 173 died.

The fires of *Black Summer* of 2019 to 2020 started in November 2019 and continued over until around February 2020. Eventually, they were brought under control. In this time of immense crisis, there were 34 lives lost. Vast tracks of land including houses, farms, towns and bushland were burned. Millions of wildlife were killed. One need only think of kangaroos, koalas, possums, potoroos, wallabies and gliders together with reptile, insect and plant life. However, the *Black Summer* fires had a social impact on the Australian community that was different from the impact of the earlier, significant bushfire disasters. There were three significant features. First, the *Black Summer* fires occurred during the Christmas, New Year period. People were generally on holidays, home, watching television or following social media. Secondly, because of the festive period tens of thousands of people were holidaying in what proved to be very vulnerable, high risk and sometimes inaccessible locations. Thirdly, in the northern Hemisphere, as well as it being a quieter time in terms of activities and news events, most populations were indoors, and again, alert to television and social media news.

## THE ROLE OF THE MEDIA

When the *Black Summer* fires started to rage, the fires were extremely serious. Due to the ferocity and locations of the fires there was a very difficult problem with communication and ensuring people's safety by the adequate communication of emergency messages. The Australian Broadcasting Commission (ABC), came to the fore in a way that was vital. The ABC, because of its national structure, had reporters and camera crew in most regional centres as well as capital cities. The ABC as a major news provider was accessible 24/7. It also had extensive international networks with journalists based all around the world. The ABC provided reporting with journalists on the ground. Camera crews went out with journalists and worked directly behind firefighters in the most dreadful, dangerous situations<sup>3</sup>.

On a daily basis, journalists provided a direct news feed of the raging fires reporting all the while in yellow fire protection coats and red helmets often looking like fire fighters themselves. The graphic news with live footage was relayed by journalists around the clock. One reported<sup>4</sup>:

‘After having covered the situation in Bermagui, Bega, Tathra, Cobargo and Numbugga all Saturday we are exhausted. There’s no respite from the choking smoke-filled air. [A person] offers us a spot on her kitchen floor to rest our heads. We file our last report at 3 am and we’re both so very grateful for a few hours’ sleep before we have to roll out again at 5 am and head south to the devastated bush village of Kiah ...’

The bushfire newsfeed was picked up and broadcast all across Australia and, indeed, all around the world.

Many Australians had a family member swept up in the fires. Those family members often found their communications closed down and were dependent upon their relatives elsewhere to provide them with news. There were many stories of family members in the bushfire areas forced to evacuate their country home with their dogs and horses and seek shelter at a beach, wharf, jetty, inlet, lake or river.

At the height of the *Black Summer* fires along the southeastern coast, the sky turned black at three o'clock in the afternoon as if it was the night. The air was dense with ash and people were truly fearful for their lives. At one point with some country towns, such as Mallacoota on the Victorian coast and Narooma on the New South Wales coast, the local firefighters retreated from fighting the fire front in the bush and travelled with their trucks to the town to form a protective perimeter ready to fight the fires through the night. All of this terrifying footage and information was broadcast and picked up by, not only Australian media, but by the international media such as CNN, BBC and Al Jazeera.

An ABC journalist, Philip Williams, described an interview with a resident of a New South Wales town, which had been destroyed by the bushfires. He reported<sup>5</sup>:

She says [the resident he's speaking to] 'The emergency call operator spoke in a calm, clear voice. He was so nice, but he just said, 'Try and get a wet towel.' And I said, 'Well, we are dying.' And he just said, 'Well, you are on your own.'

The journalist continued in another description about a person affected by the fire. He described her this way<sup>6</sup>:

Her house is gone. Sheds and stables too. The awful shock sets in and the tears begin to flow. [She says,] 'I can't believe it. I just can't believe it. I don't know what we are supposed to do next. I just don't know. I think we've just gotta get on with it, hey? It's gonna be hard but we have to do it. I'm not going anywhere. I'll rebuild again.'

The media and social media context was significant. It led to an important legal development that occurred with respect to charitable trusts. Relevantly, the fires led to extraordinary generosity by the Australian nation and the world. This unprecedented generosity may be attributed to the timing of the *Black Summer* fires, the extended period over which they played out and the significant role of the ABC in feeding all of the information out to the nation and the world. This context of the *Black Summer* fires was to be contrasted with the experiences decades earlier with natural disasters such as the Japan tsunami or the Southeast Asian tsunami, or for that matter, the pandemic experience over 2020 when public generosity, while significant, was accessed and facilitated in a

direct administrative manner such as via banks or street collectors rattling tins at traffic intersections or by telethons.

## **CELEBRITY FUNDRAISING, CELESTE BARBER AND FACEBOOK**

The coverage of the Australian bushfires over the summer of 2019 to 2020 was unique. Into this circumstance came one Celeste Barber. She was a comedian and humorist specializing in stand-up comedy on the internet. She was an Australian living at the time in the United States. She commenced a fundraising appeal of her own volition. It led to an outcome that was extraordinary.

On 3 January 2020, Barber started a fundraising campaign on Facebook<sup>7</sup>. Examination of the website showed a photo on the Facebook page displaying a building engulfed in a wall of flames, 10 metres high. To the fore of the photo was a figure of a firefighter in uniform in front of the flames.

Under the photo was a caption and a statement by Barber. She said, 'Please help any way you can. This is terrifying.' In much smaller font, there was another statement. 'Fundraiser for the trustee for New South Wales, Rural Fire Service and Brigades Donations.' Then there was a picture of Barber and a statement. 'Want to join me in supporting a good cause? I'm raising money for the trustee for the New South Wales Rural Fire Service Brigades and Donations Fund. And your contribution will make an impact. Whether you donate a lot or a little, anything helps. Thank you for your support.'<sup>8</sup>

Barber spread the message significantly. She repeatedly appeared on social media and was picked up by news services. Barber spoke about funding being necessary to save lives, to help people generally, to support firefighters and the fire service and to help rescue wildlife. Remembering this information was broadcast all around the world; there was footage of devastated farmers and townsfolk and kangaroos hopping across walls of flame, badly burned and koalas being rescued at the base of smoldering eucalyptus trees. There was a great outpouring. People in the media saw people like the women referred to in the interview with Philip Williams of the ABC<sup>9</sup>. They had lost everything. They were shown sitting in the embers of their still smoldering homes.

There was film footage of farmers breaking down, crying over the fact that they had had to shoot all their livestock, horses, dogs, everything they had. This kind of poignant tragedy penetrated the emotions of Australians and international citizens. It was that very sentiment and emotion upon which Barber focused, and because of which she was extremely successful. She raised \$51 million (Australian). Once Barber established her fundraiser it went viral attracting a large number of responses.

Notwithstanding Barber's references to the NSW Rural Fire Service Brigades and Donations Fund, on 9 January 2020 she was quoted as saying<sup>10</sup>:

‘I’m gonna make sure that Victoria get some, that South Australia gets some, also families of people who have died in these fires, the wildlife.’

Barber’s Facebook page was not updated despite the indications Barber gave.

The presentation of the online funding message and representation to donors by Barber on her Facebook page, proved to be very important as to where the donations would be distributed. When a potential donor scrolled down the Facebook page, there was a heading of the fund, a statement that it was a registered charitable organization, a notice as to where the fund was based and a line reciting community and economic development purposes in accordance with legal requirements. Then there was a statement: ‘Donations will be granted to the charity by PayPal Giving Fund within 15 to 90 days.’ There was then a ‘learn more’ click. At the end of the page, a smiling face of Barber appeared.<sup>11</sup>

## **THE INTERMEDIARY PAYPAL AND THE AVERAGE DONOR**

The Facebook page revealed that the collection of the funds by Barber as a celebrity fundraiser was through an intermediary, PayPal<sup>12</sup>. The role of the intermediary was very important. However, it was not clear to most or indeed other than the most discerning potential donor, that what the donor was donating was not a donation to the bushfires directly. In fact, the donor was making a gift to the PayPal Australian Giving Fund, a separate charitable fund. It was PayPal that was to make the donation and distribution was in its total discretion. When making a donation, the average person

might not contemplate that they were donating to PayPal or some other intermediary. Their desire in the context of the raging bushfires and the promotion of the celebrity fundraising by Barber was to help and to give support to those affected by the fires. The average person ordinarily would believe they were making a donation to help matters relating to the *Black Summer* bushfires directly.

An earnest and well-meaning citizen as a donor might give the money to a charity, whether it is for the benefit of the bushfire circumstances or some other natural disaster. When an individual made a donation on Facebook, the individual needed, with Barber's fundraiser, to make a decision. The donor was required to click onto the word 'payment'<sup>13</sup>. Next there were the 'terms and conditions'<sup>14</sup>. Human nature being what it is, one could doubt that donors by and large paid attention to the 'terms and conditions' click on Barber's Facebook page. In any event, on the Barber Facebook page, there were also 'terms of service' that flashed up to the effect that PayPal would make every effort to ensure that the money reached the particular charity<sup>15</sup>. The 'terms of service' from a consumer perspective were not easy to find.

If one contemplates an individual at home with their family, a person who is not a lawyer or accountant, but who has a very humane desire to contribute and help those who have suffered because of the fires or perhaps support Australian wildlife, they could readily click on 'terms and conditions' and 'terms of service'. But it would in all likelihood not happen. Australian consumer law has developed over the decades. In litigation and government enquiries, banks and financial institutions have been criticized for providing inadequate advice and warnings to those using their

services. One might wonder as to why Barber and PayPal were not under an obligation to give clear, simple and prominent information to potential donors of the reality of what they were doing. The further question arises in the particular case about the Barber fundraiser as to whether the expectations of the donors to the fund were in fact met. Under all of those various clicks, terms of service and the like, there was also an FAQ section<sup>16</sup>. In addition, there were pop-up boxes. If an individual wanted to probe for information on the Facebook page, the individual could find out more. However, the presentation of the Facebook page and the involvement of PayPal was not clear<sup>17</sup>.

Further questions arise. When PayPal played its role as an intermediary, was it proffering an undertaking to the donor? Was it entering into a contractual obligation? What precisely was PayPal's role? Later in time the fund collected by Barber was the subject of litigation in the Supreme Court of New South Wales - and, unfortunately, many of these nuances were not considered.

## **\$51 MILLION AND THE RFS TRUST FUND**

The fundraising efforts of Barber culminated in an immense day and night rock concert held in Sydney, where Australian and international artists provided their services largely voluntarily. The concert ran for ten hours and had a live audience of around 75,000 and was broadcast nationally and internationally. In between most performances, Barber went forward on the stage and urged those present and viewing to donate generously. The donation contact was constantly flashed onscreen.

The relevance of the concert was its national and international outreach and its capacity to stimulate donations to Barber's fund and other funds.

The *Black Summer* fires were eventually placed under control. The trustees of the New South Wales Rural Fire Service Trust Fund came to hold a substantial amount of money. PayPal transferred the full fund raised by Barber and closed it off. PayPal made the transfer without any consultation or contact with donors as to how those individuals wanted the monies allocated.

#### **ADVICE FROM THE NSW SUPREME COURT**

The trustees faced the difficulty as to how broadly they could expend the funds received through Barber via PayPal. As a result, the trustees exercised their right as trustees under the New South Wales *Trustee Act* 1925. They went to the Supreme Court to ask questions of the court under Sections 62 and 63 of the *Trustee Act* as to how they could expend the money raised by Barber<sup>18</sup>. Broadly speaking there were three questions asked of the court. First, whether the trustees could expend the funds on charities, persons and NSW firefighters beyond the Rural Fire Service of New South Wales, to which the court ultimately answered 'no'. The second question was whether the monies could be expended on the families of firefighters who had been injured or killed in the fires, and the court answered 'yes'. The third question was whether the funds could be expended to the benefit of firefighters by providing training and education and facilities about fighting bushfires in New South Wales, to which the court ultimately said 'yes'.

In proceedings of this type where the court is asked to provide advice to trustees, the benefit to a trustee is that where there is doubt, clarification is provided by the court. The decision of the court provides protection to the trustees by the fact, that if the trustees act on the basis of the court's advice, it is effectively an indemnity. In this kind of litigation, it is usual for the trustee to be the plaintiff or agitator. These types of proceedings are not the typical adversarial proceedings seen in other types of civil litigation. Ordinarily, the trustees will provide information to the court sometimes accompanied by a legal opinion obtained by the trust.

#### **THE PROTECTIVE ROLE OF THE ATTORNEY GENERAL AND THE RFS CASE**

The Crown is the conventional and acknowledged protector of charities, Hence, the Attorney General has been considered a necessary party in most charity proceedings. The Attorney General of a state or federal jurisdiction exercises what is called the *parens patriae* function of the jurisdiction<sup>19</sup>. Generally, there is a convention that the Attorney General plays a neutral role, and in some respects, acts as a type of counsel assisting the court. The Attorney General will explain to the court the facts and the circumstances, state the law and even submit to the court a particular course that the court might adopt in advising the trustees. Usually, an Attorney General is represented by counsel who presents submissions and legal arguments on the basis of the instructions given by the Attorney General. In Australia, the Attorneys General of the States and Territories and the Commonwealth are the first law officers of their jurisdiction. They are also cabinet ministers of the Government and, therefore, involved in Government budgetary policy and expenditure.

When cases of this type are presented in court, necessarily the judge will be constrained by the way the case is presented.

In the New South Wales RFS Fund case, the presentation of the evidence, information and submissions to the court was constrained indeed quite narrow. Casting back to the earlier commentary, it was apparent that Barber and PayPal played a very significant role in the circumstances of the fund coming into existence, the collection of the funds from donors and the eventual transfer of the fund to the RFS. Yet, neither Barber nor PayPal played an active role in the RFS case, rather the parties to the proceeding were the fund, the trustees and the Attorney General.

In these types of cases under the Trustee Act, it is often extremely helpful to the court if there is a contradictor. Such an individual can present alternative arguments to those being provided by the trustee, and for that matter, the Attorney General. To postulate, with the NSW case, some individuals might have provided contradictory alternative views to the court, including Barber herself, PayPal, and potential beneficiaries, such as non-firefighter individuals who lost property or loved ones through the fires, other interstate fire services such as the Country Fire Authority of Victoria or wildlife rescue and shelter services. However, the joinder of other parties and the provision of a contradictor to assist the court did not appear to be contemplated. Indeed, the case was decided and advice given to the trustees on a conventional but narrow basis.

There are some important facts that underlie the RFS case. Notably, Barber's initiative was spontaneous. She did not seek the permission or consult with the NSW Rural Fire Service in advance. It was Barber who determined through her appeal page to direct potential donors to the electronic payment system controlled by PayPal, notwithstanding the observation expressed above as to the unlikelihood of most donors accessing the click information on the Facebook page thus creating a click contract or what the Supreme Court Judge termed a 'click rep agreement'.

The Judge in the RFS case determined that from the terms of service available to each and every donor it was very clear that the individual was donating to PayPal. The Judge said the donors were advised, 'When you donate to PayPal Giving Fund, you will recommend that PayPal Giving Fund make a corresponding grant to an eligible charity in the amount of your donation.' The donor was also advised, 'PayPal Giving Fund will make every effort to grant the funds you donate to your recommended eligible charity.'

The Supreme Court Judge determined that each donor had entered into the donor terms of service before donating<sup>20</sup>. Thus, despite what the Judge described as the charitable legal environment of the donor terms of service, those terms represented a binding agreement between the donor and the PayPal Giving Fund.

The terms of the New South Wales *Rural Fires Act* were also relevant in the Judge's decision. The Act contained a set of functions set out by the court in the judgment<sup>21</sup>. The functions included the provision of rural fire services for New South Wales, assisting members of other police and emergency services and doing anything necessary for or incidental to the exercise of the fire service functions. Services included the prevention, mitigation and suppression of fires, the protection of persons from dangers and the protection of infrastructure and environmental economic, cultural, agricultural and community assets.

There was also a section in the Act concerned with interstate assistance at fires. The provision to interstate fires was considered by the court in a brief, confined manner. There was no analysis of the role of interstate fire services across state borders whether assisting, for example, Victorian fire fighters from New South Wales or reciprocal arrangements. There was no consideration of the fact that much of the fire front in NSW spread from Victoria and jumped the border into NSW. There was no consideration of towns and hamlets close to the borders – such as Mallacoota, Genoa and Gipsy Point in Victoria with Eden in NSW and Corryong in Victoria with Khancoban in NSW – and the cooperative supportive arrangements between their fire services. Self-evidently, the raging fire fronts did not heed state borders and consequential switches in administrative responsibility.

## **THE SUPREME COURT OUTCOME**

The New South Wales Supreme Court Judge determined that the donated money became, after its receipt by the PayPal Giving Fund, the subject of a charitable trust, which was to be administered according to the PayPal trust deed. The Judge noted that the public made donations in response to

a public appeal. The Judge also highlighted that a key issue in cases of the RFS type was whether or not the donations were made absolutely to the institution that received them, or whether there was a trust for a particular charitable purpose. The Judge determined that in the RFS case, the result was clear. He found that each of the donors made a payment to the PayPal Giving Fund by way of an internet facility with published terms that stated the effect of the donation<sup>22</sup>.

The judge said, ‘This is so despite what the donors may have hoped or intended might be done with the money, the donors should be taken to have intended to make the payment to the PayPal Giving Fund and should be taken to have intended that it be received according to the published terms’<sup>23</sup>. The Judge so concluded notwithstanding that one of those terms provided only an indication of the intended destination of the funds; it was merely a recommendation. The court also went on to determine that the various public and even private statements made by Barber, or for that matter of any of the donors, did not bind the trustees' application of the RFS fund when they received it from the PayPal Giving Fund.

The Judge determined that it did not matter whether the donor knew of or understood the terms of the RFS Trust Deed. Ultimately, the Judge determined that the trustees could not use the donated money to make gifts to other charities or to donate to interstate fire fighters and services or to help people or animals affected by the bushfires. In other words, the contractual terms between the donor and the recipient were wholly contractual, in writing and between the donor and PayPal, not the donor and the RFS Trust.

Furthermore, the Judge said that if the donors had an intention that the monies go other than to the NSW RFS, they had no say in the matter. The recipient of the fund was wholly at the discretion of PayPal. Relevantly, the NSW Supreme Court, had before it some evidence as to donors' intentions. The Judge noted the Court was provided in the evidence with a selection of messages from donors that were generated on Barber's Facebook fundraising page. The messages purported to indicate a donor's direction or expectation as to what would happen to their donation. The directions and expectations varied from assisting people generally in need to rescuing wildlife. Notwithstanding this evidence, albeit unexpansive, the Judge concluded that the selection or sample illustrated the sentiments and range of hopes and expectations of donors. Ultimately, the Judge formed the view that the terms of the agreement between the donor and PayPal ended the matter contractually; the intentions expressed in messages on the Facebook page were not to the point.

Additionally, the court was provided with an exhibit consisting of a legal opinion given to the trustees of the RFS Trust as to how the monies derived from the Barber donations could be allocated<sup>24</sup>. The opinion expressed the view that the intention of donors must be determined according to the objective evidence of what donors were told at the time of donating, including the notice given to donors, that the donations would be made to the PayPal Giving Fund Australia and the agreement by donors at the time of donating to the donor terms of service. This approach appeared to be adopted by the Judge. This was described as an objective approach consistent with a decision of the High Court of Australia<sup>25</sup>. A decision of the High Court is a binding precedent on lower courts.

The Judge in the RFS case followed such well-established legal principle. The principle might be encapsulated this way. If a donor enters into arrangements which have the effect of creating a trust, objective intentions of the donor are irrelevant. One should consider the objective evidence of what donors were told at the time of donating. In this respect, the Judge relied on the various ‘click’ points on the Barber Facebook page.

At this point, one might pause to reflect on the consumer rights of the donors at the time of making the donation. Were the donors misled in any way by the statements of Barber as to how the money would be expended, notwithstanding the statements contained on the Facebook page? Should consumer authorities, such as the Australian Competition and Consumer Commission (ACCC), the Australian Charities and Not-for-Profits Commission or state Offices of Consumer Affairs have intervened at the time the fundraising was occurring? Indeed, should parties such as the ACCC, Offices of Consumer Affairs or the Charities Commission have sought to intervene in the Supreme Court proceedings?

It remains that when there is high profile celebrity fundraising in alarming and emotional natural disaster circumstances, there is a public interest in the donor as a consumer having the benefit of consumer protection.

## **WAS THERE A MISTAKE BY DONORS?**

Another aspect of the RFS case was the limited consideration of whether there was a mistake made by the donors in entering into the contract with PayPal. The legal opinion obtained by the trustees of the RFS trust which was before the court considered the topic of mistake and as to whether the trustees were subject to an obligation to return donations, because the gifts were made by mistake. The legal opinion relied on a longstanding legal position drawn from a historically significant judgement that considered the circumstances in which a donor could claw back their gift. In effect, the seminal case is authority for the proposition that no mistake induced by those who derive any benefit from the gift (ie the recipient) is binding on the donor, provided there is no fiduciary relationship between the donor and recipient and there is no fraud or undue influence.

The law of mistake in Australia is well established. In effect, the principle is that in a case such as this, if the court is satisfied that the donor did not intend the transaction to have the effect which it did, the transaction will be set aside for mistake so long as the mistake is to the legal character of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it<sup>26</sup>.

Lord Walker, of the UK Supreme Court, recently held that the surrounding circumstances in which the mistake was made and its consequences for the person who disposed of their property under that mistake (ie the donor) must be considered by the Court in determining the gravity of the mistake<sup>27</sup>.

Unfortunately, in the RFS case, the court was not encouraged to consider the topic of whether there was a mistake. Indeed, there was no evidence before the court beyond the messages selected from Barber's Facebook page. By contrast, for example, an affidavit could have been obtained from a number of donors as to their intentions when they made the donation they did, and the circumstances of the donation. In summary, therefore, there is a tension between the traditional application of legal principles relating to charitable trusts and contract law against modern approaches towards consumer protection.

### **CONSUMER PROTECTION OF DONORS AND CLEAR WARNINGS**

In Australia there are extensive consumer protection provisions under both state and federal laws<sup>28</sup>. If a citizen wishes to buy a car or house or obtain a loan or credit there are strict notice requirements imposed on providers such as clarity of notices and warnings. Nothing of that nature was provided to donors in the RFS case unless the individual donor purposefully sought out the information by way of multiple 'clicks' on the Barber Facebook page. Such pursuit was unlikely when donors connected to the frightening, emotional trauma they witnessed on their screens, tablets and smart phones. Indeed, the technical key to the success of Barber's fundraising was technology. Yet smart phones, 'click contracts' and social media neither existed nor were contemplated when the legal principles were established on which the RFS case was decided. This important differentiating factor was not considered in the RFS case.

Some further questions may be asked arising from the RFS case. Natural disasters through climate change are causing disruption to the conventional way of doing things, especially fundraising. The community can see that gifting patterns have changed in response to these crises. How are they in fact to be managed? Should there be more appropriate consumer protection with crowdfunding for a crisis? Should there be charity accountability? What should government regulation look like in these circumstances? Is there a greater role for the Charities Commission?

A starting point would be a review of the role and obligations upon intermediary fund collectors such as PayPal. Contrast may be drawn with the experience of the US with PayPal. The office of the Attorney General of the State of New York later joined by 22 other state law enforcement bodies conducted an investigation across a number of states of PayPal Charitable Giving Fund Inc. PayPal had collected funds as an intermediary in charitable contexts in the US in a similar fashion as occurred in the RFS case. There was dissatisfaction with non-adherence to donors' expectations, the distribution of funds and the charging of bank fees on donation transactions<sup>29</sup>.

As a result of the investigation, PayPal ultimately agreed to make prominent disclosures to donors in the US that donors were making donations to PayPal Charitable Giving Fund Inc. and not the charity they selected. Secondly, PayPal agreed to note that the use of language implying that potential donors were directly donating to their chosen charity discontinued. Thirdly, PayPal undertook to make prominent disclosures about fees charged by PayPal when donors paid to a charity through their credit card or other banking facility. There were other matters agreed to including the provision of ongoing fundraising data to regulators<sup>30</sup>.

## **APPLYING A NEW APPROACH THROUGH CONSUMER LAW**

In summary, the RFS case demonstrated the deficiencies and unsatisfactory aspects of traditional charitable trust principles in the modern context. The Attorney General continues to play the traditional protective role over charities but what of the donor? Consideration might be given to the development of a donors' protection code drawing on the Australian Consumer Law and other consumer protection vehicles<sup>31</sup>. Consideration might also be given to the modern political nature of the role of the Attorney General as a member of the cabinet of the government of the day. Arguably there is a conflict of interest or perceived bias where charitable fundraising is of a potential net benefit to the government of the day. In the RFS case the point did not appear to be considered that the provision of \$51 million to the RFS trust would be of benefit to the NSW government in that its expenditure on the RFS fire service may be reduced by the Trust's expenditure on equipment, services and psychological counselling and training that would otherwise have to be met by the state government from its budget.

Courts too also have a role to play. For some of the factors discussed above, the RFS case was a missed opportunity for the development of charitable trust law.

Natural disasters with consequential tragedies will reoccur and the generosity of humankind will be repeated. Desirably, careful consideration of what the RFS case failed to achieve should stimulate law reform and judicial reflection.

Endnotes:

\* The Honourable Marilyn Warren AC QC is the former Chief Justice of Victoria (2003-2017) and former Judge of the Supreme Court of Victoria (1998-2003). She is currently the Vice-Chancellor's Professorial Fellow of Monash University. In 2020-2021 she was the Judge In Residence at The University of Melbourne Law School. In her article she draws on her judicial experience and also her personal observations of the *Black Summer* fires of 2019-2020. The author acknowledges the assistance of Ramon Callis, B.Comm. (Hons.) and JD student, however, the opinions expressed are her own.

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<sup>1</sup> See generally Harding, M. (2020) Charity and Law; Past, Present and Future, *Singapore Journal of Legal Studies* (September 2020), 564-580; also Dal Pont, G E (2017) Law of Charity (2<sup>nd</sup> edition) Australia (LexisNexis 2017) 16-95.

<sup>2</sup> See generally O'Connell, A. (2020) Taxation of Charities and Not-for-profits, Australia (LexisNexis 2020) 225-275.

<sup>3</sup> See generally Rowland, M. (ed) (2021) Black Summer, Australia, ABC Books. Also, references throughout the article are drawn from this text together with the author's personal observations and experiences.

<sup>4</sup> Rowland, M., op.cit., 121

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<sup>5</sup> Ibid, 111

<sup>6</sup> Ibid, 116

<sup>7</sup> <https://www.facebook.com/donate/>

<sup>8</sup> Ibid

<sup>9</sup> Rowland, M., op.cit., 111, 116

<sup>10</sup> <https://www.abc.net.au/news/2020-01-09/celeste-barber-bushfire-donations-fundraisers/11852588>

<sup>11</sup> <https://www.facebook.com/donate/>

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> See for example, Knaus, C. (2020) Celeste Barber Bushfire Funds: Labor and Greens Urge Greater Transparency Around Use of \$51m, The Guardian, 30 August 2020; also, see the New

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South Wales Parliamentary Legal Affairs Committee Inquiry into the Rural Fire Service Bill

<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2600/Report%20No%2054%20-%20PC%205%20-%20Rural%20Fires%20Amendment%20Bill%202020.pdf>

<sup>18</sup> MacDonald and anor. v Attorney General [2020] NSW SC 604

<sup>19</sup> See generally Chan, K. (2010), The Role of the Attorney General in Charity Proceedings in Canada and England and Wales, 89 Can. B. R 373

<sup>20</sup> [2020] NSW SC 604 [29] – [32]

<sup>21</sup> [2020] NSW SC [42] – [54]

<sup>22</sup> [2020] NSW SC 604 [57] - [58]

<sup>23</sup> Ibid

<sup>24</sup> Exhibit RFS-1

<sup>25</sup> See Byrnes v Kendle [2011] HCA 26

<sup>26</sup> See Gibbon v Mitchell [1991] WLR 1304, 1309

<sup>27</sup> See Pitt v Haft [2013] UK SC 25, [2013] 2AC 108, 122 per Lord Walker

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<sup>28</sup> See for example, the Competition and Consumer Act 2010 (Commonwealth); the Australian Consumer Law; the Fair Trading Act 1987 (NSW); the Fair Trading Act 2010 (WA); the Consumer Law and Fair Trading Act 2012 (Vic); the Motor Car Traders Act 1986 (Vic); the Sale of Land Act 1962 (Vic)

<sup>29</sup> James, L., Press Release, NY Attorney General, 14 January 2020

<https://ag.ny.gov/press-release/2020/attorney-general-james-announces-settlement-paypal-charitable-giving-fund-inc>

<sup>30</sup> See [https://ag.ny.gov/sites/default/files/ppgf\\_-\\_multistate\\_aod\\_ny\\_final\\_1-14-20.pdf](https://ag.ny.gov/sites/default/files/ppgf_-_multistate_aod_ny_final_1-14-20.pdf)

<sup>31</sup> Such positions were discussed in the Australian Charities and Not-for-Profits Commission Legislation Review 2018; the supplementary submission of the Law Council of Australia to the Royal Commission into National Disaster Arrangements dated 29 June 2020 <https://lawcouncil.asn.au/>; and the Royal Commissioner's report at recommendation 21.2 <https://naturaldisaster.royalcommission.gov.au/>