

# VOLUNTEERS, NOT-FOR-PROFITS AND CONTRACT LAW: LOVE OR LEGAL RELATIONS?

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*Volunteers lie at the heart of many not-for-profit organisations ('NFPOs') and are the driving force behind the benefits that those organisations provide. Yet, the common law's treatment of volunteers remains uncertain. Through a review of over 100 decisions which involve the application of contract law principles to volunteering arrangements, this article surveys that uncertainty. Following an exploration of the concepts, entitlements and challenges relevant to contemporary volunteerism in Australia, three difficulties with decision-makers' treatment of volunteers are identified: (i) divergence from the High Court of Australia's decision in *Ermogenous v Greek Orthodox Community of SA Inc* and its rejection of presumptions against the existence of a common intention to create legal relations in not-for-profit settings; (ii) the mechanical assignment to volunteers of intentions of 'love' and 'altruism' to negative the existence of contractual relations; and (iii) conflation of the principles which govern relationships of employment and the principles which govern contracts generally. This article concludes by first endorsing NFPOs' use of careful contracting to quell the lack of clarity within many volunteering arrangements, and secondly cautioning decision-makers' departure from High Court authority and legislative intent.*

## I INTRODUCTION

Volunteers are the 'lifblood' of many not-for-profit organisations ('NFPOs')<sup>1</sup> and the 'cornerstone' upon which they operate.<sup>2</sup> However, the legal status of volunteers remains 'unclear'.<sup>3</sup> The legal relationships between volunteers and those for whom

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<sup>1</sup> Andrew Stewart and Rosemary Owens, 'Unpaid Work Experience: Meeting a Regulatory Challenge' (Conference Paper, Labour Employment and Work Conference, 2012) 2 ('Unpaid Work Experience').

<sup>2</sup> Femida Handy et al, 'Public Perception of "Who is a Volunteer": An Examination of the Net-Cost Approach from a Cross-Cultural Perspective' (2000) 11(1) *International Journal of Voluntary and Nonprofit Organizations* 45, 45.

<sup>3</sup> See Clara Jordan-Baird, 'Experience Essential, Remuneration None: The Legal Status of Internships' (Working Paper No 13, Centre for Employment and Labour Relations Law, The University of Melbourne, June 2013) 8–9; Stewart and Owens, 'Unpaid Work Experience' (n 1) 2–5.

they work have been the subject of little academic analysis<sup>4</sup> and almost no statutory intervention.<sup>5</sup> The case law remains ‘underdeveloped’ and complex.<sup>6</sup> Appellate guidance substantially derives from decisions concerning high-ranking religious officials,<sup>7</sup> rendering it of limited utility to the characterisation of volunteers generally.<sup>8</sup> Even where superior courts do provide expressions of principle, there remains a ‘disjunction’ between those principles and the reasoning of lower courts and tribunals.<sup>9</sup> Ultimately, a robust understanding of contract law is ‘central’ to the development of an adequate appreciation of the ‘legal, social and economic status’ of volunteers and the broad-ranging consequences of their classification under Australian law.<sup>10</sup> Against this background, this article attempts to answer: *why* is the legal classification of volunteers significant, *how* do decision-makers approach volunteers’ classification, and *what* should be done differently?

This article principally argues that decision-makers’ legal classification of volunteers remains both flawed and contrary to the principles established by the High Court of Australia in *Ermogenous v Greek Orthodox Community of SA Inc* (‘*Ermogenous*’).<sup>11</sup> In Part II, volunteers’ contributions to the Australian not-for-profit sector are first discussed. This is followed by an assessment of the competing conceptualisations of the phrases ‘volunteer’ and ‘not-for-profit organisation’ and an examination of the rights, benefits and entitlements volunteers retain under Australian law. Part III identifies three challenges associated with contemporary volunteerism: (i) the consequences of volunteers’ typical classification as non-employed, non-contractual workers; (ii) the ‘corporatisation’ of modern NFPOs and its effect on the treatment of volunteers; and (iii) volunteers’ performance of substantially the same work as paid employees. Part IV provides a justification for assessing the legal classification of volunteers, which is accompanied by an overview of the research method utilised for the purposes of Parts V–VII.

Parts V–VII evaluate decision-makers’ classification of volunteers. In Part V it is shown that, despite rulings to the contrary in *Ermogenous*, decision-makers have

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<sup>4</sup> Julian Teicher and Xiaoyan Liang, ‘The Politics of Voice: Voice and Volunteering in a Third Sector Organisation’ in Peter Holland, Julian Teicher and Jimmy Donaghey (eds), *Employee Voice at Work* (Springer, 2019) 217, 218.

<sup>5</sup> See Jill Murray, ‘The Legal Regulation of Volunteer Work’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 696, 702.

<sup>6</sup> John Wilson and Kieran Pender, ‘Floats Like an Intern, Stings Like an Employee: The Legality of Unpaid Internships’ (2015) 236 *Ethos* 26, 28 (‘Legality of Unpaid Internships’); John O’Brien, ‘Australian Boarding School Supervisors: A Voluntary Position?’ (2013) 18(1) *International Journal of Law & Education* 43, 54.

<sup>7</sup> See, eg, *Bird v DP* (2023) 69 VR 408; *Bird v DP* (2024) 98 ALJR 1349 (‘*Bird*’); *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323 (‘*Davies*’).

<sup>8</sup> See Andrew Stewart and Rosemary Owens, *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia* (Report, January 2013) 124 [6.20] (‘*Experience or Exploitation*’).

<sup>9</sup> Murray (n 5) 713.

<sup>10</sup> *Ibid* 696.

<sup>11</sup> (2002) 209 CLR 95 (‘*Ermogenous*’).

in effect continued to invoke the ‘social presumption’<sup>12</sup> that parties within familial, charitable and religious settings do not intend to create legally binding arrangements. Part VI considers notions of ‘altruism’, ‘spiritualism’ and ‘love’, and the ways in which they are deployed by decision-makers to negative a finding of a common intention to enter legal relations. It is argued that reliance on these concepts is inappropriate; it impermissibly neglects the broad motivations which underlie volunteers’ involvement with NFPOs. Part VII explores a further holding in *Ermogenous* — that a determination as to the existence of an *employment contract* is separate to and dependent upon the recognition of a *contract* generally. It is contended that decision-makers’ conflation of the two enquiries unjustly deprives volunteers of contractual rights, even where those volunteers are rightly found not to be ‘employees’ at common law or under statute. Part VIII canvasses solutions. It concludes that NFPOs should, to the extent resources permit, facilitate certainty by contracting with volunteer workers and that decision-makers must, in adherence to *Ermogenous*, refrain from engaging in ‘unwarranted assumptions’ about the ‘usual’ or ‘general’ motivations which underpin charitable and volunteering work.<sup>13</sup>

## II VOLUNTEERS AND NOT-FOR-PROFIT ORGANISATIONS

### A *The Meaning of ‘Volunteer’*

At common law and in the context of Australian labour relations, there ‘is no accepted legal definition’ of the term ‘volunteer’.<sup>14</sup> Many attempts at defining volunteerism emphasise the absence of a legally binding relationship<sup>15</sup> and the performance of services without an expectation of monetary gain<sup>16</sup> — the

<sup>12</sup> Zhixiong Liao, ‘Intention to Create Legal Relations and the Reform of Contract Law: A Conservative Approach in the Modern Global Era’ (2013) 4(2) *Beijing Law Review* 82, 91.

<sup>13</sup> *Ermogenous* (n 11) 106–7 [28] (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>14</sup> Justice Connect, *Employee, Contractor or Volunteer? A Guide for Community Organisations* (Guide, September 2024) 16 (‘Employee, Contractor or Volunteer?’); Jordan-Baird (n 3) 9. Cf *Civil Liability Act 2002* (NSW) s 60(1); *Wrongs Act 1958* (Vic) s 35(1).

<sup>15</sup> See, eg, *Bergman v Broken Hill Musicians Club Ltd* [2011] FWA 1143, [40]–[42] (Steel C) (‘Bergman’); Australian Taxation Office, ‘Your Volunteers’ (Web Page) <<https://www.ato.gov.au/Non-profit/Your-workers/Your-volunteers/>>, archived at <<https://web.archive.org/web/20220615021215/https://www.ato.gov.au/Non-profit/Your-workers/Your-volunteers/>>; Justice Connect, *Employee, Contractor or Volunteer?* (n 14) 17; Anne Hewitt et al, *Protecting Students at Work: Australian Universities and Regulating for Quality Work Experience* (Report, September 2021) 9; Eleanor Brown, ‘The Scope of Volunteer Activity and Public Service’ (1999) 62(4) *Law and Contemporary Problems* 17, 17. See also Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 117, citing *X v Mid Sussex Citizens Advice Bureau* [2010] ICR 423; *Eldridge v Kemblawarra Child and Family Centre* [1999] NSWCA 395; *Evard v Alma Mater Society of the University of British Columbia* (1995) 14 CCEL (2d) 124; *Teen Ranch Pty Ltd v Brown* (1995) 87 IR 308 (‘Teen Ranch’).

<sup>16</sup> See, eg, *Application by McDonald* [2016] FWC 300, [32] (Hampton C) (‘McDonald’); Volunteering Australia, *Definition of Volunteering* (27 July 2015) 2.

characteristics which most obviously distinguish volunteering from employment.<sup>17</sup> It is, however, evident that some volunteers are engaged<sup>18</sup> by reference to more than a ‘psychological contract’<sup>19</sup> and that many others perform work with a view — long-term or otherwise — to obtaining fiscal benefits.<sup>20</sup> It is frequently said that volunteers are not compelled to perform work, nor do they capture the productive value of any work they do perform.<sup>21</sup> Some consider that there exists a ‘clear understanding by everyone concerned’ that volunteers’ work ‘is done as a gift to the organisation’.<sup>22</sup> These characteristics of volunteerism have been adopted by the International Labour Organization, which has considered ‘volunteer work’ to encompass ‘any unpaid, non-compulsory activity to produce goods or provide services for others’.<sup>23</sup> That is apt to mislead. The manner in which many volunteering arrangements are performed and the imposition of psychosocial pressures within them indicates something less than absolute freedom<sup>24</sup> — even if not contractually expressed.

It is often suggested that volunteering work contains an element, or even requirement,<sup>25</sup> of altruism, or a ‘primary purpose of benefitting someone else or furthering a particular belief’.<sup>26</sup> Work done in pursuit of the ‘common good’ is frequently associated with volunteerism,<sup>27</sup> as are notions of ‘free will’, ‘community’ and proximity to the beneficiaries whom volunteers’ work benefits.<sup>28</sup> Nevertheless, volunteer work ‘does not exist in a realm completely separate from the market economy’.<sup>29</sup> It is plain that some volunteering arrangements are driven in part by

<sup>17</sup> See Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (Federation Press, 7<sup>th</sup> ed, 2025) 317–18.

<sup>18</sup> This article refers to volunteers as being ‘engaged’ by NFPs and performing services under such ‘engagements’. This language of ‘engagement’ is used in a broad sense that includes both a ‘formal promise, agreement, undertaking, covenant’ and a ‘moral or legal obligation’: *Protective Commissioner v D* (2004) 60 NSWLR 513, 542 [161] (McColl JA) (emphasis added), discussing *Wik Peoples v Queensland* (1996) 63 FCR 450, 464–5 (Drummond J)..

<sup>19</sup> See Geoff Nichols, ‘The Psychological Contract of Volunteers: A New Research Agenda’ (2013) 24(4) *International Journal of Voluntary and Nonprofit Organizations* 986; Volunteering England, ‘Volunteers and the Law: A Summary’ (August 2011) 3–4.

<sup>20</sup> Nicholas Biddle et al, *Volunteering in Australia: The Volunteer Perspective* (Report, April 2022) 35 (‘*The Volunteer Perspective*’); Kevin F Hallock, ‘Paid Workers and Volunteers, Side by Side’ (2014) 57(10) *Workspan* 13.

<sup>21</sup> Brown (n 15) 17.

<sup>22</sup> Far West Community Legal Centre and Legal Aid New South Wales, *Ripped Off? Your Rights About Unpaid Wages and Entitlements at Work* (Guide, November 2023) 7.

<sup>23</sup> International Labour Organization, *Volunteer Work Measurement* (Guide, May 2021) 3.

<sup>24</sup> See Emily Stott, ‘Charities in the Contract Culture: The Unintended Consequences of Partnership and Intervention in the Free Market’ (MA Thesis, University of Canterbury, 2015) 39–40.

<sup>25</sup> Jordan-Baird (n 3) 9, citing Murray (n 5) 704; *Teen Ranch* (n 15).

<sup>26</sup> Stewart and Owens, *Experience or Exploitation?* (n 8) 5. See also Fair Work Ombudsman, *Unpaid Work* (Fact Sheet, June 2017) 3; Andrew Stewart, ‘The Nature and Prevalence of Internships’ in Andrew Stewart et al (eds), *Internships, Employability and the Search for Decent Work Experience* (Edward Elgar, 2021) 17, 22; Volunteering Australia, *National Survey of Volunteering Issues* (Survey, 2011) 2.

<sup>27</sup> Volunteering Australia, *Definition of Volunteering* (n 16) 2.

<sup>28</sup> Handy et al (n 2) 46; *McDonald* (n 16) [32] (Hampton C); *Civil Liability Act 2002* (NSW) s 60(1); *Wrongs Act 1958* (Vic) s 35(1).

<sup>29</sup> Murray (n 5) 696.

self-interest and professional aspiration — law students' work within community legal centres is one such example.<sup>30</sup> For this reason, some consider a 'binary' between volunteers and interns or persons completing work experience to be unhelpful.<sup>31</sup> Whatever be the 'true form' or 'final concept' of volunteering, it is clear that no one definition is 'unproblematic'.<sup>32</sup>

This article does not propose an all-embracing definition of 'volunteer'. In light of the contrasting conceptions of volunteerism and the diversity of settings in which it occurs, a catch-all definition would be inappropriate.<sup>33</sup> However, the individuals with whom this article is concerned are those who, gratuitously or with receipt of only nominal compensation, willingly perform services for NFPOs for reasons other than acquiring short-term fiscal gain or discharging a contract of employment.

### **B The Meaning of 'Not-For-Profit Organisation'**

Defining 'NFPO' invites difficulties similar to those encountered in defining 'volunteer'. To say an organisation is 'not-for-profit' says little about the way the business of that organisation is run.<sup>34</sup> The University of Melbourne, an employer of 13,758 individuals,<sup>35</sup> is undeniably an NFPO — though no more so than the 52.1% of all registered charitable organisations in Australia that retain no paid staff at all.<sup>36</sup> In 1980, Henry Hansmann characterised an NFPO as

an organisation that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees ... Net earnings, if any, must be retained and devoted in their entirety to financing further production of services that the organization was formed to provide.<sup>37</sup>

The 'non-distribution constraint' mentioned by Hansmann has been described as 'the fundamental difference' between an NFPO and a for-profit firm.<sup>38</sup> Hansmann's formulation has been observed to 'for[m] part of the legislative test for incorporation under the *Associations Incorporation Acts* in all Australian

<sup>30</sup> John Corker, 'The Importance of Inculcating the "Pro Bono Ethos" in Law Students, and the Opportunities to Do It Better' (2020) 30(1) *Legal Education Review* 1, 25; Francina Cantatore, 'Boosting Law Graduate Employability: Using a Pro Bono Teaching Clinic to Facilitate Experiential Learning in Commercial Law Subjects' (2015) 25(1) *Legal Education Review* 147.

<sup>31</sup> John Wilson and Kieran Pender, 'Work Experience, Internship or Employment?' (2021) 26(1) *Ethos* 30, 31.

<sup>32</sup> Stewart, 'The Nature and Prevalence of Internships' (n 26) 17, 22; Murray (n 5) 697.

<sup>33</sup> Handy et al (n 2) 46.

<sup>34</sup> *Malek Fahd Islamic School Ltd and Minister for Education and Training* [2016] AATA 1087, [18] (McCabe DP) ('Malek').

<sup>35</sup> The University of Melbourne, *Annual Report 2024* (Report, 13 May 2025) 7.

<sup>36</sup> Australian Charities and Not-for-Profits Commission, *Australian Charities Report: 11<sup>th</sup> Edition* (Report, 4 June 2025) 7 ('Charities Report 11<sup>th</sup> Edition').

<sup>37</sup> Henry B Hansmann, 'The Role of Nonprofit Enterprise' (1980) 89(5) *Yale Law Journal* 835, 838.

<sup>38</sup> Kim Weinert, 'Reforming Not-For-Profit Organisations in Australia: A Work in Progress' (PhD Thesis, Bond University, 2013) 27.

jurisdictions'.<sup>39</sup> But it is not flawless. It is plain, for instance, that many Australian trade unions are both NFPOs<sup>40</sup> and organisations which may lawfully and justifiably 'distribut[e] ... net earnings ... to ... members' through funding litigation.<sup>41</sup> The use of monies for this purpose might amount to 'financing further production of services that the organization was formed to provide', but is nevertheless the distribution of net earnings by an NFPO to 'individuals who exercise control over it'.

The expression 'NFPO' is commonly used to describe companies and other associations 'operated for charitable, scientific, educational, religious or community purposes'.<sup>42</sup> However, NFPOs need not hold or pursue any such purpose.<sup>43</sup> According to Drucker, NFPOs

do something very different from either business or government. Business supplies, either goods or services. Government controls. A business has discharged its task when the customer buys the product, pays for it, and is satisfied with it. Government has discharged its function when its politics are effective. The 'non-profit' institution neither supplies goods or services nor controls. Its 'product' is neither a pair of shoes nor an effective regulation. *Its product is a changed human being.*<sup>44</sup>

A charity is an NFPO.<sup>45</sup> A governmental department is likely not an NFPO.<sup>46</sup> It is clear that a corporation whose primary purpose is to generate wealth for its shareholders is not an NFPO.<sup>47</sup> But entrepreneurship is not incompatible with NFPOs.<sup>48</sup> Indeed, designation as a not-for-profit should not 'signify that the organisation cannot and does not make profits. It only indicates that there are

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<sup>39</sup> Charles Parkinson, 'Duties of Committee Members under the Associations Incorporation Acts' (2004) 30(1) *Monash University Law Review* 75, 76. See *Associations Incorporation Act 1991* (ACT) s 14(2)(a); *Associations Incorporation Act 1984* (NSW) s 7(2)(a); *Associations Incorporation Act 1963* (NT) s 4(1); *Associations Incorporation Act 1981* (Qld) s 5(1)(c); *Associations Incorporation Act 1985* (SA) s 18(5)(a); *Associations Incorporation Act 1964* (Tas) s 2(1); *Associations Incorporation Reform Act 2012* (Vic) s 33; *Associations Incorporation Act 1987* (WA) s 4(2).

<sup>40</sup> See Anthony Forsyth, 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model' (2000) 13(1) *Australian Journal of Labour Law* 1, 10–17.

<sup>41</sup> For a discussion of the concept of a 'litigation funder' and the application of that concept to trade unions, see *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148, [64]–[68] (Basten JA).

<sup>42</sup> *Malek* (n 34) [18] (McCabe DP).

<sup>43</sup> Cf *Charities Act 2013* (Cth) s 5 (definition of 'charity' para (b)).

<sup>44</sup> Peter Drucker, *Managing the Non-Profit Organization: Practices and Principles* (Routledge, 1995) ix–x (emphasis added).

<sup>45</sup> *Charities Act 2013* (Cth) s 5 (definition of 'charity' para (a)).

<sup>46</sup> See *Holroyd and Secretary, Department of Education, Employment and Workplace Relations* [2010] AATA 638, [21] (Carstairs SM), citing *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (Vic) (2006) 228 CLR 168.

<sup>47</sup> *Malek* (n 34) [18] (McCabe DP).

<sup>48</sup> See Kim D Weinert, 'Is it a Not-For-Profit Organisation or a For-Profit Organisation? The Case for a CIC Structure in Australia' (2014) 3 *Journal of the Australasian Law Teachers Association* 1, 3, citing Avner Ben-Ner and Theresa Van Hoomissen, 'Nonprofit Organizations in the Mixed Economy' (1991) 62(4) *Annals of Public and Cooperative Economics* 519. See also *R v Federal Court of Australia; Ex parte The Western Australian National Football League Inc* (1979) 143 CLR 190.

restrictions on what the organisation can do with its profits'.<sup>49</sup> The phrase 'not-for-profit' is thus itself misleading.<sup>50</sup>

The prevailing authorities and literature may go no further than demonstrating that the meaning of NFPO remains unclear. Notwithstanding this, the organisations with which this article concerned are those embraced under the 'ordinary meaning' of NFPO, described by the Australian Charities and Not-For-Profits Commission as 'a [non-governmental] organisation which does not operate for the profit, personal gain or other benefit of particular people, including its members or the people who run it, unless such benefit is provided as part of genuinely carrying out the entity's purpose(s)'.<sup>51</sup>

### C Volunteerism and Australian NFPOs: Statistics and Overview

Determining the prevalence of volunteerism remains challenging.<sup>52</sup> The Australian Bureau of Statistics ('ABS') estimated that, in 2020, 24.8% of Australians aged 18 years and over participated in 'formal volunteering'.<sup>53</sup> This represents a reduction from 2019, where approximately 36% of Australian adults were found to have engaged in formal volunteering.<sup>54</sup> This decline has been attributed to economic challenges and the COVID-19 pandemic.<sup>55</sup> The 2024 *Australian Charities Report* did, however, observe 'signs' that volunteering was 'returning to pre-pandemic levels',<sup>56</sup> a trend borne out in the Report's June 2025 edition.<sup>57</sup> Women are more likely to participate in volunteering than men, especially in youth assistance,

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<sup>49</sup> *Review of the Law of Negligence* (Final Report, September 2002) 60.

<sup>50</sup> *Malek* (n 34) [18] (McCabe DP).

<sup>51</sup> See Australian Charities and Not-For-Profits Commission, Submission to Chartered Institute of Public Finance and Accountancy, *International Non-Profit Accounting Guidance Part 1: Invitation to Comment on Exposure Draft CIPFA/ED/2022/1* (5 May 2023) 4.

<sup>52</sup> See Megan Woods and Karen Douglas, 'Methodological Approaches to, and Challenges of, Determining the Size, Scale, and Contribution of Volunteer Workforces' (Research Paper, Volunteering Australia, November 2022) 9–11.

<sup>53</sup> Australian Institute of Health and Welfare, 'Volunteers' (Article, 16 October 2025) <<https://www.aihw.gov.au/reports/australias-welfare/volunteers>>. 'Formal volunteering' was defined as voluntary work through an organisation.

<sup>54</sup> Nicholas Biddle and Matthew Gray, 'Ongoing Trends in Volunteering in Australia' (Research Paper, ANU Centre for Social Research and Methods, The Australian National University, 30 October 2023) 7.

<sup>55</sup> Rong Zhu, 'The Decline of Formal Volunteering in Australia (2001–2020): Insights from the HILDA Survey' (Research Paper, Volunteering Australia, September 2022) 13; Volunteering Australia, Submission No 73 to Senate Select Committee on Cost of Living, Parliament of Australia, *Inquiry into The Cost of Living Pressures Facing Australians* (April 2023) 2; Australian Charities and Not-For-Profits Commission, *Australian Charities Report: 10<sup>th</sup> Edition* (Report, 5 June 2024) 6 ('Charities Report 10<sup>th</sup> Edition').

<sup>56</sup> *Charities Report 10<sup>th</sup> Edition* (n 55) 15.

<sup>57</sup> *Charities Report 11<sup>th</sup> Edition* (n 36) 19–21. The ABS reported that 32.6% of Australian adults formally volunteered in 2023, up from pre- and mid-pandemic levels: 'Volunteers' (n 53).

educational or training organisations.<sup>58</sup> Individuals with a disability volunteer at a higher rate than individuals without a disability.<sup>59</sup> Tertiary education and above-average earnings are positively correlated with voluntary work, and individuals aged between 40 and 54 are the most likely to volunteer.<sup>60</sup> Cultural, ethnic and racial minorities volunteer at a rate similar to majority groups, though are more likely to volunteer ‘informally’ than through an organisation or group.<sup>61</sup>

The contribution of voluntary work to the Australian economy is substantial<sup>62</sup> albeit notoriously difficult to quantify.<sup>63</sup> A report published by the Victorian government in December 2012 concluded that ‘volunteering was worth about \$7.1 billion to the Victorian economy in 1992, growing to \$16.4 billion in 2006’.<sup>64</sup> Volunteers’ contributions to Victoria’s emergency management services were ‘conservative[ly]’ valued in March 2020 at ‘\$1.9 to \$2.5 billion annually’.<sup>65</sup> In May 2018, Volunteering Australia CEO Adrienne Picone contended that volunteering presents to Australia ‘an estimated annual economic and social contribution of \$290 billion’.<sup>66</sup> Whatever be the true value of volunteerism, it is not confined to economic benefits.<sup>67</sup> Voluntary work is positively related to volunteers’ physical

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<sup>58</sup> Volunteering Australia, *Key Volunteering Statistics* (Report, March 2024) 9–10, 13.

<sup>59</sup> *Ibid* 11.

<sup>60</sup> *Ibid* 16.

<sup>61</sup> *Ibid* 11.

<sup>62</sup> See, eg, Volunteering WA, *The Economic, Social, and Cultural Value of Volunteering to Western Australia* (Report, May 2015) 4 (socio-economic and cultural value of volunteering to Western Australia in 2015 ‘conservatively estimated to be \$39.0 billion’); Volunteering Queensland, *State of Volunteering in Queensland 2024* (Report, May 2024) 4 (‘the economic value of volunteering in Queensland was over \$117 billion in the 2022–23 financial year’); Volunteering ACT, *The State of Volunteering in the Australian Capital Territory (ACT) 2024* (Report, May 2024) 7 (volunteers in the ACT said in 2023 to have generated ‘\$14.1 billion of value for the Canberra Region’). See also Social Ventures Australia and Centre for Social Impact, *Taken for Granted? Charities’ Role in Our Economic Recovery* (Report, August 2023) 6–10, 28.

<sup>63</sup> See Woods and Douglas (n 52); Kakoli Roy and Susanne Ziemek, ‘On the Economics of Volunteering’ (Working Paper No 31, Center for Development Research (ZEF), University of Bonn, August 2000); Volunteering SA&NT, ‘State of Volunteering South Australia 2023: Summary and Key Findings’ (2024) 9. See also Carolyn J Cordery, Sarah Proctor-Thomson and Karen A Smith, ‘Valuing Volunteer Contributions to Charities’ (2011) 31(3) *Public Money and Management* 193, 199.

<sup>64</sup> Department of Planning and Community Development (Vic), *The Economic Value of Volunteering in Victoria* (Report, December 2012) 4.

<sup>65</sup> Emergency Management Victoria, *3Vs Final Report: Uncovering the Hidden Value* (Report, March 2020) 4.

<sup>66</sup> Volunteering Australia, ‘Mixed Results for Volunteering in 2018–19 Federal Budget’ (Media Release, 10 May 2018).

<sup>67</sup> See Volunteering Victoria, *State of Volunteering in Victoria 2020* (Report, October 2020) 2.

health,<sup>68</sup> education<sup>69</sup> and emotional maturity.<sup>70</sup> It also assists with volunteers' development of skills relevant to the paid workforce.<sup>71</sup>

### D The Treatment of 'Volunteers' under Australian Labour Laws

Volunteers occupy uncertain territory within Australian labour law. Volunteers do not, as a general proposition, receive remuneration in consideration of their work.<sup>72</sup> However, volunteers' receipt of honoraria and other gratuitous payments is commonplace.<sup>73</sup> These payments will not typically be assessable as income<sup>74</sup> and are ordinarily provided in acknowledgment of valuable contributions or as a broader gesture of goodwill or appreciation.<sup>75</sup> Meal allowances and small gifts are said also to 'go a long way' in this respect.<sup>76</sup> Volunteers may receive reimbursements for expenses incurred in the performance of their duties<sup>77</sup> and may also be provided with insurance for loss and damage incurred as a result of personal injuries suffered in the course of their work.<sup>78</sup> The *Fair Work Act 2009* (Cth) ('FW Act')<sup>79</sup> protects volunteers from coercion, undue influence, misrepresentation and harassment.<sup>80</sup> Other workplace laws also provide rights relating to occupational health and safety.<sup>81</sup>

It remains the case, however, that a 'hallmark' of many volunteer arrangements is a lack of contractual relations.<sup>82</sup> Where volunteers do not work pursuant to a contract, even the notoriously narrow labour rights enjoyed by a private contractor

<sup>68</sup> Office of Research and Policy Development, Corporation for National and Community Service, *The Health Benefits of Volunteering: A Review of Recent Research* (Report, April 2007).

<sup>69</sup> Center for Human Resources, Brandeis University, *National Evaluation of Learn and Service America* (Summary Report, 1998).

<sup>70</sup> Jodi Benenson and Allison Stagg, 'An Asset-Based Approach to Volunteering: Exploring Benefits for Low-Income Volunteers' (2016) 45(5) *Nonprofit and Voluntary Sector Quarterly* 131, 131–2.

<sup>71</sup> Chris Percy and Martin Rogers, Education and Employers, *The Value of Volunteering: Volunteering in Education and Productivity at Work* (Report, January 2021) 3.

<sup>72</sup> *McDonald* (n 16) [32] (Hampton C).

<sup>73</sup> Volunteering Victoria, *Reimbursements, Allowances, Honoraria and Tax* (Guide, March 2019) 1; Lacey Jarvis, 'Eligibility: Charities Providing Gifts and Honorariums', *TaxEd* (Article, 3 June 2020) <<https://taxed.com.au/eligibility-gifts-honorariums/>>.

<sup>74</sup> See, eg, Australian Taxation Office, *Class Ruling: Western Australian Debating League Incorporation: Payments to League Members* (CR 2021/37, 26 May 2021) 3–4.

<sup>75</sup> See James S Fishkin et al, 'Returning Deliberative Democracy to Athens: Deliberative Polling for Candidate Selection' (Conference Paper, American Political Science Association Conference, 28 August 2008) 5.

<sup>76</sup> Victoria Alive, *Money, Volunteers & Disability* (Guide, September 2019) 5.

<sup>77</sup> *Reimbursements, Allowances, Honoraria and Tax* (n 73) 1.

<sup>78</sup> See, eg, Justice Connect, 'Sample Volunteer Agreement' (2025) 2 <<https://www.nfplaw.org.au/free-resources/managing-people/managing-volunteers/sample-volunteer-agreement-or-deed-of-agreement>>.

<sup>79</sup> *Fair Work Act 2009* (Cth) ('FW Act').

<sup>80</sup> *Ibid* ss 341, 343–5, 527D. This protection is, of course, subject to the coverage of Part 3-1 of the Act: see at s 338.

<sup>81</sup> *Work Health and Safety Act 2011* (Cth) ss 7, 19.

<sup>82</sup> *Bergman* (n 15) [40]–[42] (Steel C). See also Justice Connect, *Employee, Contractor or Volunteer?* (n 14) 17.

as against their principal<sup>83</sup> are typically unavailable.<sup>84</sup> Similarly, at common law and under federal workplace legislation, the lack of a contractual agreement will in almost all cases negative the existence of a relationship of employment.<sup>85</sup> Of itself, this will deny the availability of myriad entitlements an NFPO would otherwise owe to its volunteers if those volunteers were instead engaged under contracts of service.<sup>86</sup> Beyond ‘cast[ing] an interesting light on the dynamic operation’ of the law of employment,<sup>87</sup> this carries vast ramifications both for volunteers and the organisations which engage them.<sup>88</sup>

### III THREE CHALLENGES ASSOCIATED WITH VOLUNTEERISM IN AUSTRALIA

#### A ‘Volunteer’ Status and Its Consequences in Australian Labour Law

As alluded to, and despite some contemporary shifts to the contrary,<sup>89</sup> ‘most [Australian] labour statutes continue to accord rights and protections only, or primarily, to employees’.<sup>90</sup> Volunteers thus ‘lack major workers’ rights and protections’.<sup>91</sup> NFPOs which engage volunteers typically do owe to those volunteers obligations under occupational health and safety legislation, though in some cases, those obligations are no more strenuous than those owed by the organisations to the beneficiaries of their services.<sup>92</sup> Prohibitions on attribute-based discrimination within *FW Act* s 351(1) do not protect volunteers.<sup>93</sup> Most federal discrimination laws

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<sup>83</sup> See Valerio De Stefano et al, ‘Platform Work and the Employment Relationship’ (Working Paper No 27, International Labour Organization, 2021).

<sup>84</sup> See Murray (n 5) 702.

<sup>85</sup> Irving (n 15) 83–4; Joellen Riley, ‘Estoppel in the Employment Context: A Solution to Standard Form Unfairness?’ (Conference Paper, Australian Labour Law Association Biennial Conference, 22 September 2006).

<sup>86</sup> See Michael Shand, ‘Law of the State and Religious Institutions: Cause for Concern or an Opportunity for Reform? A Review of the Impact of Commonwealth and State Laws and the Common Law on Religious Institutions’ (Sharwood Lecture in Church Law, Trinity College Theological School, May 2022) 14; *Teen Ranch* (n 15) 310 (Handley JA), cited in *Dickinson v The Tropical Fruits Incorporated* [2006] NSWCCPD 331, [44] (Roche ADP) (‘*Dickinson*’).

<sup>87</sup> Murray (n 5) 711.

<sup>88</sup> See Wilson and Pender, ‘Legality of Unpaid Internships’ (n 6) 31.

<sup>89</sup> See, eg, *FW Act* (n 79) ss 527D, 789C; *Occupational Health and Safety Act 2004* (Vic) s 23(1).

<sup>90</sup> Andrew Stewart, Mark Irving and Pauline Bomball, ‘Shifting and Ignoring the Balance of Power: The High Court’s New Rules for Determining Employment Status’ (2023) 46(4) *University of New South Wales Law Journal* 1214, 1216.

<sup>91</sup> See Sabine Tsuruda, ‘Volunteer Work, Inclusivity and Social Equality’ in Hugh Collins (ed), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 306, 306.

<sup>92</sup> *Occupational Health and Safety Act 2004* (Vic) ss 20–3.

<sup>93</sup> *FW Act* (n 79) ss 351(1), 382(a). ‘Attribute-based discrimination’ is used as a shorthand for the prohibition on an employer discriminating against an employee on the basis of one or more of the grounds listed in s 351(1). Its use in this manner should not be taken to suggest that volunteers are afforded no protection under Part 3-1.

afford limited protection to volunteers.<sup>94</sup> Volunteers do not enjoy the benefit of the National Employment Standards or their facilitation of a ‘guaranteed safety net of fair, relevant and enforceable minimum terms and conditions’ for most Australian workers.<sup>95</sup> Many statutory workers’ compensation schemes will provide no relief to volunteers who suffer injuries throughout the course of their volunteering work.<sup>96</sup> Vicarious liability — a doctrine of notorious contemporary significance to some charitable organisations<sup>97</sup> — has generally been held to operate only within relationships of employment.<sup>98</sup> This has denied relief to sufferers of physical and sexual abuse<sup>99</sup> and may expose volunteers to personal liability for tortious wrongs committed throughout the course of their work.<sup>100</sup> The isolation of vicarious liability principles to relationships of employment — and the detachment of those principles from volunteering arrangements — is now beyond dispute.<sup>101</sup> Volunteers’ typical non-contractual and non-employee status also has the potential to adversely affect the interests of their engaging organisation. A variety of duties imposed upon employees and other paid workers at common law, in equity and under statute do not govern the conduct of volunteers.<sup>102</sup> In some circumstances, this lack of legal

<sup>94</sup> See *Sex Discrimination Act 1984* (Cth) s 4 (definition of ‘employee’), pt 2-1; *Disability Discrimination Act 1992* (Cth) s 4 (definition of ‘employee’), pt 2-1; *Age Discrimination Act 2004* (Cth) s 5 (definition of ‘employee’), pt 4-2; Justice Connect, *Guide to Workplace Behaviour* (Guide, August 2025) 13. But see *Racial Discrimination Act 1975* (Cth) ss 9(1)–(1A). See also *Equal Opportunity Act 2010* (Vic) s 4 (definition of ‘employee’), pt 6.

<sup>95</sup> *FW Act* (n 79) ss 3(b), 61(1). See generally ‘Fair Work System’, *Fair Work Ombudsman* (Web page) <<https://www.fairwork.gov.au/about-us/workplace-laws/fair-work-system>>.

<sup>96</sup> See *Riverwood Legion & Community Club Ltd v Morse* [2007] NSWWCPCD 88, [24] (Roche DP) (‘Riverwood’).

<sup>97</sup> See Paula Giliker, ‘Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention’ (2018) 77(3) *Cambridge Law Journal* 506.

<sup>98</sup> See *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, 167 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Colonial Mutual Life Assurance Society Ltd v Producers & Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, 48–50 (Dixon J); Allison Silink and Desmond Ryan, ‘Vicarious Liability for Independent Contractors’ (2018) 77(3) *Cambridge Law Journal* 458. But see *Bird v DP* (2023) 69 VR 408.

<sup>99</sup> See, eg, *New South Wales v Lepore* (2003) 212 CLR 511. But now see *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* [2026] HCA 2.

<sup>100</sup> Elsie Loh, ‘Legal Risks of Volunteer Firefighters: How Real Are They?’ (2008) 23(2) *Australian Journal of Emergency Management* 47, 54.

<sup>101</sup> *Bird* (n 7) 1362 [46] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).

<sup>102</sup> See *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 (employees’ duty of fidelity to employers); *R v Darling Island Stevedoring & Lighterage Co Ltd* (1938) 60 CLR 601 (employees’ obligation to comply with lawful and reasonable directions issued by employers); *Occupational Health and Safety Act 2004* (Vic) s 25 (duty of employees to take reasonable care for their own health and safety and the health and safety of others who may be affected by the employees’ acts or omissions); Irving (n 15) ch 7. For discussion of differences between the duties and liabilities of employees as compared to volunteers both in Australia and internationally, see Joseph Mead, ‘A Legal Perspective on the Organization-Volunteer Relationship’ (2018) 48(2) *Nonprofit and Voluntary Sector Quarterly* 12;

and regulatory oversight may facilitate volunteers' defrauding of the NFPOs for which they work.<sup>103</sup>

### B The Corporatisation of NFPOs and its Effect on Volunteers

The effective operation of many contemporary NFPOs relies upon formalised and professional practices.<sup>104</sup> Absent appropriate operational structures, NFPOs expose themselves to risks of resource waste<sup>105</sup> and directorial misconduct.<sup>106</sup> Whatever be the need, source, or justification for 'corporatization'<sup>107</sup> within a given NFPO, volunteers often suffer its consequences.<sup>108</sup> While many volunteers may be driven by benevolent purposes, 'business-like practices that prioritize costs, performance management and administrative chores' have 'created a gap' between volunteers' expectations of gratuitous work and its reality.<sup>109</sup> 'Deliberate' and 'reckless' exploitation of volunteers has been found to be 'widespread' within charitable fundraising chains<sup>110</sup> and is exacerbated by 'single-minded pursuit of organisational growth'.<sup>111</sup> NFPOs' activities rely in many respects upon the generosity and goodwill of volunteers; not-for-profit structures may thus themselves be conducive to the mistreatment of volunteers.<sup>112</sup> Other undesirable practices flow from the errant

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Alison Braley-Rattai, 'A Volunteer by Any Other Name: Navigating the Contours of the "True Volunteer" in Canadian Employment Law' (2021) 23(2) *Canadian Labor and Employment Law Journal* 247; Michael Eburn, 'Liability of Volunteers and Good Samaritans: Making it Safe to Volunteer or Restricting Claims for Damage?' (2010) 7(2) *Australian Civil Liability* 14, 14–16.

<sup>103</sup> See Erica Harris, Christine Petrovits and Michelle Yetman, 'Why Bad Things Happen to Good Organizations: The Link Between Governance and Asset Diversions in Public Charities' (2017) 146(1) *Journal of Business Ethics* 149.

<sup>104</sup> See Productivity Commission, *Contribution of the Not-for-Profit Sector* (Research Report, January 2010) 307–8; Hokyung Hwang and Walter W Powell, 'The Rationalization of Charity: The Influences of Professionalism in the Nonprofit Sector' (2009) 54(2) *Administrative Science Quarterly* 268.

<sup>105</sup> Vicky Lambert and Irvine Lapsley, 'Charities, Altruism and Becoming Business-Like: Tensions and Contradictions' (2023) 20(4) *Qualitative Research in Accounting & Management* 1, 11–12.

<sup>106</sup> Harris, Petrovits and Yetman (n 103).

<sup>107</sup> Florentine Maier, Michael Meyer and Martin Steinbereithner, 'Nonprofit Organizations Becoming Business-Like: A Systematic Review' (2016) 45(1) *Nonprofit and Voluntary Sector Quarterly* 64, 70.

<sup>108</sup> See Lambert and Lapsley (n 105) 24.

<sup>109</sup> Wen Wang and Roger Seifert, 'Job Stress and Employee Outcomes: Employment Practices in a Charity' (2021) 43(5) *Employee Relations* 1178, 1188. See Bob Davidson, 'Non-Profit Organisations in the Human Services Marketplace: The Impact of Quasi Voucher-Licensing Systems' (Conference Paper, Association for Research on Nonprofit Organisations and Voluntary Action, 20 November 2008) 17.

<sup>110</sup> Standing Committee on Education, Employment and Youth Affairs, Legislative Assembly for the Australian Capital Territory, *Inquiry into the Extent, Nature and Consequence of Insecure Work in the ACT* (Report No 3, May 2018) 97.

<sup>111</sup> Liam Kay, 'Charities Should Operate Less Like Businesses, Says Charity Commission Chair', *Third Sector* (online, 5 October 2018) <<https://www.thirdsector.co.uk/charities-operate-less-businesses-says-charity-commission-chair/governance/article/1495151>>.

<sup>112</sup> See Vera Weghman, 'Exploited for a Good Cause: Campaigning Against Unpaid Internships in the UK Charity Sector' (2015) 13(2) *TripleC* 599, 600–1.

behaviours of those who wield substantial powers within NFPOs.<sup>113</sup> As has been observed within Europe and Africa, middle management is also not faultless.<sup>114</sup>

The commercialisation of NFPOs poses a variety of challenges to modern volunteers. The ‘workplace’ model adopted by many contemporary NFPOs ‘crams’ volunteers into ‘hierarchical relationships’ within which their experiences, interests and contributions are dismissed.<sup>115</sup> Volunteers’ limited influence over workplace decision-making may contribute to disillusionment and the suffering of stress and mental illness.<sup>116</sup> Where the implementation of rigid cost-saving measures results in volunteers’ exploitation, this presents additional risks of fatigue and damage to psychological health.<sup>117</sup> These circumstances may also compromise volunteers’ fiscal interests. While many volunteers reserve rights of reimbursement for expenditures personally incurred in the course of their work, 72.5% report that their respective organisations have failed to satisfy these rights.<sup>118</sup> Older volunteers suffer most in this regard.<sup>119</sup> While some well-meaning NFPOs might encounter difficulties in arranging timely reimbursements, others deny compensation as a standard practice — 41% of volunteers surveyed by Volunteering Australia in 2023 who incurred costs associated with their roles reported never having been offered reimbursement.<sup>120</sup> Such practices impair volunteers’ capacity to engage in leisure or acquire disposable income elsewhere.<sup>121</sup>

These circumstances are not harmful only in respect of volunteers. As Davidson observes, NFPOs which deal in the provision of human services

as a group have lost some of their ‘trust advantage’, because some have adopted corporate strategies and processes aimed at maximising financial surplus, organisational growth, the ‘market-based’ remuneration of senior employees, and reducing the rights and conditions of staff ...<sup>122</sup>

<sup>113</sup> See, eg, Rosemary Teele Langford and Miranda Webster, ‘Misuse of Power in the Australian Charities Sector’ (2022) 45(1) *University of New South Wales Law Journal* 70, 75.

<sup>114</sup> See Thomas G Kirsch, ‘Managing Unruliness: The (Anti-)Politics of Volunteer Management Practices in Faith-Based Organizations’ (2019) 49(3–4) *Journal of Religion in Africa* 403, 408, 416–18; Mariia Wolf, ‘Between Volunteerism and Nonprofit Professionalization: Ethnographic Case Study of Skills-Based Volunteers at Engineers Without Borders Sweden’ (MA Thesis, Södertörn University, 2022) 70–3.

<sup>115</sup> Stephen Moreton, ‘Are “Professional” HR Practices Compatible with Volunteer Management? “True Affinity and Beyond? ...”’ (Research Paper, Attend Academy, 2006) 5.

<sup>116</sup> Wang and Seifert (n 109) 1188.

<sup>117</sup> Ricky N Lawton et al, ‘Does Volunteering Make Us Happier, or Are Happier People More Likely to Volunteer? Addressing the Problem of Reverse Causality when Estimating the Wellbeing Impacts of Volunteering’ (2021) 22 *Journal of Happiness Studies* 599, 616; Biddle and Gray (n 54) 13–14.

<sup>118</sup> *Key Volunteering Statistics* (n 58) 39.

<sup>119</sup> *State of Volunteering in Queensland 2024* (n 62) 29.

<sup>120</sup> *Key Volunteering Statistics* (n 58) 39. See *Batton v The Environment Centre NT Inc* [2024] FWC 597, [33]–[38] (Riordan C).

<sup>121</sup> Lawton et al (n 117) 616; Biddle and Gray (n 54) 13–14.

<sup>122</sup> Davidson (n 109) 17.

The adoption of commercial practices within the not-for-profit sector additionally risks ‘mission drift’ and volunteers’ ‘loss of idealism’.<sup>123</sup> This deters volunteers from performing gratuitous work in the future, injuring NFPOs’ capacity to provide services as a consequence.<sup>124</sup> Indeed, ‘[r]igid’ organisational processes have ‘adversely impacted [the] recruitment and retention’ of volunteers<sup>125</sup> — volunteers’ experiences have been rendered ‘too much like paid work’<sup>126</sup> and contrary to their beliefs as to what their respective organisations ‘really stand for’.<sup>127</sup>

### C The Performance of Substantially Similar Work as Employees

The engagement by NFPOs of paid workers is commonplace.<sup>128</sup> This is especially so in relation to executive and directorial positions, where ‘business-like’ operations have led to the offering of terms of engagement competitive with those available in the for-profit sector.<sup>129</sup> In lower-ranking or subordinate positions, however, many volunteers continue to ‘often perform the same kind of work as employees’.<sup>130</sup>

In law, volunteerism and employment are incongruous, the former being (self-evidently) descriptive of non-obligatory work and the latter having its origins in notions of master and servant.<sup>131</sup> In practice, the line between volunteering and employment may at times become blurred; workers’ experiences and responsibilities

<sup>123</sup> Maier, Meyer and Steinbereithner (n 107) 65.

<sup>124</sup> Heetae Cho, Zi’En Wong and Weisheng Chiu, ‘The Effect of Volunteer Management on Intention to Continue Volunteering: A Mediating Role of Job Satisfaction of Volunteers’ (2020) 10(2) *Sage Open* 1.

<sup>125</sup> Kirstie McAllum, ‘Volunteers as Boundary Workers: Negotiating Tensions Between Volunteerism and Professionalism in Nonprofit Organizations’ (2018) 32(4) *Management Communication Quarterly* 534, 536.

<sup>126</sup> Angela Paine, Nick Ockenden and Joanna Stuart, ‘Volunteers in Hybrid Organizations: A Marginalised Majority?’ in David Billis (ed), *Hybrid Organizations and the Third Sector: Challenges for Practice, Theory and Policy* (Palgrave Macmillan, 2010) 93, 101.

<sup>127</sup> Margaret Tennant, Mike O’Brien and Jackie Sanders, ‘The History of the Non-Profit Sector in New Zealand’ (Working Paper, Committee for the Study of the New Zealand Non-Profit Sector, 2008) 27.

<sup>128</sup> See, eg, *Contribution of the Not-for-Profit Sector* (n 104) 64 (890,000 paid staff in 2006–07, representing 8.5% of total Australian employment); Community Council for Australia, ‘The Value of Working in the Charities Sector’ (Article, 16 June 2022) <<https://communitycouncil.com.au/2022/06/16/the-value-of-working-in-the-charities-sector/>>.

<sup>129</sup> Wen Wang and Roger Seifert, ‘The End of Meaningful Work in Charities? A Case Study of Ethics in Employee Relations’ (2022) 18(1) *Journal of Business Ethics* 1, 2; Margaret Gibelman, ‘What’s All the Fuss about? Executive Salaries in the Nonprofit Sector’ (2008) 24(4) *Administration in Social Work* 59; Peter Frumkin and Elizabeth K Keating, ‘The Price of Doing Good: Executive Compensation in Nonprofit Organisations’ (2010) 29(3) *Policy and Society* 269.

<sup>130</sup> Tsuruda (n 91) 307.

<sup>131</sup> See Stewart et al, *Creighton and Stewart’s Labour Law* (n 17) 10–11.

can be ‘identical or overlapping’.<sup>132</sup> Many volunteers work in a ‘structured or organised way’<sup>133</sup> and remain subject to a ‘striking’ degree of managerial control and supervision.<sup>134</sup> Even where rights to flexible working hours are maintained, volunteers’ ‘need to be reliable’ detracts from the extent to which those rights are exercised.<sup>135</sup> High levels of responsibility and obligation on the part of the worker and pervasive control wielded by the engaging organisation may be incompatible with genuine volunteering.<sup>136</sup> Indeed, they are long-recognised indicia of employment.<sup>137</sup> These circumstances present various challenges to the not-for-profit sector and to those who participate within it.

Where volunteers work interchangeably with paid employees, they often do so while engaged in ‘high-skill tasks’ and as ‘integral’ parts of their organisation.<sup>138</sup> These overlaps create ‘disputes and conflicts’ between paid and unpaid workers.<sup>139</sup> Further, it is trite that workers who perform the same or similar work as one another will be exposed to comparable risks.<sup>140</sup> While employees may have recourse to statutory relief in the event of workplace-related injury or illness, volunteers’ options remain limited.<sup>141</sup> These difficulties are compounding and cyclical. Reliance upon volunteers by NFPOs frequently flows from financial necessity.<sup>142</sup> However, where NFPOs seek to engage volunteers owing to fiscal limitations which have prevented the retention of employees, it is those very limitations which may lead also to reduced or non-existent investment in managerial, wellbeing and occupational health and safety measures.<sup>143</sup>

<sup>132</sup> Teicher and Liang (n 4) 218; Stott (n 24) 40. See also Andrew Stewart et al, ‘The Regulation of Internships: A Comparative Study’ (Working Paper No 240, Employment Policy Department, International Labour Office, 2018) 15 (‘The Regulation of Internships’); Justice Connect, *Employee, Contractor or Volunteer?* (n 14) 4–17.

<sup>133</sup> Stewart and Owens (n 8) 227.

<sup>134</sup> Murray (n 5) 697.

<sup>135</sup> See Stott (n 24) 39–40.

<sup>136</sup> Murray (n 5) 712.

<sup>137</sup> See, eg, *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561, 571–2 (Dixon CJ); *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, 197 (Kiefel CJ, Keane and Edelman JJ) (‘Personnel Contracting’).

<sup>138</sup> See Laurie Mook et al, ‘Individual and Organizational Factors in the Interchangeability of Paid Staff and Volunteers: Perspectives of Volunteers’ (2014) 5(2) *Canadian Journal of Nonprofit and Social Economy Research* 65, 81.

<sup>139</sup> Rocío López-Cabrera et al, ‘Inside “Pandora’s Box” of Solidarity: Conflicts Between Paid Staff and Volunteers in the Non-Profit Sector’ (2020) 11 *Frontiers in Psychology* 1, 3.

<sup>140</sup> Edwin J Boezeman and Naomi Ellemers, ‘Intrinsic Need Satisfaction and the Job Attitudes of Volunteers versus Paid Employees Working in a Charitable Volunteer Organization’ (2009) 82(4) *Journal of Occupational and Organizational Psychology* 897, 901.

<sup>141</sup> Robert Guthrie and Lisa Goldacre, ‘NFPOs and Workers’ Compensation’ (2011) 13 *Legal Issues in Business* 3, 5; Murray (n 5) 696.

<sup>142</sup> Dorothy Williams-Gaston, ‘Unpaid Volunteer Experiences and Perceptions of Workplace Bullying in Nonprofit Organizations: A Qualitative Phenomenological Study’ (PhD Thesis, University of Phoenix, 2023) 21.

<sup>143</sup> See Charities Regulator, *Risk Management for Charities* (Guidance) 4 <<https://www.charitiesregulator.ie/en/guidance/managing-a-charity/charities-governance-code>>.

Volunteers' performance of substantially similar work to their employed counterparts also presents risks to NFPOs. The *FW Act* establishes a suite of benefits and minimum conditions owed to workers who are 'employees' and further provides mechanisms for recovery of losses resulting from unpaid entitlements.<sup>144</sup> Under the expanded definition within the *FW Act*, whether an individual is an 'employee' is 'determined by ascertaining the real substance, practical reality and true nature of the relationship', including recourse 'not only to the terms of the contract governing the relationship', but to 'how the contract is performed in practice'.<sup>145</sup> Put simply, a volunteer performing their role and functions in a manner alike to an employee may lead to them later being classified as one.<sup>146</sup> Written agreements between volunteers and NFPOs which set out the expectations and conditions of a volunteers' engagement may provide to organisations some degree of protection against a finding of employment,<sup>147</sup> but such agreements are not impenetrable. Even under the comparatively restrictive concept of 'employment' at common law — one concerned principally with the terms of a written contract and not the manner in which those terms are performed — a bare designation of an individual as a 'volunteer' 'is not enough'.<sup>148</sup> As the High Court has observed: 'The parties' legitimate freedom to agree upon the rights and duties which constitute their relationship ... does not extend to attaching a "label" to describe their relationship which is inconsistent with the rights and duties otherwise set forth'.<sup>149</sup>

In this context, the potential consequences for NFPOs are vast. A finding of employment may lead to the recovery by an individual of years of employment benefits unaccounted for by the NFPO which engaged them,<sup>150</sup> while an unreasonable misclassification of a volunteer's status may result in the imposition on an NFPO of sizeable pecuniary penalties despite any honest intentions.<sup>151</sup>

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<sup>144</sup> *FW Act* (n 79) s 44, pt 4-1.

<sup>145</sup> *Ibid* s 15AA (emphasis added).

<sup>146</sup> See *ibid* s 15AA(2). See also *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 29 (Mason J) ('*Stevens*'); *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 33 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) ('*Hollis*'). Cf *Personnel Contracting* (n 138) 186 [42]–[43] (Kiefel CJ, Keane and Edelman JJ); *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254, 260–1 [6]–[9] (Kiefel CJ, Keane and Edelman JJ); *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 352 (Mason J) ('*Codelfa*').

<sup>147</sup> See *Rev Hedley Wycliff Atunaisa Fihaki v Uniting Church in Australia, Qld Synod* [2023] FWC 1650 (finding of employment denied on the basis that the Letter of Call issued to, and agreed by, a clergyman disavowed that the relationship was one of employment).

<sup>148</sup> Ryan P Portugal, 'Nonprofits and Volunteers: Understanding the Risks' (Practice Note, Williams Parker, December 2018) 29.

<sup>149</sup> *Personnel Contracting* (n 137) 193 (Kiefel CJ, Keane and Edelman JJ). See also Justice Connect, *Employee, Contractor or Volunteer?* (n 14) 13.

<sup>150</sup> See *Pagoda v Wesley College* [2007] WAIRComm 175, [13] (Tarr IM) ('*Pagoda*').

<sup>151</sup> See *FW Act* (n 79) ss 357–60, pt 4-1.

## IV METHODOLOGY

### A Justification

Volunteerism is indispensable to the effective operation of the Australian not-for-profit sector. The complications within volunteers' working arrangements affect volunteers, NFPOs, and the beneficiaries of NFPOs' services. These complications are exacerbated by uncertainty surrounding the legal status of volunteers. As previously outlined, a volunteer's rights and entitlements as against the NFPO for whom they work will often turn on whether the relationship is contractual. The nature and scope of NFPOs' obligations under labour laws will, likewise, depend upon the extent to which its relations with volunteers are legally binding.<sup>152</sup> In many instances, uncertainty as to the existence of contracts between an NFPO and its volunteers is capable of exposing all parties to complex and costly litigation. Consequently, '[u]nderstanding the legal differences between volunteers, employees or independent contractors is crucial'.<sup>153</sup>

### B Research Method

For the purposes of Parts V–VII, a review of case law was undertaken. The outcome of that review was the compilation of 102 decisions identified as being relevant to the issue of decision-makers' approaches to the legal classification of volunteers.<sup>154</sup> The decisions sought to be identified were those which (i) involved disputes as to whether an individual's performance of services for a NFPO was undertaken pursuant to a contract; and (ii) surveyed, expressly or impliedly, contract formation as it concerns parties' intention to create legal relations. The 102 cases were sourced from a variety of online legal databases<sup>155</sup> and located through searches for decisions which included one or more pertinent terms or phrases.<sup>156</sup> The search was principally directed at decisions rendered subsequent

<sup>152</sup> See, eg, *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ss 3 (definition of 'worker'), 11–12; *Occupational Health and Safety Act 2004* (Vic) ss 5 (definition of 'worker'), 21–3.

<sup>153</sup> Justice Connect *National Volunteer Guide: Covering Key Legal Obligations Organisations Owe Its Volunteers* (Guide, October 2018) 11.

<sup>154</sup> The list of decisions and other relevant materials is available from the author on request.

<sup>155</sup> Austlii, Jade.io, CCH, LexisNexis, Westlaw, and the Fair Work Commission's 'document search' database: see 'Document Search', *Fair Work Commission* (Web Page) <<https://www.fwc.gov.au/document-search?search-ui=decisions>>.

<sup>156</sup> At the outset, these terms were (or were variations of) 'intention'; 'Ermogenous'; 'volunteer'; 'charity'; 'NFP'. Once decisions were identified as relevant, they were added to a spreadsheet maintained for the purpose of compiling information for this article. As the database of relevant decisions was developed, searches for cases which referenced those decisions were undertaken. Also undertaken were searches of terms which appeared frequently in decisions which discussed volunteers and the intention requirement. Examples of those terms are 'love', 'altruism', 'ex gratia', 'gratuitous', and 'honorarium'.

to the High Court's 7 March 2002 judgment in *Ermogenous*. Searches of decisions which preceded this judgment were also conducted, with a view of establishing points of comparison for the law of mutual intention as it has stood since *Ermogenous*. The search was not limited by jurisdiction, though greater attention was given to Australian decisions. Of the 102 cases, 94 were from Australia, seven were from the UK and one was from New Zealand.

Many of the 102 cases were determined in industrial tribunals, such as the Fair Work Commission ('FWC'). These decisions often concerned the FW Act's unfair dismissal regime, the protection of which turns on a positive finding that the applicant was an 'employee'.<sup>157</sup> Other decisions related to workers' compensation disputes, where a want of 'employee' status will generally deny relief to an injured claimant.<sup>158</sup> Ten of the 102 decisions concerned members of a clergy,<sup>159</sup> though many other judgments of a similar kind were identified in the course of the case law review. Disputes of this type are distinctive and frequently involve the invocation of complex canonical doctrine.<sup>160</sup> The decisions which focused most directly on the application of *Ermogenous* and conventional contract formation principles were preserved in the 102-decision sample; those which relied more extensively on principles concerned with theological and related matters were omitted.

### C A Note on Consideration

This article is not concerned with the principles of consideration. Those principles dictate that, to sustain an action on a contractual promise made by the defendant, the plaintiff must show that the defendant's promise upon which the plaintiff is suing (i) is part of a bargain to which the plaintiff contributed, and (ii) was offered in return for an act done or counter-promise made by the plaintiff.<sup>161</sup> Mutual intention and consideration are closely related.<sup>162</sup> Some have contemplated the

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<sup>157</sup> FW Act (n 79) s 386(1)(a).

<sup>158</sup> See, eg, *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ss 3 (definition of 'worker'), 11.

<sup>159</sup> The term 'clergy' is used in the sense stated in the Cambridge English dictionary, that is, 'religious leaders, especially Christian priests, ministers, etc': see *Cambridge Advanced Learner's Dictionary* (Cambridge University Press, 4<sup>th</sup> ed, 2013) 'clergy' (def 1). By way of example, this definition captures individuals such as the Archbishop in *Ermogenous* (n 11) and the priest in *Threadgill v Corporation of the Synod of the Diocese of Brisbane* [2014] FWC 6277 ('*Threadgill*'), but not the Christian youth worker in *Teen Ranch* (n 15) or the teacher in *Redeemer Baptist School Ltd v Glossop* [2006] NSWSC 1201 ('*Redeemer*').

<sup>160</sup> See, eg, Barry Phillips, 'The Status of Clergy of the Anglican Church of Australia: Employees or Office Holders?' (LLM Thesis, University of Melbourne, 1997); *Threadgill* (n 159) [18]–[23] (Booth C).

<sup>161</sup> NC Seddon and RA Bigwood, *Cheshire and Fifoot Law of Contract: Australian Edition* (12<sup>th</sup> ed, LexisNexis, 2023) 184.

<sup>162</sup> See Murray (n 5).

subsuming of the latter by the former<sup>163</sup> and others have argued for the opposite.<sup>164</sup> The proposition that requirements of intention and consideration are interconnected applies with force in a volunteering context.<sup>165</sup> In brief: (i) almost universal within volunteering arrangements is the conferral by the volunteer of a benefit more valuable than the benefit (if any) provided to them by their counterparty; and (ii) the enquiry into the issue of intention demands that regard be ‘had to the consideration for the promises in question’.<sup>166</sup> Consequently, where decision-makers encounter the furnishing by a volunteer of sufficient but inadequate<sup>167</sup> consideration, the fact of the inadequacy may be relied on to negate a finding of mutual intention.<sup>168</sup>

Nevertheless, although the rules as to consideration may frequently ‘supply the answer as to whether parties intend to enter into a legally binding bargain’,<sup>169</sup> it is ‘now clear’ following *Ermogenous* that each is a ‘separate matter entirely going to the existence of an enforceable contract’.<sup>170</sup> The respective requirements — however redundant their concurrent existence may be<sup>171</sup> — are underpinned by separate rationales and separate rules of application.<sup>172</sup> This work could not accommodate a robust exploration of each; an examination of the principles of consideration and their operation in volunteering contexts was thus omitted.

## V THE ‘SOCIAL PRESUMPTION’ AND THE MISAPPLICATION OF *ERMOGENOUS*

### A *Ermogenous v Greek Orthodox Community of SA Inc*

Spyridon Ermogenous was, for more than 20 years from March 1970, the Archbishop of the Autocephalous Greek Orthodox Church in Australia. On 12 December 1993, Ermogenous resigned from his position with immediate effect. In

<sup>163</sup> Liao (n 12) 83–4. See also Mindy Chen-Wishart, ‘Consideration and Serious Intention’ [2009] *Singapore Journal of Legal Studies* 434.

<sup>164</sup> J Unger, ‘Intent to Create Legal Relations, Mutuality and Consideration’ (1956) 19(1) *Modern Law Review* 96. See Seddon and Bigwood (n 161) 230–1.

<sup>165</sup> See Murray (n 5); Anna Chapman, ‘Australian Anti-Discrimination Law, Work, Care and Family’ (Working Paper No 51, Centre for Employment & Labour Relations Law, The University of Melbourne, January 2012) 12.

<sup>166</sup> *Price v Southern Cross Television (TNT9) Pty Ltd* [2014] TASSC 70, [51] (Porter J); *Darmanin v Cowan* [2010] NSWSC 1118, [213] (Ward J). See *Thomas v Hollier* (1984) 156 CLR 152.

<sup>167</sup> As to the distinction between insufficient consideration and inadequate consideration, see Seddon and Bigwood (n 161) 191–2.

<sup>168</sup> One such example is *Lake v Wildwalks* [2024] FWC 1344 (‘*Wildwalks*’), where a lack of fiscal interests, despite the recognition of ‘altruistic benefits’, contributed to the FWC’s rejection of the existence of an intention to create legal relations: see at [52], [55] (Yilmaz C).

<sup>169</sup> *Atco Controls Pty Ltd (in liq) v Newtronics Pty Ltd (Receivers and Managers Appointed) (in liq)* (2009) 25 VR 411, 428 [60] (Warren CJ, Nettle and Mandie JJA) (‘*Atco Controls*’).

<sup>170</sup> *Renahan v Leeuwin Ocean Adventure Foundation Ltd* [2006] NTSC 4, [63] (Mildren J).

<sup>171</sup> See Seddon and Bigwood (n 161) 230–1.

<sup>172</sup> See *Atco Controls* (n 169) 428 [60] (Warren CJ, Nettle and Mandie JJA).

September 1994, Ermogenous brought proceedings in the South Australian Industrial Relations Court ('SAIRC') against the Church. Ermogenous claimed a pro rata payment in lieu of accumulated annual leave and a pro rata payment for accumulated long service leave, calculated in both cases to the date he ceased to be Archbishop.<sup>173</sup> The foundation of both claims was that Ermogenous' work as Archbishop was work performed as an 'employee', a status which would trigger Ermogenous' entitlement to the sums under statute. The Church, having at all times approached the Archbishop's engagement on the basis that it was non-contractual, had not provided to Ermogenous annual or long service leave or payment in lieu of either.

At first instance, Cunningham IM concluded that Ermogenous was an employee of the Church and fixed the Church's liability in respect of the annual and long service leave claims at \$34,662.15, together with interest.<sup>174</sup> An appeal to a single judge of the SAIRC bore no fruit for the Church,<sup>175</sup> and the Church's subsequent appeal against that decision was dismissed by a Full Court of the SAIRC.<sup>176</sup> The Church again sought to appeal, this time to the Full Court of the Supreme Court of South Australia. That Court, by majority, allowed the Church's appeal, set aside the order of the Full Court of the SAIRC, and in effect substituted an order that the Archbishop's claim be dismissed.<sup>177</sup>

Central to the decision of the Supreme Court was its conclusion that the relations between Ermogenous and the Church were not contractual. Doyle CJ and Bleby J reasoned that those relations lacked a mutual, objective intention to enter into a legal relationship, and that, as there was no *contract*, there could be no *contract of employment*. Doyle CJ noted that, 'in the case of a Minister of religion', the 'starting point' is that 'usually there is no intention to enter into a contractual relationship',<sup>178</sup> while Bleby J referred to the 'usual non-contractual status of a priest or minister' and the fact that, in such cases, 'intention cannot be presumed' and 'will have to be proved'.<sup>179</sup>

By special leave, Ermogenous appealed the decision to the High Court of Australia. The High Court unanimously found that the Archbishop's work for the Church was, contrary to the conclusions of Doyle CJ and Bleby J, underpinned by a contract. The matter was remitted to the Supreme Court for further hearing and determination conformably with the reasons of the High Court. On 26 November 2002, a single judge of the Supreme Court found Ermogenous to have been an

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<sup>173</sup> *Greek Orthodox Community of SA Inc v Ermogenous* (2000) 77 SASR 523, 535 [54] (Bleby J) ('*Ermogenous SCFC*').

<sup>174</sup> *Ermogenous v Greek Orthodox Community of SA Inc* (1997) 64 SAIR 622.

<sup>175</sup> *Greek Orthodox Community of SA Inc v Ermogenous* (1998) 85 IR 81.

<sup>176</sup> *Greek Orthodox Community of SA Inc v Ermogenous* (1999) 89 IR 188.

<sup>177</sup> *Ermogenous SCFC* (n 173) 524 [1] (Doyle CJ), 591 [276] (Bleby J). See also *Ermogenous* (n 11) 97 [2].

<sup>178</sup> *Ermogenous SCFC* (n 173) 524-5 [4]-[5].

<sup>179</sup> *Ibid* 575-6 [207].

‘employee’ of the Church and restored the orders of Cunningham IM.<sup>180</sup> No doubt to the relief of the South Australian judiciary, the Church made no further appeal.

In *Ermogenous*, the High Court ruled that the bare fact that the two parties to an alleged contract are a charitable organisation and a person who performed services for it will not ground a presumption against a common intention to create legal relations.<sup>181</sup> Common intention is instead to be determined objectively and by reference to the content and context of the agreement, and the conduct of and relations between the parties.<sup>182</sup> Notwithstanding the ‘self-eviden[t]’ fact that the relationship between the Archbishop and the Church was, ‘at its root, concerned with matters spiritual’, it ‘by no means’ followed that it was ‘impossible’ that it was a relationship governed by contract.<sup>183</sup> ‘To say that a minister of religion serves God and those to whom he or she ministers may be right, but that is a description of the minister’s spiritual duties. It leaves open the possibility that the minister has been engaged to do this under a contract of employment.’<sup>184</sup>

*Ermogenous* made ‘clear’ that rebuttable presumptions of the kind deployed in previous decisions concerning NFPOs<sup>185</sup> are ill-adept to assist in identifying parties’ common intention.<sup>186</sup> As will be shown, a range of decisions involving volunteers disclose a misapplication of these principles.

## B The Case Law: The Social Presumption

### 1 Bergman

In *Bergman v Broken Hill Musicians Club Ltd* (‘*Bergman*’)<sup>187</sup> the respondent, a not-for-profit entity, objected to the applicant’s unfair dismissal application on the basis that the applicant performed bingo calling work on a ‘voluntary’ basis and was thus not an ‘employee’.<sup>188</sup> At issue was the parties’ intention to create legal relations.<sup>189</sup> The FWC commenced an evaluation of common intention by remarking that the ‘usual motivation’ for volunteer work, ‘by its definition’, is ‘altruism rather than private gain or material advantage’.<sup>190</sup> The applicant’s circumstances were then assessed by reference to imputed — and at all times, contested —

<sup>180</sup> *Greek Orthodox Community of SA Inc v Ermogenous* [2002] SASC 384.

<sup>181</sup> *Ermogenous* (n 11) 106 [27] (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>182</sup> See generally *ibid* 105–13 [24]–[46].

<sup>183</sup> *Ibid* 110 [37].

<sup>184</sup> *Ibid* 110 [38].

<sup>185</sup> See, eg, *Ermogenous SCFC* (n 173) 575–6 [207] (Bleby J).

<sup>186</sup> *Woldeyohannes v Zion Church in Melbourne Australia Inc* [2020] FWC 4194, [56] (Colman DP) (‘*Zion Church*’); *O’Donnell v The Trustees of the Roman Catholic Church for the Diocese of Wilcannia-Forbes* [2024] FWC 1223, [50] (Easton DP) (‘*O’Donnell*’).

<sup>187</sup> *Bergman* (n 15).

<sup>188</sup> *Ibid* [8] (Steel C).

<sup>189</sup> *Ibid* [9].

<sup>190</sup> *Ibid* [42] (emphasis added).

notions of volunteerism.<sup>191</sup> First, it must be questioned whether an overarching ‘usual’ motivation for engaging in voluntary work is capable of identification.<sup>192</sup> Even if it is, there exists serious doubt as to whether it *should* be deployed as the foundation of legal analysis — references to ‘the usual non-contractual status’ of a given arrangement corrupt the inquiry.<sup>193</sup> Second, the Commission’s approach in any event appears misguided; the question is not whether there is a volunteering relationship, but whether there is a legal relationship.<sup>194</sup> This distinction is significant — volunteerism and common law contracting are not mutually exclusive.<sup>195</sup> Many NFPOs engage individuals under binding ‘volunteer agreements’.<sup>196</sup> Further, even where the totality of the dealings between an NFPO and its volunteer are not contractual, that does not deny a conclusion that components of the arrangement do give rise to legal obligations.<sup>197</sup> Within the FWC’s examination of common intention through the lens of a purported ‘definition’ of ‘volunteer work’,<sup>198</sup> attention was directed away from the ‘basic and important’ proposition that the applicant bore the onus in establishing the existence of the contract,<sup>199</sup> and towards preconceived notions of the motivations which were said to underlie work within not-for-profit organisations. In substance, the FWC applied the kind of presumption the invocation of which was rejected in *Ermogenous*. It appears that the applicant was not only required to prove the existence of legally binding terms, but also to *disprove* the existence of a volunteering relationship.

## 2 Wildwalks

In *Lake v Wildwalks* (*Wildwalks*),<sup>200</sup> following a preliminary observation that ‘[v]olunteers are not captured by the protections for unfair dismissal’, the FWC concluded that the applicant ‘was a volunteer consistent with the definition’ in the Macquarie Dictionary.<sup>201</sup> It was held that the competing factors did ‘*not change* the legal status of volunteer’, and that common intention could not be shown.<sup>202</sup> First, and alike to *Bergman*, the decision in *Wildwalks* inappropriately accepted as fact that volunteering is incompatible with common law contracting and resolved parties’ issues on that basis. As discussed previously, whether or not some

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<sup>191</sup> Ibid [36], [43]–[45].

<sup>192</sup> See *Key Volunteering Statistics* (n 58) 21.

<sup>193</sup> *Ermogenous* (n 11) 106 [27] (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>194</sup> See generally ibid 105–7 [24]–[28].

<sup>195</sup> Murray (n 5) 711.

<sup>196</sup> See, eg, Justice Connect, ‘Sample Volunteer Agreement’ (n 78).

<sup>197</sup> *Ermogenous* (n 11) 110 [37]–[38] (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>198</sup> *Bergman* (n 15) [42] (Steel C).

<sup>199</sup> See *Ermogenous* (n 11) 106 [26] (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>200</sup> *Wildwalks* (n 168).

<sup>201</sup> Ibid [40], [55]–[59] (Yilmaz C).

<sup>202</sup> Ibid [55]–[59] (emphasis added).

elements of an individual's relationship with an organisation may be described as 'voluntary' is non-determinative. Second, alike to *Bergman* and in contradiction of the majority's ruling in *Ermogenous*, the inquiry in *Wildwalks* was directed not towards the existence of legal relations between the parties in question, but to the 'legal status' of volunteers — a 'status' derived from a dictionary and not supported by judicial authority. On the basis of *Ermogenous*, the applicant could not have been obliged to adduce evidence sufficient to wholly 'change' in the perception of the Commission their purported status as a volunteer. The applicant could be required only to produce evidence sufficient to satisfy the Commission of the existence of a common intention to create legal relations. As the Full Bench of the FWC has observed, unfair dismissal applications involving NFPOs must be assessed 'like any other case'.<sup>203</sup> Contrary to the principles set out by the Full Bench and in *Ermogenous*, the FWC appears to have applied the very kind of erroneous 'rul[e] intended to prescribe the kinds of cases' in which common intention 'should, or should not, be found to exist'.<sup>204</sup>

### 3 The Rule in *Cameron v Hogan*

Also of concern is decision-makers' readiness to follow authorities that preceded *Ermogenous* and which may be in conflict with it. In *Cameron v Hogan* ('*Hogan*'),<sup>205</sup> decided in 1934, a majority of the High Court ruled in respect of 'voluntary associations' that 'unless there were *some clear positive indication* that the members contemplated the creation of legal relations inter se, the rules adopted for their governance would not be treated as amounting to an enforceable contract'.<sup>206</sup>

*Ermogenous* 'mark[ed] a new approach' to evaluating common intention.<sup>207</sup> The enduring precedential value of *Hogan* has been questioned academically<sup>208</sup> and judicially.<sup>209</sup> Seven years prior to *Ermogenous*, the New South Wales Court of Appeal ('NSWCA') observed that *Hogan* 'in some respects merits reconsideration by the High Court'.<sup>210</sup> Five years subsequent to *Ermogenous*, Palmer J considered it 'fair to say that in the 73 years since it was decided, *Cameron v Hogan* has been seen as increasingly difficult to reconcile with the needs of contemporary society'.<sup>211</sup> Where *Hogan* is applied by contemporary courts, it is often done with caution.<sup>212</sup>

<sup>203</sup> *Church Of Ubuntu v Lainie Chait* [2023] FWCFB 20, [43] (Captanzariti VP, Cross DP and Ryan C).

<sup>204</sup> *Ermogenous* (n 11) 105 [25] (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>205</sup> (1934) 51 CLR 358 ('*Hogan*').

<sup>206</sup> *Ibid* 370 (Rich, Dixon, Evatt and McTiernan JJ) (emphasis added).

<sup>207</sup> Murray (n 5) 708.

<sup>208</sup> Robert Tong, 'Judicial Intervention in the Affairs of Unincorporated Religious Associations in New South Wales' (PhD Thesis, Queensland University of Technology, 2012) 213–14.

<sup>209</sup> See *Coleman v Liberal Party of Australia (New South Wales Division)* [No 2] (2007) 212 FLR 271, 278 (Palmer J) ('*Coleman*').

<sup>210</sup> *Teen Ranch* (n 15) 310 (Handley JA).

<sup>211</sup> *Coleman* (n 209) 278 (Palmer J).

<sup>212</sup> See, eg, *Anglican Development Fund Diocese of Bathurst v Palmer* [2015] NSWSC 1856, [228] (Hammerschlag J).

The High Court did not consider the correctness of *Hogan* in *Ermogenous* and has not done so since. However, *Hogan*'s conflict with *Ermogenous* is manifest insofar as the legal characterisation of volunteers is concerned. To require in disputes involving voluntary associations 'some clear positive indication' of common intention is to engage in 'unwarranted assumptions' as to the 'usual' or 'general' practices of such associations; following *Ermogenous*, '[n]o such assumptions can be made'.<sup>213</sup> Notwithstanding this, *Hogan* continues to be referenced within workplace actions involving volunteers which are both decided post-*Ermogenous* and not confined only to the contractual status of the rules of voluntary associations.<sup>214</sup> In *Dickinson v The Tropical Fruits Inc* ('*Dickinson*')<sup>215</sup> Roche DP, having made no reference to *Ermogenous*, relied on *Hogan* in finding that the 'volunteer' applicant could not show 'some clear positive indication' of an intention to create legal relations.<sup>216</sup> Similar reasoning was deployed by the Federal Court of Australia in *Shahid v The Australasian College of Dermatologists* ('*Shahid*').<sup>217</sup> Even if *Hogan* is taken to have survived *Ermogenous*, its reference in both *Dickinson* and *Shahid* may well have been made in error. Each of the respondents were incorporated and their rules binding in law by virtue of statute; South Australian Supreme Court authority suggests that they would thus not be 'voluntary associations' to which the principles in *Hogan* would apply.<sup>218</sup>

### C Critique: Inflexibility and Misdirection

These critiques do not intend to suggest that an examination of the contexts and ideologies surrounding volunteers' work for NFPOs is inappropriate for the purpose of identifying common intention. Decision-makers consistently incorporate these elements in evaluating parties' objective intention<sup>219</sup> and they do not err merely by doing so.<sup>220</sup> Neglecting these considerations would be to diverge from the principles in *Ermogenous*; they go to the 'status of the parties' and their 'relationship to one another'.<sup>221</sup> Rather, the difficulty with these decisions rests in their reliance upon fixed rules or misdirected inquiries of the kind cautioned

<sup>213</sup> *Ermogenous* (n 11) 106–7 [28] (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>214</sup> See, eg, *Redeemer* (n 159) [87] (Nicholas J).

<sup>215</sup> *Dickinson* (n 86).

<sup>216</sup> *Ibid* [39] (Roche DP).

<sup>217</sup> *Shahid v The Australasian College of Dermatologists* [2007] FCA 693, [312] (Nicholson J) ('*Shahid*').

<sup>218</sup> See *Popovic v Tanasijevic* [2001] SASC 289, [46] (Williams J, Doyle CJ agreeing at [1], Martin J agreeing at [63]); *Johncock v Port Lincoln Football League Inc* [2013] SASC 143, [26] (Sulan J). See also *Dixon v Esperance Bay Turf Club Inc* [2002] WASC 110, [94] (Roberts-Smith J).

<sup>219</sup> See, eg, *Southern Cross Community Healthcare Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1317, [245] (Emmett AJA); *Below v The Salvation Army New Zealand Trust* [2017] NZEmpC 87, [132] (Corkill J) ('*Below*'); *Hobbs v The Salvation Army* [2024] FWC 159, [66], [68] (Bell DP) ('*Hobbs*'); *Redeemer* (n 159) [86] (Nicholas J); *O'Donnell* (n 186) [55] (Easton DP); *Threadgill* (n 159) [24] (Booth C).

<sup>220</sup> See *Ermogenous* (n 11) 105 [25] (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>221</sup> See *Zion Church* (n 186) [56] (Colman DP).

against by the High Court. Volunteer work can occur in and take its structure from a ‘full range’ of ‘institutional settings’ and ‘temporary arrangements and patterns’.<sup>222</sup> The motivations which underpin working arrangements within NFPs are various.<sup>223</sup> The importation of broad-brushed motives, beliefs and inclinations upon diverse parties whose lone commonality is participation within the not-for-profit sector represents a departure from authority laid down by the majority in *Ermogenous*.

## VI ‘SPIRITUALISM’, ‘ALTRUISM’ AND LEGAL RELATIONSHIPS

### A *Spiritual and Legal Coexistence*

Decisions concerning volunteers have often hedged analysis of common intention upon notions of ‘altruism’ and spiritualistic motivations.<sup>224</sup> The reasoning of these cases is replicative of the principles adopted within other common law jurisdictions internationally.<sup>225</sup> It is now recognised in Australian law that individuals may have ‘spiritual motivations as well as secular intentions’.<sup>226</sup> They may serve an organisation ‘both physically and spiritually’ and there exists ‘no reason why there cannot be two dimensions to a relationship, or simply two kinds of relationship’.<sup>227</sup> Indeed, commonplace in contemporary decisions are acknowledgements that spiritual, altruistic and legal intentions may coexist,<sup>228</sup> a fact that is now ‘undeniable’.<sup>229</sup> Of course, the possibility of coexistence is not determinative of its presence: ‘[T]he fact that water *can* be poured into the jar [of sand] and sit comfortably next to the sand does not mean the parties objectively intended it to do so.’<sup>230</sup>

Rather, the central inquiry must always focus upon whether there ‘*are* aspects of [the] relationship which may give rise to legally enforceable rights and duties’.<sup>231</sup>

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<sup>222</sup> Murray (n 5) 700.

<sup>223</sup> Arthur Stukas and Sarah Wilson, ‘Understanding Motivations to Volunteer’ (Research Paper, Volunteering Australia, September 2022) 4–5.

<sup>224</sup> See *Teen Ranch* (n 15) 308 (Mahoney JA); *Cudgegong Soaring Pty Ltd v Harris* (1996) 13 NSWCCR 92, 102 (Neilson J) (‘*Cudgegong Soaring*’); *Morris v Anglican Community Services* [2000] SAIRC 6, [78] (Hardy JM) (‘*Morris*’).

<sup>225</sup> See, eg, *Below* (n 219) [91], [132] (Corkill J); *Davies* (n 7) 329 (Lord Templeman). See also *Re Employment of Ministers of the United Methodist Church*, *Scottish Insurance Commissioners v Church of Scotland* 1914, SC 16; *Rogers v Booth* [1937] 2 All ER 751; *Diocese of Southwark v Coker* [1998] ICR 140; *McCaw v United Church of Canada* (1988) 51 DLR (4th) 86.

<sup>226</sup> *Zion Church* (n 186) [47] (Colman DP).

<sup>227</sup> *Ibid* [46], [47].

<sup>228</sup> See, eg, *Ermogenous* (n 11) 110 [37]–[38] (Gaudron, McHugh, Hayne and Callinan JJ); *Davies* (n 7) 329 (Lord Templeman); *Hobbs* (n 219) [65] (Bell DP); *O’Donnell* (n 186) [50] (Easton DP); *Zion Church* (n 186) [46] (Colman DP).

<sup>229</sup> *Hobbs* (n 219) [65] (Bell DP).

<sup>230</sup> *Ibid* [69] (emphasis in original).

<sup>231</sup> *Ermogenous* (n 11) 110 [38] (Gaudron, McHugh, Hayne and Callinan JJ) (emphasis in original).

## B The Case Law: Reliance on Love and Related Values

### 1 Pre-Ermogenous

A series of decisions which preceded *Ermogenous* considered notions of love and related values in determining parties' common intention. The decision of the Supreme Court that was the subject of the *Ermogenous* High Court appeal made reference to the 'spiritual' nature of the Archbishop's position.<sup>232</sup> The NSWCA in *Teen Ranch v Brown Pty Ltd* ('*Teen Ranch*')<sup>233</sup> considered that a young community worker's intention was not of a legal character, but rather to advance their 'involvement with Christian youth'.<sup>234</sup> Judge Lunn in *Gibbs v Christies Beach Sports & Social Club Inc*<sup>235</sup> determined that the applicant's contributions toward communal bingo competitions were motivated 'not from any legal obligation, but from love'.<sup>236</sup> An opposite result was reached in *Cudgegong Soaring Pty Ltd v Harris* ('*Cudgegong Soaring*')<sup>237</sup> where the applicant's work was not 'spiritual' but 'done to secure a necessity of life: shelter'.<sup>238</sup> Similarly, two NFPO workers were found to be employees where they were subject to extensive supervision and direction in *Morris v Anglican Community Services* ('*Morris*').<sup>239</sup> An example of a thorough approach to dealing with extra-legal intentions is found in *Hills v Duncombe*.<sup>240</sup> Neilson J acknowledged that the applicant was motivated by 'friendship' and 'fraternal love'; a comparison was made to *Cudgegong Soaring* in this respect.<sup>241</sup> However, Neilson J also found that the respondent had 'financial obligations to meet' and that the dealings were to the respondent's 'financial benefit'.<sup>242</sup> There may have been 'love', but 'clearly it was in the financial interests' of all parties that the arrangement be made.<sup>243</sup>

### 2 Post-Ermogenous

The case law is replete with examples of priests, clergy and similar figures being denied relief on the basis that their arrangements with religious institutions were 'governed by the laws and customs of the church'.<sup>244</sup> However, the results of these

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<sup>232</sup> *Ermogenous SCFC* (n 173) 234 (Bleby J).

<sup>233</sup> *Teen Ranch* (n 15).

<sup>234</sup> *Ibid* 308 (Mahoney JA).

<sup>235</sup> [2000] SADC 28 ('*Gibbs*').

<sup>236</sup> *Ibid* [15] (Judge Lunn).

<sup>237</sup> *Cudgegong Soaring* (n 224).

<sup>238</sup> *Ibid* 97 (Neilson J).

<sup>239</sup> *Morris* (n 224) [78] (Hardy IM).

<sup>240</sup> *Hills v Duncombe* [2001] NSWCC 172.

<sup>241</sup> *Ibid* 172 [43] (Neilson J).

<sup>242</sup> *Ibid* 172 [44]–[45].

<sup>243</sup> *Ibid* 172 [44].

<sup>244</sup> See, eg, *O'Donnell* (n 186) [54] (Easton DP); *Threadgill* (n 159) [24] (Booth C).

cases have proven inconsistent.<sup>245</sup> Otherwise than in relation to religious figures, pervasive managerial control sufficed to deny a community school's contention that two teachers were non-contractual volunteers in *Nguyen v Vietnamese Community in Australia South Australia Chapter Inc* ('Nguyen').<sup>246</sup> As a result of *Ermogenous*, it has been said that modern arguments as to an applicant's purported altruistic motivations are 'fraught with difficulty'.<sup>247</sup> However, a review of case law illustrates that many persons who perform services for NFPOs continue to be 'held to do so for love'.<sup>248</sup>

In *Dowton v The Salvation Army*,<sup>249</sup> the applicant was denied 'employee' status partly on the basis of the 'spiritual guidance' which he sought to receive.<sup>250</sup> A similar result was reached in *Mifsud v Fire and Rescue NSW Band Inc*;<sup>251</sup> the applicant's 'love for music and performance' and community sufficed to negate an intention to create legal relations.<sup>252</sup> An applicant's 'spiritual' intent and religious 'calling' led to the refusal of their unfair dismissal claim in *Hobbs v The Salvation Army*.<sup>253</sup> Teachers' purported intention to 'effect a calling to serve God' was fatal to their arguments in *Redeemer Baptist School Ltd v Glossop*.<sup>254</sup> *Wildwalks* was decided in favour of the respondent due to the 'altruistic benefits' and purposes said to have underpinned the arrangement.<sup>255</sup> A youth worker's relationship with a not-for-profit in *Campione v The Scout Association of Australia Queensland Branch*<sup>256</sup> was considered to be 'moral' and not 'legal and formal'.<sup>257</sup> The shared intention found in *Higham v Poulson*<sup>258</sup> was one of 'camaraderie'.<sup>259</sup> In *Riverwood Legion & Community Club Ltd v Morse*,<sup>260</sup> the parties manifested only 'honourable intentions' and not legal ones.<sup>261</sup> A foster carer's motivation to 'give something back' through the performance of services described as 'social' in nature 'pointe[ed] strongly against an intention' to enter legal relations in *Department of*

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<sup>245</sup> See *Zion Church* (n 186) [56] (Colman DP).

<sup>246</sup> [2014] FWC 3574, [11]–[12] (O'Callaghan SDP) ('Nguyen').

<sup>247</sup> Shand (n 86) 14.

<sup>248</sup> See Murray (n 5) 704.

<sup>249</sup> [2003] NSWCCPD 24 ('Dowton').

<sup>250</sup> *Ibid* [21] (Byron DP).

<sup>251</sup> [2024] FWC 853 ('Mifsud').

<sup>252</sup> *Ibid* 853, [61]–[68] (Wright DP).

<sup>253</sup> *Hobbs* (n 219) [66] (Bell DP).

<sup>254</sup> *Redeemer* (n 159) [86] (Nicholas J).

<sup>255</sup> *Wildwalks* (n 168) [50], [55] (Yilmaz C).

<sup>256</sup> [2021] FWC 63 ('Campione').

<sup>257</sup> *Ibid* [42]–[44] (Simpson C).

<sup>258</sup> [2004] NSWCCPD 27 ('Higham').

<sup>259</sup> *Ibid* [43] (Byron DP).

<sup>260</sup> *Riverwood* (n 96).

<sup>261</sup> *Ibid* [40] (Roche DP).

*Family and Community Services v Bee*.<sup>262</sup> In *Application by McDonald*,<sup>263</sup> the ‘community purpose’ of a charitable art society defeated a contractual claim.<sup>264</sup>

### C Individuals’ Motivation for Work

In some respects, critique of these decisions is difficult. Assessed in isolation some may be considered correct, not least where applicants have previously disavowed entry into legal relationships.<sup>265</sup> While the case law does offer ‘bizarre examples’,<sup>266</sup> an examination of the ‘relationship’<sup>267</sup> of the litigants will inevitably lead to the conclusion that, within some settings in the NFP sector, neither party could appropriately be taken to have intended to enter into legally binding agreements. Where this is assessed with adequate regard to the totality of the circumstances<sup>268</sup> it represents a correct application of *Ermogenous*. However, there are evident difficulties with denying contractual rights to a volunteer wholly on the basis of ‘spiritual’, ‘moral’, ‘altruistic’ or other similarly value-laden intentions.

#### 1 Employment Opportunities

It is beyond doubt that altruism is ‘positively associated with the decision to volunteer’.<sup>269</sup> This is not, however, conclusive — unpaid work may be undertaken ‘both to increase employability and as an act of altruism or ethical commitment’.<sup>270</sup> 10.2% of all Australian volunteers claim to have engaged in the sector to acquire work experience.<sup>271</sup> For students, ‘external forces’ facilitate the perception of volunteering as a ‘beneficial activity that improves one’s chances of gainful employment or academic access’.<sup>272</sup> In a ‘difficult graduate market’, students engage in volunteerism due to it being perceived as ‘very helpful for a CV’.<sup>273</sup> It has thus even been argued that these pressures affix an ‘involuntary’ element into

<sup>262</sup> *Secretary, Department of Family and Community Services v Bee* [2014] NSWWCPCD 66, [61], [69] (Roche DP).

<sup>263</sup> *McDonald* (n 16).

<sup>264</sup> *Ibid* [34]–[35] (Hampton C).

<sup>265</sup> See, eg, *O’Donnell* (n 186) [54] (Easton DP); *Hobbs* (n 219) [36] (Bell DP).

<sup>266</sup> *Murray* (n 5) 699.

<sup>267</sup> *Ermogenous* (n 11) 105 [25] (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>268</sup> See, eg, *Hobbs* (n 219) [51]–[69] (Bell DP).

<sup>269</sup> Jeffrey Carpenter and Caitlin Knowles Myers, ‘Why Volunteer? Evidence on the Role of Altruism, Reputation and Incentives’ (Discussion Paper No 3021, Institute for the Study of Labor, September 2007) 13.

<sup>270</sup> Stewart et al, ‘The Regulation of Internships’ (n 132) 15.

<sup>271</sup> *The Volunteer Perspective* (n 20) 35.

<sup>272</sup> Karmjit Sidhu, ‘Charitable Impulses: Motivations, Experiences and Effects of Volunteering’ (MA Thesis, Concordia University, August 2014) 6.

<sup>273</sup> Tasmin K Saxton, ‘Voluntary Work: Gaining Relevant Work Experience and Giving Back to the Community’ in June L Leishman (ed), *Professional Practice in Higher Education Training* (Abertay University Press, 2012) 72, 73.

students' work for NFPOs.<sup>274</sup> This dynamic is not isolated to volunteers themselves. NFPOs actively promote the extent to which volunteering may assist in refining employable skills.<sup>275</sup> Indeed, it has in some settings been found that over half of charities' advertisements for volunteering opportunities emphasise the development of competencies transferable to the private sector.<sup>276</sup> However, these circumstances appear to have been neglected judicially; no decision was identified where the self-interested pursuit of skill development was determinative or even relevant to a positive finding of common intention.

## 2 Other Self-Interests

71.9% of Australian volunteers perform work for personal satisfaction, 33.3% for social contact, and 32.3% to utilise skills and experience.<sup>277</sup> Many hope to 'create a path to a paid job' or acquire some other 'personal recognition'.<sup>278</sup> It appears that these reasons are grounded inherently in self-interest, notwithstanding that the acts which they facilitate produce public benefits. Even if not taken to be aligned entirely with self-interest, these motivations could scarcely be characterised as wholly 'altruistic'. Distinguishing volunteers and paid workers on the basis that the intentions of the former are 'moral in nature, rather than legal'<sup>279</sup> thus presents an 'unappealing dichotomy' which neglects the diversity of purposes for engaging in volunteerism.<sup>280</sup> Indeed, the reasons behind individuals' decisions to engage in particular forms of work are infinite.<sup>281</sup> These reasons are not confined wholly, or even mostly, to the acquisition of legal entitlements. Many employees and other paid workers value interpersonal relationships with colleagues over optimal contractual and remunerative benefits<sup>282</sup> — even lawyers.<sup>283</sup> This does not detract from the presence of concurrent desires to acquire and retain legal entitlements, and in relation to NFPO workers, it does not dispel the injustice in denying the existence of those entitlements. As Murray asks, 'should a volunteer

<sup>274</sup> Mihaela Keleman, Anita Mangan and Susan Moffat, 'More than a "Little Act of Kindness"? Towards a Typology of Volunteering as Unpaid Work' (2017) 51(6) *Sociology* 1239, 1244.

<sup>275</sup> See, eg, Centacare Family Services, *10 Reasons to Become a Volunteer* (Fact Sheet, June 2017) 1.

<sup>276</sup> See Carl Evans and Zatul N Yusof, 'Volunteering: A Viable Alternative Work Experience for University Students?' (2023) 37(1) *Industry and Higher Education* 110, 113.

<sup>277</sup> *The Volunteer Perspective* (n 20) 35.

<sup>278</sup> Hallock (n 20) 13.

<sup>279</sup> *McDonald* (n 16) [32] (Hampton C).

<sup>280</sup> Tsuruda (n 91) 308.

<sup>281</sup> See generally Natal'ya Galliot and Linda J Graham, 'School Based Experiences as Contributors to Career Decision-Making: Findings from a Cross-Sectional Survey of High-School Students' (2015) 42(2) *Australian Educational Researcher* 179.

<sup>282</sup> ADP Research Institute, *People at Work 2024: A Global Workforce View* (Report, 3 June 2024) 9–11.

<sup>283</sup> Queensland Young Lawyers and Peppercorn Recruitment, *Salary and Careers Guide 2023* (Survey, June 2023) 38.

who has worked at a charity shop for 10 years and is suddenly “dismissed” without warning have any legal recourse?<sup>284</sup>

### 3 Safety and Self-Preservation

Also relevant is the performance of volunteering arrangements and the risks inherent within them. Volunteering may entail physical and psychological hazards comparable to those present in traditional workplaces.<sup>285</sup> In the field of employment, such hazards are well-recognised. They justify the imposition of strict occupational health and safety obligations and extensive workers' compensation schemes.<sup>286</sup> No such regulation governs most NFPOs' volunteering arrangements.<sup>287</sup> That being so, the prospect of these risks must bear on the 'subject matter of the agreement' and the relationship between the parties.<sup>288</sup> It has long been acknowledged by the common law that risks of harm to proprietary rights or economic interests is indicative of an objective intention to create legal relations, even in respect of not-for-profit organisations.<sup>289</sup> This phenomenon has been characterised as 'prospective detrimental reliance' — the existence of 'serious' potential consequences may supply evidence sufficient to draw an inference of a mutual intention to contract.<sup>290</sup> It is doubtful that every individual contemplating part-time volunteering would agree to perform gratuitous work if informed that no recourse would be available for injuries suffered in the course of that work which would impair their future prospects of maintaining paid employment. However, a review of case law has not revealed any meaningful attention given to the financial risks associated with workplace injury when evaluating parties' common intention. Even if an individual did not expect to materially gain from volunteering, it must be questioned whether they would freely accept to lose from it.

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<sup>284</sup> Murray (n 5) 698.

<sup>285</sup> Boezeman and Ellemers (n 140) 901.

<sup>286</sup> See, eg, *Occupational Health and Safety Act 2004* (Vic); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic).

<sup>287</sup> See Volunteering Victoria, *Insurance and Liability* (Guide, March 2019) 1.

<sup>288</sup> See *Ermogenous* (n 11) 105 [25] (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>289</sup> *Hogan* (n 205) 370 (Rich, Dixon, Evatt and McTiernan JJ).

<sup>290</sup> Seddon and Bigwood (n 161) 238–9. See *Wakeling v Ripley* (1951) 51 SR (NSW) 183, 187 (Street CJ).

## VII CONTRACT LAW, EMPLOYMENT RELATIONSHIPS AND VOLUNTEERS

### A *The Distinction: Common Law Contracts and Contracts of Employment*

A contract of employment necessarily requires that first, a contract is recognised and, second, that this contract is one of employment.<sup>291</sup> The former is determined through the application of fundamental contract formation principles. The existence of the latter may, depending on context, be governed by statute or the common law and will in many cases require recourse to the infamously broad and uncertain indicia of employment.<sup>292</sup> As Handley JA observed in *Teen Ranch*, an examination of the indicators of an employment relationship ‘cannot assist in determining whether or not there was any contract at all’.<sup>293</sup> This view was followed in *Ermogenous* and remains good law today — an affirmative finding as to the existence of a contract must precede any analysis as to the nature of that contract.<sup>294</sup>

This distinction — and the associated need to distinguish between contractual relations and employment relations — is significant for at least three reasons. First, evidence of post-contractual conduct in respect of common intention is ordinarily admissible only to the extent that it goes to the characterisation of the parties’ dealings at the time of formation.<sup>295</sup> Where contractual terms are expressed comprehensively in a written document, the subsequent conduct of the parties is not, subject to limited exceptions, admissible for the purpose of construction.<sup>296</sup> The criteria for determining employment status — at least under the *FW Act* — is different. Notwithstanding the completeness of any written terms, whether a relationship of employment exists may now involve an assessment of ‘how the contract is performed in practice’.<sup>297</sup> Second, and as a general proposition, relationships of employment are unique.<sup>298</sup> Employment contracts have been identified by Mark Irving KC as the only variety of contract wherein one party

<sup>291</sup> Joanna Howe, Andrew Stewart and Rosemary Owens, ‘Temporary Migrant Labour and Unpaid Work in Australia’ (2018) 40(2) *Sydney Law Review* 183, 187, citing *Ermogenous* (n 11).

<sup>292</sup> See, eg, Jason Taliadoros, Rebecca Tisdale and Jane Kotzmann, ‘Application of Work Health and Safety and Workers’ Compensation Laws to On-Demand Workers in the Gig Economy: The Need for Legal Clarity’ (2021) 42(2) *Adelaide Law Review* 431, 436–40; Irving (n 15) 117.

<sup>293</sup> *Teen Ranch* (n 15) 310 (Handley JA).

<sup>294</sup> *Ermogenous* (n 11) 112–13 [46] (Gaudron, McHugh, Hayne and Callinan JJ). See *Mifsud* (n 251) 853, [68] (DP Wright). See also *Fox v Kangan Batman Tafe* [1999] AIRC 731, [90]–[91] (Giudice P, McIntyre VP and Redmond C); *Carney v Sydney Catholic Schools Ltd* [2022] FWC 2360, [89] (Anderson DP); *BHP Billiton Iron Ore Pty Ltd v CFMEU* [2006] WASC 49, [122]–[126] (Le Miere J).

<sup>295</sup> *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 163–4 (Heydon JA).

<sup>296</sup> *Codelfa* (n 146) 352 (Mason J).

<sup>297</sup> *FW Act* (n 79) s 15AA(2)(b).

<sup>298</sup> Gabrielle Golding, ‘The Distinctiveness of the Employment Contract’ (2019) 32(2) *Australian Journal of Labour Law* 170.

must be a natural person.<sup>299</sup> Their evaluation involves notions of ‘dignity’, ‘self-esteem’ and ‘economic dependence’ and they are both agreed to and performed within a ‘social context’.<sup>300</sup> Different considerations will apply in respect of the law governing contract formation generally. These considerations frequently include commerciality and the advancement of certainty in ‘every-day business transactions’.<sup>301</sup>

Third, and relevantly to NFPOs’ working arrangements, volunteers by the inherent characteristics of their roles will not satisfy many of the ‘indicia’ of employment.<sup>302</sup> Exclusivity of work for the putative employer is one such indicia;<sup>303</sup> the vast majority of volunteers undertake paid work elsewhere concurrently with their voluntary work and almost one-third perform services for more than one NFPO.<sup>304</sup> This fact also militates against another circumstance consistent with an employment relationship — the plying of a ‘profession, trade or distinct calling’ on the part of the worker.<sup>305</sup> An engaging entity’s control over a worker, though not determinative, is the most significant consideration within the test for employment.<sup>306</sup> Many NFPOs wield less pervasive control over the conduct of volunteers than for-profit firms do of their workers.<sup>307</sup> An entity’s deduction of income tax from a worker’s wages or the entity’s payment of those wages periodically is also consistent with employment;<sup>308</sup> most volunteers do not receive wages at all.<sup>309</sup>

Owing to the above it is evident that, in a volunteering context, judicial conflation of the broader law of contract and the factors relevant to determining relationships of employment will produce perverse outcomes — most of which will be adverse to volunteers.<sup>310</sup> Namely, a positive finding as to the existence of a contract may provide to a volunteer, even where correctly found not to be an ‘employee’, rights enforceable at common law or under statute. Absent such a finding — a result made more likely through the misapplication of ‘employment’

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<sup>299</sup> Mark Irving, ‘What is Special about the Employment Contract?’ (Conference Paper, Industrial Relations Society of South Australia Conference, 19 October 2012) 6–7. See also Joelleen Riley, ‘The Future of the Common Law in Employment Regulation’ (2016) 32(1) *International Journal of Comparative Labor Law and Industrial Relations* 33, 40.

<sup>300</sup> *Golding* (n 298) 174.

<sup>301</sup> See *Wilton v Farnworth* (1948) 76 CLR 646, 649 (Latham CJ), affirmed in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 180 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

<sup>302</sup> See Irving (n 15) 116.

<sup>303</sup> See *Personnel Contracting* (n 137) 178, 197 (Kiefel CJ, Keane and Edelman JJ).

<sup>304</sup> *Key Volunteering Statistics* (n 58) 14, 21.

<sup>305</sup> *Stevens* (n 146) 37 (Wilson and Dawson JJ).

<sup>306</sup> *Ibid* 29 (Mason J); *Personnel Contracting* (n 137) 178, 186, 189–91 (Kiefel CJ, Keane and Edelman JJ).

<sup>307</sup> See Tim Vantilborgh et al, ‘Volunteers’ Psychological Contracts: Extending Traditional Views’ (2012) 41(6) *Nonprofit and Voluntary Sector Quarterly* 1072, 1087.

<sup>308</sup> See *Hollis* (n 146) 43–4 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

<sup>309</sup> *Employee, Contractor or Volunteer?* (n 14) 17.

<sup>310</sup> See Murray (n 5) 713.

criteria that is intrinsically unfavourable to many voluntary workers — volunteers will be afforded no relief at all against the organisations which have engaged them.

## **B The Case Law: Conflation of Common Law Contract Formation and Employee Status**

### **1 Nguyen, Morris and Tancred**

In *Nguyen*, the applicants sought relief from unfair dismissal against a South Australia-based Vietnamese community school. The school claimed that the applicants were ‘not employees but were volunteers’.<sup>311</sup> The FWC acknowledged the respondent’s submission that each of the applicants were not, absent an intention to create legal relations, contracted employees.<sup>312</sup> The FWC continued in observing that the requirements necessary for an employment contract have been considered by courts and tribunals ‘on many occasions’ — and then proceeded to engage in no analysis as to the existence of a contract.<sup>313</sup> The matter was instead resolved, in this case in favour of the applicants, by reference to employment indicia: the periodicity of payments, tax deductions and superannuation non-payments, and the control wielded by the school.<sup>314</sup>

In *Morris*, the Court began with the observation that ‘[i]f the applicants were volunteers their claims must fail because there was no contract’.<sup>315</sup> The Court did not then assess contract formation; the analysis commenced with the finding that ‘the applicants were under the direct control’ of their manager.<sup>316</sup> Only after competing indicia were discussed was the existence of a contract examined.<sup>317</sup> In *Tancred v Shallam Pty Ltd*<sup>318</sup> the respondent contended that the applicant performed services ‘gratuitously’ for the respondent and was ‘at all times a volunteer’.<sup>319</sup> Confoundingly, and after referring to *Ermogenous*, the Court recognised a term implied in fact within the applicant’s contract without having concluded upon nor even assessed the existence of that contract.<sup>320</sup> Absent any further evaluation in this regard, the Court determined the applicant’s employment status by reference to employment indicia.<sup>321</sup>

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<sup>311</sup> *Nguyen* (n 246) [3] (O’Callaghan SDP).

<sup>312</sup> *Ibid* [8].

<sup>313</sup> *Ibid* [10]–[12].

<sup>314</sup> *Ibid* [9]–[12].

<sup>315</sup> *Morris* (n 224) [73] (Hardy IM).

<sup>316</sup> *Ibid* [74].

<sup>317</sup> *Ibid* [74]–[80].

<sup>318</sup> [2023] FedCFamC2G 777.

<sup>319</sup> *Ibid* [13] (Judge Baird).

<sup>320</sup> *Ibid* [316], [366].

<sup>321</sup> *Ibid* [384].

## 2 Richards v Conford

In *Richards v Conford*,<sup>322</sup> after canvassing common indicia of employment, the New South Wales District Court stated in reliance on *Teen Ranch* that ‘[w]hen considering whether there is a *contract of service*, the critical question is whether the arrangement between the parties evidences an intention to enter into legal relations’.<sup>323</sup>

Respectfully, this remark mischaracterised *Teen Ranch* wherein the ‘real question’ was, prior to a conclusive ruling as to the existence of a contract, one of formation.<sup>324</sup> Handley JA in that case ruled that the primary judge’s consideration of indicia of employment was inappropriate in circumstances where a binding contract had not been proven.<sup>325</sup> *Teen Ranch* could not be read as proposing that the ‘critical question’ in respect of employment relationships is one of common intention; intention could be no more or less ‘critical’ than any other element necessary for the formation of a contract. The District Court, in ironic conflict with *Teen Ranch*, proceeded to evaluate the existence of a contract and of a relationship of employment concurrently.<sup>326</sup>

## 3 Ashley

In *Ashley v Cyber Computing Recycling & Disposal Pty Ltd*<sup>327</sup> the applicant alleged that they were an ‘employee’ of the respondent as part of an unfair dismissal application.<sup>328</sup> In turn, the respondent claimed that the applicant was at all times a ‘volunteer’.<sup>329</sup> Relevantly, the applicant had received by way of bank transfer ‘approximately \$15,000.00’ from the respondent in the preceding year; this raised uncertainty as to the characterisation of the applicant’s working arrangement.<sup>330</sup> The FWC decided, ‘in light of those somewhat regular payments’, to ‘first examine’ whether the applicant was an employee ‘before considering’ the existence of a contract.<sup>331</sup> It was resolved that the applicant was not an employee, and no express ruling was made as to the existence of the contract.<sup>332</sup> Beyond its unavoidable conflict with *Ermogenous*, this approach presented practical difficulties. While a finding concerning the existence of legal relations was ‘unnecessary’ in the context of the

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<sup>322</sup> *Richards v Cornford* [2009] NSWDC 60 (‘*Richards*’).

<sup>323</sup> *Ibid* [24] (Murrell DCJ) (emphasis added).

<sup>324</sup> *Teen Ranch* (n 15) 310 (Handley JA).

<sup>325</sup> *Ibid*.

<sup>326</sup> See *Richards* (n 322) [26]–[27] (Murrell DCJ).

<sup>327</sup> [2020] FWC 3240 (‘*Ashley*’).

<sup>328</sup> *Ibid* [1]–[4] (Beaumont DP).

<sup>329</sup> *Ibid*.

<sup>330</sup> *Ibid*.

<sup>331</sup> *Ibid* (emphasis added).

<sup>332</sup> *Ibid* [64].

unfair dismissal dispute,<sup>333</sup> absent a ruling as to the contract itself, the parties' respective legal entitlements to the \$15,000 were left uncertain.

### C Critique

In some circumstances, decision-makers' conflation of the principles governing contract formation and those governing employment status will be immaterial. Where the only relevant issue in dispute is whether the individual was in law an 'employee', a ruling as to the mere existence of a contract may be insignificant.<sup>334</sup> That does not, however, displace the error of treating the two inquiries as interchangeable and it is little consolation for a volunteer who was unjustly denied contractual rights owing to their misalignment with the indicia of employment. It has long been observed that decision-makers' attachment to the concept of employment in disputes involving volunteers has deprived those volunteers of the protection of contract law.<sup>335</sup> The 'employee' inquiry relevant for most purposes under the *FW Act* is, as it now stands, not a function of the common law.<sup>336</sup> It is instead a creature of statute, provided for by amendments to the *FW Act* introduced within the *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth). Statutory intervention was guided by policies specific to the regulation of labour, none of which were directed toward the overarching law of contract.<sup>337</sup> In brief, decision-makers' deviation from the principles in *Ermogenous* and *Teen Ranch* imposes a detriment upon volunteers and represents a divergence from judicial principle and, now, legislative intent.

## VIII THE PATH FORWARD

### A Careful Contracting

The facilitation of contractual certainty is paramount. As has been shown, decision-makers continue to encounter difficulty in applying the law of contract to working arrangements within NFPOs. This difficulty is in some respects understandable; contract law is grounded in the protection and advancement of legal rights.<sup>338</sup> This presents little challenge in conventional working arrangements

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<sup>333</sup> Ibid.

<sup>334</sup> Cf *ibid* [4].

<sup>335</sup> Murray (n 5) 713.

<sup>336</sup> See *FW Act* (n 79) s 15AA(2)(b); *Personnel Contracting* (n 137); *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth) sch 1 pt 15 cl 237.

<sup>337</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2023, 6237 (Tony Burke, Minister for Employment and Workplace Relations).

<sup>338</sup> Jody S Kraus, 'Philosophy of Contract Law' in Jules L Coleman (ed), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2004) 687, 712.

where parties' pursuit of legal entitlements 'will be axiomatic'.<sup>339</sup> NFPOs present greater complexities. An 'adversarial' legal area in contract law — one which at times proves 'uncomfortably similar to warfare'<sup>340</sup> — may well be fundamentally ill-suited to govern disputes between two parties neither of whom may necessarily be acting within self-interest.<sup>341</sup> Principles born out of commercial disagreements<sup>342</sup> may not ever be capable of coherent and predictable application to the dealings of many NFPOs. Consequently, careful contracting may be no less significant for NFPOs than for their for-profit counterparts.

'Careful contracting', as it applies to well-resourced NFPOs, may consist of the production of agreements which apply harmoniously across a volunteer workforce and which accommodate the needs of the respective organisations. There is no doubt that many NFPOs would already have taken some action in this regard, most likely with a view of limiting an organisation's liability. The literature nevertheless makes clear that the duties and responsibilities of volunteers within many NFPOs remain in a state of uncertainty, and that this uncertainty erodes the efficiency, collaboration and satisfaction of the organisation's workforce.<sup>343</sup> Larger NFPOs would thus be wise to embed into their arrangements with volunteers more comprehensive statements of what is expected of those volunteers in the course of their work. To the extent that hybrid work settings shared between paid and unpaid workers produce disharmony,<sup>344</sup> this may be quelled by clear contractual allocations of responsibilities.<sup>345</sup> A robust understanding of those responsibilities on the part of volunteers will also enhance productivity.<sup>346</sup> NFPOs with adequate contractual structures could also acquire greater awareness of the scope of obligations owed to various classes of workers.<sup>347</sup> The effective implementation of these agreements would require diligent internal management practices; benefits to NFPOs would not spring merely from the content of any written agreement. It is nonetheless evident that the coordination of a large NFPO's volunteer workforce would be assisted in various capacities by robust contractual foundations.

Measures of this kind will be unachievable for NFPOs with more modest resourcing. Further difficulties may also arise, in a practical and interpersonal sense, where unsophisticated NFPOs require the execution of formalised, written

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<sup>339</sup> See Irving (n 15) 114.

<sup>340</sup> Paul MacMahon, 'Conflict and Contract Law' (2018) 38(2) *Oxford Journal of Legal Studies* 270, 283.

<sup>341</sup> See *Davies* (n 7) 329 (Lord Templeman).

<sup>342</sup> See, eg, *Codelfa* (n 14,6); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165.

<sup>343</sup> See Part III(C).

<sup>344</sup> See Wenjue Lu Knutsen and Yolande Chan, 'The Phenomenon of Staff Volunteering: How Far Can You Stretch the Psychological Contract in a Nonprofit Organization?' (2015) 26(3) *International Journal of Voluntary and Nonprofit Organizations* 962, 979.

<sup>345</sup> See Melanie Randle and Samantha Reis, 'Best Practice in Volunteer Governance: A Rapid Literature Review' (Literature Review, Department of Family and Community Services (NSW), May 2018) 39.

<sup>346</sup> Fidelity Charitable, *What Makes an Effective Nonprofit* (Fact Sheet, 2014) 1.

<sup>347</sup> Shane Simpson, 'Volunteers' in Shane Simpson (ed), *Collections Law: Charities* (Simpsons Solicitors, 2009) 3.

agreements by volunteers whose work is in nearly all respects informal. But this does not deny the utility in such organisations taking steps to formalise volunteering arrangements. A range of not-for-profit bodies publish template volunteering agreements directed toward curtailing the risks and uncertainties frequently encountered within the engagement of volunteers.<sup>348</sup> Though such templates may not afford to NFPOs the benefits which may flow from tailor-made agreements which feature clear and coherent allocations of responsibilities throughout an organisation, their use can nevertheless provide some protection from future disputes and litigation with aggrieved volunteers. It is trite that where disputes do arise, their timely and cost-effective resolution will turn on the degree to which the scope of issues are narrowed.<sup>349</sup> Actions centred around alleged oral contracts may be accompanied by substantial expense.<sup>350</sup> Further, though decision-makers may 'have some difficulty' with volunteer workers 'accept[ing] their [non-written] arrangements' for extended periods and later pursuing extensive unpaid employment benefits through alleged contraventions of workplace instruments, those decision-makers will find in favour of applicants where appropriate.<sup>351</sup> Where smaller NFPOs prefer to deal with volunteers broadly non-contractually that intention may be expressed — and more often than not fulfilled — through written terms to that effect.<sup>352</sup>

## B Decision-Makers

### 1 Ermogenous and the Social Presumption

Where disputes do arise, decision-makers must be cautious to apply the principles which bind them. At the heart of *Ermogenous* was an endorsement of substance over form — an entity characterised by its pursuit of the 'public benefit'<sup>353</sup> is capable of acting otherwise than selflessly.<sup>354</sup> This approach has not been free from controversy. Some contend that the High Court's rejection of the 'social presumption'<sup>355</sup> imposed an 'operational paradox' within which NFPOs

<sup>348</sup> See, eg, Volunteering Australia, 'Templates', *Volunteering Resource Hub* (Web Page) <<https://volunteeringhub.org.au/resourcetype/templates/>>; Volunteering ACT, 'Sample Volunteer Agreement' <<https://www.volunteeringact.org.au/wp-content/uploads/2019/08/Sample-Volunteer-Agreement-1.pdf>>; Volunteering Victoria, *Volunteer Management Toolkit* (Guide, 2022); Justice Connect, 'Sample Volunteer Agreement' (n 78).

<sup>349</sup> See Elizabeth Thornburg and Camille Cameron, 'Defining Civil Disputes: Lessons from Two Jurisdictions' (2011) 35(1) *Melbourne University Law Review* 208.

<sup>350</sup> See Ken Alexander, 'Avoiding Contracts That Make You Sick' (2007) 22(5) *The Corporate Counselor* 1, 1.

<sup>351</sup> *Pagoda* (n 150) [13] (Tarr IM).

<sup>352</sup> *Edwards v Skyways Ltd* [1964] 1 WLR 349; *Official Trustee in Bankruptcy v Alvaro* (1996) 66 FCR 372, 393 (Wilcox and Cooper JJ).

<sup>353</sup> See *Charities Act 2013* (Cth) s 5(b)(i).

<sup>354</sup> See *Morris* (n 224) [73] (Hardy IM).

<sup>355</sup> *Liao* (n 12) 91.

underpinned by ‘other-interest’ are made to accord with a legal framework that presupposes parties’ self-interest.<sup>356</sup> Whatever be the correctness of *Ermogenous*, all but seven Australian decision-makers are now obliged to follow it.<sup>357</sup> Tribunals and inferior courts should as a general rule analyse the arrangements between volunteers and NFPOs ‘like any other relationship’.<sup>358</sup> They must, of course, not ignore the patent fact that NFPOs’ dealings with volunteers will be different to the dealings between for-profit corporations and their sizeable employs.<sup>359</sup> However, the inquiry can neither begin nor end there; it must always centre upon what ‘would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened’.<sup>360</sup>

## 2 The Motivations Underlying Work with NFPOs

The motivations which compel individuals to undertake given work are various. The not-for-profit sector is no different. Decision-makers should be prepared to acknowledge the existence of a legal agreement between an NFPO and its volunteer, even if not on the terms alleged by the latter.<sup>361</sup> This should be done where, as would likely often be the case,<sup>362</sup> the evidence discloses interests beyond mere ‘altruism’ on the part of the volunteer.<sup>363</sup> An adequate assessment must take into account the variety of reasons for which volunteering arrangements may, objectively, manifest an intention to create legal rights — future employment prospects, egocentric social motivations, and protection from physical injury and economic loss. Moreover, decision-makers should be careful not to depart from the ultimate inquiry — one of *mutual* intention. Many contemporary NFPOs are large, well-financed and armed with substantial business acumen.<sup>364</sup> A lack of sophistication within those organisations’ contractual dealings should not be assumed and, even when pursuing meritorious objectives, the commercial character of some modern NFPOs should not be ignored.

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<sup>356</sup> Christopher Mills, ‘Bargain or Benefice? Understanding the Legal Relationship Between an Australian Church and Its Clergy’ (MB Thesis, Queensland University of Technology, 2018) 15–18.

<sup>357</sup> See generally *Australian Agricultural Co v Federated Engine-Drivers and Firemen’s Association of Australasia* (1913) 17 CLR 261, 278 (Isaacs J); *John v Commissioner of Taxation (Cth)* (1989) 166 CLR 417, 440 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

<sup>358</sup> Cf *Zion Church* (n 186) [56] (Colman DP).

<sup>359</sup> See, eg, *Hogan* (n 205).

<sup>360</sup> *Ermogenous* (n 11) 105–6 [25] (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>361</sup> Cf *Employee, Contractor or Volunteer?* (n 14) 17.

<sup>362</sup> See *The Volunteer Perspective* (n 20) 35.

<sup>363</sup> See, eg, *Cudgegong Soaring* (n 224) 97 (Neilson J).

<sup>364</sup> See Rani Suleman, ‘Accounting for Altruism: Tracing the Transformation of the Modern-Day Charity in the United Kingdom’ (PhD Thesis, London School of Economics and Political Science, 30 June 2021).

### 3 Ermogenous and the Multi-Factorial Test of Employment

*Contracts* and *employment contracts* are not interchangeable concepts. They are separate legal enquiries underpinned by separate policy bases and separate judicial doctrines.<sup>365</sup> Their conflation undermines both judicial principle and legislative intent.<sup>366</sup> Many volunteers could not, on a proper application of the law, be categorised as employees. This should not deny their enforcement of rights and entitlements arising under common law contracts. Where the nature or existence of contractual rights to substantial payments are left unresolved merely on the basis that they did not derive from a relationship of employment,<sup>367</sup> volunteers suffer a unique disadvantage as against both NFPOs and the for-profit workforce. While matters of balance and policy may complicate evaluations of common intention, no such difficulties arise in respect of the multi-factorial employee inquiry and its detachment from the principles governing parties' intention to create legal relations. It is true that, in most workplace settings, a mutual intention to create legal relations will be recognised as a matter of course. Indeed, the unique characteristics of NFPOs, volunteers and the disputes between them may well be foreign to many decision-makers whose work relates almost invariably to working arrangements born out of the for-profit sector. But this does not justify departures from *Ermogenous*. When confronted with an alleged contract of employment the existence of which is disputed, decision-makers must determine *first* whether there was a contract at all, and *second* whether that contract is rightly characterised as one of employment. The High Court requires, and volunteers deserve, no less.

## IX CONCLUSION

The regulation of the relations between NFPOs and their workers is fundamentally complex and presents a bespoke difficulty for workplace regulation. Absent any capacity to engage in collective bargaining,<sup>368</sup> non-employed volunteer workers are ill-equipped to negotiate more favourable entitlements.<sup>369</sup> The bare reality is that many volunteers would be uninterested in pursuing such entitlements.<sup>370</sup> A further unique complication within this area is that preferable conditions for volunteers may not — or, at least not as often as in the for-profit sphere — advance the public interest. Such conditions may come at the expense of entities whose work promotes

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<sup>365</sup> See Harvey S James, 'A Legal Basis for Workers as Agents: Employment Contracts, Common Law and the Theory of the Firm' (Working Paper No 5, Contracting and Organizations Research Institute, University of Missouri, September 2001).

<sup>366</sup> See *FW Act* (n 79) s 15AA.

<sup>367</sup> See *Ashley* (n 327) [6], [64] (Beaumont DP).

<sup>368</sup> See *FW Act* (n 79) ss 15B, 172(1).

<sup>369</sup> See *Unite the Union, Evidence on Charities* (Report, 5 September 2016) 7–8.

<sup>370</sup> See *Stukas and Wilson* (n 223) 8.

education, welfare, inclusion, human rights and the environment.<sup>371</sup> However, the mistreatment of volunteers may deprive NFPOs of their ‘essential resource’<sup>372</sup> and with it their ability to pursue virtuous purposes.<sup>373</sup> Any changes in approach must take account of these circumstances and be guided by reference to the peculiar challenges which the workplace regulation of NFPOs present.

In this article, it was shown that decision-makers’ classification of volunteers is problematic, misdirected and in conflict with *Ermogenous*. The article commenced with an exploration of the conceptual bases and prevalence of both volunteerism and not-for-profit organisations. Difficulties confronting contemporary volunteering were then examined: (i) volunteers’ deprivation of entitlements at common law and under statute; (ii) NFPOs’ corporatisation and volunteers’ mistreatment; and (iii) volunteers’ performance of tasks substantially similar to those assigned to paid employees. Following a discussion of the justification for this article and a surveying of its research methodology, decision-makers’ approaches to volunteers’ legal classification were evaluated. First, it was observed that presumptions against a common intention to create legal relations, rejected in *Ermogenous*, continue to be applied. Second, it was demonstrated that continued reliance upon notions of altruism, spiritualism and morality to deny findings of common intention is inappropriate. Third, reference was made to decision-makers’ conflation of contract formation and employment contracts and the means by which it unjustly deprives volunteers of common law rights. Finally, it was concluded that these challenges may be addressed by NFPOs’ diligent contracting of volunteers, and by decision-makers’ attentiveness to *Ermogenous* and consideration of the broad range of purposes which underlie voluntary work.

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<sup>371</sup> Charities Act 2013 (Cth) s 12(1)(a)–(c), (f)–(g), (j).

<sup>372</sup> Fidelity Charitable, *The Role of Volunteering in Philanthropy* (Report, July 2024) 2.

<sup>373</sup> See McAllum (n 125) 536.