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ACPNS Legal Case Notes Series: 2017-26 Kape v The Golden Mile Loopline Railway Society Inc & Ors (No.2).

[Working Paper]

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ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



KAPE V THE GOLDEN MILE LOOPLINE RAILWAY SOCIETY INC & ORS (NO.2) [2017] FCCA 3014

Federal Circuit Court of Australia, Lucev J, 7 December 2017

The Court has concluded that GMLRS is a constitutional corporation for the purposes of s.14(1)(a) of the FW Act.

Key words: Association, Australia, Constitutional Corporation, Trading Corporation, Nature of Activities Engaged, Revenue.

1. This case dealt with the issue of whether the first respondent, The Golden Mile Loopline Railway Society Inc. (GMLRS) is a constitutional corporation. The issue arose because of an action brought by the applicant under the Fair Work Act 2009 (Cth) (FWA). This Act applies only to a 'constitutional corporation': section 14(1)(a). If GMLRS was not a constitutional corporation the Court had no jurisdiction to hear the substantive application brought by the applicant concerning his dismissal from GMLRS.
2. Was GMLRS a constitutional corporation? GMLRS was incorporated pursuant to the Associations Incorporations Act 1987 (WA) on 25 January 1983. It was incorporated as a nonprofit organisation. GMLRS' principal areas of activity include:
 - the construction, restoration and operation of the Loopline Railway;
 - the operation of the information centre and attached museum; and
 - the operation of the Loopline Tram.
3. GMLRS had 11 staff members, but also received help from many volunteers. It was funded by income from:
 - gold coin donations for entry through the Loopline Railway station;
 - the sale of souvenirs and drinks from the Information Centre/Museum;
 - the sale of tickets on the Loopline Tram;

- a yearly payment from the City of Kalgoorlie-Boulder to assist with the operation of the Information Centre/Museum;
 - rental income received on premises owned in Williamstown Road, Kalgoorlie; and
 - income received from Max Employment and from Skilled Group for supervising "work for the dole" participants who work on the Loopline Railway development and restoration project.
4. Money was also received from the Royalties for Regions Program in Western Australia.
5. Most of the operation, construction and restoration costs for the Loopline Railway (which is not currently operational) had been funded from one-off capital grants provided by the Western Australian Department of Regional Development (DRD) and Kalgoorlie Consolidated Gold Mines Pty Ltd, but both grants were now exhausted, and GMLRS was awaiting a response on a further application to the DRD for additional funds.
6. Charitable, benevolent and not-for profit organisations and corporations may still be, and have been held to be, constitutional trading corporations. Determination of this question required consideration of GMLRS' constitution. The GMLRS Constitution clause 2 states the object of GMLRS to be:
7. The Society is a not for-profit organisation of members interested in the preservation and operation of the narrow gauge railway, known as the Loopline, as a national tourist attraction and public exhibition and as from 01/07/2000 has been registered as a "Deductible Gift Recipient" under the Income Tax Assessment Act of 1997 and is a charitable institution.
8. Its aims, as set out in the GMLRS Constitution clause 3, included:
- to preserve, maintain and improve the historic Loopline Railway;
 - to develop infrastructure for the Loopline Railway;
 - to establish the Loopline Railway and stations as a living museum displaying the history of railways in the Goldfields;
 - to educate people of the history of the Goldfields;
 - to promote general interest of the public by providing a society of persons united in the common aim of preserving and operating the narrow gauge railway.
9. Clause 20 of the Constitution is an exclusive not-for-profit clause in the usual form.
10. However, the court held that the nature of GMLRS' activities - conducting tours, selling merchandise, using 'cheap labour' from labour hire firms and work for the dole schemes - presented the appearance of a trading corporation

(at [44]-[48]). Moreover, its revenue from trading components of its activities (at most about 27%) was 'not insubstantial' and GMLRS made a profit of \$356,304.11 from gross revenue of slightly more than \$1.080 million in 2015. The court noted that this was also 'not inconsiderable' at [53]).

11. The court said that the FWA was intended to cover small corporations (at [59]):

The fact that GMLRS might be said to be a small trading corporation does not, in all the circumstances, detract from the fact that it is a trading corporation.

12. Other factors were relevant:

- even though trading was not the predominant activity of GMLRS, its trading activities were nevertheless substantial, and not merely peripheral;
- GMLRS' trading activities extended beyond the provision of tourism services such as the daily tram tours, to include income from property that it holds, but also to those activities which were engaged in with a view to its becoming a more significant income-earning tourism attraction;
- GMLRS made a profit during the 2015 calendar year;
- to the limited extent that the activities of GMLRS might be said to be for the benefit of the community or for a public purpose, that does not preclude GMLRS from being engaged in trading activities, and GMLRS was engaged in such trading activities;
- the ultimate purpose of GMLRS was not only, or even predominantly, a public benefit purpose, but rather the development of an income-earning national tourist attraction, albeit one which is not-for-profit, a factor which does not preclude it from being a trading corporation; and
- the commercial nature of the activities of GMLRS was sufficient to warrant its characterisation as a trading organisation.

13. The court concluded that GMLRS was a 'trading corporation' and therefore a 'constitutional corporation' for the purposes of the FWA. The applicant could thus pursue his unfair dismissal claim against GMLRS under the FWA.

IMPLICATIONS



The definition of a constitutional corporation is also relevant to other Commonwealth regulatory schemes such as the ACNC Legislation. Some enforcement proceedings under the ACNC regime can only be directed to constitutional corporations.

VIEW THE CASE



This case may be viewed at: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCCA//2017/3014.html>

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