



Queensland University of Technology
Brisbane Australia

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[McGregor-Lowndes, Myles & Hannah, Frances](#)

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ACPNS Legal Case Notes Series: 2020-173 Webb v Surf Life Saving New South Wales.

[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.



WEBB V SURF LIFE SAVING NEW SOUTH WALES [2020] NSWCATAD 232

New South Wales Civil and Administrative Tribunal - Administrative and Equal Opportunity Division, C A Ludlow, Senior Member, 22 September 2020

Whether it fair and just to proceed with an application for leave to proceed with a complaint of victimisation.

Key words: Discrimination, New South Wales, Nonprofit Organisation, Registered Charity, Membership, Victimisation, Due Process, *Anti-Discrimination Act 1977 (NSW)*

1. On 5 September 2019, the President of the Anti-Discrimination Board of NSW received a complaint under the [*Anti-Discrimination Act 1977*](#) (the AD Act) from Mr Webb against the respondent, Surf Life Saving NSW (SLSNSW). The applicant alleged that he had been victimised by having his membership of the Mollymook Surf Life Saving Club (MSLSC) suspended. He claimed that he was victimised for supporting a female club member who had been discriminated against by the MSLSC.
2. The President declined the complaint on 29 May 2020 on the basis that:
 1. SLSNSW is a voluntary body within s 57 of the AD Act which provides an exemption for such bodies in respect of any rule or practice which restricts admission to membership.
 2. The complainant's membership was suspended in accordance with the membership rules and practices of the SLSNSW.
 3. The conduct of the respondent did not disclose a contravention of the AD Act.
3. Mr Webb sought leave of the Tribunal to proceed with his complaint under s 96 of the AD Act.
4. The question before the Tribunal was whether the SLSNSW was exempt from the operation of the AD Act by s 57. Section 57(1) requires that for a body to be exempt for the AD Act, a body must meet three criteria:
 - (1) the activities of the body must be carried on "otherwise than for profit"; and
 - (2) the body must not be established by an Act; and
 - (3) the body must not be a body specified in s 57(1)(a)–(e).
5. Section 57(2) provides:

Nothing in this Act affects—

- (a) any rule or practice of a body which restricts admission to membership of that body, or
- (b) the provision of benefits, facilities or services to members of that body.

6. After reviewing the evidence and authorities, the Tribunal concluded that the SLSNSW, a company limited by guarantee, was covered by section 57 because it was a nonprofit body (at [31]), it was not established by an Act (at [32]), and was not one of the bodies listed in section 57(1)(a)-(e) (at [34]).

7. On Section 57(2), the Tribunal considered whether the complaint concerned any rule or practice of SLSNSW which restricted admission to membership of that body. On a review of the facts, the Tribunal said (at [39]):

On the available evidence I cannot be satisfied that the conduct complained of was done under a rule which restricts admission to membership of SLSNSW. If it was done under a practice, there is no evidence of this practice before the Tribunal. Accordingly, I am not satisfied that the conduct is exempted under s 57 of the AD Act.

8. The Tribunal then considered whether the conduct complained of was victimisation. On Mr Webb's evidence, taken at its highest, he alleged that certain office bearers of the MSLSC harassed and discriminated against a female member of that club. This would come within s 50(1)(c) of the AD Act, namely that he had alleged that SLSNSW or another person had committed an act which would amount to a contravention of the AD Act. Mr Webb had then been deprived of his membership. On the available evidence this was a detriment.

9. However, the evidence showed that the true cause of Mr Webb's suspension of membership in MSLSC was not that he lodged a complaint or made an allegation of contravening conduct, but because he sent a copy of his correspondence with SLSNSW to the local Mayor. This contravened SLSNSW's rules, in that he communicated with a third party whilst an investigation was in progress. The Tribunal concluded (at [47]):

Given the lack of evidence that Mr Webb's making of the allegations was the true or real cause of SLSNSW suspending his membership, he is unlikely to be able to establish that he was victimised by SLSNSW on that ground. He has not been able to show that his claim of victimisation is supported by the available evidence and in those circumstances it would not be fair and just to grant leave for his complaint of victimisation to proceed.

10. The application to proceed with a complaint of victimisation was refused.

IMPLICATIONS



The reasons for exemption of some nonprofit bodies from the Act was explained by the Court as [at 29]:

In *Strong v The Hospitals Contribution Fund of Australia Ltd* [2004] NSWADT 176 the Tribunal said that:

“The intention of an exception such as that in s 57 is as was said in *Gardner* at paragraph 12:

to protect the right of freedom of assembly so that a voluntary organisation could chose those persons it wished to be members and deal with those members in any manner that the members agreed, whether or not those activities might appear to persons who are not members of the association to be discriminatory.

...But in our view the term 'carried on otherwise than for profit' does not identify a body by reference to its actual financial results each year. It identifies a body by reference to its character. Whether it has a profit or a loss, and whether it calls a profit and surplus and a loss and deficit, the question is "what is its character? Does it have the character of a relatively small voluntary body, the activities of which could be carried on by an unincorporated association of people for purposes of pursuing a common interest? The exception provided for in s57 is, in our view, directed towards such bodies, and that it is bodies with that character that are identified by the term 'carried on otherwise than for profit'. ([103 – 108])

The following bodies are caught by the Act: a co-operative registered under the Co-operatives National Law (NSW) or a society under the Friendly Societies Act 1989; a friendly society registered under the Friendly Societies Act 1989; a building society or credit union registered under the Financial Institutions (NSW) Code; a co-operative housing society registered under the Co-operative Housing and Starr-Bowkett Societies Act 1998; and a registered club. [s 57].

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/nsw/NSWCATAD/2020/232.html>

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Author: McGregor-Lowndes, Myles & Hannah, Frances M.

Email: acpns@qut.edu.au

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