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ACPNS Legal Case Notes Series: 2021-17 Compliance Report into National Trust.

[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.



COMPLIANCE REPORT INTO NATIONAL TRUST (UK)

Charity Commission for England and Wales, Compliance Case Decision, National Trust, 11 March 2021

Whether a report published by the National Trust on links between its properties and histories of colonialism and slavery should trigger a Regulatory Decision

Key words: Charity, United Kingdom, Charitable Purposes, Reputational Damage, Risk Management

1. The National Trust (the charity) published a report on links between its properties and histories of colonialism and slavery in September 2020 (the report). See: Interim Report on the Connections between Colonialism and Properties now in the Care of the National Trust, including Links with Historic Slavery, September 2020, <https://nt.global.ssl.fastly.net/documents/colonialism-and-historic-slavery-report.pdf>.
2. The report triggered controversy within the membership of the National Trust and in the wider community, which resulted in the Charity Commission for England and Wales (the Commission), opening a regulatory compliance case in September 2020.
3. Concerns raised about the charity following the report were numerous, and included whether the charity had, in undertaking this work, acted outside its charitable purposes. The Commission considered that these concerns required examination because they had the potential to damage the charity's reputation, and undermine trust and confidence in charities generally.
4. The Commission's compliance case assessed whether the report was in furtherance of the National Trust's purposes, and examined the trustees' decision-making, including managing the potential risk to the charity's reputation in commissioning and publishing the report.
5. A wide range of evidence and material was examined by the Commission, including the charity's governing documents, recent annual reports and accounts, and the research report itself. The Commission also held a formal meeting with the charity, at which it put a range of detailed questions to the trustees and senior management.
6. The Commission's conclusion was that the Trust had provided a well-reasoned response to the question of how the publication of the report furthered the charity's purposes. The trustees were able to demonstrate that they explicitly considered and determined that commissioning and publishing the report was compatible with the National Trust's charitable purposes, as set out in the various National Trust Acts applicable.

7. As charity regulator, the Commission was satisfied that the trustees recognised and carefully considered the potential negative reaction that could result from the publication of the report. For example, before commissioning the research, the charity consulted a panel of 2000 members, finding considerable support for research into challenging histories, provided the findings were appropriately researched and contextualised.
8. However, evidence before the Commission was that publication of the report did generate strongly held and divided views, and in light of this, it was reasonable to conclude that the National Trust's planning and approach did not fully pre-empt or manage the potential risks to the charity. Specifically, the Commission said the charity could have done more to clearly explain the link between the report and the Trust's purpose.
9. However, the Commission found that the charity acted in line with its charitable purposes, and the trustees fulfilled their legal duties and responsibilities. Therefore, a regulatory decision was not required and the compliance case was concluded.
10. The Commission's press release is available [here](#).

IMPLICATIONS



It is a central tenet of charity law that everything a charity does must be to further its charitable purposes. This is also a public expectation when people have donated money, property and time over many years. The law makes it clear that trustees have wide discretion about how they fulfil their charitable purposes. It was therefore not for the Commission to tell trustees what was best for their charity or those they exist to serve. However, the law requires that decisions must be reasonable in the circumstances, and that they should be evidenced, recorded and explained.

The National Trust, with 5.6 million members, has an important place in England and Wales. Established by Act of Parliament in 1895, it is the nation's largest farm owner and owns very large tracts of the countryside including 750 miles of coastland and 500 historic houses. Since the report's publication, and in light of the criticism it engendered, the National Trust has undertaken work to make clear to its membership, critics and the wider public why it commissioned the report, and to reaffirm its role as a charity for the whole nation.

As to political campaigning and activity which might embrace controversy, the Commission has published guidance for charities. See: [Campaigning and political activity guidance for charities \(CC9\)](#).

England and Wales – Lindsay Driscoll, Charity Lawyer & Former Charity Commissioner

This case has raised serious concern amongst charities and charity lawyers in England and Wales. It is clear that the research carried out by the National Trust was an educational activity, firmly within its objects, and did not breach the Commission's guidelines on political activities. However, it would appear from the report, and recent statements from the Commission, that the Commission now requires charities to take pre-emptive action where their activities could cause controversy.

There is a lack of clarity on the steps which should be taken or the level of resources which should be spent on dealing with this risk. In the National Trust case, the charity convened a focus group of 2000 members before embarking on the research. It is also not clear when the Commission will take action in respect of activity deemed by some to be controversial. A freedom of information request has disclosed that there were only three complaints to the Commission

about the National Trust case and it has been suggested that failure to research the Trust property's links to slavery would also be controversial for sections of the public.

It is not clear whether this duty on charity trustees, to take special steps if their activities could be controversial, is an extension of the guidance on political activities or a new duty. In either case there are concerns that the Commission's statements will lead to a chill factor and self-censorship by charity trustees when considering whether to further their purposes in ways which some may find controversial.

Australia - Murray Baird, Charity Advisor

The Charity Commission has a legitimate interest in ensuring that resources are applied for a charitable purpose. However, there is an implication in the comments from the Commission that a potential risk of an activity having a negative impact on a charity's reputation may be a matter for regulator intervention.

We know in Australia that the so-called "history wars" can be divisive. A government agency discouraging or restraining a charity from entering on controversy runs the risk of telling a charity what to think within the bounds of its charitable purpose. By analogy, when it comes to the beliefs of religious charities, there is a natural reluctance for outsiders to question controversial belief: [Church of the New Faith v Commissioner of Pay-Roll Tax \(Vic\) \[1983\] HCA 40](#).

In Australia, a regulator's interest in public trust and confidence referenced in the first object of the ACNC Act is tempered by the second object that affirms a robust, vibrant, independent and innovative not-for-profit sector.

VIEW THE CASE



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