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ACPNS Legal Case Notes Series: 2021-124 Cancer & Bowel Research Australia Ltd and Commissioner of the Australian Charities and Not-for-profits Commission.

[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.



Cancer & Bowel Research Australia Ltd and Commissioner of the Australian Charities and Not-for-profits Commission [2021] AATA 3875

Administrative Appeals Tribunal of Australia, Senior Member Dr N A Manetta, 19 October 2021

Review of ACNC refusal to register charities where an examination of circumstances of their establishment disclosed a disqualifying purpose.

Key words: Charity, Australia, Word Investments, Circumstances of Incorporation, Private Benefit, Proper Purpose, Disqualifying Purpose, Public Policy

1. Cancer & Bowel Research Australia Ltd, Breast Cancer Australia Ltd, and Kids Cancer Research Australia Ltd (the entities) were all incorporated in May 2017 as companies limited by guarantee. They were under the control of Mr Thompson and each sought registration as a charity from the Commissioner of the Australian Charities and Not-for-profits Commission (ACNC).
2. Mr Thompson had a history of fundraising for charities since 1983 and was CEO of the Cancer and Bowel Research Association Inc (CBRA Inc) which acts as a trustee for three charitable trusts involved in raising funds in respect of different types of cancer.
3. CBRA Inc has been heavily involved in fundraising by telemarketers, doorknocking campaigns and at supermarkets malls. Before Mr Thompson's appointment as CEO in 2012, CBRA Inc had a significant debt (\$146,000 plus interest and penalties) to the Australian Taxation Office (ATO) for employee superannuation guarantee amounts.
4. The entities were to duplicate and take over the fundraising activities presently being undertaken by CBRA Inc. It was planned for CBRA Inc to be wound up, with those employees owed compulsory superannuation contributions being paid by the federal government scheme which provides for the superannuation owed to employees of insolvent companies.
5. Mr Thompson argued that funds donated by the public should not be applied to the reduction of the debt to the ATO, but devoted solely to charitable purposes (after deduction of reasonable and proper administration expenses).

6. Registration had been refused by the ACNC on the basis that the entities had a purpose, amongst others, of providing private benefits to those involved in their operation.

7. The Tribunal noted that (at [16]):

[I]t is not, generally speaking, a proper purpose for the incorporation of a company or corporation that it be used to take over the functions and property of another entity without also assuming the liabilities of that entity or making arrangements for the liabilities to be met. It may or may not be, in any individual's view, a morally justified action to take; but the law is quite clear, in my opinion, that the avoidance of the due repayment of a debt, whether the debt is owed to a private individual or to the Federal Government, is not a proper purpose for the incorporation of a company or corporation.

8. Mr Thompson argued that the ACNC "must" register an applicant for registration if the applicant is entitled to registration under Division 25 and could only have regard to any recorded purposes of the applicant, being those that appeared in the documentation accompanying the incorporation of the applicants.

9. The Tribunal referred to the majority in the High Court decision of [Commissioner of Taxation v Word Investments Ltd](#) [2008] HCA 55 that among other things in determining charitable purpose, that it was relevant to take into account the circumstances in which the institution had been explicitly established to pursue objects as expressed in its memorandum of association.

10. The Tribunal found that (at [26]):

That intention (namely, the avoidance of the payment of a taxation liability so that the substantive charitable work of CBRA Inc might continue untrammelled, so to speak, by debt) is in my opinion "a purpose" of each applicant, amongst other purposes, to which the respondent was entitled to have regard, and one to which this Tribunal ought to have regard in its de novo review, when applying the definition of charity.

11. Consequently, it followed (at [27]):

[T]hat when regard is had to the circumstances in which each applicant was formed, the applicants do not have solely charitable purposes (or ancillary purposes) as required by the definition of charity. Indeed, the purpose I have identified may well be a "disqualifying purpose" (cf paragraph (c) of the definition of charity). I note that a "disqualifying purpose" is defined to include activities that are contrary to public policy.

12. The Tribunal refused registration on these grounds and so it did not need to consider the ACNC refusal reason that a purpose of registration was to secure a benefit to a person or persons associated with the entities.

IMPLICATIONS



Comment by Murray Baird, Charity Law Adviser

It is now well settled that discerning a charitable purpose involves more than an examination of the objects of an entity set out in the Constitution.

Note 1 Section 5 of the Charities Act 2013 states that in determining the purposes of an entity, regard should be had to the governing rules, activities and any other relevant matter.

In *Commissioner of Taxation v. Word Investments Limited* [2007] FCAFC 171 at [44], the Full Court of the Federal Court affirmed the position of the primary judge that in determining whether an institution is charitable, it is necessary to consider the institution's essential object, which is itself to be determined by a consideration of the purpose of its formation, its constitution and its activities. Allsop J. observed that the evidence of the subjective motives of the directors were a relevant consideration [48].

In this case, the frank evidence of the promoter was that a motivation in establishing new charities to take over the work of existing charities, was to avoid charitable funds being applied to meet superannuation liabilities.

This amounted to a purpose which was not charitable or was a disqualifying purpose.

It is appropriate for the decision maker to take into account all relevant circumstances (a holistic analysis), to determine whether, on balance, the entity can be characterised as a charity or whether "something else is going on".

Comment by the Authors

The discretion of the ACNC to examine the circumstances in which an entity was formed in deciding whether it answered the description of "a charity" is wide and ought to be exercised with prudence. Supervision by an external judicial authority is an appropriate safeguard. Some may hold concerns about the width of the discretion of the ACNC regarding the circumstances of the entity's formation.

Consider if the associates of 'clean skin' incorporators had previous convictions involving infringements of the proposed Governance Standard 3 amendments ([The Australian Charities and Not-for-profits Commission Amendment \(2021 Measures No.2\) Regulations 2021](#)), or an entity's incorporation was merely sponsored by a removed former environmental or animal rights ACNC charity, or by a national or faith based organisation which is linked by the media, or politicians, to terrorism. Where is the line to be drawn and on what basis? It is critical for the safeguarding of civil society and democracy that such ACNC decisions are appropriately considered, judicially supervised with minimal financial barriers for all objectors.

It is unfortunate that the Tribunal found it unnecessary to examine the ACNC claims that the entities had a purpose, amongst others, of providing private benefits to those involved in their operation. This is an area of confusion and disagreement in the sector. Perhaps a Commissioner's Interpretation Statement might be warranted to clarify the ACNC's position.

Cancer and Bowel Research Association Inc has been involved in past litigation with fundraising regulators and the ATO. In 2010 the state regulator refused a licence to fundraise for The Cancer and Bowel Research Trust (the Trust) established in 1998. It raised money from the community using a range of means including telephone and door to door canvassing. The Commissioner for the South Australian Office of Liquor and Gambling stated in a press release:¹

¹ South Australia, Office of the Liquor and Gambling Commissioner, "Commissioner Statement: Cancer and Bowel Research Association Inc" (Media Statement, 6 July 2011)

I decided to refuse to issue further licences for the formerly licensed trusts because I was not satisfied that the trustee, CBRA, had operated in a sufficiently transparent manner for a charity. For example, in its 2008 financial statements CBRA initially reported that it had paid a total of \$726,519 for research projects and \$72,746 in key management compensation. Following a management review, CBRA later amended these figures to \$71,352 and \$1,206,822 respectively. This is not to say that I formed the view that CBRA or its officers were acting dishonestly but to say that CBRA did not present their financial statements in a transparent manner. The members of the board of CBRA have since acknowledged to me that the financial statements for the 2007 and 2008 financial years “were, albeit unintentionally, not transparent and apt to mislead” in—

- understating the total remuneration paid to employees of CBRA;
- in omitting to disclose that employee entitlements of senior employees had been paid through a related (unlicensed) trust, Australian Cancer Education and Prevention Fund; and
- in overstating the amount applied to “research grants” and correspondingly understating the amount applied to “prevention and awareness campaigns”.

The matter was settled after the first day of the court proceedings and the licence was granted on conditions. The Commissioner imposed standards in respect of the accounts exceeding those in the Australian Accounting Standards. The Commissioner further stated in his press release: “I was willing to enter into the negotiations because the settlement proposed met most of my concerns and included certain features which could not be achieved through formal litigation.”²

However, in July 2010 the Liquor and Gambling Commissioner declined to issue further charity licences to the applicant and the other three related Trusts because of concerns raised by that Commissioner about the financial statements of the Trusts. At the same time, the Commissioner of Taxation withdrew the Trust’s DGR status for a number of reasons, but one of the concerns was with fundraising expenses. The ATO was eventually unsuccessful on appeal in the matter. Refer [Cancer and Bowel Research Association Incorporated \(As Trustee For Cancer And Bowel Research Trust\) and Commissioner of Taxation](#) [2013] AATA 336 at 167 [and Commissioner of Taxation v Cancer & Bowel Research Association](#) [2013] FCAFC 140 at page 140 of [The Australian Nonprofit Sector Legal and Accounting Almanac 2013](#).

For further background see: McGregor-Lowndes, Myles, Flack, Ted, Poole, Glenn, & Marsden, Stephen (2014) [Defining and Accounting for Fundraising Income and Expenses](#) at page 107.

VIEW THE CASE



This case may be viewed at <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/3875.html>

Read more notable cases in [The Australian Nonprofit Sector Legal and Accounting Almanac series](#).

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