

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.



Innes & Ors v Attorney-General for the State of Victoria & Ors [2021] VSC 628

Supreme Court of Victoria, Daly AsJ, 12 October 2021

An application to cure irregularities in the appointment of trustees and administration of a charitable trust.

Keywords: Charitable Trust, Victoria, Rectification, Trustee Appointment, Personal Liability, Impugned Grants

1. The National Jockeys Trust (NJT) was established by a 2004 deed made between the Australian Racing Board Limited (ARB) and seven individuals, who were defined in the heading of the deed as “the trustees”.
2. The NJT is registered as a charity with the Australian Charities and Not-for-profits Commission (ACNC) with its summary of activities being “we provided financial and other support to jockeys and their families who were in necessitous circumstances as a result of injury, illness or death of a jockey.”¹
3. The deed recited that the ARB wished to establish a public charitable trust for the purpose of providing funds for the relief of the financial difficulties of jockeys (including apprentice jockeys, and former jockeys and apprentice jockeys) and their families (beneficiaries), where that need arose through the serious injury, illness or death of a jockey or apprentice jockey.
4. NJT is a Deductible Gift Recipient (Item 1) with the Australian Taxation Office.
5. In 2019 the trustees became aware of irregularities and sought advice from solicitors about proper compliance with the terms of the deed, a review of recordkeeping systems, the process for the appointment of trustees, and any variations required to the deed. The trustees were all volunteers and there was no evidence that they had acted in bad faith, for an improper purpose, or that there was any financial impropriety.
6. The following irregularities were identified:
 - (a) no resolution had been made by the original trustees pursuant to the deed to expand the number of trustees from a stated five to seven;
 - (b) one of the original trustees was not qualified to be a trustee at the time of his appointment;
 - (c) at least two additional purported trustees had not been validly appointed as trustees;
 - (d) a deed of amendment in 2016 had not been properly executed by the trustees;

¹ Refer to <https://www.acnc.gov.au/charity/b39c540ba5c864f08805f856639ac439#overview>

- (e) some of the grants to beneficiaries had been approved by the trustees via circular emails, inconsistent with the terms of the deed; and
- (f) not all of the minutes of meetings of trustees could be located, thus casting doubt upon whether all of the grants to beneficiaries made had been made by a majority of validly appointed trustees, with a quorum of validly appointed trustees present and voting.

7. Relief was sought from the Court for:

- (a) the rectification of the trust instrument;
- (b) approving grants, gifts and donations;
- (c) amendments to the trust instrument; and
- (d) appointment of new trustees.

8. The Attorney General did not oppose the application and did not make any submissions.

Rectification of the Trust Instrument

- 9. The terms of the trust deed was that upon the establishment of the NJT, there were to be five trustees, and if the original trustees wished to appoint more than five (but not more than seven) trustees, they must resolve to do so.
- 10. There was an error in the drafting of the trust deed due to a common mistake, as the trust deed was to provide for seven initial trustees. Seven executed the deed, but the clause was not altered to reflect this late change of instructions to the drafters and it remained at five in the trust deed.
- 11. The Court ordered the rectification of the offending clause, accepting a common mistake had been made.

Approval of grants, gifts and donations

- 12. The deed required a minimum of five trustees to transact the business of the NJT and, unless all trustees were present, a valid quorum. Any decisions made in circumstances which did not satisfy these requirements were made in breach of trust.
- 13. Many decisions to make grants, gifts and donations to beneficiaries were called into question due to trustee de son tort participation,² and thus in breach of trust. The beneficiaries who received such funds as volunteers would prima facie be obliged to return the funds, and those who authorised the transaction would be personally liable.
- 14. Further, the minutes of meetings of some transactions and circular resolutions could not be located and the trustees were unable to identify whether all of the resolutions to make these grants were validly made or not.
- 15. The Court using its broad jurisdiction approved the transactions as made in good faith and for the proper purposes of the NJT.

Amendments to the Trust Deed

² See the decision of McMillan J in *Waites v Brown* [2021] VSC 509, in which her Honour stated at [30] (citations omitted): “A trustee de son tort may be described as a person who, not being a trustee, and not having authority from a trustee, takes it upon himself or herself, to intermeddle with trust matters or to do acts characteristic of the office of trustee thereby making himself a trustee of his own wrong, that is, a form of constructive trustee. As a constructive trustee, the person erroneously asserting themselves as trustee may be liable to account to the beneficiaries for breaches of trust or breaches of fiduciary obligations.”

16. In 2016 an amendment to the trust deed was executed by a trustee. The trust deed required all the trustees, not just one of them, to execute any supplemental deed that varied, deleted or added to the terms of the deed.
17. After obtaining legal advice, all the trustees executed a supplemental deed to ratify the amendments sought to be made by the deed of amendment. However, it was later found that there were only four validly appointed trustees, with the result that the execution of the supplemental deed was also ineffective.
18. The Court found that the amendments contained in the deed of amendment were uncontroversial, concerned with the management and administration of the trust, and it was expedient for the amendments to be made and given their full effect.

Appointment of New Trustees

19. There was evidence that a number of the trustee appointments were defective in not having a formal resolution, approval of the ARB, and not being suitably qualified as per the terms of the trust deed. There was no evidence of any wrongdoing by them or any loss incurred by the NJT by reason of their purported exercise of powers under the deed, and the appointments were all honest, but mistaken.
20. The Court affirmed that the new trustees appointed in 2020 were validly appointed by the remaining four validly appointed trustees.

Costs

21. As all trustees were volunteers, acted honestly and reasonably in the conduct of the affairs of the NJT, the Court ordered that they should be indemnified for their reasonable legal costs from the assets of the NJT.

IMPLICATIONS



The irregularities that occurred in this case, even with legal advice, had the potential to cause substantial disruption to beneficiaries, as well as personal liability for trustees. It serves as a timely case study for trustees, and those advising them, about the centrality of the trust deed and having a thorough understanding of its terms.

The Court noted at [110] that “the current trustees have responsibly taken steps (including the issue of this proceeding) to remedy the irregularities, and to put in place processes to limit the likelihood of future irregularities.”

VIEW THE CASE



This case may be viewed at <https://www.lawlibrary.vic.gov.au/library-services/digital-library/judgments/innes-ors-v-attorney-general-state-victoria-ors-2021-vsc>

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