

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.



Rookwood General Cemeteries Reserve Land Manager v Attorney-General NSW [2022] NSWSC 1763

Supreme Court of New South Wales, Parker J, 20 December 2022

Whether a charitable trust existed (and then survived amalgamation legislation) over the fees collected by statutorily created trusts to administer denominational burial portions of a public cemetery.

Key words: Charitable Trusts, New South Wales, Cemetery, Extinguishment, Statutory Trust

1. Rookwood Cemetery (the Cemetery) was established in the 1860s and is now the largest cemetery in the southern hemisphere, accounting for about 30% of Sydney's burials.
2. The Cemetery was initially divided into different burial grounds on a denominational basis, with a separate trustee body for each burial ground. The common facilities were managed by a joint committee made up of representatives from each group of trustees.
3. In 2012, the trustee bodies of five of the Cemetery's burial grounds were amalgamated by state legislation, except for the Catholic burial ground. A manager was a successor to the trust bodies.
4. The Cemetery was then converted into Crown land, abolishing the trusts over the land.
5. The manager sought the advice of the Court in relation to a sum of more than \$20 million built up over the years from the operation of the Anglican burial ground.
6. The manager contended that although the amalgamation legislation had extinguished the trusts in relation to the land, the proceeds were still held subject to a charitable trust enforceable in equity.
7. The Attorney-General, who joined the proceedings, was of the same view.
8. The Court first examined the nature of Crown lands from the royal prerogative exercised by the Governor at settlement, Imperial legislation applying on responsible government for New South Wales, to the [Crown Land Management Act 2016](#) (NSW).

9. The Court then turned to examine the [Necropolis Act of 1867](#) which established the Cemetery and its management structure, and its historical amendment to the present.
10. In April 2012, acting under the then applicable [Crown Lands Act](#) (now repealed), the Minister dissolved the Anglican Trust Corporation and the other trustee corporations of the Cemetery. A new reserve trust was constituted under the name “Rookwood General Cemeteries Reserve Trust” (RGC Trust Corporation) and appointed as the trustee of each of the five reserves. An administrator was appointed to the Corporation, ending the system of management by denominational community members.
11. Following the passage of the [Cemeteries and Crematoria Act 2013](#), the operation of the combined portions of the Cemetery under the management of the RGC Trust Corporation came under the supervision of the Cemeteries Agency. The Corporation was appointed by the Agency as an authorised cemetery operator for the purposes of the Act.
12. On 1 July 2018, the Crown Lands Management Act 2016 came into effect. The result was that the Anglican Cemetery land, together with the other four portions making up the RGC land, was converted to Crown land, and any trust over the land was abolished.
13. In 2021 a government report recommended that the management and operation of Crown cemeteries in New South Wales, including the non-Catholic portion of Rookwood Cemetery, be further consolidated. The recommendations were accepted by the government, which established a single Crown cemetery operator for this purpose, named “OneCrown”.
14. The manager received advice that there was a potential that the funds from the denominational trusts may be charitable. Further, the funds had been consolidated into a pool of funds and could not be specifically identified.
15. The Court reviewed the case law on the Crown creating public and charitable trusts, and its ability to terminate such trusts. It considered that:
 - An intention on the part of the legislature to create a trust in the true sense is not “to be imputed” in the absence of an unambiguous indication to the contrary.
 - A Court, in its equitable jurisdiction, could grant declaratory and injunctive relief, at the suit of the Attorney-General, to enforce the use of the land in accordance with a public purpose, even if the purpose was not charitable.
 - Whatever restrictions might be imposed upon the executive in its dealings with land which is subject to a “public trust”, there is no restriction on legislative power, and the “seeming immutability and perpetuity” of a dedication of land to public purposes “would always yield to a statute”.

16. The manager put four issues before the Court being (at [180]):

First, the effect of the vesting of the initial portion of the Anglican Cemetery Land in the Anglican Board of Trustees pursuant to the 1867 Necropolis Act was to establish a charitable trust, enforceable in equity in the

usual way, for the use of the Land as a burial ground of members of the Anglican denomination, and for the use of the Proceeds to support those operations. Second, later accretions to the Anglican Cemetery Land, and the Proceeds derived from those accretions, were subject to the same trust. Third, the trust subsisted, despite the Cemetery being brought under the Crown Lands Act from 1986 onwards, and the repeal of part, and then the remainder, of the 1901 Necropolis Act in 2004 and 2009. Fourth, the later abolition of any trust over the Land, as a result of its conversion to Crown land on 1 July 2018, left the trust in place over the Proceeds.

17. The Court held that any trust in equity over the Anglican Cemetery Land ceased to exist when the Necropolis Act was amended to repeal the provisions claimed to have created the trust.

18. However, it was argued that the trust over the funds had not been abolished when the trust over the land had been abolished, and therefore still subsisted.

19. Section 14 of the Necropolis Act 1867 made specific provisions for identified sources of income deriving from the use of the Cemetery lands as burial grounds.

20. An amendment in 1986 to the legislation meant that the funds (at [288]):

...could only have been described in terms of use of the moneys for purposes required or permitted under the Crown Lands Act. Clearly, such a purpose would not necessarily be charitable for the purposes of the Statute of Elizabeth. In my view, any trust in equity over the Proceeds ceased at that point.

21. As the Court had concluded that as any such trust, if it ever existed, had ceased to do so well before 1 July 2018, it was not necessary to consider this issue further.

22. The case was adjourned to 3 February 2023 to allow for full consideration by the parties, the formulation of appropriate orders, and costs.

IMPLICATIONS



This is a detailed judgment that traces the history of legislation related to public lands in New South Wales from settlement, as well as the regulation of cemeteries.

The Court discussed a number of cases that were products of government lands being given over to public purposes and then re-purposed at a later time. For those interested in charity law they offer not only illustrations of the law in action but also a window into the nature of governments over time and the exercise of their powers. Some examples are:

- *Attorney-General (NSW) v Eagar* (1864) 3 SCR (NSW) 234 where lands forming a glebe for the funding of schools and churches before responsible government, and then re-vested in the Crown, were passed to the control of both executive and legislative of the Colony or held by the Crown (presumably, the Crown in right of the United Kingdom) on trust for religious and educational purposes?

- Attorney-General (NSW) v Williams (1913) 13 SR (NSW) 295 and Williams v Attorney-General (NSW) (1913) 16 CLR 404 and the Privy Council in Attorney-General (NSW) v Williams (1915) 19 CLR 343 where pursuant to arrangements between the New South Wales Government and the Commonwealth Government, the NSW Governor moved out of Government House and it was used as the Sydney residence for the Governor-General until this ceased in 1912. Could the lands be repurposed by the NSW Government to a Conservatorium of Music or had the lands been dedicated to a public use and were in effect the subject of a charitable trust?
- New South Wales v Commonwealth (1926) 38 CLR 74 where in 1913, following the establishment of the Royal Australian Navy, the United Kingdom government handed over control of Garden Island in Sydney Harbour to the Commonwealth government and the initial dedication to that purpose by the NSW government was revoked. The NSW government sought to resume control of the land in 1923 and was successful.

The underlying proposition is that a dedication of land or property to public or charitable purposes will always yield to a statute. This power bears out the importance of the quality and integrity of legislators and accountability for their actions.

VIEW THE CASE



This case may be viewed at <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC//2022/1763.html>

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

Email: acpns@qut.edu.au

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