

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.



Re Leeuwin Ocean Adventure Foundation Limited (In Administration); Ex Parte John Allan Bumbak and Richard Scott Tucker as joint and several administrators of Leeuwin Ocean Adventure Foundation Limited [2023] WASC 480

Supreme Court of Western Australia, Hill J, 20 December 2023

An application by persons appointed as administrators by a charity company board that was not listed on the ASIC register for validation, and directions as to the use of public fund accounts.

Key words: Company Limited by Guarantee, Western Australia, Insolvency, Voluntary Administrator, Sailing, ACNC/ASIC Record Conflict, Public Fund, Costs

1. Leeuwin Ocean Adventure Foundation Limited (Leeuwin) is a company limited by guarantee and an ACNC registered charity. Leeuwin owned the STS Leeuwin II (Leeuwin II), a three-masted 1850's style barquentine, and Australia's largest sail training tall ship.
2. In August 2023, a purported meeting of the board of directors of Leeuwin appointed John Allan Bumbak and Richard Scott Tucker (the Administrators) as administrators pursuant to s 436A of the [Corporations Act 2001](#) (Cth) (Act).
3. The Administrators took control of Leeuwin and continued trading with an intended marketing campaign for the sale of the sailing ship Leeuwin II.
4. After their appointment, the Administrators discovered:
 - the directors who resolved to appoint them as voluntary administrators of Leeuwin were not recorded as directors in the records of ASIC;
 - the ASIC records were inconsistent with the ACNC records. The ACNC listed the people present at the August meeting as the directors of the Company.
 - that Leeuwin had not updated its records with ASIC since 2015.
5. The Administrators filed an originating process seeking orders under s 447A of the Act to validate their appointment as voluntary administrators of the Leeuwin under s 436A of the Act. This was served on both the ACNC and ASIC.

6. The Administrators also sought a direction under s 90-15 of sch 2 of the Act (Insolvency Practice Schedule) about the use of 'Public Funds' in the Leeuwin's bank accounts to meet operational expenses, and, in the event of liquidation, as property of the company.
7. The application was heard on an urgent basis.
8. At the hearing, ASIC's position was that the creditors should not bear the cost of the application as a search before the appointment would have revealed the issue concerning directors. In any case, ASIC records could have been updated before the appointment of the Administrators.

Validation

9. The Court noted that s 447A(1) of the Act gave it broad discretion to make such orders as it thought appropriate about how Pt 5.3A was to operate in relation to a particular company, and s 447A(4)(f) of the Act gave an administrator who had been invalidly appointed, and acted based on the purported appointment, standing to make an application as an 'interested person'.

10. The Court accepted (at [26]):

That there is uncertainty as to whether the first plaintiffs have been validly appointed as the administrators of the Company. The Company's records are inconsistent in recording who the current directors of the Company are. While I accept that, pursuant to s 1274B of the Act, the ASIC records are prima facie evidence of their contents in the absence of evidence to the contrary, in this case, there is evidence to the contrary. The evidence before the court is that the ASIC records have not been updated since at least 2015 and that these records are inconsistent with those maintained by the ACNC and the information on the Company's website. I accept that the records maintained by the ACNC and the Company's website are more up to date and, on this basis, accept these reflect who the current directors of the Company are.

11. Further, the Court added (at [27]):

The minutes of the Company of the meeting held on 21 August 2023 record that each of the directors recorded as directors in the ACNC records and on the Company's website were present and voted in favour of the appointment of the first plaintiffs. On this basis, I accept that the people who are the current directors of the Company intended to resolve and did resolve to appoint the first plaintiffs as administrators of the Company.

12. The Court also noted that there was no opposition to the validation, and no prejudice to any party if the orders were made as proposed.

13. The Court made orders validating the appointment of the Administrators.

Public Funds

14. Leeuwin's Constitution required it to maintain a fund called the Leeuwin Ocean Adventure Foundation Limited Public Fund (Public Fund) for its principal purposes and principal activity in Australia. The Public Fund was to contain gifts of money or property for those purposes and activity, and not any other money or property. On any winding up of Leeuwin, any surplus assets had to be transferred to an organisation or fund with similar purposes.

15. The Administrator's assessment of the books and records of Leeuwin was that:

- The public fund had a balance of less than \$4,000.
- It was unclear which part of the funds in the bank accounts were 'Public Funds' with four bank accounts, two of which were in the name of 'Public Fund Leeuwin Ocean Adventure Foundation Limited'.
- It appeared common practice for funds to be intermingled between the 'Public Funds' accounts and Leeuwin's other accounts.

16. The Administrators proposed using the funds for the day-to-day running of Leeuwin, including continuing to trade during the voluntary administration (with a view to carrying out its charitable purpose), whilst a marketing campaign was undertaken for the sale of the Leeuwin II ship.

17. The Court responded by noting:

- there was a legal issue of substance as to whether these funds could be used for the day-to-day running of the Company, or whether these funds were held on trust by Leeuwin;
- that the matter was not settled in law, referring to [Grain Technology Australia Ltd v Rosewood Research Pty Ltd \(No 3\)](#) [2023] NSWSC 238, where the view was that 'a charitable corporation is not a trustee in the strict sense, but only a quasi-trustee'.
- that the costs of undertaking a forensic tracing exercise to ascertain Public Funds were likely to significantly outweigh any benefit that would be obtained from such an exercise.

18. The Court gave a direction that it was appropriate for the Administrators to use the 'Public Funds' as Leeuwin's funds during the voluntary administration.

Costs

19. The Court found that it would have been preferable for the Administrators to have considered the ASIC search they made before the appointment, so that the discrepancy in the board membership became apparent at that point.

20. However, the Court noted that:

...it was not clear as to the basis on which ASIC considered this conflict could have been resolved without the necessity of an application, or how the records of ASIC could have been updated given the length of time that had passed since they were last updated and the significant changes in personnel involved. It was highly likely that an application under s 447A was required to resolve this conflict.

21. In any case, it was necessary for the Administrators to seek directions from the court regarding the use of the Public Funds.

22. Bearing those factors in mind, the Court found it was appropriate for the costs to form part of the voluntary administration.

COMMENT



In [Commissioner of Taxation of The Commonwealth of Australia v. The Leeuwin Sail Training Foundation Limited](#) [1996] FCA 1644 one of the issues was whether the Foundation conducted a 'school' for the purposes of the [Sales Tax](#)

[Assessment Act 1992, s24](#) and the Court found the Foundation to be a school following the High Court decision in *Cromer Golf Club Ltd v Downs* (1973) 47 ALJR 219.

Two issues warrant a comment. The state of the interface between ASIC and ACNC registers and the legal classification of public or gift funds imposed by the ATO for DGR status. Both require clarification by either the Courts, regulators, or legislation.

Interface of Registers:

Sections 205B and 201L of the Act require companies to notify ASIC where there are changes to the details of a director, where new directors are appointed, and where a person stops being a director of a company. These sections have been “switched off” for charitable companies under section 111L(1) (table item 8) of the Act to facilitate the ACNC’s role as the primary regulator of charities and to reduce red tape for charitable companies.

The [ACNC website](#) (as of 28/12/2023) states:

Changing a CLG’s directors

A CLG must provide the details of its directors (Responsible People) to the ACNC. It must notify us of changes to directors.

A CLG does not need to notify the ACNC about other officeholders of the company who are not Responsible People. It does not need to notify ASIC of any changes to the officeholders either.

The [ASIC website](#) (as of 28/12/2023) states:

Type of change	ACNC	ASIC
Notify changes to:		
- directors (responsible persons)	Yes	No

While it is not a requirement, you can choose to notify ASIC of these changes. Late fees do not apply.

Some professional advisors recommend that ASIC be notified of all changes, as well as the ACNC, to avoid situations such as in this case. Financial institutions frequently insist on the ASIC register reflecting the position of the charity before advancing funds or credit to a corporate charity.

The financial institution usually wishes to rely on the assumptions in section 129(2) of the Act where:

A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:

- (a) has been duly appointed, and

(b) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.

The [Strengthening for Purpose Report](#) prepared as part of the 2018 legislative review of the ACNC, dealt with issues raised by the interface of the ASIC and ACNC registers receiving submissions about the practical difficulties. A submission to the Report stated:

That ASIC have indicated that they will not commit to updating their records to reflect alterations submitted to the ACNC concerning the directorship of companies limited by guarantee that are registered as charities with the ACNC.¹

The Report recommended that:

Responsibility for the incorporation and all aspects of the regulation of companies which are registered entities be transferred from the Australian Securities and Investments Commission (ASIC) to the ACNC, except for criminal offences.²

The response of the then government to the recommendation was:

The Government supports the ACNC working with ASIC, through the modernising business registers program, to reduce the practical and administrative challenges for registered entities dealing with both regulators.³

The Hon. Stephen Jones MP, Assistant Treasurer and Minister for Financial Services, has announced the [cessation of the Modernising Business Registers \(MBR\) program](#). This decision follows the [Independent Review of the MBR program](#) completed in July 2023.

Given that this process is not continuing, the Government should consider another response to the issues raised in this case and by the [Strengthening for Purpose Report](#).

Public Funds:

Leeuwin Ocean Adventure Foundation Limited is specifically listed in the Income Tax Assessment Act 1997 (s 30-105 Other Recipients – Item 13.2.3A) as a Deductible Gift Recipient (DGR). The clauses concerning the public funds and winding up would probably be insisted upon as a condition of DGR's specific legislative listing.

The Court noted that (at [33]):

¹ Submission, Relationships Australia South Australia, 23 February 2018, page 2 quoted in [Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review Report and Recommendations](#), 2018.

² [Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review Report and Recommendations](#), 2018, Recommendation 27

³ Government Response to The Australian Charities And Not For Profits Commission Legislation Review 2018, 2020, at 20.

The question as to whether funds held as 'Public Funds' by a company limited by guarantee for a specified charitable purpose are held on trust by that company is not settled.

It went on to mention the case of [Grain Technology Australia Ltd v Rosewood Research Pty Ltd \(No 3\)](#) [2023] NSWSC 238, where the view was that a charitable corporation is not a trustee in the strict sense but only a quasi-trustee. The facts of that case did not relate to a public or gift fund, but to the whole of that company's assets. The Court in that case upset a settlement agreed to by the New South Wales Attorney General and all other parties that the company assets were held on trust.

In this decision, the case of [Hunter Aged Care Foundation Limited \(in liquidation\)](#) [2023] NSWSC 1358 appears not to have been argued. That case involved an application by liquidators to be able to distribute a gift fund and surplus of a company with charitable purposes and a gift fund. The New South Wales Attorney General took the view that an application could be made under s 12 of the [Charitable Trusts Act 1993](#) (NSW) for the establishment of a cy-près scheme, or that such a scheme could be addressed by the Court as if the Gift Fund was a charitable trust. It was not disclosed in the judgment why the Attorney General came to the view that the Gift Fund was a charitable trust.

The Court, in that case, found that s 477(2)(m) of the Act conferred power on a liquidator to do all such other things as are necessary for the winding up of the affairs of a company and distributing its property, and in any case, the small gift fund amount of \$1,952.17 would have exhausted in costs long before any amount could be distributed as required.

This case is another signpost that it would be welcomed if a superior court would set out a comprehensive statement of the law and principles about how a corporation with charitable objectives holds its assets.

VIEW THE CASE



This case may be viewed at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2023/480.html>

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