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.

Equality Australia Ltd v Commissioner of the Australian Charities and Not-for-profits Commission [2024] FCAFC 115

Federal Court of Australia – Full Court, Wheelahan, Hespe and Kennett JJ, 5 September 2024

An appeal as to whether an organisation with the object of advocacy in furtherance of its goal of changing laws and social practices injurious to LGBTQI+ persons qualified as a Public Benevolent Institution.

Key words: Public Benevolent Institution, Australia, Appeal, Question of Fact, Ordinary Meaning, Sufficiency of Connection, Advocacy, Costs

1. This was an appeal from the Administrative Appeals Tribunal (AAT) decision in Equality Australia Ltd and Commissioner of the Australian Charities and Not-for-profits Commissioner [2023] AATA 2161.

2. The appeal was confined to questions of law, not fact, under s 44 of the Administrative Appeals Tribunal Act 1975 (Cth).

3. Equality Australia Ltd (EAL) is a company limited by guarantee and a charity registered under the Australian Charities and Not-for-Profits Commission Act 2012 (Cth) (the ACNC Act). It was initially an organisation established in connection with the marriage equality debate.

4. EAL had the charity subtype advancing public debate under s 25-5(5) Item 12 of the ACNC Act, which includes promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a state, territory, or another country as described in s 12(1)(l) of the Charities Act 2013 (Cth).

5. EAL focussed on marriage equality and eliminating discrimination on the grounds of sexual orientation by promoting changes to Australian law to achieve equal marriage rights for same-sex couples. The Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth) (now part of the Marriage Act 1961 (Cth)), which enabled same-sex couples to be legally married in Australia, was eventually enacted.

6. After same-sex marriage was legalised, the organisation was renamed and relaunched as EAL in December 2018. In May 2020, EAL amended its constitution to reflect a new focus.

7. EAL applied to the Commissioner of the Australian Charities and Not-for-profits Commission to be additionally registered with the subtype “Public benevolent institution” (see ACNC Act s 25-5(5) item 14). This was refused, and the Commissioner disallowed Equality Australia’s objection to the decision.

8. EAL then applied to the AAT for review to allow it to be classified as a Public Benevolent Institution (PBI).

9. The Tribunal decision was split 2-1, but the majority advised that (at [32]):

> …the outcome of the matter turned on the following questions, which assisted in what was "ultimately a process of characterisation" –
> (a) whether LGBTIQ+ people are susceptible to, or experience, distress, such as to be persons in need of benevolence; and
> (b) whether Equality Australia is organised or conducted for, or promotes, the relief of that distress.

10. The majority concluded that LGBTIQ+ people do experience distress such that they are capable of being regarded as persons in need of benevolence.

11. However, EAL was not organised or conducted for, and did not promote, the relief of that distress in the required way.

12. After considering the purpose of EAL set out in its constitution, evidence about EAL's activities, and its staffing profile, the majority concluded that (at [47]):

> In summary, we are satisfied the evidence, when viewed as a whole, confirms [Equality Australia] was focused on advocacy in furtherance of its goal of changing laws and social practices that were injurious to LGBTQI+ persons. In doing so, it was plainly motivated by a desire to address the distress these laws and practices caused to many members of that community. [Equality Australia] engaged in information gathering, networking activities, and outreach to that end, and it played a modest role in the relevant period of staging events and hosting interactions with that end in mind. We are not satisfied it routinely provides support directly to individuals or groups beyond providing referrals, information exchanges and opportunities for connection except where that support was incidental to other activities that were directed to achievement of its primary mission. Moreover, [Equality Australia] did not have access to the financial or human resources or expertise required to play a wider role beyond that which we have identified.

13. The majority accepted that law reform can relieve distress to LGBTQI+ persons as it removes direct disadvantage, and destigmatises and includes LGBTQI+ persons.

14. The majority then undertook a holistic analysis of EAL's purpose and activities, which required establishing a sufficient connection between the means employed and the benevolent ends.

15. The majority acknowledged that an organisation need not be directly involved in providing relief or aid. Still, there must be a sufficient connection, and it was not enough for an entity's activities to benefit the target group.

16. The majority concluded that EAL was not a PBI.

17. EAL appealed to the Full Federal Court with three questions:

> (i) whether, on the facts found by the Tribunal, EAL was entitled to be registered as a public benevolent institution;
> (ii) whether the Tribunal misconstrued the expression "public benevolent institution" in item 14 of s 25-5(5) of the ACNC Act as involving a test of sufficient proximity or directness between the beneficial activities of an entity and the benevolent ends it seeks to achieve, or in holding that Equality Australia did not satisfy

such a test because it was organised to advocate, educate and campaign for law reform and social change; and

(iii) whether the Tribunal erred in law in its consideration of whether Equality Australia was organised or, conducted for, or promoted, the relief of distress experienced by LGBTIQ+ people in Australia.

18. The Full Court reviewed the case law on the meaning of PBI, and noted PBI is not a technical term but is understood in accordance with common usage or ordinary meaning. All parties agreed that this was the meaning to be applied in the context of the ACNC legislation.

19. The implications of the High Court case of Comptroller-General of Customs v Pharm-a-Care Laboratories Pty Ltd [2020] HCA 2; 270 CLR 494 (Pharm-a-Care) were considered as raising two questions:

- if it is assumed that "public benevolent institution" is a phrase that bears its ordinary meaning, that ordinary meaning is a question of fact; and
- was it also a question of fact whether Equality Australia is a public benevolent institution, having regard to the facts as otherwise found by the Tribunal?

20. The Full Court noted that:

- It is no part of this Court's function to substitute its view of whether Equality Australia is a public benevolent institution for that of the Tribunal, as deciding what that ordinary meaning is involves answering a question of fact and whether EAL is a public benevolent institution within that ordinary meaning also involves answering a question of fact.
- The Court may intervene if there is an error of law by (at [27]) finding that: "the decision-maker transgresses the bounds of reasonableness, applies the wrong legal test to reach a factual conclusion, gives an expression which has an ordinary meaning a meaning or qualification of his or her own (instead of identifying and applying the ordinary meaning), or adopts a meaning contrary to that established by court authority."

21. EAL argued that:

- The Tribunal's determination that Equality Australia was not a public benevolent institution rested on an incorrect construction of the statutory expression, or an incorrect application of that expression to the facts as found.
- The Full Court decision in Federal Commissioner of Taxation v The Hunger Project Australia [2014] FCAFC 69 (Hunger Project) was inconsistent with the Tribunal's directness criterion in the PBI definition.
- The term PBI appeared in the statutory context as within the category of "welfare and rights" recipients under division 30 of the ITAA 1997, which indicated a broader rather than narrower construction of the phrase PBI.
- It did not carry the burden of proving a link, in fact, between its activities and the provision of relief.
- If there was a 'link test', then the Tribunal had, in fact, found EAL provided direct relief to its beneficiary class.
- Advocacy was an appropriate means of relief in this case, given that the relevant distress was caused by laws and practices injurious to LGBTIQ+ people.
- The interlocutory costs decision of Australians for Indigenous Constitutional Recognition Ltd v Commissioner of the Australian Charities and Not-for-profits Commission [2021] FCA 435 carried limited weight in its observations about a sufficiently direct connection between an entity's activities and its purposes, given that it did not decide the matter.

22. The ACNC argued that:

    - EAL's advocacy and policy development activities do not provide direct relief (or sufficiently direct relief), nor is there a sufficient connection between its activities and the benevolent ends it pursues.
    - EAL's activities were directed towards achieving law reform and social change for LGBTIQ+ people generally, and in this respect, were not sufficiently targeted to relieve the distress of such persons experiencing poverty, sickness, destitution, helplessness, misfortune or distress.
    - EAL's activities were inherently preventative in nature and hence not those of a PBI.
    - As the Court would be asked to adjudicate an essentially political question, viz. whether the law and policy changes for which Equality Australia advocated are for the public benefit, it was not subject to the judgment of courts and was properly the preserve of the legislature and subject to political accountability.

23. The Full Court then closely examined the cases of Australian Council of Social Service Inc v Commissioner of Pay-Roll Tax (NSW) (1982) 13 ATR 290 (ACOSS (First Instance)) and appeal Australian Council of Social Service Inc v Commissioner of Pay-Roll Tax (1985) 1 NSWLR 567 (ACOSS (Appeal)), Hunger Project Australia v Federal Commissioner of Taxation [2013] FCA 693, and Federal Commissioner of Taxation v The Hunger Project Australia [2014] FCAFC 69.

24. It characterised the Hunger Project case as a situation where (at [90]):

    > Undoubted, relief against hunger was being provided, and the key question was whether the identity of the person actually delivering that relief to the people who needed it was determinative of whether The Hunger Project Australia was a public benevolent institution.

25. And distinguished ACOSS (First Instance) as (at [91]):

    > His Honour was not considering whether an organisation which raised funds for use by particular public benevolent institutions could not itself be said to be organised "in a direct and immediate sense" for the relief of poverty, sickness, destitution or helplessness.

Did the Tribunal misapprehend or misconstrue the expression "public benevolent institution" by introducing a qualification of its own?

26. EAL argued that the Tribunal introduced its own qualification to a PBI, that of sufficient proximity, or a direct connection, between an entity's activities and its benevolent ends, based on the Hunger Project (Full Court) decision.

27. The Full Court found that the Tribunal recognised that (at [101]):

    > …the fact that whether activities are apt to achieve benevolent purposes is a question of fact and degree. It does not superimpose any criterion additional to the requirement that senior counsel for Equality Australia accepted to exist.

28. In any case, this requirement was to be found in Perpetual Trustee Co Ltd v Federal Commissioner of Taxation (1931) 45 CLR 224 and Public Trustee (NSW) v Federal Commissioner of Taxation (1934) 51 CLR 75.

29. Further, EAL did not identify any persuasive reason to conclude that a requirement of a sufficient connection is an impermissible qualification on the ordinary meaning of the statutory expression.

30. EAL had not demonstrated that:

    - the majority relevantly gave the expression "a meaning or qualification of its own" so as to err in law; and
    - the majority had adopted a meaning contrary to that which had been established by legal decisions.

31. Thus, there was no error of law.

On the facts it found, ought the Tribunal necessarily to have found that Equality Australia was a public benevolent institution?

32. The Full Court distilled the majority's findings as (at [112]):

> First, the majority accepted that LGBTIQ+ people are persons in relevant distress, which may be relieved by acts of benevolence. Secondly, the majority found that Equality Australia's purpose was to address that distress by particular means — being, in short, advocacy. Thirdly, the majority found that the means selected were directed to achieving law reform. Fourthly, the majority found that this law reform "may", in turn, relieve the distress of LGBTIQ+ people.

33. The majority recognised that there was a "logical" connection, but (at [115]):

> …recognising a connection of that kind does not lead inevitably to the conclusion that Equality Australia's activities were "sufficiently" connected with the relief of distress.

34. It was a matter of a question of fact and degree to be decided by the Tribunal's view of all the circumstances. The Tribunal had done this and reached a factual conclusion that was open to it as a matter of law.

35. There was no error of law.

36. The Full Court found that addressing the ACNC's arguments was unnecessary.

37. There was no order for costs, as the parties had agreed to bear their own costs.

COMMENT

The authors

1. **Time**

EAL applied for a subtype change with the ACNC in August 2020, and a review of the initial decision by the ACNC in April 2021. The Tribunal hearings were in August 2022 and at the end of June 2023, when the decision was made by the Tribunal. The Full Court decision was given in early September 2024, some four years after the subtype request to the ACNC.

2. **Costs**

It is to be recognised that the ACNC agreed with EAL for each to bear their own costs. Several inquiries have recommended test case funding to develop charity law in matters of public interest, including disqualifying purposes.

The 2018 ACNC Commission Legislation Review so recommended, to which the government's response was that it did not support the recommendation and would explore legislative options to address uncertainty in the law. Recommendation 7.4 of the 2024 Productivity Commission Future Foundations for Giving Inquiry Report also recommended test case funding.

3. Full Hearings

The AAT Tribunal "correctly frame[s] the question derived from the statute, make[s] findings of fact based on the evidence, and appl[ies] the law (which includes, as a practical matter, the reasoning of the courts in relevant cases) to answer the question which decides the outcome": Global Citizen Ltd and Commissioner of the Australian Charities and Not-for-profits Commission [2021] AATA 3313 at 7. In an appeal before the Federal Court, the Court is confined to questions of law, not fact, under s 44 of the AAT Act. Some argue that for the jurisprudence of charity and PBIs to develop, it would be beneficial if the Court was charged with a de novo hearing (a fresh full hearing). Others would argue that this would unduly interfere with the discretion of administrators, open the floodgates of litigation, and inflate costs. See Bob Wyatt, The Appealing Illusion, The Pemsel Case Foundation.

4. ACNC's Unresolved Arguments

As set out above, the ACNC argued that the Tribunal's decision should be affirmed on grounds other than those relied on by the Tribunal. These included that advocacy activities have never previously been recognised as sufficient for status as a public benevolent institution, the activities were inherently preventative in nature, and the case involved decision-makers adjudicating an essentially political question: whether the law and policy changes for which Equality Australia advocated were for the public benefit. These were not eventually required to be determined by the Full Court, but were dealt with in the Commissioner's Interpretation Statement of PBIs (paras. 60-67). It is difficult to reconcile the arguments to the Full Court and the CIS. It may be appropriate for the ACNC to clarify this apparent inconsistency. Some would also argue that the ACNC ought not, in the ordinary course, depart from its CIS in Court proceedings in order to promote stability and certainty.

5. A Work Around - Auspicing

Professor Ann O'Connell in the AAT decision noted at122 that "Ms Anna Brown gave evidence that EAL has an arrangement with a DGR so that it is able to receive deductible gifts in this way. The arrangement involves the payment of the fee to the DGR." This work around has been used for some time now and allows non-PBI organisations to receive tax deductible gifts via an appropriately qualified organisation. For more information about auspicing refer Justice Connect's material on auspicing.

Murray Baird – Charity Adviser and Consultant Prolegis Lawyers

"When I use a word… it means just what I choose it to mean—neither more nor less."
Lewis Carroll *Through the Looking Glass*

Eyes on the Prize

The appellation "Public Benevolent Institution" is a prize for charities awarded by the ACNC and subsidised by government revenue. It entitles its recipients to receive tax deductible donations, distributions from ancillary funds,

and to provide capped exempt fringe benefits to employees. Accordingly, it is a sought-after award, and charitable entities are at pains to come within its rubric and sometimes press against its boundaries.

It is the most numerous type of deductible gift recipient. Yet it remains undefined in statute or dictionary and is left to the notion of its ordinary meaning. Equality Australia confirms a hitherto hidden nuance in the meaning of public benevolent institution described as "sufficiency of connection".

Ordinary Meaning

The phrase, "Public Benevolent Institution", does not appear in that form in authoritative dictionaries although public house, public spirit, public convenience, public school and public enemy, and many other things public, are defined. The High Court of Australia has not considered it since 1942 when it said that the expression carries its ordinary meaning: Maughan v Federal Commissioner of Taxation [1942] HCA 32; (1942) 66 CLR 388 (26 November 1942). In the earlier case of Perpetual Trustee Co Ltd v Federal Commissioner of Taxation [1931] HCA 20; (1931) 45 CLR 224 (4 June 1931)., Starke J. said that the phrase was to be understood in the sense that it is commonly used in the English language. Dixon J. said that little help was provided by dictionaries, statutory usage or judicial decision – perhaps a veiled critique of McTiernan J.'s resort, in the same case, to the Oxford Dictionary to establish meaning for this judicially unprecedented phrase.

In Ambulance Service (NSW) v Deputy Commissioner of Taxation [2002] FCA 1023; (2002) 50 ATR 496 ("Ambulance Services"), Alsopp J. referred to " the satisfaction of the ordinary English meaning of the phrase as a composite whole" and "the present current understanding of the expression in the currently spoken English language" (at [38] and [40]). The Equality Australia case confirms that the term "Public Benevolent Institution" has an ordinary meaning. That is, an everyday, non-technical meaning. "Ordinary meaning" appears to be interchangeable with "common usage".

Popular Usage

With respect, the idea that public benevolent Institution is well understood in its ordinary usage is artificial and unhelpful. Although a non-technical meaning seems attractive, the term public benevolent institution does not appear to be well recognised in popular usage but confined to the intercourse between tax and charity lawyers, their clients and regulators. Alsopp J comments in Ambulance Services, after observing that the meaning of the phrase was "a matter of popular or ordinary meaning at that particular time": "Nevertheless, decided cases identified legal issues affecting or influencing the answering of that question. They illuminated its meaning" (Ambulance Services at [37]).

There is limited guidance for decision makers to determine the scope of sufficient connection. Perhaps we are left with the guidance of Professor O'Connell in her dissent in the Tribunal: "It ultimately involves forming an impression…one just knows whether something meets a definition when one sees it." Equality Australia Ltd and Commissioner of the Australian Charities and Not-for-profits Commissioner [2023] AATA 2161 (30 June 2023) [156]

Implications

The lesson of Equality Australia is that it is open to a decision maker to infer from the "ordinary meaning" of public benevolent Institution, a requirement of a "sufficient proximity" between activities of an entity and relief of distress. In contrast to other subtypes of charity, the focus is on the relationship between activities and outcomes rather than purposes. The Tribunal found that the activities of Equality Australia were directed to law reform and social change. Even if there is a "logical connection" between the activity and the relief, it is open to a decision maker to decide that on its view of the facts, there is an insufficient connection.

Given the apparent inconsistency between the Commissioner's contentions in Equality Australia, and the Commissioner's Interpretation Statement on PBIs (CIS), a decision impact statement or review of the CIS from the ACNC may provide clearer guidance on how the sufficiency of connection nuance will be applied by the ACNC.

Professor Ian Murray – The University of Western Australia Law School

I am perhaps a little at odds with the other commentators in that I think there is some basis for the Tribunal's (and then the Full Federal Court's) consideration of whether there was a sufficient connection between Equality Australia's activities and its purposes (see especially at [102]-[103]). Some such requirement is suggested by the need to identify (1) a purpose of relieving PBI needs (i.e. distress, misfortune, helplessness), and then separately (2) whether the means adopted by the organisation indicate that it conducts itself towards those with such needs – what I have elsewhere referred to as the targeting requirement.[1] Mandating a particular type of purpose automatically requires activities to be logically consistent with, or to match that purpose, so the targeting requirement must add something.

However, in considering whether advocacy and education means are sufficiently connected to relieving the distress of a specific group of people, several matters are relevant. First, we must ask whether the advocacy and education is targeted at the general community or aimed at the people in need of relief. As noted by the Full Federal Court in *Equality Australia* (at [78]-[79]), in *Australian Council of Social Service Inc v Commissioner of Pay-Roll Tax* (1985) 1 NSWLR 567, the means adopted involved services, advocacy and education aimed at 'the promotion of social welfare in the community generally'. That does not appear to have been the case in *Equality Australia*, with both the Tribunal and the Full Federal Court appearing to accept that the advocacy and education activities were logically directed toward relieving the distress of LGBTIQ+ people, albeit that they may not be sufficiently closely connected with the relief of that distress (at [112]-[115]).

Second, I suggest that to test the sufficiency of connection, we ought to examine the particular causes and symptoms of distress of the target group of people in need of relief. The Tribunal in *Equality Australia* accepted (at [34]-[35]) that structural discrimination (including in material part as a result of laws and policies of the state) causes minority stress for LGBTIQ+ people. Equality Australia's activities focussed on advocacy to achieve law reform and social change (Tribunal at [69], [79]), but the Tribunal found that this meant simply that Equality Australia's activities 'might inure to the benefit of the target group' (at [88]), which did not create a sufficient connection (reasoning affirmed by the Full Federal Court). This involves a failure to acknowledge that a key cause of minority stress for LGBTIQ+ people is the existence of laws and governmental policies that are discriminatory – state sanctioning of discrimination (acknowledged only very obliquely by the Tribunal at [81]). Activities such as counselling might address the symptoms of that discrimination, but only law reform and change of government policies can address the cause. Advocacy and education activities are activities uniquely suited to achieving this. It seems odd to suggest that advocacy aimed at removing a discriminatory law is characterised as insufficiently connected to the relief of discrimination from minority stress arising from state sanctioning of discrimination.

Alice Macdougall – Special Counsel, Herbert Smith Freehills

This decision increases the difficulty in providing guidance to clients on the meaning or requirements of a PBI. Whether an entity is a PBI, is, according to this decision, a question of fact to be determined based on the ACNC's understanding of the ordinary meaning of the expression, which must be reasonable and must be consistent with established authority.

As the expression is not used in our current language, one difficulty is there is no ordinary or customary meaning. "Benevolence" had a meaning in the 1930s, but now the term is considered old-fashioned and patronising.

[1] See, e.g., Ian Murray, "Public Benevolent Institution Relief Via Advocacy" (2021-2022) 56(6) *Taxation in Australia* 379-382.

The Court recognised that a PBI is an institution organised for, promoted, or conducted for the relief of need, as established in previous cases. The decision referred to the requirement for an "appropriate relationship" (at [103]) between the activities and the aims of the entity to establish this.

The AAT decided that Equality Australia was organised to address distress (at [80] AAT decision) – that appears to satisfy the requirements of the established cases and adopted in the ACNC's CIS.

However, at [88] the AAT stated: "*An entity that is organised to advocate for reform and change is (at least in this instance) too far removed from the traditional concepts of benevolence*". The Federal Court decision described this at [33] as "t*he Tribunal concluded that Equality Australia was not organised or conducted for, and did not promote, the relief of that distress* ***in the required way"*** (emphasis added). The Court accepted there was a "logical connection" but not a "sufficiency of connection". The distinction between these terms, and their relevance to an "appropriate relationship" is not clear.

The requirement for a "sufficiency of connection" is a new and uncertain addition to the requirements for a PBI and seems directly contradictory to the statements in the Hunger Project case and the ACOSS case, that a PBI "*conducts itself in a public way towards those in need of benevolence,* ***however that exercise of benevolence may be manifested***". [Commissioner of Taxation v Hunger Project Australia [2014] FCAFC 69 at [66].

On a positive note, I consider there is an opportunity for the ACNC to clarify and expand the current interpretation of PBI drawing from past decisions, and clarify that there is no limitation on how the exercise of benevolence is manifested. Under a modern understanding, this would include addressing causes of distress.

VIEW THE CASE

This case may be viewed at: https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/115.html

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