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THIRD DIMENSION

A PRACTICAL LEGAL PERSPECTIVE FOR CHARITIES AND NOT-FOR-PROFITS

Learning from Celeste Barber's bushfire appeal so that you don't get burnt

MILLS OAKLEY

Supreme Court confirms $51 million donation will go to the NSW Rural Fire Service

BY Ariane Thierry, Law Graduate

In early January 2020, while Australia suffered from catastrophic bushfires, comedian Celeste Barber began a fundraiser on Facebook which listed its beneficiary as the NSW Royal Fire Service & Brigades Donations Fund (**RFS Fund**). By the end of January, donations had amounted to an incredible $51 million (**Donation**), making it the largest charity drive effort ever on Facebook. As the donations continued to increase, Ms Barber made various statements suggesting that the Donation could be divided up between various charities and for different purposes, not just to the RFS Fund.

The Trustees of the RFS Fund (**Trustees**) applied for judicial advice under section 63 of the *Trustee Act 1925* (NSW), submitting to the Court that they wished to honour the intentions of Ms Barber and of donors, within the limits of the RFS Fund Trust Deed (**Trust Deed**). As the RFS Fund is a charitable trust, the Attorney General of NSW joined the proceedings on behalf of the Crown, to represent the objects of the RFS Fund. On 25 May 2020, Slattery J of the Supreme Court of NSW (**Court**) advised that the Donation could not be distributed to other charities or for purposes outside of the scope of the Trust Deed.

The Appeal

Ms Barber's fundraising appeal directed donors to make a donation through PayPal. Upon reading the terms and conditions, it became apparent that a donation through PayPal was not made directly to the RFS Fund. This was despite the fact that the fundraiser's description and 'about' heading listed the Trustees of the RFS Fund as the beneficiary of the fundraiser. Rather, the PayPal payment was made to the PayPal Giving Fund Australia (**PayPal Fund**). Donors who made a donation to the PayPal Fund were bound by the PayPal Fund's Donor Terms of Service (**Terms of Service**). The Terms of Service stated that the PayPal Fund was not required to remit the donation to the RFS Fund, but that it would 'make every effort to grant the funds' in accordance with the donor's recommendation (to the RFS Fund).

> "…Ms Barber made various statements suggesting that the Donation could be divided up between various charities and for different purposes, not just to the RFS Fund."

In late January 2020, the PayPal Fund distributed the Donation to the RFS Fund. This was despite the fact that Ms Barber had made various statements during the course of the fundraiser that may have led some donors to believe that the Donation would be distributed to other charities and for other bushfire related causes.

The RFS Fund

The RFS Fund is an express charitable trust constituted by the Trust Deed in 2012. The purpose of the RFS Fund, according to the Trust Deed, is to distribute income from time to time as it sees fit:

a. To enable or assist fire brigades to 'meet the costs of purchasing and maintaining fire-fighting equipment and facilities, providing training and resources and/or to otherwise meet the administrative expenses' of fire brigades associated with their activities;

b. For authorised investments consistent with the above in point a.; and

c. For the costs of managing and operating the RFS Fund.

The Advice

The Trustees asked the Court to consider whether they could apply the Donation in four different ways. In response to each of the four questions posed by the Trustees, the Court advised:

1. *To pay money to other charities or rural fire services (both within and outside of NSW) to assist in providing relief to people and animals that have been affected by bushfires.*

The Court confirmed that the Trustees cannot distribute the Donation to other charities or interstate, to assist people and animals.

This is because the purpose of the RFS Fund is to assist brigades, not those affected by bushfires. Further, the Trustees cannot make a donation to other charities for 'bushfire related purposes', as this would be ultra vires to the purpose of the RFS Fund and ultimately in breach of trust.

The Trustees are also prohibited from making any donations to any interstate fire services. The only exception to this arises where an interstate fire brigade is assisting in NSW bushfire relief under the command of a NSW officer in charge of that fire, and their administrative expenses can be met.

2. *To set up, or contribute to, a fund to support rural firefighters injured whilst firefighting, or the families of deceased rural firefighters killed while firefighting.*

The Court advised that it would be permissible under the Deed for a proposed fund to be established by the Trustees for the purposes of 'preventing future fires and resourcing the brigades'. Slattery J confirmed that the Trustees could provide funds to brigades in order 'to address physical dangers by the recent fires.'

> "The Terms of Service stated that the PayPal Fund was not required to remit the donation to the RFS Fund, but that it would 'make every effort to grant the funds' in accordance with the donor's recommendation (to the RFS Fund)."

This means that money may be donated to brigades to help them meet the costs of providing resources to protect people from dangers resulting from bushfires in rural areas. The money must still, however, be for 'resources' for brigades, and cannot be given directly to people affected by the bushfires. It must also be used for 'protection of persons from dangers to their safety and health' where the danger arises from fires. The Court agreed that the Trustees could pay brigades money to provide food, water and temporary shelter for those affected immediately after a bushfire.

The Court agreed with the Attorney General of NSW that the Trustees could provide funds to assist injured firefighters and the families of fallen firefighters, beyond the immediate aftermath of bushfires. One of the reasons for this conclusion is that such longer-term assistance will likely encourage more volunteers. Encouraging more volunteers can be considered as providing resources under the RFS Fund's purposes.

3. *To provide physical and mental health training and resources and trauma counselling services to volunteer firefighters who require such training and resources in connection with their volunteering under section 9 of the Rural Fires Act 1997 (NSW).*

The Trustees may set up a fund to provide physical and mental health training for volunteer firefighters, as well as trauma counselling. This is because such training and counselling falls within the definition of 'training and resources' and counselling can be considered protecting firefighters 'from a danger to their safety and health arising from the fires.'

> "…the Court confirmed that the Trustees of the RFS Fund were never bound by Ms Barber's statements…"

4. *To set up, or contribute to, a fund that meets the costs for volunteer rural firefighters to attend and complete courses to improve relevant skills.*

The Trustees may set up such a fund as it will fall within the definition of 'training' and thus be within the purposes of the RFS Fund.

Slattery J also confirmed that the Court's advice did not prohibit a donor from bringing a suit against the PayPal Fund for not directing part of the Donation towards other causes. In conclusion, the Court confirmed that the Trustees of the RFS Fund were never bound by Ms Barber's statements and the Donation cannot be distributed amongst different charities or for various purposes outside of the scope of the purposes of the RFS Fund.

Practical Advice for Not-for-profits (NFPs) and Trustees

Following the Court's advice, NFPs should:

- Ensure that donors are aware of the intended beneficiary and the purposes to which their donation will be applied;
- Avoid making contradicting statements regarding how donations will be distributed; and
- Read the terms and conditions when using third party platforms such as PayPal to facilitate the fundraising event (particularly if the contract with the third party states that the third party has full control over how the donations may be distributed).

Trustees should also ensure that the trust deed clearly outlines who the intended beneficiaries of the trust are, and understand the limitations of how donations may, or may not, be distributed by the trust.

Case Note: Equity Trustees Ltd (As Sole Trustee of the Sir Colin and Lady MacKenzie Trust Fund) v Attorney-General for Victoria

BY John Vaughan-Williams, Associate

The recent Supreme Court of Victoria case of *Equity Trustees Ltd (As Sole Trustee of the Sir Colin and Lady MacKenzie Trust Fund) v Attorney-General for Victoria* (**MacKenzie Case**) is a good reminder of the principles that courts will consider when determining whether it needs to modify the terms of a charitable trust, through what is known as a *cy-près* scheme.

Facts of Case

Lady Winifred Iris Evelyn MacKenzie (**Deceased**) passed away in 1972. The Deceased left a will dated 1966, and a codicil dated 1969 (collectively, the **Will**).

Relevantly to these proceedings, the Will provided that a specific portion of the Deceased's residuary estate (that is, the portion of the estate that remains following specific gifts) would be held on trust in perpetuity, such trust being known as the 'Sir Colin and Lady MacKenzie Trust Fund' (**Trust**). There were two separate charitable purposes to which the Trust was to be applied, both of which are relevant to the proceedings.

Sanctuary Charitable Purpose

The Will provided that one third of the income deriving from the Trust was to be applied annually towards the Sir Colin MacKenzie Sanctuary (**Sanctuary**), to be spent as far as possible in the furthering of scientific knowledge of the native fauna maintained in the Sanctuary (**Sanctuary Gift**).

Sir Colin MacKenzie had been the husband of the Deceased. He had established the Institute of Anatomical Research in Healesville, Victoria, which conducted studies of local fauna. The land on which the Institute was based was eventually passed to the Healesville Council, and became known as the 'Sir Colin MacKenzie Sanctuary'. The Sanctuary came under control of the Zoological Parks and Garden Board (**Board**) in the late 1970s, and the Board was one of the defendants in these proceedings.

Crucially to these proceedings, the Will contained a condition that if the name of the Sanctuary changed from the 'Sir Colin MacKenzie Sanctuary' (**Prescribed Name**), then the Sanctuary Gift would no longer apply, and that one third of the Trust would instead be applied to the remainder of the Trust.

> "Circumstances in which a cy-près scheme can be applied include where the gift is impractical, impossible or illegal."

Scholarship Charitable Purpose

The Will then set out that the other two thirds of income stemming from the Trust was to be applied to scholarships and grants for studies in comparative anatomy, studies which had to have a medical significance, and further the understanding of human health and disease (**Scholarships Gift**).

Under the Will, the distribution and application of these scholarships and grants were to be decided by a committee, composed of the individuals holding five specified positions (**Scholarships Committee**).

One of the positions on the Scholarships Committee was held by a representative of the National Health and Medical Research Council (**NHMRC**). Before these proceedings, the NHMRC had written to the trustee of the Trust, advising that it did not wish to have a representative on the Scholarships Committee, due to a perceived conflict of interest.

Circumstances regarding name of Sanctuary

Some ambiguity existed at the time of the proceedings as to whether the name of the Sanctuary had changed from the Prescribed Name. Since the Sanctuary referred to land, the question of the Sanctuary's name largely depended on how it was known to the public, as opposed to how the name was formally registered anywhere. This is in distinction from the name of a corporation, which can easily be determined from an official record.

It was uncontroversial that at the time of the Deceased's death, the Sanctuary was still known by the Prescribed Name.

In the decade following the Deceased's death, there was further evidence that the Sanctuary had retained the Prescribed Name, with Government Gazettal notices regarding the Sanctuary referring to it by the same name. The Prescribed Name was registered as a business name in 1984, and that registration remained until 2002. However, sometime in the mid-1990s, the Sanctuary began being known as the 'Sir Colin MacKenzie Zoological Park' (**New Name**). The New Name was, for example, used in a Victorian regulation in 1996 when referring to the Sanctuary.

In 2000, the Board had obtained deductible gift recipient endorsement for a fund registered under the New Name, an endorsement which remained current as at these proceedings.

The Prescribed Name did not resurface until 2014, when the Board registered it as a trade mark. Contemporaneously, the Board registered the New Name as a business name.

Questions before the Court

The questions before the Court in the MacKenzie Case were:

a. Had the Sanctuary Gift lapsed, due to the name of the Sanctuary changing? If the Sanctuary Gift had lapsed, how should it be applied?

b. Could the Will be modified so as to replace the NHMRC representative on the Scholarships Committee, as well as adding a mechanism to replace Scholarships Committee representatives in the future?

Cy-Près Schemes

Relevantly to these proceedings, a court can apply a *cy-près* scheme to a charitable trust (often arising from a will) if it can no longer be performed according to its strict wording. A *cy-près* scheme involves modifying the trust, so as to give effect to the settlor's or testator's intention as best as possible.

The ability to apply a *cy-près* scheme arises both from common law (that is, judge-made law), and statute (which vary across each state and territory).

Circumstances in which a *cy-près* scheme can be applied include where the gift is impractical, impossible or illegal.

In these proceedings, the Court needed to consider whether to apply a *cy-près* scheme to both the Sanctuary Gift and the Scholarships Gift.

Court's Findings

Had the Sanctuary Gift lapsed?

The Court held that it was clear, on the evidence, that the Prescribed Name had fallen into total disuse between 2002 and 2014.

The Sanctuary was no longer known in any capacity under the Prescribed Name, and this was not affected by the registration of the Prescribed Name as a trade mark in 2014. Instead, it was clear that the Sanctuary had become known under the New Name.

The Court assessed whether the New Name was a significant enough divergence from the Prescribed Name so as to cause the Sanctuary Gift to lapse.

The Court first considered whether it could use extrinsic materials to determine the Deceased's intention, and to interpret the Sanctuary Gift accordingly. The Court noted that it is limited in when it may interpret a will other than according to its literal and ordinary meaning.

The relevant principles regarding the consideration of extrinsic materials in interpreting a will were discussed by the Court. These principles included the following:

a. Terms of a will must be construed according to their plain meaning. Extrinsic evidence can only be used to understand the words used.

b. In interpreting a will, a court will only add words if it is clear on the face of the will that words have been omitted from it.

c. Courts will strive not to interpret a will in a way that would lead to intestacy (that is, so that gifts fail in their entirety, without any 'gift over' provision).

Although the Court accepted that it seemed clear that the Deceased's intention, in including the condition in the Will regarding the Prescribed Name, was to honour her late husband, the wording of the Sanctuary Gift was clear and unambiguous. It could not be interpreted any other way than that if the Sanctuary ceased to be known by the Prescribed Name, it would fail. Accordingly, the Court held that the Sanctuary Gift had failed.

Could the Court apply a cy-près scheme to the Sanctuary Gift?

Given the Court's view that the Sanctuary Gift had failed under the Will, it then considered whether it could apply a *cy-près* scheme in order to amend it.

The Court held that although there were deficiencies with the wording of the Sanctuary Gift, those deficiencies fell short of rendering the gift impractical, impossible or illegal. In particular, the Court gave weight to the fact that the Will provided a 'gift over' provision (that is, a clause providing an alternative gift in the event that the original gift fails).

The Will provided that if the Sanctuary Gift failed, one third of the Trust would be applied to the Scholarships Gift. Accordingly, the Court held that it was unable to apply a *cy-près* scheme to the Sanctuary Gift.

Could the Court apply a cy-près scheme to the Scholarships Committee?

Regarding the proposed variation to the Scholarships Committee, the Court came to a different conclusion.

The Court held that given one of the members of the Scholarships Committee was not willing to perform its role, this would render the Scholarships Gift impossible to perform. Accordingly, the Court held that it was within its power to apply a *cy-près* scheme to replace that member.

Additionally, the Court agreed to the request to apply a *cy-près* scheme to insert a mechanism into the Will to replace members of the Scholarship Committee, which would eliminate the need to make continual applications to the Court. The Court included in its reasons that a previous application – before these proceedings – had already been made to the Court for a *cy-près* scheme to replace another member of the Scholarships Committee, and that both applications had cost the Trust over $100,000 in legal fees.

Take Away Points

The MacKenzie Case demonstrates that the circumstances in which a court will, and will not, apply a *cy-près* scheme to a charitable trust can be subtle, and can vary based on only minute differences in facts. It is recommended that trustees of charitable trusts carefully consider the prospects of any claim before commencing any court proceedings.

The Ties That Bind Parent and Subsidiary Companies

BY Carlie Alcock, Associate

The holding company with subsidiary company structure is one commonly found in the not-for-profit and charity space, perhaps as much as it is found in the commercial arena. Commonly used to separate certain operations of a company into a distinct, albeit related, legal entity, either to minimise specific tax liabilities or maximise eligibility for tax concessions, the structure also enables organisations to protect assets and limit risk liability.

The symbiosis of the structure is evident in its definition under the *Corporations Act 2001* (Cth) (the **Act**), which defines each entity by reference to the other. Section 46 of the Act provides that a company is a subsidiary of another company (the 'holding company') where:

1. the holding company:
    a. controls the composition of that company's board of directors; or
    b. controls more than half of that company's maximum voting power at general meetings; or
    c. holds more than half of the share capital issued for that company; or
2. that company is a subsidiary of a subsidiary of the holding company.

The amount of control that a holding (or parent) company exerts over a subsidiary will depend on how the relationship between them is structured in the subsidiary's governing documents.

Typically, in a not-for-profit or charity structure, the holding company will act as the sole member of the subsidiary and will be responsible for appointing and removing the directors on the board (or a majority of the directors if the board has the option to appoint co-opted directors) of the subsidiary, although this may vary in degrees between organisations. As well as other strategic decisions, the holding company (as the sole member) will often be responsible for the approval of significant decisions involving the subsidiary company's direction or future, including any decision to wind up the company or amend its constitution. The subsidiary's constitution may also contain additional reserve powers, specifically delegating the approval of some matters to the holding company, such as the appointment of a Chief Executive Officer or decisions around the buying or selling of certain assets.

While a holding company will have some degree of control over the subsidiary, there may be instances where the control exhibited by that company is so direct that it is held to be a director itself, and therefore liable for the debts of its subsidiary in the event that the subsidiary becomes insolvent. The definition of 'director' at section 9 of the Act includes a person whose 'instructions or wishes' the directors 'are accustomed to act in accordance with', even though that person is not properly appointed as a director. Often referred to as 'shadow directors', persons (including parent companies) meeting this definition under the Act will be held to the same standard as those validly appointed as directors.

It is important here to separate the notion of 'instructions or wishes' from 'advice', in the sense that 'advice' is not generally tied to an obligation to act. Under section 9, a person will not be held to be a director where that person provides advice in that person's professional capacity or through their business relationship with the directors.

Further, the inclusion of the words 'accustomed to act' suggests that there has been a pattern formed whereby such instructions are anticipated and there is a reasonable expectation that they will be followed. Alternatively, there may be a relationship established through which an understanding exists that decisions of fundamental importance will be directed by an external person or body. In this situation, it is possible that even a single decision exclusive from any evident pattern could be considered to have been made under the instruction of a shadow director.

> "Typically, in a not-for-profit or charity structure, the holding company will act as the sole member of the subsidiary and will be responsible for appointing and removing the directors on the board…"

In the event that a subsidiary becomes insolvent, one of the first places that creditors will seek to look is the holding company. In times of economic uncertainty like the present, it is important for holding companies and subsidiaries to be clear on where the responsibility and control lies between them. It will not be unusual for a holding company to exercise greater direction or control over its subsidiary during times of financial instability, however, in order to ensure that the holding company is not seen to be a shadow director, it will be important for the board of the subsidiary to exercise its own analysis and independent decision making.

This may be made more complex, but is no less important, where some of the directors of the subsidiary also sit on the board of the holding company.

In *Standard Chartered Bank of Australia Ltd v Antico*[1] the New South Wales Supreme Court reviewed the relationship between the holding company (**Pioneer**) and its subsidiary (**Giant**). Giant was being wound up and Standard Chartered Bank of Australia initiated proceedings against Pioneer alleging that Pioneer was in fact a shadow director of Giant and was therefore liable under the insolvent trading provisions for the actions of Giant.

The Court held that the fact that Pioneer owned 42% of Giant and had three nominee directors appointed to its board, was not sufficient to hold Pioneer out as a director. However, in observing the various strategic decisions that had been made by Pioneer, along with other aspects of its management and financial control over Giant, the Court found that Pioneer was in fact a shadow director of Giant, stating that Pioneer had a 'willingness and ability to exercise control, and an actuality of control, over the management and financial affairs of Giant'[2].

> "In times of economic uncertainty like the present, it is important for holding companies and subsidiaries to be clear on where the responsibility and control lies between them."

On the other hand, in the case of *Dairy Containers Ltd v NZI Bank Ltd*[3] the High Court in Wellington considered the allocation of control between the New Zealand Dairy Board (**NZDB**) and its wholly-owned subsidiary, Dairy Containers Ltd (**Dairy**). All of Dairy's directors were appointed by NZDB and were employees of NZDB. However, despite the Court acknowledging that Dairy's directors, as employees of NZDB, were used to acting in accordance with the instructions of NZDB, it held that, as the directors of Dairy, they were not accustomed to acting on the basis of instructions from NZDB.

In considering these two examples, it is clear that the form and content of communications between a holding company and its subsidiary will be fundamental in determining whether such communications are held to be instructions or directions, or simply advice. Similarly, it will be the pattern of those communications that will be important in concluding whether or not the subsidiary has become accustomed to acting on the instruction or direction of the holding company.

Since the decisions described above, an exemption has been introduced at section 187 of the Act which provides that a director of a wholly-owned subsidiary will be held to have acted in good faith and in the interests of the subsidiary where that director acts in good faith and in the interests of the holding company. In such circumstances, the director's actions will be upheld, provided that the constitution of the subsidiary expressly authorises the director to act in the interests of the holding company and, that at the time of the director's actions, the subsidiary is not insolvent and does not become insolvent as a result of the actions.

It is, however, important to recognise that the exemption at section 187 does not excuse the directors from independently evaluating each decision. Particularly in our current economic climate, where financial instability is being felt across all industries and sectors, and insolvency appears a bleak reality for many perhaps more than ever before, it is vital that directors identify where they may have dual responsibilities and ensure that they maintain a level of independent analysis at every stage of their decision making.

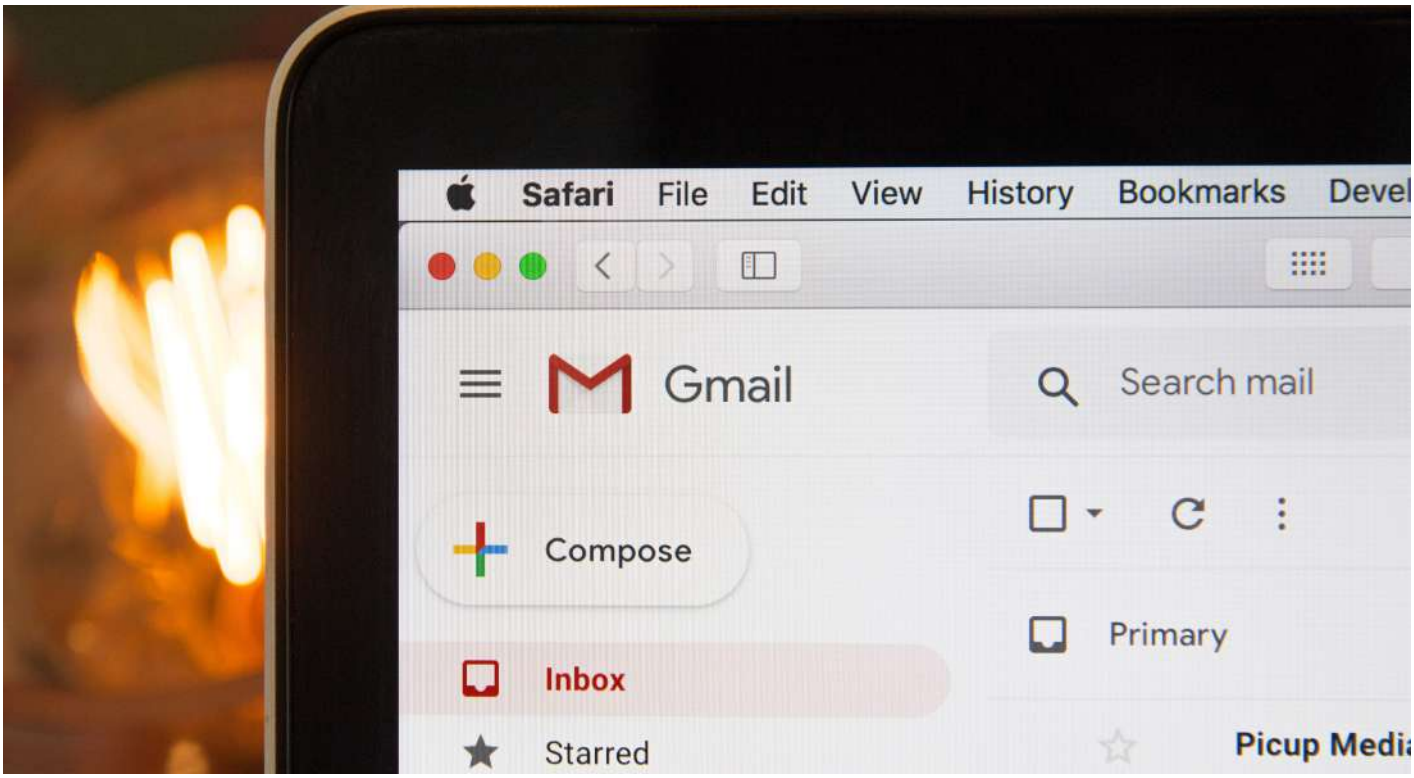
[1] [No. 1 and 2] (1995) 38 NSWLR 290.

[2] Standard Chartered Bank of Australia Ltd v Antico [Nos 1 and 2] (1995) 38 NSWLR 290, 328.

[3] (1995) 7 NZCLC 260.

A Warning Against Hyperlinks from the Australian Computer Society

BY Ariane Thierry, Law Graduate



Emailing members with hyperlinks to important documents may appear to be a sure-fire way for directors and management to notify their organisation's members of a meeting or proposal. However, a recent Federal Court decision confirmed that this may not be enough. *Clarke v Australian Computer Society Incorporated [2019]* FCA 2175 highlighted - among other concerns - how a not-for-profit's (**NFP**) management must ensure that each of its members receive proper notice where a special resolution is being put to a vote at a general meeting. Wigney J delivered a scathing judgment of Australian Computer Society Incorporated (**ACS**)'s behaviour. Although their breaches were perhaps trivial, the Court ruled that the general meeting and special resolution be invalidated. The case should be a warning for NFPs on how their actions and omissions may not satisfy their obligations.

The Facts

ACS is an incorporated association under the *Associations Incorporation Act 1991* (ACT). Around a quarter of its 41,000 members are voting members. On 25 October 2019, it held a general meeting where a special resolution to apply for registration as a company limited by guarantee under the *Corporations Act 2001* (Cth) was put to its members. The resolution was passed by 75.1% of members, which was effectively made successful by a single vote. Prior to this, various emails were sent out to its members regarding the meeting which purported to provide notice of special resolution. Mr Clarke, the applicant, was a voting member who opposed the resolution. In November 2019, Mr Clarke began proceedings seeking interlocutory relief to restrain ACS from applying for registration as a company limited by guarantee. He challenged the validity and passing of the special resolution on five grounds. The Court found in favour of Mr Clarke on all grounds.

> "Members are 'entitled to hear and be heard' and must be given fair opportunity to give their opinion and ask questions."

The Decision

The Court found that ACS did not comply with its rules by correctly notifying its members of the proposed special resolution and the general meeting. Firstly, ACS did not send the notice to members that had opted out of marketing emails. This amounted to 1,196 voting members. The Court critiqued ACS on the fact that a member choosing to opt out of marketing emails did not mean they were opting out of receiving important communications. Further, ACS made no additional effort to send the notice to members who had not provided their email address, or those members where the email had 'bounced back'. Twenty members had not provided their email address, including five voting members. While these are not necessarily large numbers, the importance of this technical error is evident in the fact that the resolution was only passed by one vote.

Secondly, ACS did not properly send the notice of the special resolution or general meeting in its emails. The documents pertaining to both were included in hyperlinks that members could click onto to open and download. The Court ruled that this resulted in the document not being 'attached to or contained in' to the email. Indeed, the hyperlinks were a 'pointer to the location of a file stored elsewhere that is accessible over the internet'. They were a means by which members could access the documents. Thus, the documents that were linked from the hyperlinks, including the formal notice of the general meeting, were not strictly sent to the members.

ACS's management committee also made other critical mistakes that resulted in the ruling against them. The Court held that similar to directors, management of an incorporated association who propose to move the association in a new direction must make a full disclosure of all known material facts (including opposition to the proposal) to its members. In the notices sent to members, ACS had materially misled its members, who could have been led to believe that the changes proposed were only minor, when in fact they involved new rules and a new constitution. It was only by clicking through multiple hyperlinks that members may have understood the full extent of the proposed changes.

Moreover, ACS also only provided one document that purported to present an opposing argument to the proposal. On analysing that document, it was evident that the document did not present a 'purely objective comparison' between the existing and proposed constitutions.

The Court also ruled that ACS' secretary, who had supposedly been delegated the capacity to validate proxy votes, had incorrectly determined that two proxy votes were invalid. While the members had both incorrectly provided their membership numbers in the proxy vote form, the secretary could have easily remedied these clerical mistakes. Finally, the Chair of ACS at the general meeting breached his duties by stifling debate and questions from members prior to the vote. He did not act in good faith, or facilitate the necessary debate. Members are 'entitled to hear and be heard' and must be given fair opportunity to give their opinion and ask questions. Although the Court accepted that some of these breaches were minor and technical, they all contributed to the special resolution passing and hindered the meeting's validity. Ultimately the general meeting and special resolution were set aside for a new general meeting.

Take Away Points for NFPs

Directors and management committees should take the Court's ruling in this case as an indication of how notices to members may be construed. Firstly, it is vital that all members receive proper notification of meetings and any special resolutions. This includes ensuring emails have not 'bounced back', that emails are sent to all members who have provided their addresses, and that members who have not provided email addresses are sent hard copies. Secondly, sending members an email with a hyperlink directing members to the notice of a meeting, will not constitute proper notice. Organisations should thus tread carefully if they seek to rely on hyperlinks when sending notice to their members. Finally, this case demonstrates how organisations proposing to move in a different direction must provide all material information to their members in a clear and effective way. This includes allowing members to express their concerns and ask questions.

Review of the Costs and Pricing of Interment in New South Wales

BY *Alison Sadler, Lawyer*

Background

Late last year, the Independent Pricing and Regulatory Tribunal (**IPART**) released a report with interim findings and recommendations about costs and pricing of interments (burial of a body or cremated remains) in New South Wales (**NSW**) cemeteries.

The IPART review was initiated due to significant reform in the sector over recent years, which included the introduction of the *Cemeteries and Crematoria Act 2013* (NSW). Section 145 of the *Cemeteries and Crematoria Act 2013* (NSW) provided that IPART was to produce a report within three years which showed the results of an investigation of interment costs and pricing of interment rights within the interment industry with regard to:

- The relativity of costs and pricing factors for perpetual and renewable interment rights; and
- Full-cost pricing of perpetual interment rights, including provision for the perpetual case of interment sites and cemeteries.

This article will discuss some of the proposed recommendations in the interim report.

Proposed recommendations

In evaluating the costs and pricing of interments, IPART was conscious of the need to find a balance between ensuring that interment prices are affordable and equitable, and that cemeteries operate in a way that is financially sustainable.

The 15 recommendations of IPART range across these considerations. In our view, the majority of the recommendations are sensible.

> "Cemetery operators who are forced to acquire land at exorbitant prices necessarily pass these costs onto consumers."

Some of the recommendations are:

Recommendation 1: Cemeteries and Crematoria NSW (CCNSW) be made responsible for acquiring land for new cemeteries in Sydney as part of a statutory review of the Cemeteries and Crematoria Act 2013 (NSW).

As identified by the interim report, the absence of a consolidated development approach for new cemeteries has contributed to a highly competitive land acquisition market characterised by price distortion. Cemetery operators who are forced to acquire land at exorbitant prices necessarily pass these costs onto consumers.

Accordingly, we agree with the principle behind the interim report's recommendation to centralise the process for identifying new cemetery land, in that it will reduce competition and increase efficiency in an industry dealing with mounting economic and practical pressures.

However, the proposal that CCNSW should be made solely responsible for acquiring new cemetery land does not adequately address the expertise and flexibility that is demanded by the cemetery land acquisition process.

The effective identification and acquisition of land for use as a cemetery requires specialist planning, valuation, infrastructure and development experience, and accordingly should be the responsibility of a suitably qualified entity such as the Department of Planning, Industry & Environment.

Recommendation 6: There be a legal obligation on all cemetery operators to make adequate financial provision for perpetual maintenance of interment sites and the cemetery.

The interim report identifies how there is currently 'no legal requirement for cemetery operators to set aside funds for the costs of perpetual maintenance.'[1] We acknowledge that a framework for adequate perpetual maintenance is essential.

However, we note that recommendation 6 has the effect of burdening cemetery operators with the future responsibility for this prior failure, and in turn increasing the cost of individual interment rights for consumers. In requiring all cemetery operators to make adequate financial provision for the perpetual maintenance of interment sites and cemeteries, the implementation of recommendation 6 will result in cemetery operators necessarily factoring future perpetual maintenance liabilities into contemporary interment pricing.

We have suggested in our submissions to IPART that the process of correcting historical failures should be done by way of a government subsidy provided to cemetery operators, so that these prior perpetual maintenance costs are not passed onto present and future consumers.

Recommendation 9: CCNSW to develop guidelines on when and how a cemetery operator can use perpetual maintenance funds for a cemetery.

We welcome the recommendation that CCNSW develop guidelines on when and how a cemetery operator can use perpetual maintenance funds for a cemetery.

In particular, the guidelines have the potential to negate the need for an independent perpetual fund manager, such as Treasury Corporation, in that they may outline:

- The degree of separation required between a cemetery operator and the maintenance fund;
- The permitted uses of perpetual maintenance funds; and
- How maintenance providers may access perpetual maintenance funds set aside by cemetery operators.

We submitted to IPART that existing cemetery operators should be invited to provide input on the development of the guidelines by CCNSW.

> "However, we note that recommendation 6 has the effect of burdening cemetery operators with the future responsibility for this prior failure, and in turn increasing the cost of individual interment rights for consumers."

Recommendation 11: To make it easier for consumers to compare and understand prices for bodily interment services, cemetery operators be required by regulation to publish prices for all bodily interment services on a consistent basis.

We agree with the interim report's recommendation that interment prices be published consistently by all cemetery operators, as it will in principle simplify the interment process for consumers and make that process more transparent. In our submissions, we suggest that CCNSW consult with cemetery operators on the different names and types of service components that are included in their interment prices, so that a common terminology may be developed that is both easily adopted by cemetery operators to their existing services, and appropriately comparable for consumers.

Summary

The deadline for feedback on the interim report was 24 February 2020. IPART will consider the feedback it receives from the public and conduct further research before releasing a draft report in July 2020.

Pursuant to section 145 of the *Cemeteries and Crematoria Act 2013* (NSW), IPART is also required to investigate competition, cost and pricing factors in the funeral industry as part of this review. However, due to the current effects of the COVID-19 pandemic on the funeral industry, IPART has decided to delay commencement of the review for the time being.

[1] Interim Report, 5.

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Topics from previous issues

Issue 24, Summer 2020

- New Charitable Fundraising Guidelines in New South Wales
- Australian Accounting Standards Board proposes a new definition of 'not-for-profit entity'
- Update on Disability Royal Commission
- Know thy rules: The importance of governing documents
- The role of the Australian Competition and Consumer Commission in not-for-profit mergers

Please look out for our next issue, which will mark the celebration of Third Dimension's 10th Anniversary!

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