



2021 ACNC Case Roundup Court & Tribunal “War Stories”

Jessica Lipsett (Director) & Andrew Lind (Consultant)

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Introduction

Corney & Lind Lawyers Pty Ltd

- Mid size law firm – 18 lawyers + 24 staff
- Our focus areas

Schools & Education

Not for Profit & Charity

Commercial

Employment & Discrimination

Personal Injury

Commercial Litigation

Family Law

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- Our lawyers travel to you if needed
- Specialist lawyers committed to delivering “*just redemptive outcomes*®” with care, attention and integrity
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PBIs under the microscope – ACNC & litigation

- › ACNC targeting PBIs in compliance action.

- › March 2020 - announced "500 PBIs to undergo review as part of DGR Reforms":
 - › Assessed ongoing eligibility as a charity, PBI subtype and DGR status.
 - › Identified based on risk profile.
 - › This work is intended to be rolling annual work.

- › *Commissioner's Interpretation Statement: Public Benevolent Institutions* under review, in response to changes in practice and recent case law.

1. ***Global Citizen Ltd v Commissioner of the ACNC*** [2021] AATA 3313 (September 2021)

- › Application for PBI status refused.
 - › Charity for advancement of education seeking also PBI status
 - › Its aim - to end extreme global poverty by the year 2030
 - › GCL does not provide relief directly (or through related entities) to those in need, but instead works to convince governments and major philanthropists to provide relief
- › Arguments of the Commissioner:
 - › GCL had an independent purpose (ie. Education or advocacy) that prevent it from being a PBI (“the purposes sub-issue”); and
 - › GCL does not provide relief directly (“the provision of relief sub issue”).

1. *Global Citizen Ltd v Commissioner of the ACNC*

The purposes sub-issue (emphasis added):

- › [85] It is important to distinguish between cases and principles that apply to determining charitable status on the one hand, and those that apply to determining PBI status on the other... **the fact that charitable purpose or purposes must be exclusively charitable does not mean that a PBI must have exclusively benevolent purposes”**.
- › 88 Our analysis of the authorities suggests we should **not apply an “exclusivity of purpose” test in relation to PBIs.**
- › [90] – to determine purpose, examine constituent documents and activities (ie. what it says it does in its constitution, and what it actually does”.
- › [97] – the difference between purposes and activities is not always clear.
- › [99] – “even if education/advocacy are viewed as purposes, we are satisfied they are **incidental and ancillary to the main purpose being the relief of poverty”**

1. *Global Citizen Ltd v Commissioner of the ACNC*

The provision of relief sub-issue:

- › Notion that a PBI must directly provide benevolent relief rejected since 2014 *Hunger Project* case.
- › [102] Issue here = “whether the activities of GCL provide relief, albeit indirectly, to those living in extreme poverty” or [103] was the provision of relief as ‘too abstract’ and ‘too remote’.
- › [123] – “Uncontested evidence suggests that advocacy, awareness-raising and educational activities are common methods employed by entities tackling the issue of global poverty (and other global issues)”:
 - › Activity of seeking specific financial commitments from government and philanthropists sufficient nexus to relieving poverty;
 - › Third party acknowledgments from other international aid organizations with common benevolent purpose.

1. *Global Citizen Ltd v Commissioner of the ACNC*

We acknowledge our decision on the law – a decision which we have concluded is required by reference to the state of the authorities – raises potentially important and difficult questions of public policy. The evidence clearly established that most large PBIs engage with the political process as a regular and indispensable part of their work because governments are invariably key players in delivering the relief that is sought. Once that reality is accepted, ***there is potentially a blurring of the distinction between a PBI that participates in the political process as part of its activities in providing benevolent relief and an entity that is pursuing political outcomes for their own sake.*** If the line needs to be more clearly defined, there may be a need for the Parliament to refine the definition of ‘public benevolent institution’ in the legislation. As we have explained, the expression was itself introduced to narrow the range of organisations that were entitled to the valuable concessions in question after court decisions made nearly a century ago.

1. *Global Citizen Ltd v Commissioner of the ACNC*

International aid and development:

- › “117] The need to adopt a contemporary meaning of the notion of PBI is particularly relevant in the context of international aid and assistance, whether that be humanitarian assistance or developmental assistance.
- › [118] ... it is increasingly likely that relief will be provided by a variety of entities working with governmental and other NGOs to achieve positive results, using advocacy and awareness-raising as an integral part of that process to achieve their goals.
- › [123] This uncontested evidence suggests that advocacy, awareness-raising and educational activities are common methods employed by entities tackling the issue of global poverty (and other global issues).

1. *Global Citizen Ltd v Commissioner of the ACNC*

Implications:

- › [74] “not appropriate for the term [PBI] to be fixed in time” – ‘When the question is whether a particular institution is a public benevolent institution, the answer depends on the common or ordinary understanding of the expression at the relevant time’
- › Humanitarian & Developmental assistance = PBI eligible (maybe).
- › Directness test is gone - Recognition of ‘contemporary means of delivering relief’ which may include entities working together with government through advocacy, awareness-raising and educational activities.
- › PBIs may have other charitable purposes additional to benevolent purposes (e.g. the advancement of religion):
 - › Benevolent purpose must be “predominant”
 - › Beware – charitable trust obligations and donor expectations

2. *Women's Life Centre Inc v Commissioner of the ACNC* [2021]

AATA 500 (March 2021)

Overview

- › Women's Life Centre applied for registration with 3 subtypes – advancing health, advancing social or public welfare, and public benevolent institution.
- › ACNC declined registration as a PBI.
- › Question for the tribunal – did WLC meet the description of a public benevolent institution?
- › Outcome in the AAT = affirmed ACNC decision.

2. *Women's Life Centre Inc v Commissioner of the ACNC*

› Principal objective – WLC Constitution:

(1) The principle [sic] objective of the organisation is to provide relief of poverty, suffering, distress, misfortune, destitution, misfortune [sic] or helplessness for pregnant women and mothers of all sections of the public irrespective of race, colour or creed.

2. *Women's Life Centre Inc v Commissioner of the ACNC*

(2) Other objectives include:

- › *(a) to provide counselling for women facing a crisis pregnancy;*
- › *(b) to offer support to women in need during pregnancy and after childbirth;*
and,
- › *(c) other related purposes.*

2. *Women's Life Centre Inc v Commissioner of the ACNC*

Activities (as described in application for registration):

Providing counselling services to women facing a crisis pregnancy, providing free pregnancy testing and moral and material support to women in need both during pregnancy and after childbirth. These activities are aimed at advancing the mental health of pregnant women and new mothers in need.

Beneficiaries of WLC's 'benevolent' relief:

Pregnant women and mothers in need located primarily in the Albury region who are facing difficulties due to poverty, suffering, distress, misfortune, destitution or helplessness irrespective of race, colour or creed.

2. *Women's Life Centre Inc v Commissioner of the ACNC*

“Crisis pregnancy”:

- › *Not clearly defined – encompasses a wide range of situations in which a pregnant woman might experience uncertainty or anxiety.*
- › *Services do not appear precisely targeted towards women experiencing a “crisis pregnancy”, as opposed to pregnant women more generally.*
 - › *Unease and uncertainty – not distress, suffering or misfortune.*

Description of WLC as ‘apostolate’ and a ‘pro-life ministry’ focused on ‘the intrinsic value of saving just one unique and unrepeatable life’ – suggests a different purpose to the provision of benevolent relief.

*Not sufficiently distress focused – [71] We are not satisfied WLC was geared towards providing relief from poverty, distress, suffering or misfortune. The counsellors were trained instead **to provide emotional support and assistance of a more general kind**, even if some of the individual women who visited WLC also had basic needs the counsellors would attempt to address.*

2. *Women's Life Centre Inc v Commissioner of the ACNC*

Implications:

- › Essential – alignment of stated purposes and activities;
- › Entity must have clear ‘targets’ or beneficiaries of benevolent relief – suffering from poverty, sickness, destitution, distress, disability, suffering, misfortune and the aged and the young (**narrow focus and precise ‘audience’**);
- › Religious motivation / purpose – evidence of a non-PBI purpose?
 - › [32] *Provided we are satisfied those other purposes are genuinely ancillary to the main purpose of benevolence, that will not be an issue*
 - › Global Citizen case – multiple charitable subtypes (e.g. PBI and advancement of religion as long as PBI is the main purpose).

3. *Angel Loop Ltd v Commissioner of the ACNC* [2021] AATA 3894 (October 2021)

- Angel Loop Ltd – refused registration as a charity.
- Charities Act 2013 (Cth) section 5:

charity means an entity:

- (a) that is a not-for-profit entity; and
- (b) all of the purposes of which are:
 - (i) **charitable purposes** (see Part 3) that are for the public benefit...; or
 - (ii) **purposes that are incidental or ancillary to, and in furtherance or in aid of, purposes of the entity** covered by subparagraph (i); and

Note 1: In determining the purposes of the entity, have regard to the entity's governing rules, its activities and any other relevant matter.

Note 2: The requirement in subparagraph (b)(i) that a purpose be for the public benefit does not apply to certain entities (see section 10).

- (c) none of the purposes of which are disqualifying purposes (see Division 3); and
- (d) that is not an individual, a political party or a government entity.

3. *Angel Loop Ltd v Commissioner of the ACNC*

- Promoting culture of innovation and entrepreneurship capable of being a charitable purpose – promotion of industry or commerce – *Triton* case;
- *Triton* case – focused on inventors with ideas that were likely to have commercial success. Provided advice, education, guidance and assessment of commercial viability for inventions, all for free.

3. *Angel Loop Ltd v Commissioner of the ACNC*

[26] The facts in the present case are somewhat different from those in *Triton*. ***In Triton all of the help was given to the inventor.*** In the present case help is not only given to the inventor; the Applicant brings the inventor and the investor together, screens the proposals, and assists the Angel group or groups to put together the necessary finance to fund the proposal in the hope of obtaining a huge commercial benefit for both inventor and investor.

Private purpose = facilitating business relationships for the private benefit of entrepreneurs and investors (not broader public).

3. *Angel Loop Ltd v Commissioner of the ACNC*

*[28] While it is true that the activities of the Applicant in this matter would be likely to increase entrepreneurial business activity in a positive way and provide encouragement for innovation and entrepreneurship, the evidence does not show that that is the sole or predominant purpose of the Applicant. The Applicant goes further than encouragement. Part of its essential activities is obviously to bring about an arrangement between an inventor and an entrepreneur(s). Its core function is not simply to educate and encourage or assist. **A core function is to bring about a commercial deal between investor and inventor.** That cannot be said to be ancillary to the charitable purpose. It is a purpose, if not the main purpose, of the Applicant. **It is a noncharitable purpose even though it is doubtless a worthy purpose. ...***

*[30] **The facilitation of the possible deal between investor and inventor is not ancillary to the charitable purpose.***

3. *Angel Loop Ltd v Commissioner of the ACNC*

Implications:

- › Non-charitable purposes must be “incidental or ancillary” to charitable purposes **and in furtherance and aid** the charitable purposes;
- › Independent, non-charitable purposes that are not merely ancillary or incidental to broader charitable purpose will disqualify entity as a charity.
- › Charitable purpose must be discerned from **both governing rules and activities**;
- › Private benefit – an unsought consequence, or substantive purpose? [29] An ancillary purpose has been described as one which is not “*of substance in its own right*”, “*only lawfully to be pursued as conducive to promoting*,” the main purpose and is merely a means of achieving the main purpose or is otherwise an “*unsought consequence*” of the pursuit of the main purpose

4. *Australians for Indigenous Constitutional Recognition Ltd v Commissioner of the ACNC* [2021] FCA 435 (April 2021)

Overview

- › Primarily an application for costs.
- › Originating application – to vary ACNC’s objection decision and register the AICR as a PBI.
 - › Application brought in the Federal Court of Australia, rather than the Administrative Appeals Tribunal.
 - › [14] *The applicant chose to appeal to this Court rather than seek review in the Tribunal where it would not have been exposed to the possibility of an adverse costs order.*
- › Interlocutory application for a maximum costs order of \$10 under s40.51 of the Federal Court Rules
 - › Purpose - "not so much a desire to limit the exposure to an adverse costs order in complex and lengthy commercial litigation, but rather to address concerns as to access to justice, public interest, and a desire to limit the costs of all parties, particularly in less complex and shorter cases".

4. *Australians for Indigenous Constitutional Recognition Ltd v Commissioner of the ACNC*

Key issue – did the Applicant have an arguable case for registration as a PBI?

- › Purpose - advancing education, promoting reconciliation, mutual respect and tolerance between groups of individuals in Australia; and advancing public debate, for the purpose of achieving self-determination and recognition in the Australian Constitution for Indigenous Australians.
- › [25] - "there comes a point where an entity can be seen to be pursuing, for beneficial purposes, social, political or legal change through increasing awareness, debate and other activities, rather than providing direct (or sufficiently direct) relief to those intended ultimately to benefit from the entity's pursuits."
- › [26] - "The more abstract and less direct an institution's activities are to the relief of poverty, sickness, destitution, helplessness or distress, the less likely the entity is to be regarded as a PBI."

4. *Australians for Indigenous Constitutional Recognition Ltd v Commissioner of the ACNC*

Key issue – did the Applicant have an arguable case for registration as a PBI?

- › Registered as charitable – advancing social or public welfare.
- › [26]... if it is assumed... that the activities of the applicant are likely in the longer term to provide benefit to Indigenous Australians and to reduce distress, that of itself does not amount to the applicant being a strong contender for being a PBI.

4. *Australians for Indigenous Constitutional Recognition Ltd v Commissioner of the ACNC*

Maximum Costs Order:

- › Accepted that the Applicant's had an arguable case – but not strong enough to support a maximum costs order.
- › Application for order would not have been necessary in the Tribunal – no costs jurisdiction.
- › Insufficient public interest for litigation to resolve purported uncertainty in the meaning of PBI.
- › Potential future public interest that AICR could achieve if registered as a PBI considered irrelevant.
- › Application brought in the Federal Court resulted in greater use of judicial resources and costs incurred by Respondent (eg. Responding to application for maximum costs order).

4. *Australians for Indigenous Constitutional Recognition Ltd v Commissioner of the ACNC*

Implications:

- › Safer jurisdiction for review of ACNC decisions – Administrative Appeals Tribunal (unless specific circumstances warrant application to Federal Court). Otherwise, risk of adverse costs order for charities.
- › Clearly debatable whether the term "PBI" has a settled meaning. For example:
 - › What cohorts of people are sufficiently "in need" in a modern context?
 - › When will preventative activities be considered benevolent?
 - › How is the dominant purpose determined in a PBI with multiple purposes?
 - › What does it mean to target relief to those in need, in a modern context?
- › Comment by Myles McGregor-Lowndes:
 - › *The definition of a public benevolent institution requires an active case load for the definition to keep pace with changing social conditions and attitudes in the Australian community, or a regulator which is willing and able to publicly disclose its PBI registration decisions.*

5. *Cancer & Bowel Research Australia Ltd v Commissioner of the ACNC* [2021] AATA 3875

Overview

- › Application for review of ACNC's rejection of application for charitable status for 3 companies limited by guarantee.
- › [6] - *Registration had been refused on the basis that the entities had a purpose, amongst others, of **providing private benefits** to those involved in their operation..., but, as will become clear, a more fundamental issue arose in the course of the hearing.*

5. *Cancer & Bowel Research Australia Ltd v Commissioner of the ACNC*

Reasons for incorporation/registration as charity:

- › CBRA Inc seriously mismanaged – significant debt to ATO (\$146,000 plus interest and penalties.
 - › Unpaid superannuation guarantee amounts in respect of employees.
- › Applicant incorporated to duplicate and take over the fundraising activities being undertaken by CBRA Inc.
 - › Desire to avoid funds raised for the charitable purposes of the entity to be diverted to the ATO to discharge outstanding debt.
- › Plans for CBRA Inc to scale down/wind up in due course.

5. *Cancer & Bowel Research Australia Ltd v Commissioner of the ACNC*

Purpose for incorporation relevant?

- › [16] *it is not, generally speaking, a proper purpose for the incorporation of a company or corporation that it be used to take over the functions and property of another entity without also assuming the liabilities of that entity or making arrangements for the liabilities to be met... the avoidance of the due repayment of a debt, whether the debt is owed to a private individual or to the Federal Government, is not a proper purpose for the incorporation of a company or corporation.*
- › No dispute that the entity's objects (as set out in its constitution) indicate charitable purposes.
- › Word Investments case - *"In addition to what flows from the constitution to be given to the memorandum of association, it is necessary to take into account the circumstances under which Word was formed"*.

5. *Cancer & Bowel Research Australia Ltd v Commissioner of the ACNC*

Decision

- › ACNC decision (rejection of applications for registration) affirmed.
- › One clear reason explaining the Applicants' incorporation – to terminate, or reduce, the ongoing liability to the ATO.
- › [26] - *"That intention (namely, the avoidance of the payment of a taxation liability so that the substantive charitable work of CBRA Inc might continue untrammelled, so to speak, by debt) is in my opinion "a purpose" of each applicant, amongst other purposes."*
- › [27] - *"It follows... **the applicants do not have solely charitable purposes** (or ancillary purposes) as required by the definition of charity. Indeed, the purpose I have identified may well be a "disqualifying purpose" (cf paragraph (c) of the definition of charity). I note that a "disqualifying purpose" is defined to include activities that are contrary to public policy".*

5. *Cancer & Bowel Research Australia Ltd v Commissioner of the ACNC*

Implications

- › Confirmation – discerning charitable purpose requires broad and holistic analysis.
 - › Section 5 Charities Act – to the purposes of an entity, may have regard to the governing rules, activities and **any other relevant matter**.

Overarching – 2021 ‘War story’ - Lessons, Tips and Traps

- › PBI remains a highly sought charitable subtype – multiple purposes, and new contemporary approach may widen the net still.
- › Existing PBIs – expect regulator review / oversight to ensure continued eligibility.
- › New PBIs – continue to expect ‘high bar’ regulator gate keeping.
- › Charitable purpose is key, but whole context including activities are taken into account in determining real purpose.
- › Observations for faith-based charities:
 - › If faith-based charities have an associated PBI, the time might be right to apply to consider adding "advancement of religion" as a charitable subtype.
 - › Potential benefits – movement of resources towards advancement of religion, discrimination, exempt fringe benefits...
 - › Consider Womens Life Centre case - faith based charities will not be treated more favourably by Courts/Tribunals.
 - › May have religious motivation, but ultimately must still provide benevolent relief.
- › If litigating with the ACNC – don't assume benevolence on costs. Consider jurisdiction and alternatives to litigation carefully.



QUESTIONS?



Contacts

Name: *Jessica Lipsett*

Position: Director

Email: *jessica.lipsett@corneyandlind.com.au*

Name: *Andrew Lind*

Position: Consultant

Email: *andrew.lind@corneyandlind.com.au*

Call us on 07 3252 0011 or visit www.corneyandlind.co.au

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