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UPDATED COMMENTARY

Author Derek Mortimer has updated important issues in the not-for-profit sector and the more significant are referred to below.

Formation - Sources of NFP revenue

In *Lindsay Cameron* [2023] FWC 2902, Commissioner Schneider summarised the factors to be taken into account when considering whether a body was a “constitutional corporation”. Referring to *Aboriginal Legal Service of WA Inc v Lawrence* [No 2] (2008) 37 WAR 450; [2008] WASCA 254, the factors included:

- (1) A corporation may be a trading corporation even though trading is not its predominant activity;
- (2) trading must be a substantial and not merely a peripheral activity;
- (3) “trading” is not given a narrow construction. It extends beyond buying and selling to activities carried on with a view to earning revenue and includes trade in services;
- (4) the making of a profit is not an essential prerequisite to trade, but it is a usual concomitant;
- (5) the ends which a corporation seeks to serve by trading are irrelevant to its description;
- (6) whether an incorporated body’s trading activities are sufficient to justify its categorisation as a “trading corporation” is a question of fact and degree;
- (7) the corporation’s current activities, while an important criterion, are not the only criterion; and
- (8) an activity’s commercial nature is an element in deciding whether the activity is in trade or trading.

See [1.1.105].

Impact of Australian Charities and Not-for-profits Commission

It is noted that, in *Re Leeuwin Ocean Adventure Foundation Ltd* [2023] WASC 480, the case was brought by administrators of a charitable company limited by guarantee. The names of directors who purported to voluntarily appoint the administrators were not listed with ASIC but were listed by the ACNC. The administrators sought orders under s 447A of the *Corporations Act* to validate their appointment. Justice Hill said: “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.” Consequently, the author maintains that, provided they are up to date and reflect valid decisions of a charity’s board, the ACNC register of responsible persons will be accepted by courts as prima facie evidence of director appointment. See [1.1.107A].

State and Territory taxation, duties and imposts - Payroll tax

In *Trinity College Gawler Inc v Commission of State Taxation* [2023] SASC 178, Justice Blue summarised the critical integers relevant to assessing an exemption from payroll tax under the South Australian Act as:

1. the kind of work performed by the school employee in question during the relevant period; and
2. the kind of work ordinarily performed in connection with the conduct of schools providing education of that kind.

See [5.2.103].

Dispute management - By-laws and policies

In *Carabetta v Carlingford Bowling, Sports & Recreation Club* [2023] NSWSC 1442, the court granted declaratory relief to a member of a Club formed as a company limited by guarantee. The court found a by-law was inconsistent with the defendant Club's constitution. See [55.1.132].

Removal of directors

In *Weidemann v Victorian Farmers Federation* [2023] FCA 1643, the court needed to consider the effect of the so-called "100 member" rule within the defendant's constitution. Despite the court's finding that the giving of the notice itself was valid, problems with motions within the notice (purporting to appoint new directors of the defendant without reference to the normal preferential ballot process) meant the notice was declared invalid. Further, his Honour noted previous authority that members do not have a "residual power" to appoint directors outside of the process set out in a constitution. See [55.1.210].

Other remedies for members

The author notes that there is recent authority for the proposition that a member of an incorporated association may bring derivative actions using the exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189. In *Diakovasili v Order of AHEPA NSW Inc* [2023] NSWSC 1282, Justice Black stated that the rule in *Foss v Harbottle* and the exceptions to that rule:

allow a claim by a member of an incorporated association for the benefit of that incorporated association, where the rights of that incorporated association otherwise could not be vindicated by action brought by it.

See [55.1.320].

Winding up - Deregistration by a court or regulator

In *Re Yeronga Bowls Club Inc* [2023] QSC 275, Hindman J refused to make an order to wind up the Club on the just and equitable ground based on insufficient evidence that renovation costs would exceed Club assets and at [104]:

The fact that the [Club] is going to trade at a loss is not sufficient [for the Club] to have failed. The purposes of the Club include providing facility for bowls ... not for making a profit.

See [75.1.303].

Court ordered winding up

In *Hunter Aged Care Foundation (in liq)* [2023] NSWSC 1358 Foundation directors appointed liquidators after being unable to reach agreement regarding distribution of assets. The court gave directions to the liquidators to distribute the Foundation's surplus to a not-for-profit organisation identified by the liquidators, noting the

"comprehensive process" undertaken by liquidators to identify a suitable recipient. The court made those directions under s 488 of the *Corporations Act* relating to delegation of court powers to a liquidator. See [75.1.403].