



Law Council  
OF AUSTRALIA

*Legal Practice Section*

23 January 2024

The Honourable Stephen Jones MP  
Assistant Treasurer and Minister for Financial Services  
PO Box 264  
Shellharbour City Centre, NSW, 2529

The Honourable Dr Andrew Leigh MP  
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Via email: [Stephen.Jones.MP@aph.gov.au](mailto:Stephen.Jones.MP@aph.gov.au)  
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cc: ACNC Commissioner Sue Woodward AM  
[Sue.Woodward@acnc.gov.au](mailto:Sue.Woodward@acnc.gov.au)

Dear Minister Jones and Minister Leigh

### **Recent WA Supreme Court case due to the inability to rely on the ACNC register**

I wrote to you on 7 December 2023, on behalf of the Charities and Not-for-Profits Committee (**Committee**) of the Law Council of Australia's Legal Practice Section, about the interaction between the *Corporations Act 2001* (Cth) (**CA**) and the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**).

That letter included some specific recommendations to address the difficulties relating to reliance on the ACNC register and the interaction with the ASIC register.

I am writing now to alert you to a recent decision of the Supreme Court of Western Australia which highlights these issues and which regrettably required charitable funds to be applied for legal costs for a court application, rather than for charitable purposes: *Re Leeuwin Ocean Adventure Foundation Limited (In Administration); Ex Parte John Allan Bumbak and Richard Scott Tucker as joint and several administrators of Leeuwin Ocean Adventure Foundation Limited*<sup>1</sup> (**Re Leeuwin**).

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<sup>1</sup> [2023] WASC 480 <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2023/480.html>

In Re Leeuwin, Hill J of the Supreme Court of Western Australia agreed that there was uncertainty as to the validity of the appointment of administrators by the directors of a charitable company and this required an application by the administrators to the court to validate the appointment.

The uncertainty arose because:

1. Since 2015, the company had been notifying the ACNC of changes to the directors, as required under section 65–5(1)(c) ACNC Act, and not ASIC. This was in compliance with the law.
2. The directors who resolved to appoint the administrators were those listed on the ACNC register and the company’s website but were not the directors listed on the out-dated ASIC register.
3. Section 129(2) CA enables third parties to rely only on the ASIC register.
4. As the ASIC register was not up to date, the administrators considered there was uncertainty as to whether they had been validly appointed and therefore applied to the court. Hill J accepted this uncertainty existed<sup>2</sup>:

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

It is disappointing to note ASIC’s view as presented in paragraph 14 of this decision:

*At the hearing on 8 September 2023, counsel for the first plaintiffs brought to my attention an email response from ASIC. While ASIC did not oppose the application, it was ASIC’s view that their records could have been updated before the first plaintiffs’ appointment.*

Requiring or expecting charitable companies to keep both the ASIC and ACNC registers up to date is undermining the policy of minimising red tape and duplication of reporting. It is clear from the legislation and both the ACNC and ASIC websites that only the ACNC needs to be notified of changes in directors.

Hill J considered ASIC’s position in relation to the decision as to awarding costs in paragraph 39:

*There is a conflict between the records of ASIC and the ACNC. It is not clear as to the basis on which ASIC considers this conflict could have been resolved without the necessity of an application or how the records of ASIC could have been updated given the length of time that has passed since they were last updated and the*

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<sup>2</sup> Paragraph 26

*significant changes in personnel involved. In my view, it was highly likely that an application under s 447A was required to resolve this conflict.*

We request that you consider urgent amendments to the CA as set out in Recommendations 5 and 7 of my December letter (extract **attached**) to address these issues. In addition, we recommend that section 1274B of the CA be amended to enable information from the ACNC register to be relied on as evidence in court in the same manner as information from the ASIC register.

The Committee would welcome the opportunity to discuss this submission with you with the goal of improving the regulatory landscape for registered charities. In the first instance, please contact the Chair of the Committee, Bridgid Cowling at [bcowling@abl.com.au](mailto:bcowling@abl.com.au).

Yours sincerely

A handwritten signature in black ink, appearing to be 'G. Provis', with a long horizontal flourish extending to the right.

**Geoff Provis**  
**Section Chair**

**Extract of LCA letter of 7 December 2023:**

*Recommendation 5: That the ASIC register contains no detail of charitable companies but only a link referring the public to the ACNC register.*

Problems continue to arise from banks (and other third parties) relying on the ASIC record. The Committee suggests that the information on the ASIC register for a charitable company be reduced to contain only the name and a statement that it is a registered charity and a link to the charity's listing in the ACNC register (similar to the ABN lookup function on the ABR website).

*Recommendation 7: That charitable companies are not required to notify ASIC about any changes to their directors and third parties can rely on the ACNC register. The changes required to achieve this are:*

- a) section 129(2) of the CA is amended to enable third parties to rely on the ACNC register for charitable companies; and*
- b) section 203AA of the CA is "switched off" or amended for charitable companies.*

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

However, section 129(2) of the CA states:

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

- (a) has been duly appointed; and*
- (b) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.'*

And section 203AA of the CA states:

*'(1) A person's resignation as a director of a company takes effect on:*

- (a) if, within 28 days after the day the person stopped being a director of the company, ASIC is notified of that fact under subsection 205A(1) or 205B(5)--the day the person stopped being a director of the company;*
- or*

*(b) in any other case--the day written notice is lodged with ASIC stating that the person has stopped being a director of the company.'*

The above sections 129(2) and 203AA of the CA have the effect of requiring that charitable companies notify both ASIC and the ACNC where there are changes to directors despite section 111L(1) of the CA.

The ACNC is required to notify ASIC of any changes made by registered charities as part of the Charity Passport program, however in practice, the Committee has found that these changes are not reflected in the ASIC registers. Further, the Strengthening for Purpose Report, prepared as part of the 2018 legislative review of the ACNC, identifies that ASIC has previously advised that they will not commit to updating the records of directors of charitable companies.<sup>3</sup>

The Committee submits that sections 129(2) and 203AA of the CA may have the effect of imposing liability on previous directors of charitable companies where ASIC has not been notified of their resignation or where ASIC has been notified but has not updated its publicly available register. This exposes previous directors of charitable companies (and the charities themselves) to unnecessary risk. Further, the Committee has found that many organisations with whom charities interact and rely on regularly (such as banks and financial institutions, and other third parties) insist on relying on ASIC's outdated records despite the ACNC register being more up to date, resulting in charitable companies being unable to update signatories and key representatives quickly and easily for the purposes of bank/financial institution accounts, investments and contracts.

To prevent the above issues, charitable companies are compelled to explicitly notify ASIC of changes to their directors (despite section 111L(1) of the CA), thereby increasing the regulatory burden imposed on charitable companies, and undermining the intention that registered charities be primarily regulated by the ACNC.

The Committee suggests that the above issues could be remedied by:

- c) Amending section 129(2) of the CA to state (amendment in **bold**):  
*'(2) A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC or, in the case of a company registered with the ACNC, from the ACNC register, to be a director or a company secretary of the company...'*;
- and
- d) Either:
  - a. Switching off section 203AA of the CA for registered charities; or
  - b. Stating that the resignation of a director of a registered charity takes effect on the date the ACNC is notified as their date of their resignation.

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<sup>3</sup> Strengthening for Purpose Report (n 2) 109.

<sup>4</sup> These amendments are canvassed in more detail in the LCA's submission on Treasury Laws Amendment (Measures for Consultation) Act 2023: Miscellaneous and Technical Amendments—Spring 2023: <https://lawcouncil.au/resources/submissions/miscellaneous-amendments-to-treasury-portfolio-laws-2023->