

TAX

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PROMOTING COMMUNITY PROSPERITY



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From July 2008 charitable entities need to be registered with the Charities Commission if income tax and gift duty exemptions are to be available. Over 25,000 charitable entities have been registered.

One area in which the Commission resists registration concerns entities promoting general economic prosperity through helping individual businesses to flourish. The Commission appears to have adopted the view that the private benefit received by the business proprietor in question prevents charitable classification.

Its approach in this area was recently reviewed by the High Court in *Canterbury Development Corporation v Charities Commission*. It is worthwhile to look at the case and consider some of its implications.

Facts and issues

The case involved three bodies, but the Court's discussion centred mainly on the position of the Canterbury Development Corporation (CDC) so only the position of CDC needs to be considered.

CDC's core functions were to assist with the economic development of Christchurch and Canterbury. More specifically, CDC's constitution permitted it to pursue purposes such as creating employment, providing various counselling services to businesses,

encouraging the establishment and development of efficient businesses and promoting community welfare in the Canterbury region. These objectives were largely achieved by CDC providing advice and assistance to individual businesses.

The activities of CDC were largely funded by central and local government.

A charitable purpose is one that relates to the relief of poverty, the advancement of education, the advancement of religion or any other matter beneficial to the community. In addition, the relevant purpose must be performed in a manner which confers "public benefit".

CDC contended that its purposes were charitable under all heads with the exception of the advancement of religion. CDC added that it satisfied the public benefit requirement.

The most likely purpose of CDC for charitable classification was the category relating to other matters beneficial to the community. CDC contended that its promotion of economic development in Canterbury by helping individual businesses to prosper was beneficial to the community. The Commission responded by saying that the enrichment of the individual businesses by CDC prevented it being classified as a charity under the

'benefit to the community' head.

The Court's discussion largely concentrated on this issue.

Beneficial to the community

Beginning many years ago, the courts have been asked whether assistance to business, and agriculture in particular, could be regarded as beneficial to the community qualifying as a valid charitable purpose. On those earlier occasions the business assistance had largely been in general terms such as the organising of exhibitions and displays. This had been approved as charitable.

More recent reviews by the courts had involved situations where the assistance had been directly to individual businesses. Cash grants, upgrade of IT systems and help with commercialising ideas had been some of the recent forms of assistance considered by the courts. Again though there was the ultimate objective of community benefit.

Two recent Australian cases had given a favourable answer to the community benefit question. An English case, on the other hand, adopted the contrary view.

In *CDC* the High Court decided to follow the view taken in the English case.

The Court indicated that business assistance activities could be charitable only in the context of communities which are, relatively, disadvantaged. The High Court reasoned that, to be charitable, the activities must be directed towards assuaging some need. No claim of deprivation was made by CDC with respect to Christchurch or Canterbury and, as a result, the Court concluded that the promotion of economic well-being for those districts by the means adopted by CDC was not beneficial to the community so as to be a charitable purpose.

The Court applied similar reasoning to conclude that there was no public benefit.

CDC's primary purpose was in fact to assist individual businesses rather than the general public. Although this assistance may have been provided in the hope that the economic success of the individual businesses would be reflected in the economic well-being of the Canterbury region, this was not CDC's primary purpose. Public benefit was not at the core of CDC's operation.

The Commission was found to be correct to reject CDC's application for registration as a charitable entity.

Some thoughts

The issue at the heart of the *CDC* case is the vexed one of ascertaining whether some private benefit conferred by a set of activities is fatal to a claim for charitable status. Since charity is to help human beings some personal benefit is always present. Further, the 1891 *Pemsel* case as the foundation stone for the modern law of charity, expressly recognised that a charity may benefit the rich as well as the poor.

In each case it becomes necessary to evaluate whether private benefit is so prominent as to cross the line into a private arrangement.

In the *CDC* case, the view evidently adopted was that the private benefit obtained by individual business owners was too significant. Conferral of the private benefit was the driving force for CDC's activities.

An alternative perspective would appear to be available.

Apparently, central and local government tax dollars were available to promote employment in the Canterbury region. CDC became the selected delivery instrument to achieve that goal. CDC judged that a suitable approach would be to help individual businesses grow and



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prosper.

The government agencies presumably regarded the arrangements as satisfactory. Funds to private business were presumably thought of as a necessary step if the ultimate objective of economic stimulation of the Canterbury region was to be achieved. Assistance by the means selected may have been regarded as a sensible, if not the most practical and effective, disbursement of available funds if prosperity for Canterbury was to be promoted. Regional economic prosperity may need to be stimulated not only at the “macro” level but also at the “micro” level. It is unlikely that the government agencies thought that there was any mandate to simply channel public funds to private business.

It would seem likely that CDC would have regarded its task as simply implementing government objectives.

The Court in the *CDC* case rejected an analysis along these lines. In the Court’s view, the objective of contributing to regional well-being was too remote a benefit to recognise. The analysis should stop, the Court thought, at the level of the private businesses which received support and assistance from CDC. The High Court rejected the notion that the business assistance was merely a means to an end.

This aspect suggests the possibility of wider implications of the *CDC* case. Government assistance to business with a view to promoting employment and, in turn, general community prosperity occurs throughout the country. If the correct analysis is that the assistance is simply to enrich private business, and not to foster community well-being, government agencies may find it difficult to justify the disbursement of public funds in this area.

We anticipate that many current and prospective charitable entities may need to

review their documentation in light of this decision.

For assistance, please contact Willy Sussman or John Bassett or your usual Bell Gully adviser.

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