



3 February 2021

Our ref: CF/20/1075

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Dear Mr McGregor-Lowndes

Appeal of decision to refuse to declare organisation as a community or charitable organisation

Background

On 11 September 2020, Tokens for Humanity Ltd (the **Applicant**) applied to the Victorian Commission for Gambling and Liquor Regulation (the **Commission**) to be declared, pursuant to section 8.3.3 of the *Gambling Regulation Act 2003* (the **GR Act**), as a community or charitable organisation (the **Application**).

On 30 September 2020, an authorised delegate of the Commission determined to refuse the Application on the basis that the Commission was not satisfied that the Applicant had a charitable purpose due to the sources of income specified in the Applicant's business plan (the **Decision**).

On 21 October 2020, you wrote to the Commission on behalf of the Applicant seeking to appeal the Decision (the **Appeal**).

Decision

Having considered the matters set out below, the Commission on review has determined to grant the Appeal and declare the Applicant a community or charitable organisation pursuant to section 8.3.5 of the GR Act.

The Appeal

You submitted, in summary, that:

- a) undertaking "consulting and advisory work" that could be classed as "commercial activities" does not exclude the Applicant from being considered a charitable organisation in accordance with the High Court's decision in *Commissioner v Word Investments Limited* (Word Investments)¹;

¹ *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* [2008] HCA 55.

- b) the Applicant is bound to apply any profit made to its charitable purposes in accordance with clause 6 of its constitution;
- c) the source of income is almost irrelevant in determining whether an organisation is one with charitable purposes; and
- d) the "consulting and advisory work" is not a dominant activity of the Applicant.

On 4 January 2021, you wrote to the Commission to state your preference that the Commission determine the Appeal on the basis of the documents it had received to date, rather than a face-to-face or virtual hearing.

Legislation and task before the Commission

Section 8.3.1 of the GR Act states that an organisation may apply to the Commission to be declared a community or charitable organisation. A declaration that an organisation is a community or charitable organisation remains in force for a period of ten (10) years unless the declaration is revoked or renounced under Chapter 8 of the GR Act.²

Section 8.3.3 of the GR Act empowers the Commission to make a declaration that an applicant is a community or charitable organisation. Relevantly, this section states:

- (1) *The Commission, by instrument, may declare an organisation to be a community or charitable organisation if the Commission is satisfied that the organisation is conducted in good faith for—*
 - (a) *any philanthropic or benevolent purpose, including the promotion of art, culture, science, religion, education or charity...*
- (2) *In determining whether to make a declaration under subsection (1), the Commission may have regard to any matter which it considers relevant, including but not limited to—*
 - (a) *the conduct of fundraising or minor gaming activities by the applicant³;*
 - (b) *the conduct of any person directly or indirectly associated with the applicant⁴.*

There are no specific matters prescribed by section 8.3.3(2) of the GR Act which the Commission must consider prior to declaring an organisation to be a community or charitable organisation.

Relevantly, the objective of the GR Act concerning this Appeal is in section 1.1(2) of the GR Act, which, amongst other factors, states:

- ...
- (2) *The main objectives of this Act are—*
- ...

² Section 8.3.6 of the GR Act.

³ In this case, the operation of the TokenSpin platform.

⁴ In this case, the board of directors and secretary of the Applicant.

(e) *to ensure that-*

- (i) *community and charitable gaming benefits the community or charitable organisation concerned;*
- (ii) *practices that could undermine public confidence in community and charitable gaming are eliminated...*

...

After consideration of an application under section 8.3.3(1) of the GR Act, the Commission must, pursuant to section 8.3.3(3), either:

- a) declare the applicant to be a community or charitable organisation for the purposes of this Act; or
- b) refuse the application.

Section 8.3.4 of the GR Act allows the applicant to appeal against a decision to refuse an application for a declaration under section 8.3.3(3) of the GR Act, provided the appeal is in writing and specifies the grounds on which it is made.

After consideration of an appeal under section 8.3.5 of the GR Act, the Commission may:

- a) confirm the original decision of the delegate to refuse the application; or
- b) declare the applicant as a community or charitable organisation.

In this context, the Commission, on an appeal, stands in the shoes of the original decision maker and makes a fresh decision with respect to the application. In doing so, it must consider all the information, material and evidence before the original decision maker. It may also consider further information, material or evidence as part of making its decision.

The Commission's decision

In the Commission's view, the Applicant has provided sufficient documents to demonstrate that it is a bona fide community or charitable organisation, including:

- a) a copy of the Applicant's constitution which specifies:
 - (i) on a 'winding up' or 'dissolution' that any surplus assets shall not be distributed amongst the members of the organisation, but shall be transferred to one or more organisations with objects similar to the objects of the Applicant and whose constitutions prohibit the distribution of their income and property among their members; and
 - (ii) the Applicant's obligation to apply any profit made solely to its charitable purpose, which includes promoting a combination of religion, education and charity;
- b) a copy of the Applicant's business plan specifying how funds will be distributed to not-for-profit and charitable organisations in order to fulfil its charitable purpose;
- c) a copy of NSW Fair Trading's 'Charitable Fundraising Authority' for the Applicant valid from 13 August 2020 until 12 August 2025; and

- d) a copy of the Queensland Department of Justice and Attorney General's 'Certificate of Registration as a Charity' for the Applicant dated 17 May 2019.

The Commission also notes that the Applicant is registered with the Australian Charities and Not-for-profits Commission as a charity which benefits the "general community in Australia". For clarity, the Commission regards the Applicant's registration with other national and state-based regulators as matters which are supportive, but not determinative, of whether the Applicant satisfies the relevant statutory test under the GR Act.

Commercial activities and charitable organisations under the GR Act

The requirement of 'good faith' is often applied to parties negotiating in commercial contracts. The Commission considers that similar principles should apply to an organisation which is declared as a charitable organisation under the GR Act.

In the case of *Macquarie International Health Clinic*,⁵ the NSW Court of Appeal held that the obligation of good faith does not require parties to compromise their own commercial interests, however the parties must negotiate in such a way as to achieve the contract objectives. Similarly, the Commission does not consider that a declared charitable organisation has to excuse its commercial interests when the focus and primary outcome of the majority of its activities and events are of a philanthropic or beneficial nature.

The Commission accepts that the Applicant must place some importance on running a successful business to achieve its purpose as a charitable organisation that is to be financially viable to make donations. As such, the Commission accepts that the "consulting and advisory work" undertaken by the Applicant does not take the Applicant outside the scope of a community or charitable organisation under the GR Act. However, the Applicant's interests must be balanced to ensure that its directors and secretary conduct the organisation in an honest and fair manner.

The Commission has no evidence of any possible conflict of interest, which may suggest an intention of the directors or secretary to obtain a real financial advantage through their association with the Applicant, or any dishonesty or past behaviour of the directors or secretary not conducting themselves in good faith. Further, the Commission has no basis for any concerns regarding the competence and experience of the directors and secretary to perform their duties.

Having considered the above matters, the Commission on review hereby grants the Appeal.

If you have any queries please contact Cameron Warfe, Acting Manager, Legal Services on (03) 9098 5272 or via email (cameron.warfe@vcqlr.vic.gov.au).

Yours sincerely



Deirdre O'Donnell
Deputy Chair

⁵ *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268.