

Administrative Decisions Tribunal New South Wales

Medium Neutral Citation	Australian Vaccination Network Inc v Department of Finance & Services [2013] NSWADT 266
Hearing Dates	13 & 14 June 2013
Decision Date	25/11/2013
Jurisdiction	General Division
Before	Magistrate N Hennessy, Deputy President
Decision	The decision of the Director General, Department of Finance and Services to direct Australian Vaccination Network Inc to adopt a new name is affirmed.
Catchwords	MERITS REVIEW - direction to Australian Vaccination Network Inc to adopt a new name - whether name is unacceptable because it is misleading, undesirable or suggests a connection with government -
Legislation Cited	Associations Incorporation Act 2009 Associations Incorporation Regulation 2010 Administrative Decisions Tribunal Act 1997
Cases Cited	Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union (1979) 27 ALR 367 Taco Bell Pty Ltd v Taco Co of Aust Ltd (1981) 40 ALR 153; 60 FLR 60 Interlego AG v Croner Trading Pty Ltd (1992) 39 FCR 348; 111 ALR 577 Corporate Affairs Commission v Bradley [1973] 1 NSWLR 382 Corporate Affairs Commission v Bradley [1974] 1 NSWLR 391 Drake v Commissioner for Corporate Affairs, Supreme Court of WA, unreported 7 April 1999, 19 April 1999 Re Little & Australian Securities Commission, (Virgin Mary's case) (1996) 22 ACSR 226; (1996) 24 AAR 62; (1996) 14 ACLC 1730 South Pacific Airlines of New Zealand Ltd v Registrar of Companies [1964] NZLR 1 Drilex Systems Pte Ltd v Registrar of Companies [1990] Part 6 [HC,S'pore]
Category	Principal judgment
Parties	Australian Vaccination Network Inc v Department of Finance & Services
Representation	Legal Services, Department of Finance and Services (Respondent) Counsel M White (Applicant) M Spartalis (Respondent)
File Number(s)	133078

REASONS FOR DECISION

Introduction

- 1 The Australian Vaccination Network Inc (AVN) has been directed to change its name. The main reason the Director General of the Department of Finance and Services gave for making that direction was that the name is likely to mislead the public in relation to the nature, objects or functions of AVN. The Director General found that AVN's message is anti-vaccination and that the name does not reflect that message. Two other reasons the Director General relied on were that the name is "undesirable" and that it suggests a connection with the Commonwealth government.
- 2 AVN applied to the Tribunal for a review of that decision. I have decided that the decision to direct AVN to adopt a new name is the correct and preferable decision. But my conclusion is not based on a finding that AVN's message is exclusively anti-vaccination, that the name suggests a connection with the Commonwealth government or that the name itself is undesirable.
- 3 AVN's main object is the dissemination of information and opinions that highlight the risks of vaccinations. AVN is sceptical about vaccinations. The existing name, Australian Vaccination Network Inc, suggests that the association is pro vaccination or, at least, is committed to providing comprehensive information and opinions about the pros and cons of vaccination. The name should be changed so that it is not likely to mislead the public in relation to its main object. Although I do not have to decide this issue, a name that includes the word "risk" or "sceptic" such as Vaccination Risk Awareness Association Inc or Vaccination Sceptics Network Inc would, in my opinion, be acceptable. The name could also include the word "Australia" or "Australian" without suggesting a link to government.

Background

- 4 AVN is a small scale, non-profit organisation registered under the *Associations Incorporation Act 2009* (the Act). It was originally incorporated in 1994 with the name Australian Council for Immunization Information Incorporated. In 1997 the organisation changed its name to the Australian Vaccination Network Incorporated. Its main object is the dissemination of information and opinions, which are sceptical about vaccinations. Armed with that information, and information supporting vaccinations provided by government, it believes that everyone should be able to make an informed decision about whether to vaccinate themselves and their children.
- 5 On 27 August 2002, the Department received a complaint alleging that AVN's name was false and misleading. In response to the complaint, a delegate of the Director General wrote to the complainant on 17 September 2002 saying:

The name of the Australian Vaccination Network was accepted after the Department applied its normal criteria to ascertain that the name is not misleading as to the nature, objects and purposes of the association. It is the Department's view that as the association provides information relating to vaccination, as is suggested by its name, it is not misleading.
- 6 AVN relied on this letter as evidence that its name is not misleading. The Department pointed out that in 2002 the Director General had power to reject a proposed name as "undesirable" but no power to direct an existing association to change its name: *Associations Incorporation Act 1984* (repealed), s 9 and 12.
- 7 A new Act came into force in 2009 giving the Director General power to direct an

association to change its name if it is "unacceptable": *Associations Incorporation Act* 1984, s 11.

- 8 Around October 2011, the Department received further correspondence alleging that AVN's name is misleading and/or deceptive. By letter of 12 December 2012, the Director General required AVN to change its name.
- 9 With effect from 21 December 2012, the *Associations Incorporation Regulation* 2010 was amended to add the following kinds of name to the list of unacceptable names:

A name that is likely to mislead the public in relation to the nature, objects or functions of an association or proposed association or in any other respect: *Associations Incorporation Amendment (Unacceptable Names) Regulation* 2012, Schedule 2, Cl 13.

- 10 On 14 January 2013 the Director General revoked the December 2012 order and issued a new direction to AVN to change its name. The new direction relied on two grounds: the new "likely to mislead the public" ground and the more general ground that the name was "undesirable." AVN was required to take action to change its name before 21 March 2013.
- 11 The Hon. Anthony Roberts MP, the Minister for Fair Trading, recounted these events in answer to a question in parliament on 9 May 2013 about what action the government was taking to protect the community from being misled by AVN. The Minister told parliament that it was the government's view that the name AVN is unacceptable. He went on to say:

To address this issue in the public interest, in December last year the O'Farrell-Stoner government introduced the *Associations Incorporation Amendment (Unacceptable Names) Regulation* 2012. This amendment expanded the classifications of unacceptable names to include any name that is likely to mislead the public in relation to the nature, objects or functions of an association. Following the commencement of this amendment, on 14 January this year Fair Trading issued the Australian Vaccination Network with a direction to change the name of its association.

- 12 AVN applied for an internal review of the Director General's decision. On 19 February 2013 the decision was affirmed relying on both the "misleading" and "undesirable" grounds that had already been given. The Director General's delegate made the following findings:

- (1) The Australian Vaccination Network Inc's message is anti-vaccination.
- (2) Its name does not reflect that message or its true nature, objects or functions.
- (3) Its name is likely to mislead the public.

- 13 In those circumstances, the Director General's delegate concluded that the name is "unacceptable."

- 14 On 15 March 2013 AVN applied to the Tribunal for a review of the decision. AVN also applied for a stay so that it could continue using its name pending a final decision. The stay was granted subject to the condition that a consumer warning be placed on the header of AVN's websites and its facebook page. The warning is as follows:

CONSUMER WARNING

New South Wales Fair Trading has directed Australian Vaccination Network Inc. to change its name because it regards the name to be misleading. The AVN is challenging this direction and the challenge is currently before the New South Wales Administrative Decisions Tribunal.

- 15 At the hearing, the Department relied on a third ground for directing AVN to change its name. That ground is that the name is unacceptable because it suggests a connection with the government of the Commonwealth.

The law

- 16 The objects of the Act are set out in s 3:

The objects of this Act are:

(a) to establish a scheme for the registration of associations that are constituted for the purpose of engaging in small-scale, non-profit and non-commercial activities, including:

(i) associations that are currently unincorporated (which become bodies corporate when they are registered), and

(ii) associations that are currently incorporated under other legislation (which retain their corporate status following registration), and

(b) to make provision with respect to the corporate governance and financial accountability of associations registered under that scheme.

- 17 The Director General may direct an association that has an "unacceptable" name, to adopt a new name. The relevant provision is s 11:

(1) The Director-General may, by order in writing served on an association that has an unacceptable name, direct the association to adopt a new name.

(2) Such a direction may be given whether or not the association's name was acceptable when the association was registered.

Note: Changing circumstances may mean that a name that was acceptable when the association was registered has since become unacceptable.

(3) A direction:

(a) must specify the grounds on which the association's current name is unacceptable, and

(b) must specify a date by which an application for registration of a change of name must be made (being a date no less than 2 months after the date on which the direction is given), and

(c) must state that the association's registration may be cancelled if such an application is not made on or before that date.

- 18 Under s 11(2) a direction to adopt a new name may be given whether or not the association's name was acceptable when the association was registered. The Note to that provision explains that changing circumstances may mean that a name that was acceptable when the association was registered has since become unacceptable.

- 19 An "unacceptable name" is defined in s 18. The Department relies on s 18(1)(f) and (g):

18 Unacceptable names

(1) For the purposes of this Act, a name is unacceptable if:

(a) it does not include, at the end of the name, the word "Incorporated" or the abbreviation "Inc", or

(b) it contains foreign language characters, or

(c) it includes the word "police" or "sheriff", unless its use is the subject of a consent in force under section 204B of the Police Act 1990 or section 12 of the Sheriff Act 2005, or

(d) the Director-General is of the opinion:

(i) that it is identical to, or closely resembles, some other name that is registered, that is reserved or that is the subject of an earlier application for reservation, and

- (ii) that the public would be likely to be misled if associations operated under both names, or
 - (e) the Director-General is of the opinion that it suggests a connection with the Crown or the State, or
 - (f) the Director-General is of the opinion that it is offensive or undesirable, or
 - (g) it is declared by the regulations to be unacceptable.
- (2) A name is not unacceptable on a ground referred to in subsection (1) (e), (f) or (g) if, in a particular case, the Minister directs that the name is acceptable.

- 20 Pursuant to s 18(1)(g) the *Associations Incorporation Regulation 2010* (the Regulation) declares certain names to be unacceptable. Clause 6 states that:

For the purposes of section 18 (1)(g) of the Act, the names set out in Schedule 2 are declared to be unacceptable names.

- 21 Schedule 2 includes clauses 6 and 13:

A name that suggests a connection with the government of the Commonwealth, New South Wales, another State or Territory or another country.

A name that is likely to mislead the public in relation to the nature, objects or functions of an association or proposed association or in any other respect.

Issues

- 22 The Tribunal has power to review any direction given by the Director General to an association under s 11: s 104(1)(b) and *Administrative Decisions Tribunal Act 1997* (ADT Act), s 63. The Tribunal must determine, as at the date of the hearing, whether the Director General's decision is the correct and preferable decision. In doing so it must have regard to the material then before it, including any relevant factual material and any applicable written or unwritten law. The Tribunal has power to affirm, vary, set aside or remit the decision.
- 23 The issue, expressed at the highest level of generality, is whether the Director General made the "correct and preferable" decision when he ordered AVN to adopt a new name.
- 24 The first ground for the name change direction is that it is:
- A name that is likely to mislead the public in relation to the nature, objects or functions of an association or proposed association or in any other respect.
- 25 This ground involves the Tribunal:
- (1) making a finding of fact about AVN's nature objects and functions;
 - (2) considering any "other respect" in which it is said that the name is likely to mislead the public and making findings of fact about those "other respects";
 - (3) determining, in context, the meaning of the phrase "likely to mislead the public"; and
 - (4) determining whether the name is likely to mislead the public in any of those respects.
- 26 The issue is not whether the information on the website is accurate or whether the public would be misled by that information. Consequently, I have not taken into account any

evidence about the correctness or scientific validity of the information on AVN's website when considering this ground.

27 Another irrelevant matter is whether a change of name would cause AVN any prejudice or inconvenience or have any adverse policy consequences. Again, I have not taken into account any evidence on those subjects when considering this ground.

28 The second ground for the order to adopt a new name is that it is:

A name that suggests a connection with the government of the Commonwealth, New South Wales, another State or Territory or another country.

29 The suggested connection is with the Commonwealth because of the inclusion of the word "Australian" in the name. This ground involves the Tribunal determining whether the whole name, by itself, "suggests" such a connection.

30 The third ground for the order to adopt a new name is that:

The Director-General is of the opinion that it is offensive or undesirable.

31 This ground involves determining the meaning of "undesirable" and whether the objects of AVN or the context in which it operates are relevant to that issue.

AVN's nature, objects and functions

32 The nature, objects and functions of AVN must be gleaned from evidence including its "constitution", code of ethics, the content of its website and the evidence from AVN especially from its former President, Meryl Doley, and its current President, Greg Beattie.

33 Initially, the Department did not submit that there was any "other respects" in which AVN's name was likely to mislead the public. When questioned, the Department nominated the conduct of AVN's office bearers. But the Department did not identify that conduct with sufficient particularity or in sufficient time for me to be satisfied that AVN was on notice that that was another basis for the Department's decision. In those circumstances I have only taken into account the "nature, objects and functions" of AVN. For simplicity I will use the term "objects" to refer to AVN's "nature, objects and functions."

34 Section 6(3)(c) requires an applicant for registration to include a statement of its objects. I assume that the statement AVN provided is that in its Model Rules. AVN sets out the objects in its Model Rules as its "constitution". The Model Rules are linked to the website and contain the following objects at Part 1, B:

The advancement and promotion of education and learning amongst the public about matters concerning human health and human physical and social well being.

The propagation, publication, dissemination and diffusion of knowledge and information about such matters.

The encouragement and promotion of the widest possible dissemination of the public of all information concerning human health and human physical and social well-being.

35 The Department submitted that despite the absence of any reference in the objects to vaccination or to the organisation being opposed to vaccination that is its main objective. I accept that AVN is not, as its objects suggest, concerned about human health and human

physical and social well-being in general. Despite what the objects say, it is concerned, almost exclusively, with vaccination policy and practice in Australia. The "constitution" does not accurately describe AVN's objects. Mr White, representing AVN agreed that they left a lot to be desired.

36 AVN submitted that the critical document in terms of identifying its objects is the Code of Ethics that is binding on all office bearers and members of subcommittees. The Code, a four page document which can be accessed through a link on AVN's website, sets out the manner in which those bound by it should conduct themselves while performing their functions. The Code sets out 11 objectives for which AVN has been established. Those objectives are:

- (1) To encourage all families to be fully informed with regards to medical procedures in general - vaccination specifically - enabling them to make educated decisions.
- (2) Making available the experience of families (with their permission) and the results of research to members of the association and to other interested persons and associations.
- (3) To assist in public relations and community education.
- (4) Liaising and exchanging information with interested individuals and associations within Australia and overseas.
- (5) Collection, publication and dissemination of information, and the provision of resource facilities.
- (6) Encouraging research and liaising with researchers in Australia and overseas.
- (7) Encouraging State and Federal governments to record the necessary vaccination information so true records can be accessed for research purposes. These records include:
 - (a) monitoring the vaccination status of those contracting 'vaccine preventable' diseases
 - (b) compulsory reporting, recording and investigation of possible vaccine reactions
 - (c) mandatory recording of all lot and batch numbers of vaccines to enable the tracking of possible 'hot lots'
 - (d) maintenance of national toll-free number of parents and health professionals to report suspected adverse vaccine and drug reactions. These reactions are to be investigated by an independent panel which includes consumer representatives as the primary stakeholders
 - (e) independent testing of both vaccine safety and effectiveness using placebo-controlled studies which are funded by the government and are completely free of drug company influence
 - (f) a new government committee to be set up to review all new vaccine licences; this committee to include stakeholders from consumer groups such as the AVN.
 - (g) new legislation to be introduced in every state of Australia to guarantee that no child or adult can be discriminated against as a result of their vaccination status

and that no school, preschool, childcare centre or employer can require vaccination for any reason.

- (8) To develop the AVN Management committee to bring groups together, sharing ideas, spreading the workload and networking information.
- (9) Publicising the AVN as widely as possible in local areas; giving parents the opportunity to have access to unbiased information.
- (10) Challenging media articles that give misleading information to the public.
- (11) Dealing with any and all threats to the AVN's ability to protect and inform the Australian public.

37 These objectives are expressed in very general terms. There is nothing in them that is overtly critical of vaccinations but one underlying message is that AVN is concerned that vaccinations may not be safe or effective.

38 In her evidence, Ms Meryl Dorey, the former President of AVN, stated that she has never thought of herself as being "anti-vaccination." She highlighted the following parts of the Code, which are not included in the objects, in support of that perception:

Remember, we cannot tell the parent to vaccinate or not to vaccinate their children or themselves.

Do not allow your attitudes on this subject to influence your dealings with any parent and support them in their decision - whatever that decision may be.

Do not give medical advice. Any parents needing medical advice are to be encouraged to see a competent health professional.

39 As a not-for-profit association, AVN's members are not in a position to give medical advice, including advice about vaccinations. Including such a direction in a Code of Ethics is a wise course but does say anything about its objectives. Similarly, it is unsurprising that AVS would exhort its members to support people regardless of their decisions about vaccinations. That is simply good public relations.

40 Of more assistance in ascertaining AVS's objectives is the content of its website. If a reader does a google search for AVN, a link appears to its website. On the google search page, the reader can see the following information:

Australian Vaccination Network, Inc | Because every issue has two avn.org.au/
Information and support for people who are concerned about vaccination risks.
Make an informed vaccination ... - Why the AVN? - Do doctors have to sign ...

41 When the reader clicks on the name, the webpage opens. It is headed "Australian Vaccination Network Inc" with a by-line "Because every issue has two sides". The words "Information and support for people who are concerned about vaccination risks" do not appear on the website itself. I regard those words as particularly significant. They have been chosen to summarise the content of the website. More so than any of the objects referred to above, this phrase accurately reflects AVN's main objective.

42 AVN's home page contains approximately 18 menu items or tabs, some with drop-down menus including two "blogs" ('No compulsory vaccination' and 'The Real Australian

Skeptics'). The home page also contains 15 blocks of information, some of which appear to be permanent and others of which appear to change over time. Many reflect topics of current debate or interest to do with vaccinations or the AVN. For example, one item is headed "Government and AMA - funded booklet - an exercise in propaganda." The website also contains commentary on the Director-General's decision for AVN to change its name.

- 43 One of the articles featured on the home page that appears to be a permanent feature is entitled "pros and cons". The first part of the article can be read on the home page but to see the whole article, the reader needs to click on the link. The article in whole, says:

One of the most vital of these decisions is whether to vaccinate our children fully, partially or at all. All of these choices are valid but, since vaccines, like all medical procedures, can carry with them the possibility of serious injury or death, we need to be able to make our choice with the best available information.

Unlike medical treatments which are given to relieve the symptoms of illness, vaccination is given to healthy babies, children and adults. Therefore, the requirement to ensure safety is greater for vaccines than for any other medical product or procedure.

The medical community and government health authorities want to ensure that every child, and indeed, every adult, gets each vaccine on offer. But the ultimate decision is and must always remain with us - the child's parents. After all, vaccination is not compulsory for school, pre-school or childcare in Australia and no parent will lose out on any government payment if they choose not to vaccinate.

By the time an Australian child is 12 months old, they will receive 23 vaccines and by the time they start school, that number will more than double. We owe it to our children to be fully informed about all aspects of vaccine safety and effectiveness. If we don't investigate this issue fully, we may not be doing the best thing for our children or for ourselves.

The Australian Vaccination Network, Inc. (AVN) has been operating since 1994 with a mandate to provide scientifically-sourced information on this complex and difficult issue. We believe that everyone has the right to access all available data on vaccinations, immunisations, immunizations, inoculations - whatever you choose to call them. The government and the medical community provide you with one side of the story - the AVN gives you the other side. Taken together, this data will allow you to make the best possible decision for the health of your child.

The AVN - because every issue has two sides.

- 44 This article gives a flavour of the views expressed in the remainder of the site. For example, the menu bar has an item "Website Links". In the drop down menu there is a link to "Mainstream Medical Links". The following description appears on that page:

On this page you will find links to vaccination information from a medical perspective. But like all issues, the subject of vaccination has two sides. The AVN urges you to carefully examine both before making your decision. These websites will give you a good start in seeking out information on what the mainstream medical community considers to be the benefits and effectiveness of vaccination.

- 45 The website also contains pages which deal with various illnesses including cervical cancer, chickenpox, cholera, measles, hepatitis, influenza, meningitis and polio. On the page relating to hepatitis B, the following quotation from Dr Jane Orient, appears, "For most children, the risk of a serious vaccine reaction may be 100 times greater than the risk of hepatitis B." There are also photographs of healthy unvaccinated children and of disfigured children whose disabilities are attributed to having been vaccinated.
- 46 The Department submitted on the basis of the website and AVN's Facebook page that AVN is mostly concerned with opposing vaccination and mandatory immunisation. There is nothing on the website outlining the benefits of vaccination or depicting healthy children

who have been vaccinated.

- 47 At the top of the website is a menu of topics including "Join the Debate". If a reader clicks on that text he or she is taken to a google website where there is a moderated forum for discussion of the issues presented on the website. Peter Ward, a retired pastor and neighbour of the current President, Mr Beattie, is the independent moderator of the discussion forum. He is not a member of AVN and had no previous involvement with that organisation. When Mr Beattie asked Mr Ward to be the moderator, Mr Ward told him that his personal view was that vaccinations did far more good than harm but he still agreed to be the moderator.
- 48 The discussion forum, which was launched in 2011, has 92 registered participants who have contributed in excess of 3,500 posts. Mr Beattie estimates that there is roughly equal representation from those questioning vaccination and those supporting it. In particular, the debate site has numerous posts from Dr John Cunningham a surgeon and epidemiologist from Victoria who is said to be staunchly pro-vaccine.
- 49 The Department made the point that this discussion forum is a google website and not part of AVN's website. That does not diminish AVN's point that it provides an independently moderated forum for people to discuss the pros and cons of vaccination.
- 50 Under the tab "Know Your Rights" is a drop down menu including the topic "what you need to do". If the reader clicks on that link he or she is taken to a page which includes the following information:
- 5- Know your rights. Vaccination is not compulsory for school, preschool, childcare or playgroup. You cannot lose any government entitlements should you choose not to vaccinate though for some payments, you will need to register as a conscientious objector in order to obtain your benefits.
- 51 The former President of AVN, Ms Dorey, said that AVN represents many people with a broad range of opinions on the subject of vaccination. Some are very much against vaccination others choose to vaccinate selectively. Some supporters vaccinate fully but are in favour of individual choice. Ms Dorey maintains that AVN provides information on the downside of vaccination to balance the pro-vaccination information provided by government and the medical community. She emphasised the fact that the website has links to government sites.
- 52 Mr Greg Beattie, the current President, agrees. He says that AVN is neither anti, nor pro vaccinations. Rather, it is a forum for discussion. AVN does not advocate a particular course of action or advise people to vaccinate or not to vaccinate themselves or their children. The website states that "all these choices are valid." Parents who choose vaccination are not condemned.
- 53 While I agree that AVN is not 'anti' vaccination in the sense that it opposes all vaccinations in all circumstances, it presents and lobbies in favour of one side of the issue. Others are permitted to present the other side on a separate discussion forum, but AVN's agenda is not to give a comprehensive account of the pros and cons of vaccinations.
- 54 Looking at all the evidence, but having particular regard to the content of the material on AVN's website, my conclusion is that AVN's main object is the dissemination of information and opinions which highlight the risks of vaccinations. It an organisation which is sceptical about vaccinations. Secondary objects include:

- (1) supporting people who choose not to vaccinate themselves or their children while not condemning people who choose to vaccinate;
- (2) lobbying government on issues including vaccination research, vaccination licences, recording the effects of vaccination and ensuring that vaccination remains non-compulsory for most people; and
- (3) permitting debate about the pros and cons of vaccination.

Meaning of "likely to mislead the public"

- 55 These words are all ordinary English words with relatively straightforward meanings. The most similar phrase is found in cl 18 of Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (The Australian Consumer Law) which provides that
- A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- 56 In determining whether a particular event is "likely" a practical judgment needs to be made as to the risk: *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367, 42 FLR 331.
- 57 The "public" are people of ordinary intelligence, experience and education who are seeking information about vaccinations. The public is not confined to people in northern New South Wales even though that is where AVN is based. The website is accessible to people throughout Australia.
- 58 The test is an objective one. There is no need to prove that any person was actually misled: *Taco Bell Pty Ltd v Taco Co of Aust Ltd* (1981) 40 ALR 153; 60 FLR 60. The Tribunal will not defer to the judgment of any witness on the ultimate issue of whether the name is likely to mislead the public: *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348 at 387; 111 ALR 577 at 617; 25 IPR 65; per Gummow J (Black CJ and Lockhart J agreeing) (Full Fed Ct). But evidence of the response of members of the target audience to the impugned conduct is admissible and may be persuasive. The opinion expressed by the Director General's delegate in the 2002 letter, that AVN's name is not misleading, is in the same category.

Is the name likely to mislead the public?

- 59 The evidence tendered by the Department on this issue was from four sources:
- (1) members of the public (Ms Gibson, Ms McDermott, Ms Moon and Ms Hilton)
 - (2) a medical practitioner (Dr Brian Owler, President of the Australian Medical Association, New South Wales Ltd)
 - (3) current and former members of Parliament (the Hon Dr Pezzutti, the Hon Dr McDonald MP, the Hon Ms Ficarra MP and the Hon Dr Kaye MP) and
 - (4) public sector managers namely Ms Sue Campbell-Lloyd and Dr Jeremy McAnulty.
- 60 The relevant evidence tendered by AVN includes affidavits from its former and current Presidents.

- 61 Four women gave evidence about their experience in accessing AVN's website. Some of that evidence is not relevant because it relates to being misled in relation to the content of the website, rather than the name. Some of the evidence about AVN's name suggesting a connection with the Commonwealth government is addressed separately below.
- 62 Ms Gibson had her first child in 2007 and says she was an extremely anxious first-time parent. She searched "vaccination information Australia" through the google search engine on the internet. She came across the AVN's website. Ms Gibson says that she quickly realised that the information on the website was not pro-vaccination and says she would never have looked at the website had she known that they were an anti-vaccination group.
- 63 Ms McDermott provided a statement saying that she has been employed in childcare since 2001. When she was working as a nanny in 2011 the family asked her to have a whooping cough booster. She says that in the interests of being up-to-date with the latest information on vaccination she did a google search using the words "Australian vaccination" and was directed to the AVN's website. She said she assumed by the official, yet neutral sounding, name that the website was published by suitably qualified people. She says she studied the website and found the information plausible. She became very concerned about the effects of vaccination but could not find any information on the website dealing with the advantages of vaccination.
- 64 Ms Moon gave evidence that in 2004 there were media reports about an alleged connection between autism and vaccinations. She was concerned about these reports and when seeking information on the internet she came across the AVN's website. She says the website contained a lot of information referring to a study undertaken by Dr Andrew Wakefield. The study was on the link between autism and the measles mumps and rubella (MMR) vaccination. Ms Moon says that she was misled by the name of the organisation and by the way they present themselves as an unbiased voice on the subject. In her view the AVN has a clear anti-vaccination agenda.
- 65 Dr Brian Owler is the current president of the Australian Medical Association, New South Wales Ltd. The AMA is aware of AVN's activities and has been concerned about them for some time. He says the AMA does not believe vaccination should be compulsory nor does it object to the existence of AVN but it does believe that AVN should be required to clearly disclose through its name and all its material that they do not support vaccination.
- 66 Dr Owler also said that he had read media reports and was "particularly concerned with statements attributed to the CEO of the Australian College of Midwives indicating that she had been misled by the AVN." While Ms Dorey responded to those allegations, the CEO, Ms Kinnear, did not give evidence. Evidence of what Dr Owler read in a media report is not sufficiently reliable for me to take into account. I make no finding that Ms Kinnear or anyone else associated with the Australasian College of Midwives, has ever been misled in relation to AVN's nature, objects or functions by virtue of its name.
- 67 Evidence was given by the current and former members of parliament. The Hon Brian Pezzutti was a member of the NSW legislative Council from 1988 to 2003. In his view AVN promotes an anti-vaccination message but the name suggests the positive promotion of vaccination within the community. He is concerned that people in the community, particularly parents of children looking for information on vaccination, could be misled by the name. He has made several speeches in parliament condemning AVN for what he sees as disseminating incorrect information, promoting scare campaigns and misquoting material.

- 68 The Hon Marie Ficcaro is a Liberal Member of the NSW Legislative Council and Parliamentary Secretary to the Premier. She is of the view that the name AVN appears to promote the public health value of vaccination whereas, in fact, they are anti-public vaccination. She is concerned that people seeing the name AVN would think it a credible organisation. She added that the name AVN also implies pro-health establishment credentials, when they are not part of any government-endorsed program, nor are they respected by NSW Health. Her main concern is to stop the dissemination of inaccurate vaccination advice.
- 69 The Hon Dr Roland Kaye, Greens Member of the NSW Parliament in the Upper House, stated that in around 2010 he searched on the internet for information about compulsory immunisation. He found the AVS website and anticipated that it would contain information relating to scientific studies on the benefits of mass and compulsory immunisation. Dr Kaye says he has received verbal complaints from people with concerns about AVN. He told them that he, too, is concerned because he believes that the name is deceptive.
- 70 The Hon Dr Andrew McDonald, a state Member of Parliament gave evidence that in around 2009 he became aware of the AVN. He is concerned that the name AVN is designed to mislead the public into believing that it is a sanctioned and balanced body. If the name is not changed he believes that the public could be led into assuming that they are dealing with an unbiased organisation.
- 71 Two public sector managers gave evidence expressing their opinion on this issue. Dr McAnulty, a registered medical practitioner employed as the Director, Health Protection with Health Protection NSW gave evidence that he believes the name is misleading because it implies that it is providing accurate information about vaccination. He has looked at AVN's website, read media releases, spoken to various people and has formed the opinion that they discourage people from vaccinating themselves or their children.
- 72 Ms Campbell-Lloyd gave evidence that she is employed by NSW Ministry of Health and that her current position is Manager, Immunisation Unit, Health Protection NSW. Approximately 15 years ago she was made aware of AVN by members of the public and by health professionals. After that she says AVN increased its profile and became more vocal on radio, television and in the print media. She says NSW Health is concerned about AVN's activities, particularly as the name adopted by that organisation does not accurately reflect its position on vaccination. NSW Health has a strong interest in promoting the public health benefits of vaccination and ensuring that the community can make informed decisions about vaccinations based on evidence.
- 73 Firstly, Mr Beattie says that AVN has been operating under the same name for approximately 16 years and the public is well aware from media coverage or by looking at the website, that it provides an alternative perspective to the mainstream view. Indeed, Mr Beattie professes that AVN is notorious for being a vaccination choice group. In those circumstances, the public would not be misled by its name.
- 74 Regardless of how long AVN has been operating and its notoriety, I am satisfied that a significant section of the public has never heard of AVN and/or is not aware of its real objects.
- 75 Secondly, Mr Beattie relied on the 2002 decision of the Director General finding that the name was not misleading. Mr Beattie added that there was no evidence of a change in circumstances as envisaged by s 11(2) of the Act. I agree that circumstances have not changed since 2002 and I will take the 2002 decision into account.

- 76 Thirdly, Mr Beattie pointed out that none of the members of the public who said they had been misled by the name, chose not to vaccinate themselves or their children. That is not a relevant consideration.
- 77 AVN's final and main point is that it is not anti-vaccination organisation so its name is not misleading. As I have said, AVN is not 'anti' vaccination in the sense that it opposes all vaccinations in all circumstances. But I am satisfied that the name Australian Vaccination Network Inc implies that the organisation favours vaccination or, at least, attempts to provide comprehensive information about the pros and cons of vaccinations. I am also satisfied that AVN's objects do not include providing a pro-vaccination message nor do they seek to present all the available information about vaccination. AVN's main objects is the dissemination of information and opinions that highlight the risks of vaccinations. It is an organisation that is sceptical about vaccinations. Its attempt to bring some balance into the debate is limited to a link to government websites and hosting a discussion forum on another site.
- 78 My conclusion is that without any information, other than the name, an ordinary member of the public would be likely to be misled into thinking that one of AVN's objectives is to give a pro-vaccination message or, at least, to provide comprehensive information about vaccination. That is not the case.
- 79 A second basis on which the Department submitted that the name is likely to mislead the public was in relation to the information AVN provides on its website. According to the Department, the name suggests that that information is accurate, scientifically sound and published by suitably qualified people when it is not.
- 80 When the Director General's delegate made the decision under review he relied did not rely on this ground. The key findings of fact were that AVN's message is anti-vaccination and that the name does not reflect that message or AVN's objects. That is the basis on which AVN understood that the decision had been made.
- 81 While the Tribunal may make a decision based on new grounds that were not relied on by the original decision maker, AVN must be afforded procedural fairness. I am not satisfied that AVN was on notice that the Department would be relying on this alternative ground for its decision. Even if they were on notice, and had a reasonable opportunity to respond, I am not satisfied that this ground provides a further basis for the decision.
- 82 Apart from general opinions expressed by medical practitioners and others, neither party adduced any specific evidence about the accuracy or scientific validity of any of the information on the website or the qualifications of the authors of that material. There is simply insufficient evidence for me to make a finding about the accuracy or validity of any of that information. For that reason, and because AVN was not on notice of this alternative ground, I am not satisfied that AVN's name is likely to mislead the public about the accuracy or scientific validity of the content of the website or about the qualifications of the authors.
- 83 I will go on to consider whether the name suggests a connection with the government of the Commonwealth and/or whether it is 'undesirable'.

Suggests a connection with the government?

- 84 A name that suggests a connection with the government of the Commonwealth, New South

Wales, another State or Territory or another country is an "unacceptable" name. The only connection that the name "Australian" can suggest is a connection with the Commonwealth government. The test is not whether the name suggests that the association is a Commonwealth agency. All that is required is that the name suggests "a connection" with the Commonwealth government.

- 85 Only the name, in isolation, can be taken into account when determining whether it suggests a connection with the Commonwealth government. AVN's web address and the content of its website are irrelevant. I have disregarded evidence about those matters.
- 86 In 1962 the Attorney-General who was the Minister administering the *Business Names Act* 1962, gave a direction that names should not be accepted for registration without his consent if they were "names suggesting connection with the Crown, the Commonwealth of Nations, the Government of the Commonwealth of Australia, or of a State or of any other part of the Queen's dominions, possessions or territories" or if they were "names suggesting connection with the government of a foreign country": *Corporate Affairs Commission v Bradley* [1973] 1 NSWLR 382.
- 87 In 1967 application was made for the registration of the name "Rhodesia Information Centre" as a business name. One issue was whether that name suggests a connection with the Rhodesian Government. Sheppard J held that it was sufficient if the words used suggested "to a reasonable number of people" a connection with a specific government. On appeal, the Court of Appeal regarded that formulation of the test as too restrictive: *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 406. It held that it is enough if "an appreciable" or "not insignificant" number of people would make that connection.
- 88 In relation to the meaning of the words "suggest" Sheppard J said at first instance that it is an ordinary English word with a plain enough meaning. He went on to say, at 389, that it is defined in the Shorter Oxford Dictionary as follows:
- "To cause to be present to the mind as an object of thought; an idea to be acted upon; to put forward the notion, opinion or proposition; to give a hint or inkling of; without plain or direct expression or explanation; to give the impression of the existence or presence of."
- 89 Sheppard J held that the name Rhodesia Information Centre did suggest a connection with the Rhodesian Government because the name "evoke[s] the idea that the business carried on under that name will provide information about the geographical area known as Rhodesia, and that there is to be found in them a notion or a basis for saying that in all probability the business is connected with the government of that place."
- 90 Several witnesses gave evidence that they assumed AVN was a government sponsored, government supported or government affiliated organisation. I assume that they mean that the association receives government funding or is a statutory body of some kind. That, of course, is not the case.
- 91 Ms Dorey gave the following reason for including the word "Australian" in AVN's name:
- We wanted to pick a name that would describe exactly what we did and would also convey the fact that we would be operating anywhere in Australia where there was a need. So in order to convey out nationwide status, the word "Australian" was included.
- 92 The Department made the point that government bodies such as Australia Post, the Australian Federal Police, the Australian Passport Office and the Australian Bureau of Statistics all have the word "Australia" or "Australian" in their name. It was not the

Department's submission that every name of a not for profit association which includes "Australian" or "Australia" is unacceptable. But, it was said that in this case the name as a whole is unacceptable because it suggests such a connection.

- 93 The word "Australia" is not a word that is deemed to be unacceptable by the Regulation. Words or phrases that must not be used in an association's name include "made in Australia", "GST" and "aboriginal corporation": *Associations Incorporation Regulation 2010*, Schedule 2, cl 12.
- 94 To be an unacceptable name, the whole name, "Australian Vaccination Network Inc." must suggest a connection with the Commonwealth government. The word "Australian" when read in conjunction with the other words in the name, does not suggest such a connection.
- 95 All associations registered under the Act must use their full name, including the word "Incorporated" or "Inc" in any publication: s 41 and s 18(1)(a). That word, or its abbreviation, denotes that the organisation is a small scale not for profit association registered under the Act. While a name such as the Australian Government Inc is likely to suggest a connection with the Commonwealth government despite the inclusion of the word "Inc," the combination of the words "network" and "Inc." negates any suggestion that the organisation is connected with the Commonwealth government.

Is the name undesirable?

- 96 A name is "unacceptable" if the Director-General is of the opinion that it is "offensive or undesirable". Of course, the Director-General's opinion is not conclusive. The question as to whether or not the name is undesirable is an objective question to be determined by the Tribunal when reviewing the decision: *Corporate Affairs Commission v Bradley* [1973] 1 NSWLR 382 at 387; *Drake v Commissioner for Corporate Affairs*, Supreme Court of WA, unreported 7 April 1999, 19 April 1999. Any undesirability must be assessed in accordance with community standards.
- 97 The word "undesirable" must be interpreted in context but, contrary to AVN's submission, the *ejusdem generis* rule does not apply. There are no general words in the provision to be read down to embrace only things falling within a certain category.
- 98 A key issue is whether undesirability must be apparent from the name in isolation or whether the objects and activities of the association are relevant. In *Re Little & Australian Securities Commission*, (Virgin Mary's case) (1996) 22 ACSR 226; (1996) 24 AAR 62; (1996) 14 ACLC 1730 the Administrative Appeals Tribunal was interpreting s 367(1)(b) of the Corporations Law and Regulation 4.2.01(1)(a) of the Corporations Regulation. That Regulation, which is substantially the same as the provisions under consideration in this case, states that:

For the purpose of paragraphs 367(1)(b) of the Corporations Law, a name is unacceptable for registration under Part 4.2 of the Law if it is a name that:

(a) in the opinion of the Commission, is undesirable, or likely to be offensive to:

(i) members of the public; or

(ii) members of any section of the public

- 99 By a majority, the AAT held that the company name "Virgin Mary's Pty Ltd" was likely to be

offensive and undesirable to a section of the community, namely members of the Anglican, Roman catholic and Islamic faiths. It also held that it was not relevant to take into account the fact that it was proposed that the business to be carried on under that name was a bar/night-club. That fact was not relevant because the Corporations Law does not require a company wishing to be incorporated to provide details of its objects or the context in which it proposes to operate. Furthermore, the particular Regulation that the applicants relied on in that case did not mention context whereas other Regulations did.

100 With one exception, none of the "unacceptable names" identified either specifically or by description in the Act refer to the context in which the name is proposed to be used. The exception is "a name that is likely to mislead the public in relation to the nature, objects or functions of an association or proposed association or in any other respect."

101 Section 6(3)(c) requires that when applying for registration an organisation is required to include a statement of its objects. But in the absence of any reference to those objects in s 18(1)(f), I am not satisfied that that requirement is for the purpose of determining whether the name is undesirable. It follows from this conclusion that the name must be undesirable on its face.

102 In *South Pacific Airlines of New Zealand Ltd. v Registrar of Companies* [1964] NZLR 1 the issue was whether the name "Airlines of New Zealand Limited" so nearly resembles the name "New Zealand National Airways Corp" as to make the former calculated to deceive or "undesirable". As to the meaning of "undesirable" McGregor J said at 65 that:

The expression "undesirable" would seem to embrace any name or names which would offend public policy or might give offence to any particular section of the community, or any particular religion. Each name must be considered by the Registrar in the light of its own merits or demerits, but it is clear that any name that might mislead the public or a recognised section of the public in any particular locality, or would be likely to cause confusion, is undesirable, irrespective of the intentions or the motives or purposes of the applicant.

103 McGregor J concluded that the proposed name was calculated to deceive and was also undesirable. Although His Honour mentioned causing confusion as an example of undesirability, the Department did not submit that mere confusion was sufficient to make a name undesirable. Unlike the situation in *South Pacific Airlines of New Zealand Ltd* there is no evidence that the public is confusing AVN with the name of another organisation. In *Drilex Systems Pte Ltd v Registrar of Companies* [1990] Part 6 [HC,S'pore] SK Chan J found that Telecoms had confused two entities - Drilex Systems Inc and Drilex Systems Pte Ltd. That evidence was conclusive evidence of confusion. The High Court of Singapore found that the names so resemble each other that one is likely to be mistaken for the other.

104 While the Department did not rely on confusion as a basis for undesirability, it did submit that "disharmony" was sufficient to make AVN's name undesirable. It relied, in particular, on the evidence of a member of the public, Ms Gibson:

The information on the AVN website caused me to be fearful that my child could suffer autism, or any other side affect (sic) including potentially death through vaccinations. I became extremely fearful for my daughter's well being, not because of what could happen to her if I didn't get her vaccinated, but rather what could happen to her as a result of the vaccinations.

105 The Department also relied on the evidence of former MP, the Hon Dr Pezzutti. He expressed the opinion that the activities of AVN were "irresponsible and destructive to the community". He went on to say:

. . . contrary to what their name suggests they promote an anti-vaccination message which is

based on information that is inaccurate and in many instances misquotes available information.

- 106 Dr Pezzutti has made speeches in parliament drawing attention to the misleading information provided by an author quoted on the AVN's website, Dr Viera Scheibner. Dr Pezzutti sees AVN's activities, not as seeking to raise concerns about the dangers of immunisation, but as a scare campaign which impacts negatively on childhood immunisation.
- 107 This evidence relates to the content of AVN's website, not to the name itself. The "disharmony" which is said to have arisen is because of material on the website. Because the test of undesirability concerns only the name of the organisation, that evidence is irrelevant. My conclusion is that the name Australian Vaccination Network Inc is not undesirable.

Acceptable names

- 108 The Department does not have to suggest alternative "acceptable" names. But because a name change involves passing a special resolution and applying to the Department, AVN would, understandably, like some guidance as to an acceptable name.
- 109 AVN wrote to the Department on 27 December 2012 advising that it intended to "cooperate fully in ensuring our name is in accordance with all relevant legislation" and asked for advice as to the least change which would conform with the legislation. The Department did not reply to that letter. On 18 February 2013 Mr Beattie wrote to the Department again asking for guidance as to the change of name and re-iterating that his organisation intends to co-operate fully. No reply was received to that letter.
- 110 On 6 March 2013, AVN wrote to the Department for a third time asking for an indication as to whether any of the following names were acceptable: Australian Vaccination (Information) Network; Australian Vaccination Information Network; Australian Vaccination Information; Australian Vaccination Network (for Choice); Australian Vaccination Choice and Australian Immunisation Network.
- 111 The Department replied to this letter on 11 March 2013 stating that "any name change being considered by the Association (including those listed in your letter) should take into consideration the reasons why the change is required and avoid misleading the public as to the message, true nature, objects or functions of the Association." AVN did not find this response helpful.
- 112 While I cannot predict the name or names that the Director General may consider acceptable, none of the options AVN has suggested reflect their main object in a way that would make it unlikely that the public is misled. Merely adding the word "information" does not achieve that goal. Including the word "choice" merely reflects one of AVN's secondary objectives, to ensure that people are given a choice about whether or not to vaccinate themselves or their children.
- 113 In my view, to be acceptable, the name should reflect AVN's scepticism about vaccinations. Although I do not have to decide this issue, and my opinion is not binding, a name that includes the word "risk" or "sceptic" and vaccine or vaccination would be acceptable. Examples include Vaccination Risk Awareness Association Inc or Vaccine Sceptics Network Inc. Other combinations of those words would, in my opinion, be acceptable. The name could also include the word "Australia" or "Australian" without suggesting a link to the Commonwealth government. Of course, these are not the only names that may be

acceptable.

Order

The decision of the Director General, Department of Finance and Services to direct Australian Vaccination Network Inc to adopt a new name is affirmed

Costs

114 Neither party applied for costs and I make no order.

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