

## THE DUTIES OF OFFICERS AND EMPLOYEES IN NON-PROFIT ORGANISATIONS

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### Introduction

The theme for this paper was motivated by the writer's experiences in working with officers and employees of organisations operating within the non-profit sector in Australia. Of those organisations, the overwhelming majority were formed for sporting purposes. Accordingly, this paper will concentrate on identifying the particular duties facing officers and employees of organisations within the sporting sphere.

The paper attempts to crystallise some of the current ideas about the principles of corporate governance that should be implemented by a non-profit organisation. Those ideas, which have emanated from a number of recent cases, articles and statutory amendments, are juxtaposed to examples of large and small non-profit organisations in Australia.

The writer has also attempted to address the statutory and common law duties of officers and, to a lesser extent, employees, of non-profit organisations. Reference will be made to some current public examples of conduct in the sporting sphere that appears to be in contravention of the statutory duties of officers and employees.

Finally, the writer will outline some of the common complaints of members of non-profit organisations and identify the primary remedies that are available to them as against the offending officers of the organisation and the organisation itself.

### Corporate Entities and the Profit Dichotomy

Non-profit organisations (otherwise known as not-for-profit organisations) are typically formed for some community, sporting, social, charitable or other benevolent purpose, whereas for-profit companies are formed with a view to securing profits to their members. In *Cameron v Hogan*<sup>1</sup>, the High Court made some pertinent observations in relation to the nature and purpose of what were then termed 'voluntary associations':

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1 (1934) 51 CLR 358.

They are for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character, or otherwise stand apart from monetary gain and material advantage.<sup>2</sup>

It is important to recognise at the outset that the term ‘non-profit’ in relation to an organisation does not mean that it does not make, or indeed strive to make, a profit. To the contrary, these days many organisations operating in the non-profit sector make significant amounts of profits, that is they show significant levels of retained earnings on their year-end balance sheets (eg the Australian Football League). The primary difference between the two types of organisation, however, is that those operating in the non-profit sector are typically prohibited by statute and/or their constituent documents from distributing any profits they do make to their members. Of course, members do receive benefits in other ways if the organisation makes a profit (eg better facilities, subsidised food and drink, etc).

An important benefit that can flow to a non-profit organisation is tax-exempt status under Division 50 of the *Income Tax Assessment Act 1997*. The main criteria established by the Australian Taxation Office for obtaining tax exempt status is that the organisation’s constitution contains a prohibition on distributing profits to members. This prohibitive element is also a condition of incorporation under the relevant State and Territory associations incorporation legislation.<sup>3</sup>

The legislation does not prohibit incorporated associations from distributing surplus assets to their members in the event of winding up. But the ability to obtain tax-exempt status is likely to be adversely affected if such a provision is contained in the rules governing the association. The requirement normally insisted on is that surplus assets go to an organisation with similar objects. For-profit companies, on the other hand, whilst not obliged to distribute profits to members until after a dividend has been declared, are carried on with the specific aim of making profits and distributing these to members in proportion to their shareholdings.

## **Types of Non-Profit Organisations**

In Australia there are three main types of structures used by those who wish to establish a non-profit organisation:

- Unincorporated association
- Incorporated association

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<sup>2</sup> Ibid, 370-1.

<sup>3</sup> See *Associations Incorporation Act (Vic) 1982*.

- Company limited by guarantee

It is important to understand the basic structural elements of each type of organisation before one can properly address the raft of rights and remedies that may be available to members under the respective structures. The main attributes of each type of non-profit organisation are summarised below.

### **Unincorporated Associations**

The term ‘unincorporated association’ is commonly applied in Australia in relation to a ‘society, chamber, institute, union, club, federation, council, league or guild which is essentially voluntary in nature and which exists for the purpose of giving expression to the desire of a group of persons to further a common interest or purpose.’<sup>4</sup>

These organisations are usually funded by subscriptions from members and intermittent fundraising activities (eg raffles, etc). The members usually elect a committee to manage the affairs of the organisation. Unincorporated associations may have a statement of objectives and rules but many do not. Before we saw the commercialisation of sport and the implementation of a funding scheme by the Australian Sports Commission and other statutory bodies, unincorporated associations comprised the bulk of voluntary associations in Australia.

The main problem with unincorporated associations from a member’s perspective is that there is no relationship between members and the association, whether contractual or otherwise. In *Cameron v Hogan*<sup>5</sup>, the High Court proffered the following observations:

[s]uch associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations inter se, the rules adopted for their governance would not be treated as amounting to an enforceable contract.<sup>6</sup>

In that case, the lack of a contractual relationship between the members and the association meant that members had no standing to challenge the decisions of the association’s committee.

### **Incorporated Associations**

All states and territories now have incorporation legislation for associations. The feature of these models is that members are immune from personal liability at the suit of third parties in their capacity as members. In relation to the liabilities faced by committee members, Fletcher contends that ‘committee members in all

4 Ward B, ‘Position of Sporting Clubs’ (1989) *Sporting Law*, Business Law Education Centre 1, 3.

5 (1934) 51 CLR 358.

6 Ibid, 370-1

jurisdictions owe in the same measure, the common law and equitable duties which law and equity have imposed on company directors.<sup>7</sup>

In Victoria, the legislation governing incorporated associations was recently amended to provide for civil and criminal liability in the case of committee members who knowingly or recklessly misuse information obtained by virtue of their position or their position within the association either to his or her own pecuniary advantage or material benefit or to the detriment of the association.<sup>8</sup> These provisions substantially mirror sub-sections 232(5) and (6) of the Corporations Law. It is interesting to note the legislators saw fit not to include a general provision requiring committee members to exercise care and diligence in the performance of their duties.

Incorporated associations in all jurisdictions are granted corporate status and, as a result, gain all the traditional legal attributes of a corporation including:

- recognition as a separate legal entity with perpetual succession and a common seal;
- an ability to contract;
- an ability to acquire, hold and dispose of real or personal property; and
- an ability to sue or be sued in its own name.

The legislation was enacted to give members of non-profit organisations the same rights as their for-profit counterparts. It necessarily follows, in the writer's opinion, that the same common law and equitable principles should apply to committee members of incorporated associations as to officers of corporations.

Incorporated associations are required to register a set of their rules either when applying for registration or soon after registration is granted. The rules of incorporated associations in each jurisdiction are required to adhere to certain minimum requirements.<sup>9</sup>

Whilst these minimum requirements help to regulate the governance procedures put in place by an association's controlling officers, in practice, many associations pay little or no heed to the provisions of their rules. Perhaps this is not surprising given the constant amendments and add-ons which (the writer has found) are features of the constitutions of many incorporated associations. Indeed, the writer has found the constitutions of many state, territory and national sporting bodies to be all but indecipherable, often including hand written amendments or references to regulations and by-laws which simply do not exist.

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7 Fletcher K, *The Law Relating to Non-Profit Associations in Australia and New Zealand*, The Law Book Co Ltd, Sydney (1986) 289.

8 *Associations Incorporation Act (Vic)* 1981, sub-sections 29A(1) and (2).

9 See *Associations Incorporation Act (Vic)* 1981, s 6.

The vagaries which pervade the rules of many incorporated associations may in fact have led to fewer cases being brought by aggrieved members than may have been the case if the rules were properly drafted and it was clearer when officials were acting *ultra vires* or the rules were otherwise not being complied with. In the writer's experience, many members of incorporated associations never even see a copy of the association's rules during the tenure of their membership.

A solution to the problem of inadequate amendment procedures in relation to an association's rules may be for all jurisdictions to adopt the South Australian example and require any amendments to the rules of an incorporated association (including the incorporation of by-laws and other regulations) to be submitted for approval by the relevant statutory authority prior to their taking effect. The Victorian legislature has gone some way towards addressing the problem by providing members with a statutory right to seek directions and declarations from the Magistrates' Court in relation to members' rights and obligations under an association's rules.<sup>10</sup> Members' rights under the legislation exist whether or not 'a right of a proprietary nature is involved'.<sup>11</sup>

### **Companies Limited by Guarantee**

Section 9 of the Corporations Law defines the company limited by guarantee as one that is formed on the principle of having the potential liability of members limited to the amount that that member has 'guaranteed' to pay under the company's memorandum of association. References to shareholders in the Corporations Law do not apply to members of companies limited by guarantee because such companies do not have a share capital. However, apart from specific exceptions, a reference to a 'member' includes a reference to a member of a company that is a company limited by guarantee.

Section 517 of the Corporations Law provides that members of a company limited by guarantee will not be required to contribute more in a winding up than the amount they have guaranteed under the constitution. In sports clubs, the amount guaranteed by members is typically less than \$50 per member. Members' guarantees cannot be used by a company to secure a loan.<sup>12</sup> Moreover, the amount of the guarantee can only be varied with the consent of the affected members.<sup>13</sup>

Under Pt 5.6 Div 2 of the Corporations Law, if a company has insufficient funds to meet its liabilities, the court may require persons who were members within a year of the date on which the winding up action commenced to honour their guarantees. However, the amount for which past members are liable is limited to

10 *Associations Incorporation Act (Vic)* 1981, sub-section 14A(2).

11 *Ibid* sub-section 14A(3)

12 *Re Irish Pony Club Co* [1906] WN 127.

13 *Hennessy v National Agricultural and Industrial Development Association* [1947] IR 159.

debts incurred only up to the date on which they ceased to become members of the company.

Are members who are minors in the eyes of the law obligated to satisfy their guarantees under the Law? The writer suggests that, at least in Victoria<sup>14</sup>, minors will not be bound by such guarantees (or any other penalty associated with their membership of the corporation) because there is in fact no contract between the minor and the organisation.

It is important to note that (with the repeal of the former section 179 of the Corporations Law) there is no longer any prohibition against either the constitution or a resolution of a company limited by guarantee purporting to give a person a right to participate in the divisible profits of the company otherwise than as a member. The effect of this change to the Law is that companies limited by guarantee may now resolve to distribute surplus funds to persons or organisations who are not strictly members of the company. The change is likely to be of most assistance to so-called 'umbrella' organisations who are comprised of members who are natural persons (another requirement of the old Law which has been abolished) and who wished to distribute funds to other organisations.

In relation to the liability of directors of companies limited by guarantee, the position appears to be that they owe the same duties as directors of companies having a share capital.<sup>15</sup>

## **Governance Principles and Objectives**

Much has been said and written about the governance principles, which should apply, to managers of organisations operating in the non-profit sector. The scope of this paper is narrower than a detailed analysis of those principles would permit. However, it is pertinent in any analysis of the duties of directors and committee members of an organisation to consider some of the primary governance principles that apply to the non-profit sector.

The position at law is that a director's duty is an objective one, to be tailored according to the duties the director is called upon to perform and other aspects of the company concerned. The NSW Court of Appeal in *Daniels v Anderson*<sup>16</sup> concisely puts the current position of directors as follows:

A person who accepts the office of director of a particular company undertakes the responsibility of ensuring that he or she understands the nature of the duty a director is called upon to perform. That duty will vary according to the size and business of the particular company and the

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14 See, *Supreme Court Act* (Vic) 1986, section 49.

15 Cf Sievers A, 'The Honorary Director: the Obligations of Directors and Committee Members of Non-profit Companies and Associations' (1990) 8 *C&SLJ* 87, 89.

16 (1995) 13 *ACLC* 614.

experience or skills that the director held himself or herself out to have in support of appointment to the office.<sup>17</sup>

In *Re Property Force Consultants Pty Ltd*<sup>18</sup>, Derrington J pointed out that a director cannot avoid responsibility:

[s]imply by ignoring everything except the area of his specialty. In particular, if he had reason to suspect irregularity in the company's financial affairs, he was not entitled to ignore it, leaving it to the financial expert on the board.<sup>19</sup>

Section 232(4) of the Corporations Law was amended in 1992 to impose an objective standard of care on directors (and other officers) of a corporation. That section states as follows:

In the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances.

Section 232(4) is a civil penalty provision in addition to common law and equitable remedies.

There are various schools of thought on how much involvement directors need in the day-to-day operations of a company in order to discharge their common law and statutory duties to the company. Some say that the present regime promotes conservatism on the part of directors and will ultimately lead to lesser returns to members. Others say that the law really only requires directors to properly delegate and to then take notice of the reports they receive - the responsibility then is to appoint competent advisers to assist in the discharge of their duties.

It is as difficult to place a matrix over non-profit organisations as over for-profit organisations. Like their for-profit counterparts, non-profit organisations can range from the very small (eg a chess club) to the very large (eg the Australian Red Cross).

The objectives of non-profit organisations are as diverse as the people who join them. In the case of the Australian Red Cross, the Victorian Chairman, Mr Brian Ward, has raised the interesting dilemma which faces organisation such as theirs, namely, is it better for Red Cross to accumulate \$25 million in retained earnings and invest those funds for future earnings growth or should they

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17 Ibid, 665 (per Clarke and Sheller JJA).

18 (1995) 13 ACLC 1,050.

19 Ibid, 1,061.

distribute those funds to those in immediate need, as the objects of the organisation would appear to suggest.<sup>20</sup>

In trying to resolve such dilemmas, John Carver says that the most common error occurs when a non-profit board proclaims that its first obligation is to its customers. In the case of Red Cross, that would be people in need of emergency assistance and blood. Carver states that, more truthfully, the organisation's primary obligations are to its owners (stakeholders), on whose behalf and with whose empowerment the board then determines which customers will command the staff's obligation.<sup>21</sup>

Regina Herzlinger puts it slightly differently when she states that:

[d]irectors should determine the social and demographic characteristics of the users who generate the sales revenues to ensure that the organisation is serving the truly needy and the other groups it intends to serve.<sup>22</sup>

Ms Herzlinger suggests that the non-profit board should consist of 8 to 12 members, regardless of the organisation's size and should be divided (according to expertise) amongst four primary committees: planning, compensation, auditing and regulatory compliance.<sup>23</sup> In reality, the committee of a golf club would probably find it difficult to divide into groups to deal with these matters. They are more likely to divide themselves into such sub-committees as: social, pennant, finance, junior development, etc. Ms Herzlinger's model would, however, have merit in a larger organisation such as a hospital or Red Cross.

A major inhibitor to responsible corporate governance principles being applied across the board in the non-profit sector is the vast differences in the size and resources of many organisations. For an organisation such as Red Cross, it would be much easier to implement responsible corporate governance procedures than for an organisation such as a local golf club or chess club. The main reason for this is that small organisations will simply not have sufficient resources to enable officers to contract in specialist accounting, legal and other advice to enable them to properly discharge their statutory and fiduciary obligations to the organisation.

Smaller organisations commonly rely on advice given by committee members who are elected on to the committee because of their professional experience or qualifications. In the writer's experience, however, advice given by such officers is either ill-informed or clouded by emotion or a sense of duty to the objects of the organisation. The result is that many committee members may find themselves liable under common law and statutory duties for the advice they

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20 Interview with the writer on 20 June 1997.

21 Carver J, 'When Owners are Customers: The Confusion of Dual Board Hats' 10 *Nonprofit World* 4, 11.

22 Herzlinger R, 'Effective Oversight: A Guide for Nonprofit Directors' *Harvard Business Review* (July-August 1994) 52, 55.

23 Ibid, 58.



give whilst sitting on the committee, unless they make it clear prior to election that they will not sit on the committee in any professional capacity.

## **Duties under the Corporations Law**

This part of the paper identifies a discreet area of the Corporations Law which contemplates both civil and criminal liability for officers and employees, whether in or out of the jurisdiction. In particular, this part focuses on the obligations imposed on officers and employees under sections 232(5) and (6) which are in addition to the general law.

Misuse of company information by an officer or employee (or a former officer or employee) is covered by section 232(5) of the Corporations Law. Section 232(5) reads as follows:

An officer or employee of a corporation, or a former officer or employee of a corporation must not, in relevant circumstances, make improper use of information acquired by virtue of his or her position as such an officer or employee to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation.

Section 232(6), on the other hand, proscribes misuse by an officer or employee of his or her position within a corporation. That section reads as follows:

An officer or employee of a corporation must not, in relevant circumstances, make improper use of his or her position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation.

Both sections 232(5) and (6) are civil penalty provisions. As such, an officer or employee who contravenes either section, or is involved in a contravention of either of them, is liable to civil provisions under Part 9.4B. Importantly, an officer or employee may be liable under sections 232(5) and (6) in circumstances where they may not owe a fiduciary duty to the corporation. In addition, they may be liable in circumstances where the conduct complained of occurs outside the jurisdiction.<sup>24</sup>

A member may apply to the court in respect of a breach of sections 232(5) and (6) under section 1324.<sup>25</sup> Note however that jurisdiction to confer the relief available under that section may only be exercised by the superior courts. This is a curious result given that the inferior courts may nonetheless grant the monetary relief available under section 1317HD.

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<sup>24</sup> Sections 1313A and 1317DC, Corporations Law.

<sup>25</sup> *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 15 ACLC.

Proof that an officer or employee has contravened either section will depend on whether there has been improper use of information or position as the case may be. 'Improper use' is determined by an objective assessment of impropriety.<sup>26</sup> Improper use is not limited to conscious impropriety. Whether there has been improper use will depend on an assessment of whether there has been a breach of the standards of conduct that would be expected of a reasonable person with knowledge of the duties, powers and authority of the officer's or employee's position and the particular circumstances of the case.<sup>27</sup> There is no uniform or inflexible standard that applies equally to every person who is the subject of the provisions.<sup>28</sup> In *Grove v Flavel*<sup>29</sup> the South Australian Full Court described the term 'improper' in the following terms:

The word 'improper' is not a term of art. It is to be understood in its commercial context to refer to conduct which is inconsistent with the 'proper' discharge of the duties, obligations of the officer concerned.<sup>30</sup>

In interpreting whether there has been improper use for the purpose of sections 232(5) or (6), the courts will adopt a purposive rather than a causative approach. Therefore, an officer or employee will contravene either provision if they adopt a course of conduct with a view to obtaining an advantage or causing detriment to the corporation. It will not matter that such advantage or detriment has not in fact occurred.<sup>31</sup>

The state of mind of the officer or employee is therefore relevant to the question of whether or not the person improperly used information or his or her position, as the case may be.<sup>32</sup> In *Australian Securities Commission v Matthews & Anor*<sup>33</sup> the Western Australian Full Court held that while the test for impropriety was objective, the subjective state of mind of the officer was relevant to the objective determination of the propriety or otherwise of the conduct. The Full Court said that the conduct should not be measured against some uniform reasonable director but rather the duties and responsibilities of the officer should be considered.

There are two schools of thought as to the type of information covered by section 232(5). The first is that 'information' means information which equity would protect by injunction if a director intended to use it in breach of his or her fiduciary duties.<sup>34</sup>

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26 *R v Byrnes* (1995) 130 ALR 529 (following *McNamara v Flavel* (1986) 43 SASR 410; *Chew v R* (1992) 107 ALR 171; *Whitehorse v Carlton Hotel Pty Ltd* (1987) 70 ALR 251).

27 *R v Byrnes* (1995) 130 ALR 529.

28 *Grove v Flavel* (1986) 4 ACLC 654.

29 (1986) 4 ACLC 654.

30 *Grove v Flavel* (1986) 4 ACLC 654 at 662.

31 *R v Byrnes* (1995) 130 ALR 529 (following *Chew v R* (1992) 107 ALR 171).

32 *Chew v R* (1992) 107 ALR 171.

33 (1995) 13 ACLC 497.

34 *Rosetex Co Pty Ltd v Licata* (1994) 12 ACSR 770 (Young J), following Burt CJ in *Es-Me Pty Ltd v Parker* (1971-1973) CLC 40-038; *London and Mashonaland Exploration Co Ltd v New Mashonaland*

The alternative view (and the one to which the writer subscribes) is that the information need only have been acquired by the officer or employee in the course of their position within the corporation. It does not matter that the information is not confidential.<sup>35</sup> The writer relies on the following comments by Millhouse J in *McNamara v Flavel*:

That others also may have had the information is not to the point: the test is not that the information is confidential ... it is how the information is acquired: it was acquired because of the appellant's position as a director.<sup>36</sup>

Whichever school of thought prevails, it is clear that the duty under section 232(5) overlaps with the general law duty and the duty to act honestly under section 232(2).<sup>37</sup>

Many of the cases relating to improper use of information or position involve directors with knowledge of the precarious financial position of their corporation.<sup>38</sup> For example, in *Fitzroy Football Club Ltd v Bondborough Pty Ltd & Ors*<sup>39</sup> the Court of Appeal of the Supreme Court of Victoria accepted the Respondents' submission that there was no intent by the directors to divert a corporate opportunity from the embattled AFL club, the Fitzroy Lions. To the contrary, the Court held that the directors, after taking advice from the club's accountant, had acted in the best interests of the club by not letting the club enter into a contract for the purchase of a hotel.

Compare the decision in *R v Cook; Ex parte Commonwealth Director of Public Prosecutions*<sup>40</sup> where the Queensland Court of Appeal rejected a director's defence that he had acted in the honest belief that his actions were for the benefit of the corporation. The Court held, however, that where a director's alleged misuse of position was an abuse of power, the director's belief that his or her conduct was in the best interests of the corporation might be relevant in determining whether the conduct was improper. But in that case the alleged misuse of power by the director was plainly one which the director ought to have known he had no authority for.<sup>41</sup>

The potential scope of sections 232(5) and (6) within the non-profit sector is worthy of comment. Consider the position of an AFL footballer or administrator who is in possession of important secret information concerning his team's

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*Exploration Co Ltd* [1891] WN 165; *Riteway Express Pty Ltd v Clayton* (1987) 10 NSWLR 238; *On the Street Pty Ltd v Cott* (1990) 3 ACSR 54 applied.

35 *McNamara v Flavel* (1988) 6 ACLC 802 at 807 (Millhouse J).

36 (1988) 6 ACLC 802 at 807 (Millhouse J).

37 *Marson Pty Ltd v Pressbank Pty Ltd* [1990] Qd R 264 (Macrossan CJ).

38 In relation to section 232(5), see *Grove v Flavel* (1986) 43 SASR 410. In relation to section 232(6), see *Jeffrey v National Companies and Securities Commission* [1990] WAR 183.

39 (1997) 15 ACLC 638.

40 (1996) 14 ACLC 947.

41 *R v Byrnes* (1995) 130 ALR 529 followed. Cf *Re Tasmanian Spastic Association Ltd; Australian Securities Commission v Nandan* (unreported, Federal Court of Australia, Merkel J, 10 April 1997).

players and tactics for the coming season. If that player or administrator went to an opposing team, could sections 232(5) or (6) have the effect of preventing him from using that information for the benefit of his new team? The authorities on point are of little assistance in answering this question. Nonetheless, in the writer's view, the sections could apply if the information could be shown to be sensitive enough to warrant protection by the Courts.

In this regard, it is worth noting the following comments by Young J in *Rosetex Company Pty Ltd v Licata*:<sup>42</sup>

Accordingly, in my view, "information" in s 232(5) means the sort of information which equity would protect by injunction if a director used it in breach of his fiduciary duties. "Improper" use of that information is in much the same plight as a breach of fiduciary duty under the general law.

Applying the logic proposed by Young J in that case, it is worth considering the following comments by Laskin J of the Supreme Court of Canada in *Canadian Aero Service Ltd v O'Malley*:<sup>43</sup>

An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, the ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company, rather than a fresh initiative that led him to the opportunity which he later acquired.

## Officers' Control over Members

The Corporations Law continues to draw the distinction between 'members' and 'shareholders' so that it can maintain a separate form of governance over companies limited by guarantee. 'Members' are defined in section 9 to include shareholders. Section 246A states:

A person is a member of a company if they:

- (a) are a member of the company on its registration; or

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42 (1994) 12 ACLC 269,273.

43 (1973) 40 DLR (3d) 371, 382. Cited with approval by Santow J in *Colour Control Centre Pty Limited & Anor v Richardo & Ors* (Supreme Court of New South Wales, 24 July 1995).

- (b) agree to become a member of the company after its registration and their name is entered on the register of members; or
- (c) become a member of the company under section 167 (membership arising from conversion of a company from one limited by guarantee to one limited by shares).

Traditionally, admission to membership of a non-profit organisation was governed by the rules for admission established by the founders of the organisation and varied by members admitted subsequently. Even if these rules discriminated against persons on the grounds of race, sex or religion or permitted the committee to arbitrarily 'blackball' an applicant, the courts were reluctant to intervene to the advantage of the aggrieved applicant.

Freedom of association has traditionally been the cornerstone of the existence of non-profit organisations. This principle holds fast, albeit to varying degrees, in all Australian jurisdictions where, despite the enactment of equal opportunity legislation, the provisions generally only touch on non-profit organisations (if at all) to the extent that such organisations are 'clubs' within the meaning of the relevant legislation. This term is defined essentially so as to include those organisations that provide purely social facilities. Therefore, an organisation such as a women's tennis club would probably be outside the ambit of the relevant equal opportunity legislation.

Contrast the notion of freedom of association to the situation that exists in relation to listed companies where there are no limits on who may join. Apart from the essentially private nature of corporate quasi-partnerships the situation is even more obverse to the extent that directors can typically refuse to register a transfer of shares from one person to another in certain circumstances.

In *R v Benchers of Lincoln's Inn*<sup>44</sup> the decision of the Inn to refuse to admit an apparently qualified person as a law student was upheld because 'they make their own rules as to the admission of members; and even if they act capriciously upon the subject, this court can give no remedy in such a case; because in fact there has been no violation of a right'.<sup>45</sup>

It has been said that directors' duties are owed to the company and its members as a whole. However, it is submitted that this approach may be inappropriate to a non-profit organisation, whether a company limited by guarantee or an incorporated association, whose objects specifically require the furtherance of some benevolent purpose. This is because it is often the case in practice that the directors of a non-profit company are precluded by the company's constitution from diverting the activities of the company outside the ambit of the originally contemplated activities of the company even if the members ratify the departure.

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44 (1825) 4 B & C 855.

45 Ibid 859-860 (Bayley J).

Specific examples of cases, which have dealt directly with such complaints by members of non-profit organisations, are set out below.

The terms of the constitution govern members of a company limited by guarantee. Section 140(1) of the Corporations Law states inter alia that a company's constitution constitutes the terms of a contract between the members and the company and between each of the members.

The State and Territory legislation governing incorporated associations provides that the terms of the association's rules also constitute the terms of a contract between the members and the association. Fletcher correctly simplifies the position by stating that 'the constitution thus constitutes the terms upon which members freely associate for particular purposes.'<sup>46</sup> However, in *Cameron v Hogan*<sup>47</sup> the High Court found unanimously that the relationship between the members of an association is consensual but not contractual. This rule can be contrasted where the claimant's sole relationship with the association is as a member. In those circumstances, the court has found the relationship to be contractual to the same extent (but perhaps more limited) as the contractual relationship which is evidenced in a company's memorandum and articles of association.<sup>48</sup>

## Common Complaints of Members

### Lack of Adherence to the Rules

Members of non-profit organisations, like their counterparts in for-profit organisations, are entitled to have a general expectation that the organisation will be managed in accordance with the rules or constitution (as the case may be). However, this expectation, at least in the case of associations, must be viewed in the light of Stoljar's assertion that 'the real point about the rules is that they are designed as instructions or as a ground plan for the continuous running of the association, not to create private legal rights.'<sup>49</sup>

Deviations from the rules may have different effects on different types of members within a non-profit organisation. For instance, members of a sporting association such as a golf club are often divided into classes such as active (involved in competition) and social (restricted to enjoyment of social facilities). If the committee of the golf club were, for example, to resolve that the course was only to be opened on every second day rather than every day, the rights of the active members would be affected to a far greater extent than those of social members, whose rights would hardly be affected at all.

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46 Fletcher, above n 7, 44.

47 (1934) 51 CLR 358.

48 See, *Baker v Jones* [1954] 1 WLR 1005; 2 All ER 553; *Schweikert v Burnell* [1963] NSW 821; *John v Rees* [1970] Ch 345; *Woodford v Smith* [1970] 1 WLR 806.

49 Stoljar, *Groups and Entities*, ANU Press, Canberra (1973) 43.

Fletcher asserts that:

[j]udicial review is dependant upon the concerned member establishing a basis upon which a court may assume jurisdiction. Courts claim no overriding jurisdiction over associations or association tribunals. There is not a judicial remedy for every breach of association rules.<sup>50</sup>

The situation is different where the departure is from the constitution of a company limited by guarantee. There, the courts are able to intervene on an application by a member pursuant to various provisions of the Corporations Law.<sup>51</sup>

In *Ryan v Kings Cross RSL Club Ltd*<sup>52</sup>, McLelland CJ in Eq rejected an argument that the Court had no jurisdiction to grant an injunction against an incorporated club restraining it from acting on an expulsion of the plaintiff not properly resolved in accordance with the articles. There, his Honour relied upon the contractual effect of the articles. On the question of the Court's jurisdiction in this regard, *Ryan's* case was applied with approval by Needham J in *McNab v Auburn Soccer Sports Club Ltd*<sup>53</sup>.

#### **Unauthorised Alterations to the Rules**

To the extent that they are governed by the principles of majority rule, non-profit organisations are typically no different to their commercial counterparts. Both the associations incorporation legislation and the Corporations Law provide that before an association or company (as the case may be) can amend its rules it must obtain the consent of at least 75% of its members.

Unfortunately, in the past many administrators of sporting bodies were lacking significant expertise in the formalities of meeting procedure. As a result, numerous proceedings have been issued by disgruntled members seeking declaratory relief and injunctions restraining the relevant organisation from acting in accordance with the purported amendment to the rules. Thankfully, sporting administrators today are becoming more conversant with procedural guidelines for conducting meetings and are more inclined to seek legal advice before taking any serious procedural step.

Most of the recent cases concerning companies and departures from the terms of their memorandum and articles of association have been run along the lines that the departure from the articles (or the amendment thereof) would be oppressive, unfairly prejudicial or unfairly discriminatory to a particular member or group of

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50 Fletcher, above n 7, 69.

51 Cf sections 260 and 1324.

52 [1972] 2 NSWLR 79 (Ryan's case).

53 [1975] 1 NSWLR 54, 59.

members.<sup>54</sup> One of the most significant of these cases in recent years has been *Wayde & Anor v New South Wales Rugby League Ltd*<sup>55</sup>. That case involved a non-profit company limited by guarantee which was the controlling body of rugby league and its decision to exclude a rugby football club's team from its competition. By majority<sup>56</sup>, the High Court found that the League's conduct was neither oppressive nor unfairly prejudicial to the club.<sup>57</sup>

In *Melbourne Juventus Soccer Club Inc v Australian Soccer League Ltd*<sup>58</sup> the Federal Court held that, because the board had not formed an intention prior to a meeting that it would exclude the club from its competition, its conduct could not be said to be oppressive. In an interlocutory hearing in the same case, the club failed in an attempt to join the League's chairman to the proceedings.<sup>59</sup>

### **Limited Access to Information About the Company's Affairs**

In *Australian Securities Commission v The Multiple Sclerosis Society of Tasmania*<sup>60</sup>, a member of the Society, a company limited by guarantee formed for purely benevolent purposes, claimed that he had been denied access to information by the Society's directors. He consequently brought oppression proceedings against the company under the equivalent of what is now section 246AA of the Corporations Law.

The member in that case, Mr Cohan, wanted to run for election to the company's board and was told that he needed to have his nomination signed by two financial members of the company. This was not actually required by the company's articles. To ensure that his nomination was valid (ie signed by two current members of the company), Mr Cohan sought to obtain access to the company's register of members which was required to be kept pursuant to sections 209 and 210 of the Corporations Law. The company refused Mr Cohan's numerous requests for access to the register of members. Zeeman J commented as follows:

[t]he clear inference to be drawn is that the respondent, by its officers, was going out of its way to obstruct or delay Mr Cohan's attempts to obtain access to the register of members even though its plain obligation under the Law was to permit him to have such access.<sup>61</sup>

Despite these comments, the Judge held that the company's refusal to allow Mr Cohan access to the register of members was not sufficient by itself to warrant the court's intervention. However, the court did take this matter into account in

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54 Cf *Gambotto v WCP Ltd* (1995) 127 ALR 417; 16 ACSR 1; 13 ACLC 342.

55 (1985) 61 ALR 225.

56 Mason CJ, Wilson, Deane, Dawson JJ.

57 Cf *Plenty v Seventh-Day Adventist Church of Port Pirie* (1986) 43 SASR 121.

58 Federal Court of Australia, Melbourne, Olney J, 20 September 1995.

59 Federal Court of Australia, Melbourne, Sundberg J, 7 September 1995.

60 (1993) 10 ACSR 489; 11 ACLC 461.

61 *Ibid*, 501; 471.



granting the remedy sought under the equivalent of section 246AA because of Mr Cohan's expulsion from the company.

### Denial of Natural Justice

The inherent nature of non-profit organisations is often such that the board, committee or some other duly appointed body is conferred with the power to discipline members for having contravened a provision of the organisation's rules.

Many organisations fail to adequately provide in their rules procedures or procedural safeguards for the disciplining of members. The judiciary in a number of cases has addressed this frequent problem. For example, as early as last century, Brett LJ in *Dawkins v Antrobus*<sup>62</sup> expressed the view that public policy required that the rules of natural justice be incorporated in every constitution. Later, Megarry J in *John v Rees*<sup>63</sup> made the following comments in declaring that the rules of natural justice should not be excluded unless it is the manifest intent of the rules:

Before resorting to public policy, let the rules of the club or other body be construed: and in the process of construction, the court will be slow to conclude that natural justice has been excluded. Only if the rules make it plain that natural justice was intended to be disregarded will it be necessary for the courts to resolve the question of natural justice.<sup>64</sup>

In *Byrne v Kinematograph Renters' Society Ltd*<sup>65</sup>, Harman J stated the principles of natural justice to apply in any proceedings before a domestic tribunal to be as follows:

First, that the person accused should know the nature of the accusation made, secondly, that he should be given an opportunity to state his case and thirdly, ... that the tribunal should act in good faith.<sup>66</sup>

The Privy Council in *University of Ceylon v Fernando*<sup>67</sup> approved his Honour's statement.

It is difficult to identify the circumstances in which these principles should be applied in every case. In *Russell v Duke of Norfolk*<sup>68</sup>, Tucker LJ made the following comments, which were cited with approval by the Privy Council in *University of Ceylon v Fernando*<sup>69</sup>:

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62 (1881) 17 Ch D 615, 630.

63 [1970] Ch 345.

64 [1970] Ch 345, 400.

65 [1958] 1 WLR 762; 2 All ER 579.

66 *Ibid.*, 784; 599.

67 [1960] 1 WLR 223, 232; [1960] 1 All ER 631, 638.

68 [1949] 1 All ER 109.

69 [1960] 1 WLR 223; [1960] 1 All ER 631.

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter which is being dealt with and so forth.<sup>70</sup>

### **Termination of Membership**

A person's membership of an organisation may be terminated against the will of the member either permanently (expulsion) or for a short period of time (suspension). Fletcher identifies the fact that associations possess no inherent power to suspend or expel their members. The learned author goes on to state that such a power can only be exercised if it is expressly conferred in the association's rules.<sup>71</sup> The writer submits that the same can be said for companies limited by guarantee.

In *Samuel v St George Leagues Club Ltd*<sup>72</sup>, Powell J identified the principles of law which are relevant to a case where an organisation seeks to suspend or expel a member as follows:<sup>73</sup>

1. A club may not suspend or expel a member unless a power to do so is contained in its constitution.
2. Unless a deviation from the constitution is sought or assented to by the member to be affected, the power to suspend or expel, if it is to be validly exercised, must be exercised strictly in accordance with the procedures laid down in the club's constitution.
3. Where the rights of the member to be affected by the decision are of a proprietary nature, the power to suspend or expel must be exercised in accordance with the rules of natural justice.
4. Although the rules of natural justice to be applied in any particular case depend upon the circumstances of the case<sup>74</sup> what is required for the valid quasi-judicial function, such as the exercise of a power to suspend or expel, is judicial fairness.<sup>75</sup>

Powell J argued in *Samuel's* case that, depending on the nature of the charge and the potential consequences to the accused, he or she may also be entitled:

1. to be given detailed particulars of the matters with which he or she has been charged;

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70 [1949] 1 All ER 109, 118

71 Fletcher K, above n 7, 62.

72 Supreme Court of New South Wales, Powell J, 20 October 1992 (*Samuel's* case).

73 Ibid, 21.

74 See *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 18.

75 See *Mobil Oil Australia Pty Ltd v FCT* (1963) 113 CLR 475 at 504.

2. to be given, in advance of any hearing of the charge, a statement of evidence to be tendered to support the charge; and
3. to have the assistance of competent legal representation.<sup>76</sup>

It is submitted that a person charged to appear before a domestic tribunal should, regardless of what the rules of the organisation say, be afforded the right to representation in the following circumstances:

1. where the person appearing before the tribunal is unable to properly put their defence to the charge (eg where the person charged is a minor or cannot speak English);
2. where the outcome of the hearing has the potential to adversely affect the person's ability to earn an income (eg a professional footballer); and/or
3. depending on the complexities of the issues in either factual or legal terms and the discretion open to the decision maker.

In relation to the first criteria, it should be borne in mind that Australia is a party to the United Nations Convention on the Rights of the Child. Although the Convention has no effect unless its terms are incorporated into domestic law, it is arguable that the legitimate expectation doctrine developed in *Teoh's case*<sup>77</sup> may apply to decisions of non-government bodies. Article 12 of the Convention provides:

1. State Parties shall assure to the child who is capable of forming his or her own views the rights to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

The second and third assertions are drawn from the commentary of Adrian Robins<sup>78</sup> in one of the only published works on this issue.

It is worth noting the results of the empirical study by Tom Mullen<sup>79</sup>, which was commissioned by the Lord Chancellor's Department in the United Kingdom. He

<sup>76</sup> *Samuel v St George Leagues Club Ltd* (Supreme Court of New South Wales, Powell J, 20 October 1992, 22).

<sup>77</sup> *Minister for Ethnic Affairs v Teoh* (1995) 128 ALR 353.

<sup>78</sup> Robbins A, 'Representation Before Tribunals' (1983) 8 *Legal Service Bulletin* 128, 129.

<sup>79</sup> Mullen T, 'Representation of Tribunals' (1990) 53 *MLR* 230.

reviewed the effectiveness of legal representation in four statutory tribunals. Mr Mullen concluded that:

[t]he principal general conclusion of the report is that special representation increases the likelihood of success for appellants and applicants at tribunal hearings.<sup>80</sup>

In making his third assertion, Powell J relies on *Pett v Greyhound Racing Association Ltd*<sup>81</sup>. In that case the Court of Appeal, constituted by Lord Denning MR, Davies LJ and Russell LJ held, on an interlocutory application, that a greyhound owner facing a charge of doping and having a right of audience at the inquiry, could appoint an agent to appear for him, and there was no reason why that agent should not be a lawyer. There was reference made to balance of convenience. However, in *Samuel's* case, the learned Judge did not appear to take account of the decision at the final hearing of *Pett v Greyhound Racing Association Ltd*<sup>82</sup> by Lyell J where the Judge found himself faced with what he considered to be inconsistent statements from the Court of Appeal in the interlocutory hearing and the Privy Council in *University of Ceylon v Fernando*<sup>83</sup>. Lyell J followed the latter case and held that the plaintiff was not entitled to be represented at the hearing.

With respect to his Honour, the authorities do not appear to support his third assertion. Lord Denning in *Enderby Town Football Club Ltd v Football Association Ltd*<sup>84</sup> said that, where the rules relating to the hearing of charges against a member before a domestic tribunal say nothing about representation, whether or not the party charged is entitled to be represented is a matter for the tribunal. Lord Denning's view was endorsed by the New Zealand Court of Appeal in *In Re Royal Commission*<sup>85</sup>.

In *McNab's* case, Needham J held that two High Court decisions relied on by the plaintiff, namely *R v Board of Appeal; Ex parte Kay*<sup>86</sup> and *Edgar and Walker v Meade*<sup>87</sup>, did not establish 'any principle that in proceedings before a domestic tribunal, legal representation is a right of the 'accused' person.'<sup>88</sup>

However, even if the tribunal is a consensual one, where a member's livelihood is at stake, a tribunal cannot always refuse legal representation. 'The seriousness of the matter and the complexity of the issues, factual or legal, may be such that refusal would offend natural justice principles.'<sup>89</sup>

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80 Ibid 233.

81 [1969] 1 QB 125.

82 [1970] 1 QB 46.

83 [1960] 1 WLR 223; [1960] 1 All ER 631.

84 [1971] Ch 591.

85 [1962] NZLR 96, 117(Cleary J).

86 (1916) 22 CLR 183.

87 (1916) 23 CLR 29.

88 [1975] 1 NSWLR 54, 60-61.

89 Hocken M, 'When is there a right to legal representation before a statutory body or tribunal in Australia?' (1994) 24 *Q Law Soc. J* 241, 248.

## Members' Remedies

Members have traditionally found it difficult to maintain legal actions against non-profit organisations and their directors. So difficult, in fact, that 'confusion' and 'uncertainty' are terms that have frequently been used to describe the history of legal cases involving non-profit organisations.<sup>90</sup> Much of this so-called 'confusion' and 'uncertainty' has emanated as a result of the essentially private nature of these organisations and the seemingly subjective nature in which courts have applied legal principles to them.

Despite the private nature of non-profit organisations, they have an increasing impact on our society from both a social and economic perspective. For example, it has been said that decisions taken by non-profit organisations can 'vitaly affect the fortunes or reputations of those concerned.'<sup>91</sup>

In virtually all major English-speaking jurisdictions, the majority of judicial consideration of the rights and remedies available to members of an organisation has centred on two types of for-profit companies, namely listed companies and companies which Dr Boros identifies as being 'corporate quasi-partnerships'.<sup>92</sup> In the context of the problems faced by members of non-profit organisations to sue derivatively, the American Judge Rodowsky cites with approval the comments of Professor Deborah DeMott<sup>93</sup>, as follows:

Not-for-profit corporations have been characterised as corporate 'Cinderellas,' as the 'neglected stepchildren of modern organization law,' relegated to the hand-me-downs of their half-siblings, the for-profit business organisations. Statutory neglect or inattention is probably the best explanation for the predicament of a member of a not-for-profit corporation who believes its affairs to be mismanaged by its directors.<sup>94</sup>

Only in the past 20 years have Australian courts begun to pay particular attention to the needs of the non-profit sector. There has been an increasing tendency by the courts to resort to equitable principles in difficult circumstances relating to members of non-profit organisations.

At common law a comprehensive system of rights, duties and remedies has developed which are based on legal recognition of interests which the law will protect in a variety of ways. Standing to bring an action against a voluntary organisation has traditionally been determined by reference to any proprietary rights of the member or, alternatively, the existence of any contractual

90 Baxt R, 'The Dilemma of the Unincorporated Association' (1973) 47 *ALJ* 305.

91 O'Connor D, 'Actions Against Voluntary Associations and the Legal System' (1977) 4 *MonLR* 87.

92 Boros E, *Minority Shareholders' Remedies*, Clarendon Press, Oxford (1995) 5-6.

93 DeMott D, *Shareholder Derivative Actions: Law and Practice*, Callaghan, New York (1986) 2:04, Supp 1993, 22.

94 *O'Donnell v Sardegna*, Court of Appeals of Maryland, 646 A 2d 398 (1994) 6.

relationship between the member and the organisation. That early basis for determining standing was gradually widened to extend to situations where decisions of an association impinged on a member's 'right to work'.

The courts' apparent reluctance to intervene in the affairs of non-profit organisations emanates from the early cases dealing with organisations such as gentlemen's clubs or religious societies where it was apparent that intervention by the courts would have been inappropriate.<sup>95</sup> As shall be shown in this chapter, the courts appear to have mellowed in their application of the strict legal doctrines regarding standing - to the ultimate benefit of members of non-profit organisations.

Even before *Cameron v Hogan*<sup>96</sup>, a member's right to sue a voluntary association was limited to where he or she could show a proprietary right in the association. Indeed this was the only basis on which a member could bring an action against the association.<sup>97</sup>

The Australian courts have been bound for some time by the High Court's decision in *Cameron v Hogan*<sup>98</sup>. That case concerned a dispute between Mr Hogan who was a member of the Victorian State Parliamentary Labor Party, which was an unincorporated association, and the Party's Executive Officers. The dispute arose as a result of Mr Hogan's expulsion from the party by the Executive after they initially refused to endorse him as a candidate or submit to ballot his nomination as a person seeking selection by the Party as a candidate for the Victorian State election to parliament. Mr Hogan sought the following remedies:

1. a declaration that he was still a member of the association and that the Executive's actions had been wrongful;
2. an injunction to restrain his exclusion from the association; and
3. damages.

Mr Hogan failed on all three counts because he could not show that he had any standing to bring the action. In the course of their joint judgment, the Judges in that case made the following statement:

The organisation is a political machine designed to secure social and political changes. It furnishes its members with no civil right or proprietary interest suitable for protection by injunction. Further, such a

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95 Sievers S and Baxt R, 'The Rights of Members of an Unincorporated Association or a Victorian Incorporated Association to Challenge Decisions of Management - A Continuing Defect in the Law' (1984) 2 *C&SLJ* 3, 5.

96 (1934) 51 CLR 358.

97 *Rigby v Connol* (1880) 14 Ch D 482.

98 (1934) 51 CLR 358.

case is not one for a declaration of right. The basis for ascertainable and enforceable legal right is lacking.<sup>99</sup>

Since then, *McKinnon v Grogan*<sup>100</sup> has addressed the difficulties faced by members in suing a club or association on the basis of decisions taken by that organisation, particularly in relation to the election of persons to the organisation's committee of management. One of the arguments Wooten J was forced to dispel was that the member plaintiff was suing a club which had no recognition at law and therefore the defendant was not a legitimate target, notwithstanding his conduct. His Honour made the following comments in the course of his judgment:

I consider that citizens are entitled to look to the courts for the same assistance in resolving disputes about the conduct of sporting, political and social organisations as they can expect in relation to commercial institutions. If it is not forthcoming, a vast and growing sector of the lives of people in the affluent society will be a legal no-man's land in which disputes are settled not in accordance with justice and the fulfilment of deliberately undertaken obligations, but by deceit, craftiness, arrogant disregard of rights and other means which poison the institutions in which they exist and destroy trust between members.<sup>101</sup>

The idea of what constitutes a 'proprietary right' has altered dramatically since these two cases were decided. It is submitted that in the case of most sporting organisations, members' rights are almost always of a proprietary in nature. The test for the existence of proprietary rights is whether or not the member derives some benefit (whether tangible or intangible) from the organisation of which he or she is a member. It should be noted that a member's ability to assert a proprietary right has evolved primarily out of the ability of associations themselves to own property since the introduction of uniform associations incorporation legislation.

It is worth noting especially the case of *Finlayson v Carr*<sup>102</sup>, which concerned membership of the Australian Jockey Club. In that case the Court held as follows:

[M]embership of the club carries with it important rights of a tangible and practical nature to the enjoyment of the property of the club ... it is clear that membership of the club carries with it important proprietary rights.<sup>103</sup>

It has been postulated that for a member of an unincorporated sporting association to assert a proprietary right, he or she may need to be able to assert a

99 (1934) 51 CLR 358, 378 per Rich, Dixon, Evatt and McTiernan JJ.

100 [1974] 1 NSWLR 295.

101 Ibid 298.

102 [1978] 1 NSWLR 657.

103 Ibid, 666.

right to use the association's premises and chattels while a member and share in the proceeds of the association in the event of dissolution.<sup>104</sup> With respect, the writer does not think that could be correct in most cases since an unincorporated association is incapable of owning any property in the first place unless a complex set of trust arrangements has been put in place by members at the outset of the formation of the association.

A subtler test is applied in the case of members of incorporated non-profit organisations where individuals are precluded under both the Corporations Law and the respective Associations Incorporation legislation from asserting a share in the organisation concerned. There, it is submitted that members of sporting organisations which are deemed to be non-profit can, assert the existence of proprietary rights in a number of ways, the most obvious of which include a right to the use and enjoyment of the following:

- social facilities (ie. the bar or lounge of a bowling club);
- playing fields (ie. a golf course);
- playing equipment (ie. rowing boats and oars).

However, in a more 'passive' organisation (eg, an appreciation society) it may be more difficult for a member to show that he or she has a proprietary interest or that a sufficient contractual interest exists which would provide the member with sufficient standing to bring an action to prevent mismanagement of the organisation by the board or committee.

The right to show that the person is merely associated with the organisation that confers some collateral benefit on the person is unlikely to be enough unless the person was, for instance, employed by the organisation as well. What may need to be shown in an action by a member *qua* member is that the organisation acted in such a manner as to restrict the member from exercising some entitlement which the member held or had a legitimate expectation of holding in connection with membership of the organisation.

The existence of contractual rights between a member and a non-profit organisation will provide an aggrieved member with an additional basis on which to establish standing to bring an action for relief. In such a case the type of relief sought will be in the nature of contractual remedies.

For those organisations that are incorporated, whether under the relevant State and Territory legislation or the Corporations Law, it is now much easier for members to assert the existence of a contractual right.<sup>105</sup> In earlier cases in which the courts grappled with the question of standing to sue, it was held that a

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104 O'Connor, above n 91, 93.

105 See, *Associations Incorporation Act* (Vic) 1982, s 14 and *Corporations Law*, s 180 and *Bailey v New South Wales Medical Defence Union Ltd* (1995) 132 ALR 1.



member could only assert that the rules of the organisation constituted the terms of a contract when it was reasonable to presume that the members of the organisation intended to enter into legal relations.<sup>106</sup>

The repercussions of such a finding, particularly in the case of an unincorporated association where the members would be deemed to enter into a contract with each and every other member, would lead to the ‘farical result’ mentioned by Deirdre O’Connor.<sup>107</sup> She pointed out that an unincorporated trade union with 1,000 members would lead to a total of 499,500 individual contracts being formed.<sup>108</sup> Moreover, each of those contracts would undergo a series of ‘implied novations’ each time a new member joined the organisation or an existing member left.

It is interesting to note further Ms O’Connor’s comments, adopting in part the words of the High Court in *Cameron v Hogan*<sup>109</sup>, where she said that ‘[i]n adopting rules, the members ought not to be presumed to contemplate the creation of enforceable rights and duties so that every departure ‘exposes the officer or member concerned to a civil sanction’.<sup>110</sup> Whilst the High Court’s comments in this regard may still hold true today, the writer does not think that the statement can be taken literally in the context of directors’ duties in light of the NSW Court of Appeal’s decision in *Daniels v Anderson*.<sup>111</sup>

In *Dixon v Australian Society of Accountants*<sup>112</sup> it was held that the principles espoused by the High Court in *Cameron v Hogan*<sup>113</sup> do not apply to persons who become members of a company limited by guarantee.

It seems then that members of non-profit organisations that are incorporated will have little trouble in asserting a contractual interest as amounting to the existence of some justiciable issue that, in turn, would confer the requisite degree of standing to bring an action.

### Damages

Members or incorporated associations and companies limited by guarantee are generally able to claim damages for acts committed by an organisation in breach of its rules. This is because the rules of an incorporated association and a company limited by guarantee constitute the terms of a contract between the organisation and its members. For example, where an *ultra vires* act is committed by an organisation, this will result in a breach of contract giving rise to an entitlement to damages. Such a right was recognised by Lord Denning in his

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106 *Rose and Frank Co v J R Crompton and Bros Ltd* (1923) 2 KB 261.

107 O’Connor, above n 85.

108 *Ibid* 97.

109 (1934) 51 CLR 358, 376.

110 O’Connor, above n 85, 97.

111 (1995) 16 ACSR 607, 13 ACLC 614.

112 (1989) 95 FLR 231; 87 ACTR 1.

113 (1934) 51 CLR 358.

dissenting judgment in *Abbott v Sullivan*<sup>114</sup>. The other judges in *Abbott's* case did not agree with Lord Denning but it is submitted that their reasoning is limited to *ultra vires* acts by unincorporated associations.

Another circumstance in which an action for damages has been found to exist is where a member has been wrongfully expelled from an organisation.<sup>115</sup> In *Bonsor's* case the House of Lords by majority held that an action for damages was justifiable where a member was wrongfully expelled from an association. It is worth noting the change in attitudes in the four years from *Abbott's* case to *Bonsor's* case. Both cases concerned unincorporated associations.

The New South Wales Supreme Court recently considered whether damages could be paid to a member whom, it was earlier held, had been expelled from the incorporated association in circumstances where he had been denied natural justice.<sup>116</sup> The member claimed that there was an implied term in the rules of the association that the rules of natural justice would be observed in any disciplinary proceedings against him, and that the association would not unlawfully interfere with the member's enjoyment of his rights as a member of the association. In denying the member's claim for damages for a breach of the association's rules, Windeyer J made the following comments:

I do not think that it could possibly be said that there was an implied term in the rules that those bodies would act within their powers in accordance with natural justice in any way that if they failed to do so would be a breach of the obligations of the defendant to the plaintiff. That in my view would be an impossible situation and an impossible term and not one which would properly be implied. What could be implied would be that the defendant would take reasonable care in determining the members of the tribunal; not that it would be in breach of its duty to a member if those tribunals acted without power or contrary to the rules of natural justice.... in my view there is no contractual term which has been breached which is available to the plaintiff.<sup>117</sup>

This decision has important connotations for all non-profit organisations that purport to exercise disciplinary measures over their members. What is clear is that such organisations should, as far as possible, seek to remove themselves from the direct activity of hearing disciplinary matters. This is not to say, however, that these organisations should also divorce themselves from the sanctioning of members. After a finding of guilt has been made by the separate tribunal, it may be open to the organisation to impose a sanction on the member without exposing the organisation to any real liability for breach of contract, subject to affording procedural fairness to the member.

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114 [1952] 1 KB 189.

115 *Bonsor v Musicians' Union* [1956] AC 104; [1955] 3 All ER 518 (*Bonsor's* case).

116 *Wilson v Hang Gliding Federation of Australia Incorporated* (Supreme Court of New South Wales, Equity Division, Windeyer J, 22 September 1995).

117 *Ibid.*, 3.

## Injunction

In *Lee v Showman's Guild of Great Britain*<sup>118</sup> the English Court of Appeal identified four categories of case where an injunction would be granted to restrain wrongful expulsion:

1. When action has been taken which is contrary to natural justice.<sup>119</sup>
2. When a person, who has not condoned a departure from the rules, has been acted against contrary to the rules of the organisation.
3. When the *bona fides* of the decision are in doubt.<sup>120</sup>
4. When the rules of the organisation have been misapplied, albeit honestly.

Often the injunction will be granted in circumstances where more than one of these categories is present.

## Declaratory Relief

This remedy is often sought by aggrieved members in addition to damages and/or injunctive relief and is applicable to many types of complaints involving non-profit organisations.<sup>121</sup> Order 25, rule 5 of the Rules of the Supreme Court of Victoria allows the Court to make binding declarations of right whether or not any consequential relief is or could be claimed. The same power is conferred on other State Supreme Courts and the High Court.

In *McKinnon v Grogan*<sup>122</sup>, Wootten J held that the rights and opportunities of a member were worthy of legal protection and so granted declaratory relief to the aggrieved member.<sup>123</sup> Declaratory relief was also granted in the earlier case of *Field v NSW Greyhound Breeders, Owners and Trainers Association Ltd*<sup>124</sup>. Whilst having no recognisable legal right to invoke the jurisdiction of the court, the member was of sufficient standing for the purposes of the granting of declaratory relief.

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118 [1952] 2 QB 329.

119 Cf *Wilson v Hang Gliding Federation of Australia Incorporated* (unreported, Supreme Court of New South Wales, Equity Division, Windeyer J, 22 September 1995).

120 See: *Australian Securities Commission v The Multiple Sclerosis Society of Tasmania* (1993) 10 ACSR 489; 11 ACLC 461 and *Gaiman v National Association for Mental Health* [1971] Ch 317.

121 *Cameron v Hogan* (1934) 51 CLR 358; *Millar v Smith* [1953] NZLR 1049; *Harrison v Hearn* [1972] 1 NSWLR 428; *McKinnon v Grogan* [1974] 1 NSWLR 295; *Fagan v National Coursing Association of South Australia* (1974) 8 SASR 546; *Enderby Town Football Club v Football Association Ltd* [1971] Ch 591.

122 [1974] 1 NSWLR 295.

123 *Ibid* 298.

124 [1972] 2 NSWLR 948.

## The Oppression Remedy

Sally Sievers correctly asserts that the courts have taken a more adventurous approach to the statutory remedy for oppressive, unfairly prejudicial or unfairly discriminatory conduct than was previously the case.<sup>125</sup> In support of her assertion, Ms Sievers cites the decisions in *Re Spargos Mining NL*<sup>126</sup> and *Jenkins v Enterprise Gold Mines NL*<sup>127</sup>.

In *Re Ingleburn Horse and Pony Club Ltd*<sup>128</sup>, Street CJ refused to follow an earlier unreported decision where it was held that the scope of the oppression remedy did extend to non-profit companies limited by guarantee. Zeeman J rejected this approach in *Australian Securities Commission v The Multiple Sclerosis Society of Tasmania*<sup>129</sup> where he did not hesitate in applying what is now section 246AA to a company limited by guarantee which was formed purely for benevolent purposes.

## Conclusion

Sporting organisations form the largest (in number and volume of members) component of the non-profit sector and, as sport continues along its path towards an ever greater degree of commercialism, it is vital that proper and efficient governance principles be put in place to ensure the protection of members and the survival of the organisations themselves.

In this paper, the writer has attempted to draw together the primary principles of corporate governance and expose their shortcomings in the non-profit sector, particularly in relation to small organisations. It has been shown that governance principles which have evolved at common law and by way of the legislature are generally unable to be implemented by small non-profit organisations without the resources necessary to contract in the necessary degree of expertise in a given area. The reason for this may be that professionals are no longer willing to give up their time to serve on boards and committees of non-profit organisations unless they are adequately compensated or comprehensive (and expensive) insurance policies are put in place.

The paper also pointed to a discreet arm of the Corporations Law (ie section 232) which imposes civil penalties on officers and employees of a corporation in addition to the general law. It was shown that athletes who are (or were) employees of a corporation may be liable to the sanctions imposed by the Law. In the writer's view, much more attention needs to be paid to these duties by officers and employees of non-profit organisations operating in the commercial

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125 Sievers S, 'A Different Application of the Oppression Remedy - The Protection of Membership Rights in a Company Limited by Guarantee' (1993) 11 C&SLJ 367.

126 (1990) 3 ACSR 1.

127 (1992) 6 ACSR 539.

128 (1973) ACLC 40-061.

129 (1993) 10 ACSR 489; 11 ACLC 461.

sporting sphere. Given the high stakes involved in competitive sport, the writer considers it will not be long before creative sporting clubs start exploring options such as those provided for in the Corporations Law to protect their positions.

Finally, the paper adverted to some of the most common complaints levelled at officers by members of non-profit organisations and identified the primary means of relief open to members in various situations.

The main theme of this paper has been an undeniable need for reform of the non-profit sector, particularly in relation to sporting organisations. This reform should primarily be aimed at encouraging non-profit organisations (particularly associations) to identify their membership bases and educate them as to the raft of rights and remedies available to them in forcing officers to adhere to their general law and statutory duties. The main problem that will be encountered in seeking to achieve such reform will be opposition from sports hierarchies that are driven by ego and ambition. For the good of sport, it is imperative that members of sporting organisations be protected by the courts in respect of their involvement in those organisations and particularly against wrongful acts of officers and employees.