

# TOPIC 1

## UNINCORPORATED NON-PROFIT ASSOCIATIONS

### Introduction

It was stated in *Smith v Anderson* (1880) 15 Ch D 247 that an 'association' includes any group of persons who have agreed to join together in the pursuit of one or more common objects or purposes. This obviously includes those entities such as companies and partnerships which have been formed for profit-making purposes. However the word 'association' may also be used to describe those non-profit associations which have been formed to promote religious, educational, literary, scientific, artistic and other similar community-wide benefits. It is upon those latter associations that this Chapter is concerned.

Unincorporated non-profit associations are not specifically regulated by one piece of legislation, although some specific kinds of associations, such as charities which wish to raise money by requesting donations from the public, may need to be registered under various state Acts<sup>1</sup>. This situation can be compared with that facing incorporated associations — that is, legal entities created by regulation such as the Corporations Law or one of the state associations incorporation Acts, or created by the Crown as an exercise of Royal Prerogative.

### Nature of unincorporated non-profit associations

In *Conservative and Unionist Central Office v Burrell* [1980] 3 All ER 42, it was argued that there are six characteristics which are either essential or normal characteristics of a non-profit association. These are, it was argued:

- 1 there must be members of the association;
- 2 there must be a contract binding the members among themselves;
- 3 there will normally be some constitutional arrangement for meetings of members and for the appointment of committees and officers;
- 4 a member will normally be free to join or leave the association at will;
- 5 the association will normally continue in existence independently of any change that may occur in the composition of the association; and
- 6 there must as a matter of history have been a moment in time when a number of persons combined or banded together to form the association.

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<sup>1</sup> See for example the Charitable Fundraising Act 1991 (NSW).

Although points 3, 4 and 5 were not put forward as essential characteristics, the judge, Vinelott J, agreed at 58 that points 1, 2 and 6 were essential characteristics of unincorporated associations.

Where unincorporated non-profit associations are concerned, the focus is upon those associations which have been formed for social, religious, educational, literary, artistic, charitable and scientific purposes. These aims should not involve members of the association making a direct pecuniary 'profit' for themselves<sup>2</sup>. However, it would be incorrect to say that such associations cannot be involved in profit-making activities such as, for example, raising money by holding fetes, selling magazines, badges, pens and so on. As long as the association's objects are not focused upon profit for members, but are orientated to these 'charitable' ends, then the association will be regarded as a 'non-profit' association and will not be regulated by, for example, the Corporations Law or the Partnership Act. A comparison can be drawn in this respect with unincorporated non-profit associations on the one hand and partnerships and joint ventures on the other hand. Partnerships are, in the main, unincorporated *profit-making* associations. Partners intend to make a joint profit which they will distribute among co-partners. Similarly, joint venturers aim to make individual profits for themselves.

### **Status of unincorporated non-profit associations**

Unincorporated non-profit associations are not legal entities<sup>3</sup> and are in reality nothing more than the aggregate of all its members at a particular time. In *Watson v J & AG Johnson Limited* (1936) 55 CLR 63, Starke J described at 68 a particular unincorporated non-profit association, the Loxton Club, in the following way:

It appears that the Loxton Club is what is known as a members' club. Its rules provide that the property and effects of the club shall be vested in three trustees in trust for the members for the time being, and that all concerns of the club except such as are in the hands of the trustees shall be managed and controlled by its committee. The club is not a juristic entity: it is not even a partnership it is simply a voluntary association of a number of persons for the purpose of affording its members and their friends facilities for social intercourse and recreation, and the usual privileges, advantages and accommodation of a club. The property acquired for or arising from

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<sup>2</sup> See *R v Judges of Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 and *Re Proprietary Articles Trade Assn of South Australia Inc* [1949] SASR 88.

<sup>3</sup> *Leahy v Attorney-General (NSW)* (1959) 101 CLR 611 at 619 and *Watson v J & AG Johnson Limited* (1936) 55 CLR 63 at 67.

the conduct of the club, though vested in trustees, belongs to the general body of members. The interest, however, of each member in the general assets of the club exists only during membership. and is not transmissible: it is a right of admission to and enjoyment of the club while it continues (*Wertheimer, Law Relating to Clubs*, 5th ed. (1935), pp 1, 22).

The lack of legal entity status causes a number of problems for unincorporated associations in areas such as ownership of property, liability of committee members, the conduct of legal proceedings, members' rights, gifts to the association, and the dissolution of the association. These problems will be discussed in this Chapter. However it should be said at this point that because of the lack of legal recognition of these associations and the problems which flow therefrom, many non-profit associations have been incorporated by registration as companies limited by guarantee<sup>4</sup>. Upon incorporation, the association ceases to be unincorporated and becomes a body corporate enjoying legal entity status. It is from that point on that the association is regarded as a company and is accordingly regulated by the Corporations Law. A direct consequence of incorporation is that many of the problems with being unincorporated disappear. More recently another alternative has become available for these associations - namely, the possibility of being incorporated under the associations incorporation legislation<sup>5</sup>. Although this latter alternative is discussed in Chapter 5, suffice it now to say that registration as an incorporated association gives an association legal entity status<sup>6</sup> and gives its members<sup>7</sup> and in some cases its committee members<sup>8</sup> limited liability.

## **Formation and constitution of unincorporated non-profit associations**

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<sup>4</sup> Corporations Law s 115(1)(b). Where it is envisaged that the association will carry on activities in more than one jurisdiction or where it may be ineligible to incorporate as an incorporated association, a company limited by guarantee will often be the most appropriate form for the association to take.

<sup>5</sup> See Associations Incorporation Act 1984 NSW; Associations Incorporation Act 1981 Vic; Associations Incorporation Act 1981 Qld; Associations Incorporation Act 1985 SA; Associations Incorporation Act 1987 WA; Associations Incorporation Act 1964 Tas; Associations Incorporation Act 1991 ACT; Associations Incorporation Act 1963 NT. These are discussed in Chapter 5.

<sup>6</sup> See s 15 Associations Incorporation Act 1984 NSW; s 14 Associations Incorporation Act 1981 Vic; s 13(1) Associations Incorporation Act 1981 Qld; s 20(3) Associations Incorporation Act 1985 SA; s 10 Associations Incorporation Act 1987 WA; s 11(1) Associations Incorporation Act 1964 Tas; s 22 Associations Incorporation Act 1991 ACT; s 9(1) Associations Incorporation Act 1963 NT.

<sup>7</sup> s 21 Associations Incorporation Act 1985 SA; s 27 Associations Incorporation Act 1964 Tas; s 21 Associations Incorporation Act 1963 NT.

<sup>8</sup> See s 16 Associations Incorporation Act 1984 NSW; s 15 Associations Incorporation Act 1981 Vic; s 24 Associations Incorporation Act 1981 Qld; s 12 Associations Incorporation Act 1987 WA; s 51 Associations Incorporation Act 1991 ACT.

## Formation

There is little formality required in forming an unincorporated non-profit association. Although mutual understanding of the members is important, these members from a practical point of view usually adopt a name for the association and a constitution or set of rules<sup>9</sup>. It should be noted that there is no set form for these rules to follow, although it is common for them to be in writing.

Unincorporated non-profit associations do not need a name in order to function. In most cases however, a name is chosen by the association's first members. The main common law restriction on choosing a name is that a person does not use it to deceive and to inflict pecuniary loss: See *Earl Cowley v Countess Cowley* [1901] AC 450 at 460. Where the rules of the association provide a mechanism for change of name, members may alter the name by following the procedure. It is unclear what the procedure is in order to change a name where the rules make no provision for change<sup>10</sup>.

In relation to the constitution or rules of the association, matters such as membership, management, objects and purposes are often dealt with. In addition, procedures for the alteration of the constitution or rules are often set out in the document as well. As is the position dealing with change of name mentioned above, there is some controversy with respect to the procedure to be followed in relation to changing rules or constitution where the procedure has not been particularised. Recent authority seems to indicate that in such circumstances a majority decision will suffice: See *Master Grocers' Association of Victoria v Northern District Grocers' Co-op Limited* [1983] 1 VR 195.

## The association's rules and their effect

In relation to the association's rules, there is a general assumption that members of unincorporated non-profit associations do not intend to be contractually bound by the association's rules. The courts assume that there are no legal obligations between members unless the rules actually make it clear that there are. This means that in most situations members cannot maintain a court action alleging a breach of the rules.

This assumption was affirmed in Australia by the High Court in *Cameron v Hogan* (1934) 51 CLR 358.

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<sup>9</sup> *Conservative and Unionist Central Office v Burrell* [1980] 3 All ER 42 at 58.

<sup>10</sup> In these situations it is unclear whether a majority of members may v change the association's name or whether unanimous agreement is needed. See *Thellusson Valentia* [1907] 2 Ch 1 and *Re GKN Bolts and Nuts Limited (Automotive Division) Birmingham Works Sports and Social Club; Leek v Donkersley* [1982] 2 All ER 855.

This case concerned an expulsion from the Australian Labor Party, an unincorporated non-profit association. The expelled member sued for damages for breach of contract, and also claimed an injunction so as to restrain the association from expelling him. It was claimed that the expulsion was not in accordance with the rules. However, in order to obtain a remedy, the member had to establish that the rules of membership of the Labor Party amounted to a contract.

The High Court, after examining the nature of such an association, concluded that the rules did not have contractual force. The court questioned whether, in the absence of some right of a proprietary nature, a member has a contractual right under the association's rules to complain when 'unjustifiably excluded' from the association. Their Honours thought that, due to the general character of such associations, a member has no such right. It was held (at 371) that, if a member of such an association complains of failure to observe the rules by the committee, then the member must show that the rules conferred upon them:

a contractual right to the performance of the particular duty upon which he insists ... [as] such 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.

In such circumstances there can be no recovery from either the committee or the members for a breach of *contract*. However, the court stated that, if the effected member asserts rights arising out of membership and these assertions are ignored, then those ignoring the member may be liable in *tort*.

A number of subsequent cases have attempted to distinguish the decision in *Cameron's* case. For example, in *McKinnon v Grogan* [1974] 1 NSWLR 295, Wootten J stressed that *Cameron's* case was 40 years old and was frequently distinguished or ignored as it was 'out of tune with the felt needs of the time'. According to His Honour, courts should deal with disputes between individual members and social clubs. To characterise a political party or an institution which provides a major sport in the community in the same way as a group of friends meeting for tennis is characterised in a legal sense is inadequate, his Honour said. See also *Plenty v Seventh Day Adventist Church of Port Pirie* (1986) 43 SASR 121.

The general presumption that courts will not interfere in the management of an unincorporated non-profit association will not apply when:

- proprietary rights are involved; or
- if there is a clear indication that the rules are legally binding.

## Management

Although there is no set management structure that must be adhered to, unincorporated non-profit associations are usually administered by a committee comprising certain members of the association. Where a committee is formed, it is the committee members who are often personally responsible for debts incurred<sup>11</sup> and torts which are committed in the name of the association (see *Bradley Egg Farm v Clifford* [1943] 2 All ER 378) and they may have no right to indemnity from the general body of members.

Committee members are liable simply by virtue of the fact that they are members of the committee, and it does not matter that a particular committee member was not present at the time the committee resolved to undertake a course of activity. In *Ward v Eltherington* [1982] Qd R 561 an association wished to build a clubhouse and entered an agreement with a firm of engineers for the firm to produce the necessary drawings and plans. The firm was not paid, and sued for its fees. One question was who on the committee was liable, as some of the committee members were absent from the relevant meeting. The court concluded that it was liability because of status — it did not matter who was present or absent at the meeting.

The meetings of unincorporated non-profit associations must be convened and held in the manner provided by the rules: see *Helwig v Jonas* [1922] VLR 261. Where there are no rules, the common law can be used to regulate the calling of, and the conduct at meetings. In this regard the common law makes provision for reasonable notice of meetings, the contents of the notice, quorum, the election of a chairperson and voting.

The powers and duties of the members of the committee are laid down by the association's rules.

## Contractual relations

As an unincorporated non-profit association is not a legal entity in its own right, it has no capacity to enter into a binding contract.

Any contract purportedly made on behalf of such an association will have to be made with *all* the members or with an agent or trustee acting within their authority on behalf of the members or the committee in order to be enforceable.

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<sup>11</sup> See Liability of the Committee of Unincorporated Non-profit Associations (1979) Uni Qld LJ 11 (1).

As a usual rule *members* of an association are not liable for contracts made on their behalf. The rationale for this position was illustrated in *Freeman v McManus* [1958] VR 15<sup>12</sup>. In that case the Victorian Supreme Court had to consider whether a particular unincorporated political association was capable of taking a lease or tenancy of land. Authority suggested that it could not, but argument by counsel suggested ‘that a disposition of property may be made to an aggregate of persons under the descriptive name of an association’. This was rejected.

O’Byrne J cited and applied *Halsbury’s Laws of England* (3rd edn, Butterworths, London, vol 5, p 270) for support. According to the judge (at 24):

the fact that the members of a society have entrusted its affairs and management to a committee does not give the committee authority to make contracts binding on the members, especially in a case where the members have no interest in the society’s funds.

As the political organisation had a large and fluctuating membership and its members had no proprietary interests in its assets, the executive of the organisation could not bring its members into a contractual relation with third parties.

The position with respect to *committee members* is different. Where such committee members acting within their authority have entered into a contract purportedly on behalf of the association, they will be personally liable to the party that they made the contract with. In *Bradley Egg Farm v Clifford* [1943] 2 All ER 378, a poultry farmer had his poultry tested by an ‘employee’ of an unincorporated society which was formed to provide various technical services to its members. The test was carried out negligently, with the result that the poultry farmer’s fowls had to be destroyed. The farmer attempted to sue the ‘employer’ — that is, the committee of the association — for breach of contract. A central issue before the court was identifying the employer.

The majority of the Court of Appeal held that the committee was liable as the employer. According to Scott LJ at 386, the law:

has to choose from the various persons associated together under the umbrella of the society’s name, those most concerned in the function of making contracts, those of the associated persons who were most directly concerned and to discard those who were, for any reason, least directly concerned. In the latter category stand the mere members who, under the society’s rules, have no liability beyond their annual 7s 6d membership subscription, and have no right to participate, now or on winding up, in the funds of the society. But the body of members want to see the purposes of the

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<sup>12</sup> See also *Bradley Egg Farm v Clifford* [1943] 2 All ER 378,

society implemented, almost in the same way as in the case of a charity; and they appoint an executive council to carry out those purposes. Making a contract ... is essentially a function which cannot be performed without somebody accepting personal responsibility to perform the contract and pay money.

The Court of Appeal acknowledged that the committee may obtain some relief out of the association's funds. The so-called 'common fund' of the association has been used to offset a committee's liability in some situations, for example, the payment of workers' compensation.

Members of this society were not liable, as they had no rights or interest in the funds or property of the society and they had entrusted management to a committee. According to Goddard LJ at 381:

that does not mean that they thereby give the committee authority to make contracts binding on them. Otherwise a person who pays a subscription of 7s 6d to this society might find himself involved in liabilities of an unknown amount.

The position with respect to the liability of the committee members is not totally straightforward. This is particularly so where the members of a committee enter into a contract which is intended to last beyond that committee's term of office. In such cases it has been held that the committee in force at the time the contract was entered into could not be regarded as undertaking personal liability for a long period of time in respect of that contract. This was the case in *Carlton Cricket & Football Social Club v Joseph* [1970] VR 487 where Gowans J distinguished *Bradley Egg Farm v Clifford* [1943] 2 All ER 378 on the basis that the contract in that case concerned a single act whereas in *Joseph* the contract was for a lease expressed to last for 21 years.

In *Joseph*, a document purporting to give rights to occupy land for a specific purpose over a long period was entered into between a company and an unincorporated association. In particular, the Fitzroy Football Club, an unincorporated association with a fluctuating membership, purported to agree to play certain football matches on the sports ground owned by the plaintiff for a 21 year period. The agreement was signed by two officers of the association as 'being duly authorised by the members', but it was on terms expressed to be made with the association itself. The plaintiff alleged that after this agreement was entered into the President and Secretary of the unincorporated association negotiated with another party, the St Kilda Cricket Club, to play the matches on St Kilda's sports ground. The plaintiff sought injunctions to restrain the procuring of a breach of its contract. The basic issue before the court was whether there was a contract at all between Fitzroy Football Club and the plaintiff. The Supreme Court of Victoria held that there was no contract.

According to the court, the company was purporting to enter into contractual relations with

an association as it was constituted from time to time, not with the members of the association at the time the document was executed. This meant that, as there was no legal entity in existence, there could be no contract.

The plaintiff also argued that the committee or the officers who signed the agreement should be liable. Gowans J disagreed with this and approved of *Freeman v McManus* [1958] VR 15, where O'Bryan J stated at 25:

General provisions such as these do not warrant the inference that the executive is authorised by its members to pledge their credit or bring them into onerous contractual relations with third parties, in relation to all such matters as the executive may deem to be within the objects and for the purposes of the organisation.

It was accepted by Gowans J that the rules of the association conferred no authority on the committee to bind all the members, and that there had been no resolution of the members indicating that they approved of the agreement. In distinguishing *Bradley Egg Farm v Clifford* Gowans J acknowledged that here the committee would have been undertaking liability for a 21 year period, even though membership of the committee may have changed. According to his Honour at 499:

The members of the committee could not be regarded in the circumstances ... as authorising the undertaking of obligations of the kind dealt with in the document in such a way as to make themselves personally liable for the performance of those obligations over the years.

The rules of an association may provide that the members of the committee shall be indemnified against any personal liability, or such an indemnity may be given in respect of a particular transaction: see *Ex parte Goddard: Re Falvey* (1946) 46 SR (NSW) 289. Where there is no express indemnity given the position is less clear.

Other problems in making the committee of an unincorporated non-profit association liable were illustrated in *Peckham v Moore* [1975] 1 NSWLR 353. Peckham was engaged to play football with an association (Canterbury Rugby League Football Club) for three years. In 1970 and 1971 he played for the club. In 1972 he was injured at training and claimed workers' compensation. His first action was brought against the club as the club, and was unsuccessful, the answer being that there was no such legal person capable of being sued. This case was an appeal in respect of his second action, which he brought against all members of the committee at the time that he first agreed to play for the club (that is, 1970). It should be noted that the committee members were elected annually, so those people were not necessarily the same as the members of the committee in 1972 when he was injured.

The player was awarded compensation and the club appealed. The appeal was successful.

The main question was, who were his employers? Hutley JA found that the whole club membership was not his employer, but that the club committee was. His Honour relied upon the decision in *Bradley Egg Farm v Clifford* [1943] 2 All ER 378. The next question was, which committee? The court held at 363 that it was the 1972 committee:

Once he is put on the payroll by that committee for a given year, that committee becomes his employer for that year and it is to that committee that he must look if he wishes to enforce his rights as a workman.

The court in effect constructed a series of contracts with each committee. There was a contract with the 1970 committee to play football for that year, there were contracts with the 1971 and 1972 committees to do likewise. In addition, there was a further contract with the 1970 committee under which the player agreed to offer his services to the 1971 and 1972 committees. That offer could be accepted by those committees simply by paying him for playing football during the year. If any of these committees did not accept his offer to play for that year, then the terms of this additional contract with the 1970 committee were to the effect that he could recover compensation from the 1970 committee members.

In the end, it was held that the action was taken against the wrong committee. However, whatever committee was liable, Hutley JA stated that the committee members would be entitled to be indemnified out of the association's funds<sup>13</sup>.

## **Tortious liability**

The liability of members of an unincorporated non-profit association in respect of tortious claims is determined by general principles of law: see *Baker v Jones* [1954] 2 All ER 553. Membership of the association or the committee does not of itself create any special duty of care, however cases seem to suggest that it will be the committee members who will be liable in respect of tortious claims.

In *Smith v Yarnold* [1969] 2 NSW 410, Smith was a spectator at a greyhound race meeting and was injured when the grandstand collapsed. The race meeting was run by the Taree Greyhound Racing Club, an unincorporated association, and Smith sued the committee of which Yarnold was secretary. The action was grounded in both tort (occupiers' liability) and contract (purchase of a ticket), and the main issue was whether Yarnold and the other members of the committee were the proper parties to be sued.

The New South Wales Court of Appeal found the committee liable as occupiers of premises.

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<sup>13</sup> The decision on this aspect can be compared with *Bradley Egg Farm* where the members of the committee were held personally liable.

According to Herron CJ at 414–15:

Membership of a committee of a club ... does not carry with it any special duty of care towards other members of the club. As regards liability to a stranger, there is no distinction between a member of a committee and an ordinary member of the club, though members of a committee will be liable personally, to the exclusion of the other members, if they act personally. These principles were fully analysed by the Court of Appeal in *Bradley Egg Farm v Clifford* [1943] 2 All ER 378. The reasons why a committee of an unincorporated club or association is liable to a stranger in contract or in tort do not depend entirely upon a logical basis. This is emphasised in the judgment of Scott LJ at 386, with which Lord Goddard agreed. His Lordship points out that if A purports to contract with the unincorporated body he is not to be treated in law as having contracted with all the members. The members are not the society, for the society has no existence. It is nothing; or rather, it is a mere name to describe the purposes which existed in the minds of those who had associated themselves together to achieve those purposes. However, his Lordship emphasises that the plaintiff intended to make a real contract with somebody and had never formed any intention beyond the vague one of making a contract with the person or persons the law would hold responsible on the contract. In other words, the plaintiff did not think about it at all, but merely assumed that somebody would be responsible. The plaintiff expected performance and not breach, but the rest was assumption which he never even began to think out. Hence, said his Lordship, the function of the law is to imply an intention on the plaintiff's part to make his contract with the person or persons whom alone the law regards as those responsible. That cannot be the society, for it does not exist. The law, therefore, has to choose from the various persons associated together under the umbrella of the society's name those most concerned in the function of making contracts, those of the associated persons who are most directly concerned, and to discard those who are for any reason least directly concerned. His Lordship concludes with the observation that businessmen who accept the office of being on the executive council appear to him to be the persons whom the law must regard as pledging their own credit in order to perform the duties which they voluntarily undertake for their so-called 'society'; just as do the committee men of a club.

As with the position in respect to contracts it is unclear whether committee members have a right of indemnity out of the association's funds.

## **Members rights and liability**

It has been said that the members of an unincorporated association are bound together for a common purpose or purposes by mutual undertakings inter se to carry out such purpose or purposes, and to comply with the mutual rights and obligations which are stated in the

rules of the association: see *Conservative and Unionist Central Office v Burrell* [1980] 3 All ER 42 at 58. This falls short of creating a contractual relationship between members in most cases.

As far as ordinary members are concerned, liability is usually limited to the amount of their subscription or entrance fee: see *Wise v Perpetual Trustee Co Ltd* [1903] AC 13. However, if the rules of the unincorporated non-profit association are regarded as legally binding and the members have, within these rules or independently, agreed to accept greater liability, then members will be bound to this increased liability.

Members are entitled to use the property of the association for as long as they remain members: see *Re St James' Club* (1852) 2 De GM & G 383; 42 ER 920. If the association is dissolved, any surplus assets remaining after the association's debts have been paid will be disposed of as provided by the rules<sup>14</sup>. These rules often provide for the distribution of the surplus to be divided among the members who are members at the time of dissolution.

The rules usually provide for a procedure to enable members to resign: see *Finch v Oake* [1896] 1 CH 409.

## **Court proceedings and unincorporated non-profit associations**

### **Court intervention in internal management disputes**

Historically courts would only interfere in the management of an unincorporated non-profit association when a proprietary right of members was interfered with. This would be so where it was considered that members had an interest in the property of the association. However, if the association had no property or if members had no proprietary rights such as any contractual rights, the courts jurisdiction to interfere was very limited.

This approach has been modified over time. It is stated in Halsbury's Laws of Australia volume 28, Butterworths 1993 at 829,493:

Many modern courts have also been willing to decide that the rules of a non profit association were intended to create a legally enforceable contractual relationship between the association and its members or the members inter se, especially when dealing with trade unions, trade or professional associations, professional or semi-professional sporting associations and other similar bodies. In circumstances where an association controls a trade, profession or other activity from which a person derives all or some part of his or her livelihood, decisions made by that association

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<sup>14</sup> *RE GKN Bolts & Nuts Ltd Sports & Social Club and Leek v Donkersley* [1982] 2 All ER 855.

which restrict his or her rights may breach the common law doctrine of restraint of trade. The scope of this doctrine, which is often referred to as the 'right to work', is not restricted to contractual restraints and will apply to matters such as:

- (1) rejection of an application for membership of an association;
- (2) refusal to grant a licence or permit; and
- (3) restrictions placed on the rights of a person which amount to a restraint of trade, regardless of whether the person concerned is a member of the association or not.

In other cases modern courts have agreed to intervene in the affairs of a non profit association even when the activities of that association have, at the most, a tenuous connection with the livelihood of its members or other persons subject to its control. It is not clear how far this approach would extend to allow judicial intervention in circumstances where a member, or a person who was not a member, was affected by a decision of an association which had no relevance to his or her livelihood and challenged that decision in the courts.

Illustrations can be given of the situations where the courts have interfered in the management of an unincorporated association. It has been held that members may challenge a committee's decision dealing with disposition of property. It was in that context that *Cameron's* case was distinguished in *Rendall-Short v Grier* [1980] Qd R 100. In *Rendall-Short* it was held that members had a 'proprietary right' in insisting on a committee of management applying income and property of the association in the promotion of its objects.

Similarly, in *Harbottle Brown & Co Pty Ltd v Halstead* [1968] 3 NSW 493, a particular clause in the rules of the Wine and Spirits Merchants' Association purported to oust the jurisdiction of the court to determine disputes. The court held the committee could not take away the plaintiff's right to bring the action to court.

In cases where unincorporated non-profit associations have the power to regulate employment ('right to work') in particular areas by granting licences, courts will often intervene where a committee of the association prevents a person from earning their livelihood. In *Nagle v Fielden* [1966] 1 All ER 689 the plaintiff had trained racehorses for a number of years. The stewards of the jockey club controlled horse-racing. A licence was needed in order to train horses. The plaintiff could not get a licence and she claimed it was because she was a woman. No reasons were given for the refusal. However her 'head lad' had a licence and the plaintiff claimed that this pointed to the fact that she could not get a licence because she was a woman and showed that it had nothing to do with her capacity and fitness as a trainer.

The plaintiff claimed a declaration that this practice of the stewards was void against public policy and she also claimed an injunction so as to obtain a licence. It was argued that there needed to be a *contractual* relationship between the plaintiff and the stewards and, as there was no such relationship, she could not succeed.

The plaintiff stressed the monopolistic position of the stewards in controlling horse-racing. According to Lord Denning MR at 693:

if we were considering a social club, it would be necessary for the plaintiff to show a contract. If a man applies to join a social club and is blackballed, he has no cause of action: because the members have made no contract with him they can do as they like. They can admit or refuse him, as they please, but we are not considering a social club. We are considering an association which exercises a virtual monopoly in an important field of human activity. By refusing or withdrawing a licence, the stewards can put a man out of business. This is a great power.

In the circumstances the plaintiff has a remedy: 'He may not be able to get damages unless he can show a contract or a tort; but he may get a declaration or injunction' (at 694):

Where an association, who have the governance of a trade, take it on themselves to licence persons to take part in it, then it is arguable that they are not at liberty to withdraw a man's licence — and thus put him out of business — without hearing him. Nor can they refuse a man a licence — and thus prevent him from carrying out his business — in their uncontrolled discretion. If they reject him arbitrarily or capriciously, there is ground for thinking that the courts can intervene.

In these employment cases involving unincorporated non-profit associations, the Australian judiciary has adopted a related approach, and is thus able to intervene in disputes. This approach involves the examination of whether the rules of the association amount to a *restraint of trade*. In *Tutty v Buckley* (1970) 92 WN (NSW) 329, Tutty (a minor) signed a contract to play Rugby League with an unincorporated association (the Balmain Football Club). Certain rules of the association were objected to on the basis of them being unreasonable restraints of trade in preventing Tutty from moving to another club.

The New South Wales Court of Appeal had to consider the applicability of the decision in *Cameron v Hogan* and had to decide, therefore, whether the court should not interfere. In the circumstances of professional football, the court said that the rules had contractual force and therefore they could intervene. However, both the Court of Appeal and, later, the High Court (at (1971) 125 CLR 353) noted that in the circumstances the issue of whether the rules had contractual force was irrelevant where there was an unreasonable restraint of trade.

*Tutty's* case was distinguished from *Cameron's* case. Their Honours found that the restraint

was unreasonable. This view was affirmed in the High Court. An unreasonable restraint of trade amounts to a breach of public policy.

### **Procedural dilemmas**

When suing an unincorporated non-profit association it is important to identify the correct defendant and to make sure that pleadings are properly drafted. In *Clark v University of Melbourne* [1978] VR 457, declarations were sought concerning certain regulations made by various university bodies – mainly concerning money to be paid by the university to the Student’s Representative Council (an unincorporated association). The court stated (at 477):

what was required is that the interests of all persons intended to be represented have been adequately represented, or that an opportunity has been provided to have their case presented.

This meant all of the Council members.

However, there could be problems when a plaintiff desires to bring an action against all members of the association. A solution is in the form of a representative action<sup>15</sup>: see *John v Rees* [1970] Ch 345.

### **Gifts to unincorporated non-profit associations**

A difficulty here is that unincorporated non-profit associations are not legal entities. A gift for such an association must either be for present or future members beneficially or for purposes connected with the association, otherwise it will fail. If the gift is treated as one for the association’s non-charitable purposes, or is regarded as a gift to the members from time to time, it could fail. In order to prevent failure, Australian courts have adopted the following rule: a gift or a bequest to such an association is a gift to its members at the time the instrument takes effect. The gift will then be valid. However, this presumption has not always been consistently applied.

In *Leahy v A-G (NSW)* [1959] AC 457 (Privy Council); (1959) 101 CLR 611 (High Court), a gift of real estate was made to trustees ‘upon trust for such order of nuns of the Catholic Church or the Christian Brothers as my said Executors and Trustees shall select ...’. By another clause in the same will, the residue of the testator’s estate was disposed of to the trustees on trust for the provision of amenities in such convents as the trustees shall select. The trustees brought an action to determine the validity of these clauses. It was argued that the gift to

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<sup>15</sup> See the various Supreme Court Rules, for example, NSW Pt 8, r 13.

the order of nuns was an absolute gift. The majority of the High Court agreed and upheld the gift. However, the Privy Council disagreed, although it upheld the gift for other reasons. The High Court in *Bacon v Pianta* (1966) 114 CLR applied Leahy's case in striking down a gift 'to the Communist Party of Australia'.

Where a gift is on trust for members who are beneficiaries, there is little problem. However, problems arise where the gift is for a purpose, for example, 'a gift to the blind society'. The purpose generally needs to be charitable to be valid. For example, it could be:

- for the relief of poverty;
- for the advancement of education;
- for the advancement of religion; or
- for any other public purpose.

## **Dissolution**

What are the rights of members when an association dissolves? In *Re Sick and Funeral Society of St Johns Sunday School, Golcar Dyson v Davies* [1972] 2 All ER 439 it was decided to wind up a society. Some members attempted to pay up subscriptions which they had not paid for three years so as to share in the distribution.

According to Megarry J, membership is a matter of contract. When members make payments they become entitled to benefits in accordance with the rules. The money they pay becomes the property of all members. Upon dissolution members participate in the division — but not members who have not paid for three years. This decision was followed in *RE GKN Bolts & Nuts Ltd Sports & Social Club and Leek v Donkersley* [1982] 2 All ER 855.

Finally, it should be noted that an association does not have perpetual succession.