LPAB 09: Law of Associations – Summer 2025

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Topic 1: Unincorporated Non-profits

Key cases

Cameron v Hogan – Courts will generally not interfere in internal affairs unless there is a clear breach. (no standing)

Camenzuli v Morrison – Courts will generally not intervene in unincorporated

Bradey's case – members are generally not liable but committee may be personally liable

Main concept

They are not separate legal entities, meaning they lack the capacity to enter contracts or be sued as an entity.

Unincorporated/non-profit:

1. Rules/constitutions are not enforceable (except in some circumstances). A member does not have standing to go to court. *Cameron v Hogan, Camenzuli v Morrison*
2. Lacks legal entity status *Watson v J & A G Johnson Ltd*

Exceptions:

1. Where the rules expressly/implied state that they are enforceable/legally binding *(Plenty)*
2. Dpsuted property rights *(Rendall-Short)*
3. Right to work in chosen field *(Nagle)*
4. Restraint on trade *(Buckley)*
5. Public policy (*Harbotle*) or procedural fairness (*AFL*)

Liability: committee may be liable. Depends on length of contract/committee at the time.

What is an unincorporated non-profit association (UNA)?

- 'association' describes nonprofit associations which have been formed to promote religious, educational, literary, scientific, artistic and other similar community benefits (i.e.: charitable, football clubs, sports clubs, etc).
- It is a voluntary combination of persons with some object or purpose in common (*Kibby v Santiniketan Park Association Inc*).
- An unincorporated non-profit association is not a legal entity (*Watson v J & A G Johnson Ltd*)
  - has no juristic existence apart from its members and the rules are not binding (general preposition in *Cameron v Hogan*).
- *Bohemians Club v Acting Federal Commissioner of Taxation* 'a voluntary association of persons who agree to maintain for their common personal benefit, and not for profit', an establishment the expenses of which are to be defrayed by contributions made by these persons.

- Any rules that the association may have to regulate its affairs do not necessarily constitute an enforceable contract between the members (*Cameron v Hogan*) as they are presumed not to be legally binding (unless there is some exception).
- Therefore, generally, there is no remedy for breach of the rules.

Formation

- There is little formality required in forming an unincorporated non-profit association, although mutual understanding of the members is important.
- members usually adopt a name for the association and a constitution or set of rules.
- there is no set form for these rules to follow, although it is common for them to be in writing.

Issues

- limited enforceability by members of the association's rules or constitution, if any;
- contractual enforcement problems associated with contracts that are purportedly made on behalf of members of unincorporated associations with those outside the association;
- potential personal liability for committee members for debts and torts that are incurred;
- limited access to judicial intervention in the affairs of the association when a dispute arises between members of the association;
- uncertainty surrounding the enforceability of gifts made to an association.

Management

- Although there is no set management structure that must be adhered to, unincorporated nonprofit associations are usually administered by a committee comprising certain members of the association. *Ward v Eltherington*

Rights and Liability of Members

- liability is usually limited to the amount of their subscription or entrance fee (*Wise v Perpetual Trustee Co Ltd*).
  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.

Gifts

- A gift must either be for present or future members beneficially or for purposes connected with the association, otherwise it will fail.

Tortious Liability

- 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. *Smith v Yarnold* and *Hrybynyuk v Mazur*

Rules are not enforceable

- there is a general assumption that members of unincorporated non-profit associations do not intend to be contractually bound by the association's rules and therefore not enforceable (*Cameron v Hogan) (Camenzuli v Morrison)*

Topic 5: Corporate Governance

Key cases and legislation

s140 Effect of Constitution and replaceable rules

Main concept

Governance = how companies are directed and controlled

The Law of Corporate Governance: Relationship between stakeholders (directors, shareholders, minor shareholders) and how they relate to each other and how the law brings balance of interests between them.

How the company runs, how decisions are made, how conflicts are resolved, etc.

Mechanism

How are decisions made within a corporation?

Typically within a constitution.

A company may have its own constitution or can adopt what is known as replaceable rules (*S 141 Corporations Act: Table of replaceable rules*). You can elect to follow the replaceable rules. If there is anything missing in the company's constitution go to the replaceable rules.

If the constitution is not in place then *s141* replaceable rules takes effect.

What is the relationship between the constitution (or replaceable rules) and directors/members?

IT IS A LEGALLY BINDING CONTRACT between members and directors.

140 Effect of Constitution and replaceable rules:

1) A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:
   a) between the company and each member; and
   b) between the company and each director and company secretary; and
   c) between a member and each other member;

under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.

Exceptions:

S 1322 Irregularities: (2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

It applies only to procedural or formal irregularities, not substance irregularities. The test is whether there has been substantial injustice.

Eg: Meeting to elect or remove a director without receiving the proper notice: it would be unjust, it is a procedural error, but it is unjust.

The Court may declare the resolution invalid, if considered it was unjust OR some other remedy to address whatever substantial (injustice or not) occurred. Orders are listed in s1322 (4).

Doctrine of Unanimous Assent

Allows shareholders to approve decisions without requiring a properly constituted meeting or without having to observe any other prescribed formalities. This principle thus permits informal methods of shareholder approval provided that all shareholders are fully aware of what action is being taken and have consented to it.

Eg: a propriety company (3 directors, one share each) - they say they think they should increase their remuneration as directors, and the next day they do it through a meeting, without notice, (informally).

They were all there, and they made a decision who affects everyone, the test here is: even if there is a situation where any remuneration needs a formal meeting and assumes that the general meeting will include the shareholders, but they do not have voting right, they had a right as a member, but not right to vote. And those who did a right to vote, made a decision that does not amount to an invalid resolution, even if informally and without the knowledge of the shareholders who did not have the right to vote.

In summary, it means that their decision might stand, even though there was a procedural irregularity (*S 1322*).

CHECK Oppression concept: Constitution is a legal document, directors must follow, majority shareholders must follow too, but even if they do and it is a legal decision, it does not mean that there has not been oppression and that the minority shareholder does not have a remedy.

Derivative actions

Legislation

Section 236 - Bringing, or intervening in, proceedings on behalf of a company (who can)

Section 237 - Applying for and granting leave (MUST SATISFY THE ELEMENTS).

Section 239 - Effect of ratification by members (what's the position when they ratify something?)

Overview

Derivative actions are a critical mechanism in Australian corporate governance, allowing minority shareholders to initiate legal proceedings on behalf of the company when those in control fail or refuse to do so.

This remedy is particularly vital in addressing corporate wrongdoing, especially when directors or majority shareholders act against the company's best interests.

Used in cases of fraud, breach of fiduciary duties, or directors failing to act in the company's best interests

Statutory Framework

The primary legislative framework governing derivative actions in Australia is *Sections 236 and 237* that outline the process and criteria for a member or officer of a company to apply for leave (permission) from the court to bring proceedings on behalf of the company.

Section 236 – Who Can Bring a Derivative Action?

Under **Section 236**, only an eligible applicant can initiate or intervene in proceedings on behalf of the company. Eligible applicants include:

- A current shareholder of the company *(236(1)(a)(i));*
- A former shareholder who was a member when the cause of action arose *(236(1)(a)(i));*
- An or former officer of the company (e.g., a director) *(236(1)(a)(2));.*

Notably, creditors do not have standing to bring a derivative action.

Section 237 – Court's Leave to Bring a Derivative Action

A person must apply to the court for leave before bringing a derivative action. The court will grant leave if all five statutory criteria under **Section 237(2)** are satisfied:

a) The company is unlikely to bring the proceedings itself.

b) The applicant is acting in good faith.

c) *The action is in the best interests of the company.*

d) *There is a serious question to be tried.*

e) *Proper notice has been given to the company.*

The burden of proof rests on the applicant to demonstrate compliance with these criteria.

S 239 Effect of ratification by members (what's the position when they ratify something?)

The majority may call a meeting to ratify what they are doing (fraud or something wrong). Eg: They might establish an expense account (all the expenses are paid by the company, personal expenses as well). This clause says that does not stop the minority from seeking leave to commence proceedings.

Key Cases

Australian courts have clarified the application of derivative actions through significant case law. The rule in *Foss v Harbottle (1843)* established that a company itself is the proper plaintiff in legal proceedings concerning wrongs committed against it.

For exam:

1) Do they qualify under s236?
2) Then go through each of the elements in s237

Check that oppression remedies may not be better (i.e. harm to the individual not the company)

However, statutory reforms have allowed members to act in the company's stead under specific circumstances.

Swansson v RA Pratt Properties (2002)

Key Issue: The "good faith" requirement and ensuring that the action benefits the company.

Outcome: The applicant must demonstrate a serious question to be tried and that the claim justifies the costs.

Harley v McDonald [2001]

Key Issue: Establishing good faith.

Outcome: Courts scrutinize an applicant's motives to ensure they are not acting for personal gain.

True Value Solar Holdings Pty Ltd and Anor v Fernandez (2013)

Key Issue: Interpretation of "best interests of the company."

Outcome: The court adopted a more generous approach in granting leave where corporate misconduct was apparent.