Unincorporated Non-Profit Associations - Answer Scaffold

1. Introductory Paragraph

Unincorporated associations (UNAs) are voluntary, non-profit groups (e.g., social, sporting, charitable) without legal entity status. They cannot sue, be sued, or enter contracts as an organisation (*Watson v J & A G Johnson Ltd*). Outside of some exceptions, courts generally avoid interfering in UNA affairs (Cameron v Hogan). However, committee members may be personally liable for contracts and torts (*Bradley Egg Farm v Clifford*).

The legal framework governing UNAs is largely shaped by case law, with legislative intervention occurring only when associations choose to incorporate under the *Associations Incorporation Act 2009 (NSW).*

In this scenario…

2. Issues

- **Identify and Define the Legal Issue**
    - Are the rules enforcable?
    - Can the courts intervene? Are there valis exceptions?
    - Is there liability?

3. Rules

- **Can the Court Intervene?**
    - **General Rule:** Courts do not interfere in the internal affairs of UNAs (*Cameron v Hogan*, confirmed by *Camenzuli v Morrison*).
    - **Exceptions:**
        1. **Where the rules expressly/implied state that they are enforceable/legally binding:** and there has been a breach. *(Plenty v Seventh Day Adventist Church)*
        2. **Property disputes:** Courts will always intervene (*Rendall-Short v Grier*).
        3. **Employment-related disputes:** Right to work cases (*Nagle v Fielden*).
        4. **Restraint of trade:** Must be unreasonable (*Buckley v Tutty*).
        5. **Public policy/procedural fairness:** If there is an attempt to limit access to justice and the courts. (*Harbottle v Halstead*, *AFL v Carlton Football Club Ltd*).
- **Enforceability of Rules and Constitution**
    - **General Rule:** UNA rules are not legally enforceable contracts (*Cameron v Hogan*).
    - **Exceptions:** Where rules expressly or impliedly state enforceability (*Plenty v Seventh Day Adventist Church*).
- **Contractual and Tortious Liability**
    - **General Rule:** UNAs cannot enter contracts or be liable as entities.
    - **Who is liable?**
        - Members **are not** generally liable (*Wise v Perpetual Trustee*)

- Committee members **may** be personally liable for contracts and debts (*Bradley Egg Farm v Clifford*).
- Contracts extending beyond a committee's term create uncertainty (*Carlton Cricket & Football Social Club v Joseph* ,*and Peckham*).
- **Tortious liability:** Committee members may be personally liable for negligence (*Smith v Yarnold*).

4. Conclusion

- Summarise the likely legal outcome based on the facts.
- Discuss whether judicial intervention is likely etc

A note on PF:

Procedural fairness alone is **insufficient** to create a legal right enforceable by the court unless it is expressly or impliedly part of a contractual or proprietary arrangement (Bacon v Pianta). Enforceable if the union's rules impliedly or expressly require procedural fairness and the rule simply a contractual legal relationshio (Plenty).

Under the rule in Cameron v Hogan (1934), courts will not interfere in the internal decisions of unincorporated associations (including unions and political parties) **unless** there is:

- A breach of **contractual rights** arising from the association's rules, OR
- An impact on **proprietary rights** (such as loss of property or financial benefits).

Procedural Fairness and Expulsion Cases

Even though procedural fairness (natural justice) is generally expected in decision-making by associations, the rule in *Cameron v Hogan* limits the ability of courts to enforce it unless there is a contractual or proprietary right at stake. Courts will only enforce the contractual rights and obligations as outlined in the association's constitution. However, judicial intervention is typically restrained to ensuring compliance with these internal rules rather than imposing external legal standards.

Key Cases:

- Breen v Amalgamated Engineering Union (1971) – Courts have recognised that procedural fairness may be implied into the rules of an association if the rules create a contract between the member and the association.
- Harrison v Victorian Amateur Football Association (1980) – Courts found that procedural fairness may be required where expulsion could lead to loss of important benefits or standing.
- Australian Football League v Carlton Football Club (1998) – Suggested that courts are more willing to intervene when the association's decision affects financial or proprietary interests.

Lifting the corporate veil and insolvent trading – answer scaffold

1. Introduction

Under Australian company law, a company is recognised as a **separate legal entity** from its directors and shareholders, meaning they are generally not personally liable for the company's debts (**Salomon v Salomon**). This principle is known as the **corporate veil**, but courts may "lift" or "pierce" the veil in cases of fraud, sham arrangements, or where justice requires (**Gilford Motor Co Ltd v Horne**). Regardless of whether the veil can be lifted or not, directors also have a **statutory duty to prevent insolvent trading** under *s.588G of the Corporations Act 2001 (Cth)*, and failure to comply can result in **personal liability** (**ASIC v Plymin**). However, defences such as the **safe harbour provisions** *under s.588GA* may protect directors who take reasonable steps to restructure a failing company.

This answer will assess whether the corporate veil should be lifted in relation to XXX, whether the company engaged in insolvent trading. It will also consider whether any statutory defences apply for XXX.

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2. Issue

- **Identify and Define the Legal Issue**
- Is the company **a separate legal entity**, or should the corporate veil be lifted?
- Has the company engaged in **insolvent trading**?
- Can any **statutory defences** protect directors from liability?

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3. Lifting the Corporate Veil

- **General Rule:** A company is **separate from its owners** and directors are not personally liable (**Salomon v Salomon**).
- **Exceptions:** Courts may lift the veil where:
    - **Fraud or sham arrangements** exist (**Gilford Motor Co Ltd v Horne**).
    - A company is used to **avoid legal obligations** (**Jones v Lipman**).
    - The company is **acting as an agent** for its controllers (**Walker v Wimborne**).
    - A **corporate group operates as a single entity**, not distinct subsidiaries (**Hobart Bridge Co Ltd v Commissioner of Taxation**).
- **Application:** Consider whether the facts suggest misconduct warranting veil lifting.

4. Did the Company Engage in Insolvent Trading?

Is the company insolvent?

- *s.588G Corporations Act*: Directors must **prevent a company from incurring debts while insolvent**.
- **Test for Insolvency:**
    - **Definition:** A company is insolvent if it cannot pay its debts **as and when they fall due** (*s.95A(1) Corporations Act*).
    - **ASIC v Plymin ("The Indicators of Insolvency")** – courts assess:
        - Continuing losses
        - Overdue debts
        - Dishonoured cheques
        - Lack of cash flow/credit facilities
        - Relationship with bank
    - Consider commercial reality that creditors won't always insist on payments being made to the letter of the contract
    - Debt is payable at time stipulated in contract unless:
        - Express or implied agreement for extension of time
        - Course of conduct to give rise to an estoppel
        - Well established course of conduct in the industry where debts are payable at a time other than that stipulated
    - Custom Bus cashflow test - Not just a cashflow test, more about balance sheet and ability to pay via various means. Look at solvency not liquidity, solvency means anything the company can utilise to pay the debt. look at all resources at disposal of the company to pay debts, which assets were liquid/realisable when payments became due?

Is the director liable? (must go through all elements)

- **To establish a director breach, elements of *s588G(1)* need to be met:**
    - *S588G(1)(a):* Was the person a **director** at the time? (*s.9 definition* **of "director" includes shadow directors**)
    - *S588G(1)(b):* Was the company insolvent **when the debt was incurred**? (as above – re debt and test for insolvency)
    - *S588G(1)(c):* Did the director **suspect insolvency** (subjective test)? Would a **reasonable director** have suspected insolvency (objective test, *Metropolitan Fire Systems v Miller*)?

Oppression and member remedies – Answer Scaffold

1. Introduction

Under *s.232 of the Corporations Act 2001 (Cth),* minority shareholders may seek relief when a company's affairs are conducted in a manner that is **oppressive, unfairly prejudicial, or discriminatory**. The test for oppression is **objective**, requiring an assessment of whether reasonable directors would consider the conduct unfair (Wayde v NSW Rugby League). Common examples include **exclusion from management (**Dalkeith**), excessive director remuneration** (Kizquari)**, share dilution** (Hannes)**, and improper dividend restrictions** (Loch v John Blackwood**)**. If oppression is established, *s.233* **grants the court broad remedial powers**, including ordering the purchase of shares, regulating company affairs, or winding up the company. Courts prioritise ending the oppression over compensating shareholders (Campbell v Backoffice Investments).

This answer will assess whether oppression has occurred and determine the most appropriate remedy.

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2. Issues

- **Identify and Define the Legal Issue**
  - Has the company's conduct **oppressed, unfairly prejudiced, or discriminated** against a minority shareholder (*s.232 Corporations Act*)?
  - Does the conduct **contradict the interests of members as a whole**?
  - What remedies under *s.233* may be appropriate?

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3. Has There Been Oppression? (*s.232*)

S232 Grounds for Court order

The Court may make an order under section 233 if:

a) the conduct of a company's affairs; or
b) an actual or proposed act or omission by or on behalf of a company; or
c) a resolution, or a proposed resolution, of members or a class of members of a company; is either:
d) contrary to the interests of the members as a whole; or
e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

- The court will assess **whether the company's conduct is unfair** using an **objective test** (Wayde v NSW Rugby League) i.e. even if a decision is made in good faith and within directors' powers, it may still be oppressive if reasonable directors would consider it unfair (but usually ok if it benefits the company).
- Look beyond legal rights to what is just and equitable (Nasser)
- O'Neill v Phillips - "is the exercise of power contrary to what the parties have, by words or conduct, agreed"

- "Would the actions of the majority conflict with the promises which they appear to have exchanged between themselves"

- **Common types of oppressive conduct:**
    - **Exclusion from management:** If the shareholder had a **legitimate expectation** of participation (**Dalkeith Investments**). Real oppression is not just the exclusion, but also not paying fair market price for the shareholding - provided there is no proof that the s/h removal was necessary in the interests of the company (O'Neill)
        - A reasonable offer to buy out the minority s/h must be made (O'Neill):
        - Must purchase shares at fair value
        - If value not agreed, competent expert should be nominated, expert will decide how costs are borne
        - Both parties should have same right of access to info which bears upon value of shares and both should have right to make submissions to expert
        - Majority s/h should offer to pay costs of Plaintiff
    - **Excessive director remuneration:** Must be justified based on company performance (Kizquari). There needs to be bona fide attempt to measure worth as directors - you must show how salary is calculated, can't just increase it significantly simply because you want to max out what company can afford.
    - **Issuing shares to dilute minority control:** Permitted only if done for a **genuine company purpose** (Hannes).
    - **Withholding dividends without justification:** Could be oppressive if profits are high but dividends are unfairly restricted (Loch v John Blackwood). If not declaring dividend you must consider history of company, financial needs - if you need urgent capital, taking it from dividend won't be oppression but could be if company made sound profit, increased pay, and didn't declare dividend (DG Brims)
    - **Diverting business away from the company for personal gain** (Scottish Cooperative).
    - **Boardroom tactics that disadvantage the minority** (Starr). Bullying or being sneaky to get what you want inc: Director to use their tactical skills to secure an advantage, or overbearing attitude.
        - Minority must establish unfairness - not enough to say they are always outvoted

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4. Key Considerations: Legitimate Expectations and Just and Equitable Conduct

- O'Neill v Phillips: A shareholder's **legitimate expectations** should be considered.
- Even if actions are **legally valid**, they may still be oppressive if they breach an implied understanding between members.
- The **"just and equitable" principle** may apply if the minority has been unfairly excluded from business operations.
- **Ratification** (approving an action at a general meeting) **cannot legitimise an oppressive act**

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5. Remedies Under *s.233*: How to End the Oppression

Courts are concerned with the remedy that most effectively puts an end to the oppression, not to compensate

The court has **broad discretion** to make orders under *s.233*, including:

- *(d)* **Compulsory share purchase** (most common remedy but only available if the company is still operating):
    - Shares should be bought at **fair market value**, without a minority discount. A buy-out order is not to compensate for the shareholder's loss but to separate the oppressor and the oppressed (Campbell v Backoffice Investments).
- *(c)* **Regulating the company's future affairs** (e.g., appointing an independent director).
- *(b)* **Altering the company's constitution** to prevent future oppression.
- *(h)* **appointing a receiver** or a receiver and manager of any or all of the company's property;
- *(i)* **restraining a person** from engaging in specified conduct or from doing a specified act;
- *(a)* **Winding up the company (s.461)**:
    - **A last resort**, used only if the company **cannot be managed fairly** going forward.
    - Courts generally prefer **alternative remedies** to preserve a profitable business.
    - *S.461* - gives grounds on which company can be wound up
        - ASIC v International Unity Insurance lists circs which may justify winding up order under *461(1)(k):*
        - Mismanagement, misconduct or lack of confidence in conduct of affairs
        - Breaches of Corp Act ie. director's duties, inadequacy or accounts/record-keeping
        - Need to ensure investor protection
        - Company has not carried on business candidly with public
        - Fraud/sham transactions

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6. Practical Considerations: Litigation and Settlement Strategies

- **Offers of compromise:** If a fair settlement offer is rejected, the rejecting party **may bear litigation costs**.
    - If an offer is rejected and the court awards a lower sum, the rejecting party may be penalised with full costs.
    - Strategy: Offering a fair settlement early can pressure opponents and reduce litigation risks.
- **Fair valuation of shares:** Valuation should consider the company's trading performance **before the oppressive conduct occurred**.

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7. Conclusion

- If **s.232 oppression is proven**, a remedy under *s.233* must **end the oppression** rather than simply compensate the minority.