Dysfunctional not-for-profit organisations –what are the options?

The answer to this question all depends on the Australian state or territory in which the association was incorporated. In some states, you have rights just like a shareholder in a company and in other states, a disgruntled member only has the option of seeking the winding up of a dysfunctional association.

HUMANS ARE POLITICAL BEASTS

It is fascinating to dive deep into the weird and wonderful case law relating to not-for-profit associations. It gives an anthropological perspective into a unique Australian beast. Our personal favourites: Happy Huskies, Houghton Table Tennis & Sports Club, Australian Alpaca Association, Echunga Football Club, Bohemians Club and Border Fancy Canary Club.

No matter the warm and fuzzy cause, an association's members do not always behave nobly. Politics corrupts the mission of such charitable causes, especially where some associations have diverse memberships, tiered and complex structures and access to millions of dollars. If you add a self-drawn constitution to the mix, egos, a dispute is inevitable.

BEFORE STATUTORY RIGHTS

Members have traditionally found it difficult to maintain legal actions against not-for-profits and their directors or officeholders. Australian Courts have been bound for some time by the High Court decision of *Cameron v Hogan* (1934) CLR 358 which has cemented Courts' reluctance to intervene in associations unless a trust exists or there is a proprietary interest. The test for existence of proprietary rights is whether the member derives some benefit (whether tangible or intangible) from the organisation it is a member (see *Finlayson v Carr* [1978] 1 NSWLR 657). Although what is considered a proprietary right has altered dramatically since *Cameron*.

AVENUES OF REDRESS IN VICTORIA AND NSW

Associations are first registered, or incorporated, under state or territory legislation to become an "incorporated association". These organisations can then apply to the Australian Securities and Investment Commission (ASIC) to obtain an Australian Registrable Body Number (ARBN). As a result, these organisations are subject to their respective Incorporations of Associations Act and its regulations which are generally known as the 'Model Rules' (and insofar as the organisation's constitution does not contradict the Act or the Model Rules).

Some states and territories have given disgruntled members remedies by incorporating section 233 of the *Corporations Act 2001* (Cth). This is very important as it allows the Court a general discretion to regulate the future conduct of the association's affairs without having to take the "nuclear option" of winding

up on the grounds of oppression. Section 126 of the *Associations Incorporation Reform Act 2012* (Vic) permits Victorian members to apply to the Supreme Court of Victoria for orders to wind up the association on various grounds including that it is just and equitable to do so. This is a mirror provision of section 461(k) of the *Corporations Act 2001* which applies to companies. Similarly, section 63 of the *Associations Incorporation Act 2009* (NSW) enumerates the grounds on which a Sydney-sider can apply to Court to seek specific relief or have it wound up.

WHAT IS MISSING IN TASMANIA?

The Tasmanian government does not give members express rights to seek a winding up order of an association. Dal Pont identified a lacuna: "the Tasmanian legislation makes no equivalent provision, and does not purport to apply pts 5.4 or 5.4 A (dealing with winding up by a Court) of the *Corporations Act 2001* (Cth) may reveal a lacuna in the Tasmanian law. Yet the Court's inherent jurisdiction on to order winding up on just and equitable grounds may remain." (Law of Associations, 2017, p.524).

Upon careful review of the *Associations Incorporation Act 1964* (Tas), we understand that the Tasmanian legislation can allow for a Court application, but the only relief is winding up the association. Section 32 carves out Part 5.7 of the *Corporations Act 2001* (alongside Part 5.5 and 5.6) which is in relation to winding up of bodies other than companies. Section 583(c)(ii) of Part 5.7 of the *Corporations Act 2001* could give Tasmanian members a chance at applying to the Federal Court of Australia for the winding up of their association on the ground that it is just and equitable to do so.

It also appears that the general law of oppression for members of associations is still available (see *Shew v Police and Citizens Youth Club* [2022] NTSC15 and *Millar v Houghton Table Tennis & Sports Club Inc* [2003] SASC 1).

Certainly, the Tasmanian legislation is well out of date, and it is open to abuse by small cliques of individuals who seize the reins of power in a society (*Porima v Te Kauhanganui o Waikato Inc.* [2001] 1 NZLR 472 (per Hammond J at [80]).

FURTHER INFORMATION

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