

HOW TO BE SELFISH AND POLITICAL WITHOUT REALLY TRYING – TIME FOR A PARADIGM SHIFT IN THE RESOLUTION OF DISPUTES WITHIN QUEENSLAND’S NOT- FOR-PROFIT ASSOCIATIONS

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Disputes within incorporated associations in Queensland currently come within the jurisdiction of the Supreme Court of Queensland. There is no statutory requirement for internal dispute resolution procedures and no statutory mediation requirement. Both are features of similar legislation in some other Australian jurisdictions. In an environment of significantly increased membership of not-for-profit associations, a more accessible and less formal dispute resolution regime is called for. The author argues that a therapeutic approach to internal disputes would be preferable to the current adversarial approach.

I THE ADVERSARIAL STATUS QUO

According to the Office of Fair Trading there are approximately 20,000 incorporated associations in Queensland.¹ Although some of these associations no doubt boast few more than the statutory requirement of seven members,² it would be fair to suggest that virtually all Queenslanders are involved in, or are members of, an incorporated association at some time in their life. Associations which cater for the sporting, cultural, political and professional activities of citizens are probably destined to play an even more prominent role in the lives of ordinary Queenslanders given the needs of an aging population, many of whom still desire to maintain an active social, sporting and cultural life after retirement.³

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¹ Department of Tourism, Fair Trading and Wine Industry Development, *Review of the Associations Incorporation Act 1981* (Qld), Consultation Paper (2005).

² *Associations Incorporation Act 1981* (Qld) s 51(a).

³ D Rowland, 'An Ageing Population: Emergence of a New Stage of Life?' in S Khoo and P McDonald (eds), *The transformation of Australia's Population: 1970-2030* (2003) 8, 8.

Given the diverse and extensive membership base of these associations it is not surprising that disputes between members and the two organs of management of an association – the management committee and the members in general meeting – are very common. Some disputes can be resolved internally, but an increasing number cannot. Despite the existence of mechanisms within the legislation for an external review of some disputes,⁴ and the availability of various mediation forums, these avenues are rarely pursued by most community groups.

The *Associations Incorporation Act 1981* (Qld) (the Act) provides for a judicial review of the validity of a decision of an association which deprives a member of a right conferred on that member by the association's rules.⁵ But what constitutes such a right is usually limited to the very basic matters of admission to, and expulsion from, membership, acting in accordance with the association's rules and procedural matters.⁶

Although some expulsion cases are dealt with judicially, it is rare for other sources of dispute – such as contrary interpretations of club rules – to reach the litigation stage. Furthermore, discretion to refuse an application for review exists where a matter is considered to be trivial.⁷ Neglecting to hold committee meetings or to ignore applications for membership have been held to be reviewable matters,⁸ but often the issues giving rise to disputes, while vitally important to the disputants, lack sufficient statutory impetus to attract jurisdiction. In the case of *Re Maggacis*⁹ Thomas J dismissed an application for the review of a procedure for the election of a sporting coach, where the successful candidate was himself a voting member of the appointing committee, saying that: 'It was one of the many exercises in life where people are entitled to act, if they so choose, selfishly or politically'. Selfish or political behaviour is clearly at the heart of many disputes within clubs and community organisations. The Office of Fair Trading, which has responsibility for administering the Act, makes this observation in a more diplomatic way:

The membership of an incorporated association can be made up of a number of individuals with different personalities, values and beliefs and this may lead to disputes arising within that membership, particularly about the interpretation of an association's rules.¹⁰

Such behaviour on the part of members of public statutory tribunals would be almost certain to attract jurisdiction for review, since in those tribunals high levels of objectivity and impartiality are required, and where in the words of one judicial authority: 'the administration of justice by courts proper, and those acting in a similar

⁴ Section 119 allows for the appointment of a special investigator by the Chief Executive, pursuant to saving provisions in the now repealed *Financial Institutions Code 1992*. This avenue is really only available where there is a purported issue of fraud or serious financial mismanagement which amounts to criminal behaviour on the part of the association's management committee.

⁵ *Associations Incorporation Act 1981* (Qld) s 71(2).

⁶ See various clauses of the Model Rules in the *Associations Incorporation Regulation 1999* (Qld) – such as clauses 6, 8, 9 and 10.

⁷ *Associations Incorporation Act 1981* (Qld) s 73(2)(a).

⁸ *Della Bon v Abednego* [2000] QSC 275.

⁹ [1994] 1 Qd R 59, 68.

¹⁰ Department of Tourism, Fair Trading and Wine Industry Development Queensland, *Incorporated Associations – Good Business Guide* (2005) 49 <[http://www.fairtrading.qld.gov.au/oft/oftweb.nsf/AllDocs/BF1D4613C153A04A4A256F6A001AA6FE/\\$File/IA%20Good%20Business%20Gui](http://www.fairtrading.qld.gov.au/oft/oftweb.nsf/AllDocs/BF1D4613C153A04A4A256F6A001AA6FE/$File/IA%20Good%20Business%20Guide.pdf) de.pdf> at 30 June 2006.

capacity, public policy requires that there should be no doubt about the purity of the administration'.¹¹ But in the private association, neither the perception nor the reality of selfish and political behaviour and motivation can really be avoided.¹²

Domestic tribunals are usually established in circumstances which are radically different. The members, generally speaking, have agreed to abide by a set of rules and the authority of a committee to enforce them, if necessary by expulsion. The committee members cannot, in the nature of things, divest themselves of the manifold predilections and prejudice resulting from past associations with members. Apprehension of bias could be generated in all kinds of ways. If it was a disqualifying consideration, the enforcement of the consensual rules would be largely unworkable.

If there are justiciable issues at the heart of a dispute (which relate to the rights of a member conferred by the association's rules), jurisdiction for a review is vested in the Supreme Court.¹³ It is hardly surprising that few disputes reach this forum considering the expense involved and the complexity of rules of evidence and procedure which really demand professional legal representation. Most matters which do reach the court are grounded in allegations that the applicant has been denied natural justice by the respondent association.¹⁴

The Act requires an incorporated association to observe the rules of natural justice in adjudicating upon the rights of its members conferred by the association's rules. But the benefit to the corporate health of an association, where external adjudication of disputes concerning an alleged denial of natural justice occurs is, in practice, quite limited given that any overturned decision will frequently be reconsidered by the association's management committee or by the members in general meeting. This may do nothing to address the underlying causes of any dispute.

There is no definition of natural justice in the Act, and the common law authorities tell us that the content of natural justice will depend on the circumstances of each case – how the impugned decision was made, what the consequences were for the applicant and what rights are available under the association's rules.¹⁵ Nevertheless, an applicant who establishes that they have been denied natural justice as required by the Act, establishes that there has been an error in law and is entitled to have the decision set aside as void.¹⁶

The court does have a discretion to require an applicant to exhaust any possible remedies or adjudicatory processes available within the association¹⁷ before filing an

¹¹ *Mahoney v NSW National Coursing Association Ltd* [1978] 1 NSWLR 161, 170 (Glass JA).

¹² *Ibid.*

¹³ At common law a court will consider whether an association's rules do in fact empower the association to exercise the powers which it purports to exercise (*Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329), but will generally not supplant its own decision for that of the domestic tribunal where those powers are in fact provided for in the rules (*Malone v Marr* [1981] 2 NSWLR 894).

¹⁴ *Associations Incorporation Act 1981* (Qld) s 71(3).

¹⁵ According to one commentator: 'The courts emphasize that particular applications do not create precedents, but as more and more decisions are subject to judicial review it is only natural that public and private tribunals, their advisers and lawyers who appear before them look for guidelines, if not firm rules'. J R S Forbes, *Justice in Tribunals* (2002) 87.

¹⁶ *Escobar v Spindaleri* (1987) 7 NSWLR 51.

¹⁷ *R v Williams; Ex parte Lewis* [1992] 1 Qd R 643.

application for review, but the Act itself mandates neither the exhaustion of internal remedies nor even the existence of internal remedies to begin with. The Act contains no prescription for dispute resolution mechanisms beyond the recognition of the authority of a general meeting to overturn decisions of the management committee in some circumstances – a few of those circumstances being dealt with in the statutory Model Rules.¹⁸ Under the rules of most associations, the right to be heard by a general meeting in relation to other sorts of disputes is usually subject to the ability of the member concerned to requisition a meeting by petitioning the management committee or by lobbying for the support of a significant number of other members.¹⁹ So in effect the ultimate internal authority to adjudicate on a dispute is a simple majority of the members in general meeting. If a member asserts that this simple majority has, in reaching a decision, breached the vague and uncertain content of the principles of natural justice, or denied a right which the member ought to possess under the association's rules, then the next step pursuant to the Act is an originating application in the Supreme Court of Queensland.²⁰

Although the nature of dispute resolution processes within Queensland associations is frequently adversarial in nature, there is no statutory or common law requirement that a domestic tribunal must conduct itself according to an adversarial model.²¹ Most of the litigation in the area of associations' law involves claims by members of associations that they have been unfairly excluded from an organisation or that the process used to expel them has been contrary to the association's rules. The process used to expel a member, however, is necessarily adversarial in that it invariably involves a contest between firstly the individual member and the management committee, and then the individual member and a general meeting of members. A survey of the few matters which make it to a Supreme Court review are illustrative of this.

¹⁸ The Act provides that the management committee must be elected by the members in general meeting (s 62(1)) and that the management committee must see that the association complies with rules concerning the convening of general meetings (s 57(1)) – so that, in this sense, management committee decisions are ultimately reviewable by the membership by way of a change in committee membership (in addition to any decisions expressly subject to a general meeting review under the association's rules). Clause 10 of the Model Rules, for example, (contained in sch 4 of the *Associations Incorporation Regulation 1999* (Qld)) provides a process for a general meeting of members to adjudicate on an appeal by a member over a decision of the association's management committee to terminate that person's membership. The Model Rules are a set of basic provisions, drafted in plain English, which an association is able to adopt, either as written or in amended form, as its own rules. The *Associations Incorporation Act 1981* (Qld) s 47 provides that where a matter is included in a provision of the Model Rules but not in an association's own rules, then the association's own rules are taken to include that other provision. Section 47(3) allows, however, an association to expressly exclude the operation of s 47. One suspects that many (and perhaps most) associations may be unaware of the operation of s 47.

¹⁹ Clause 26 of the Model Rules would require that a general meeting can be requisitioned by 33 per cent of the members of the management committee or by ordinary members of the association numbering double the number on the management committee plus one.

²⁰ The Office of Fair Trading reminds associations that: 'If the situation cannot be resolved within the association, you can choose to seek mediation or legal advice. It has no power to intervene in an association's internal disputes. It cannot provide legal advice to you, nor can it assist in interpreting the rules. Ultimately only the Supreme Court can make a ruling on internal disputes'. Department of Tourism, Fair Trading and Wine Industry Development Queensland, above n 10, 50.

²¹ Forbes observes that: 'A duty to act judicially does not mean that it (the domestic tribunal) must act judicially'. Forbes, above n 15, 163.

In the matter of *Green v Nanango Bowls Club Inc.*²² the applicant sought orders overturning his expulsion from the bowls club, a constitutional objective of the club being to: 'develop and promote activities to advance good fellowship between club members.' The source of the dispute was a number of letters received by the club's management committee, from (among others) the applicant's sister and her husband, complaining of the language the applicant had used to describe her after 'an incident' one afternoon at the club premises. The management committee voted to expel Mr Green on the grounds that his impugned conduct breached a clause of the club rules which proscribed various forms of unacceptable behaviour.²³ Although the applicant had been provided with copies of the letters of complaint, the club secretary, in the notice of the expulsion hearing, did not specify exactly which form of conduct in the rules was alleged to have been exhibited by exactly which actions or words of the applicant. According to White J, this failure to adequately particularise the impugned conduct, with reference to the club rules, amounted to a breach of natural justice and the applicant was successful. The order was therefore a declaration that the decisions of both the management committee and the general meeting to expel Mr Green were void. Both the applicant and the volunteer members of the association's management committee would therefore have endured at least three adversarial processes, culminating in a Supreme Court hearing where both parties were represented by solicitors and counsel. The ultimate result would almost certainly have been the convening of another general meeting, this time with written notice which complied with the court's understanding of procedural fairness. The benefit to all parties from this process would have been negligible.

Therefore in these circumstances, the adoption of adversarial processes may lead to a party being declared 'the winner', but that is not really a 'resolution' in the sense that the internal dissension leading to the adversarial process had not been resolved. These sorts of adversarial processes consequently do not resolve disputes at all – and in *Green's Case* I would suggest that the statutory review process simply prolonged the dispute at considerable expense to the parties – exactly the same outcome is likely to have occurred and the applicant would, almost certainly, have still been expelled from the club. In *Re Maggacis*, commenting on the evolution of civil rights and liberties, Thomas J advises that: 'In guiding this evolution, the idealism of judges should be tempered with the knowledge that intrusion of lawyers into every aspect of human life and the cultivation of a litigious society may not be in the public interest'.²⁴

Given the fractious, political and dare I say it, selfish nature of community organisations we ought not to assume, however, that the dearth of associations matters heard by Queensland courts is any reflection of a lack of disputation within these organisations. If we do accept the view of Thomas J that association members are entitled to act selfishly and politically, we should not conflate that with a fatalistic acceptance that the law, and law makers, can do nothing but sit by while community organisations wallow

²² [2002] QSC 201.

²³ Clause 12 of the club's constitution provided that a member: 'shall not conduct illegal gambling, betting on games, speak obscene or abusive language or indulge in unseemly conduct. Any alleged infringement of this clause, on report in writing to the Council, shall be investigated by the Council, which shall have the power to demand and direct apologies and, if necessary, if the offending person be a member, to deal with that person under the provisions of Clause 13 [pertaining to expulsion]'.

²⁴ *Re Maggacis* [1994] 1 Qd R 59, 68.

in dysfunction and pick up the pieces when the dust of litigation settles. It is inadequate legislative policy to simply ask associations to settle their disputes internally (where the association's rules provide for this), and that if this internal process fails, to seek adjudication in the Supreme Court. What is needed is some prescriptive general process for the hearing of grievances within these community organisations and an ultimate review forum which is both more accessible and more therapeutic in operation than the Supreme Court.

In the next section I suggest that a dispute resolution scheme within an amended *Associations Incorporation Act 1981* (Qld) ought to be based on a therapeutic, rather than an adversarial model.

II A NEW PARADIGM - THERAPEUTIC JURISPRUDENCE

A dispute within an association is fundamentally dissimilar to a dispute within a company or a dispute involving a public authority. An incorporated association is a corporate expression of shared interests, objectives and values, and that shared experience is shaped and regulated by a set of rules to which the members voluntarily submit. The authority to interpret and apply those rules is granted to the management committee which has an authority defined by the consent of members. A dispute in this context, therefore, is a disagreement of an insular and private nature. Nevertheless, the paradigm for the legal resolution of associations' disputes is a blend of approaches from administrative law and company law. Being a hybrid and somewhat *ad hoc* approach, there is a consequent lack of a credible underlying jurisprudence on which to ground a system of dispute resolution. Inevitably therefore, the jurisprudence which informs the approach of the legislature and court towards dispute resolution in private associations is adversarial in nature – and it is that adversarial jurisprudential paradigm which I say is counterintuitive. The legislative reforms suggested later in this paper are based on the premise that the law ought not to act exclusively as a forum for adversarial arbitration of associations' disputes but as a therapeutic agent. The contention is that in these sorts of disputes, 'the law itself can function as a kind of therapist'.²⁵

As in company law,²⁶ the constitution of an incorporated association forms the terms of a contract between the members and the association.²⁷ Resolution of commercial contractual disputes, although sometimes able to be achieved through mediation or arbitration, is ultimately a matter for an impartial and external, statutory tribunal. Authority to adjudicate disputes concerning the terms of a commercial contract lies with the court. The role of the law in a commercial contractual dispute is to decide which party to the dispute shall prevail – the health, well-being or continued ability of the parties to contract not only falls outside the court's jurisdiction, but ought to be excluded from judicial reasoning as matters outside the terms of the contract. Perhaps axiomatically, the dysfunction which lies at the heart of many commercial disputes is

²⁵ B J Winick, 'The jurisprudence of therapeutic jurisprudence' (1997) 3(1) *Psychology, Public Policy and Law* 184, 185.

²⁶ *Corporations Act 2001* (Cth) s 140(1): 'A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract.'

²⁷ *Associations Incorporation Act 1981* (Qld) s 71(1): 'Upon incorporation the rules of the association shall constitute the terms of a contract between the members from time to time and the incorporated association.'

neither addressed nor resolved by adversarial litigation and the disintegration of business relationships is often accelerated by litigation.

Therapeutic jurisprudence is informed by beliefs that adversarial legal processes can have a wide range of deleterious effects on the physical, mental and emotional wellbeing of the parties to a dispute – in addition to the deleterious effects of the dispute itself. Although traditionally associated with the so-called problem solving courts²⁸ there is a growing trend to incorporate this approach into other areas of legal focus. Therapeutic jurisprudence takes the view that the legal content of a dispute is not the only factor (or even the major factor) which impacts on the health or wellbeing of the parties to the dispute. The manner in which the dispute is addressed and resolved is also critical.

The coercive nature of a judicial decree or order, as the result of an adversarial attempt to sway judicial opinion, often does nothing to address the underlying tensions and political differences which give rise to the dispute. More importantly, an adversarial approach to dispute resolution within associations does nothing to promote and encourage the resolution of disputes internally. Simply asserting that it is judicial and legislative policy not to interfere in the internal affairs of private associations,²⁹ and vesting jurisdiction to hear those disputes which are nevertheless eligible for review in a superior court, may reduce the incidence of associations litigation, but surely does nothing to reduce the incidence of internal disputes. Research shows that 86 per cent of associations in Queensland have an income of less than A\$50,000 per annum, and 78 per cent have a membership of less than 100.³⁰ Organisations of this size simply do not have the resources to access the Supreme Court in order to resolve a dispute.

The reluctance to prescribe internal procedures of any sort gains some credence from the liberal right to freedom of peaceful assembly and association. Article 22(1) of the *International Covenant on Civil and Political Rights*,³¹ to which Australia is a signatory, provides that: '[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests'. Even this fundamental source, however, recognises that the freedom to associate is not unlimited and ought to be coupled with some responsibilities by those who choose to associate in a formal way.³² A right to associate and to incorporate may

²⁸ See, eg, D Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' in D Wexler and B Winick (eds), *Law in a Therapeutic Key* (1995) 811. Here a broader conceptualisation of therapeutic jurisprudence is applied beyond the American drug courts which address problems of recidivism via a blend of case management and rehabilitation in

²⁹ There is judicial policy of long pedigree to the effect that it is inappropriate for a public court to intrude into the internal affairs of a private association. See, for example, the following House of Lords dicta: 'Save for the due...administration of property, there is no authority... to take cognisance of the rules of a voluntary society' (*Forbes v Eden* (1867) LR 1 SC & DIV 568, 581). Since the seminal High Court decision of *Cameron v Hogan* (1934) 51 CLR 358, 373, in which the court pronounced that: 'agreements to associate for scientific or philanthropic, social or religious purposes are not agreements which courts of law can enforce', the policy has prevailed in Queensland. As stated in *Re Maggacis* [1994] 1 Qd R 59, 67: 'it is not appropriate that the courts intrude unduly into the management of private associations'.

³⁰ F Guthrie, *Report on the Non-Profit Enterprises Business Improvement Project* (February 2002).

³¹ *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 22(1) (entered into force 23 March 1976).

³² *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 22(1) (entered into force 23 March 1976): 'No restrictions may be placed on

be a licence to act selfishly and politically, but if such behaviour threatens to undermine an association (if not addressed) to the extent that the association's continued existence is at risk, then some legislative prescription of dispute resolution procedures may in fact be seen as a protection of the right to associate.

What then would constitute a therapeutic approach to the resolution of associations' disputes? A coherent dispute resolution regime would not involve the imposition of a particular mediator or domestic tribunal format, but would recognise that those disputes which just cannot be resolved internally would be dealt with in a forum which suits the nature and needs of this type of organisation. As one commentator has suggested: 'researchers have renounced the paternalistic notion of the therapeutic State' – the agenda is not about imposing some publicly determined conception of normative wellbeing, but in this context would involve elucidating, to some extent, the association's own views about what constitutes its wellbeing and how that can be best achieved.³³

In *Green's Case* discussed above,³⁴ neither the process nor the outcomes of the dispute resolution procedure were therapeutic. There was no attempt to mediate the dispute between members of the club and this rapidly escalated into a dispute between an individual member and the association itself. This escalation process and the tendency of an association's management to 'take sides' in disputes between members is a direct, and perhaps inevitable, result of the adversarial paradigm. The process of convening a hearing for the termination of membership and then enduring a hearing in the Supreme Court would naturally involve some degree of stress and trauma for the parties – and the point I am examining here is that this stress and trauma is in addition to that created by the subject matter of the dispute itself (the allegedly abusive behaviour of the applicant).

A therapeutic alternative to the adversarial paradigm would have some genesis in the restorative justice approach. Rather than simply processing the litigating parties according to the usual legislative rules, any external forum for review would have as its goal the restoring of the balance between the parties which allows a harmonious free association to continue (where possible). To some extent this approach is adopted by the Small Claims Tribunal in Queensland, which is convened by a referee (usually a specially trained magistrate) in an informal environment and in which lawyer advocates are excluded unless all parties agree and the Tribunal is satisfied that no party would be at a disadvantage.³⁵

In many associations the only formal dispute resolution procedure within their constitution is probably the right of a member to appeal to a general meeting following a decision to expel the member. If we were to adopt a legislative policy which required associations to adopt some procedure for initially dealing with grievances in a less adversarial manner, this would not be an infringement of the right to associate. It would bolster that right. In the following section I discuss statutory requirements for internal

the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.'

³³ B Arrigo, 'The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime' (2004) 11(1) *Psychiatry, Psychology and Law* 23, 24.

³⁴ [2002] QSC 201. See above n 22 and accompanying text.

³⁵ *Small Claims Tribunal Act 1973* (Qld) s 32(3).

dispute resolution and mediation mechanisms adopted in other jurisdictions which do not always prescribe the method of mediation to be adopted, but specify how mediation and the hearing of grievances is to be carried out if an association has not turned its attention to this matter within its own rules.

III REFORM IN OTHER JURISDICTIONS

A *United Kingdom*

Australian jurisdictions are relatively progressive in comparison to the rest of the common law world when it comes to the choice of corporate personalities open to community organisations – and the legal structure of an organisation will, to some extent, impact on the availability and appropriateness of dispute resolution procedures. In the United Kingdom, for example, most sporting, cultural and community organisations are either incorporated as companies limited by guarantee or as registered charities.³⁶ Until quite recently, not-for-profit organisations in England needed to adopt both these structures and comply with both company law and charities law if the organisation wanted to benefit from limited liability, legal personality and the ability to access even modest amounts of public funding.³⁷ Remedies open to a disgruntled member of a company limited by guarantee are, of course, those provided for by corporations legislation and since a company is fundamentally a commercial entity we would not expect these remedies to be as appropriate for a private community organisation as those provided for in dedicated associations' laws.

Charities in the United Kingdom, which are somewhat more broadly defined than in Australia, will soon be able to incorporate as a body akin to incorporated associations in Australia.³⁸ Disputes between members of these organisations, or between members and the organisation itself are often referred to mediation, but no statutory provisions for internal dispute resolution exist and a common law civil action may be the only other avenue open to a member.³⁹

Clause 32 and sch 6 of the Charities Bill 2005 (UK) creates a new legal entity, the Charitable Incorporated Organisation, which has been created specifically for charities. Virtually all incorporated charities are currently companies limited by guarantee and there are dual reporting requirements for both the Companies House and the Charity Commission. Although this proposed legislation has some resemblance in terms of its substantive provisions to Australian incorporated associations' legislation, it contains no provisions for the resolution of internal disputes. No such incorporation process,

³⁶ As a company limited by guarantee, these organisations would be regulated by the *Companies Act 1985 and 1989* (UK) which contains no provision for the resolution of internal disputes.

³⁷ In Queensland, not-for-profit organisations which are incorporated associations but which do not meet the stringent criteria for registration as a charity can still access significant funding sources via statutory schemes such as the Gambling Community Benefit Fund, established by the *Gaming Machine Act 1991* (Qld) s 315.

³⁸ The Charities Bill 2005 (UK) has passed through the House of Lords and is currently awaiting a second reading in the House of Commons: *Public Bills Before Parliament 2005-06* (2006) The United Kingdom Parliament <http://www.publications.parliament.uk/cgibin/newhtml_hl?DB=semukparl&STEMMER=en&WORDS=chariti%20bill&ALL=charities%20bill&ANY=&PHRASE=&CATEGORIES=&SIMPLE=&SPEAKER=&COLOUR=red&STYLE=s&ANCHOR=muscat_highlighter_first_match&URL=/pa/pabills.htm#muscat_highlighter_first_match> at 9 June 2006.

³⁹ Such as a civil action for breach of trust, breach of contract or breach of director's duties.

however, is available for non-charitable associations, and internal disputes would therefore be resolved pursuant to the limited company's own memorandum and articles of association.

All Australian jurisdictions, in providing for the creation of a dedicated legal structure for associations, separate to that available under company law, are therefore well placed to provide some statutory guidance to internal dispute resolution for these entities. The extent to which this opportunity is taken, however, varies between jurisdictions. Some Australian jurisdictions already take a more therapeutic approach to associations' disputes, although others are even less progressive than Queensland.

B *New South Wales*

The *Associations Incorporation Act 1984* (NSW) provides that the rules of an association must provide for the mechanism for the resolution of disputes between members (in their capacity as members) and between members and the incorporated association.⁴⁰ This then would be the minimal therapeutic requirement we could expect. It represents some requirement that an association attempt to address internal disputes other than simply referring them to the finality of a general meeting.

The Model Rules, set out in sch 1 of the *Associations Incorporation Regulation 1999* (NSW), provide that all disputes are to be referred to a community justice centre for mediation in accordance with the *Community Justice Centres Act 1983* (NSW). This mechanism for the resolution of disputes in the Model Rules would apply where an association's rules do not provide for the matter. In this legislation there is no statutory power to expressly exclude the Model Rules.

This differs significantly from the Queensland legislation. Internal dispute resolution is not a matter which must be provided for within an association's rules. Unsurprisingly therefore, there is no equivalent model rule to that of the New South Wales legislation which prescribes a mediation process. Even if such a model rule existed in the Queensland legislation, there is an express statutory authority to exclude the Model Rules.⁴¹

C *Victoria*

In most salient respects, the *Associations Incorporation Act 1981* (Vic) operates in a similar way to the *Associations Incorporation Act 1984* (NSW). The schedule to the Victorian Act in s 17 requires an association to include a grievance procedure in its rules and there is no provision to exclude the Model Rules.⁴² Model Rule 8 in sch 5 of the *Associations Incorporation Regulation 1998* (Vic) suggests compulsory mediation before progressing to a pursuit of a member's rights according to law.

⁴⁰ *Associations Incorporation Act 1984* (NSW) sch 1 cl 5A.

⁴¹ Although s 47(1) of the *Associations Incorporation Act 1981* (Qld) provides that: 'if a matter is not provided for under an incorporated association's own rules but the matter is provided for under a provision of the Model Rules (the "additional provision"), the association's own rules are taken to include the additional provision', the power to expressly exclude the Model Rules appears in s 47(3) which states that: 'Subsection (1) does not apply to an incorporated association as far as its own rules provide that the subsection does not apply to the association'.

⁴² *Associations Incorporation Act 1981* (Vic) s 21(3).

Interestingly s 14B of the *Associations Incorporation Regulation 1998* (Vic) also prescribes that a member must be allowed to appoint *any person* to act for them in a grievance procedure – and that the rules of natural justice must apply. Although there may well be situations where a member is so traumatised by the content of a dispute, or has some unavoidable disability preventing self-advocacy (such as coming from a non english speaking background), this provision ought to have been drafted more rigidly to either preclude the appearance of professional legal advocates or to make their appearance subject to the agreement of all parties to the dispute. The fact that the early involvement of lawyers in associations' disputes is not often warranted, was the focus of some important obiter in *Green's Case* where White J stated that:⁴³

Mr Green contends that he was entitled to be represented by his solicitor ... I am not persuaded that the council failed to accord Mr Green procedural fairness when it declined to allow him legal representation. Even though there is no statutory prohibition or prohibition in the rules it is not inappropriate to keep such procedures reasonably informal.

It could well be the case, given the nature of community organisations, that a member is significantly disadvantaged in not having the necessary resources to engage counsel in such a dispute – and the subsequent imbalance of power may itself infringe the individual member's right to associate.

It is worth noting that the *Associations Incorporation Regulation 1998* (Vic) also gives jurisdiction to the Magistrates Courts⁴⁴ to declare and enforce the rights and obligations of members under the rules, and these courts may refuse to give any orders sought for reasons similar to those set down in the current Queensland Act with respect to the Supreme Court's jurisdiction.⁴⁵ The Victorian Parliament recognised eight years ago that Supreme Court litigation would be beyond the resources of the vast majority of associations.⁴⁶

D South Australia

In South Australia no statutory model rules are available, and there is only a very basic set of required constitutional content (which does not include provision for the resolution of internal disputes).⁴⁷ The Supreme Court of South Australia has a jurisdiction to amend an association's rules on application by the members.⁴⁸

⁴³ [2002] QSC 201, [28].

⁴⁴ *Associations Incorporation Act 1981* (Vic) s 14A(2).

⁴⁵ The Court may refuse to give an order on the grounds that the application is trivial, or unreasonable, or where the conduct of the appellant has contributed to the costs of the proceedings: *Associations Incorporation Act 1981* (Vic) s 14A(4). See further above n 7 and accompanying text.

⁴⁶ The Minister in her Second Reading Speech for the Associations Incorporation (Amendment) Bill 1997 (Vic) declared: 'In expressing support for the Bill I also point out that the miscellaneous provisions now provide -- among other things, but probably most significantly -- for members of associations to have disputes heard in the Magistrates Court rather than in the Supreme Court, which is an expensive means of enforcing one's rights.' Victoria, *Parliamentary Debates*, Legislative Council, 14 October 1997, 138 (Hon. D A Nardella).

⁴⁷ *Associations Incorporation Act 1985* (SA) s 23A.

⁴⁸ *Associations Incorporation Act 1985* (SA) s 24A.

E *Western Australia*

The *Associations Incorporation Act 1987* (WA) mandates that whilst some matters must be dealt with in an association's rules, internal dispute resolution is not one of these matters.⁴⁹ Although the power to wind up an association is given to the Supreme Court,⁵⁰ there are no statutory natural justice requirements applying to decisions of an association and hence no provision for a court to resolve any internal dispute between the association and its members.⁵¹

F *Tasmania*

Incorporated associations in Tasmania are regulated by the *Associations Incorporation Act 1964* (Tas). There is no express provision within this Act for dispute resolution, but model rules are available and the legislation provides that where an association's rules, submitted as part of its application for incorporation, do not exclude or modify particular provisions of the Model Rules, then those particular Model Rules are deemed to form part of the rules of the association.⁵² Model Rule 35 then provides that internal disputes, meaning disputes between a member of the association and the association itself, are to be determined by arbitration in accordance with the provisions of the *Commercial Arbitration Act 1986* (Tas). This is an interesting compromise between the expense and complexities of a higher court hearing and the informality of a mediation.⁵³ The Model Rules do provide, however, that disputes in relation to the termination of individual membership are to be dealt with by the association's committee, at first instance, and then by the members in general meeting. The arbitration provision is expressly excluded from applying to matters of expulsion.⁵⁴

G *Northern Territory*

The Northern Territory is one of the few jurisdictions to have enacted mandatory natural justice requirements in relation to the resolution of disputes within incorporated associations (either between individual members or between members and the association).⁵⁵ The *Associations Act 2003* (NT) also provides that a member of an association may apply to a local court or to the Supreme Court for an order in relation to conduct (or proposed conduct) of the association which is oppressive, or unfairly

⁴⁹ *Associations Incorporation Act 1987* (WA) sch 1.

⁵⁰ *Associations Incorporation Act 1987* (WA) s 31.

⁵¹ One would presume, therefore, that a member who asserts that the association is bound by the rules of natural justice when adjudicating on the rights of members would need to invoke common law authorities. There is some authority in *Dickason v Edwards* (1910) 10 CLR 243, 255; [1910] VLR 537 that (in the absence of statutory standards) the rules of an association ought to be constructed in a way which is consistent with the rules of natural justice.

⁵² *Associations Incorporation Act 1964* (Tas) s 16. The Model Rules are contained in the *Associations Incorporation (Model Rules) Regulation 1997* (Tas).

⁵³ Arbitration provides, for example, for the appearance of legal representatives by agreement of all parties, or where the subject matter of the dispute involves amounts exceeding A\$20,000, whereas legal representatives are unlikely to be involved in mediations: *Commercial Arbitration Act 1986* (Tas) s 20.

⁵⁴ *Associations Incorporation (Model Rules) Regulation 1997* (Tas) cl 35(1), (2).

⁵⁵ *Associations Act 2003* (NT) s 39 provides that: 'If the committee of an incorporated association exercises a power of adjudication that it has in relation to a dispute between members of the association, or a dispute between itself and members of the association, the rules of natural justice must be observed'.

prejudicial or unfairly discriminatory.⁵⁶ Both courts have similar powers with respect to the orders that can be issued in response to such an application⁵⁷, except that the local court cannot give an order to wind up the association or to appoint a receiver.⁵⁸ There is a requirement that an association's constitution contain a procedure for the settling of disputes between a member and the association⁵⁹ and, interestingly, an express provision for the incorporation of customs and traditions from the ethnic community to which the association's members belong.⁶⁰ Presumably then, it is possible for associations with a predominantly aboriginal membership to take advantage of Indigenous dispute resolution mechanisms. Model rules are available, as in some other jurisdictions, and these provide for grievance and dispute resolution procedures similar to those in the Victorian legislation,⁶¹ but there is no statutory provision which would insert a model rule into an association's own rules if they were silent as to a particular matter.⁶²

H *Australian Capital Territory*

The *Associations Incorporation Act 1991* (ACT) provides that members of an association who are deprived, by a decision of the association's management committee, of a right conferred by the association's rules may make application to the Supreme Court or the Magistrates Court for a remedy.⁶³ As under the Queensland Act, the Model Rules are deemed to apply where the association's own rules are silent as to a matter which is provided for in the Model Rules.⁶⁴ Although neither this Act nor its Regulations make any specific provision for internal dispute resolution, the Model Rules do mandate a process for dealing with the 'disciplining of members'.⁶⁵ This procedure requires that a member who is to be suspended or expelled from the association has a right of appeal to the management committee in regard to this suspension or expulsion, which is to include a right to an oral hearing. This is of interest in that the common law does not recognise any general right to a hearing for members of an association in such disputes.⁶⁶

Under the legislation of the Australian Capital Territory, an association can, of course, avoid the imposition of the right to an oral hearing of a dispute by drafting its rules in that way. As in Queensland,⁶⁷ the statutory natural justice requirements cannot operate to exclude express provisions of an association's rules in relation to dispute resolution –

⁵⁶ *Associations Act 2003* (NT) s 109. Section 109(c) also allows a member to seek orders in circumstances where they allege that the association's rules contain provisions which are 'unfair or unreasonable'.

⁵⁷ *Associations Act 2003* (NT) s 109(f), for example, provides that the court may issue an order requiring a person to do a specific act, while s 109(g) empowers the court to alter the constitution of an association.

⁵⁸ *Associations Act 2003* (NT) s 109(5).

⁵⁹ *Associations Act 2003* (NT) s 21(c).

⁶⁰ *Associations Act 2003* (NT) s 21(3).

⁶¹ *Associations (Model Constitution) Regulations 2004* (NT) cl 56.

⁶² *Associations (Model Constitution) Regulations* (NT) cl 56.

⁶³ *Associations Incorporation Act 1991* (ACT) ss 49, 50.

⁶⁴ *Associations Incorporation Act 1991* (ACT) s 37(1), (2).

⁶⁵ *Associations Incorporation Regulation 1991* (ACT) sch 1, s 9.

⁶⁶ See, eg *Croatia S Sydney Soccer Football Club Ltd v Soccer Australia Ltd* (Unreported, Supreme Court of New South Wales, Einstein J, 23 September 1997).

⁶⁷ *Associations Incorporation Act 1981* (Qld) s 47(3).

and the rules of the association are deemed to be the terms of a contract between each of the members and between the members and the association itself.⁶⁸

IV RECOMMENDED REFORMS FOR QUEENSLAND

A therapeutic paradigm for the resolution of associations' disputes in Queensland would ideally involve each of the following reforms:

A *Removal of the jurisdiction of the Supreme Court to hear disputes*

As we have seen above, in Victoria the jurisdiction to adjudicate disputes externally has been removed from the higher courts to the Magistrates Court. A similar reform here would have the advantage of decentralising the forums (there are far more Magistrates Courts than Supreme Courts in Queensland). It would also involve far less expense for parties to the dispute. All stipendiary magistrates are deemed to be referees of the Small Claims Tribunal⁶⁹ and therefore can be expected to have at least some training and insights into the nature of disputes within community organisations.⁷⁰

However, I believe it would be counter-intuitive to both make the court process more accessible and then to encourage more litigation and less self-reliance by creating a broader jurisdiction for review. If the Magistrate's Court was to be the choice of an alternative forum I would suggest keeping the grounds for a statutory external review reasonably narrow – and to require some form of internal grievance procedure and mediation as a condition precedent to getting a court hearing.

If a Magistrates Court is to gain jurisdiction there will also need to be some thought given as to the rules of procedure and evidence which will apply. If we adopt the legislative position adopted by the Small Claims Tribunal discussed above, then both procedure and evidence would be a matter for negotiation between the parties and the court.⁷¹ This surely has some therapeutic advantage as no party will have complex and adversarial processes imposed upon them.

Another issue requiring attention would be the appellate hierarchy to which any decision of a magistrate sitting in an association's jurisdiction would be subjected. A right of appeal to a higher court, against any review by a magistrate, could ultimately nullify the therapeutic advantage of a hearing in a less formal environment, but to what extent would we need to reconcile this with a need to allow the law of private and domestic tribunals to continue to develop? My own submission would be that in light of the relatively few matters which are litigated in the superior courts of Queensland (only two matters involving an internal dispute of an incorporated association were heard by the Supreme Court in the 2005 calendar year – and none by the Court of

⁶⁸ This is generally the position at common law in Australia (*Dickason v Edwards* (1910) 10 CLR 243, 251-255) and by statute in the Australian Capital Territory (*Associations Incorporation Act 1991* (ACT) s 58).

⁶⁹ *Small Claims Tribunal Act 1973* (Qld) s 5(1).

⁷⁰ *Small Claims Tribunal Act 1973* (Qld) s 5(1).

⁷¹ The *Small Claims Tribunal Act 1973* (Qld) s 32(3) provides, for example, that no party may be legally or professionally represented unless all other parties agree. Section 33(3) displaces the standard rules of evidence and empowers the tribunal to inform itself on any matter in such manner as it thinks fit.

Appeal)⁷², the lack of future legal development would be a small price to pay for the overthrow of the adversarial paradigm.

Another alternative forum for review could be the Commercial and Consumer Tribunal (CCT).⁷³ This tribunal commenced operation in July 2003 to hear matters from various 'empowering Acts'⁷⁴ such as the *Building Act 1975* (Qld), the *Liquor Act 1992* (Qld) and the *Retirement Villages Act 1999* (Qld). This is in many ways the ideal forum for the resolution of associations' disputes as it is already equipped with the sort of jurisdiction and powers which promote a therapeutic hearing. The Tribunal has the power to permit or prohibit legal representation at hearings and the *Commercial and Consumer Tribunal Act 2003* (Qld) is based on the principle that parties should be self-represented whenever possible.⁷⁵ Most matters will involve an initial mandatory mediation, and legal representation, at this stage, is also at the discretion of the presiding Tribunal member and with the consent of the other parties.⁷⁶ An application to commence a hearing is currently A\$212⁷⁷ for matters commencing pursuant to most of the empowering Acts and this puts the forum more realistically within the range of community organisations and their members. The provision for mandatory mediation and case management would go some way towards avoiding the feared increase in litigation which may arise if the jurisdiction was transferred to the Magistrates Court.

One weakness of this forum could be the somewhat centralised location of the facilities. Currently the Tribunal is only physically located in Brisbane and although there is some provision for teleconferencing, and the registry operates an online service, the infrastructure does not really exist for the CCT to convene in anywhere near the number of centres as does the Magistrates Court. For this reason, it would seem to be clearly more equitable, in the interests of access to justice, to vest jurisdiction in the Magistrates Court. It should, however, be noted that a lack of available statistical data kept by the relevant jurisdictions makes it difficult to quantify any increased benefits to associations in those jurisdictions, such as Victoria (discussed above),⁷⁸ where jurisdiction has been transferred to a lower court.⁷⁹

⁷² According to the judgments available on the court's own website at: Queensland Courts <<http://www.courts.qld.gov.au>> at 31 August 2006.

⁷³ According to the Department of Tourism, Fair Trading and Wine Industry Development, '[t]he Commercial and Consumer Tribunal is an independent decision-making body for resolving consumer and industry related disputes and reviewing administrative decision fairly, quickly, economically and informally'. *Commercial and Consumer Tribunal* (2004) Department of Tourism, Fair Trading and Wine Industry Development <<http://www.qbt.qld.gov.au>> at 16 June 2005.

⁷⁴ *Commercial and Consumer Tribunal Act 2003* (Qld) ss 4(1), 8.

⁷⁵ *Commercial and Consumer Tribunal Act 2003* (Qld) s 76(1) provides that a person representing a party (other than an individual) cannot be a lawyer and that an individual must represent himself or herself. Section 76(2) sets out the conditions upon which legal representation may be permitted, including at the direction of the Tribunal itself (s 76(2)(e)).

⁷⁶ *Commercial and Consumer Tribunal Act 2003* (Qld) s 117.

⁷⁷ According to the current scale published by the Tribunal Registry at *Commercial and Consumer Tribunal* (2004) Department of Tourism, Fair Trading and Wine Industry Development <<http://www.qbt.qld.gov.au/Registry/rFees.shtm>> at 16 June 2005.

⁷⁸ See above n 44, and accompanying text.

⁷⁹ Consumer Affairs Victoria, like its counterparts in other jurisdictions, has no statutory responsibilities in relation to internal disputes and so does not keep records of litigated disputes or their outcomes. Similarly, matters dealt with by the State's Magistrates Courts are not reported. There is anecdotal evidence that some associations in Victoria do not believe that the Magistrates Court is the appropriate forum, and a recent review of that State's legislation recommends (in

B *Statutory requirement for internal grievance procedures*

The second strategy we can adopt to assist associations manage disputes is to create some statutory requirement for associations to have meaningful internal processes for resolving grievances. Often what starts as a minor personality clash or a disagreement over a relatively trivial matter can snowball into genuine threats of legal action, defamation suits and attempts by members to have each other expelled from the association. In *Green's Case* discussed earlier,⁸⁰ a dispute over harsh language in the car park of a bowls club rapidly escalated into a Supreme Court hearing about the content of natural justice. Some of these disputes could surely be nipped in the bud if there were a process for addressing grievances that fell short of court action or convening general meetings – but was perceived by the aggrieved party as more credible than simply an appeal hearing to the same committee that made the impugned decision in the first place. In my view the *Associations Incorporation Act 1981* (Qld) ought to require some internal dispute management procedures which must be exhausted before an application could be made to a court or tribunal for an external review.⁸¹ Even if there was such a prescribed process within a Queensland association, there is no statutory requirement for an applicant to exhaust those remedies before they apply to the Supreme Court for a review.

C *Mediation*

If internal procedures fail then the next port of call ought to be external mediation. There is already a free mediation service provided by the Department of Justice and Attorney-General in Queensland, but that is rarely utilised. This would almost certainly change if we were to require mediation before a tribunal or court review. A mediator does not rule for either party or decide the issue for them – but can assist the parties to come to a negotiated settlement and if necessary to formalise the terms of their agreement in a legally binding way. Considering the fairly specialised nature of associations disputes it may be desirable for the Office of Fair Trading (as the body administering the *Associations Incorporations Act 1981* (Qld)) to train or be involved in the provision of mediators – but regardless of who coordinates them, mediators need to be available in all areas of the State. Obviously some disputes, once they leave the association are beyond mediation – but an internal dispute may seem insoluble simply because there has been no independent viewpoint up until that point.⁸²

response) that magistrates be given the option of referring such disputes to mediation or arbitration: *Review of the Associations Incorporation Act 1981 (Vic) Interim Report* (2005) Consumer Affairs Victoria, 28 <[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Consultations_Reviews/\\$file/IAreviewreport.pdf#xml=http://search.justice.vic.gov.au/isysquery/ir14ba2/2/hilite](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Consultations_Reviews/$file/IAreviewreport.pdf#xml=http://search.justice.vic.gov.au/isysquery/ir14ba2/2/hilite)> at 30 June 2006.

⁸⁰ [2002] QSC 201. See above n 22 and accompanying text.

⁸¹ Forbes considers that the traditional reluctance of courts to intervene in the internal disputes of clubs could well have extended to some strict rule of internal exhaustion – but legislatures and courts have declined to create such requirements even where the constitution of an association itself seeks to proscribe legal action until internal remedies have been sought: Forbes, above n 15, 268.

⁸² And of course there must always be some ultimate provision for external adjudication if a party requires it, because as Forbes observes ‘in some quarters the belief persists that a hearing is superfluous in “clear” cases...That is the very idea that natural justice seeks to dispel’: Forbes, above n 15, 90.

V CONCLUSION

We need a shift in focus from adversarial and external dispute resolution process to a model which positively encourages and empowers associations to resolve their disputes internally. Disputes within a voluntary organisation can be a healthy and therapeutic experience if properly managed, and my intention here has not been to suggest that we ought to try and prevent or suppress disputes via legislation or policy.⁸³ Proponents of both restorative justice and therapeutic jurisprudence acknowledge that the therapeutic agenda is not about control. However, if some disputes must be settled by a public tribunal, then that tribunal ought to be informed, as far as possible, by a therapeutic rather than adversarial ethos. This is not a time for incremental changes to associations' law. Major legislative reforms do not happen often in this area. The leading High Court decision dates back more than sixty years.⁸⁴ Opportunities for reform are infrequent, and for that reason this shift in focus needs to be rapid and paradigmatic.

⁸³ See, eg, S Lukes, *Power: A Radical View* (1974) 24, cited in D Carson, 'Therapeutic Jurisprudence and Adversarial Injustice: Questioning Limits' (2003) 4(2) *Western Criminology Review* 124, 127. Here Lukes states: 'is it not the supreme and most insidious exercise of power to prevent people, to whatever degree, from having grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural and unchangeable, or because they value it as divinely ordained and beneficial?'

⁸⁴ *Cameron v Hogan* (1934) 51 CLR 358.