ACTIONS AGAINST VOLUNTARY ASSOCIATIONS AND THE LEGAL SYSTEM

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A PROBLEM IN LEGAL CONCEPTUALISM AND JUDICIAL POLICY

Any person who wishes to bring any legal action against a voluntary association and association not for profit (hereinafter called an association), either in the capacity of member (or non-member), will not find it an easy process. The whole history of litigation involving such associations has been marked with confusion and uncertainty.[1]

While technically non-commercial and private, these associations cover a wide spectrum of human activity which could be described as public, and include trade unions, professional associations of all kinds, secret societies, churches, educational institutions and a great variety of clubs. Any group of persons formally associated together for the promotion of politics, sport, art, science or literature is defined as a voluntary association and/or association not for profit.[2]

In spite of their private legal character the influence such bodies do, and potentially could, exert in our community is extensive. Decisions and action taken by such associations can "vitally affect the fortunes or reputations of those concerned".[3] Their effect is public but they are governed, so far as the law sees fit to govern them at all, by private law. In this article I will canvass cases which deal with claims based on membership of an association (including refusals to grant membership) expulsion from membership and related problems. I do not deal with the wider issues of actions against associations and their committees based on wrongs or breaches of contract, etc., committed by associations, their committees or individual members.

Consider, for example, the following:

(i) *Case A:* C is a member of a political party. He is refused endorsement as a candidate for election and the party expels him. He wishes to challenge this action and claim damages.[4]

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1 R. Baxt, "The Dilemma of the Unincorporated Association" (1973) 47 *A.L.J.* 305.

2 Halsbury, *Laws of England* (4th ed., London, Butterworths, 1974) Vol. 6, 201. *Automobile Proprietary Ltd* v. *Brown* [1955] 1 W.L.R. 573 (C. of A.).

3 B. R. McClintock, "Footballers and their Clubs" (1975) *A.C.L.D.* 142. J. W. Morris, "The Courts and Domestic Tribunals" (1953) 69 *L.Q.R.* 318.

4 *Cameron* v. *Hogan* (1934) 51 C.L.R. 358.

(ii) *Case B:* M is aggrieved because she has been barred from playing in a midweek golf competition. She calls on the court to declare the decision of the club invalid.[5]

(iii) *Case C:* H, a university student, wishes to prevent the student council from dealing with student funds in a particular way. He takes legal action to that end.[6]

(iv) *Case D:* G joins a rugby league football club and wishes to stand for president. A dispute develops. Eventually he wishes to challenge the validity of a meeting of the club and decides to do this through the courts.[7]

(v) *Case E:* F is a trainer of racing dogs under licence issued by the minister, on the recommendation of an organisation which controls the activity of dog-racing throughout the state where F lives and works. As a result of an alleged infringement of a rule of the association, and at a subsequent hearing by a domestic tribunal, his licence is cancelled and he is disqualified for ten years. He challenges the validity of this action in court and claims damages.[8]

(vi) *Case F:* E's trade union membership is terminated. This prevents him working at his trade. He seeks reinstatement and damages from the union.[9] Whilst the trade union case may be one governed by specific legislation, it may depend on the nature of the union and its incorporation (or otherwise) under relevant State or Commonwealth legislation. I am assuming in dealing with these cases that no legislative model operates to govern the particular problem.

In all six cases the plaintiffs had a genuine grievance, potentially capable of solution in the legal process, but considering the present state of the law concerning associations operating in Australia today, they may well be without a remedy.

As the prime concern of lawyers is or should not be "law" or the courts nor, even, the legislature but the people on whom these institutions operate, where a person is hurt, the law's concern should be to provide a remedy.[10] Considerations of judicial economy and political expediency, while relevant in determining the limits of legal process, should not obscure this primary aim.

Further, with the gradual breakdown of many of the security institutions within our society, the legal system will be called upon more and more as an independent respected and functionally adequate institution to provide a forum or escape valve for the dissidents in our society and their

5 *Millar* v. *Smith* [1953] N.Z.L.R. 1049.
6 *Harrison* v. *Hearn* [1972] 1 N.S.W.L.R. 428.
7 *McKinnon* v. *Grogan* [1974] 1 N.S.W.L.R. 295.
8 *Fagan* v. *National Coursing Association of South Australia* (1974) 8 S.A.S.R. 546.
9 *Enderby Town Football Club* v. *Football Association Ltd* [1971] Ch. 591.
10 E. Cahn, "Law in the Consumer Perspective" (1963) 112 *U. Pens. L. Rev.* 1.

energies. It can be argued that the courts will be called upon less and less, with the development of specialist tribunals and other dispute settling devices, to work within their traditional framework as dispute settlement institutions for primarily commercial or financial disputes. The question raised must be—who shall have access to the courts? What matters should they be called upon to adjudicate?

In an attempt to show how successfully and appropriately the legal process fulfils the need of the community it serves, this article looks at the court's use of various legal devices to both control access to its process and regulate the use of legal remedies in relation to disputes concerning voluntary associations. The peculiar mixture of legal conceptualism and judicial policy which is revealed in coming to grips with the problems of associations shows, very clearly, the failure of the courts to understand and respond to the importance of their role as this independent, respected and functionally adequate safeguard in our social system.

LOCUS STANDI—GENERALLY

A good example of this is the way the courts have dealt with the problem of *locus standi* and voluntary associations. The natural system of the common law is that if A and B are private parties and A hurts B, B has standing to get a determination of the legality of A's action. Unfortunately, where associations are concerned the process is not so simple. While the common law provides remedies for slight injuries to the smallest of interests, (the tort of trespass is a good example) it refuses to protect other "non-traditional" interests, usually for policy reasons.

In the field of administrative law where the standing issue has been even more hotly contested in litigation than in the associations area, there has been a gradual increase in the number and kind of people who have standing to sue.[11] The courts in the U.S.A., for example, have over a relatively short period transformed the traditional model of American administrative law. This model had sought to reconcile the claims of government authority and private autonomy by preventing intrusions on what was called private liberty or property unless the legislature had expressly authorised such an intrusion. The courts achieved this, primarily, by eliminating the effect of the requirement of *locus standi* as a barrier to legal process. Now a wide variety of affected interests have the right not only to participate in, but to force the instigation of formal proceedings before the plethora of agencies within the American system. This has been carried out to such an extent that administrative law decisions have virtually created a political process to allow a wide range of affected interests to be represented in the process of administrative decision.

[11] R. B. Stewart, "The Reform of American Administrative Law" (1975) 88 *Harvard L.R.* 1667.

Such an expansion naturally required an expansion of the legal concepts of liberty and property. The traditional question to determine standing—"does the interest asserted by the plaintiff amount to a legal right?"[12] and thus insisting that the plaintiff must be able to show a concurrent right to take private legal action before he could challenge administrative decisions was demonstrably inadequate. There was an obvious need to protect new classes of private interests, or to put it another way, to acknowledge the public character of many activities.

The first moves in this direction came with an application of the "statutorily recognised" interest test.[13] In the *Data Processing* case standing was granted to persons who suffered "injury in fact" by reason of the challenged agency action and who were "arguably within the zone of interests to be protected or regulated under a relevant statute".[14]

Such development in this area of the law prompts one to ask the question as to why *locus standi* should be used as a limiting factor in litigation at all beyond the essential requirement of judicial function i.e. a case and a controversy? The "injury in fact" test of *Data Processing* encompasses aesthetic, conservational and recreational values as well as economic interests but the American courts have not, as yet, embraced Professor Jaffe's "public action" under which a judge would be allowed the discretion to accord standing to any able, willing plaintiff in order to curb illegality.[15]

The great expansion of rights to participate is defended on the basis that it allows a substitute political process, the ultimate aim of which is to re-order government institutions so that access and influence may be had by all. Such developments clearly recognise that if *locus standi* is made too complex or artificial, then barriers to justice are created and the wrong tool is used to accomplish other judicial objectives. In spite of the "costs" of the liberalised approach—chiefly excessive use of resources and delay—the common thread through the fabric of the law of *locus standi* in the public law field should be, and generally is, the answer to the question whether the interest is worthy of protection once established that the plaintiff is sufficiently aggrieved.[16]

Where associations are concerned, the courts have preferred to remain confined to the rigid judicial moulds devised for private law litigation. By a reasoning process which I have called legal conceptualism, judges have attempted to do "justice" in particular cases. As many of the associations which come before the courts have a decidedly public character, like trade unions and sporting associations, private law concepts which embody a rationale quite different from that applied to public disputes, or disputes

[12] L. Jaffe, *Judicial Control of Administrative Action* (Boston, Little, Brown, 1965).
[13] *Data Processing Serv. Orgs.* v. *Camp* 397 U.S. 150 (1970).
[14] Ibid. p. 153.
[15] Jaffe, op. cit. pp. 459-500.
[16] S. Thio, *Locus Standi and Judicial Review* (Singapore Uni. Press, 1971) p. 13.

involving a public interest, are incapable of producing a "fair" result without descending to legal absurdity. For example, *Case F* (supra) represents a situation where there is a public interest in having a person's right to work recognised and protected in appropriate cases. Until recently before a person in this situation could use the legal process he was forced to show either a contractual right (based on some agreement with the union) or a right to union property before he could even come to court to have the substance of his claim heard. A right to work was not then a legally recognised interest capable of legal protection. Slowly in a regrettably piecemeal fashion, such a right has emerged and received tacit recognition.[17] The same kind of development has not, however, emerged to deal with problems of sporting associations. They are still confined to the old private law bases of *locus standi* and jurisdictional limitation. This is in spite of an emerging "public" character and a degree of power exercised by such association which can legitimately be compared to corporate bodies of a commercial character. The law in this area would benefit initially from the development of tests of standing more akin to those operating or being developed in the public law field, because very frequently, the policy factors involved are the same. (See discussion infra p. 111.)

All Australian courts are presently bound by the High Court decision in *Cameron* v. *Hogan*.[18] This is, then, the starting point for any examination of associations and their use of legal process. The decision, applied in its full vigour, would deny a hearing in court of any kind to each of the six plaintiffs above. The case concerned a dispute between the plaintiff (a member of the Victorian State Parliamentary Labor Party) and the Executive Officers of the Party (an association). After refusing to approve, endorse or submit to ballot the plaintiff's nomination as a person seeking selection by the Party as a candidate for the Victorian State election to parliament, the Executive expelled him from the Party. The plaintiff came to court seeking three remedies: a declaration that he was still a member of the association and that his exclusion had been wrongful; an injunction to restrain his exclusion from the association; and damages. He failed on all three counts. He could not show any *locus standi* to invoke the Court's process. In the words of the joint judgment (comprising Rich, Dixon, Evatt and McTiernan JJ.)

> "The organisation is a political machine designed to secure social and political changes. It furnishes its members with no civil right or proprietary interest suitable for protection by injunction. Further, such a case is not one for a declaration of right. The basis of ascertainable and enforceable legal right is lacking."[19]

Earlier in the judgment the court had noted

[17] *Buckley* v. *Tutty* (1971) 125 C.L.R. 353.
[18] (1934) 51 C.L.R. 358.
[19] Ibid. p. 378.

> "Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations, *inter se,* the rules adopted for their governance would not be treated as amounting to an enforceable contract."[20]

The court laid down a legal test to govern access to its process where the litigation concerned an association: the plaintiff must show a proprietary right or a contractual nexus in or with the association before the merits of the case could be considered. Declaring itself bound by the conceptual limits of private law the High Court was able to hide behind a strict legalistic approach to the case before it and avoid a statement of policy about the relation of the legal system and political parties.

LEGAL CONCEPTUALISM AND VOLUNTARY ASSOCIATIONS

In dealing with legal problems Australian courts invariably use a conceptual approach and it is not limited to the threshold question of *locus standi.* They exhibit a true conservatism in their approach to the whole nature and function of the legal process. Consequently, as associations fit uneasily into the conceptual mould, the threshold issue of *locus standi* is a feature of the litigation in this area, and it is accompanied by a whole range of "contractual" and "proprietary" problems often leading to embarrassing results and expensive litigation.[21]

Such associations have no distinct legal personality.[22] A member is neither a partner nor a shareholder.[23] Members are bound to contribute nothing more or less than the subscriptions required by the rules.[24] Even where constituted by statute[25] such bodies lack the element of a commercial character. So, should a person wish to sue such an association, he has an immediate difficulty in showing an existing legal relationship which is required by the courts bound by *Hogan's* case before they will determine the merits of his case. Several alternatives are now open to potential plaintiffs.

(a) *A Proprietary interest*

Once a right of property in the association is shown, the litigant can proceed. Originally this was the only basis on which he could frame his

[20] Ibid. p. 371.
[21] *Peckham* v. *Moore* [1975] 1 N.S.W.L.R. 353.
[22] "Persons are either natural or artificial. The only natural persons are men. The only artificial persons are corporations. Corporations are either aggregate or sole" —Maitland, "The Corporation Sole", *Selected Essays* (1900) p. 73.
[23] *Wise* v. *Perpetual Trustee Co. Ltd* [1903] A.C. 139 (P.C.).
[24] Ibid.
[25] South Australia (*Associations Incorporation Act* 1956). Western Australia (*Associations Incorporation Act* 1895). Tasmania (*Associations Incorporation Act* 1964). A.C.T. (*Associations Incorporation Ordinance* 1953). N.T. (*Associations Incorporation Ordinance* 1963).

case.[26] Such a requirement was used most effectively in the notorious case of *Rigby* v. *Connol*[27] to prevent a trade union member, expelled from his union, from bringing legal action to challenge the decision.

The case was cited with approval in *Cameron* v. *Hogan*[28] yet applied in its full vigour today, the litigant in *Case F* (supra) would have no remedy for his "sentence of economic death"[29]—expulsion from a trade union where such membership is a prerequisite for obtaining employment in a particular trade. As he would, without difficulty, easily use the courts to recover a debt of a few dollars, such a result is anomalous, to say the least. On the other hand, to argue in *Case B* (supra) that a golfer has a proprietary interest in using a golf course, in order to litigate the merits of a case with local interest, is just as absurd. This is not to deny the "justice" of any such case or the appropriateness of the use of the legal process in the latter case.

What conceivable interest in property could a member of an association have? Does it amount to a right to use the club's premises and chattles while a member and an expectation of a share in the proceeds if the club should be dissolved?[30] A licensee (*Case E* supra) could claim that this was a species of property interest.[31]

The exclusion of all litigants in voluntary association disputes who have no property interest can, of course, be explained historically, as a vestige of the limitation on the jurisdiction of the Court of Equity in its power to grant injunctive relief. Most common law jurisdictions have rejected this narrow approach, yet, through *Cameron* v. *Hogan,* it remains entrenched in Australian law because of "the general character of voluntary associations which are likely to be formed without property and without giving their members any civil right of a proprietary nature."[32]

The court fails to come to grips in this statement with the problem of what *is* the general "character" of voluntary associations. It would seem that a legal analysis which concerns itself with the discovery of a property relation as a precondition to adjudication cannot encompass the greater and more complex problem of the nature and importance of the particular association. It is clear when one examines the particular dispute in *Hogan's* case that the High Court would be very loath to become enmeshed in a sticky political fight involving a major political party which

[26] A. C. Holden, "Judicial Control of Voluntary Associations" (1971) 4 *N.Z.U.L.R.* 343.
[27] (1880) 14 Ch. D. 482.
[28] *Cameron* v. *Hogan* (1934) 51 C.L.R. 358.
[29] D. Lloyd, "The Right to Work" (1957) 10 *Current Legal Problems* 36.
[30] As this usually only happens because of financial difficulties, it would be unlikely there would be anything for the members to share. The point is well illustrated in *Re Sick and Funeral Society of St. John's Sunday School* [1973] Ch. 51.
[31] *Fagan* v. *National Coursing Association of South Australia* (1974) 8 S.A.S.R. 546. *Banks* v. *Transport Regulation Board* (1969-1970) 119 C.L.R. 222.
[32] *Cameron* v. *Hogan* (1934) 51 C.L.R. 358, 370.

would receive heavy publicity. A decision on the merits would have been capable of being declared partisan whichever way it went. The use of a legal conceptual tool to implement a now irrelevant judicial policy is unfortunate because it made it necessary for judges to create "legal fiction" to overcome a binding precedent. (An example is *Case B* supra). How much simpler would it be for judges had they only to discard the policy basis of a binding decision without having to pay lip service to a rule of law requiring the establishment of a property relation before they could proceed to the merits of the case.

The association cases involving trade unions provide a good example of this judicial technique. Judges obviously see the need to entertain such cases yet feel bound and are bound to follow *Cameron* v. *Hogan* and find a property interest in the union worthy of protection. A recent N.S.W. decision in *Makin* v. *Gallagher*[33] is a classic example. The case concerned a well-publicised dispute between the N.S.W. Branch of the Australian Building Construction Employees' and Builders Labourers' Federation and the Federal Management Committee of the same body. The N.S.W. Branch took legal action against the Federal Management Committee seeking a declaration that certain resolutions of the Federal Committee were void and an injunction to prevent the committee from acting on them. One of the major issues was, inevitably, the *locus standi* of the plaintiff. The defendants, arguing squarely on the authority of *Cameron* v. *Hogan* said that the plaintiffs must show either a contractual right or a proprietary interest in the association if they were to be entitled to relief of any kind.

Mr Justice Holland found that the plaintiffs had, in fact, sufficient interest in property to support their claim. While the Full High Court in *Cameron* v. *Hogan* insisted on the requirement of rights of a proprietary nature, Holland J. maintained that "the interest does not have to amount to a present legal or beneficial interest in specific ascertainable land, chattels or money".[34] Hogan had relied on his interest in the funds of the Labor Party.[35] The plaintiffs here relied partially on their interest in the property and funds of the federation.[36] The two claims appear indistinguishable but here the judge, relying on the interpretation of *Cameron* v. *Hogan* made by the Supreme Court of Queensland in *Atkinson* v. *Lamont*[37] and *Heale* v. *Phillips*[38] that Hogan's case was not intended to apply to trade unions and relying on dicta in an English decision in *Osborne* v. *Amalgamated Society of Railway Workers*,[39] (the latter case

[33] [1974] 2 N.S.W.L.R. 559.
[34] Ibid. p. 579.
[35] *Hogan's Case* at 368 ff.
[36] *Makin* v. *Gallagher* [1974] 2 N.S.W.L.R. 559, 579.
[37] [1938] Qd.S.R. 33.
[38] [1952] Qd.R. 489.
[39] [1911] 1 Ch. 540.

was not referred to in *Cameron* v. *Hogan*) found sufficient "property interest" to support their claim.

The conclusion of the judge, from a policy point of view, is to be welcomed but his method of distinguishing *Cameron* v. *Hogan* is unconvincing. It would be highly desirable for the courts to openly hold that members of an association with benevolent purposes but whose members do not have beneficial interest in the funds, should carry the same right of legal protection as is presently given to the members who do, in fact, have a beneficial interest in the funds. But until *Cameron* v. *Hogan* is overruled, few judges feel so inclined, as like Mr Justice Holland, they prefer to take the legal conceptual approach and find a legally protected interest which is as slight as the right to share in a distribution of the funds, should the association be wound up, together with the right to receive the benefits which, by the rules of the union, follow from membership. However, these same members have no right to enforce the application of the funds in question to the granting of those benefits. The judge explains away the latter problem as a "defect in remedy" not in terms of having no right.[40]

Voluntary sporting associations face the same problem. In *Fagan* v. *National Coursing Association of S.A. Incorporated*[41] a trainer of racing dogs had had his licence cancelled and he applied to the Supreme Court of South Australia for a declaration that the disqualification was void and was contrary to the rules of natural justice and to the rules of the association. Bright J. clearly held that the plaintiff had no enforceable contract with the defendant (any more than any other licensee has with the grantor of a licence). He also had no remedy in tort (which might subsist if the plaintiff had membership rights in the use and enjoyment of club premises and he were prevented from exercising them by an *ultra vires* expulsion or deregistration). Yet the plaintiff could have a remedy by declaration or injunction where he had a subsisting right of a proprietary nature.

Whether a licence of the kind held by the plaintiff was a species of property or an interest in property thus became the primary question. His Honour came to the conclusion that it was a "right in the nature of a proprietary right"[42] arguing by analogy to the right to work. Loss of capacity to work is akin to deprivation of capacity to work[43] and such a loss is recoverable as a head of damage in an action in tort. He cites *Banks* v. *Transport Regulation Board*[44] as authority for treating such a right as a species of property. The right so "defined" was sufficient to give the court jurisdiction to interfere with a domestic enquiry but, at a later part

[40] *Makin* v. *Gallagher* [1974] 2 N.S.W.L.R. 559, 580.
[41] (1974) 8 S.A.S.R. 546.
[42] Ibid. 562.
[43] (1974) 8 S.A.S.R. 546.
[44] (1969-1970) 119 C.L.R. 222.

of the judgment, he refuses to grant an award of damages because the "mere improper purported expulsion of a member, *not amounting to a breach of property rights . . .*" cannot give rise to a claim for damages (emphasis added).

The real question, of course, is whether the particular injury to the plaintiffs is sufficiently serious, in fact, to warrant judicial intervention. Different considerations will apply depending on the remedy sought. The requirement of natural justice in a hearing before a domestic tribunal of an unincorporated association can be enforced on far slimmer grounds than a right to damages, and this can be properly supported if one examines the interests of the litigants in this particular situation. Ought the members of a sporting association committee be liable for awards of damages in such a case? The "penalty" for a decision in favour of the plaintiff could be much more severe, in pecuniary terms, in a damages action than in the use of the declaratory order. (See discussion of remedies infra.) The legal game of manufacturing a right to sue out of some nebulous or, at worst, fictitious interest in association property[45] hardly established clear guidelines for future litigants.

(b) *A Contractual Right*

An alternative basis used to establish standing and then the substance of the case is to assert a right arising out of contract. It is, at present, the commonest and simplest basis on which the courts interfere in association disputes. An alleged breach of contract is generally required if the plaintiff claims damages against any association.

Associations are generally established on a consensual basis, and, provided that the members contemplate the creation of legal relations,[46] the rules of the association become the terms of an enforceable contract. Supervision of such contracts belongs to the courts. The basic question thus becomes: do members of associations so intend?

In the case of *Hogan* v. *Cameron*[47] at first instance, Gavan Duffy J. came to the conclusion that the members of the political party in question did so intend, but his opinion was firmly rejected by the High Court. Seldom, they said, could the rules of any large association be interpreted as conferring on a member a right to the performance, by a committee, of any particular duty. In adopting rules, the members ought not to be presumed to contemplate the creation of enforceable rights and duties so that every departure "exposes the officer or member concerned to a civil sanction".[48] Thus no plaintiff could be entitled to damages, if he made a claim as a member of the defendant association, in contract.

[45] *Millar* v. *Smith* [1953] N.Z.L.R. 1049.
[46] *Rose and Frank Co.* v. *J.R. Crompton and Bros Ltd* (1923) 2 K.B. 261.
[47] [1934] V.L.R. 88.
[48] *Hogan's Case* at p. 376.

One could only comment, at this stage, that such eminently logical conceptual approaches based on a strict application of the law of contract, make a convenient smoke screen for unspoken judicial policy. Judges who wish to be involved, find an intention to enter legal relations, judges who wish to avoid involvement in public controversy reverse the process.[49]

The fact that the whole contract basis of intervention is riddled with fiction seems to be irrelevant.[50] One example illustrates the point nicely. If an association is unincorporated (say a trade union with 1,000 members) and an intention to enter legal relations is found, then each member has a contract with every other member . . . in this case 499,500. Each time a new member joins then the contracts will undergo a series of implied novations to regulate the contractual relationships involved.

As well as being an inappropriate device for determining standing to sue in association disputes, the impeccable logic of the High Court is reinforced when disputes arise over agreements which exhibit clear intentions to enter legal relations and thus would technically be a contract, but the parties to the agreement are impossible to construct from the proved terms of the agreement without coming to a conclusion which is absurd. It is legally possible for persons combining together as an association to enter into legal relations with other people (as opposed to the situation in *Hogan's* case where the contract was alleged to be with the members *inter se*). However, if any person who does so attempts to sue such an association he finds that it is practically impossible.[51] If the agreement purports to create continuing rights and obligations like a tenancy agreement or an employment contract, as opposed to a single transaction like a sale, then the problems are even more severe. With whom does the plaintiff in such an action contract? With all the members of the club? When the membership is a fluctuating one this produces a result which has been described as "too fantastic to warrant serious consideration".[52] It would mean that each time a member resigned or a new member were elected then there would be an implied novation of the agreement.

Such a result would seem to be inconsistent with the terms of membership which are usually that no member of a club as such is liable to pay to the funds of the club anything other than the subscription fee for as long as he is a member. Does he contract with the committee of the club or association? In agreements requiring continuing obligations it is difficult to believe that these persons intended to be so bound. It would involve them making themselves personally liable for the performance of

[49] P. S. Atiyah, *An Introduction to the Law of Contract* (2nd ed., Oxford, Clarendon Press, 1971) Ch. I.
[50] *Enderby Town Football Club* v. *Football Association Ltd* [1971] Ch. 591.
[51] *Peckham* v. *Moore* [1975] 1 N.S.W.L.R. 353.
[52] *Freeman* v. *McManus* [1958] V.R. 15, 21; *Banfield* v. *Wells-Eicke* [1970] V.R. 481; *Carlton Cricket and Social Club Ltd* v. *Joseph* [1970] V.R. 487.

those obligations over the years. It might be otherwise if the transaction were a single act like the pledge of credit to acquire goods.[53]

The absurdity of such an approach is well illustrated in the recent N.S.W. Court of Appeal decision of *Peckham* v. *Moore*.[54] Here a footballer sued, at first instance, his "employing" sporting club for workers' compensation. The defence argued that the purported agreement on which the case was based could give rise to no legal relations at all and thus the plaintiff had no standing to sue. The question became; with whom did Peckham contract? It was agreed that should the answer be "the members of the club" then the legal result was absurd. The same conclusion had been reached in a series of prior cases.[55] Such a diffuse and fluctuating body[56] could hardly have been the intended party or parties to the contract, said Hutley J.A. in spite of the fact that it was clearly established in evidence that Peckham did intend to do just that. His mistake was in not knowing that this club was not in law a legal person capable, without complications, of so contracting. The judges were driven to adopt a reasoning not dependent wholly on a logical approach to the law of contract.[57] They found he had contracted with the committee of the club because, though unspoken in the judgment, therein lay his only hope of remedy.

The law of contract, then, is a difficult conceptual mould into which to fit the legal problems of associations. Courts, without rejecting its basis, adapt contractual principles to fit the actual requirements of particular plaintiffs. They avoid any procedural problems of a person suing himself (if he is a member of the club then he must be liable for, say, his own wrongful expulsion) by finding "an intention to enter legal relations with a committee or managing body".[58] They permit the recovery of damages for injury to reputation and punitive damages though these are not normally part of damages in contract. They do not allow that the courts are capable of reviewing every single clause of the "agreement" on which the contract is based by implying terms covering "exhaustion of remedies"[59] and the application of the "good faith" principle[60] an approach not usual in other kinds of contractual interpretation. In spite of this, only rarely will judges see the contractual basis as a fiction designed to give the court jurisdiction[61] and even more rarely criticise such a fictional basis as a heritage of a "by-gone age" when the common

[53] *Carlton Cricket and Social Club* v. *Joseph* [1970] V.R. 487, 499.
[54] [1975] 1 N.S.W.L.R. 353.
[55] J. F. Keeler, "Contractual Actions for Damages against Unincorporated Associations" (1971) 34 *M.L.R.* 615.
[56] *Peckham* v. *Moore* [1975] 1 N.S.W.L.R. 353, 357.
[57] Ibid. p. 370.
[58] Ibid. pp. 369-370.
[59] *Baker* v. *Jones* [1954] 2 All E.R. 553.
[60] *Lee* v. *Showman's Guild of Great Britain* [1952] 2 Q.B. 329.
[61] *Enderby Town Football Club* v. *Football Association Ltd* [1971] Ch. 591.

law was more rigid and formalistic . . . and less mature and well adapted to meet the changing needs of time.[62]

It is clear that by basing the plaintiff's *locus standi* in contract, the courts are driven to reconcile two competing goals. On the one hand they do not, for policy reasons, wish to be made courts of appeal from decisions of domestic tribunals[63] or intervene in any way which would destroy the desired autonomy of associations, yet they wish to limit the power of such associations to make any private arrangements they care to and so deprive the courts of any right to determine the legal questions involved.[64] Both these goals involve complicated questions of policy which have to be faced by the courts.

An examination of a series of decisions involving sporting associations and domestic tribunals illustrates the point. Most sporting associations of any size e.g. racing and football associations, have as part of their constitution and rules procedures to deal with licensing and other matters, particularly disciplinary matters. Usually any enquiry takes place before a domestic tribunal of some kind. Should a person be the subject of one of these enquiries, he may, if dissatisfied, wish to have the matter adjudicated in court on the basis of breach of natural justice. Can he do so?

He has two legal hurdles to jump. First, his standing to sue must be established and then the substance of his claim. If the plaintiff is lucky the courts will simply imply the fiction that the basis of the court's intervention is contract, whether it be between the members *inter se* or an agreement between a non-member and the association.

In *Trivett* v. *Nivison*[65] Rath J. said

> "As . . . the association and its committee have no statutory basis whatsoever, in so far as they are required in their dealings with other persons, to apply the principles of natural justice, the only juristic basis is to be found in contract. The basis in contract is recognised in cases dealing with the discipline of a member by a voluntary organisation to which he belongs: see, for example *Australian Workers Union* v. *Bowen (No. 2)* [(1948) 77 C.L.R. 601 at p. 628] where Dixon J., as he then was, said: 'It is important to keep steadily in mind when we are dealing with a domestic forum acting under rules resting upon a consensual basis.' Lord Denning has said that it is a fiction created by lawyers so as to give the courts jurisdiction to treat the rules of such a body as a contract: *Enderby Town Football Club Ltd* v. *Football Association Ltd* [[1971] Ch. 591, at p. 606]. But he also said that such rules are a contract in legal theory. The same classification in legal theory must . . . be found in a case such as the present where the relationship involved

[62] *Nagle* v. *Fielden* [1966] 2 Q.B. 633, 653 per Salmon L.J.
[63] *Lee* v. *Showman's Guild of Great Britain* [1952] 2 Q.B. 329, 341.
[64] Ibid. p. 342.
[65] [1976] 1 N.S.W.L.R. 312.

> is not that of a club and its members, but that of a club or rather association of clubs to a non-member."[66]

But Rath J. did not go on to quote the further remarks of Denning L.J.

> "Although the jurisdiction of a domestic tribunal is founded on contract express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy."[67]

When the same argument was made in *Beale* v. *S.A. Trotting League* Napier C.J. stated

> "With all respect, I am quite unable to follow this reasoning. It seems to me that the 'S.A. Rules of Trotting' are not promulgated as the terms of a contract, but as a code for the regulation and control of the sport or business of trotting. It seems to me that they are no more a contract than are the by-laws of a municipal corporation."[68]

In *Fagan* v. *National Coursing Association of S.A.*[69] Bright J. refused to accept the kind of classification so easily made by Rath J. (supra) that the plaintiff as a non-member complaining of the cancellation of his licence by a sporting association had in "legal theory" a contract with the association "any more than any other licencee has with the grantor of the licence". In strict legal theory, it is submitted, Bright J. is correct. No one in the position of the plaintiff could in any sense enforce the rules of this association or the behaviour of its officials. How then could he be described as a contractee?

Bright J. eventually came to the conclusion that "the court has the power to interfere with a domestic inquiry, irrespective of contract or property right, at least where it is alleged that a statutorily recognised body has, in the course of the inquiry, acted in breach of the rules of natural justice and has, in consequence of the inquiry, taken away the licence which the plaintiff requires in order to earn his living in his chosen way".[70]

One might comment that the result is the same in each of the cases cited, jurisdiction to control the proceedings of the domestic tribunal was found at least in so far as the need to apply the principle of natural justice is concerned. But the use of the legal concepts of contract and property, if strictly applied, could put barriers in the way of litigants in other association disputes. Surely if the rules are a contract they should be able to be constructed to exclude expressly the requirements of natural justice in domestic hearings? Denning L.J. denies this right on the grounds of "public policy" (supra). It is not a public policy which is applied in all kinds of contracts.

[66] Ibid.
[67] *Enderby's Case* p. 595.
[68] [1963] S.A.S.R. 209, 231.
[69] (1974) 8 S.A.S.R. 546.
[70] Ibid. p. 561.

The result of using a legal fiction and then creating exceptions to its application gives litigants in association disputes the worst of both worlds. They must claim a contract or proprietary right to have the substance of their claim examined but the general rules of contract law do not then apparently apply because they are "inappropriate". There would be many enquiries of domestic tribunals which, because of their administrative character, would not in the ordinary event, be subject to the rules of natural justice. How can these be excluded if the right to intervene is an implied term in a contract? The issue becomes, of course, when will the term be implied which is a clear policy decision having no bearing whatever on the rules of contract and/or implied terms.

As one learned commentator has said: with each new reported case bearing on the powers of trade unions and other associations to inflict economic ruin on those under their control the hesitation of the court on the question of their control by legal process is becoming more apparent. The need is for flexible principles capable of being applied and adapted to novel conditions the scope for future development would seem to be limited so long as the jurisdiction of the court remains tied to a thoroughly artificial nexus of contract.[71]

(c) *Interests other than contractual or proprietary rights*

In *Lee* v. *Showman's Guild of Great Britain*[72] it was suggested that though the rights and reciprocal duties of members of voluntary associations are dependent on either property rights or contractual rights "in theory", the courts must always be prepared to intervene to protect the "right to work".[73] The need for this additional legal basis is quite evident where there is clearly no contractual relationship on which the plaintiff can rely to establish standing to sue. Such a case is *Nagle* v. *Fielden*.[74] Here the plaintiff was aggrieved by the defendant's refusal to give her a licence i.e. she was claiming the *right* to enter contractual relations with the defendant. She was successful because "[j]ust as the courts will intervene to protect his rights of property, they will also intervene to protect his right to work".[75] This opinion was expressed by two of the judges in the Court of Appeal and it has been accepted by the High Court in *Buckley* v. *Tutty*.[76] In this case they avoided the unwelcome consequences of an application of *Cameron* v. *Hogan* by basing their decision on the existence of a non-contractual "restraint of trade" doctrine and declined to require that the plaintiff show a contractual or proprietary interest in order to seek the remedies of declaration or injunction. The basis of the "right to work" is established in Australia at least for these remedies. It is, of

[71] See generally, D. Lloyd op. cit.
[72] [1952] 2 Q.B. 329.
[73] Ibid. at p. 343 and p. 347.
[74] [1966] 2 Q.B. 633.
[75] Ibid. p. 646, per Lord Denning M.R.
[76] (1972) 46 A.L.J.R. 23.

course, to be hoped that in future cases the decision will not be restricted to the restraint of trade context, and that "right to work" will be given a liberal interpretation. In a recent case in N.S.W. concerning a professional punter who was "warned off" the racing courses controlled by the N.S.W. Trotting Club Limited (a company limited by guarantee)[77] the principal argument of the plaintiff was that his exclusion was an infringement of his right to work. The contrary argument for the defendant was that the resolution excluding the plaintiff was no more than the exercise by a proprietor of land of his rights as such, which they submitted, could not be cut down or subjected to a rule requiring the observance of natural justice in relation to them unless the plaintiff could be regarded as having an equitable interest in the plaintiff's land.[78] This case is presently on appeal but if this reasoning were confirmed it would seriously limit the scope and purpose of this new legal right. The case, however, does nothing to solve the threshold problems of other plaintiffs where the "right to work" is not in issue.

If one views the problem of voluntary associations as a private law problem then the approach of the High Court in *Cameron* v. *Hogan* is internally consistent. The common law system has developed a comprehensive system of rights, duties and remedies which are based on legal recognition of interests which the law will protect in particular ways. If one accepts this limitation to the legal process then the function of the judges will be to examine the remedy sought by the particular plaintiff, apply the criteria appropriate to determine the required standing for that particular remedy and then, if the threshold is passed, to determine the case on the merits. Rights commonly can arise in tort, in contract, because of an interest in property and under a statute, and as a result of an equitable obligation or interest. They are a precondition of a cause of action in the courts. It is a cliche to state that there can be no right without a remedy and the converse is even more obvious, there is certainly no remedy without a right which has been clearly recognised by the courts. As the foregoing has implied, most legal rights are a byproduct of a legal relation which creates mutual obligations. Sometimes such relationships are consensual as in the case of contract, others are implied as in tort. With an armoury of discernible rights, duties, obligations and remedies the particular judge can be a technician. He merely fits the plaintiff's problem into a predetermined category and the result flows from a process of reasoning within the confines of the system chosen. The judge does not see his primary function as a dispenser of "just results" but as a person who can expertly apply the established law to reach conclusions and settle disputes. He has a discretion only when two competing rules are made available to him. He can take either a "broad" or a "narrow" approach if the precedents which bind him so allow. Beyond

[77] *Forbes* v. *New South Wales Trotting Club Ltd* (1977) Waddell J. (unreported).
[78] Ibid.

this theoretically he can do nothing without the intervention of the legislature.

This was the approach of the High Court in *Cameron* v. *Hogan*. The logic of the argument of the majority judgment is impeccable. The contractual basis of voluntary associations is riddled with fictions and absurdities. This particular legal relation just does not "fit" the factual arrangement which one describes as an "unincorporated association". Whether the dispute which comes before the court is between a member of the association and the association itself, or a person outside the association suing the association for whatever remedy, it is hard to apply strictly the principles of contract law and allow a remedy of any kind to the plaintiff which will be appropriate or "just". The same comment can be made about other kinds of legal relation which might be relied on.

> "The difficulties the plaintiffs have encountered are procedural in the first instance and are difficulties notoriously associated with members of clubs and other unincorporated associations entering into relations intended to be of a legal nature with other persons or bodies. The undesirability of bodies handling large funds and carrying out transactions in which the public have an interest remaining in an unincorporated form to which the law accords no recognition must be manifest."[79]

These are the words of a judge at the conclusion of a complex judgment where he had had to grapple once again with the difficulty of placing the problems of unincorporated associations within the framework of private law. He, once again, created legal fiction to achieve a practical result.

Relief can only be possible within this context if the judges are able to consider creating new rights and legal relations to allow plaintiffs reasonable access to the courts. Such a development could follow the pattern of development in the administrative field. It would need an acceptance of the fact that voluntary associations are not insignificant non-legal entities, but large organisations capable of affecting the social system in which we live. The legal concepts of private law and the remedies it offers may, however, be inappropriate to deal with the problems of associations. The decision in *Peckham* v. *Moore*[80] which, after several abortive attempts by Peckham, resulted in a successful claim by a footballer for worker's compensation from a sporting association, eventually led to a political reaction to the decision. To classify all sporting associations as employers was regarded by the associations as an unmanageable burden for which they had "few resources". To this point, although running large businesses (one would not need great skill to estimate the gate receipts alone on weekend football games, not to mention the revenue from advertising etc.) sporting associations were able to avoid the responsibilities of employers by hiding behind the shelter

[79] *Carlton Cricket and Football Social Club* v. *Joseph* [1970] V.R. 487, 501.
[80] [1975] 1 N.S.W.L.R. 353.

of the association label. As non-entities they had no clear obligation to insure against injury to their players and Peckham had the inconvenience and potential cost of running three legal actions to have determined finally some liability in the club concerned for the injuries he had suffered. Ironically had the Court of Appeal in N.S.W. followed strict legal logic in coming to the decision they did he would have been unsuccessful (see the discussion supra) and the trouble he faced together with the unconvincing reasoning of the court are a clear indication that the strict application of the principles of the common law to the peculiar problems of associations gives unsatisfactory results.

In *McKinnon* v. *Grogan*[81] Wootten J. declined to use the legal conceptual approach. He put aside *Cameron* v. *Hogan* as a case which was out of date and preferred to base his decision on the standing question squarely on policy grounds and found that the right to take part in the management of a club was a sufficient interest to allow consideration of the plaintiff's case by the Supreme Court. The implications of such an approach will be discussed infra.

Apart from this decision, no judge in an Australian jurisdiction has openly rejected the criteria set down in *Cameron* v. *Hogan* for the courts interference in association disputes. The results have been unfortunate, depending, for most part on the remedy sought and the inventiveness of judges in avoiding the unpalatable consequences of the *Hogan* decision.

ASSOCIATION DISPUTES AND THE REMEDY SOUGHT

Do *locus standi* requirements (in association disputes) vary according to the remedy sought? This is one of the difficulties of universal concern in administrative law. In that jurisdiction it is largely the product of separate historical development. So, with no other compelling reason for its continuation, proposals that standing be the same whatever form of relief is claimed have been made by a number of law reform committees.[82] Similar problems are found in association disputes.

(a) *Damages*

Generally, damages are only available for breach of contract or as a result of a tortious act. This makes it difficult for a litigant to recover damages against an association. If the plaintiff alleges a breach of contract he must face the possibility that the court will construe the relationship between himself and the association as one not intended to create legal rights and responsibilities. *Abbott* v. *Sullivan*[83] is a case in point. Here

[81] [1974] 1 N.S.W.L.R. 295.

[82] English Law Commission Published Working Paper No. 40 *Remedies in Administrative Law* (1971) p. 95. Scottish Law Commission Memorandum No. 14. *Remedies in Administrative Law* (1971) pp. 49-50. It should be noted, however, that little attention was devoted to the *locus standi* problem in the Report of the Kerr Committee—See para. 254.

[83] [1952] 1 K.B. 189.

the plaintiff brought an action against an association for a declaration that they had made *ultra vires* resolutions which had resulted in his losing his employment and further, he sought damages for breach of a negative stipulation in the contract between himself and the association, and damages against one of the defendants for the tort of procuring the breach of contract alleged.

Obviously, both claims rested on his establishing the contractual nexus between himself and the association. At first instance, it was held that he could not claim damages for the *ultra vires* act of the association and this point was confirmed on appeal because the judge "could not see any legal peg on which to hang an award of damages".[84] Lord Denning was quite prepared to allow the plaintiff to recover damages because "[a] wrongful dismissal . . . of a member from his livelihood is just as damaging, indeed more damaging, than a wrongful dismissal by an employer of his servant".[85] The other two judges declined to adopt his approach. As no express contractual term could be found to cover the claim for breach, none could "properly" be implied, and the plaintiff failed. Four years later in *Bonsor* v. *Musicians Union*[86] the majority supported the view that an action for damages based on contract would lie in respect of wrongful expulsion from an association.

One would like to see statements (albeit obiter) like "the membership of a club may be a matter of temporal advantage, and the deprivation of it may be an injury or damage of which the law will take cognisance",[87] more widely adopted or specifically explained to give some general causes of action in tort. To date, this has not been attempted by the judiciary.

In *Fagan's* case[88] the plaintiff, a trainer who had been disqualified for ten years, sought, as well as injunctive relief, an award of damages against the association. Bright J. acknowledged that there were no reported authorities on the question of whether an improper expulsion or deregistration which did not amount to a breach of property rights or breach of contract could give rise to a claim for damages. He appears to take the negative view that the remedy is not available in such a case. The decision could be explained on the basis that there was no damage in fact. Yet Bright J. says "I see no right to damages here".[89]

The right to work, now "fully recognised by law"[90] is a useful basis on which to pursue a damages action, but such an action is, of necessity, limited to the class of case where the plaintiff's livelihood is in jeopardy.

Other accepted torts such as conspiracy, defamation, interference with contract,[91] intimidation or even trespass could be available to plaintiffs. It

[84] Ibid. p. 200.
[85] Ibid. p. 205.
[86] [1956] A.C. 104; [1955] 3 All E.R. 518 (H.L.).
[87] *Chamberlain* v. *Boyd* (1883) 11 Q.B.D. 407, 415 (C.A.), per Bowen L.J.
[88] (1974) 8 S.A.S.R. 546.
[89] Ibid. p. 563.
[90] *Edwards* v. *Society of Graphical and Allied Trades* [1971] Ch. 354, 376.
[91] *Carlton Cricket and Football Social Club* v. *Joseph* [1970] V.R. 487.

has even been suggested that a tort remedy more widely based like "intentional injury to another without just cause and excuse"[92] could be in the process of evolution. Others have argued that a person might have a status which the law could recognise[93] but as yet this, too, has not been fully established as the legal basis for a claim in damages.

(b) *Injunction*

The traditional legal conceptual view is that the court will not entertain proceedings against an association for the remedy of injunction unless the plaintiff could show a proprietary right or contractual basis for his relief.[94] The inadequacy of the former requirement is well illustrated in Australian law.[95]

The obvious injustice of a strict application of *Cameron* v. *Hogan*[96] to prevent injunctive relief in association cases has long been recognised. In *Harrison* v. *Hearn*[97] Helsham J. was asked to give injunctive relief to a group of students who were challenging actions taken by the Student Council of Macquarie University. The students could show no right of a proprietary or contractual nature so as to come within the strict ratio of *Cameron* v. *Hogan* and thus establish their standing. Yet the judge saw clearly that to dismiss the case on such a ground, attractive as it might be,[98] would mean that no one could prevent, by legal means, an abuse of power by the student council. He thus found, as a fact, that the student body had ultimate control of the council through its power to amend the constitution after referendum. He then decided, as a matter of law, that this "interest" was sufficient to provide *locus standi* on which to grant injunction, because he could see no reason why membership of such association should not have the same legal protection as would be given in the case of an association where the members had full beneficial interest in the funds.[99]

One must, of course, fully approve such an approach even if it comes, at times, close to overruling, by judges at first instance, of a decision of

92 *Mogul Steamship Co. Ltd* v. *McGregor Gow & Co.* (1889) 23 Q.B.D. 598, 612 per Bowen L.J. suggests such a remedy, but Fleming *The Law of Torts* p. 35 suggests that one could not claim the existence of a "prima facie tort doctrine for intended injury within our legal system" (and he cites *Abbott* v. *Sullivan* [1952] 1 K.B. 189 as an example), though it exists in American jurisdictions (*Advance Music Corp.* v. *American Tobacco Co.* (1946) 70 N.E. 2d 401.

93 *Forbes* v. *Eden* (1867) L.R. 1 Sc. & D. 568, 576, per Lord Chelmsford.

94 *Lee* v. *Showman's Guild of Great Britain* [1952] 2 Q.B. 329, 341 and *Hogan's* case applying the rule in *Rigby* v. *Connol* (1880) 14 Ch. D. 482, 487 which took the even stricter view that the whole equitable jurisdiction was based on a right of property.

95 R. P. Meagher, W. M. C. Gummow and J. R. F. Lehane, *Equity, Doctrines and Remedies* (Sydney, Butterworths, 1975) and cases cited at 487.

96 (1934) 51 C.L.R. 358.

97 [1972] 1 N.S.W.L.R. 428.

98 Ibid. p. 438.

99 Here Helsham J. directly applied the dictum of Fletcher Moulton L.J. in *Osborne* v. *Amalgamated Society of Railway Servants* [1911] 1 Ch. 540, 562, and cited Street J. in *Flynn* v. *University of Sydney* [1971] 1 N.S.W.L.R. 857 as authority.

the full court of the High Court of Australia even one so out of touch with modern circumstances.[100] Unfortunately, as stated previously judges who perceive this inadequacy rarely criticise the decision on the basis of policy but merely avoid applying it by widening absurdly the notion of "proprietary interest" where they felt intervention was warranted and narrowing it to the limits of *Cameron* v. *Hogan* when they wished to exclude particular plaintiffs.[101] This has led, in the opinion of a leading text, to "the situation where injunctions were granted in circumstances where one might have thought there was least necessity for them, e.g. social clubs[102] and not where they were most needed, e.g. employers' associations and trade unions".[103]

The other legal conceptual basis on which to found *locus standi* to seek an injunction against a voluntary association is a right based in contract. In *Lee* v. *Showman's Guild of Great Britain*[104] the English Court of Appeal established conclusively that the injunctive remedy would lie where the plaintiff could establish a contract between himself and the association and allege, in fact, breach of some negative contractual stipulation of the following kind: that the association would not purport to expel the member otherwise than for sufficient reason, in accordance with the rules of the association, *bona fide* and in accordance with the rules of natural justice. Four categories of case were set out where the court would agree to interfere by injunction to restrain wrongful expulsion from a professional association or trade union

(i) When action has been taken which is contrary to natural justice.[105]

(ii) When a person, who has not condoned a departure from the rules, has been acted against contrary to the rules of the club.

(iii) When the *bona fides* of the decision are in doubt.[106]

(iv) When the rules of the association have been misapplied albeit honestly.[107]

(c) *The declaratory judgment or order*

Where no damages are sought, a declaratory order is a convenient remedy for association disputes. In all six cases (supra) the plaintiff

[100] *McKinnon* v. *Grogan* [1974] 1 N.S.W.L.R. 28.
[101] Ibid.
[102] *Meagher, Gummow and Lehane* op. cit. p. 488 for various instances of such an approach.
[103] *Rigby* v. *Connol* (1880) 14 Ch. D. 482, 487.
[104] [1952] 2 Q.B. 329. This case effectively denies the narrow basis of *Rigby* v. *Connol* (supra) which was the basis on which *Cameron* v. *Hogan* was decided. Thus one cannot really claim, in strict legal theory, that *Lee's* case states the law applicable in Australia at the present moment in relation to this particular remedy and its availability.
[105] This ground has produced the majority of cases concerning control of the courts by the legal process.
[106] *Dawkins* v. *Antrobus* (1881) 17 Ch. D. 615, 630 establishes (a), (b) and (c).
[107] This additional category was added in *Lee* v. *Showman's Guild of Great Britain* [1952] 2 Q.B. 329.

asked for specific relief in the form of a declaration of the plaintiff's rights, in addition to other remedies.

As a remedy *sui generis*[108] it avoids the *locus standi* problems of remedies like the injunction.[109] In fact, its greatest merit is its flexibility.[110] As all Supreme Courts of the Australian States and the High Court have the statutory power to make "binding declarations of right whether or not any consequential relief is or could be claimed",[111] it is generally available to associations. Used creatively, by judges, this remedy potentially solves many of the threshold problems of this area of the law.

"In my opinion", said Lord Sterndale M.R. in *Hanson* v. *Radcliffe* U.D.C.,[112] ". . . the power of the court to make a declaration where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion".

Such an approach was adopted enthusiastically in *Sutherland Shire Council* v. *Leyendekkers*[113] by Street J. "[T]he power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration".[114]

In the same case his Honour saw the immense value of the removal of irrelevant legal bars to litigants in such an approach. "An almost unlimited variety of disputes has thus been resolved, in many of which there was either no occasion to grant, or no jurisdiction to grant, effective consequential or substantive relief."[115] His Honour then cites voluntary association disputes to illustrate his point.

His Honour's liberal and creative approach is well illustrated in *Field* v. *N.S.W. Greyhound Breeders, Owners and Trainers Association Ltd.*[116] Here the plaintiff was a bookmaker who was not a member of the association or of the club concerned and became involved in enquiries concerning the running of greyhounds. He was subsequently disqualified for life by a domestic tribunal of the club. Street J. had no difficulty in finding that this plaintiff, with no recognisable legal right to invoke the jurisdiction of the court, had *locus standi* for the purposes of a declaration

108 *Chapman* v. *Michaelson* [1909] 1 Ch. 238, 243.
109 Thio, op. cit., argues that there are no differences, at least in public or administrative law in *locus standi* requirements for injunction and declaration. In some cases however, a difference appears in *locus standi* requirements for these remedies where voluntary associations are concerned.
110 *Field* v. *N.S.W. Greyhound Breeders, Owners & Trainers Association Ltd* [1972] 2 N.S.W.L.R. 948.
111 Queensland *R.S.C.* Order 37, r. 5. N.S.W. s. 75 *Supreme Court Act* 1972. South Australia *R.S.C.* Order 25, r. 5. Tasmania *R.S.C.* Order 28, r. 5. Western Australia *R.S.C.* Order 18, r. 16. Victoria *R.S.C.* Order 25, r. 5.
112 [1922] 2 Ch. 490, 507.
113 [1970] 1 N.S.W.R. 356.
114 Ibid. pp. 361-362.
115 Ibid. p. 363.
116 [1972] 2 N.S.W.L.R. 948.

because "[t]he exercise of the defendant Association of its discliplinary powers against the plaintiff inevitably exposes him to prejudice in that it can result . . . in his being excluded from participating for at least some time hereafter in his activity of bookmaking".[116a] Such an interest was real and direct enough to warrant an exercise of the jurisdiction of the court. His Honour made this statement without supporting authority but it is clearly in line with his approach to this remedy first exemplified in the *Leyendekkers* case.[117]

The same approach was exhibited in *Case C* (supra),[118] where a university student wished to prevent the students' council from dealing with students funds in a particular way. He sought both a declaration that resolutions of the student council were *ultra vires* and an injunction to restrain their implementation. The former remedy was given without discussion, the latter, discussed supra, proved more doubtful.

McKinnon v. *Grogan*[119] is a further illustration. Here a club member (*Case D* supra) wished to stand for president and after an internal dispute, attempted to challenge in court the validity of a meeting of the club. Once again the case of *Cameron* v. *Hogan* and its *locus standi* requirement were cited in argument in an attempt to deny jurisdiction to grant a declaration. Wootten J. disregarded the legal conceptual bases of this decision of the High Court. He felt that the rights and opportunities of members to participate in club activities and management were "worthy" of legal protection,[120] and he was prepared to give declaratory relief.

This statement of what is sufficient "interest" to have *locus standi* for a declaration is significant in that it was made under s. 75 *Supreme Court Act* 1970 (N.S.W.), which is in the same terms as Order 25, Rule 5 of the English Act.[121] This section, operating in a judicature context, is in quite different terms to s. 10 of the *Equity Act* (N.S.W.) which formerly provided the statutory power in N.S.W. to grant declarations until the judicature system was adopted in that State in 1972.

Since s. 75 of the *Supreme Court Act* has been in operation another notable decision by the N.S.W. Court of Appeal in *Parramatta City Council* v. *Sandell*[122] has taken a restrictive view of the jurisdictional limitations on the power of courts to grant a declaration—"Section 75 of the *Supreme Court Act* is not in the wide terms of s. 10 of the *Equity Act,* 1901. It does not permit mere declarations as to "interests".[123] This

[116a] Ibid. p. 950.
[117] [1970] 1 N.S.W.R. 356.
[118] *Harrison* v. *Hearn* [1972] 1 N.S.W.L.R. 428.
[119] [1974] 1 N.S.W.L.R. 295.
[120] Ibid. p. 298.
[121] *R.S.C.* Order 25, r. 5—"The Court is authorised to make binding declarations of right whether any consequential relief is or could be claimed."
[122] [1973] 1 N.S.W.L.R. 151.
[123] Ibid. p. 173.

distinction between a right and an interest was explained more fully by Hutley J.A. in *Mutton* v. *Ku-ring-gai M.C.*[124]—"The word [interest] can refer not to a legal bond at all, but some sort of advantage, material or intellectual. . . . The translation of some interests into rights is part of the continuous process of legal evolution. The interest precedes the right and itself stimulates the battle for the right".[125]

It would be unfortunate to say the least if this legalistic distinction were to be maintained. It seems to attach the worst features of legal conceptualism to a remedy which has the greatest potential for discarding such an approach. No doubt, on the facts, the decision in *Sandell's* case was "just", but justice could have been achieved quite easily by the use of the discretion to grant this remedy without sacrificing the flexibility of jurisdiction. In the context of actions against associations such an interpretation would eliminate plaintiffs like Mr Grogan who claimed an interest in the management of his football club. It is hoped that the approach of Wootten J. will be preferred in subsequent cases, otherwise the efficacy of the declaratory remedy will be severely curtailed when it can be argued it could be adopted and applied in the context of other remedies.

In *Cameron* v. *Hogan*[126] the plaintiff sought, in addition to other remedies a declaration of right. The court dismissed his application in summary fashion because "[t]he basis of ascertainable and enforceable legal right is lacking"[127] and "[t]he policy of the law is against interference in the affairs of voluntary associations which do not confer upon members civil rights susceptible of private enjoyment". It is uncertain whether the decision was, in fact, based on lack of jurisdiction to grant declaratory relief or the exercise of judicial discretion. Creative judges have chosen the latter interpretation.

Until the standing to sue rules are untied from the requirement of civil rights of a proprietary nature and connected more to question of the merit of the plaintiff's case then the problems connected with this area of the law will remain, in Australia, as vexed and confusing as ever.

Courts in other countries have not been so conservative. A member who claimed a declaration that his expulsion from his trade union was illegal was recognised as having sufficient *locus standi* to pursue his claim.[128] Factional disputes in organisations are often settled conveniently in a suit for declaration.[129] Borchard cites dozens of cases where declar-

124 [1973] 1 N.S.W.L.R. 233.
125 Ibid. p. 252.
126 (1934) 51 C.L.R. 358.
127 Ibid. p. 378.
128 See cases cited in P. W. Young, *Declaratory Orders* (Sydney, Butterworths, 1975) pp. 176-177.
129 *Rex* v. *Cheshire County Court Judge: Ex parte Malone* [1921] 1 K.B. 301. *Gibson* v. *Wellington Federated Seamen's Industrial Union* [1935] N.Z.L.R. 664, 686-7.

ations have been made on behalf of members of associations concerning some business or dispute arising out of the association.[130]

A plaintiff who seeks declaratory relief against an association need not show a cause of action, based on a legal right like a contractual or proprietary right, yet he must be somebody who can show an "interest" in the action so as to justify his seeking relief. The discretion attached to the remedy is used to avoid involvement where it was judicially undesirable.

So declarations are frequently granted to determine problems arising out of club membership,[131] membership of professions[132] and a wide variety of legal problems arising within trade unions.[133] The standing of the plaintiff in such disputes is usually based on the traditional grounds or linked to concepts like the "right to work" (see infra). The creative approach of judges like Wootten J. and Street J., as he then was, who have relied on the wide terms of the jurisdiction to grant declaratory relief and liberally interpreted it, shows some change is occurring at least within the ambit of this particular remedy.

POLICY CONSIDERATIONS IN ASSOCIATION DISPUTES

In *Cameron* v. *Hogan*[134] it was stated that, as a general rule, the courts do not interfere in the contentions or quarrels of political parties, or, indeed, in the internal affairs of any association, society or club. Any agreement of parties which might create such an association could only be classified as personal or domestic and thus be unenforceable by a court.[135] Domestic quarrels should thus seek domestic solutions within the structure of the particular organisation.

Thus the real basis of the decision in *Cameron* v. *Hogan* is not the fixed need to establish the existence or non-existence of legal rights of one kind or another, but one of judicial policy.[136] Should courts accept or reject responsibility for performing ordinary judicial functions in relation to associations of a "non-business" character? "[T]he key to *Hogan's Case*", says one judge, "is to be found, not in the mere fact that it was a voluntary association that was in question, but rather in the nature of that particular voluntary association".[137] A so-called "proper" desire to avoid the identification of the judiciary with partisan politics coupled with a reluctance to say so, was resolved by characterising the Australian Labor Party as an informal meeting of friends, and refusing to adjudicate

130 E. M. Borchard, *Declaratory Judgments* (2nd Ed., Clevland Banks, Baldwin, 1941).
131 *Ryan* v. *Kings Cross R.S.L. Club* [1972] 2 N.S.W.L.R. 79.
132 See *Law Society of N.S.W.* v. *Weaver* [1974] 1 N.S.W.L.R. 271 and cases cited in Young, op. cit. pp. 175-176.
133 See *Ethell* v. *Whalan* [1971] 1 N.S.W.L.R. 416.
134 Per Starke J. pp. 383-384.
135 *Murchison* v. *Scottish Football Union* (1896) 23 R. (Ct. of Sess.) 449, pp. 466-467.
136 *McKinnon* v. *Grogan* [1974] 1 N.S.W.L.R. 295.
137 *Beale* v. *S.A. Trotting League* [1963] S.A.S.R. 209, 212-213.

the case on, ostensibly, legal conceptual grounds. Such timidity was not exhibited in the English courts in a recent case concerning expulsion from a political party.[138]

Should our courts openly acknowledge that a decision whether to intervene has been arrived at by a consideration of policy and thus a balancing of competing interests in the particular case? They rarely do.[139] Recently, however, in the N.S.W. Supreme Court, Mr Justice Wootten has taken a step in the other direction. Courts, he says, *should* overtly concern themselves with judicial policy. The kind of association being considered, the seriousness of the injury suffered in the particular case, the public interest and the likely effect of a multiplicity of such claims on the work of the courts as relevant issues, should be factors which are carefully weighed. Relief should not be denied merely because, as in *Hogan's* case, the particular issue is contentious. Courts have still a responsibility to decide legal questions which arise in the political arena. Quite often it is a task specifically assigned to them by Parliament, e.g. interpreting constitutions and the processes of Parliament. If the judicial system stands aloof from these and other questions, a vast and growing sector of the lives of people in affluent society will be legal no-man's land in which disputes are settled, not in accordance with justice and the fulfilment of deliberately undertaken obligations, but potentially by deceit, craftiness, arrogant disregard of rights and many other means which poison the institutions in which they exist and destroy trust between members.[140]

Even without such explicit statement, these kinds of policy factors can explain the gradual change in judicial attitudes to some kinds of association over the last forty years. However, the fact that such policy is implicit rather than explicit, and "explained" in legal conceptual terms probably accounts for the piecemeal and confusing state of the law today. What are the relevant issues of policy with which the courts should be concerned?

(a) *The kind of association being considered*

Some associations, although they lack legal identity, have powers and use them as great, if not greater, than any exercised by courts of law. Predictably, it is in cases involving this kind of association that courts have shown the greatest interest and, consequently, the greatest judicial development has taken place. The most obvious example is the trade union. In 1968 the British Royal Commission on Trade Unions and Employer's Associations stressed in its report the importance to the trade

138 *John* v. *Rees and Others* [1970] Ch. 345.
139 *McKinnon* v. *Grogan* [1974] 1 N.S.W.L.R. 295, 297-298.
140 Ibid.

unions and the public generally that their status, at law, should be clear.[141] Such associations have clear "public" overtones, with large memberships and usually well defined rules and constitutions. To classify them as social clubs where courts are scarcely concerned except to ensure "fair play"[142] is to distort their purpose and significance within our society. In disputes concerning such associations the judges have chosen to intervene on the basis that "the proper tribunal for the settlement of legal disputes is the courts".[143]

One might ask why these disputes are more "legal" in nature than those that occur in for example, sporting clubs. The answer is, of course, the nature of the organisation, not the nature of the dispute in issue. Sporting clubs cover a wide spectrum of activity ranging from small tennis and golf clubs to large league sporting organisations like football and racing associations. This latter kind of club can today hardly be classified as informal, private groups who, *per se,* do not intend their inter-club relations to be examined by the courts should disputes arise.

Cases A, E and *F* would all be disputes involving associations of a particularly "public" character, which if taken alone, would justify judicial intervention. *Case D,* the rugby league football club dispute, seems more contentious. While the judge chose to intervene here, there could be very strong arguments against his judicial intervention except where there had been a clear breach of the rules of "fairness" etc. The only issue at stake here was the desire of the plaintiff to be president of the club. One might claim that this was of little public import and not, necessarily, worthy of the creation of the "right to participate in the affairs of such an association" as one susceptible of judicial protection, unless the failure to intervene will in fact create the "legal no-man's land" as feared by the judge. *Cases B* and *C* would, it is submitted, fail on the same grounds, neither association having sufficient "public" character to attract the interest of the court.

(b) *The seriousness of the injury suffered in the particular case*

This should be seen as a major policy factor. One hopes for a shift from excessive judicial concern for the "nature" of the injury to the consequences of the injury, of whatever kind, to the plaintiff involved. A property nexus is particularly inappropriate and the contractual right has its own serious limitations.

The expulsion cases provide a good example. The seriousness of the consequences of an expulsion will vary according to the kind of associ-

141 See British Royal Commission on Trade Unions and Employers' Associations (1968) London, H.M.S.O. Cmnd. 3623.
142 *Lee* v. *Showman's Guild of Great Britain* [1952] 2 Q.B. 329.
143 Ibid. p. 354 and adopted in *Enderby Town Football Club* v. *Football Association Ltd* [1970] 3 W.L.R. 1021, 1026.

ation. To be expelled from one's trade union spells economic death in the majority of cases, being barred from a social club may be merely embarrassing. The cancellation of licences to pursue sporting activities is becoming an area of increasing judicial intervention. Each case, in substance, has had serious effects on the livelihood of the plaintiff. One might contrast the case of the professional punter who is "warned off" racecourses and who failed in his bid to assert a right to work worthy of protection[144] with Mr Fagan in South Australia who, facing cancellation of his licence on two separate occasions, had spectacular success in the courts in challenging the domestic tribunals who purported to cancel it. As can be seen in *Case B* as contrasted with *Cases E* and *F* the distinction between the two is hardly made by the determination of some fictitious property right or contractual nexus.

Generally, the courts should only intervene where it is clearly demonstrated that private resolution will harm an interest which warrants legal protection. In response to such a need the judges have invented the "right to work" or even "the right to participate in the running of a major community activity" as such important interests. They should further look at the consequences of ignoring such interests. *Case C* provides a good example. To deny H his remedy would be to allow the defendant to act free from control. The judge in this case saw such a consequence as very serious. He thus proceeded to the merits of the case. In *Case A* such consequences were not considered and the plaintiff lost even though such a decision meant "political annihilation". One must agree that the same fate will befall the professional punter.

It would be safe to say that this particular policy consideration is in a state of great confusion. Few judges, except in the clear instances involving trade union or professional association expulsion (or even where membership of such an association is refused) where the plaintiff's livelihood is at stake, will proceed beyond the "proprietary interest" or "contractual nexus" inquiry into the difficult problem of weighing up the consequences or seriousness of the case to either the particular plaintiff or the group he represents. A development in this area would be timely. There is no doubt an argument for the view that a club member's non-proprietary interests should be the object of consideration regardless of the nature of the club. This was the major factor in the decision for the plaintiff in *Case D*.

(c) *The public interest*

Obviously this kind of factor is linked with the kind of association involved, but additionally the court must consider the attitude of the community towards the purposes of the association and, even, the

144 *Forbes* v. *N.S.W. Trotting League* (1977) N.S.W. (unreported).

frequency of its conflicts with other groups or the State itself. Perhaps the court's interference in a seemingly trivial matter in *Case B* can be explained by the surrounding circumstances. The legal action arose out of a dispute of some notoriety which had considerable "public interest". Perhaps the same sort of consideration should have prompted intervention in *Case A* (expulsion from a political party) or justified it in *Case C* (misuse of student funds). It certainly justifies the court's intervention in major sporting association disputes. The *Peckham* v. *Moore* case in N.S.W. attracted a great deal of public interest and at its conclusion, intervention by the state government because of the serious implications of the case on workers' compensation claims.

(d) *The likely effect of a multiplicity of such claims*

While improperly closing judicial doors to plaintiffs whose injuries are real usually involves substantial injustice, one must move to a position which will not squander the resources of the judicial machinery but take account of this problem. It is probably one of the most difficult factors to judge, and has been the chief problem in judicial review of administrative agency decisions.[145] In other areas of law, the fear of the "floodgates" of litigation has never been realised, and as suggested in the *Grogan* case, judges have other devices to prevent such a result—one that is particularly useful is the discretion as to an award of costs.

(e) *Autonomy of associations*

Legal supervision can sometimes do more harm than good. The judges should consider the problem of their qualification to decide particular questions. The tendency to make application for judicial determination of questions easily and appropriately settled within the association machinery has, to some extent, been limited by the requirement of exhaustion of remedies before recourse to the courts. Provided the "exhaustion" requirement is qualified by not insisting on it where this would be unjust, e.g. where the domestic tribunal offered an inadequate remedy,[146] it has a very necessary function in implementing this particular policy. The same caution can be seen in the jurisdictional and/or discretionary limitation to the declaration remedy of considering the availability of an alternative and better qualified tribunal even where there is no statutory requirement that it should be used.

CONCLUSION

It has been sought to show that the standing of those who would bring legal action against associations is a vexed legal question. The above

[145] K. C. Davis, "Administrative Law Treatise" (St. Pauls, West Publishing Co., 1958) pp. 208-294.
[146] *Lee* v. *Showman's Guild of Great Britain* [1952] 2 Q.B. 329, 343 and 347.

discussion of policy consideration would support the conclusion that the subject is ripe for legislation.[147] It is submitted that the only method of rationalisation, in the light of the various policy factors, is to construct a two part statutory section, to be included in a general legislative enactment on associations, which firstly makes provision for a universal test of standing for all kinds of remedies and then confers on the courts a discretion to give persons outside the statutory formula leave to seek relief having regard to criteria specified in the section. It would depend on the judiciary to develop the case law along the lines of policy clearly provided for in the Act.

Such an approach would avoid the excesses of legal conceptualism which have marred the application law in this area and permit the free entry of the legal system into areas of human activity where effective control by legal process can add much to the quality of life.

[147] R. Baxt, op. cit.