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# Legal duties as part of the governance framework for incorporated associations: A comparative analysis

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*Incorporated associations are founded by, and subsequently operate exclusively on, the collective action of individuals, which is largely voluntary and motivated by altruistic goals. This article will examine through doctrinal analysis the statutory duties and common law obligations of an incorporated association. In examining these specific legal duties, this article will reveal the lack of consistency across Australian jurisdictions, and gaps in how the law regulates the conduct of committee members within an incorporated association. Furthermore, this article will consider whether an officer of an incorporated and unincorporated association is a fiduciary — and, if this is so, whether this status arises out of the category of principal and agent.*

## Introduction

All forms of not-for-profit organisations are not immune from collapse due to mismanagement.[1] In spite of an altruistic mission at its core, when a not-for-profit organisation does collapse, questions are inevitably raised regarding the degree of regulation these organisations can rely on in their management structure. In the push for improved regulation and greater governance for not-for-profit organisations, there is the misconception that officers of a management committee of an incorporated association find themselves in the same position as company directors.[2] While this is true of officers of a company limited by guarantee it is not true otherwise.

Reliance on, and attraction to, this misconception is largely due to the slim body of case law and legislation for incorporated associations, which inadequately clarifies legal duties for its management committee.[3] This article

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1 For example, Zoe's Place was placed into voluntary administration and was placed under investigation by the Health Quality and Complaints Commission for serious allegations relating to complaints of malpractice. S Elsworth, 'Zoe's Place in Queensland may Close', *The Australian* (online), 18 June 2009, at <http://www.theaustralian.com.au/news/zoes-place-in-queensland-may-close/story-0-1225737048892> (accessed 19 June 2009). See also K Weinert, 'Is there a Perfect Environment to Allow a Villain and a Villainess to Thrive?' in R Franks and S Meindl (Eds), *The Real and the Reflected: Heroes and Villains in Existent and Imagined Worlds*, Inter-Disciplinary Press, 2012, p 49.

2 K Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand*, Law Book Company, 1986, p 289; A Twaits, 'The Duties of Officers and Employees in Non-Profit Organisations' (1998) 10(2) *Bond Law Review* 313.

3 There are two obvious reasons why there is a lack of judicial authority for incorporated associations. First, in the event a member of a Queensland incorporated association has a grievance regarding the misgivings of the management committee, all complaints must be

briefly examines the functions of a management committee as compared to a board of directors, and asserts that a need exists to regulate a committee member's conduct through legal duties.

Furthermore, this article compares each of the statutory legal duties of both a corporation and an incorporated association, illustrating the differences in the legal duties of a committee member as compared to a company director and how the law considers them differently.[4] Precision can be seen to be lacking in both the common law and the statute law's approach to prescribing legal duties for a committee member. Consequently, to fill this gap, attention is turned to equity and the question of whether or not fiduciary principles can provide clarity.

Australia's development of fiduciary law in this area has stagnated with the courts expressing a reluctance to expand the established categories of fiduciary relationships and, also, to find for a breach of these duties within these established fiduciary categories. The application of this law to unincorporated and incorporated associations is largely unknown and previously unexamined. This article considers whether committee members of an unincorporated and an incorporated association are, in fact, fiduciaries through the established relationship of principal and agent and, therefore, subject to fiduciary duties.

## The respective functions of a board of directors and a management committee

Similarities between the roles of a director and an officer of a management committee can be evidenced in that each operate as a collective group of individuals elected or appointed to their respective positions. The incorporated association legislation provides that the function of the management

settled by the Supreme Court: Associations Incorporation Act 1981 (Qld) s 71(2). Supreme Court actions would be out of reach for an ordinary member (particularly for members of a level 1 and level 2 associations) due to high litigation costs and the risks in pursuing litigation, and the highly legalistic nature of making an application in this jurisdiction. Moreover, the Supreme Court has the discretionary power to dismiss applications if the court believes the matter is trivial: Associations Incorporation Act 1981 (Qld) s 73(2)(a); see *Re Maggacis* [1994] 1 Qd R 59; BC9303047. Furthermore, Queensland's governing executive department (Office of Fair Trading) has no statutory authority to receive, investigate, or settle any complaints or disputes relating to the management of an incorporated association. The only powers the executive has over incorporated association relates to the administration of an incorporated association: Associations Incorporation Act 1981 (Qld) Pt 6 Div 2; Associations Incorporation Regulations 1999 (Qld) reg 14 and Pt 5 Div 3.

4 The Australian Charities and Not-for-Profit Commission (Consequential and Transitional) Act 2012 (Cth) turns off the statutory duties of care and diligence, good faith and not to misuse position or information under the Corporations Act 2001 (Cth) for directors of a company limited by guarantee. Therefore, it is prudent to note that this article is concerned with the legal duties of a director within a for-profit entity. At the time of publication the Australian Charities and Not-for-Profit Commission (Consequential and Transitional) Act 2012 remain in effect, despite the federal government announcing the abolition of the Australian Charities and Not-for-Profit Commission. See Australian Charities and Not-for-Profit Commission, Latest News, Update: Status of ACNC Act, 14 March 2014 <https://www.acnc.gov.au/ACNC/Comms/LN/Update_Status_of_ACNC_Act.aspx> (accessed on 23 March 2014).

committee is to control and manage the association's operation and business; collectively, the committee has control of the association's property.[5] However, little is really known about how a management committee carries out these legislative functions. With no direct prescription (either by convention or legislation) on how to achieve these functions and manage an association, a management committee has the freedom and the autonomy on how best to manage its association. There is, of course, an expectation that a management committee will guide the management of the association in accordance with the association's altruistic mission – that is, with integrity, and in a manner free from self-interest and, moreover, impropriety

The pursuit of profit maximisation for companies provides a more definitive set of functions of a board of directors, being:

- appointing and rewarding a chief executive officer;
- setting business goals;
- formulating strategies;
- approving business plans (which includes setting annual budgets, make key management decisions such as, major capital expenditure, restructuring and refinancing and business acquisitions);
- monitoring the performance and results of the business and management;
- establishing and review shareholders policies (where relevant); and
- examining conformance strategies.[6]

These tasks, both specific and numerous, clearly dictate that a board of director's function is to achieve and maintain a company's fiscal capabilities. Accordingly, the economic nature of a company's activities is justification for regulation, and for a company director to be accountable. However, the traditional view is that incorporated associations pursue non-economic activities, and that the trustworthiness of an incorporated association means the need for regulation is not warranted. Without regulation, or a clear set of obligations compelling an officer to undertake the proper administration of a not-for-profit organisation, dishonest committee members are free to use the incorporated association's property and resources for private interests and gain.[7]

## Regulation and accountability of committee members

There are overwhelming social and economic reasons to justify the regulation of not-for-profit organisations. While theoretically both an incorporated association and a company are accountable to their members, a company achieves this better than an incorporated association. Corporation law

5 Associations Incorporation Act 1981 (Qld) s 60; Associations Incorporation Act 1964 (Tas) s 21 and Model Rule 23; Associations Incorporation Act 1984 (NSW) s 21; Associations Regulations 2004 (Model Constitution) (NT) Pt 4; Associations Incorporation Act 1981 (Vic) Sch 1 r 4 (Vic); Associations Incorporation Act 1985 (SA) s 29; Associations Incorporation Act 1987 (WA) s 20; Associations Incorporation Act 1991 (ACT) s 60. Furthermore, an association's property also includes the association's funds as well as real property.

6 H Ford, R Austin and I Ramsay, *Ford's Principles of Corporations Law*, 15th ed, Butterworths, 2013, pp 225–6.

7 Weinert, above n 1.

promotes a culture of transparency and accountability through the concept of governance. Basic governance within a corporation provides a framework to protect an organisation's resources, and to effectively manage and control risk.[8] The governance framework for a company is set by the law and reinforced by regulatory bodies.[9] The requirements compel a company to maintain robust internal processes and have systems in place, such as accurate financial reporting, and timely disclosure of material interests.[10] At the centre of the governance framework is the board of directors and, specially, attention is on the director's behaviour in governing the organisation. In undertaking their roles, directors must follow specific legal duties and obligations, which is an important mechanism of organisational governance.[11] Conversely, the law relating to incorporated associations does very little to encourage a management committee to achieve transparency, accountability, governance, or to protect an association's property.

## The regulatory framework

### Statutory duties

For management committees of an incorporated organisation the duties are set out in the state legislation. Directors of a company limited by guarantee are subject to the Corporations Act 2001 (Cth). The Corporations Act 2001 (Cth) provides statutory duties extending to: each director; company secretary; any other person who makes or participates in decision-making that affects the whole or a substantial part of the company; and anyone else who has the capacity to significantly affect the company's financial standing.[12] The incorporated associations' legislation does not have a similar statutory provision; however, any statutory duties prescribed under the association legislation are read to apply only to members of a management committee.[13] There are numerous inconsistences between the statutory duties of a company director and an officer of a management committee, and each duty will be individually examined.

### Duty of care and diligence

Section 180(1) of the Corporations Act 2001 (Cth) provides that directors must discharge their duties and use their powers with a degree of care and

8 A Cadbury, *Corporate Governance and Chairmanship: A Personal View*, Oxford University Press, 2002, p 220.

9 A Calder, *Corporate Governance: A Practical Guide to the Legal Frameworks and International Codes of Practice*, Kogan Page, 2008, p 1.

10 Corporations Act 2001 (Cth).

11 I Ramsay, *Corporate Governance and the Duties of Company Directors, Centre for Corporate Law and Securities Regulation*, Faculty of Law, University of Melbourne, 1997, p 10.

12 Corporations Act 2001 (Cth) s 180(1). Section 9 of the Corporations Act 2001 (Cth) defines the term 'director' to also include de facto and shadow directors.

13 See Associations Incorporation Act 2009 (NSW) Pt 4 Div 1; Associations Incorporation Act 1995 (SA) Pt 4 Div 1; Associations Incorporation Act 1981 (Vic) Pt v; Associations Incorporation Act 1997 (WA) Pt v; Associations Act 2003 (NT) Pt 4 Div 1; Associations Incorporation Act 1991 (ACT) Pt 4.

diligence that a reasonable person would exercise if they were in the position and in those same circumstances. A similar, clearly expressed provision in the legislation for incorporated associations can be found in Victoria and South Australia, where this provision states that an officer of a management committee must act at all times with reasonable care and diligence when exercising their powers and in discharging their duties of their office.[14] The wording of this provision is similar to the Corporations Act 2001 (Cth); however s 39A(4) of the South Australian Act and the new Victorian legislation does not go as far as s 180(1) because they omit the key phrases: 'in a like position'; and 'in the corporation's circumstances'. This exclusion of these means that these provisions do not import any standard of care and diligence (whether objective or subjective) on an officer of a management committee. The cases tend not to distinguish clearly between duties of care, diligence and skill. The duty of diligence first appeared in the case of the *Charitable Corporation v Sutton*[15] and aspects of this case have been referred to in modern cases. Although it can be argued that the duty of diligence is a sub-set of care, due to the loose usage in the cases it is worth considering it separately.

## The duty of skill

The elements of skill and a standard of skill are not specified in either s 39A(4) of Associations Incorporation Act 1995 (SA) or s 180(1) of the Corporations Act 2001 (Cth). However, over time, the courts have inferred that directors are subject to an objective standard that obliges directors to:

- reasonably understand the company's affairs insofar that a director is capable of reaching an informed opinion of the company's financial position;[16]
- be capable to keep abreast of the company's affairs;[17] and
- to keep sufficient abreast of the company's affairs to act appropriately in the event the company is unable to pay its debts in due course, and the director is to reasonably expect the company cannot pay its debt.[18]

The payment of debts is addressed by three states in their respective association's legislation: New South Wales, Northern Territory, and South Australia. These provisions refer to a member of the management committee, or a person who took part in the management of the association, who at the time of, or immediately before, incurring a debt had reasonable grounds to accept that the association would be capable of paying the incurred debt when

14 Associations Incorporation Act 1985 (SA) s 39A; Associations Incorporation Reform Act 2012 (Vic) s 84; Associations Incorporation Reform Regulations 2012 (Vic) Sch 4, Model Rule 45(3)

15 (1742) 2 Atk 400, citing *Coggs v Bernard* 1 Salk 26; 91 ER 25.

16 *Statewide Tobacco Services v Morley* (1990) 2 ACSR 405; 8 ACLC 827.

17 *Re Australasian Venzolana Pty Ltd* (1962) 4 FLR 60.

18 *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115; 9 ACLC 946; BC9100656.

it became due.[19] Furthermore, the states' legislation provides a statutory defence if an officer can prove the debt was incurred outside of their consent and authority.[20] Additionally, officers will not be liable if, at the time the debt was incurred, they had reasonable cause to accept that the association could not pay all its debts when they became due.[21] These provisions imply that a committee member must have knowledge and a basic understanding of the association's finances. Company directors are required to possess a level of skill to be able to understand the company's affairs and its financial statements.[22]

## Duty of solvency

Under the provisions of the Corporations Act 2001 (Cth), a company director has a duty to prevent insolvent trading.[23] New South Wales and the Northern Territory also place a positive duty to prevent insolvency upon committee members, similar to that of company directors. Furthermore, the legislation of these states has defence and penalty provisions that reflect ss 588H (defence) and 588J (penalty and recovery of the debt) of the Corporations Act 2001 (Cth). While these respective provisions for the prevention of insolvency employ different terms, there is a defence available for a director and a committee member if both are able to prove that they had reasonable grounds, or a reasonable presumption, to expect the association or company could meet its debts at a time, or shortly after, the debt was incurred.[24] Looking specifically at the key term 'reasonable grounds to expect', which is contained in both pieces of legislation, it implies that there was a possibility that the debt could be paid.[25] Therefore, there must have reasonable grounds of being confident that the company is solvent.[26] Further, committee members in New South Wales and the Northern Territory could successfully argue that an officer of a management committee had reasonable grounds to expect the association was solvent.

## Duty of diligence

For a company director, 'their duty of care is their obligation to exercise reasonable prudence'.[27] A director in exercising this duty must not be seen to be passive in attending board meetings.[28] The common law expects company

19 Associations Incorporation Act 2009 (NSW) s 68; Associations Act 2003 (NT) s 90; Associations Incorporation Act 1985 (SA) s 9AD.
20 Associations Incorporation Act 2009 (NSW) s 68(3); Associations Act 2003 (NT) s 90(2); Associations Incorporation Act 1985 (SA) s 49AD(2).
21 Associations Incorporation Act 2009 (NSW) s 68(3); Associations Act 2003 (NT) 90(2); Associations Incorporation Act 1985 (SA) s 49AD(2).
22 Ford, Austin and Ramsay, above n 6, p 501.
23 Corporations Act 2001 (Cth) s 588G.
24 Corporations Act 2001 (Cth) s 588H(2); Associations Incorporation 2009 (NSW) s 68(3); Associations Act 2003 (NT) s 90(2).
25 *Tourprint International Pty Ltd (in liq) v Bott* (1999) 17 ACLC 1543; 32 ACSR 201; [1999] NSWSC 581; BC9903133.
26 *Metropolitan Fire Systems Pty Ltd v Miller* (1997) 23 ACSR 699; BC9702035
27 *Re Property Force Consultants Pty Ltd* [1997] 1 Qd R 300; (1995) 13 ACLC 1051 at 1061; BC9505859.
28 *Vrisakis v ASIC* (1993) 9 WAR 395; 11 ACSR 162; 11 ACLC 763.

directors to attend all meetings unless there are exceptional circumstances that prevent them from attending.[29] However, for a committee member of an incorporated association, the requirement to attend meetings is less stringent than that of a corporation, and is largely subject to association's Model Rules. Queensland's Model Rules set out the required number of members, and who from the management committee must be present, to conduct meetings[30] — but these Rules places no specific obligation on individual members as to their rate of attendance. Conversely, the chair of meetings must be the association's president of the association, which gives the implication that there is a higher requirement on the president to attend meetings more than other committee members.[31] Furthermore, McPherson J in *Ward v Eltherington* held that an officer could not avoid liability by being absent from all committee meetings.[32]

Additionally, a director's inattention at board meetings is a cause for concern.[33] The concept of attendance, as it applies to a company director, has been stated as taking the reasonable steps to guide and monitor the company with attention to:[34]

1. acquire a rudimentary understanding of the company's business;
2. be informed about the company's activities;
3. generally monitor the company's affairs and policies; and
4. be familiar with the financial status of the company by undertaking regular review of the company's financial statements.[35]

For incorporated associations, there are no guiding principles or statutory provisions applicable to committee members on the obligation of being attentive at meetings. As the statutory power and responsibility is given to committee members to manage an association, there is a reasonable expectation that a committee member would be conscientious of the association's activities, policies, affairs and its financial standing.

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29 Ibid.

30 Associations Incorporation Regulation 1999 (Qld) Pt 3 Div 1, Model Rule 23(5). Queensland's Model Rules require that for a management committee to be held, more than 50% of elected members to the committee must be present: Associations Incorporation Regulation 1999 (Qld) Pt 3 Div 1, Model Rule 24.

31 Associations Incorporation Regulation 1964 (Tas) Model Rule 15; Associations Incorporation Regulation 1984 (NSW) Model Rule 8; Associations (Model Constitution) Regulations 2005 (NT) Model Rule 35; Associations Incorporation Regulations 1998 (Vic) Model Rule 14; Associations Incorporation Regulation 1999 (Qld) reg 23(9) and Model Rule 14. Associations can determine their own committee meeting procedure and the numbers for a quorum. These provisions also provide for the incorporated association to have alternatives for a chair should the president be unable to attend. Associations Incorporation Act 1985 (SA) s 23A(1)(c)(v); Associations Incorporation Act 1987 (WA) s 16, Sch 1; Associations Incorporation Act 1991 (ACT) Sch 1.

32 [1982] Qd R 561.

33 *Ashurst v Mason* (1875) LR 20 Eq 225.

34 *Daniels t/as Deloitte Haskins Sells v AWA Ltd* (1995) 37 NSWLR 438; (1995) 118 FLR 248; (1995) 16 ACSR 607; BC9504558.

35 *Francis v United Jersey Bank* (1981) 43 2A 2d 414; *Daniel t/as Deloitte Haskins Sells v AWA Ltd* (1995) 16 ACSR 607.

## Reliance and delegation

Both a company director and a committee member could find themselves in circumstances where they need to rely on advice (expert or otherwise) and delegate roles to others within the corporation or association. The management committee has the legislative ability to delegate any or all of their functions and powers to a subcommittee of the association.[36] A company's board of directors also have the statutory authority to delegate their powers.[37] Excluding the Northern Territory, the delegation power for an incorporated association is largely confined to sub-committees, whereas directors can delegate their own powers to other directors, employees, or to any other persons.

The associations' legislation does not specify whether a management committee is ultimately responsible for the actions of the delegate, whereas the Commonwealth statute provides that a director who delegated power is responsible for the delegate.[38] It is unclear whether such a responsibility falls onto the management committee and/or the individual. The issue of whether or not the rules of agency are applicable in this instance will be discussed further in this article.

Boards of directors have the power to rely on and seek advice from certain people.[39] Information and professional advice is often sought and relied on by directors, and they would have reasonable grounds for having confidence in the following people:

- An *employee of the corporation* — grounds for confidence: the information given is reliable and competent in relation to matters concerned; or
- A *professional advisor or expert* — grounds for confidence: the information given is regarded to be within the person's professional or expert competence; or
- Another *director or officer* — grounds for confidence: matters that are within the director's or officer's authority; or

36 Associations (Model Constitution) Regulations 2004 (NT) reg 25; Associations Incorporation Act 1964 (Tas) s 28; Associations Incorporation Regulation 2010 (NSW) Sch 1, Model Rule 21; Associations Incorporation Regulation 1999 (Qld) reg 27; Associations Incorporation Reform Regulations 2012 (Vic) Sch 4, Model Rule 43. South Australia, Western Australia and the Australian Capital Territory have no express provisions that allows for the management committee to delegate powers to a sub-committee. Alternatively, a management committee maybe capable of creating and delegating to a sub-committee as the legislation in these jurisdictions provides for the ability of the association to alter the constitution or rules, and this would see the creation of sub-committees. The altered rules may go so far as to state the sub-committee's purpose, responsibility and powers.

37 Corporation Act 2001 (Cth) s 198D.

38 Directors will not be liable if they believed, on reasonable grounds, that the delegate would exercise their power, which is in line with the duties of the company's directors, as required by law, the company's constitution, and in good faith — providing the director made proper inquiry that the delegate was reliable and competent. Law Economic Reform Program Act 1999 (Cth) s 190(1)–(2).

39 Corporations Act 2001 (Cth) s 189.

- A *committee of directors* — grounds for confidence: matters within the committee's authority, and on which the director did not serve in relation to such matters.[40]

To determine whether or not a director or an office holder within a Victorian incorporated association has performed a duty of care and diligence under the general law and statute, it must be shown that the director's reliance was in good faith.[41] For a director's reliance to be reasonable, a director should: make an independent assessment of the information or advice; have their own knowledge of the corporation's operation; have knowledge of the company's and the corporation's complex structure;[42] and, that their reliance on the information or advice can be said to be reasonable.[43]

Section 189 provides a safe harbour for directors to rely on the information or advice from others without verification.[44] This presumption is rebuttable if a director knew, or by the exercise of their ordinary care should have known, that any facts or issues would not be reasonable.[45] The general law will also look at the transaction's risk and its nature, and the steps taken by the director as to the reasonableness of the reliance.[46]

The legislative requirement for directors to undertake an independent assessment of the information or advice requires directors to do more than listen. They must assess the information or advice provided, and employ their skill and judgment.[47] The criticism aimed at this legislative requirement is that it encourages directors to act alone instead of working as a collective, which is how a board should operate.[48]

Section 588H and the Victorian Act provide a defence for directors and Victorian office holders within an incorporated association if they can prove that they relied on information about the company's affairs provided to them from a competent person.[49] However, directors cannot rely upon this defence if they have failed in their duty to prevent the company's insolvent trading, or by inadequately performing their general law and statutory duties.[50] A director's failings would be a lack of participation in the company's affairs,[51] or the unreasonable reliance on other directors to look after the affairs of the

40 Corporations Act 2001 (Cth) s 189(a)(i)–(iv).
41 Associations Incorporation Reform Act 2012 (Vic) s 86(2)(b); Associations Incorporation Reform Regulations 2012 (Vic) Sch 4, Model Rule 45(4)(a).
42 Corporations Act 2001 (Cth) s 189(b)–(c); Associations Incorporation Reform Act 2012 (Vic) s 86(2)(b)(ii).
43 Corporations Act 2001 (Cth) s 189(c).
44 *ASIC v Adler* (2002) 168 FLR 253; 41 ACSR 72; [2002] NSWSC 171; BC200200827.
45 *Daniels v Anderson* (1995) 37 NSWLR 438; 16 ACSR 607 at 665-6.
46 *Adler v ASIC* (2003) 46 ACSR 504; (2003) 21 ACLC 1810; [2003] NSWCA 131; BC200303670.
47 *Southern Resources Ltd v Residues Treatment Trading Co Ltd* (1990) 56 SASR 455; 3 ACSR 207; 8 ACLC 1151.
48 J Farrar, *Corporate Governance — Theories, Principles and Practice*, 3rd ed, Oxford University Press, 2008, p 98.
49 Corporations Act 2001 (Cth); Associations Incorporation Reform Act 2012 (Vic) s 86(2)(a)(i)–(iv).
50 Corporations Act 2001 (Cth) s 588G.
51 *ASIC v Plymin (No 1)* (2003) 175 FLR 124; (2003) 46 ACSR 126; [2003] VSC 123; BC200302080.

company.[52] Should a director not give the sufficient information to a person needing to perform the task that that director wishes to rely upon, then a s 588H defence would not be available.[53]

The statutory reliance for committee members of incorporated associations is only available in South Australia and in Victoria. South Australia's provision[54] is almost an exact reflection of s 189 of the Corporations Act 2001 (Cth), but the only point of difference being that a South Australian association may rely on a sub-committee of association's members, whereas a company a director and an officer holder within a Victorian incorporated association can rely on information or advice from others, such as an expert, an employee, and other directors.[55] The provisions on reliance for associations in South Australia and Victoria are straightforward, but for all the other Australian jurisdictions there is statutory silence.

Despite this silence, it is arguably open to a management committee, in those jurisdictions without reliance provisions, to search out and rely on information and professional or expert advice to assist them in the proper administration of the association – and, moreover, to protect the association's property.

## The duty of acting in good faith, in the best interest and for proper purpose

This all-encompassing statutory duty focuses on different elements of 'acting in good faith, in the interest of the company for proper purpose'. Section 181 and s 85 of the Associations Incorporation Reform Act 2012 (Vic) requires that directors and other officers must exercise their powers and discharge their duties in good faith, in the best interest of the corporation and the association, and for a proper purpose.[56] The duties to act in good faith and in the interest of the company are viewed as a fundamental civil obligation for a director.[57] How the courts test a contravention of this section is by an objective standard based on what a comparable person, with the same knowledge and skills as the director, would have done in the same circumstances.[58] The rules regarding best interest and proper purpose are discussed in detail below.

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52 *Metal Manufacturers Ltd v Lewis* (1988) 13 NSWLR 315; 13 ACLR 357; 6 ACLC 725; BC8801926.

53 *Manpac Industries Pty Ltd v Ceccattini* (2002) 20 ACLC 1304; [2002] NSWSC 330; BC200201881.

54 Associations Incorporation Act 1985 (SA) s 39AB.

55 Corporations Act 2001 (Cth) s 189(a)(iv); Associations Incorporation Act 1985 (SA) s 39AB (a)(iv); Associations Incorporation Reform Act 2012 (Vic) s 86.

56 Corporations Act 2001 (Cth). See also Associations Incorporation Reform Regulations 2012 (Vic) Sch 4, Model Rule 45(4)(b).

57 Ford, Austin and Ramsay, above n 6, p 513. The Note contained in s 85 of the Associations Incorporation Reform Act 2012 (Vic) states that it has the same effect and application as s 146 of the Corporations Act 2001 (Cth). Should an officer holder within a Victorian incorporated association contravene s 85 the guilty person may be ordered by a court to pay a pecuniary penalty of up to $20,000.

58 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 NSWLR 68; [1974] AC 821; (1974) 3 ALR 448; [1974] 1 All ER 1126.

## Best interest

The best interest of the company may be defined by the company's constitution, which would affect a director's duties,[59] and is generally linked to the best interests of the shareholders as a general body.[60] In circumstances where different classes of shareholders have diverging interests, a director must act fairly between the different classes.[61] These classes of shareholders under the corporation's constitution allow the board to take into account the interests of one group over another member group or, creditor.[62] For an incorporated association, the management committee could be required to advance its objective that it is non-commercial.

Overall, incorporated associations must pursue their altruistic objectives, which serve as an association's best interest. Similar to a company, an incorporated association allows for different groups of members, such as financial, associate, or social members. Financial or active members confer voting rights, whereas social or associate members do not have voting rights and are confined to the enjoyment of the association's facilities. Unlike a company director, a management committee is not required to take into account the interests of one group of members over another group.[63] The caution here for management committees and the board of directors is that a departure from the rules or constitution may result in their treatment towards members being seen as oppressive and unfairly prejudicial or discriminatory to a specific group or class of members.

## Proper purpose

The element of proper purpose under s 181(1)(d) of the Corporations Act[64] requires directors and other officers to exercise their powers and discharge their duties for a proper purpose.[65] For a company director, this is conferred by contract and legislation to exercise their powers for the expressed or implied purpose.[66] The 'proper purpose' doctrine for a company director is a set of principles, which determines if a director has acted for an improper purpose:[67]

- the fiduciary powers of directors are to be exercised for the purpose for which they are given, not collateral purposes;

59 *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285; 70 ALR 251; [1987] HCA 11; BC8701766.

60 *Mills v Mills* (1938) 60 CLR 150; (1938) 11 ALJR 527; BC3890123.

61 Ibid.

62 Ford, Austin and Ramsay, above n 6, p 381.

63 *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459; 61 ALR 225; [1985] HCA 68; BC8501065; *Melbourne Juventis Soccer Club v Australian Soccer League Ltd* (unreported, FCA Vic, Onley J, 20 September 1995).

64 Corporations Act 2001 (Cth); *Gambotto v WCP Ltd* (1995) 182 CLR 432; 127 ALR 417; [1995] HCA 12; BC9506434.

65 Section 181 is a civil provision, whereas s 184 is a criminal provision for a director's duty of good faith within the Corporations Act 2001 (Cth).

66 Ford, Austin and Ramsay, above n 6, pp 400–1.

67 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187; 14 ACSR 109; 12 ACLC 674; BC9406797.

- the substantial purpose of directors was improper or collateral to the director's duties;[68]
- the acts performed by a director were for the benefit of the company;[69] and
- the court will apply the 'but for' test to determine what the director's relevant purpose was (ie, the court will consider if a director would still have acted in the same manner had the collateral purpose not existed).[70]

The element of proper purpose for a committee member would be to achieve the association's objectives conferred upon them by the association's rules and respective legislation. The absence of any provisions contained in the association's legislation across the jurisdictions, knowing whether or not there is a duty to act for proper purpose upon a management committee, is unclear.

## The duty not to improperly use a position or information

This duty requires a company director, an officer and an employee not to improperly use a position. For a company director this duty is a civil obligation under s 182(1) of the Corporations Act 2001 (Cth) and they must not improperly use their position to:

(a) gain an advantage for themselves or someone else; or
(b) cause detriment to the corporation.

This provision overlaps with s 183(1), which states that a corporation's director, officer or employee are prohibited to obtain information by virtue of their positions, and they must not use that information for a personal gain or an advantage for someone else, or to cause detriment to the corporation.[71]

Some incorporated associations have provisions for the duty not to misuse a position or information. However, the legislative framework varies between jurisdictions. In New South Wales, Australian Capital Territory and Victoria there is statutory duty not to improperly use information or a position, and these provisions apply to committee members and former committee members.[72] However, in South Australia and the Northern Territory, this duty applies to officers, former officers and employees — which is the same under the Corporations Act 2001 (Cth). Officers of incorporated associations in the Australian Capital Territory only have a duty not to improperly use their position.[73]

The provisions for misuse of information and position for incorporated

68 The determination is not whether a director's decisions were bad or good, but whether they acted in breach of their fiduciary duties: ibid.

69 This standard of testing for these principles is not whether the director acted honestly or altruistically. A director's conduct will be objectively assessed: *ASIC v Adler* (2002) 168 FLR 253; 41 ACSR 72; [2002] NSWSC 171; BC200200827.

70 *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285; 70 ALR 251; [1987] HCA 11; BC8701766 per Mason, Deane and Dawson JJ.

71 Corporations Act 2001 (Cth).

72 Associations Incorporation Act 2009 (NSW) ss 32–33; Associations Incorporation Act 1981 (Vic) s 29A; Associations Incorporation Reform Act 2012 (Vic) s 83. See also Associations Incorporation Reform Regulations 2012 (Vic) Sch 4, Model Rule 45(5).

73 Associations Incorporation Act 1991 (ACT) s 111(1).

associations in each jurisdiction uses the phrase 'to gain, directly or indirectly, any pecuniary benefit or material advantage for himself or herself or any other person, or so as to cause a dettiment to the association'.[74] This phrase for incorporated associations is similar to the phrase that applies to corporations. For corporations, this phrase is found in s 184(2)(a), which is a criminal provision. Apart from New South Wales, the statutes for incorporated associations have not separated these provisions into civil obligations or criminal offenses like the Corporations Act 2001 (Cth).

The duties of a committee member differ between jurisdictions. The sections concerning the improper use of position for management committees in the Northern Territory, Victoria, South Australian and the Australian Capital Territory directly reflect s 182(1) for corporations, that is: not to improperly use their positions.[75] The other two jurisdictions, New South Wales and Victoria, have approached the improper use element in another way. Victoria's legislation states that members of the management committee must not knowingly or recklessly make improper use of their position in the association.[76] The words 'knowingly' or 'recklessly' imports that a committee member who contravenes this provision is conscious of the impropriety. The Victorian provision for the improper use of a position by a committee member follows the ruling in *R v Byrnes*,[77] thus making the state of mind relevant when testing a contravention objectively.

New South Wales has taken a different approach to the improper use of a committee member's position. Under s 33, committee members are guilty if they use their position with intention of directly or indirectly gaining an advantage for themselves or others, or if they cause detriment to the association.[78] The NSW provision follows the criminal offense of s 184(2)(a) within the Corporations Act 2001 (Cth). However, the NSW provision does not contain the element of impropriety like the other jurisdictions and the Corporations Act 2001 (Cth). Rather, this provision itself is concerned with intent and dishonesty. The consequences for breaching s 33[79] replicates the same penalties for contravening s 184(2),[80] which is imprisonment, a pecuniary penalty, or both.[81] The NSW provision closely resembles the fiduciary duty to act honestly, but it is the selection of the word 'dishonesty' that should be discussed further.[82]

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74 Associations Incorporation Act 1985 (SA) s 39A(3); Associations Act 2003 (NT) s 33(2)–(3).

75 Corporations Act 2001 (Cth); Associations Act 2003 (NT) s 33(3); Associations Incorporation Act 1985 (SA) s 39A(3); Associations Incorporation Act 1991 (ACT) s 111(1).

76 Associations Incorporation Act 1981 (Vic) s 29A(2); Associations Incorporation Reform Act 2012 (Vic) s 83(4).

77 (1995) 183 CLR 501; 130 ALR 529; [1995] HCA 1; BC9506451.

78 Associations Incorporation Act 2009 (NSW).

79 Associations Incorporation Act 2009 (NSW).

80 Corporations Act 2001 (Cth).

81 The NSW legislators are sending a strong public policy message to deter committee members of acting dishonestly by imposing a criminal provision. Associations Incorporation Act 2009 (NSW) s 33. The penalty for improperly using information or position is a civil penalty up to $20,000, and a court may also order compensation to the effected incorporated association. Associations Incorporation Reform Act 2012 (Vic) s 83(5).

82 *Phipps v Boardman* [1967] 2 AC 46; [1966] 3 All ER 721; [1966] 3 WLR 1009.

Regardless of what term is employed — 'improper', or 'dishonest use of a position' — its reach and effect are alike. However, for New South Wales the application of s 33[83] is narrower than the respective provisions for corporations and the jurisdictions of South Australia, the Northern Territory, and the Australian Capital Territory.[84] Being found guilty of breaching this provision turns, and depends only, on the committee member's awareness of the wrongdoing. This narrow provision fails to provide for circumstances where committee members have purportedly acted honestly, reasonably, and without any intention of harm or an advantage, but have misused their position.[85]

## Duty not to improperly use information

Section 183 of the Corporations Act 2001 (Cth) states that a director, an officer, an employee who obtains information must not improperly use that information to gain an advantage for themselves or someone else,[86] or cause detriment to the company.[87] The main concept in this provision is the term 'information'. Information is referred as the type of information that the law of equity would restrict the director from using for a personal profit.[88] Furthermore, a finding of improper use of information could be where a director has failed to consider the general interests of a creditor that caused detriment to the company.[89] Breaching either of the impropriety provisions will attract civil[90] and/or criminal penalties.[91]

Similarly, the statutory provisions relating to the misuse of position for incorporated associations are expressed as the improper use or dishonest use of information. There are only four jurisdictions that have express provisions within the incorporated associations' legislative framework: Victoria; South Australia; New South Wales; and the Northern Territory. The application of these provisions regarding the misuse of information varies between each jurisdiction. South Australia and the Northern Territory have provisions similar to, and are as wide as, those provisions found in the Corporations Act 2001 (Cth); these apply to a current or former officer and employee of the incorporated association.[92] However, in New South Wales and Victoria, the improper use of information only applies to current and former committee members of the management committee and not to employees.[93]

The Australian Capital Territory has similar provisions that overlap between

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83 Associations Incorporation Act 2009 (NSW).

84 Corporations Act 2001 (Cth) s 182; Associations Incorporation Act 1985 (SA) s 39A(3); Associations Act (NT) s 33(3); Associations Incorporation Act 1991 (ACT) s 111(1).

85 *R v Towey* (1996) 132 FLR 434; 21 ACSR 46 at 61; BC9602791.

86 Corporations Act 2001 (Cth) s 183(1).

87 Ibid, s 182(2).

88 *Rosetex Co Pty Ltd v Licata* (1994) 12 ACLC 269; 12 ACSR 779; BC9402358 per Young J.

89 *McNamara v Flavel* (1988) 13 ACLR 619; 6 ACLC 802.

90 Civil penalties are in the forms of a pecuniary penalty order, disqualification order and or compensation order. Such orders are proved on the balance of probabilities that a contravention of ss 182 and 183 of the Corporations Act 2001 (Cth).

91 Ibid, s 214.

92 Associations Incorporated Act 1985 (SA) s 39A(2); Associations Act (NT) s 33(2); Corporations Act 2001 (Cth) s 183(1),(4).

93 Associations Incorporated Act 2009 (NSW) s 32; Associations Incorporated Act 1981 (Vic)

the use of a position and information for members of a management committee. Three out of the four jurisdictions prohibit the misuse of information if it is 'acquired by virtue of their position'.[94] This phrase is not expressed in the Corporation Act 2001 (Cth), but it is one factor from a list in establishing a breach of s 183.[95] Santow J in *Forkserve Pty Ltd v Jack* listed a total of seven factors needed to prove that an officer of a corporation breached s 183 of the Corporations Act 2001 (Cth)[96] — each one of these is directly embraced into the incorporated associations' statute for the jurisdictions of South Australia, the Northern Territory and Victoria.[97]

## Duty to disclose a personal interest

The statutory provisions regarding interested directors and members of a management committee stem largely from the conflict rule. The conflict rule, in general, prohibits directors placing themselves in a position where their personal interest or duty will conflict with their duty to the company.[98] However, applying this rule in its strictest form creates practical difficulties in a commercial setting, such as prohibiting a director from holding a board position, being a nominee director or a director being a shareholder. The courts have acknowledged these difficulties and have accepted that a director can act with a personal interest. However, this is prohibited if the personal interest is not a bona fide concern for the benefit of the whole company or fairness between members.[99]

For corporations, s 191(1) states that a director of a company with a material interest in a matter that relates to the affairs of the company must give notice to other directors of that interest unless s 191(2) says otherwise.[100] There is strict liability by a director to notify other directors of a material interest when a conflict arises.[101] Further, this provision applies to all directors, regardless of whether the company's constitution permits a director to be interested in a transaction with the company.[102] The heart of this

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s 29A(1); Associations Incorporation Reform Act 2012 (Vic) s 83(1). See also Associations Incorporation Reform Regulations 2012 (Vic) Sch 4, Model Rule 65, but this Rule is only applicable to current committee members.

94 Associations Act (NT) s 33(2); Associations Incorporation Act 1981 (Vic) s 29A(1); Associations Incorporation Act 1985 (SA) s 39A(2).

95 Corporations Act 2001 (Cth); *Forkserve Pty Ltd v Jack* (2001) 19 ACLC 299; [2000] NSWSC 1064; BC200007218.

96 (2001) 19 ACLC 299; [2000] NSWSC 1064; BC200007218.

97 The statutory provision in Victoria for the improper use of information also contains the words 'knowingly or recklessly', which is consistent with the provision regarding the improper use of a position by a member of a management committee and the ruling in *R v Byrnes* (1995) 183 CLR 501; 130 ALR 529; [1995] HCA 1; BC9506451.

98 Ford, Austin and Ramsay, above n 6, p 528.

99 *Mills v Mills* (1938) 60 CLR 150; (1938) 11 ALJR 527; BC3890123.

100 This provision of the Corporations Act 2001 (Cth) provides for both public and proprietary companies. However, s 191(1) will not apply to a proprietary company with only one director. Corporations Act 2001 (Cth) s 191(5).

101 Corporations Act 2001 (Cth) s 191(1A).

102 A company's constitution may outline procedures when the event of a conflict arises for a director. Yet s 193 of the Corporations Act 2001 (Cth) provides that in addition to the company's constitution the key provision of s 191(1) has effect to restrict a director from having material interest in a matter or holding an office involving duties or interest that

provision is that companies cannot allow themselves to diminish the general prohibition on conflicts by the company's constitution.

The term 'material personal interest' is not a term defined by the Corporations Act, and the common law is consulted as to its meaning.[103] Specifically, the word 'material' requires an assessment of what a director personally expects and the matter being considered.[104] This assessment looks at the nature of the interest and the director's capacity to influence the vote and decision/s by the board and whether the conflict of interest is of a real and substantial kind.[105]

Further, s 191(1) refers to an indirect or direct interest.[106] A direct interest is self-explanatory, but an indirect interest often involves a third party. For instance, an indirect interest is when a director's relative holds an interest and, therefore, would benefit from a matter before the company's board. In this instance, it would be necessary to determine if there is a material personal interest.[107]

There is a list of exceptions under s 191(2), which does not require a director to provide disclosure or notice of an interest.[108] From this list, only one feature is focused on, as pointed out, some of the incorporated association's legislation has adopted a similar exception for committee members. Subsequently, a director does not have to give notice to disclose an interest if the interest arises because the director is a member of the company held in common with other members of the company.[109]

Finally, the procedure on how a director's interest is disclosed to the board is set out in s 191(3).[110] This provision stipulates that a director must, in their notice to the board, outline sufficient details of the nature of the interest, the extent of the interest, and the relation of the interest to the company's affairs.[111] The notice of disclosure must be given to the board as soon as practicable after the director becomes aware of the interest. Accordingly, the notice must be detailed in the company's minutes.

For a company, s 194 is a replaceable rule.[112] Section 194 states that if a director of a proprietary company has a material personal interest that relates to the affairs of the company, and the director discloses the nature and the extent of the interest in relation to the affairs of the company at a director's meeting then it is in accordance with s 191.[113] Where a director's interest does not need to be disclosed under s 191, that director can vote on matters relating

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conflict with their duties or interests as a director. A company's constitution in this regard must satisfy s 191 and not be in derogation of it: *Centofanti v Eekimitor Pty Ltd* (1995) 65 SASR 31; 15 ACSR 629; 13 ACLC 315; BC9503037.

103 Corporations Act 2001 (Cth).

104 Ford, Austin and Ramsay, above n 6, pp 555–6.

105 *McGellin v Mount King Mining NL* (unreported, WA SC, Murray J, CIV 1268/1997, 7 April 1998) BC9801129.

106 Corporations Act 2001 (Cth).

107 Ford, Austin and Ramsay, above n 6, p 556.

108 Corporations Act 2001 (Cth).

109 Ibid, s 191(2)(a)(i).

110 Ibid.

111 *Camelot Resources Ltd v McDonald* (1994) 14 ACSR 437; BC9402987.

112 Corporations Act 2001 (Cth).

113 Ibid.

to the interest and the interested transactions.[114] The vote may proceed and the director can retain the benefit from the transaction providing the transaction was entered into before the disclosure was made. Further, the company cannot avoid the transaction because the interest exists.

The provisions in Victoria, South Australia, Western Australia, Australian Capital Territory and Northern Territory deal with the disclosure of an officer's personal interest. Section 31(1) of the Northern Territory's Associations Act 2003 states that a member of a committee who has a direct or indirect pecuniary interest in a contract or proposed contract with the association, must disclose the nature and the extent of the interest to the committee. The committee member must disclose this interest as soon as the member becomes aware and, further, the interests must be disclosed at the association's Annual General Meeting.[115] This Northern Territory provision is clear as to how and when a committee member is required to disclose a pecuniary interest. The jurisdictions of Victoria, Australian Capital Territory, South Australia and Western Australia have the same wording in their disclosure provisions.[116]

These state provisions are constructed differently from that of the Corporations Act.[117] The requirement of disclosure for incorporated associations only occurs if there is a direct or indirect pecuniary interest for a contract or a proposed contract; whereas, for a company director, there needs to be a material personal interest in a matter relating to the affairs of the company that could affect the board's deliberation. Circumstances where company directors must disclose their interests are wider than those for committee members. For instance, a company director may be required to disclose an interest relating to a transaction or in holding a specific position within another company; whereas, for a committee member, the requirement for disclosure only needs to be a mere interest, and it need only be disclosed to the management committee. Disclosure provisions for incorporated associations are restrictive, and this raises concerns that incorporated associations' legislation does not actively encourage sophisticated transparency in disclosing information.

Parallel to s 191(2) of the Corporations Act 2001 (Cth), incorporated associations in Victoria, Western Australia, South Australia, and the Northern Territory have provisions where management committee members do not have to disclose their interests. Unlike s 191(2), the exceptions for incorporated associations are fewer and more obscure than for corporations. Specifically, committee members in the Northern Territory, Western Australia, South Australia and Victoria are not required to disclose their interest to the association if:

a. they are employees of the association; or
b. a member of a class of members for whose benefit the association is established; or

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114 Ibid.

115 Associations Act 2003 (NT) s 39(1)(a)–(b).

116 Associations Incorporation Act 1981 (Vic) s 29B(1)–(2); Associations Incorporation Reform Act 2012 (Vic) s 80; Associations Incorporation Act 1985 (SA) s 31(1); Associations Incorporation Act 1991 (ACT) s 65(1); Associations Incorporation Act 1987 (WA) s 21.

117 Corporations Act 2001 (Cth) s 191.

c. the committee member's pecuniary interest is in common with all or a substantial proportion of the members of the association.[118]

Incorporated associations' statutes provide that committee members with an interest in a contract or proposed contract are not permitted to vote or take part in the decision. However, an interested committee member can be present and take part in the committee's deliberations.[119] The obvious concern here is that the legislation allows for a committee member to wield his or her influence and power over other members to vote for in a manner that will benefit his or her interest. However, in Western Australia and Victoria, there are stricter provisions compared to the other jurisdictions.[120] An interested committee member in both of these jurisdictions are forbidden to take part in any deliberations or decisions of the committee,[121] but the legislation in Western Australia is silent in regards to allowing a committee member to vote on a decision in relation to an interested contract.[122] It can be said that a committee member participating in the deliberations undermines the aims of a disclosure regime.

Additionally, the timing and recording of a disclosed interest by committee members appears to be consistent across the jurisdictions that have disclosure provisions. These provisions require an interested committee member to disclose the nature and extent of his or her interest to the management committee as soon as they have become aware of the interest.[123] Furthermore, most of these jurisdictions (apart from Victoria) require the interested committee member to disclose their interests at the next annual general meeting of the association.[124] The provision relating to recording an interest by a management committee member exists only in Victoria, Western Australia and the Northern Territory, where the interest of a committee member must be recorded in the minutes of the management committee.[125] Transparency or disclosure under these provisions takes a 'bare foot' approach to disclosure. Disclosure at an association's annual general meeting may

118 Associations Act 2003 (NT) s 31(2); Associations Incorporation Act 1981 (Vic) s 29B(2); Associations Incorporation Reform Act 2012 (Vic) ss 80(3)–(4), 81(2); Associations Incorporation Act 1985 (SA) s 31(2); Associations Incorporation Act 1987 (WA) s 21(2). The ACT disclosure provision applies to committee members, but only if they are also employees of the association: Associations Incorporation Act 1991 (ACT) s 65(3).

119 Associations Act 2003 (NT) s 32; Associations Incorporation Act 1991 (ACT) s 65(2); Associations Incorporation Act 2009 (NSW) s 31(5)–(6); Associations Incorporation Act 1985 (SA) s 31.

120 Associations Incorporation Act 1987 (WA) s 21(1).

121 Associations Incorporation Act 1987 (WA) s 22; Associations Incorporation Reform Act 2012 (Vic) s 81(1).

122 Associations Incorporation Act 1987 (WA) s 22. Section 81(1)(b) prohibits a committee member within a Victorian incorporated association to vote in a matter being considered by the committee where the committee member has a material personal interest. Associations Incorporation Reform Act 2012 (Vic). See also Associations Incorporation Reform Regulations 2012 (Vic) Sch 4, Model Rule 65(2)(b).

123 Associations Incorporation Act 1987 (WA) s 21(1); Associations Incorporation Act 1985 (SA) s 31(1)(a); Associations Incorporation Act 1981 (Vic) s 29B(1)(a); Associations Incorporation Reform Act 2012 (Vic) s 80(1); Associations Act 2003 (NT) s 32(1)(a).

124 Associations Incorporation Act 1985 (SA) s 21(1)(b); Associations Act 2003 (NT) s 31(1)(b).

125 Associations Incorporation Act 1987 (WA) s 21(4); Associations (Model Constitution) Regulations 2004 (NT) reg 43; Associations Incorporation Reform Act 2012 (Vic) s 80(6).

transpire months after an interest has become a conflict, and only then would the wider membership of the association become aware of the interest. This statutory regime does very little to encourage transparency or sharing of information, and this creates the risk of an ill-informed membership base and a perception of a tainted management committee.

New South Wales and Queensland's disclosure regime is widely different from the other jurisdictions. Section 31 of NSW' associations legislation provides that if a committee member has a direct or indirect interest in a matter being considered, or about to be considered, and the interest appears to raise conflict with the proper performance of the committee member's duties, then the committee member must disclose the nature of the interest at a committee meeting.[126] This provision brings clarity to the duty of disclosing an interest and neatly folds in the duty to avoid a conflict, which is absent from the other jurisdictions. Unlike the other jurisdictions, the disclosure of an interest in New South Wales is broader in all matters, like transactions, agreements and other things, and not only contracts or proposed contracts.[127] This provision encourages timely and efficient disclosure of a direct or indirect interest being considered, or about to be considered, by a management committee.

Pursuant to s 31(6), the committee must determine for itself whether the interested member can be present during the committee's deliberation, or allow the interested member to take part in the committee's determination/decision regarding the relevant matter.[128] However, before the management can agree to allow the interested member to vote or be present during deliberations, the interested member must give sufficient disclosure of the nature of the interest.[129] This would see that a real discussion with the management committee would revolve around whether or not the interested party's decision would infringe upon his or her proper performance of their duties.

Furthermore, New South Wales is more astute in recording a member's interest. The legislation states that the committee must keep a book for that very purpose and must record all particulars of the disclosure.[130] This book must be open at all reasonable hours for any member of the association to inspect; the book must be kept at the same address as the register of committee members, and must be open to all members to inspect the book that they know exists.[131] New South Wales' disclosure provisions may be considered as exemplary for incorporated associations, and other jurisdictions should take note.

Queensland's provision regarding disclosure of an interest could, out of all the jurisdictions, be judged as substandard. Regulation 23(8) provides that a member of a management committee must not vote on a question about a contract or proposed contract if the member has an interest in the contract or proposed contract — and, if the member does vote, the vote cannot be

126 Incorporated Associations Act 2009 (NSW).
127 This interpretation of 'matters' lends itself from s 191(1) of the Corporations Act 2001 (Cth).
128 Associations Incorporation Act 2009 (NSW).
129 Ibid, s 31(2).
130 Ibid, s 32(3).
131 Ibid, s 32(3),(4).

counted.[132] However, this provision is silent on whether a member with an interest is permitted to be present during deliberations.

Furthermore, unlike other jurisdictions, Queensland's provision does not outline any procedural requirements to guide an interested officer to disclose the nature and the extent of his or her interest. Without a procedural requirement as to when or where an interest is to be disclosed, it would be tempting for a committee member not to disclose an interest, especially when that person may benefit indirectly from this undisclosed interest — the provision implies disclosure for a *direct* interest, which is very narrow (emphasis added).

Another point of concern is that if the interested officer does not abstain from the vote, how would this affect the validity of the contract? Unlike the Corporations Act 2001 (Cth) and associations in other jurisdictions, Queensland's regulation does not express whether or not a contravention of the regulation would affect the validity of the contract. This conflict rule is contained in all associations' model rules. The lack of a disclosure requirement by the association's rules would inevitably lead to situations where an interested member may have a court render the contract unenforceable.[133]

Moreover, Queensland's provision for disclosure is contained within the subordinate legislation. This, unfortunately, does not provide any Queensland incorporated association with any legal duties that regulates the behaviour of a committee member under the Associations Incorporation Act 1981 (Qld).[134] The construction of the provision at its core does not deal adequately with transparency for members — it is a poor mechanism that does not afford a management committee the opportunity for a discussion of the issue.

Despite the known shortcomings of the Corporations Act 2001 (Cth), it does provide a solid framework for directors' duties compared with the associations' legislation. Table 1 succinctly shows the statutory legal duties for committee members across all jurisdictions are deficient and lag behind the Corporations Act.[135] However, the jurisdictions of South Australia, Northern Territory, New South Wales and Victoria can be seen to have made improvements with legal duties and obligations for an officer of a management committee.

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132 Associations Incorporation Regulations 1999 (Qld).

133 *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189; 4 ACSR 431; 9 ACLC 539.

134 Section 87 imposes a duty on the association's secretary to register the association's interest in land: Associations Incorporation Act 1981 (Qld).

135 2001 (Cth).

**Table 1 — Statutory duties of an incorporated association compared to a company[136]**

| Duty | SA | VIC | ACT | NSW | QLD | NT | WA | TAS | Company |
|---|---|---|---|---|---|---|---|---|---|
| Care, skill and diligence | ✔ | ✔ | | | | | | | ✔ |
| Proper use of position and information | ✔ | ✔ | | ✔ | | ✔ | | | ✔ |
| Pay debts | ✔ | | | ✔ | | ✔ | | | ✔ |
| Reliance | ✔ | ✔ | | | | | | | ✔ |
| Delegation | | | | | | ✔ | | | ✔ |
| Disclosure of material interest | | ✔ | | ✔ | | ✔ | ✔ | | ✔ |
| Good faith | | ✔ | | | | | | | ✔ |
| Proper purpose | | ✔ | | | | | | | ✔ |

## Filling the gaps in the statutory framework

There is a well-established body of common law and statutory duties that prohibit company directors from abusing their powers and, moreover, their position. For committee members, it is difficult to pinpoint a body of case law that applies specifically to not-for-profit associations. There have been encouraging developments in Victoria, South Australia and the Northern Territory to impose positive statutory duties on committee members; however, for incorporated associations operating in jurisdictions without these statutory duty provisions, are there any rules that governs a committee member's conduct? The judgment of Owen J in the matter *Haselhurst v Wright* is examined to answer this question.[137]

Justice Owen was asked to grant an injunction on the grounds that the directors of a building society breached their fiduciary and common law duties.[138] Before there could be a decision regarding the injunction, Owen J needed to look at a preliminary legal issue: if there was a breach, it first must be established whether a duty existed. Investigating whether or not there were legal duties owed by the building society's officers, Owen J examined the building society's governing legislation. Similar to incorporated associations, building societies have their own special legislation and are not touched by the corporations' law, and the building societies' legislation offered no

136 Table 1 is adopted and modified from an article by Charles Parkinson entitled 'Duties of Committee Members under the Associations Incorporation Acts' (2004) 30(1) Monash University Law Review 75.

137 (1991) 4 ACSR 527; 9 ACLC 728; BC9101208.

138 Ibid, at [35].

assistance.[139] Owen J simply noted that the duties owed by the building society's officers 'are to be found in the common law'. However, Owen J's statement is problematic on two grounds. First, there is no precedent that applies or develops common law duties for the management committee of an incorporated association.[140] Second, Owen J does not advance his statement by failing to recognise or pinpoint a substantive common law duty with which an officer of the building society is obliged to comply. The application of common law duties to officers of a management committee has shown to be improbable due to the leading decision of *Cameron v Hogan*.[141]

*Cameron v Hogan* established a long-standing policy that the courts refrain from interfering with the internal management and affairs of a voluntary association.[142] This negative and long-standing policy has allowed the courts to regard many actions involving voluntary associations as non-justiciable.[143] However, the courts in more recent times have shown some willingness to intervene, but only where an association has infringed the rules of natural justice and a member's economic interests, livelihood or reputation.[144] Despite the courts slowly moving away from the strict policy position of *Cameron v Hogan*, would the courts go further and impose general law duties and obligations upon an officer of a management committee?[145] Most likely not — the courts have shown further unease to speak with an authoritative voice on matters involving voluntary associations, and where it seems convenient, the courts will resort to the policy of *Cameron v Hogan* to dismiss a claim.[146] Incremental advances by the courts may, in the future, reach a point

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139 Section 1A of the Associations Incorporation Act 1981 (Qld) expressly states that incorporated associations registered in Queensland are excluded from s 5F of the Corporations Act 2001 (Cth). Other state and territory legislation have similar provisions in their associations' legislation. However, if an incorporated entity is limited by guarantee, then the Corporations Act 2001 (Cth) will apply.

140 Justice Johnson in the decision of *Lai v Tiao (No 2)* [2009] WASC 22; BC201000885 at [84] acknowledged that there is no authority that establishes an officer of incorporated associations owes common law duties.

141 (1934) 51 CLR 358; [1934] ALR 298; (1934) 8 ALJR 145; BC3400025.

142 Ibid. The reasons behind the High Court's policy of non-intervention are: rooted in nineteenth century view of the limits of judicial intervention; a respect for the association's privacy; and a fear that trivial and vexatious disputes will be encouraged which subsequently will open the 'floodgates' to litigation. J Forbes, 'Judicial Review of Political Parties', Research Paper No 21, Parliamentary Library, Parliament of Australia, 1995–1996, p 3.

143 See also *Carberry v Drice as Representative of Brisbane Junior Rugby Union* [2011] QSC 016; BC201100522; *Islamic Council of South Australia Inc v Australian Federation of Islamic Councils Inc* [2009] NSWSC 211; BC200901945; *Metropolitan Petar v Mitreski* [2003] NSWSC 1007; BC200306541; *Skelton v Australian Rugby Union Ltd* [2003] QSC 193; BC200303338; *Rush v WA Amateur Football Club League (Inc)* [2001] WASC 154; BC200103078; *Clarke v ALP (SA Branch)* [1999] SASC 415; BC9906355; *Plenty v Seventh Day Adventist Church of Port Pirie* (1986) 43 SASR 121; *Heale v Philips* [1959] Qd R 489; *Abbott v National Coursing Association of South Australia* [1941] SASR 140.

144 See *Buckley v Tutty* (1971) 125 CLR 353; [1972] ALR 370; (1971) 46 ALJR 23; BC7100400; *Nurses Memorial Centre of South Australia v Beaumont* (1987) 44 SASR 454; *Carter v NSW Netball Association* [2004] NSWSC 737; BC200405171; *Dixon v Australian Society of Accountants* (1989) 18 ALD 102; 87 ACTR 1; 95 FLR 231.

145 (1934) 51 CLR 358; [1934] ALR 298; (1934) 8 ALJR 145; BC3400025.

146 Ibid. *Carberry v Drice as Representative of Brisbane Junior Rugby Union* [2011] QSC 016; BC201100522; *Islamic Council of South Australia Inc v Australian Federation of Islamic Councils Inc* [2009] NSWSC 211; BC200901945.

where the judiciary will no longer consider issues involving voluntary associations as novel or insignificant, and the courts may be more reticent in developing the common law duties specifically for voluntary associations.[147] Returning again to Owen J's judgment, he held that fiduciary duties were owed by the society's directors to the body corporate, and the society's directors are to act in the society's best interest (as a whole) and to avoid being motivated by self-interest.[148]

## Fiduciary duties and obligations

### Is an officer of a management committee a fiduciary?

The ruling in *Haselhurst v Wright* is confined to a building society, and Owen J does not elaborate his finding as to why these specific directors are fiduciaries.[149] This shortfall in this decision makes it difficult to conclude with any certainty as to whether officers of an incorporated association are also fiduciaries. Yet, the important aspect from Owen J's comment is that fiduciary duties are 'owed to the body corporate'.[150] As it is known, an incorporated association is a body corporate with perpetual succession and, for that reason, it is sound to conclude that under Owen J's finding this could be applied to an officer of a management committee and, therefore, conclude an officer of a management committee are fiduciaries and owe fiduciary duties to its association.[151]

### The fiduciary doctrine

There are a number of established legal relationships that give rise to fiduciary obligations and duties. These well-known, established categories are: trustee and beneficiary; principle and agent; employee and employer; solicitor and client; and director and company and partners.[152] While these fiduciary categories are not closed, the task still remains difficult to identify a fiduciary in novel relationships due to the judiciary not establishing a strict formula to identify a fiduciary.[153]

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147 The increased activity by parliament legislating regarding not-for-profit organisations may subsequently result in the courts' role to interpreting and giving effect to what parliament has legislated.

148 *Haselhurst v Wright* (1991) 4 ACSR 527; 9 ACLC 728; BC9101208 at [40], [45].

149 Ibid.

150 Ibid.

151 The respective state legislative provisions which confirms an incorporated association (upon registration) to be a body corporate are: Associations Incorporation Act 1981 (Qld) s 21; Associations Incorporation Act 2009 (NSW) s 8; Associations Incorporation Act 1991 (ACT) s 22; Associations Incorporation Act 1981 (Vic) s 38(2); Associations Incorporation Act 1964 (Tas) s 11(1); Associations Incorporation Act 1985 (SA) s 20(3); Associations Incorporation Act 1987 (WA) s 10(a); Associations Act 2003 (NT) s 11(a).

152 P Latimer, *Australian Business Law*, 30th ed, CCH, 2011, p 744; P Finn, 'The Fiduciary Principle' in T G Youdan (Ed), *Equity, Fiduciaries and Trusts*, Carswell, 1989, pp 1, 33–41.

153 *Virginia Surety Company Inc v Dumbrell* [2011] VSC 602; BC201110762; D Ong, *Trusts Law in Australia*, 3rd ed, Federation Press, 2007, p 540. Attesting to the slow development of the fiduciary principle is Mason J who remarks that 'the fiduciary relationship is a concept in search of a principle'. Sir Anthony Mason, 'Themes and Prospects' in P D Finn (Ed), *Essays in Equity*, Thomson Reuters, 1985, p 246. Adding to the tempered vagueness of

Outside the established category of a charitable trustee and beneficiary, the task of identifying a fiduciary relationship existing in the not-for-profit context is not as obvious. Both Seivers and Latimer state that a committee member of an unincorporated association *may* have fiduciary obligations to members (emphasis added).[154] This carte blanche statement, in the same way as Owen J, is made without explanation or justification. While on the surface it may seem obvious, however, it is not easy to denote that a committee member is a fiduciary. The fundamental question always asked when trying to establish a fiduciary relationship is: what is a fiduciary? This question too cannot always be simply answered.

## What is a fiduciary?

The general approach taken by the Australian courts in identifying a fiduciary is founded in a legal relationship[155] that is outside the parties' legal obligations in contract and torts.[156] The parties' legal relationship will be of a particular nature, which exhibits trust and confidence, where the fiduciary will undertake to, or agree, to act for or on behalf of another person.[157] Acting on behalf of another provides the fiduciary with discretion to exercise power that will affect the interest of somebody who, within this relationship, is in a position of disadvantage and venerability.[158] This description of a fiduciary relationship outlines particular characteristics that can easily be applied to an officer of an unincorporated and incorporated association. The application of these features can be seen when an individual takes on the role of an officer of the management committee: they undertake to act for the interests of the association. Further, by acting on behalf of the association, an officer has the power and the discretion (by virtue of his or her position) to make decisions that will affect the association and its members. An officer is trusted to make decisions that will benefit the association and its members. However, this arrangement places members in vulnerable position where an officer can abuse the power and position.[159] Hence, it is very easy to see why Sievers and

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fiduciary is expressed by Jacobson J that is, 'the term "fiduciary relationship" defies definition'. *ASIC v Citigroup Global Markets Australia Pty Ltd (ACN 113 114 832) (No 4)* (2007) 160 FCR 35; 241 ALR 705; [2007] FCA 963; BC200704944 at [270].

154 A S Seivers, *Associations and Clubs Laws in Australia and New Zealand*, 3rd ed, Federation Press, 2010, p 17; Latimer, above n 152, 744.

155 See *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41; 55 ALR 417; [1984] HCA 64; BC8400480; *Maguire v Makaronis* (1997) 188 CLR 449; 144 ALR 729; [1997] HCA 23; BC9702653; *Estate Realties Ltd v Wignall* [1991] 3 NZLR 482.

156 P Radan and C Stewart, *Principles of Australian Equity and Trusts*, LexisNexis Butterworths, 2010, p 181.

157 *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41 at 96 per Mason J; 55 ALR 417; [1984] HCA 64; BC8400480.

158 Ibid, at CLR 96, 142 per Mason and Dawson JJ.

159 The feature of trust is impulsive due to the notion that not-for-profit organisations are more trustworthy than for-profits as a consequence of information asymmetry, contract failure and the perception that an officer is wholesome and selfless when perusing and undertaking the association's unadulterated and altruistic purposes. See D Young, 'Alternative Models of Government-Nonprofit Sector Relations: Theoretical and International Perspectives' (2000) 29 *Nonprofit and Voluntary Sector Quarterly* 149 at 154; L Salamon, 'Putting the Civil Society Sector on the Economic Map of the World' (2010) 81(2) *Annals of Public and Cooperative Economics* 167 at 168–9.

Latimer concluded that officers of unincorporated and incorporated associations are fiduciaries and, therefore, owe fiduciary duties. However, doubt remains over whether the last characteristic of vulnerability is truly present in the relationship between an officer and the association's members.

There are possibilities where members of the association and its property are vulnerable to abuse by an officer of the management committee. Giving rise to this possibility is the statutory power of control and power vested in the management committee to operate and conduct the association's business.[160] This unqualified power allows an officer of a management committee to make decisions about the association's affairs and property without the need for the membership base to be involved or consulted in the decision-making process.[161] However, to counterbalance this exclusive power, the association's rules provide members with voting rights.[162] Each member of an association has one vote, and the rules provide that a majority of members present can decide on matters by way of a resolution at a general meeting.[163] This facilitates a democratic method of decision-making that ensures the administration of the association is being conducted in a proper manner.

However, where members do not have voting rights, the management of the organisation is centralised amongst an exclusive few individuals, and this will create a private sphere. Within this private sphere, all the decisions regarding the management of the association will be made. How decisions are made and how individuals conduct themselves within this sanctum is out of view without the need to be answerable to the membership base.[164] Acting independently to the rest of the association, this private sphere will become insular, allowing an individual to act bona fide in self-interest. The management of the association falls upon the shoulders of a few, and these few individuals will become highly involved in the association and possess the necessary knowledge on how to manage it. Members will come to trust and blindly accept any information provided by these individuals. This will allow the dominant personalities to orchestrate the numbers amongst the membership base to support their agenda — this can occur regardless of

160 Associations Incorporation Act 1981 (Qld) s 60(1).

161 For example, in Queensland the management committee must decide whether there is a need for the association to take out public liability insurance and the amount of public liability insurance. This decision by the management committee in regards to not taking out public liability insurance is to be reported at the association's annual general meetings. Associations Incorporation and Other Legislation Amendment Act 2007 (Qld) ss 70, 70A.

162 Associations Incorporation Regulations 1999 reg 38(2); Associations Incorporation Regulations 2010 (NSW) reg 22(2); Associations Incorporation Regulations 1991 (ACT) reg 20(2); Associations Incorporation Act 1981 (Vic) s 29(5); Associations Incorporation Regulations 2009 (Vic) reg 16(1); Associations Incorporation (Model Rules) Regulations 2007 (Tas) reg 18(1); Associations Incorporation Act 1988 (WA) 1987 s 24; Associations (Model Constitution) Regulations 2004 (NT) reg 40(1). There is no provision within the Associations Incorporation Act 1985 (SA) nor its accompanying regulations which expressly states that a member has one vote. However, the publication entitled *An Example of Rules for Incorporated Associations* produced by the Government of South Australia, Consumers and Business Services states that a member of an incorporated association has only one vote: at <http://www.ocba.sa.gov.au/assets/files/02_association_rules.pdf>, p 12 (undated).

163 Association Incorporation Regulations 1999 (Qld) Sch 4, reg 38.

164 Weinert, above n 1, p 53.

whether members have voting rights or not.[165] The private sphere that emerges in this instance is because these few individuals have a monopoly in the management of the organisation. Worst of all, the structure of associations allows such individuals to self-regulate, which will permit any acts of self-interest or other misdeeds to be hidden from the membership base and, consequently, members would be in a vulnerable situation. However, the finding of a fiduciary relationship in a novel situation remains an impossible task, despite the presence of venerability.[166]

The courts are highly reluctant to impose a higher standard of conduct prescribed under equity to those in a 'relative equal position'.[167] Further reluctance by the court to impose fiduciary obligations will bring about uncertainty in a commercial context.[168] While the relationship between an officer and member is not commercial in nature, the relationship is, however, contractual; it this aspect of the parties' relationship that the courts would focus upon.[169]

The finding that an officer of an organisation is a fiduciary seems unlikely. Identifying the core of an officer's relationship to another member and to the association itself is rooted in contract and, moreover, this contract places each officer and member on an equal footing. The courts would prefer to elicit an officer's and a member's obligations from contract and not draw upon stricter equity principles that may alter the operation of the contract.[170] Although courts seem impervious to a plea of a fiduciary relationship, they will, however, afford the opportunity for a party to argue for a finding of a fiduciary relationship.[171]

The opportunity to argue that an officer of a not-for-profit organisation was a fiduciary happened in the Canadian case of *London Humane Society (Re)*.[172] Here it was found that an officer of a not-for-profit organisation was a fiduciary due to their discretion over the organisation's property — the interest remained vested in the organisation, not the members.[173] Therefore, an officer of a not-for-profit organisation is in a fiduciary relationship with the organisation itself,[174] and the public.[175] These findings by the Canadian courts

165 *McClelland v Burning Palms Surf Lifesaving Club* (2002) 191 ALR 759; [2002] NSWSC 470; BC200203189.

166 *Hospital Products Ltd V United States Surgical Corp* (1984) 156 CLR 41; 55 ALR 417; [1984] HCA 64; BC8400480.

167 A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238 at 238.

168 S White, 'Commercial Relationships and the Burgeoning Fiduciary Principle' (2000) 9(1) *Griffith LRev* 98 at 99. Dawson J expressed that confusion and uncertainty will occur in commercial dealings if the fiduciary principle was imposed: *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41; 55 ALR 417; [1984] HCA 64; BC8400480 at [494].

169 The rules of an incorporated association operate as a contract between the association and its members: *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759; [2002] NSWSC 470; BC200203189.

170 *Hospital Products Ltd V US Surgical Corp* (1984) 156 CLR 41; 55 ALR 417; [1984] HCA 64; BC8400480 at [97] per Mason J.

171 *Virginia Surety Company Inc v Dumbrell* [2011] VSC 602; BC201110762 at [35].

172 (2010) ONSC 5775.

173 Ibid.

174 *London Humane Society (Re)* (2010) ONSC 5775.

are not surprising. Compared with Australia, the development of fiduciary law in Canada has been progressive, and the fiduciary doctrine has been widened to include relationships where there are non-economic interests.[176] Furthermore, the analysis of a fiduciary relationship is prescriptive, which subsequently has created a 'catch-all' situation, unlike Australia's approach, which is prospective.[177] However, it remains to be seen whether the Australian judiciary would be amenable to view an officer of an incorporated association as a fiduciary.

The law confers some nominal statutory duties, but no rules to govern the conduct of an officer who has control of an association's funds and property. This is unacceptable and, therefore, a different view of an officer of a voluntary association is needed to find and recognise some rules of obligations that are applicable to an officer of an association. This alternative view would be to see an officer as an 'agent' of the association.

## Principal agent relationship

Viewing an officer as an agent the law would subject that person's conduct to certain duties and obligations. The decision and policy of *Cameron v Hogan* has repeatedly been shown to be a barrier for the courts to adequately deal with grievances involving a not-for-profit organisation — as surprising as it may seem, *Cameron v Hogan* can be helpful in identifying an officer as an agent.[178] The majority stated in *Cameron* that officers may be agents for the members of the association and, furthermore, stated that upon there being no doctrine of agency, an association's members are joint principals who can hold an officer and the committee responsible.[179]

The incorporated association legislation offers some guidance in knowing whether an officer of a management committee is an agent; however, there remains inconsistency across most of the jurisdictions. Queensland is the only jurisdiction that expressly states every member of the management committee, and any manager appointed by the management committee, are deemed to be agents of the association.[180] However, the remaining jurisdictions do not provide such clarity.

New South Wales' incorporated association's legislation notes that any people who hold themselves out to be an agent of the association can make the

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175 The court found that the fiduciary relationship between an officer and the public is largely due to the public making donations to the organisation: *Pathak v Hindu Sabha* (2004) OJ No 1981.

176 *Frame v Smith* (1987) 42 DLR (4th) 81.

177 *Norberg v Wynrib* (1992) 92 DLR (4th) 449; L Rotman, 'Fiduciary Doctrine: A Concept in Need of Understanding' (1996) 34(4) *Alberta L Rev* 821 at 833.

178 In more recent times, the lower courts have shown their preparedness to hear disputes regarding the members of an incorporated association. While these decisions found there to be a breach of natural justice, the courts did not find a member's contractual interests and rights were infringed. See *Rose v Boxing NSW Inc* [2007] NSWSC 20; BC200700280 and *Goodwin v VVMC Club Australia (NSW Chapter)* (2008) 72 NSWLR 224; [2008] NSWSC 154; BC200800991. Both of these judgments found that the association had inadequately dealt with a dispute with a member and ordered compensation.

179 *Cameron v Hogan* (1934) 51 CLR 358; [1934] ALR 298; (1934) 8 ALJR 145; BC3400025 per Rich, Dixon, Evatt and McTiernan JJ; *Kelly v National Society of Operative Printers* (1916) 113 LT 1055.

180 Associations Incorporation Act 1981 (Qld) s 60(2).

assumption that this person is duly appointed and has the authority to be an agent.[181] This provision is a direct reflection of the indoor management rule found in s 129 of the Corporations Act 2001 (Cth). Furthermore, s 126 of the Corporations Act 2001 (Cth) and the New South Wales' Act state that an agent has an association's expressed and implied authority to make, vary, ratify or discharge a contract on behalf of the association.[182] These provisions in the NSW' statute are wide, and they do not specify how and who within the association can be appointed as an agent. The danger of these provisions is that any person purporting to be an agent may bind an association to a contract or transaction that the association may not know about, want, or is within the purpose of the association. These provisions strongly imply that an association's agent is entrusted to undertake dealings in good faith. While under the general law an unruly agent may be personally liable for their actions, the legislation does not provide any liability provisions for agents or individuals purporting to be agents. However, the other states provide stricter provisions relating to an agent's conduct.

Respective legislation in the Australian Capital Territory, Western Australia, South Australia and Victoria states that an agent may execute documents and deeds under the association's common seal.[183] These jurisdictions require an agent to be appointed in writing and the agent's authority continues only for a period specified in the instrument that confers the agent's authority — and, if no period is stated, revocation or termination of the agent's authority by way of notice.[184] These provisions can be assessed to be applicable only to the association appointing a specific individual to undertake a one-off task, such as purchasing property. Nothing within these jurisdictions suggests a member or an officer of the management committee is automatically an agent. The jurisdictions of the Tasmania and the Northern Territory contain no provisions that allow for the appointment of an agent to act on the association's behalf.

These gaps in the legislation raise two queries. First, whether officers of a management committee are agents for the association in the jurisdictions of South and Western Australia, Victoria, Tasmania and the Northern Territory; and, second, whether is it probable that associations in Tasmania and the Northern Territory have the power to appoint an agent. The last relies on the legal instrument that provides an association with a juristic personality. This, subsequently, allows an association to have the legal capacity to exercise powers to carry out the organisation's business, which endows an association the ability to enter into contracts.[185] This juristic personality permits an association to appoint an agent by contract or in writing to act on behalf of the

181 Associations Incorporation Act 2009 (NSW) s 24(4).

182 Ibid, s 21(1).

183 Associations Incorporation Act 1991 (ACT) s 55(2); Associations Incorporation Act 1991 (SA) s 55(1); Associations Incorporation Act 1981 (Vic) s 19(7); Associations Incorporation Reform Act 2012 (Vic) s 39; Associations Incorporation Act 1987 (WA) s 13(1)(f).

184 Associations Incorporation Act 1991 (SA) s 55(2),(3); Associations Incorporation Act 1981 (Vic) s 19(8); Associations Incorporation Reform Act 2012 (Vic) s 39(3).

185 Associations Incorporation Act 1981 (Qld) s 25; Associations Incorporation Act 2009 (NSW) ss 19, 21; Associations Incorporation Act 1991 (ACT) s 42; Associations Incorporation Act 1981 (Vic) s 19; Associations Incorporation Act 1964 (Tas) s 20; Associations Incorporation Act 1985 (SA) s 26; Associations Incorporation Act 1987 (WA) ss 14, 20; Associations Act 2003 (NT) Pt 4.

association. However, with regards to the first query (whether an officer is an agent in the remaining jurisdictions) remains unclear and, therefore, attention is turned to the general law.

The *Cameron v Hogan* decision provides a clear answer to the query — the majority stated that an officer may be an agent for the association and its members.[186] Their Honours failed to explain why an officer is an agent and, in the absence of any judicial reasoning, it may be presumed that a finding of agency arises out of necessity to carry out transactions and the association's activities — regardless of whether the association is incorporated or unincorporated.

Nevertheless, there is some difficulty determining whether an individual committee member of an unincorporated association is an agent due to the law not recognising this particular form as a juristic entity and, furthermore, any transaction or contract involving an unincorporated association needs to be in the officer's own name.[187] However, these concerns are overcome by the decision of *Kelly v National Society of Operative Printers*.[188] Here, the majority found that an officer of an unincorporated body is an agent.[189] An officer acting as an agent of either incorporated or unincorporated associations will not receive remuneration, nor will the agent be subject to an enforceable contract of agency. Therefore, in the absence of an enforceable contract, an officer would be found to be a gratuitous agent.[190] Once an agency relationship has been established, it must be determined what is the agent's authority.[191]

## An agent's authority

The scope of an agent's authority is important when considering whether the agent has acted outside his or her authority and, consequently, would lose the right of indemnity for their actions. The types of authority are: (a) actual authority, implied and expressed; (b) ostensible authority; and (c) retrospective authority.[192]

The type of authority conferred upon an agent derives from the source that creates the agency and principle relationship. As already established, an officer of an incorporated association is an agent under the respective association legislation that provides an agent (officer) with actual authority. The agent being conferred with the authority to perform particular acts in the name of the association creates this actual authority. Furthermore, an officer's actual authority may be implied by the agent's conduct, the circumstances, or

186 *Cameron v Hogan* (1934) 51 CLR 358; [1934] ALR 298; (1934) 8 ALJR 145; BC3400025 per Rich, Dixon, Evatt and McTiernan JJ.

187 *Freeman v McManus* [1958] VR 15; [1958] ALR 201; *Carlton Cricket and Football Social Club v Joseph* [1970] VR 487.

188 (1916) 113 LT 1005.

189 Ibid, at 1058, 1062 per Swinfen Eady LJ, Phillimore LJ and Bankes LJ.

190 *Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174 at 185; [1995] 3 All ER 211; [1995] 2 WLR 49.

191 *Credit Lyonnais Bank Nederland NV v ECGD* [2000] 1 AC 486; [1999] 1 All ER 929; [1999] 2 WLR 540; [1999] 1 Lloyd's Rep 563.

192 S *Fisher, Agency Law*, Butterworths, 2000, pp 32–9.

activities that are incidental to the association's activities.[193] The rules governing an agent's apparent authority (regardless whether it is expressed or implied) the doctrine of ultra vires may be a consequence for an officer who has acted outside his or her authority.

The doctrine of ultra vires has been disposed of by the association legislation. Under the associations' statute, the ultra vires rule has been altered regarding the power of an officer to enter into a binding agreement with the association — it shall not be invalid where the association did not have the power or the capacity to do such an act or to execute the document.[194] Where an association lacks the power to execute a transaction, the courts are willing to remedy this through the rules of constructive trust — especially where unincorporated associations are involved.[195] Despite the doctrine of ultra vires being set aside by statute, the conduct of an agent of an incorporated association will remain subject to the recognised general law duties of an agent.

## Duties of an agent

The principal and agent relationship gives rise to certain and onerous duties for an agent.[196] Justice McCardie in *Armstrong v Jackson* stated that these particular and onerous duties are due to the agent's position of confidentiality, and situations that can lend themselves to abuse, or to be taken advantage of and, therefore, requires the agent's conduct to be of a high standard.[197] The essence of McCardie J's judgement illustrates that there is a fiduciary dimension to the principal agent relationship and that strict equitable principles apply.[198] Gibbs CJ and Mason J in *Hospital Products Ltd v US Surgical Corp* also support this position by recognising that the principal agency relationship is a fiduciary relationship.[199] Further, to the strict equitable obligations owed by an agent to the principle that arises from the special position of trust, there are also an agent's contractual duties.[200]

The respective incorporated association legislation allows an officer to operate as an agent of the association; however, neither the statute nor the association's rules provide an agent with any rules, duties or obligations

193 *Verdi Club Inc v National Australia Bank* (1991) 104 FLR 344; R Munday, *Agency Law and Principles*, Oxford University Press, 2010, pp 48–51.

194 Associations Incorporation Act 1981 (Qld) s 26; Associations Incorporation Act 2009 (NSW) s 20; Associations Incorporation Act 1991 (ACT) s 56; Associations Incorporation Act 1981 (Vic) s 17; Associations Incorporation Reform Act 2012 (Vic) s 35; Associations Incorporation Act 1985 (SA) s 27; Associations Incorporation Act 1987 (WA) s 15. Constructive notice will not be discussed, as it is not in the scope of this article.

195 *Worthing Rugby Football Club v Inland Revenue Commissioners* [1985] 1 WLR 409; [1985] STC 186;. There are numerous pragmatic difficulties which an unincorporated association experiences largely due to its poor legal standing.

196 *Armstrong v Jackson* [1917] 2 KB 822 at 826 per McCardie J.

197 Ibid, at 826.

198 Ibid, at 825–6 per McCardie J.

199 (1984) 156 CLR 41; 55 ALR 417; [1984] HCA 64; BC8400480 at [68], [96] per Gibbs CJ and Mason J.

200 *Rothschild v Brookman* (1831) 5 Bli (NS) 165 at 197; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 at 451; (1984) 2 IPR 499; [1985] 3 All ER 351; [1984] 3 WLR 448; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716; [1965] 2 All ER 725; [1965] 3 WLR 276.

specific to an agent.[201] Therefore, it is plausible to find an officer as a gratuitous agent due to the absence of remuneration and an enforceable contract.[202] Establishing that an officer is a gratuitous agent poses the question: does that officer owe the association the fiduciary duties of an agent or a lesser duty of care?[203]

Where an officer is a gratuitous agent (appointed by statute), it is reasonable for an association to rely and trust on that agent's skill and judgement. However, the members must also have confidence that an agent's performance will be carried out in in accordance with the fiduciary duties of an agent.[204] The fiduciary duties owed by an agent are as follows:

1. *no conflict rule* — officers must not be in conflict with the association and they should not take advantage if a conflict arises;[205]
2. *no profit rule* — an officer must not receive a profit at the expense of the association;[206]
3. *duty of loyalty* — an officer must make all the relevant information available to the association;[207] and
4. *duty of confidentiality* — any information obtained by the officer for the association must not be used by that officer for a private advantage.[208]

Conversely, the required level of care a gratuitous agent owes a principal is declared to be what might be reasonably accepted in the circumstances and, furthermore, judged objectively.[209] This means that an agent's actual degree of skill and experience, or the skill and experience that the agent has laid on themselves.[210]

The strictness of these fiduciary duties for officers raises the old argument that it would be unreasonable to expect volunteers to satisfy this high standard on the basis that individuals are acting out of prevailing social mores. The courts would give strong consideration to this argument, and would more than likely find that the lower common law duty applies. Where officers do not hold themselves out to have a special skill or knowledge, the court has held that, in the circumstances, a gratuitous agent will be held to the standard of care of

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201 Many incorporated associations rely and operate on the efforts of volunteers who occupy positions on the management committee, and it would be a fair assessment that these volunteers generally would not have any knowledge or understanding of an agent's duties. Therefore, the respective incorporated associations legislation should outline these obligations.

202 An association's rules can be read to have the effect of a contract: *Islamic Council of South Australia Inc v Australian Federation of Islamic Council Inc* [2009] NSWSC 211; BC200901945; *Liddle v Central Australian Legal Aid Service Inc* [1999] NTSC 35.

203 *Chaudhry v Prabakhar* [1989] 1 WLR 29; [1988] 3 All ER 718.

204 *Bristol & West BS v Mathew* [1998] Ch 1 at 18 per Millett LJ; [1996] 4 All ER 698; [1997] 2 WLR 436.

205 *Western Areas Exploration Pty Ltd v Streeter (No 3)* (2009) 234 FLR 265; (2009) 73 ACSR 494; [2009] WASC 213; BC200906821 at [48].

206 *Cook v Deeks* [1916] 1 AC 554; [1916-17] All ER Rep 285; (1916) 27 DLR 1.

207 *Breen v Williams* (1996) 186 CLR 71; 138 ALR 259; [1996] HCA 57; BC9604086.

208 *Morison v Moat* (1851) 68 ER 492 at 898.

209 *Chaudhry v Prabakhar* [1989] 1 WLR 29; [1988] 3 All ER 718 per Stocker and Stuart-Smith LJJ.

210 Ibid.

a competent agent when carrying out the business of the association.[211] The court held there are no grounds to exempt a gratuitous agent from a duty of care when they are entrusted to carry out a task.[212] Hence, officers of incorporated and unincorporated associations acting as an agent for them can be a fiduciary — but it is more than likely a court will hold an agent to a minimal standard of care and not to strict fiduciary obligations.

## Conclusion

There are some similarities between the roles and functions of a company director and an officer of a management committee. Both operate as a collective group of individuals who are in control of and manage their respective entity's property and carry out the operation and business. There is very little known about how a management committee carries out these functions. There is, of course, a desired presumption and expectation that a management committee of an association manages in accordance with the association's altruistic mission. However, the altruistic mission can no longer be a shield to deflect the need for better accountability and transparency of not-for-profit organisations.

There are overwhelming social and economic reasons to justify the call for better transparency and accountability through a governance framework within not-for-profit organisations. Unfortunately, the law relating to incorporated associations does very little to encourage a management committee to achieve transparency and accountability, or to promote a governance framework that protects an association's property and controls risk. Legal duties and obligations are important mechanisms of organisational governance, and an examination of legal duties for incorporated associations reveals a number of shortcomings.

This article first analysed an officer's statutory duties across state and territory jurisdictions. This analysis illustrated that New South Wales, Victoria, South Australia and the Northern Territory have more statutory duties compared to the other jurisdictions. Furthermore, these jurisdictions have made advances and improvements by introducing some statutory duties. Table 1 succinctly shows the statutory duties of committee members across all Australian jurisdictions, and demonstrates inconsistencies in statutory duties for officers of a management committee. Where there are significant gaps in the legislation, the general law is considered.

The general law has proved unhelpful in ascertaining whether an officer of a management committee is subject to common law duties. There are no common law duties due to the long-standing decision of *Cameron v Hogan*,[213] which set the precedent that, in the absence of a proprietary right or interest in the property of the association, any issue regarding the internal management of a voluntary association is non-justiciable. Despite incremental advances by the courts to intervene in some matters involving the internal management of voluntary associations, the courts have, however, been

211 *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* (1984) 157 CLR 149 at 168–70 per Brennan J; 55 ALR 509; [1984] HCA 59; BC8400481.

212 Ibid.

213 (1934) 51 CLR 358; [1934] ALR 298; (1934) 8 ALJR 145; BC3400025.

reluctant to develop common law duties for officers of a voluntary association. This article shows that, in a number of cases, it has been held that an officer owes some general law duties. Where the common law has shown to be scant, the fiduciary law has been shown to be of some assistance.

However, for fiduciary duties to be owed, it must be established that an officer is a fiduciary and that an officer has a fiduciary relationship with the association. The established fiduciary categories do not include an officer of a management committee or a voluntary association.

The courts do not wish to hold an individual to stricter or a higher standard of conduct especially where the parties are in a relatively equal position by showing that an officer and a member of an association are in an equal position. With very few statutory, common law and fiduciary duties affecting the conduct of an officer an alternative view of the role of the officer is needed.

Identifying an officer as an agent will, in fact, subject that officer's conduct to strict fiduciary duties in particular circumstances. The circumstances in which an agent owes fiduciary duties were clearly stated by Lord Denning MR in *Boardman v Phipps* when he said:

> if an agent uses property, with which he has been entrusted by his principal, so as to make a profit for himself out of it, without his principal's consent, then he is accountable to his principal . . . So, also, if he uses a position of authority, to which has been appointed by his principal, so as to gain money by means of it for himself, then also he is accountable to his principal for it . . . Likewise with information or knowledge which he has been employed by his principal to collect or discover, or which he has otherwise acquired, for the use of the principal, then again if he turns it to his own use, so as to make a profit by means of it for himself, he is accountable . . . for such information or knowledge is the property of his principal, just as much an invention is . . .[214]

Notwithstanding the negative impact of *Cameron v Hogan*,[215] it was stated by the majority (Rich, Evatt, and McTiernan JJ) that an officer may be an agent, and members of an unincorporated association are joint principals. Furthermore, the English Court of Appeal decision of *Kelly v National Society of Operative Printers*, cited by the majority in *Cameron v Hogan*,[216] found that an officer of an unincorporated association may be an agent.[217] The respective associations' legislation also gives some additional support to the concept that an officer is an agent of the association with actual authority. While the respective legislation does not identify the type of agent the common law would most likely view an officer to be a gratuitous agent when dealing with third parties. The standard of care for a gratuitous agent will take into account the agent's actual degree of skill, judgment and experience that they hold themselves out to have. Furthermore, the courts have shown little tolerance to exempt a gratuitous agent from liability and, therefore, in the circumstances, a gratuitous agent has been held to a minimal standard of care opposed to that expected of a competent agent. This, however, is reflective of torts law and not fiduciary principle as such.

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214 [1965] Ch 992 at 1018–19; [1965] 1 All ER 849; [1965] 2 WLR 839.
215 (1934) 51 CLR 358; [1934] ALR 298; (1934) 8 ALJR 145; BC3400025.
216 Ibid, at CLR 373.
217 (1916) 113 LT 1055 at 1058, 1060, 1062.