

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



ASMAR V ALBANESE [2021] VSC 263; ASMAR V ALBANESE (NO 2) [2021] VSC 324; ASMAR V ALBANESE (NO 3) [2021] VSC 334

Supreme Court of Victoria, Ginnane J, 7 May 2021;(No 2) Matthews AsJ 4 June 2021; (No 3) Ginnane J, 9 June 2021

Series of Interlocutory applications involving a political party internal dispute.

Key words: Associations, Victoria, Federal Intervention, ALP, Preselection, Injunction

1. Unions or their officers affiliated (Unions) with the Australian Labor Party (ALP) sought an interlocutory injunction restraining the persons who comprise the National Executive of the ALP from acting upon or giving effect to any nominations received in respect of the 22 Federal House of Representative seats in Victoria.
2. In June 2020, the National Executive passed a resolution exercising its powers to appoint administrators to the Victorian ALP Branch. All committees of the Victorian State Conference, as defined in the Victorian Rules, were suspended, and all officials and staff of the Victorian Branch were required to report to the administrators. In January 2021, the National Executive passed further resolutions appointing an Interim Governance Committee to replace the Administrators.
3. The National Executive resolved to open nominations for federal candidates at midday on Tuesday 4 May 2021 and close them at 10am on Friday 7 May 2021. This departed from the usual lengthy and consultative process and did not in any way reflect the procedures for pre-selection as set out in clause 3.5 of the Branch Rules.
4. The Unions argued that:
 - a) The National Executive had exercised power that it did not have;
 - b) There was a close connection between the issues in this case and the operation of the Commonwealth Electoral Commission Act;
 - c) The nature and extent of the financial contributions that the plaintiffs as affiliated unions provided to the ALP were in issue;
 - d) The improper purpose argument which primarily relied on the truncated timetable for nominations that the resolution imposed applied.
5. The National Executive relied on the High Court case of [Cameron v Hogan](#) [1934] HCA 24 that the dispute was not justiciable as it involved an unincorporated political party with no contractual basis for the relationships, and thus no basis for a member to bring an action against an unincorporated association unless some proprietary right could be shown. The Court noted however that (at [14]):

Nonetheless, many decisions of trial judges, particularly in Queensland, New South Wales and South Australia, have decided that unincorporated political parties have changed in character because of the public funding regime and their registration under the Electoral Acts. Some of those cases have suggested that political parties have become a form of public institution and that disputes arising in them, particularly in respect of their pre-selection of candidates for election, are justiciable in the public interest. However, there are judgments rejecting that basis for distinguishing *Cameron v Hogan* including Riordan J's considered judgment in *Setka*.

6. The Court found that the Unions had established a serious question to be tried and union affiliation fees may place the Unions in a different legal relationship to unincorporated association members.
7. The Court decided that the balance of convenience applied and granted an early hearing date. The selection of candidates should not occur until the conclusion of the hearing of this proceeding and probably its determination. The Court acknowledged that it could make orders undoing the outcome of the pre-selection ballots if the Unions' case was successful, but it may well be an unwieldy process that may have unintended consequences.
8. The Court ordered that the interlocutory injunction remain until at least the completion of the trial of the proceeding.

Asmar v Albanese (No 2) [2021] VSC 324

9. This application dealt with issues of legal privilege attaching to discovered documents between the parties. The main dispute concerned legal advice given to the National Executive after a newspaper article foreshadowed that the Unions would commence litigation against the National Executive. The advice was found to attract privilege.

Asmar v Albanese (No 3) [2021] VSC 334

10. This interlocutory proceeding occurred after the substantive trial of the case, but before judgment was delivered. The issue was whether the injunction should be continued, and had the balance of convenience shifted?
11. The Court summed up its consideration as (at [23]-[25]):

Whichever decision the Court makes on the question of the continuance of the interlocutory injunction disadvantage and prejudice may be caused to one side in this litigation. It is significant that the interlocutory injunction prevents the ALP, the political party to whom all the individuals involved in the litigation belong, from nominating candidates for Victorian House of Representative seats in Victoria. This is at a time when other political parties are free to nominate candidates. I consider that the ALP's inability to nominate candidates is a significant matter. There is some force in the defendants' submission that campaigning is best associated with the promotion of the preselected candidate. I consider that on balance it is appropriate not to continue the interlocutory injunction. There is a lower risk of ultimate injustice with no injunction in place. I accept that if the plaintiffs succeed some confusion may occur if different candidates are thereafter preselected. If on the other hand, the plaintiffs do not succeed, the defendants and their political party have been politically prejudiced by not having candidates preselected and able to commence campaigning in electorates.

IMPLICATIONS



Kairouz v Bracks [2021] VSC 130 was also heard at the same time as the trial of this matter as it arose of the same circumstances.

Given the recent judgment in *John Setka v Noah Carroll & Ors* [2019] VSC 571, for the High Court case of Cameron v Hogan to be overturned or distinguished authoritatively, the High Court will have to eventually review this case, or one similar. The words of the ALP constitution are clear and concise that the members do not intend for disputes to be heard in the courts under the law of contract.

If the Court finds another means to review the issues through union affiliation rights or that unincorporated political parties have changed in character because of the public funding regime and their registration under the Electoral Acts, this could mean a change in the law of unincorporated associations in Australia.

VIEW THE CASE



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EVENTS