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.

Ipswich Netball Association Inc v Netball Queensland Limited [2021] QSC 348

Supreme Court of Queensland, Wilson J, 17 December 2021

A failed attempt to disaffiliate an association member from a sporting peak body.

Key words: Company Limited by Guarantee, Queensland, Member, Affiliate, Class of Members, Variation of Class Rights, Board Powers

1. Netball Queensland Limited (Netball Queensland) is a company limited by guarantee, which was established in 1971 as the governing body for netball in Queensland. Its first object was to "conduct, encourage, promote, advance, control and manage all levels of Netball in Queensland interdependently with Members and others".

2. Ipswich Netball Association Inc (Ipswich Netball) was established in the 1920s and incorporated on 6 January 1987. It is responsible for the administration of netball in the Ipswich region.

3. Ipswich Netball was a founding member of Netball Queensland, being a "Member Association", which is a legal entity recognised by Netball Queensland as representing a geographic area or group of clubs.

4. A series of disputes arose between the two organisations which led Netball Queensland's board to resolve:

    - not to renew Ipswich Netball's affiliation;
    - not to re-affiliate Ipswich Netball unless there was major change in the management committee; and
    - not to consider affiliation of Ipswich Netball until after the AGM and SGM, with assurances in relation to conduct and civil and responsible communication.

5. Ipswich Netball claimed that the decisions were invalid and sought declaratory relief.

6. The parties agreed the issues were:

    i. Is the dispute justiciable?
    ii. Pursuant to what power (if any) were the decisions made?
        a. Did the Netball Queensland Constitution confer any such power?

b. Did the Netball Queensland Affiliation and Membership Policy (the Policy) confer any such power?
c. Whether sections 124 and 125 of Corporations Act 2001 (Cth) (Corporations Act) authorised the decisions.

iii. If the decisions were not authorised by the Netball Queensland Constitution or by the Policy should they be declared invalid and of no effect and Netball Queensland be ordered to reinstate to Ipswich Netball the rights and privileges it enjoyed prior to the making of the decisions?

iv. Is the Policy an invalid attempt to vary class rights contrary to section 246B(2) of the Corporations Act?

v. Is the Policy unconstitutional and therefore invalid because:
a. It is inconsistent with the Netball Queensland Constitution and therefore not authorised by the Netball Queensland Constitution?
b. It is an unauthorised amendment to the Constitution?

vi. Is the Policy and its enforcement oppressive within the meaning of section 232 of the Corporations Act 2001?

vii. If the answer to either or both of questions (iv) or (v) above is 'yes', should the Policy be declared invalid and of no effect and Netball Queensland be ordered to reinstate to Ipswich Netball the rights and privileges it enjoyed prior to the making of the decisions?

viii. If the answer to question (vi) is 'yes', should Netball Queensland be ordered to terminate the Policy and reinstate to Ipswich Netball the rights and privileges it enjoyed prior to the making of the decisions?

ix. In the alternative to questions (iii) to (viii) above:
a. In making the decisions did Netball Queensland afford natural justice to Ipswich Netball?
b. Was Netball Queensland subject to and did it breach an implied term of cooperation in the Policy by failing to give Ipswich Netball access to the re-affiliation form prior to making the decisions?
c. Were the decisions oppressive within the meaning of section 232 of the Corporations Act?
d. If Netball Queensland failed to afford natural justice to Ipswich Netball or breached an implied term of cooperation, or if the decisions were oppressive (per questions ix (a), (b) and (c):
- Should the decisions be declared invalid and of no effect, or set aside?
- Should the Court order Netball Queensland to reaffiliate the applicant for the 1 April 2021 to 31 December 2021 affiliation period?

7. The parties further agreed that as Netball Queensland was a company limited by guarantee rather than an unincorporated association, all of the agreed issues were justiciable.

8. The Court found that the matter could be resolved on the basis of issues two, three and four being the power by which the decisions were made, and the variation of class rights.

9. The Court found that whilst Member Associations were defined in the Constitution, the terms Affiliated Member Associations and Affiliates were not, and from a detailed examination of the constitution, the terms were not synonymous. Thus the decisions of the board of Netball Queensland should be characterised as decisions about Ipswich Netball's affiliation and not their membership.

10. The Court found that the constitution did not confer power on the board to make decisions about 'affiliation' (rather than membership) and further the decisions were not made pursuant to the Code of Conduct and Integrity or Disciplinary Regulation adopted by Netball Queensland.

11. It was argued that the Affiliation and Membership Policy made by the board conferred a power on the board to refuse affiliation or impose conditions on re-affiliation.

12. The Court found that Netball Queensland board's decisions to refuse affiliation or prescribe conditions on Ipswich Netball's affiliation were not made on the basis that the conditions and requirements in the Policy had not been met. Further, the Policy did not contain any such general right of discretion to refuse affiliation and the Policy was an impermissible variation of class rights under the Corporations Act and therefore invalid.

13. Netball Queensland argued that the effect of sections 124 and 125 of the Corporations Act, together with its Constitution, was that its board could do anything it wished to do, unless expressly prohibited by a clause in the Constitution. It further argued that this included the power to make the decisions (being decisions not to affiliate the applicant unless certain assurances were given).

14. Section 124(1) of the Corporations Act provides:

> A company has the legal capacity and powers of an individual both in and outside this jurisdiction. A company also has all the powers of a body corporate, including the power to:
>
> (a) issue and cancel shares in the company;
> (b) issue debentures (despite any rule of law or equity to the contrary, this power includes a power to issue debentures that are irredeemable, redeemable only if a contingency, however remote, occurs, or redeemable only at the end of a period, however long);
> (c) grant options over unissued shares in the company;
> (d) distribute any of the company's property among the members, in kind or otherwise;
> (e) grant a security interest in uncalled capital;
> (f) grant a circulating security interest over the company's property;
> (g) arrange for the company to be registered or recognised as a body corporate in any place outside this jurisdiction;
> (h) do anything that it is authorised to do by any other law (including a law of a foreign country).
>
> A company limited by guarantee does not have the power to issue shares.

15. The broad powers conferred by section 124(1) are subject to section 125 of the Corporations Act, which provides:

> (1) If a company has a constitution, it may contain an express restriction on, or a prohibition of, the company's exercise of any of its powers. The exercise of a power by the company is not invalid merely because it is contrary to an express restriction or prohibition in the company's constitution.
> (2) If a company has a constitution, it may set out the company's objects. An act of the company is not invalid merely because it is contrary to or beyond any objects in the company's constitution.

16. The Court found that there was nothing in sections 124 and 125 of the Corporations Act which could operate to diminish the enforceability among the members and the company of the contractual obligations among them arising out of the memorandum and articles of association.

17. The consequence was that Netball Queensland's board was obliged to exercise any power to make decisions about Ipswich Netball's affiliation in accordance with the Constitution and the Policy. That was the case regardless of whether the Constitution contained any express limitations on the exercise of that power. Ipswich Netball, as a member, was entitled to commence proceedings against the respondent to enforce its contractual rights under section 140(1)(a) of the Corporations Act.

18. The Court found that the Constitution allowed directors to make policies, but it did not set out a procedure for varying or cancelling the rights of members in a class of members. Accordingly, section 246B(2) of the Corporations Act was engaged. Section 246B(2) provides that those rights may only be varied by special resolution passed at a meeting of the class of members whose rights are being varied, or with the written consent of 75% of the members.

19. As the Policy was simply approved by the Netball Queensland CEO, it was ineffective to vary class rights in relation to Member Associations. Accordingly, the Policy was invalid where it imposed an affiliation process upon a Member Association.

20. The Court found that the decisions were not authorised and were therefore invalid, and further that the Policy as it related to affiliation of Member Associations was invalid. Netball Queensland was ordered to reinstate Ipswich Netball's rights and privileges as a Member Association.

IMPLICATIONS

Peak membership associations seeking to discipline or remove members need to ensure they are aware of their procedures and processes. This may require appropriate external legal advice.

Peak membership associations should also periodically have their constitutions reviewed to ensure that they are fit for purpose and that the board and senior management are aware of the provisions of the constitution relating to their responsibilities.

The argument put before the Court at [139] that:

> …the company has the power to make decisions about membership. Consequently, if the Constitution and the Corporations Act do not confine the exercise of that power to the company in a general meeting, and if the Constitution does not restrict the board's power to make those decisions, then the board had the power to make the decisions, or to authorise executive management to do so.

is interesting.

This argument confuses questions of corporate capacity and the authority of different organs of the company. Section 124 of the Corporations Act does not answer the question of the company's authority to make the decisions, but rather deals with a more basic question of corporate capacity.

VIEW THE CASE

This case may be viewed at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC//2021/348.html

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Date of creation: December 2021

Number of case: 2021-152