

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.



Australian Federation of Islamic Councils Inc v United Muslims of New South Wales Inc [2021] NSWCA 311

Supreme Court of New South Wales, Court of Appeal, Bathurst CJ, Bell P, Meagher JA, 15 December 2021

An appeal from a decision about a dispute between a national body and one of its state bodies as to the standing of the state body and its representatives in relation to the national body.

Key words: Incorporated Association, New South Wales, Appeal, Unincorporated Association, Federation, Resolution, Intervention

1. This case arose from an appeal from the primary decision of [United Muslims New South Wales Incorporated v Australian Federation of Islamic Councils & Ors](#) [2021] NSWSC 382.
2. The Chief Justice gave the reasons for the decision, with which Bell P and Meagher JA agreed.
3. The Australian Federation of Islamic Councils Inc (AFIC) was incorporated in Tasmania on 14 October 1999 under the Associations Incorporation Act 1964 (Tas) (the Tasmanian Act). AFIC replaced the Australian Federation of Islamic Societies as the peak body of Islamic State Councils.
4. The AFIC constitution makes provision for three tiers of administration and governance being:
 - a) the Federal Congress, which is the highest policy-making organ, with ultimate responsibility to achieve the objects and purposes of the Federation;
 - b) the Federal Council, which has the general governance and control of the affairs of the Federation, subject to the AFIC constitution and resolutions of the Federal Congress; and
 - c) the Executive Committee, which manages the business and affairs of AFIC in accordance with the constitution and resolutions of the Federal Congress and the Federal Council.
5. The Model Rules for associations incorporated under the Tasmanian Act (the Model Rules) apply to AFIC to the extent they are not inconsistent with the AFIC constitution (the Tasmanian Act s 16).
6. United Muslims of New South Wales Inc (UMNSW) is registered under the Associations Incorporation Act 2009 (NSW) (the NSW Act). UMNSW was incorporated to act as the umbrella society for Islamic societies in NSW, with

its constitution being drafted to operate coherently with the AFIC constitution. It was intended that Islamic societies in New South Wales would be members of each of UMNSW and AFIC. However, this was not the situation that ensued.

7. Significant disagreements arose between the representatives of AFIC and UMNSW concerning the corporate governance and administration of each entity.
8. AFIC advised UMNSW that several UMNSW office bearers did not qualify to be on the UMNSW executive committee and requested that UMNSW take immediate steps to hold an annual general meeting (AGM) and election. UMNSW rejected these contentions. AFIC then put a number of UMNSW members on a proscribed list of members and appointed a caretaker interim committee to manage the NSW affairs of member societies until such time that an election of a new executive committee and a new Council to represent NSW in AFIC could be held.
9. Despite this, UMNSW gave notice of its Annual General Meeting to be held on 17 January 2021. The “Agenda” stated that the business of the meeting included the “election of office-bearers”.
10. On 16 January 2021, the meeting convened by the interim caretaker committee was held. Nineteen societies attended. Of those attending, 10 were not members of UMNSW and of the other nine, only one, the Canterbury Islamic Society, attended the subsequent UMNSW meeting of 17 January 2021. On 1 February 2021, The Council of Islamic Societies in New South Wales (CIS) was registered as an incorporated association under the NSW Act with the name “The Council of Islamic Societies in NSW Incorporated”.
11. On 17 January, UMNSW’s Annual General Meeting was held with seventeen Islamic member societies of UMNSW in attendance. They elected office bearers and a delegate to AFIC.
12. UMNSW sought a declaration that the purported displacement of it as the State Council for New South Wales was invalid and the purported appointment of CIS as the State Council for New South Wales was also invalid.
13. The primary Court held that the AFIC constitution does not permit the removal or displacement of an existing State Council by AFIC’s member societies for that state electing a new State Council. The Court found that the individuals comprising the new council were not the State Council for New South Wales and that they had no capacity to appoint a delegate for that State Council.
14. The appeal from the primary Court was on four grounds (at [61]):
 - a) Whether the primary judge erred in holding that the AFIC constitution does not permit the removal or displacement of an existing State Council by AFIC’s member societies for that state electing a new State Council (appeal ground 1).
 - b) Whether the group of individuals constituting the New Council, purportedly appointed on 16 January 2021, was capable as an unincorporated association of being a State Council under the AFIC constitution (notice of contention ground 1).

- c) Whether the primary judge erred in not finding that at the meeting on 16 January 2021, the AFIC member societies in New South Wales who were present decided that UMNSW should be removed as the State Council and replaced by the elected committee of individuals constituting the New Council (appeal ground 2).
- d) If UMNSW remained the AFIC State Council for New South Wales, whether Mr Elrayes was duly appointed as its delegate under cl 12(1) of the AFIC constitution (appeal grounds 3 and 4).

15. The Court of Appeal made the following observations about the constitutions of both bodies:

- It is appropriate to take into account, as part of the context, the provisions of the AFIC constitution when considering the UMNSW constitution;
- Both constitutions operated as a contract between the associations and their members;
- Both constitutions should operate harmoniously with the other, and that member societies in New South Wales were to be members of each of AFIC and UMNSW.

Whether the AFIC Constitution permits a State Council to be removed by AFIC's member societies in that state

16. There is no express provision in the AFIC constitution governing the removal of State Councils. The Appeal Court found that (at [87]):

...under the AFIC Constitution, a State Council can be removed by AFIC by the invocation of the expulsion provisions in the Model Rules, or as a result of it being wound up, or by orders made in proceedings under Ch 2F of the Corporations Act. However, absent the use of the expulsion provisions, AFIC does not have the power to remove a State Council. The removal of UMNSW in this case did not occur by invocation of either of those provisions.

Whether an unincorporated group of individuals was capable of being a State Council under the AFIC Constitution

17. Could the CIS be a "State Council" when it was merely formed by the appointment of the committee at the meeting of 16 January 2021, had no rules or any other form of agreement binding the original members (presumably, the original committee members), no mechanism for holding property and no procedure for the admission of members.

18. The Court of Appeal held that (at [99]-[100]):

The State Council is an umbrella organisation for other societies in the relevant state, most having in excess of 100 members. It is difficult to see how as a matter of practice it could operate other than as an incorporated association. For these reasons, the primary judge erred in concluding that for the purposes of the AFIC Constitution, a State Council could be an unincorporated association.

Did the meeting on 16 January 2021 resolve that the committee which was elected be constituted as a new State Council for New South Wales

19. The Court of Appeal found there was no resolution appointing the elected committee members as a State Council at the 16 January CIS meeting concluding that (at [109]):

...what occurred at the 16 January 2021 meeting fell well short of the meeting resolving that the committee be appointed as the new State Council and that UMNSW be removed. At most it could be regarded as being resolved to take steps towards that objective, but not as having achieved it.

Was Mr Elrayes validly nominated by UMNSW as delegate for the New South Wales State Council to the Federal Council of AFIC

20. If Mr Elrayes was appointed as president of UMNSW, and if it was a State Council for AFIC purposes, then he would become its delegate to AFIC under the AFIC constitution.

21. As there was no challenge to the validity of the meeting of UMNSW at which that position was filled, the primary Court made the declaration sought by UMNSW that Mr Elrayes was the delegate for the New South Wales State Council to ACFID.

22. ACFID argued that the appointment of Mr Elrayes as president of UMNSW did not need to be recognised by AFIC because it involved the participation of non-AFIC members who were members of UMNSW.

23. The Court of Appeal noted that (at [131]):

AFIC, in conceding the validity of the UMNSW meeting, has accepted that members of UMNSW were entitled to attend and vote. It follows that any resolution passed at the meeting was effective to appoint Mr Elrayes as president.

Summary

24. None of the appeal grounds were made out (despite finding the primary erred in relation to the notice of contention about unincorporated association being capable of being a state council) and the appeal was dismissed.

IMPLICATIONS



This case stands for the importance of ensuring that the provisions of constitutions are adhered to, that meetings make explicit their resolutions, which should be comprehensive and clearly recorded in the minutes, and that national body constitutions clearly set out the relationship between the various parties.

The judgment contains useful summary of what constitutes an unincorporated association at [92 ff].

VIEW THE CASE



This case may be viewed at <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2021/311.html>

Read more notable cases in [The Australian Nonprofit Sector Legal and Accounting Almanac series](#).

Author: McGregor-Lowndes, Myles & Hannah, Frances M.

Email: acpns@qut.edu.au

Date of creation: January 2022

Number of case: 2021-166

Disclaimer: The material included in this document is produced by QUT's [Australian Centre for Philanthropy and Nonprofit Studies](#) (ACPNS) with contribution from some authors outside QUT. It is designed and intended to provide general information in summary form for general informational purposes only. The material may not apply to all jurisdictions. The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters you or your organisation may have.

Commons licence:

[This work is licenced under a Creative Attribution 4.0 International licence \(CC BY 4.0\).](#)