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.

Dawkins v The State Secretary, Australian Labor Party (WA Branch) [No 2] [2022] WASC 117

Supreme Court of Western Australia, McGrath J, 8 April 2022

A member seeks to challenge a pre-selection decision of a political party formed as an unincorporated association.

Key words: Unincorporated Associations, Western Australia, Member, Preselection, Justiciability, interpretation of Rules

1. WA Labor (ALP) is an unincorporated association for the purpose of promoting stated political objectives. Dawkins is a member of the Australian Labor Party and an unsuccessful aspirant to be the endorsed candidate for the ALP in the federal seat of Forrest at the federal election to be held on 21 May 2022.

2. Dawkins claimed that the Administrative Committee of the ALP and the State Executive acted contrary to the WA Labor Rules, and sought declaratory relief from that Court that the ALP had acted contrary to the WA Labor Rules.

3. The ALP argued that as it was an unincorporated association the claim was non-justiciable, and in the alternative that the pre-selection process was conducted in accordance with the rules.

Justiciability

4. Dawkins argued that the 1934 High Court decision in Cameron v Hogan did not apply to this situation. In that case, it was held that a member could not maintain an action for any breach of a voluntary association's rules, including the rules for pre-selection, unless the member could establish interference with a relevant proprietary right, or the member could establish that the rules were contractually binding

5. Dawkins proposed to the Court that:

    a) The ALP rules had contractual force because pre-selection was a matter where his property, income or reputational interest could be adversely affected; and/or
    b) The Commonwealth Electoral Act 1918 (Cth) gave political parties a statutory status, and accordingly, disputes concerning the rules of political parties registered under the Commonwealth Electoral Act are justiciable because Parliament, in conferring legislative recognition upon political parties, had taken them beyond the ambit of mere voluntary associations.

6. In relation to the first issue the Court found that (at [41]):

> The plaintiff [Dawkins] joins a large group of men and women who aspire to be a Member of Parliament and are not pre-selected. That loss of opportunity to be a Member of Parliament is an insufficient basis to contend that the failed candidate's property, income or reputational interest has been adversely affected.

7. The ALP rules did not create a contract, and hence there was no exception to the general rule in Cameron v Hogan.

8. In relation to the second issue, the Court agreed with the NSW Court of Appeal in Camenzuli v Morrison [2022] NSWCA 51, noting (at [53]):

> [T]hat the provisions in the Commonwealth Electoral Act providing for party registration, candidate nomination and endorsement and public funding do not purport to affect the general internal operations of political parties. The public interest in the operation of major political parties does not justify judicial intervention in internal party disputes generally. Whether a dispute within a political party is justiciable must be determined in each case by reference to relevant provisions of the Commonwealth Electoral Act.

9. The Court decided that the matter was not justiciable, but went on to consider whether the ALP rules had been breached.

Breaches of the Rules

10. Dawkins argued that:

    a) The Administrative Committee's decision to reject his EOI for pre-selection for the federal seat of Forrest was in breach of the ALP Rules, and was therefore invalid, as it was beyond the exercisable power of the ALP Administrative Committee; and
    b) He was denied the opportunity to attend and address the State Executive during the hearing of his appeal against the Administrative Committee's decision.

11. The Court noted that the approach to interpreting the rules of a voluntary association are like the construction of a corporate constitution, or similar to the principles applicable to the construction of commercial contracts. However, this was to be tempered with a degree of flexibility as the by-laws are drafted in an ad hoc and piecemeal fashion by lay-persons rather than lawyers, couched in terms intelligible to them but which often lack the consistency, coherence, form and drafting that would be expected in a statute or commercial contract. This means that the courts should not make too much of infelicities of expression in the by-laws, nor be too quick to identify absurdity, illogicality or apparent inconsistencies.

12. The Court found that under the rules, the Administrative Committee is vested by the State Executive with the power to assess EOIs by the rules, and that assessment is not limited to a mere vetting of applications. A more substantive analysis of the suitability of the candidate is involved. It may reject an EOI for reasons other than its compliance with the mere technical requirements for an EOI.

13. The Court found in relation to the second argument that Dawkins was not denied the opportunity to attend the meeting of the State Executive. Rather, he decided not to attend.

14. The matter was dismissed.

IMPLICATIONS

In most circumstances the Court will not intervene in the internal affairs of an unincorporated association. The High Court case of Cameron v Hogan confirmed that associations which are 'social, sporting, political, scientific, religious, artistic or humanitarian in character', and not formed 'for private gain or material advantage', are usually formed on the basis of mutual consent. Unless there is some clear, positive indication that the members wish to relate to each other in a legal fashion, the rules of the association will not be treated as an enforceable contract, in contrast to the rules of incorporated bodies such as companies.

Since Cameron v Hogan, a significant number of cases have distinguished or otherwise declined to follow this precedent of the High Court. A trenchant criticism is found in McKinnon v Grogan [1974] 1 NSWLR 295, 298 where Wootten J said that 'citizens are entitled to look to the courts for the same assistance in resolving disputes about the conduct of sporting, political and social organisations as they can expect in relation to commercial institutions'. According to Wootten J at 298, if disputes are not settled by the courts, this would create a 'legal-no-man's land, in which disputes are settled not in accordance with justice and the fulfilment of deliberately undertaken obligations, but by deceit, craftiness, and an arrogant disregard of rights'.

The Queensland decision of Baldwin v Everingham [1993] 1 Qd R 10 also distinguished Cameron v Hogan. The Court granted declaratory relief as to the operation of the federal constitution of the Liberal Party of Australia on the basis that political parties had been given statutory recognition by the Electoral Act (at 18-20), and said (at 24) that there was a sufficient public interest in the enforcement of the rules of registered political parties.
The NSW Court of Appeal in Camenzuli v Morrison [2022] NSWCA 51 stated changing the justiciability of unincorporated associations was outside its remit (at [66]):

> If this conclusion creates immunities from control in matters of significant import for the operation of a democratic political system, the ability to prevent abuse and regulate the institutions concerned must lie with the parliament.

See also Asmar v Albanese [2022] VSCA 19, of which the Court of Appeal said at [46] that "we are comfortably satisfied it is wrong". They endorsed the reasoning of the lower court in Asmar v Albanese (No 4) [2021] VSC 672 and in Setka v Carroll [2019] VSC 571.

On the specific issue see: Greg Taylor, 'Leadership Spill Rules from the Constitutional Perspective' (2021) 95 *Australian Law Journal* 203.

Refer generally to Robert Tong (2012): "Judicial intervention in the affairs of unincorporated religious associations in New South Wales". Professional Doctorate thesis, Queensland University of Technology.

VIEW THE CASE

This case may be viewed at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC//2022/117.html

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

Email: acpns@qut.edu.au

Date of creation: April 2022

Number of case: 2022-54