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ACPNS Legal Case Notes Series: 2023-154 Carabetta & Anor v Carlingford Bowling, Sports & Recreation Club.

[Working Paper]

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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.



Carabetta & Anor v Carlingford Bowling, Sports & Recreation Club [2023] NSWSC 1442

Supreme Court of New South Wales, Henry J, 27 November 2023

Whether new by-laws were inconsistent with an existing club constitution.

Key words: Club, New South Wales, Company Limited by Guarantee, Constitution, By-laws, Contract, Inconsistency, Voting Rights, Standing

1. Carlingford Bowling, Sports & Recreation Club Ltd (the Club) is a company limited by guarantee and a registered club under the [Registered Clubs Act 1976](#) (NSW).
2. It operates a bowling club, and had amalgamated with Denistone Sports Club Ltd in 2019 and the Brush Park Bowling Club in 2018. The Club assumed all assets and liabilities and all members of those clubs.
3. Clause 9.4 of the Club's constitution provided that membership of the Club was divided into nine classes, including Life Members, Bowling Members, and Social Members, as well as The Members of the dissolved Club – Brush Park Members, and The Members of the dissolved Club – Denistone Sports Members.
4. Clause 9.7 provided that Life Members, Bowling Members and Social Members were deemed to constitute Full Membership of the Club.
5. Social Members were entitled to hold only up to two positions on the Club board, but the other classes were unrestricted in this regard.
6. Clause 18.11(ii) provided that the election of Directors must be conducted at the Annual General Meeting (AGM) in the manner the Board directs provided that, if the By-laws so provide, a ballot for election of Directors may be held during the seven day period immediately preceding the date of the AGM and the result of such ballot must be declared at the AGM.
7. Clause 18.11(iii) provided that:
 - iii. The Board has the power to make By-Laws regulating all matters in connection with the election of the Board not otherwise provided for by this Constitution.

8. Clause 19.2 provided that:

... the Board shall have power from time to time:

...

b. To make such By-Laws not inconsistent with the Constitution of the Club as in the opinion of the Board are necessary or desirable for the proper control, administration and management of the Club's finances, affairs, interests, effects, and property and for the convenience, comfort, and well-being of the members of the Club and to amend or rescind from time to time any such By-Laws and without limiting the generality thereof.

9. In September 2023, the Board approved new by-laws that limited the rights of Social Members to vote in an election by introducing a two-year membership qualification period, and created a single-interest group made up of former members of amalgamated clubs and bowlers who elected to remain registered with Bowls NSW under an amalgamated club.

10. A candidate for the position of Senior Vice President was advised that his name would not be included on the ballot paper as he was from a single-interest group and there were already two directors from that same group. His lawyer advised the Club that the additional by-laws placing conditions on who could be a director were ultra vires and invalid.

11. An application was made to the Court by the nominating director seeking declarations that the additional by-laws were invalid as being inconsistent with the Club's Constitution.

12. The Club agreed after some discussion not to declare the imminent election results and that it would re-hold the election if the Court found against it.

13. The Club first argued on the basis of [Cameron v Hogan](#) [1934] HCA 24 that the issue was not justiciable, but later accepted that the constitution operated as a contract between the Club and its members, with the nominated director having the requisite standing.

14. The Court determined that the issues for determination were whether:

- The additional By-laws are inconsistent with the Club's Constitution; and
- if so, whether as a matter of discretion the Court should grant declaratory relief in the terms sought.

By-laws

15. The Court considered that the constitution took effect as a statutory contract between the Club and each member by virtue of s 140 of the [Corporations Act 2001](#) (Cth). The constitution was to be construed according to the rules of construction applicable to contracts generally, which included the presumptions that specific provisions prevail over inconsistent general provision, and terms expressly agreed by the parties prevail over incorporated terms, and the principle that clauses are not inconsistent merely because one qualifies or modifies the effect of the other.

16. It was noted that ordinarily, the by-laws did not usually form part of the statutory contract, but a by-law that is inconsistent with the constitution is invalid to the extent of the inconsistency.

17. The Court found that (at [64]):

...the Additional By-laws 10(f) and 18(c) are inconsistent with the Constitution. This is primarily on the basis that inconsistency in By-laws is expressly prohibited by the Constitution and the nature of the By-laws as a

lesser instrument, and the Additional By-laws abrogate and impose limits on rights conferred by the Constitution on members in a manner that is incompatible and in conflict with those rights, such that effect cannot be fairly given to both.

18. The Court was not persuaded that the By-law merely clarifies an issue on which the Constitution is currently silent, namely a prerequisite time period of membership required to vote, or that it operates as a qualification and not an inconsistency, nor that it was merely a caveat or proviso.
19. The Court determined that the additional by-laws were in direct conflict and incompatible with the rights for a Social Member to vote under the Constitution, which was unconstrained by a time limit.

Grant of Declaratory Relief

20. The Club argued that the Court should exercise its discretion and refuse to grant the declaratory relief sought because the application was not urgent, there was a delay in commencing proceedings, and the application did not seek an injunction.
21. The delay was not significant merely being seven weeks, and in any event the Club had prior notice of the contested matters.
22. As to the lack of an application for an injunction, there was no evidence the Club would have undertaken the election process differently if an application for injunctive relief was in issue, and there was no identification of any specific prejudice caused by that matter, or by the delay.
23. The nature of the denial of rights of members to vote and stand for election, and the effect of the additional by-laws as invalidating an election in the event of inconsistency, were matters which, in the Court's view, weighed in favour of the exercise of its discretion to grant declaratory relief.
24. The Court granted the application.

COMMENT



A company constitution may give the directors power to make rules or by-laws for certain matters. This is more common in social and sporting clubs.

One of the attractions of by-laws is that the directors can usually make and alter them by board resolution quickly, rather than going before a general meeting of members.

The question can arise as to whether these by-laws or rules form part of the statutory contract between members and the company. Ordinarily, the by-laws or rules do not form part of the contract, but they may be enforceable if the member and the company have agreed that they will be enforceable in law. This agreement maybe express or implied.

VIEW THE CASE



This case may be viewed at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2023/1442.html>

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