SUPREME COURT OF QUEENSLAND

CITATION:	*Miller v Soroptimist International of the South West Pacific* [2020] QSC 242
PARTIES:	**ROSALINE MILLER** (applicant) **v** **SOROPTIMIST INTERNATIONAL OF THE SOUTH WEST PACIFIC** ACN 147 990 627 (respondent)
FILE NO/S:	SC No 195 of 2020
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	7 August 2020
DELIVERED AT:	Cairns
HEARING DATE:	17 June 2020
JUDGE:	Henry J
ORDERS:	**1. Leave is given for the filing and reading of the affidavit of David Kerwin sworn 15 June 2020.** **2. It is declared that the respondent's purported termination of the applicant's membership as a Soroptimist notified to the applicant by a letter sent on behalf of the board of directors of the respondent dated 20 February 2020, is void, invalid and ineffective.** **3. It is declared that the respondent's purported terminations of the applicant's positions as membership convenor and director of the respondent notified to the applicant by a letter sent on behalf of the board of directors of the respondent dated 20 February 2020, are void, invalid and ineffective.** **4. It is declared that the applicant was wrongly deprived in her capacity as secretary of the respondent of her entitlement to attend the meeting of the directors of the respondent on 19 February 2020.** **5. Liberty to apply on the giving of two business**

days' notice in writing.

6. **The parties will be heard as to costs at 9.15 am on 4 September 2020 if costs have not been agreed in the meantime.**

CATCHWORDS: ASSOCIATIONS AND CLUBS – EXPULSION, SUSPENSION AND DISQUALIFICATION – EXERCISE OF POWER – DENIAL OF NATURAL JUSTICE GENERALLY – where the applicant was a member of an incorporated association known as Soroptimist International of Townsvile Inc ("the Townsville Club") – where the Townsville Club was in-turn a member of the respondent, a company limited by guarantee – where the applicant was the "membership convenor" of the respondent which, under the respondent's constitution, entitled her to be a director of the respondent – where the applicant was also the secretary of the respondent – where the respondent's board of directors passed three resolutions purporting to terminate: (a) the applicant's membership of the Townsville Club; (b) her position of membership convenor and her directorship of the respondent; and, (c) her appointment as company secretary of the respondent – where the applicant was not given notice of the director's meeting – where s 208D *Corporations Act 2001* (Cth) requires removal of a director by a meeting of the members after timely notice – where s 71(3) *Associations Incorporation Act 1981* (Qld) provides "an incorporated association shall be bound by the rules of natural justice in adjudicating upon the rights of its members conferred by the rules of such association on its members" – where the constitution of the Townsville Club allowed the respondent's board of directors to terminate membership of the Townsville Club – whether the applicant was afforded natural justice – whether a clause in an incorporated association's constitution allowing a third-party's adjudication to bind the incorporated association is contrary to and inconsistent with s 71(3) *Associations Incorporation Act 1981* (Qld) – whether the resolution revoking membership in the Townsville Club was valid – whether the resolution removing the applicant as a director and revoking her office of membership convenor was valid – whether the resolution removing the applicant as company secretary was valid – whether a company secretary is entitled to natural justice when the board of directors is considering their removal – whether the court should exercise its discretion to grant declarations to such effect

Associations Incorporation Act 1981 (Qld), s 71, s 71(3), s 72
Corporations Act 2001 (Cth), s 208D, 208E

Cameron v Hogan (1934) 51 CLR 358, considered
Clubb v Edwards (2019) 93 ALJR 448, cited
Hill v Green (1999) 48 NSWLR 161, applied

Kovacic v Australian Karting Association (Qld) Inc [2008] QSC 344, applied
McClelland v Burning Palms Surf Life Saving Club (2002) 191 ALR 759, applied
McNab v Auburn Soccer Sports Club Ltd [1975] 1 NSWLR 54, applied
R v Williams; Ex parte Lewis [1992] Qd R 643, cited
Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 179 ALR 238, cited

M Aaronson and M Groves, *Judicial Review of Administrative Action* (Thompson Reuters, 5th ed, 2013) [7.20]

COUNSEL: M Jonsson QC for the applicant
P McCafferty QC for the respondent

SOLICITORS: Preston Miller Lawyers for the applicant
Barry.Nilsson. Lawyers for the respondent

[1] The applicant seeks declarations that the respondent's purported terminations of her positions as membership convenor and director of the respondent, her appointment as secretary of the respondent and her membership as a Soroptimist were void, invalid and ineffective. Injunctive relief is also sought but the application turns upon whether the declarations should be made and was litigated on that basis.

Background

[2] The applicant was a member of an incorporated association, Soroptimist International of Townsville Incorporated ("the Townsville Club").[1] Its constitution provides it "shall be a member of Soroptimist International of North Queensland Incorporated and Soroptimist International of the South West Pacific (the Federation)".

[3] The Townsville Club constitution's reference to Soroptimist International of the South West Pacific is to the respondent, a public company limited by guarantee pursuant to the *Corporations Act 2001* (Cth). The respondent's constitution describes it as "the Federation of Soroptimist International in the South West Pacific". It is convenient to refer to it as "the Federation", the short description used in both its constitution and the Townsville Club's constitution.

[4] Clause 9 of the Federation's constitution provides that membership of the Federation shall consist of clubs established by the Federation. The Townsville Club is one such club.

[5] The applicant, Ms Miller, became a member of the Townsville Club in April 2010. She has held various positions within the Townsville Club and within the Federation. At the time of the purported terminations she was a member of the Townsville Club and the secretary and membership convenor of the Federation.

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1 Affidavit of Rosaline Miller, court doc 8, ex RDM1.

Clause 14.3.1 of the Federation's constitution provides certain elected position holders, including the membership convenor, "shall be" directors. Ms Miller was therefore also a director of the Federation.

[6] On 19 February 2020 an extraordinary directors' meeting of the Federation was held in the absence of Ms Miller, without notice to her. Relevantly to the present case, three resolutions were considered by the meeting, namely resolutions:

> "1. Pursuant to 19.1 of Federation Constitution to Terminate the appointment of Rosaline Miller as Company Secretary with effect from 20 February 2020. …
>
> 2. Pursuant to 14.6.1.5 of Federation Constitution that the office of Director becomes vacant by virtue of Membership Convenor Rosaline Miller acting negligently and/or failing to act in the best interests of the Federation. …
>
> 3. Pursuant to 10.10 of the Club Constitution of the South West Pacific Adopted 1st May 2016 that Rosaline Miller's membership as a soroptimist be terminated by the Federation Board of Directors for engaging in conduct that adversely affects the reputation of Soroptimist International."[2]

[7] The resolutions included particulars of allegedly inappropriate conduct. The first two resolutions were carried unanimously. The third resolution was carried by the votes of nine of the 10 voters present, with the tenth voter abstaining.

[8] The applicant was informed of the purported termination decisions by three letters dated 20 February 2020 from the Federation President. The respective content of the three letters included the following:

> 1. "We write to inform you that your appointment as Company Secretary of the Federation has been terminated with effect from 20 February 2020.
>
>   This decision was made by the Board of Directors in accordance with the terms of the Federation Constitution. …"
>
> 2. "We write to inform you that your position as Membership Convenor and as a Director of the Federation has been terminated with effect from 20 February 2020.
>
>   This decision was made by the Board of Directors in accordance with the terms of the Federation Constitution." …
>
> 3. "We write to inform you that your membership as a Soroptimist has been terminated with effect from 20 February 2020.
>
>   This decision was made by the Board of Directors in accordance with the terms of the Federation Constitution and the Club Constitution of the South West Pacific. …"[3]

[9] Each of the letters went on to stipulate the grounds upon which the decision was based. The letters relating to the applicant's termination as company secretary,

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2 Affidavit of Anusha Santhirasthipam, court doc 9, ex AS61, pp 519–20.

3 Affidavit of Rosaline Miller, court doc 2, ex RDM5, pp 79–83.

membership convenor and director went on to direct her to immediately return all property of the Federation in her possession or control. The letter notifying the termination of membership went on to assert that the applicant was "hereby automatically terminated" from all positions she held at the Townsville Club and the Federation. None of the letters informed the applicant of any rights she had to contest, conciliate or appeal the termination decisions.

Nature of relief sought

[10] Declarations are sought. As a matter of general principle there must be some utility in making a declaration.[4]

[11] In 1934 the High Court in *Cameron v Hogan* considered the general character of voluntary associations tended against courts' involvement in remedying such associations' failures to observe their rules unless a civil right of a proprietary character was involved.[5] However, as was explained by Margaret Wilson J in *Kovacic v Australian Karting Association (Qld) Inc*:[6]

> "The scope of the decision in *Cameron v Hogan* has been explored in many cases over the last 64 years. It is now tolerably clear that the Courts will intervene in the affairs of voluntary associations in some circumstances, including –
>
> (a) where there has been a breach of contract;
>
> (b) where a proprietary right has been infringed;
>
> (c) where someone's livelihood or reputation is at stake."

[12] That declarations have utility for the purpose of redressing reputational damage was earlier confirmed by the High Court in *Ainsworth v Criminal Justice Commission.*[7]

[13] In the present case it is additionally relevant, in respect of the Townsville Club, that s 72 *Associations Incorporation Act 1981* (Qld) confers a discretion upon this court to make a declaration, notwithstanding that no right of a proprietary nature is involved. Further, it is relevant in respect of the Federation, a company, that s 140(1) *Corporations Act* provides the Federation's constitution is a contract as between the company, its directors and its secretary.

[14] The above principles have overlapping relevance to each purported termination but it is convenient to deal with the purported terminations in turn.

Membership termination

[15] By the events of 19 and 20 February 2020 the Federation purported to terminate Ms Miller's membership of the Townsville Club.

[16] Clauses 10.9, 10.10 and 10.11 of the Townsville Club constitution provide for termination of membership of the Townsville Club as follows:

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4 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582.

5 (1934) 51 CLR 358, 370, 378.

6 [2008] QSC 344, [26].

7 (1992) 175 CLR 564, 581–2 (Mason CJ, Dawson, Toohey and Gaudron JJ), 585 (Brennan J).

"**Termination of Membership**

10.9 Membership of the Club shall be terminated when a member:

10.9.1 has not paid her membership subscription by the end of the financial year in which due; or

10.9.2 has not attended meetings for twelve (12) consecutive months without seeking leave of absence.

10.10 <u>Membership may be terminated</u> by the Club <u>or</u> the Federation Board of Directors when a member:

10.10.1 engages in conduct that adversely affects the Club and/or the reputation of Soroptimist International; or

10.10.2 fails to fulfil provisions of the Constitution and By-Laws as prescribed by the Federation;

and seventy-five percent (75%) of the members present at an extraordinary general meeting called to consider the matter resolves to expel the member, <u>provided</u> that the member is <u>given notice</u> of the proposed motion, <u>or</u> seventy-five percent (75%) of the Board of Directors voting resolve to expel the member.

10.11 If the member considers her membership wrongfully terminated by such decision, she may apply for dispute resolution proceedings in accordance with the Federation's Dispute Resolution Manual." (emphasis added)

[17] It will be noted that clause 10.10 permits of membership of the Townsville Club being terminated by the Townsville Club "or" the Federation. At first an incorrect version of the Townsville Club constitution was exhibited by Ms Miller. It did not contain a provision allowing for termination of membership of the Townsville Club by the Federation. Correct versions had been exhibited by each side by the time of the hearing. The Federation's counsel submitted the absence of explanation, or adequate explanation, for the exhibiting of the incorrect document, particularly given Ms Miller is a legal practitioner, was a serious matter, relevant to the exercise of my discretion whether to grant the relief sought. This was in substance an invitation to infer impropriety rather than error. I am disinclined to draw such an inference without it being put to Ms Miller. The respondent did not request that Ms Miller be produced for cross-examination. Against that background I am unwilling to draw any adverse inference about the filing of the erroneous exhibit or the absence of detailed explanation for what may merely have been an innocent error. They are, for present purposes, neutral facts.

[18] That conclusion is linked with an objection taken by Ms Miller's counsel to the Federation's filing and reading of an affidavit of David Matthew Kerwin. That affidavit was served after the directed date for doing so and so late as to deprive Ms Miller of an opportunity to respond to it. My above conclusion dispenses with the disadvantage grounding the objection. While it also renders part of the affidavit

irrelevant, other parts are relevant. In the circumstances my orders will give leave for the reading and filing of the affidavit.

[19] Returning to clause 10.10, in the event of a member engaging in conduct that adversely affects the reputation of Soroptimist International, the clause allows for the termination of the member's membership of the Townsville Club by a vote to expel the member by at least 75 per cent of the Townsville Club members at an extraordinary general meeting or of the Federation's board of directors. On its terms, the requirement in clause 10.10 that the member be "given notice" of the motion only relates to an expulsion by the Townsville Club at an extraordinary general meeting, not to an expulsion by the Federation's board of directors.

[20] On the face of it, clause 10.10 empowered the Federation to terminate Ms Miller's membership of the Townsville Club without notice. It may be, as the Federation's counsel urged, that the need for notice was dispensed with in the constitution so as to reserve to the Federation the ability to summarily expel a member in the event of an emergency. However, as will be seen, the determinative point is whether, regardless of what control the Federation wanted to reserve to itself, the need for notice, and a right to be heard, was nonetheless required by Queensland law.

[21] Ms Miller contends clause 10.10's empowerment of the Federation is repugnant to s 71(3) *Associations Incorporation Act 1981* (Qld), which provides:

> "(3) An incorporated association shall be bound by the rules of natural justice in adjudicating upon the rights of its members conferred by the rules of such association on its members."

[22] The Townsville Club's rules, namely its constitution, provide in clauses 10.1 to 10.5 for the process by which persons acquire membership of the Townsville Club. The right of membership is thereby conferred by those rules, with the consequence that a decision to terminate such membership is an adjudication of the kind to which s 71(3) applies.

[23] Ms Miller's counsel submits s 71(3) requires that an adjudication with respect to the rights of a member be undertaken by the incorporated association and subject to the rules of natural justice. Section 71(3) does not actually stipulate that the adjudication to which it refers must be undertaken by the incorporated association. It does not in terms preclude the rules of an association allowing the adjudication to be undertaken by some external agent. However, the obvious purpose of the sub-section is to ensure the rules of natural justice are applied in any adjudication of rights of members of an incorporated association "conferred by the rules of such association on its members".

[24] It would be contrary to that purpose if it could be avoided merely by an association's rules allowing an entity other than the association to conduct the adjudication. The words of s 71(3) cannot sensibly be read down to permit such avoidance.[8] The words cast upon the incorporated association the obligation of

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[8] The "reading down" and "up" approaches are elaborated upon by Edelman J in *Clubb v Edwards* (2019) 93 ALJR 448, 535.

ensuring the rules of natural justice are complied with in respect of any adjudication upon the rights of members of an incorporated association conferred by its rules.

[25] The adjudication task here arose by operation of the rules of the association and was made in respect of rights conferred by those rules. Those characteristics mean that, even though permissibly performed by an entity other than the association, the adjudication was nonetheless an adjudication of the association and the association was bound to ensure it was conducted in accordance with the rules of natural justice. The Federation was as bound by the rules of natural justice as the Townsville Club was because it was making a decision under the Townsville Club's rules upon the rights of a Club member conferred by those rules.

[26] It follows that while s 71(3) did not prevent the adjudication in question from being conducted by the Federation, it did require the adjudication to conform with the rules of natural justice. It is not to the point that clause 10.10 did not require the Federation to give notice of the adjudication meeting. If the rules of justice required such notice to be given, then s 71(3) required it to be given.

[27] The rules of natural justice derive from the common law and are not rigidly proscribed. They oblige decision-makers to afford procedural fairness to those whose rights or interests would be adversely affected by the decision under contemplation. A traditional rule of natural justice, the hearing rule, *audi alteram partem*, requires an adjudicator to hear a person before making a decision about that person's interests.[9] Its application in the present context required that Ms Miller be given notice of the motion against her and an opportunity to present her case to those adjudicating the motion.[10]

[28] That did not occur. The decision to terminate Ms Miller's membership was not validly made because it was not, as s 71(3) required, made in accordance with the rules of natural justice.

[29] The Federation's submissions placed much emphasis upon the fact clause 10.11 of the Townsville Club's rules entitled Ms Miller to apply for dispute resolution proceedings per the Federation's Dispute Resolution Manual if she considered her membership was wrongfully terminated. Whether that entitlement has substance is questionable given that the dispute resolution clause, clause 28, in the Federation Constitution applies to "members and clubs" and the Federation's only members are clubs, pursuant to clause 9.1 of its constitution. Given the conclusion I will reach, it is unnecessary to decide the point and I proceed on the premise there is such a right of recourse open to Ms Miller.

[30] The obstacle to the present relevance of that right of recourse is it is remedial to an adjudication. Availability of dispute resolution after an adjudication is no substitute for the right to be heard before an adjudication is made. It does not remove the statutorily imposed obligation to comply with the rules of natural justice when adjudicating. At best, the right to dispute resolution proceedings might be relevant to the appropriateness of granting the relief sought.

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9 M Aronson and M Groves *Judicial Review of Administrative Action* (Thompson Reuters, 5th ed, 2013) [7.20].

10 See, for example, *McNab v Auburn Soccer Sports Club Ltd* [1975] 1 NSWLR 54, 59–60.

[31] Ms Miller seeks a declaration that the membership termination decision was void, invalid and ineffective. It was. As to whether I should so declare, s 72 *Associations Incorporation Act 1981* (Qld) confers a discretion upon this court to make such a declaration, notwithstanding that no right of a proprietary nature is involved. The termination decision deprived Ms Miller of a right of membership which could only be removed by a termination decision made in accordance with the rules of natural justice, a protection afforded by statute. The circumstances are so clear cut that the availability of a dispute resolution process is of no persuasive influence upon whether the discretion to make the declaration should be exercised. It does not present as a more convenient and satisfactory remedy[11] in circumstances where it cannot sensibly be said in light of my findings that there is a dispute to resolve and where the process would occur under the auspices of an entity which did not accord Ms Miller natural justice in the first place. Ms Miller should not be left to attempt to restore her membership by such a process. She was wrongly deprived of her right of membership and should have her declaration.

[32] Ms Miller's application also sought orders purporting to enforce what is, given the invalidity of her membership termination, a continuing right of membership. The court expects its declaration will be respected. In case it is not, Ms Miller should have an avenue to pursue the enforcement of her right. To that end it is presently sufficient to give the parties liberty to apply. The same conclusion should be reached in the event of success regarding the remaining subjects of the application.

Membership convenor and director termination

[33] Turning next to the termination of Ms Miller as membership convenor and director, it will be recalled Ms Miller's holding of a position as director was an automatic consequence, under the Federation's constitution, of her election as a membership convenor of the Federation.

[34] However, while she may have become a director by operation of the Federation's constitution, the Federation is a public company within the meaning of the *Corporations Act 2001* (Cth). It follows her position as director and her removal therefrom was subject to the provisions of that Act.

[35] On the topic of removal of directors, s 203D *Corporations Act 2001* relevantly provides:

> "**203D Removal by members—public companies**
>
> *Resolution for removal of director*
>
> (1) A public company may by resolution remove a director from office despite anything in:
> (a) the company's constitution (if any); or
> (b) an agreement between the company and the director; or
> (c) an agreement between any or all members of the company and the director.
>
> If the director was appointed to represent the interests of particular shareholders or debenture holders, the resolution

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11 *R v Williams, ex parte Lewis* [1992] Qd R 643, 658.

to remove the director does not take effect until a replacement to represent their interests has been appointed.

…

Notice of intention to move resolution for removal of director

(2) Notice of intention to move the resolution must be given to the company at least 2 months before the meeting is to be held. However, if the company calls a meeting after the notice of intention is given under this subsection, the meeting may pass the resolution even though the meeting is held less than 2 months after the notice of intention is given.

Note: Short notice of the meeting cannot be given for this resolution (see subsection 249H(3)).

Director to be informed

(3) The company must give the director a copy of the notice as soon as practicable after it is received.

Director's right to put case to members

(4) The director is entitled to put their case to members by:
(a) giving the company a written statement for circulation to members (see subsections (5) and (6)); and
(b) speaking to the motion at the meeting (whether or not the director is a member of the company).

(5) The written statement is to be circulated by the company to members by:
(a) sending a copy to everyone to whom notice of the meeting is sent if there is time to do so; or
(b) if there is not time to comply with paragraph (a)—having the statement distributed to members attending the meeting and read out at the meeting before the resolution is voted on. …" (emphasis added)

[36] Further, s 203E provides a resolution of directors of a public company is "void to the extent that it purports to … remove a director from their office".

[37] It follows from ss 203D and 203E that Ms Miller had the right to timely notice of the intention to move the motion for her termination as director and to the opportunity to put her case both in writing and in person to the meeting, which meeting should have been of the members, not merely the directors. None of that occurred. The statutory prerequisites for her removal as a director were not met and it follows her purported termination as director is void.

[38] Counsel for the Federation accepts Ms Miller's purported termination was contrary to the *Corporations Act* but submits that fact is a distraction from the lack of utility in the orders sought. In urging an absence of utility the Federation highlights that Ms Miller was only a director because she was a membership convenor, that her

term as membership convenor is in any event over and that there was no invalidity attending her removal as membership convenor.

[39] It is clear Ms Miller was only a director because she was a membership convenor but she disputes her term as the Federation's membership convenor was at an end. She deposes that she was in the midst of serving a four year term. That cannot be correct. Clause 26.2 of the Federation's constitution provides such a position holder:

> "…shall be elected/appointed for an initial period of two (2) years and may be re-elected/appointed for further periods of two (2) years as prescribed by the Federation."

[40] Ms Miller sought and lost re-election to the position of membership convenor in October last year.[12] Her existing term was due to end on 9 May 2020 at the annual general meeting. In fact, that meeting was postponed to 28 June 2020 (because of COVID-19 related concerns) but that does not matter. The Federation's point is that the relief Ms Miller seeks from the court cannot now serve the purpose of restoring her to continued occupation of a position which she lost her bid for re-election to.

[41] I agree. The situation is quite different from her being wrongly deprived of her right of membership. How else has Ms Miller been effected by the wrongful termination of her position as director?

[42] Her counsel submitted that because she was asked to return Federation property her proprietary rights were impacted. Any possession of Federation's property by Ms Miller would have been an incident of the position(s) she held. No broader entitlement to possession has been identified. This was not a loss of a proprietary right. Even if it was, it is so trivial, particularly in the context of the mere sliver of time she could otherwise have remained in the position, as to carry no material weight in considering the exercise of my discretion whether to make a declaration.

[43] At the highest, a declaration Ms Miller's termination as director was void would ease any reputational damage done by Ms Miller's unlawful termination. That topic is more sensibly considered after deciding whether Ms Miller was also wrongfully removed from her position as membership convenor.

[44] The provisions of the Federation's constitution dealing with removal from such a position are:

> "**Removal from Office**
>
> 26.4 Notwithstanding the above, if a person in an elected position is not carrying out the duties of her position, at an extraordinary meeting called to consider the matter and held either by physical meeting or by electronic meeting, the Directors may, following a resolution carried by a seventy five percent (75%) majority of the Directors in a secret ballot, remove her from that position before the expiration of her term of office and may appoint another

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12 Affidavit of Anusha Santhirasthipam, court doc 9, ex AS20, p 225.

person in her stead to hold office until a postal or electronic ballot of Clubs for the elected position can take place.

26.5 Such removal from office does not take effect until one (1) month after the person is advised in writing of the Director's decision, the grounds on which it is based and of the right of appeal which will be sent to Clubs for voting by postal or electronic ballot.

26.6 If the person wishes to exercise her right under Clause 26.5, the Clubs after reviewing her appeal on why she should not be removed from the position shall vote by secret ballot on the resolution that the person be removed from office. Seventy five percent (75%) of the Clubs voting must be in favour of the resolution for the removal to be confirmed otherwise the resolution is defeated." (emphasis added)

[45] It may be observed at once that the termination letter asserted it had effect on the date it was written. On its terms, clause 26.5 precludes any removal taking effect until one month after the written advice of the decision, presumably to protect the relevant person's right of appeal. More problematically clause 26.5 requires such an advice to advise of the right of appeal. The termination letter contained no such advice, with the consequence clause 26.5's pre-requisites could not have been met and the purported removal could not yet be effective. The purported termination was therefore of no effect.

[46] Another problem for the Federation[13] is that at its meeting the board of directors did not actually decide to remove Ms Miller from the office of membership convenor. It will be recalled the letter advising Ms Miller of the board of directors' decision advised "your position as Membership Convenor and as a Director of the Federation has been terminated". However, the board's decision involved the carriage of a resolution in these terms:

> "Pursuant to 14.6.1.5 of Federation Constitution that the office of Director becomes vacant by virtue of Membership Convenor Rosaline Miller acting negligently and/or failing to act in the best interests of the Federation." (emphasis added)

[47] Those words did not refer at all to Ms Miller being removed from or vacating the office of membership convenor.

[48] Even accepting, as the grounds cited in the resolution suggested, that some of the alleged conduct of concern occurred in Ms Miller's capacity of membership convenor, it is impossible to infer the words of the resolution carry the meaning that Ms Miller was being removed as membership convenor. The words' only active language refers to the office of director becoming vacant by virtue of Ms Miller's conduct.

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13 This problem attracted little attention in argument. If it had been the only source of invalidity it may have been appropriate to afford the parties the opportunity to address it further.

[49] While words removing Ms Miller as membership convenor might have arguably supported the inference they also removed her as director, the converse cannot apply.[14] Entitlement to hold the office of director derived from holding the office of membership convenor, whereas the holding of the office of membership convenor derived from election to that position.

[50] If clause 26.4, the constitutional clause relevant to removal of a membership convenor, had been cited, it might have provided some assistance by inference. But the only clause cited in the resolution was clause 14.6.1.5, which relates to removal of directors. The conclusion is inescapable that, contrary to what was said in the letter of termination, the board of directors did not in fact decide to terminate Ms Miller's position as membership convenor.

[51] For all of those reasons the purported termination in the letter of 20 February 2020 was ineffective.

[52] As already discussed Ms Miller had not been re-elected as membership convenor so she has no current right to be protected by a declaration regarding her further occupation of the position. As with her purported termination as a director, the only utility in a declaration is to assuage reputational damage. I now turn to that topic as it relates to the invalid purported terminations from both positions.

[53] There is no evidence of actual reputational damage. However, the circumstances of a case may support an inference of reputational damage as an inevitable result of a known wrong or wrongs.

[54] Here Ms Miller lost in her bid for re-election and the issue of reputational damage falls to be considered in that light. However, it is one thing for a person to lose an election and quite another to be removed from office before the expiry of the person's term in office. I readily infer such impact upon reputation as might flow from merely losing an election would be less than the reputational damage inevitably occasioned by the Federation's wrongful purported termination of Ms Miller's then current positions as director and membership convenor.

[55] Such a conclusion is more easily drawn in circumstances where, additionally, Ms Miller's membership was also wrongly terminated. While it is impossible to articulate the degree of reputational harm done by those collective wrongs, I am satisfied it was of sufficient substance to warrant declarations regarding them.

[56] I record for completeness that the existence of the right of appeal per clause 26.6 of the Federation's constitution was an unpersuasive consideration against exercising the discretion to make a declaration for three reasons. Firstly, the invalidity of the purported termination in part derived from a failure to advise of that right of appeal in the notice in writing given pursuant to clause 26.5. Secondly, the purported termination was, contrary to clause 26.5, of supposedly immediate effect, thus depriving Ms Miller of the temporal opportunity clause 26.5 should have given her

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[14] For example, see *Maloney v NSW National Coursing Association Ltd (No 2)* [1978] 1 NSWLR 161, 175.

to appeal before the decision took effect. Thirdly, a right of appeal is no answer to a complaint of procedural unfairness in relation to an initial determination.[15]

Secretary termination

[57] Section 204D *Corporations Act* provides a secretary is to be appointed by the directors and s 204F provides the secretary holds office on the terms and conditions determined by the directors. The Federation's constitution does not contain any fetter upon the statutory position that a secretary serves as determined by the directors.

[58] Clause 19 of the Federation's constitution, relevantly provides:

> "19. **COMPANY SECRETARY**
>
> 19.1 The Federation must have a Company Secretary. The Directors must appoint <u>and may terminate</u> the appointment of the Company Secretary. The Directors shall, in accordance with the Act and this Constitution, determine the terms and conditions of appointment of a Company Secretary. The Company Secretary shall be a resident of Australia and an Australian Soroptimist. …
>
> 19.3 The Company Secretary is <u>entitled to attend all meetings</u> of the Federation, all meetings of the Directors and any other meetings, <u>and may speak on any matter</u> but does not have a vote as Company Secretary. …". (emphasis added)

[59] Clause 19.1 gives the directors the power to terminate Ms Miller's appointment as company secretary. Notably that clause does not require that decision to be made at a meeting. That is consistent with s 248A *Corporations Act* which allows directors to pass resolutions without meetings. Nor does clause 19.1 confer any procedural protection on the secretary. Nonetheless Ms Miller argues her purported termination as secretary was invalid.

[60] In this instance the provisions of the *Corporations Act* do not provide direct assistance to Ms Miller's argument in the way its provisions regarding directors did above. However, her counsel argues the termination was invalid because the Federation acted in breach of the rules of natural justice by not giving her notice of the meeting and an opportunity to be heard.

[61] He submitted the rules of natural justice condition the exercise of any power to terminate the rights of any party to a contract constituted by the constitution of an association and are only excluded to the extent made plain by the constitution. That the Federation's constitution is such a contract is confirmed by s 140(1) of the *Corporations Act*. That section relevantly provides a company's constitution has effect as a contract "between the company and each director and company secretary … under which each person agrees to observe and perform the constitution and rules so far as they apply to the person".

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15 *Hill v Green* (1999) 48 NSWLR 161, 172, 197; cited with approval by McHugh J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 179 ALR 238, 271.

[62] The submission of Ms Miller's counsel, in urging a default starting point that the rules of natural justice do apply, finds support in the observations of Campbell J in *McClelland v Burning Palms Surf Life Saving Club*.[16] After a review of authority his Honour there concluded:

> "In Australia, the preferable view is that natural justice comes to operate in private clubs and associations by the rules of those private organisations being construed on the basis that fair procedures are intended, but recognising the possibility that express words or necessary implication in the rules could exclude natural justice in whole or part."[17]

[63] It is doubtful whether that articulation of a default position in favour of the applicability of the rules of natural justice was intended to apply beyond the members and elected office bearers of such organisations to also protect the holders of unelected office in companies. In any event, given that the rules of justice are not proscribed and depend upon the nature of the case it is not possible to divine the extent of any relevant procedural protections without reference to the content of the governing document in question and the nature of the position concerned.

[64] The nature of the position in question may also inform the force of any inference to be drawn from the content of the organisation's governing document. In that regard it would be unremarkable if a constitution conferred procedural protections for removal from an elected position but did not do so for removal from an appointed position. The elected nature of the former supports the implication of procedural protections safeguarding removal in a way the appointed nature of the latter does not.

[65] Indeed here, the constitution goes so far as to confer a special majority in favour of, and a right of appeal against, removal from elected positions, yet not for removal as a secretary. That clause 19.1's conferral upon the directors of the power to terminate a secretary's appointment is unaccompanied by a requirement for a special majority or a right of appeal is consistent with the company secretary being an appointed servant rather than an elected office holder of the company.

[66] I infer from the absence in clause 19.1 of procedural protections which are included elsewhere in the constitution, that the rules of natural justice are excluded by necessary implication in respect of a termination from that position. However, the same reasoning cannot exclude protections, included within the constitution, of general application to the secretary and meetings.

[67] Clause 19.3 provides the secretary "is entitled to attend all meetings … and may speak on any matter". The inference sought by Ms Miller is that this language is intended to confer a right to attend and be heard at any directors' meeting. As against this the Federation stresses clause 19.3's reference to attendance and speaking at meetings occurs in the context of it, in the same sentence, providing the secretary "does not have a vote" at such meetings. The Federation submits such language is merely permissive; allowing secretaries to attend and speak at meetings notwithstanding that they cannot vote at them.

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16 (2002) 191 ALR 759.
17 (2002) 191 ALR 759, 785.

[68] There is partial substance to the Federation's argument – partial because the language relating to meeting attendance is different from the language relating to speaking at meetings. The former uses the word "entitled" whereas the latter only uses the word "may".

[69] The provision that the secretary is "entitled" to, rather than merely "may", attend meetings is more than permissive. It positively confers upon the secretary an entitlement, that is to say, a right to attend meetings. This is unremarkable, for secretaries have important statutory duties to fulfill for companies and their roles could be unworkable if they did not have the right to attend company meetings.[18]

[70] That the secretary "may" speak at meetings does not mean the secretary has a right to speak at meetings but rather that it is permissible for the secretary to speak. Again, this is unremarkable in that there may be many matters discussed at meetings where the views or input of the secretary are not sought or are not relevant. Doubtless this explains why the clause says the secretary may speak, not that she is entitled to speak.

[71] The upshot is that Ms Miller had a right to attend the meeting. By implication she had a right to timely advance notice of the meeting and its subject matter in order that she could decide whether to exercise her entitlement to attend. The Federation's failure to give Ms Miller notice of the meeting and the resolutions to be put was a clear breach of Ms Miller's implied right to such notice under clause 19.3 of the constitution – a document the company and its directors were contractually bound to follow.

[72] What consequence did that breach have? Had the breach not occurred Ms Miller may have attended the meeting and may have persuaded the Chair to allow her to speak to the motion to terminate her position as secretary. She effectively lost an opportunity to attempt to be heard on that resolution. It does not follow that such a loss infected the legitimacy of her termination by the directors, made pursuant to clause 19.1. They could after all have resolved to terminate her position without ever holding a meeting.[19]

[73] Thus, in distinction to the other termination decisions, this termination was not ineffective. That makes injunctive relief inappropriate. So too does the fact time has moved on and a new secretary, who will again serve at the pleasure of the directors, has been appointed.[20]

[74] What utility is there in a declaration? There is no proper basis to declare Ms Miller is still the secretary. At best the declaration would acknowledge she was wrongly deprived of the opportunity to attend the meeting. Such a declaration could only serve the purported purpose of easing reputational damage. It is an unrealistic stretch to infer she would have suffered reputational damage only by being deprived of an opportunity to attend the meeting. If that were the only wrong done I would not make a declaration.

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18 See Ch 2D *Corporations Act 2001* (Cth).

19 *Corporations Act 2001* (Cth) s 248A.

20 In fact a new secretary appears to have been in place at the meeting of 19 February 2020 – an anomaly which need not be pursued for present purposes.

[75] However the wrong done to Ms Miller by that deprivation occurred as part of a collective set of wrongs in connection with the conduct of the meeting of 19 February 2020 and the letters about it the following day. It is not practicable to separate out different strands of reputational damage arising from what was a collective event. I have already inferred the occurrence of reputational damage sufficient enough to warrant declarations regarding the earlier mentioned wrongs. Even if the wrong connected with Ms Miller's position as secretary did not of itself cause reputational damage, a declaration as to that wrong would assist the work of the other declarations in redressing the reputational damage which was caused in connection with a meeting she was wrongly deprived of an opportunity to attend.

Orders

[76] My orders for declaratory relief should reflect the above conclusions.

[77] As to costs, my provisional view is that Ms Miller has succeeded to such a substantial extent in seeking declaratory relief that she should simply have her costs rather than there being an apportionment of costs. That said, there may be matters relevant to costs which I am unaware of and the parties should have an opportunity to be heard if they cannot agree on costs.

[78] My orders are:

1. Leave is given for the filing and reading of the affidavit of David Kerwin sworn 15 June 2020.

2. It is declared that the respondent's purported termination of the applicant's membership as a Soroptimist notified to the applicant by a letter sent on behalf of the board of directors of the respondent dated 20 February 2020, is void, invalid and ineffective.

3. It is declared that the respondent's purported terminations of the applicant's positions as membership convenor and director of the respondent notified to the applicant by a letter sent on behalf of the board of directors of the respondent dated 20 February 2020, are void, invalid and ineffective.

4. It is declared that the applicant was wrongly deprived in her capacity as secretary of the respondent of her entitlement to attend the meeting of the directors of the respondent on 19 February 2020.

5. Liberty to apply on the giving of two business days' notice in writing.

6. The parties will be heard as to costs at 9.15 am on 4 September 2020 if costs have not been agreed in the meantime.