

SUPREME COURT OF QUEENSLAND

CITATION: *Cuthbert v Abbott & Ors* [2022] QSC 113

PARTIES: **SHANE CRAIG CUTHBERT**
(Applicant)
v
SHARON ABBOTT & OTHERS
(First to Twenty-eighth Respondents)

FILE NO/S: C88 of 2022

DIVISION: Trial Division

PROCEEDING: Originating application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 26 May 2022 (ex tempore)

DELIVERED AT: Cairns

HEARING DATE: 26 May 2022

JUDGE: Bradley J

ORDER: **THE ORDER OF THE COURT IS THAT:**

- 1. The application filed on 29 April 2022 is dismissed.**
- 2. The proceeding commenced on 16 February 2022 is dismissed.**
- 3. The applicant is to pay the respondents' costs of the proceeding.**

CATCHWORDS: ASSOCIATIONS AND CLUBS - EXPLUSION, SUSPENSION AND DISQUALIFICATION - EXERCISE OF POWER - DENIAL OF NATURAL JUSTICE GENERALLY - where the applicant applied for membership of The Australian Labor Party - where the Administrative Committee reviewed the applicant's membership - where the applicant was rejected as a member of the party - where the applicant alleged that the Administrative Committee failed to comply with the rules of The Australian Labor Party and failed to afford the applicant natural justice - whether the court has jurisdiction to hear the applicant's claim - whether the court would exercise its jurisdiction, as a matter of discretion, to grant the applicant any relief.

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564, cited

Asmar v Albanese [2022] VSCA 19, followed

Annetts v McCann (1990) 170 CLR 596, cited
Australian Football League v Carlton Football Club Ltd [1998] 2 VR 546, cited
Baldwin v Everingham [1993] 1 Qd R 10, not followed
Buckley v Tutty (1971) 125 CLR 353, cited
Camenzuli v Morrison [2022] NSWCA 51, followed
Cameron v Hogan (1934) 51 CLR 358, applied
Carter v NSW Netball Association [2004] NSWSA 737, distinguished
Dawkins v The State Secretary of the Australian Labor Party (WA Branch) [2022] WASC 117, cited
Eastham v Newcastle United Football Club Ltd [1964] Ch 413, cited
Echunga Football Club Inc v Hills Football League Inc [2014] SASC 201, cited
Ermogenous v Greek Orthodox Church Community of SA Inc (2002) 209 CLR 95, followed
Fisher v Keane [1878] 11 ChD 353, not followed
Greig v Insole [1978] 1 WLR 302, cited
Harrington v Coote (2013) 19 SASR 152, cited

COUNSEL: The applicant appeared on his own behalf
D Quinn (sol) appeared for the respondents

SOLICITORS: The applicant acted on his own behalf
Holding Redlich for the respondents

- [1] On 1 October 2020, the applicant Shane Craig Cuthbert applied for membership of The Australian Labor Party (ALP). His application was accepted by the Administrative Committee of the Queensland branch of the ALP. Later, the Administrative Committee reviewed or reconsidered Mr Cuthbert's membership and resolved to reject him as a member of the party.
- [2] On 16 February 2022, Mr Cuthbert commenced this proceeding by filing an originating application, naming the ALP as the respondent. Mr Cuthbert alleges the Administrative Committee has failed to comply with the rules of the ALP and failed to afford him natural justice.
- [3] On 14 April 2022, Applegarth J made directions. These allowed Mr Cuthbert to file a further amended application on 22 April 2022, naming the present 28 respondents in place of the ALP. The respondents are the members of the Administrative Committee. On 28 April 2022, the respondents filed a notice of address for service.
- [4] His Honour's directions also provided for a preliminary issue to be determined. The preliminary issue is whether the court has jurisdiction to hear Mr Cuthbert's claim and, if it does have jurisdiction, whether the court would exercise its jurisdiction, as a matter of discretion, to grant Mr Cuthbert any relief. The preliminary issue arises because the respondents contend that the applicant's claim is a dispute concerning his membership of an unincorporated political party that is not within the jurisdiction of the court.

- [5] Mr Cuthbert filed written submissions on 29 April 2022. In them, he advanced several grounds on which, he says, his claim against the respondents is justiciable. On 29 April 2022, Mr Cuthbert also filed an application for leave to amend his originating application in further respects.
- [6] In their written submissions, the respondents have joined issue with Mr Cuthbert on each of his grounds. The respondents rely on the law as set out by the High Court in *Cameron v Hogan* (1934) 51 CLR 358. They also cite recent consideration of that decision by the New South Wales Court of Appeal in *Camenzuli v Morrison* [2022] NSWCA 51, and, in some respects, by the Victorian Court of Appeal in *Asmar v Albanese* [2022] VSCA 19.
- [7] On 16 May 2022, Mr Cuthbert filed an outline of submissions in reply to the respondents' submissions.
- [8] On 26 May 2022, the parties appeared. Their respective written submissions were read, and the court heard brief oral argument on the preliminary question.
- [9] This is an edited version of the *ex tempore* reasons given for the orders made that day on the preliminary issue.

The nature and constituent documents of the ALP

- [10] Many of the submissions by Mr Cuthbert and the respondents concern the nature and certain constituent documents of the ALP. Before considering the submissions, it is convenient to identify the matters that are not in dispute.
- [11] It is common ground that the ALP is an unincorporated voluntary association. It is a political party, which is to say it is made up of individuals associated together for the advancement of the cause of a particular political programme. The relevant history of the ALP was briefly sketched by D M Campbell J in *Burton v Murphy* [1983] 2 Qd R 321, 333-335.

National Constitution

- [12] The ALP's main constituent document is the ALP National Constitution (**National Constitution**). A copy was tendered with the respondents' submissions. Among its first provisions is clause 2 dealing with the legal status of the National Constitution:

“(a) It is intended that the National Constitution and everything done in connection with it, all arrangements relating to it (whether express or implied) and any agreement or business entered into or payment made or under the National Constitution, will not bring about any legal relationship, rights, duties or outcome of any kind, or be enforceable by law, or be the subject of legal proceedings. Instead all such arrangements, agreements and business are only binding in honour.

(b) Without limiting clause 2(a), it is further expressly intended that all disputes within the Party, or between one member and another that relate to the Party be resolved in accordance with the National Constitution and the rules of the state branches and not through legal proceedings.

(c) By joining the Party and remaining members, all members of the Party consent to be bound by this clause.”

[13] The National Constitution specifies the objectives, to achieve which the ALP is to act in accordance with principles of action and reforms set out in its platform from time to time. The association has been formed and exists to achieve certain public purposes. It is not an association for the personal or pecuniary benefit of its members.

[14] The ALP consists of branches formed in each state and territory. The National Constitution includes “National Principles of Organisation”. These are intended to be binding on state branches and to be implemented through branch rules.¹

[15] The National Principles of Organisation include principles on membership. These provide for membership to be:

“open to all residents of Australia who are prepared to accept its objectives and who have associations with no other political party or proscribed organisation.”

[16] The “right to join” may only be impaired “in circumstances in which it can be demonstrated clearly that an individual cannot meet” the membership requirement.

[17] There are many specific rules about the process for recruitment of members, applying for membership, payment of membership fees, and the like. Among these are minimum standards for members’ rights. There are two of these. The first is that:

“The process of joining the Party shall be simplified and all unnecessary impediments to that process shall be removed from state branch rules.”

[18] The second is that, subject to attendance requirements in a state or territory:

“Full membership rights in all states and territories shall begin to accrue in accordance with the relevant state requirements and those rights shall accumulate, to a maximum, following two years consecutive membership.”

[19] The membership rights, in this context, include: “being eligible for preselection; standing and voting for or standing on, the various Party bodies and executives.”

[20] The National Constitution requires that each state branch of the ALP “must adopt rules that establish an appeals process in relation to compliance with and enforcement of branch rules.” These branch rules are submitted to the National Executive for approval. Indeed, all state branch rules must be revised in accordance with the National Principles of Organisation and submitted to the National Executive for endorsement. The National Executive may amend the rules of any state branch to implement the National Principles of Organisation.

¹ State branches are defined to include territory branches.

- [21] The National Constitution provides that “decisions of the National Conference are equally binding on all members of the Party” and that decisions “which relate to organisational, administrative or rules matters continue in force until a subsequent Conference otherwise determines.” Amongst the National Conference decisions two may be of relevance.
- [22] The first is from the 1955 National Conference and is about members initiating legal proceedings. It is a resolution that:
- “as a general principle it cannot concede the right of any member of the party to initiate legal proceedings for the purpose of establishing the constitutional behaviour of the Labor Movement. We emphasise that, with a few isolated exceptions, the history of our Party discloses we have functioned on a basis of complete determination in accordance with our own rules and our own interpretation of them. We insist we must continue to create our own procedures, taking care of our own business without the introduction of lawyers and law courts.”
- [23] The second is from the 1979 National Conference and is about grievances. It expresses the belief “that the procedures of the Party at state and national level provide adequate opportunity for people who are dissatisfied to seek redress of Grievance.” And it “calls upon all members of the Party in respect of matters in dispute to refrain from making comment outside the Party.”

State Rules

- [24] The Queensland Labor Rules 2021 (**Rules**) are the internal rules of the state branch known as “Australian Labor Party (State of Queensland).” A copy of the Rules was tendered with the respondents’ submissions. The relationship between the ALP and the state branch under the National Constitution and the Rules is not relevantly different to that considered by the full court in *Burton v Murphy*. These reasons proceed on the basis that the ALP is a single political party.²
- [25] The state branch is not incorporated. It is a constituent part of the ALP. It consists of members accepted into membership in accordance with the Rules and industrial unions affiliated in accordance with the Rules. A person may become a member of the party through a state branch. In the present case, this may be done in accordance with the Rules. Each member is bound by the National Constitution and the Rules made by the relevant state branch in accordance with the National Constitution.
- [26] An Administrative Committee is responsible for the overall administration of the state branch.
- [27] The Rules are expressly subject to rules made by the National Conference and the National Executive.³ The national rules prevail in the event of a dispute “as to membership of the Party or any Party Unit.”

² The Victorian Court of Appeal reached the same conclusion with respect to the Australian Labor Party, Victorian Branch in *Asmar v Albanese* at [156]-[173].

³ The National Constitution is a rule made by the National Conference.

[28] The Rules provide for a disputes tribunal:

“22 DISPUTES TRIBUNAL

- (1) The Disputes Tribunal shall, subject to the powers of the National Conference, the National Executive and the State Conference, mediate, conciliate, arbitrate or otherwise hear and determine all matters in dispute within the Party properly referred to it.
- (2) The Disputes Tribunal shall operate independently in its deliberations at all stages of the disputes process.
- (3) The procedures for the operation and conduct of the Disputes Tribunal shall be in accordance with Appendix Eight (AP8).”

[29] Appendix Eight comprises 47 provisions dealing with the membership of the Disputes Tribunal, its method of operation, the initiation of a dispute, mediation, arbitration, appeals, the powers of the Disputes Tribunal, breaches of Disputes Tribunal rulings, public comment on matters before the Disputes Tribunal, and other matters including the time within which a complaint may be lodged.

Mr Cuthbert’s grounds

[30] Mr Cuthbert advanced several grounds on which he contends his claim for relief against the respondents is justiciable. It is convenient to deal with these under the six major topics, and then to deal with the remaining grounds.

Whether Mr Cuthbert is party to a contract with other members

[31] In his first ground, Mr Cuthbert contends that the National Constitution and Rules are a contract between the members of the ALP. He says he is or was a member and may sue for breach of the contract.

[32] Mr Cuthbert relied on the decision of the High Court in *Ermogenous v Greek Orthodox Church Community of SA Inc.*⁴ There, the majority set out the following approach to the issue of intention to create contractual relations:

[24] “It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty.” To be a legally enforceable duty there must, of course, be identifiable parties to the arrangement, the terms of the arrangement must be certain, and, unless recorded as a deed, there must generally be real consideration for the agreement. Yet “[t]he circumstances may show that [the parties] did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts”.

[25] Because the inquiry about this last aspect may take account of the subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding

⁴ (2002) 209 CLR 95.

circumstances, not only is there obvious difficulty in formulating rules intended to prescribe the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist, it would be wrong to do so. Because the search for the “intention to create contractual relations” requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the word “intention” is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties.”⁵

- [33] Whether a member enters a contractual relationship with other members and the members of the Administrative Committee depends on what is objectively conveyed by the provisions of the party’s constituent documents, having regard to the circumstances in which those statements were made. It is not determined by placing the ALP in a particular category of entities. As the Court of Appeal observed in *Camenzuli v Morrison*, some political parties have rules which have contractual force,⁶ citing as an example the decision of Robb J in *Johnson v The Greens NSW*.⁷ There a political party had chosen to incorporate under the *Associations Incorporation Act 2009* (NSW), and s 26 of that Act gave contractual force to the party’s constitution so that *Cameron v Hogan* was inapplicable.
- [34] The only means by which intention was communicated between members (and between Mr Cuthbert and the state branch, and so the ALP) was in the form of the National Constitution and the Rules.
- [35] I respectfully adopt the approach of Stanley J in *Echunga Football Club Inc v Hills Football League Inc*,⁸ that the rules of a voluntary association open to the public have an inherent public dimension and may justify a more flexible interpretive approach because they are a product of the efforts and resolutions of lay persons. Having noted that, it would be difficult to imagine a clearer statement of an intention not to create legal relations than clause 2 of the National Constitution. As the Court of Appeal observed in *Asmar v Albanese*, by that clause, the ALP “adopted the principle of non-justiciability in terms reflecting the decision in *Cameron v Hogan*” and:

⁵ (2002) 209 CLR 95, 105-106 [24]-[25] (Guadron, McHugh, Hayne and Callinan JJ), footnoted citations omitted.

⁶ [2022] NSWCA 51, [65] (Basten, Leeming and Payne JJA).

⁷ [2019] NSWSC 215 at [18].

⁸ [2014] SASC 201, [18], applied by Le Meire J in *Kaur v Sikh Gurdwara Perth (Inc)* [2017] WASC 270, [44].

“clearly expressed their desire not to create legal relationships based upon the National Constitution ..., and not to have disputes as to those constituent documents determined by the courts.”⁹

[36] Mr Cuthbert’s contention that a member of the ALP has a contractual claim to enforce the Rules against other members, by reason of their common membership, like the case put by the appellant in *Asmar*, is “an assertion strikingly inconsistent” with the National Constitution.”¹⁰ It is also directly contrary to the 1955 National Conference decision. It is inconsistent with the provisions in the Rules providing for the resolution of disputes through internal party processes and perhaps inconsistent with the 1979 resolution calling on members to refrain from making comment outside the Party in respect of matters in dispute.

[37] Mr Cuthbert identifies some matters that, he says, indicate an intention to create contractual relations between members of the ALP. The National Constitution and the Rules are “large and complex” written instruments. The Rules comprise “some 111 pages.”

“They are drafted in legal language and style. They use language such as ‘shall’, ‘comply with’ and ‘enforce’ throughout the document and contain detailed procedures for complaints.”

[38] Mr Cuthbert also notes:

“The complaints procedures specifically require that procedural fairness be followed, which is a distinctly legal concept and implies various legal rights afforded to individual members. The Rules also confer rights, obligations powers and duties on members and officers and even specifically refer to those words and concepts throughout the document. Further, if the parties have always acted as if the rules were binding, this also supports the plaintiff’s conclusion.”

[39] He contends that all these circumstances “appear to infer that the Rules are intended to be binding and enforceable” despite the “clear statements that they are not so.”

[40] There are other matters that indicate an absence of intention to create legal relations. The ALP has remained unincorporated for the whole of its existence, extending over more than a century. The members have not chosen to form a company limited by guarantee or convert the party into an incorporated association under any of the available legislative schemes. The objectives of the party are entirely political. It is not an association for the personal welfare, improvement, or provision of services to its members. The internal procedures for disputes are framed instead of and to the exclusion of legal remedies. The National Constitution may be amended by the National Conference and the Rules may be amended by the State Conference or the National Executive. The control of these constituent documents is beyond any member. This might be distinguished from a conventional notion of a voluntary agreement to contractual terms.

[41] The party’s constituent documents, in the circumstances in which they were made and are used, objectively convey that, by joining the ALP as a member, a person

⁹ [2022] VSCA 19, [69] (T Forrest, Whelan JJA and Forbes AJA).

¹⁰ [2022] VSCA 19, [39].

does not intend to create legal relations between the member and other members or between the member and the managing committee of the unincorporated association. It follows that the National Constitution, and the Rules made in accordance with it, do not comprise a contract between the members of the ALP.

Whether *Cameron v Hogan* is “bad law”

- [42] Mr Cuthbert also contends that the proper administration of the affairs of a political party has an importance beyond the interests of the party members amongst themselves. He says the significance of the ALP is such that disputes concerning its rules are justiciable.
- [43] He also submits that “normative policy considerations such as the public importance of voluntary associations and the rights of individuals” are a basis to reject the reasoning of the High Court in *Cameron v Hogan*. He says *Cameron v Hogan* is “bad law.”
- [44] Mr Cuthbert further submits that his claims are justiciable because the internal stability and good governance of a political party is important in the democratic process, to the extent that there is a public interest in ensuring it is administered in accordance with a correct construction of its rules.
- [45] In *Cameron v Hogan*, the High Court held that a member of the ALP, the then Premier of Victoria, could not maintain an action that his exclusion from the party was in breach of its rules, nor could the member maintain an action for any other breach of any party 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.
- [46] The decision in *Cameron v Hogan* was applied by the New South Wales Court of Appeal in *Camenzuli v Morrison*,¹¹ its force undiminished by the passage of nearly ninety years. The unsuccessful party sought special leave to appeal on two grounds; the first being whether the authority of *Cameron v Hogan* should be qualified in light of later amendments to the *Commonwealth Electoral Act 1918* (Cth) about the printing of the name of a candidate endorsed by a registered political party on a ballot paper. The High Court refused special leave because there were insufficient prospects of success on an appeal from that decision in relation to the finding that the matter was not justiciable (applying *Cameron v Hogan*) as well as to the substantive question of construction of the relevant party rules.¹²
- [47] *Cameron v Hogan* is a decision of the High Court. The decision in *Camenzuli v Morrison* is not obviously wrong. This court should proceed on the basis that the decision in *Cameron v Hogan* remains binding authority in accordance with its terms.¹³ Mr Cuthbert’s submission that the decision is “bad law” must be rejected.
- [48] In *Cameron v Hogan*, the majority said of the general character of the voluntary associations which are likely to be formed without property, and without giving to their members any civil right of a proprietary nature:

¹¹ [2022] NSWCA 51.

¹² [2022] HCATrans 606.

¹³ The Victorian Court of Appeal had reached the same conclusion in *Asmar v Albanese* [2022] VSCA 19, [208].

“They are for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private gain and material advantage. Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations inter se, the rules adopted for their governance would not be treated as amounting to an enforceable contract.”¹⁴

- [49] For the reasons identified above, there is no clear positive indication that the members of the ALP contemplated the creation of legal relations between each other by the act of joining the party. On the contrary, by subscribing to the National Constitution (and the Rules) the members manifested an intention not to create legal relations.
- [50] The public importance of political parties may be accepted. They have been, to certain extents, the subject of legislation in the *Commonwealth Electoral Act* and the *Electoral Act 1992* (Qld). Each Act provides for the registration of a political party for particular purposes and for a copy of the party constitution to be lodged with the election authority. Although questions about the person who holds a particular position with a statutory function or duty may be justiciable, neither Act provides that a registered party’s rules or constitution may be legally enforced.
- [51] In *Baldwin v Everingham* [1993] 1 Qd R 10 the recognition and registration of political parties was the basis on which Dowsett J distinguished *Cameron v Hogan*. Although his Honour’s reasoning was followed in several subsequent decisions,¹⁵ following *Camenzuli* it must now be accepted that the statutory changes have not put registered political parties in a different position from that which prevailed at the time of *Cameron v Hogan* in respect of internal disputes.
- [52] Neither the law as it is to be applied by courts nor any statute enacted by Parliament has altered the import of *Cameron v Hogan* to bring about the situation for which Mr Cuthbert contends.

The identification of respondents

- [53] Next, Mr Cuthbert says he has been able to identify the respondents, who are the members of the administrative committee of the state branch of the ALP. He contends the respondents are in breach of the rules, so he may sue them. He need not sue all the members of the party. This, he says, removes a former impediment to obtaining relief for a breach of the rules of an unincorporated voluntary association.
- [54] It is true that, historically, the practical difficulty of identifying the necessary respondents was one of the reasons courts declined to hear disputes about the inner

¹⁴ (1934) 51 C.L.R. 358, 370-371 (Rich, Dixon, Evatt and McTiernan JJ).

¹⁵ E.g. *Clarke v Australian Labor Party* (1999) 74 SASR 109, 136–9 [73]-[91] (Mullighan J); *Coleman v Liberal Party of Australia, New South Wales Division [No 2]* (2007) 212 FLR 271 (Palmer J); *Butler v Mulholland [No 2]* [2013] VSC 662, [103]-[105] (Robson J).

workings of unincorporated voluntary associations. The absence of such a difficulty in the present proceeding, of itself, does not make Mr Cuthbert's claim justiciable.

Whether Mr Cuthbert's livelihood is affected

- [55] Mr Cuthbert says his livelihood or trade is affected by his rejection as a member of the ALP. He says membership provides him as an individual with an opportunity to pursue a paid political career by nominating for and winning a seat at an election and by being appointed to a paid office in the party. There are many instances where courts have intervened where a decision of a domestic tribunal of a voluntary association expelling a person from membership was made without good faith or dishonestly and the person's livelihood depends upon membership.¹⁶
- [56] Mr Cuthbert does not and has never depended on membership of the ALP for his livelihood. He has never been elected as a member of parliament. He has never been selected as a candidate for the party. Nor does it appear has he ever nominated for selection. Mr Cuthbert has never been appointed to any paid office in the party. He has not sought such employment. He has never derived any income from membership of the ALP.
- [57] Mr Cuthbert says the ALP's rejection of his membership affects his prospects of holding elected office because another party, such as the Liberal National Party, would likely reject his application for membership on the grounds that he had formerly been a member of the ALP. This, he says, adversely affects his prospect of election to a paid public office.
- [58] If Mr Cuthbert aspired to be elected to parliament, then in the expression of McGrath J in *Dawkins v The State Secretary of the Australian Labor Party (WA Branch)* [2022] WASC 117, he is one of "a large group of men and women" with such an aspiration but have not been selected or elected. I respectfully adopt his Honour's conclusion that the loss of an 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."¹⁷
- [59] Mr Cuthbert, in reply, relied on an "offer of holding future ALP fundraising events" and "the ALP Election Night party" at his "venue", the *Porthole*. Nothing in the National Constitution or the Rules restricts the holding of events or parties at venues owned or operated by persons who are not members of the ALP.
- [60] In no relevant sense do the internal rules of the party place an unjustifiable restraint on the income earning activities of Mr Cuthbert or substantially and unreasonably restrict his liberty of employment.¹⁸ They are not a restraint of trade.
- [61] I reject Mr Cuthbert's submission that his livelihood is affected by the party's enforcement of the National Constitution or the Rules.

¹⁶ E.g. *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546.

¹⁷ [2022] WASC 117, [41].

¹⁸ cf *Buckley v Tutty* (1971) 125 CLR 353, 381 (Barwick CJ, McTiernan, Windeyer, Owen and Gibbs JJ); *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413, 446 (Wilberforce J); and *Greig v Insole* [1978] 1 WLR 302, 345 (Slade J).

Whether Mr Cuthbert's reputation is affected

- [62] Mr Cuthbert also says his reputation is affected by his rejection as a member of the ALP. He also says the court has jurisdiction because the rejection of his membership involved the civil wrong of defamation. In his outline of submissions in reply, Mr Cuthbert states that he has “long held” that he was “defamed by the respondents and their staff/employees.”
- [63] Mr Cuthbert contends that certain persons made statements that were defamatory of him. He says those statements were an element in the Administrative Committee's decision to reject his membership. In his words, “the defamation and review of membership go hand in hand.”
- [64] Mr Cuthbert may have a claim for defamation against one or more persons who, he alleges, have published defamatory matter about or concerning him. That is not the claim he seeks to bring in this proceeding. With respect, the two do not go hand in hand.
- [65] Mr Cuthbert relies on the decision of Palmer J in *Carter v NSW Netball Association* [2004] NSWSC 737. There, the Association certified to the Commission for Children and Young People, under s 39 of the *Commission for Children and Young People Act 1998* (NSW), a decision of its Disciplinary Committee that Ms Carter had “been the subject of disciplinary proceedings relating to child abuse, sexual misconduct or acts of violence in the course of employment.” His Honour found that the certification affected her livelihood and reputation. This was because “by virtue of the entry of her name on the database maintained by the Commission, one area of employment which is, as a matter of reality, closed to her, is any employment involving direct, unsupervised contact with children” and she was “branded as a “*child abuser*”, both by the decision of the Disciplinary Committee and by her inclusion in the database of the Commission.”
- [66] The facts alleged by Mr Cuthbert do not raise questions of this kind. I have dealt above with Mr Cuthbert's contentions about the effect on his livelihood. He does not assert an interest similar or analogous to the reputational rights considered in *Carter*.
- [67] In Mr Cuthbert's case, the Administrative Committee was not making official findings of some legal import, undertaking a statutory inquiry, or exercising an inquisitorial power of the kinds considered in *Annetts v McCann* (1990) 170 CLR 596, or *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
- [68] The general proposition that injury to reputation makes justiciable a matter that would otherwise not be so, has been traced to the decision in *Fisher v Keane* [1878] 11 ChD 353. The parties to that dispute accepted that the decision of a domestic tribunal could not be challenged if it was made *bonâ fide*. In the judgment, Jessel MR expressed a broader view: that a tribunal should not “blast a man's reputation for ever - perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct.” This powerful reaction may say more about the importance of the Army and Navy Club in 1878, than it does about the general reach of judicial supervision. I note the doubt expressed by Kourakis CJ in *Harrington v Coote* (2013) 19 SASR 152 about how the effect on personal

reputation alone makes a dispute justiciable, where there is no underlying property right or legally binding agreement conferring a right to a fair hearing.¹⁹

The scope of declaratory relief

- [69] Mr Cuthbert says the court has jurisdiction to grant declaratory relief about matters that might otherwise be beyond jurisdiction on other grounds. He contends, “the court does have a discretion to decide what is justiciable.”
- [70] If a matter is not justiciable, the court cannot decide it. If it is justiciable, there may be discretionary reasons for the court to decline relief. These principles do not operate in reverse. A discretion of the kind for which Mr Cuthbert contends would not be compatible with the rule of law.
- [71] A declaratory remedy is available to vindicate a legal right. The court can make a declaration of right whenever the applicant’s interest is sufficient to justify it. Where there is no legal right, no such relief is available.²⁰

Mr Cuthbert’s other submissions

- [72] Finally, Mr Cuthbert submits that his claim involves the rights of individuals, issues of good faith and honesty, and that equity entitles him to enforce the party’s rules because the party itself has power to do so.
- [73] These submissions are framed in very general terms. It is not possible to identify with precision their legal or logical basis. Mr Cuthbert has not identified any legal right. His submissions employ good faith and honesty as mere rhetorical flourishes. Again, absent a legal right, it does not appear that the ALP could enforce its internal rules against a member by a court proceeding.
- [74] Mr Cuthbert’s submissions differentiate voluntary associations from commercial entities and government agencies. In this sociological view, such bodies are private, with voluntary membership, without commercial objects, and are self-governing.
- [75] Insofar as he may be understood, Mr Cuthbert submits that “from a normative point of view, there appears to be no moral justification as to why relief from a court should be limited strictly to commercial arrangements.”
- [76] This proposition is undoubtedly correct. Relief is not so limited. It is available for infringement of personal rights, whether commercial in nature or not.
- [77] Historically, the courts have respected decisions of citizens to organise themselves in ways, by tradition, not subject to jurisdiction, and to conduct themselves in a manner intended to be autonomous. Mr Cuthbert challenges the reluctance of courts to intervene, where no legal rights are involved and where internal procedures are available to resolve disputes in place of members taking each other to law. If normative explanations are required, the following may suffice.
- [78] Voluntary associations have been viewed positively, at least since the time of Burke and de Tocqueville. Emile Durkheim categorised voluntary bodies as a form of

¹⁹ 160-161 [19]-[20].

²⁰ *Cameron v Hogan* (1934) 51 CLR 358, 378; *Nagle v Feilden* [1966] 2 QB 633, 647 (Denning MR).

organic solidarity and so as an indicator of social evolution.²¹ In more contemporary language, one might propose two benefits. People from diverse backgrounds can organise into voluntary associations around a common purpose, and so contribute to social cohesion. They also serve as an intermediary sphere between the centre of political power and the electorate, allowing for the expression of minority preferences. The ready application of state power, through the courts, could endanger the conditions in which such social institutions arise and prosper.

- [79] According to its constituent documents, the ALP remains such a voluntary association in this traditional sense. It has insisted upon self-determination of its own procedures and its own business, as the 1955 National Conference confirmed. Its members are to trust one another to comply with their common rules.

Conclusion

- [80] Mr Cuthbert's claim about the internal conduct of the ALP is not justiciable.
- [81] It is unnecessary to decide whether, in the absence of any legal right, the court should decline to exercise its jurisdiction, and leave Mr Cuthbert to the party's internal dispute resolution procedures. If Mr Cuthbert's claim was justiciable, then there may be discretionary grounds to do so, as the respondents contend. Such a decision could not be made until relevant factual controversies were resolved.

Disposition

- [82] The proceeding brought by Mr Cuthbert should be dismissed, including his application to further amend the originating application.
- [83] Costs should follow the event. No submissions to the contrary was put.

²¹ *Division of Labour in Society* (1893).