“In search of an appropriate analogy for sports entities incorporated under associations incorporation legislation in Australia and New Zealand using broadly conceived corporate law organic theory.”
“In search of an appropriate analogy for sports entities incorporated under associations incorporation legislation in Australia and New Zealand using broadly conceived corporate law organic theory.”

Colin Huntly
B.Bus, PGradDipBus, M.Com (Curtin)
Acknowledgements

For in much wisdom is much grief: and he that increaseth knowledge increaseth sorrow.¹

Reading for the PhD is an essentially selfish process. As with all selfishness, there is an abundance of what the economists euphemistically refer to as “externalities” (ie: costs borne by others). In this regard, the important task of honouring each of those individuals whose combined support got me to the finish-line must commence with the reflection that “it takes a village”. The village that has contributed to the completion of this thesis is as erudite as it is diverse. If only I could name all of them at once rather than piecemeal! That would be my clear preference, for each one in turn is foremost in my thoughts as I tap away at the keyboard to complete this final salutary task.

In 1999, Foundation Dean of Law at Murdoch University, Professor Ralph Simmonds took a considerable risk and accepted my proposal to read for the PhD in Law. Until his elevation to the Supreme Court of Western Australia in January 2004 his Honour provided exemplary supervision and mentoring to me in this research. I am still uncertain if I am more in awe of his mastery of business associations law, or of his personal and professional kindness. The former provided the intellectual capital to enrich, focus and test the quality of my research. The latter is typified in his willingness to proof-read the final thesis and advise on examiner’s reports. Simply put, without Professor/Justice Simmonds’ support, there would be no PhD in the reader’s hands.

¹ Ecclesiastes 1:18.
The final year of my research was the make-or-break phase. The greatest lesson in personal and professional kindness was provided to me at the start of this time when Dr Christopher Kendall, Associate Professor and newly appointed Dean of Murdoch Law School, agreed to supervise me through to completion. Despite a punishing schedule, the unrelenting demands of office, and at considerable personal cost, Dean Kendall kept me on track and on task with a combination of guidance, inspiration and insight. In my darkest hours he encouraged me on with his scary brilliance and quick wit. Exemplar, mentor and friend.

In financial terms, this research was principally made possible by my employer, Curtin University of Technology. The practical support of Curtin Business School’s Staff Development Committee enabled me to devote 18 months of the past 5 years to the project on a full-time basis. In addition, my colleagues in the School of Business Law, foremost among those being my longsuffering and ever-supportive Head of School Dr Rob Guthrie, have provided all manner of sustenance along the way.

Murdoch University Law School provided the perfect environment for me to develop this thesis from its vaguely conceived beginnings through to this hefty narrative. The facility the Law School offered me to withdraw from the hustle and bustle into a quiet and creative space with all of the requisite research facilities was essential. I am particularly indebted to Sharon Owens in the School Office for - well, everything basically. Anne Greenshields, the Senior Law Librarian taught me how to do legal research properly - several times a semester. Her amazing knowledge and patience are equally appreciated.
I have had the privilege of staunch colleagues in the School of Business Law at Curtin Business School over the past 11 years. Aside from my Head of School Dr Rob Guthrie mentioned above, during the period of my PhD candidacy 4 colleagues in particular have stood by me in both light and shade. Associate Professor Dr Dale Pinto never failed to enquire how I was going, provide a consoling or encouraging word and show a genuine interest in my progress. Associate Professor Dr Pauline Sadler has been a comrade throughout the process. In the darkest days her counsel and humour kept me engaged with the process and helped me see the bigger picture. John Maltas who, at a time of life when many people are retiring into intellectual obscurity, is himself in the thick of PhD research, is a constant source of inspiration and has been a true friend. Courage and determination are concepts to most but creeds to him – creeds that he has endeavoured to inculcate into me over the years. Associate Professor Dr Peter Williams has also been an unflagging fellow-traveller throughout the process and has been a valued sounding-board on matters of style and expression in particular. In addition to my Business Law colleagues, Adjunct Professor Dr Pat Addison in the School of Accounting at Curtin Business School has been a key supporter of my research. Her conviction that a PhD is not a “real” PhD “unless it changes you in terms of the way you think” remains one of the most insightful observations I have heard about the process.

In terms of practical support, I am indebted to Jennifer Lalor in the Curtin Learning and Scholarship Network and her team for the data entry and preliminary data description. I am likewise indebted to the staff of Curtin’s Document Services and Inter-Library Loans Section at the TL Robertson Library. I doubt that there are staff
to match them in terms of professionalism and efficiency in any library in the country.

My closest friends, and both sides of our family have shown a genuine interest in my work over the years. It is difficult to explain a process to others that one does not fully understand oneself, but they have each nodded sagely, listened to my often desperate ramblings and either offered to fill my glass, fix me a nice cup of tea or changed the subject at exactly the right times.

One final word of advice to anyone reading this and who is thinking of reading for the PhD for themselves. When I started this process I did not expect to move house 4 times, renovating one and building another. I did not expect my supervisor to be appointed to the Supreme Court Bench less than 12 months before submission. I did not expect that I would become a father, develop grey hair, get promoted, or move out beyond the suburbs. It is a long and uncharted journey. Sometimes you lose your way and wonder why the hell you ever started in the first place. Indeed, I am told that many who start never finish. So make sure you choose a supervisor who is both brilliant and kind. Make sure you keep your friends and family close to hand. Keep taking the medication! And above all, make sure you have a strong, honest, courageous, and loving partner with a critical eye and a soft heart.

_I dedicate this thesis to my partner Marion and my son Dylan._

_My heart and my hope, my anchor and my sextant, my cause and my reward._

Colin Huntly

May, 2005
ABSTRACT

Common lawyers are notoriously suspicious of legal theory. This is exemplified by the dearth of theoretical content in Australian corporate law debate. If the first sin of legal theory is “to presume that it can offer a blueprint for actual decision-making and be a substitute for judicial and lawyerly wisdom”, then surely it is an equal transgression to profess that judicial and lawyerly wisdom can for long elude criticism without a sound theoretical basis.

Reasoning by analogy is commonplace. This is as true in legal reasoning as in any other discipline. Indeed, it has been suggested that in the Australian legal context analogical reasoning is the very same “judicial and lawyerly wisdom” referred to above. In order to determine whether there is a true analogy, a number of legal scholars have suggested that a variety of potential known source analogues should be carefully analysed for their potential relevance to a less familiar target analogue lest an inapt analogy should lead one into error.

The modern trading company is widely regarded as an apt source analogue for resolving jurisprudential issues involving incorporated associations and societies. However the basis upon which this assertion is made has never been adequately elucidated. This thesis tests the hypothesis that the modern trading company is the most apt source analogue for developing a jurisprudence of incorporated associations and societies. This is achieved using a theoretical approach drawn from corporate realist theory that is informed by an epidemiological investigation of incorporated sporting associations and societies in Australia and New Zealand.
# TABLE OF CONTENTS

## Volume I

- **ACKNOWLEDGEMENTS** ............................................................................................................. i
- **ABSTRACT** ................................................................................................................................. v
- **TABLE OF CONTENTS** ............................................................................................................. vi
- **INTRODUCTION** ......................................................................................................................... 1

## CHAPTER 1: CORPORATE LAW THEORY IN GENERAL AND ORGANIC THEORY IN PARTICULAR ................................................................. 9

- **INTRODUCTION** .............................................................................................................................. 9
- **THE CORPORATION AND LEGAL PERSONALITY** ........................................................................ 11
- **THE CORPORATION, COMMON LAW AND LEGAL THEORY** ......................................................... 14
- **THEORIES OF THE CORPORATION** ............................................................................................... 17
  - *Fiction and Concession Theories* ................................................................................................. 17
  - *“Realist” Theory* .......................................................................................................................... 19
  - *Aggregate Theory* ....................................................................................................................... 23
  - *Bracket Theory* ............................................................................................................................ 24
  - *Economic (“Contractual”) Theories* ............................................................................................ 25
  - *Purpose (“Subjectless” Property) Theory* ..................................................................................... 31
  - *“Common-Fund” Theories* ........................................................................................................... 32
  - *“Communitarian” Theory* ............................................................................................................ 34
  - *Feminist Theory* .......................................................................................................................... 37
  - *Organisational Theory* ................................................................................................................ 43
  - *Applying Broadly Concieved Organic Theory* .......................................................................... 43
- **THE INFLUENCE OF THEORY ON CORPORATE LAW IN AUSTRALIA & NEW ZEALAND** ................ 45
  - *Internal Control of Corporations* ............................................................................................... 49
  - *External Relations of Corporations* ............................................................................................ 52
  - *Corporate Regulation* ................................................................................................................. 56
CHAPTER 3:  INCORPORATED SPORTING ASSOCIATIONS: ONE ACT

WITH TWO SCENES ........................................................................................................... 154

INTRODUCTION ................................................................................................................. 154

WHAT IS AN INCORPORATED ASSOCIATION? ................................................................. 155

Characteristics of “Incorporated Associations” ................................................................. 158
Eligibility for Incorporation ............................................................................................ 166
Eligible Purposes........................................................................................................ 166
Minimum Size............................................................................................................ 172
Mutual vs. Public Benefit Eligibility.......................................................................... 172
Organised/Institutionalised ............................................................................................. 173
Private ........................................................................................................................ ..... 177
NonProfit Distributing / Personal Benefit Restrictions................................................... 179
Operational Associations ........................................................................................... 180
Non-Operational Associations ................................................................................... 181
Cancellation of Incorporation................................................................................ 182
Winding-Up........................................................................................................... 184
Internal Governance........................................................................................................ 190
Delegated Management.............................................................................................. 190
Decision-Making Procedures ..................................................................................... 199
Member Governed Associations ........................................................................... 200
Delegate Managed Associations............................................................................ 201
Voluntary Association ............................................................................................... 202
Taxation Status of Incorporated Associations................................................................. 204
Summary........................................................................................................................ .2 08

CHAPTER 4: EMPIRICAL DATA: METHODOLOGY AND DESCRIPTIVE
STATISTICS ....................................................................................................................... 211

INTRODUCTION.......................................................................................................................... 211
METHODOLOGY ........................................................................................................................ 212
Sampling Methodology ........................................................................................................ 213
Budget and Funding ............................................................................................................. 214
Draft questionnaire............................................................................................................ ..
Format and Coding Issues................................................................................................... 215
Final Draft Self-administered questionnaire ................................................................. 215
Survey Sample Selection................................................................................................. 216
Volume II

CHAPTER 5: APPLYING BROADLY CONCIEVED ORGANIC THEORY: LEGISLATIVE DRESS SUIT OR STRAITJACKET? .............................. 270

INTRODUCTION........................................................................................................................................................................ 270

Legislative Framework vs. Observed Reality ............................................................................................................................ 271

Sui Generis? ................................................................................................................................................................................... 272

Eligibility for Incorporation ......................................................................................................................................................... 277

Organised/Institutionalised ............................................................................................................................................................ 281

Private ........................................................................................................................................................................................... 284

Non-Profit Distributing / Personal Benefit Restrictions ........................................................................................................ 285

Internal Governance ....................................................................................................................................................................... 288

Voluntary Association .................................................................................................................................................................... 297

Taxation Status of Incorporated Associations ............................................................................................................................................................ 298

SUMMARY ..................................................................................................................................................................................................... 300

CHAPTER 6: AN APPROPRIATE VIEW OF INCORPORATED ASSOCIATIONS ............................................................................................ 305

INTRODUCTION........................................................................................................................................................................ 305

CHARACTERISTICS OF INCORPORATED ASSOCIATIONS ........................................................................................................ 307

Trading Companies ........................................................................................................................................................................... 307

Closely-Held Companies ............................................................................................................................................................. 308

Charitable Trusts ............................................................................................................................................................................... 309

Eleemosynary Corporations .......................................................................................................................................................... 310

RAISON D'ÊTRE ............................................................................................................................................................................ 312

Trading Companies ........................................................................................................................................................................... 312

Closely-Held Companies ............................................................................................................................................................. 314

Charitable Trusts ............................................................................................................................................................................... 315

Eleemosynary Corporations .......................................................................................................................................................... 316
CORPORATE SIZE ...................................................................................................................... 318
Trading Companies .................................................................................................................. 319
Closely-Held Companies ......................................................................................................... 320
Charitable Trusts .................................................................................................................... 321
Eleemosynary Corporations .................................................................................................... 322

MUTUAL VS. PUBLIC BENEFIT ELIGIBILITY ........................................................................ 322

ORGANISED/INSTITUTIONALISED .......................................................................................... 322
Trading Companies .................................................................................................................. 322
Closely-Held Companies ......................................................................................................... 324
Charitable Trusts .................................................................................................................... 324
Eleemosynary Corporations .................................................................................................... 325

PRIVATE ................................................................................................................................... 325
Trading Companies .................................................................................................................. 325
Closely-Held Companies ......................................................................................................... 327
Charitable Trusts .................................................................................................................... 328
Eleemosynary Corporations .................................................................................................... 329

NONPROFIT DISTRIBUTING/PERSOAL BENEFIT RESTRICTIONS ........................................ 330
Trading Companies .................................................................................................................. 330
Closely-Held Companies ......................................................................................................... 332
Charitable Trusts .................................................................................................................... 333
Eleemosynary Corporations .................................................................................................... 334

DELEGATED MANAGEMENT ................................................................................................. 335
Trading Companies .................................................................................................................. 335
Closely-Held Companies ......................................................................................................... 339
Charitable Trusts .................................................................................................................... 341
Eleemosynary Corporations .................................................................................................... 344
CONCLUSION .......................................................... 355

INTRODUCTION .......................................................... 355

CHAPTER 1 .......................................................... 356
  Summary .......................................................... 356
  Implications and Limitations of the Research .......................................................... 359
  Contribution to Knowledge .......................................................... 360

CHAPTER 2 .......................................................... 360
  Summary .......................................................... 360
  Implications and Limitations of the Research .......................................................... 364
  Contribution to Knowledge .......................................................... 365

CHAPTER 3 .......................................................... 366
  Summary .......................................................... 366
  Implications and Limitations of the Research .......................................................... 370
  Contribution to Knowledge .......................................................... 371