“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.
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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.

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I have had the privilege of staunch colleagues in the School of Business Law at
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My closest friends, and both sides of our family have shown a genuine interest in my
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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.

\[ \textit{I dedicate this thesis to my partner Marion and my son Dylan.} \]

\[ \textit{My heart and my hope, my anchor and my sextant, my cause and my reward.} \]

Colin Huntly \hspace{2cm} 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 2: ANALOGICAL REASONING AND POTENTIAL LEGAL ANALOGIES FOR INCORPORATED SPORTING ENTITIES

INTRODUCTION ............................................................................................................................ 75

THE PLACE OF ANALOGY IN LEGAL REASONING ................................................................. 76

Analogy Defined ............................................................................................................................ 79

Metaphor Defined ........................................................................................................................ 80

Mapping ....................................................................................................................................... 81

The “Allegorical Continuum” ...................................................................................................... 84

THE ROLE OF ANALOGY AND METAPHOR IN PROBLEM SOLVING .......................................... 89

Discovery and Justification ...................................................................................................... 89

Prediction and Insight ............................................................................................................... 92

ANALOGY & METAPHOR IN LEGAL REASONING .................................................................. 93

The Trading Company Paradigm .............................................................................................. 99

Raison d'être .................................................................................................................................. 101

Full (and Separate) Legal Personality ...................................................................................... 102

Limited Liability for “Owners” and Managers ........................................................................... 104

Shared “Ownership” by Investors of Capital ............................................................................. 106

Delegated Management Under a Board Structure .................................................................... 112

Transferable Shares ................................................................................................................... 116
The Closely Held Company ................................................................. 117
  Raison d’être......................................................................................... 120
  Full Legal (and Separate) Personality ............................................. 121
  Limited Liability ............................................................................. 124
  Shared Ownership by Investors ...................................................... 125
  Delegated Management ................................................................ 128
  Transferable Shares....................................................................... 131

The Charitable Trust .......................................................................... 132
  Definition and Status.................................................................... 132
  Raison d’être..................................................................................... 136
  Management of Charitable Trusts .................................................. 137
  Limited Liability? .......................................................................... 140
  Shared Ownership......................................................................... 141

The Eleemosynary Corporation .......................................................... 143
  Definition and Status.................................................................... 143
  Raison d’être..................................................................................... 144
  Management of Eleemosynary Corporations .................................. 146
  Limited Liability? .......................................................................... 147
  Shared Ownership......................................................................... 148

SUMMARY ......................................................................................... 150

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
Eligible Purposes
Minimum Size
Mutual vs. Public Benefit Eligibility
Organised/Institutionalised
Private
NonProfit Distributing / Personal Benefit Restrictions
Operational Associations
Non-Operational Associations
Cancellation of Incorporation
Winding-Up
Internal Governance
Delegated Management
Decision-Making Procedures
Member Governed Associations
Delegate Managed Associations
Voluntary Association
Taxation Status of Incorporated Associations
Summary

CHAPTER 4: EMPIRICAL DATA: METHODOLOGY AND DESCRIPTIVE
STATISTICS

INTRODUCTION
METHODOLOGY
Sampling Methodology
Budget and Funding
Draft questionnaire
Format and Coding Issues
Final Draft Self-administered questionnaire
Survey Sample Selection
Volume II

CHAPTER 5: APPLYING BROADLY CONCEIVED 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
INTRODUCTION

In a public discussion paper detailing proposed amendments to the *Associations Incorporation Act 1987* (WA), the regulator of incorporated associations in Western Australia stated that:

It is clear that members of the committee of an association are acting in a fiduciary capacity and are in an analogous position to directors of a company, as such, they are likely to be subject to similar common law and equitable duties.²

The regulator does not go on to elucidate the basis on which this proposition has been formulated in this discussion paper. It is, however, clear that the view expressed by the regulator reflects accepted orthodoxy on the subject in the limited scholarly literature on the point. As to whether or not committee members do indeed stand in a fiduciary relationship with their incorporated association, Dr Fletcher has written: “No case law establishes this proposition but several States have clarified the position by detailing officers' duties in their legislation.”³ Sievers, has observed that “there is little if any direct authority on this point.”⁴ Sievers has further stated:

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It is not clear to what extent the committee members and office bearers of either unincorporated or incorporated associations will be subject to other common law or equitable duties imposed on them as agents or fiduciaries, for the [sic] members as a whole in the situation of unincorporated associations and the members of the association itself in the case of incorporated associations.\(^5\)

In addition, it appears that the only dicta considering the suitability of resorting to the company law analogy in determining the nature of legal relationships within incorporated associations,\(^6\) is to be found in New Zealand cases. In New Zealand, the equivalent of the incorporated association is the "incorporated society".\(^7\) As Professor Stevens has observed “much ink has been spilt over whether the standard of diligence and the standard of skill are higher or lower than those that apply to trustees or those that apply to directors of for-profits.”\(^8\)


\(^6\) The sporting entities that will be examined in this thesis are incorporated in Australia under the following measures; *Associations Incorporation Act 1991* (ACT); *Associations Incorporation Act* (NT); *Associations Incorporation Act 1984* (NSW); *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 1964* (Tas); *Associations Incorporation Act 1981* (Vic); *Associations Incorporation Act 1987* (WA). The equivalent measure in New Zealand, is the *Incorporated Societies Act 1908* (NZ). The nomenclature adopted in the relevant Australian legislation is “incorporated association” while in New Zealand it is “incorporated societies”. As reported in chapter 4, Australia has by far the greatest number of incorporated sporting entities and for this reason the nomenclature adopted throughout the thesis is “incorporated associations”. Unless otherwise indicated, this noun should be taken to be inclusive of incorporated societies formed in New Zealand.


As I observe⁹ in chapter 2, it is possible to develop a jurisprudence of incorporated associations by means of analogy with established legal forms. Nevertheless, such analogy-based jurisprudential development is not without its difficulties. For example, each of the New Zealand High Court Justices in the 1991 decision of *Walker v Mt Victoria Residents Association Inc* [1991] 2 NZLR 520 expressed varying degrees of uncertainty about the applicability and utility of principles derived from company law cases in resolving the legal problems faced by incorporated associations. Richardson J obiter, referring to the comments of Cooke J in the earlier case of *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159,¹⁰ stated:

> I have been content to approach these questions on the assumption that the traditional rigid rules which apply to consideration of the vires acts of companies are of equal application to incorporated societies. The *Incorporated Societies Act 1908* (NZ) itself does not provide clear guidance … [whether it] … may require or allow a broader approach historically and in the wider public interest.¹¹

Hardie Boys J was of the opinion that principles of agency were universally applicable regardless of the nature of the entity in question. His Honour did, however indicate that the special nature of an incorporated association was of importance when deciding a matter of law in relation to such a body:

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⁹ It is acknowledged that academic writing has traditionally adopted the impersonal omnipresent third person voice with its attendant pronoun utilisation. However, the modern trend (including in higher research theses) is towards the active voice favouring a more direct and judicious use of the personal first person and its requisite pronoun utilisation. I have adopted the latter of these stylistic alternatives in this thesis. The significance of this stylistic choice will naturally be more evident in later chapters. (See Meehan, M & Tulloch, G, *Grammar for Lawyers*, Butterworths, Chatswood, 2001 at 49-55).

¹⁰ At 178 Per Cooke J “The law or practice relating to limited liability companies is not necessarily a helpful analogy in approaching these cases.”

¹¹ At 523.
The rules of an incorporated society, which by definition does not exist for profit, but normally for purposes of mutual interest and concern of its members, and so is likely to function informally rather than formally, must in my view be construed sensibly and realistically so as to give them practical and workaday effect.\textsuperscript{12}

Perhaps delineating the common ground between these two views, Doogue J observed that:

Regardless of the appropriate inter-relationship between incorporated societies ... and companies ... it seems to me to be clear the ordinary rules relating to ratification of an agent's acts must apply to the affairs of incorporated societies as much as to the affairs of incorporated companies.\textsuperscript{13}

However, developing novel areas of law by analogy is potentially fraught with pitfalls. This is particularly so where due cognisance is not taken of significant differences between the known source analogue, and the unfamiliar target analogue in question.

If analogy is a flawed basis for jurisprudential development, it could be argued that a theoretical approach to the problem at issue might be considered to either compensate for, or suggest an alternative to, this methodology. Such alternative approaches, while significantly different, are not necessarily mutually exclusive. Indeed, it has been suggested that such dualistic dialogue is essential in order to achieve any intellectual development in law, whether with regard to a “settled” area or a more novel juristic phenomena. Professor Dan-Cohen expresses the necessity for this tension most clearly as follows:

\textsuperscript{12} At 524.
This increased commitment to rigor and precision permits legal theory to play a critical, explanatory and constructive role within the general legal enterprise. It is critical when it exposes the latent presuppositions (factural [sic] and normative) implicit in existing legal practices. It is explanatory when it unites various practices and relates them to a social or to a normative theory, which lends them coherence and meaning. It is constructive when it suggests new institutional arrangements and legal devices for the achievement of some ends. But legal theory can serve these goals only at the price of immediate relevance. It can offer only a partial view of the legal problem with which it deals. It cannot be more complete and truer to the richness of social reality than is the body of knowledge contained in the various disciplines on which it draws. The conclusions and recommendations of legal theory must therefore remain partial and tentative. To be applicable to the solution of problems, they must be filtered through or supplemented by the common sense and good judgement of a wise practitioner fully cognizant of the details of the specific legal issue. The first sin of legal theory is accordingly to presume that it can offer a blueprint for actual decisionmaking and be a substitute for judicial and lawyerly wisdom.14

Modern common law corporate theory has, in many respects been greatly influenced by an often unspoken acceptance of the application of the “organic theory”.15 This is particularly apparent when tracing the development of juridical commentary regarding the inter-relationships pertaining between directors, shareholders and the company itself. It follows, therefore, that any application of corporate law principles by analogy from the law relating to companies assumes the direct applicability of the corporate law organic theory. It therefore becomes important to define and test the corporate law organic theory in connection with incorporated associations in order to

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13 At 526.
14 Dan-Cohen, M, Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society, University of California, Berkeley, USA, 1986 at 3.
determine if the company law model is an appropriate source analogue when analogising with respect to the item under consideration. In order to test the suitability of such a theoretical approach and introduce some of the creative tension to which Professor Dan-Cohen refers, it is also appropriate to examine a number of potential known legal source analogues that might be considered by both practitioners and scholars alike.

The importance of considering a variety of analogical alternatives in such an investigation has been stressed by Professors Tomasic, Bottomley, and McQueen in the following terms:

Understanding the diversity of corporate structures is an important prerequisite to appreciating the impact of corporate law principles on corporate life. An important question for future corporate regulation is whether greater attention should be paid to these differences, so that different principles and regulatory regimes might apply to different types of [corporations].

The wisdom of basing an analogical examination of incorporated associations solely on the trading company model has, as has been mentioned above, already been questioned. The extent to which reasoning by analogy between companies (which are essentially commercial in nature) and incorporated associations (which are voluntary, non-profit and usually altruistic in nature) might hold true must be vigorously interrogated before postulating its correctness as a basis for jurisprudential development. Research into this question is necessary to bring the light of legal reasoning into a dark juridical place. Such research must be


independent of untested supposition and inappropriate analogy between one corporate form and another. The central objective of this thesis is to achieve this aim.

An additional aim of this inquiry is to determine the dominant structural model or models that exist in incorporated associations by means of epidemiological inquiry. Earlier research that I conducted in 1996\(^\text{17}\) indicated that, of the total cohort, anything up to one in three incorporated associations could be sporting groups. By any measure this indicates that the most significant ascertainable user-group of the legislation is sporting entities. For this reason I have surveyed a randomised 10% sample of all incorporates sporting associations and societies in Australia and New Zealand to derive the empirical data at the heart of this project. This will ensure the broadest possible application of the principles that emerge from the discussion. Once this is accomplished, the thesis will apply both corporate law organic theory broadly conceived and analogical reasoning to such models as emerge from the epidemiological testing. This will provide important insights into the true nature of incorporated associations and suggest something of the way forward for these entities in terms of legislative treatment, juridical consideration and theoretical development.

The thesis begins in the first chapter by defining and analysing the corporate law organic theory in detail within the broader context of alternative legal theories of corporate bodies. The second chapter explores four potential legal source analogues

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that may provide guidance in developing an appropriate jurisprudence of incorporated associations. Chapter 3 of the thesis examines the broad legislative framework in Australia and New Zealand that allows for the incorporation of voluntary sporting associations. The foci of this broad survey will be the eligibility criteria in each jurisdiction, the structural internal requirements, the ongoing operational requirements and the dissolution requirements laid down in the various statutory measures. In chapter 4, results of an epidemiological inquiry into the actual structure and nature of incorporated sporting associations in each of the jurisdictions under consideration will be analysed. By reference to the underlying tenets of broadly conceived organic theory, chapter 5 will consider the extent to which the current legislative framework can be said to be in step with the actual nature of incorporated sporting associations. The final chapter will consider which of the alternative legal analogies identified in chapter 2 offers the richest analogical schema for the development of a coherent and appropriate jurisprudence of incorporated sporting associations in the jurisdictions under review. The thesis thereafter concludes.
CHAPTER 1

CORPORATE LAW THEORY IN GENERAL AND
ORGANIC THEORY IN PARTICULAR

“Firms are bundles of unruly phenomena. They entail not just production, but production by groups of people. Therefore, theories designed to contain and regularize the appearance of firms go beyond concepts about economic production to articulate concepts about communities. These concepts variously distinguish the individual and the group, usually according to the interests of one or the other greater moment. No single comprehensive, objective theory of the firm has taken hold. Firms still represent different things to different observers.”1

INTRODUCTION

As stated in the introductory chapter, this thesis will analyse incorporated sporting associations in Australia and New Zealand from the corporate law organic theoretical perspective. It is intended that this analysis will provide insight into the development of an appropriate jurisprudence of these peculiar legal forms. In particular, the suitability of such jurisprudential development on the basis of analogy from the corporate law applicable to the modern trading company will be evaluated. This chapter establishes that part of the theoretical framework relating to corporate law organic theory. The chapter commences with a summary of legal scholarship dealing with legal personality generally and corporate legal personality in particular. The chapter then moves on to consider the role of theory in common law specifically in the context of legal theories of the corporation.

Following this, the major theoretical schools of the common law with respect to the corporation are considered in turn, namely: fiction and concession theories; “realist” (organic) theory; aggregate theory; bracket theory; economic (contractual) theories; purpose (subjectless property) theory; common fund theories; communitarian theory; feminist theory; and, organisational theories. Some of the influence of corporate law theory in the Australian and New Zealand company law statutes is considered below. The traditional difficulties of the common law in accounting for groups of persons follow from this consideration of corporate law theory, as is the tendency of common law reasoning towards anthropomorphism.

Having laid out the theoretical framework, the chapter then settles on a working definition of broadly conceived organic theory as it will be applied throughout the remainder of this thesis. This theoretical perspective is adopted because it professes a strong belief in the natural existence of corporate groups including voluntary associations, and requires respect for the right of such groups to exercise self determination on all internal matters. The chapter concludes by identifying key points of theoretical convergence in what currently are the most influential schools of corporate law thought.
In general terms, the basic “right and duty bearing unit”\[^2\] recognised by our legal system, is the individual person.\[^3\] However, it is true to say that not every person is, or has always been equally so recognised at law. For instance, historically aliens, slaves, married women, minors and the mentally ill have all suffered legal “dis-ability” to some extent.\[^4\] Conversely, idols\[^5\] and deceased saints\[^6\] have been recognised at common law as enjoying legal rights and bearing legal duties.\[^7\] It follows, therefore, that the notions of enjoying legal rights and bearing legal duties are not necessarily inherent to human beings.

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\[^5\] Pramatha Nath Mullick v Pradyumna Kumar Mullick (1925) 52 Ind App 245; Duff, PW, "The Personality of an Idol" (1927) 3 *Cambridge Law Journal* 42; Vesey-FitzGerald, SG, "Idolon Fori" (1925) 164 *Law Quarterly Review* 419; & Smith, B, "Legal Personality" (1928) 37(3) *Yale Law Journal* 283 at 285.

existence. This gives rise to the vexed question of determining who are “juristic persons”, or put another way, legal actors.

One concept which may assist in dealing intelligently with this apparent dichotomy is the Greek concept of “persona”. This was the name given to the masks used by performers in plays, to project the role being played. Our word “personality” is derived from this Greek root. The term “personality” has, of course many different meanings and applications. In corporate law, it is often the noun used to denote the

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“right and duty bearing” quality referred to above. It is this usage, and not the notion of “human-ness” per se with which this work is concerned.

The word “corporation” originates from a Latin word, corpus (a group, or body of people). The orthodox common law view is that an association of persons achieves legal existence or recognition by a process known as incorporation, from the Latin term incorporatus (clothed in one body). This conception is not dramatically different from the Greek notion of “persona”. In a sense, therefore, when one speaks of legal “right and duty bearing” one is speaking at the same time, of “visibility” in the eyes of the law. An individual can be the “bearer” of legal rights and duties just as a group can be the “bearer” of legal rights and duties.

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“A corporation (or body corporate) in the common law sense is a legal device by which legal rights, powers, privileges, immunities, duties, liabilities and disabilities may be attributed to a fictional entity equated for many purposes to a natural person.”

THE CORPORATION, COMMON LAW AND LEGAL THEORY

As observed by Professor Bottomley, corporate law theory seeks to provide a rationale and framework within which legal reasoning and legislation can develop relating to incorporated entities.\(^{17}\) The perspectives and assumptions of different theoretical bases (whether acknowledged or not) are influential in the development of a body of law.\(^{18}\) The common law attitude towards the individual person over centuries has been considered by many scholars, as has the common law attitude towards groups. Often, authors bring both together under the banner of “persons”. On the one hand, this classification is a simple reference to the ancient persona. On the other hand however, this label suggests a reductionist view within common law whereby the individual human actor is regarded as the fundamental social, legal, political and moral unit.\(^{19}\)

When surveying the common law, it is definitely possible to identify points and periods where particular theories of the corporation have been persuasive.\(^{20}\) There is, however,

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\(^{19}\) See Smith, B, "Legal Personality" (1928) 37(3) Yale Law Journal 283 at 287; and, Hemphill, PC, "The Corporation Sole and Theories of Legal Personality", PhD thesis, University of Sydney, Sydney, 1988 at 68.

considerable doubt as to the existence of a common law theory of the corporation.\textsuperscript{21} This of course is hardly surprising. Given the documented descriptive and pragmatic nature of common law, practitioners, legal academics and jurists display a large degree of scepticism (even hostility) to theoretical inquiry generally.\textsuperscript{22} According to this orthodox doctrinal view “law is found in books”.\textsuperscript{23} In response, some legal theorists have, perhaps uncharitably, suggested that the paucity of theory based corporate legal scholarship is more suggestive of a lack of intellectual rigor in the area.\textsuperscript{24} In addition,

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\textsuperscript{23} A view which achieved its current prominence in the Anglo-American legal world largely through the efforts of Christopher Langdell, Dean of Law at Harvard in the late 19\textsuperscript{th} century (Radin, M, "The Endless Problem of Corporate Personality" (1932) 32 Columbia Law Review 643 (Cf Timberg, S, "Corporate Fictions: Logical, Social and International Implications" (1946) 46 Columbia Law Review 533 at 544)). See also Simmonds, NE, "Protestant Jurisprudence and Modern Doctrinal Scholarship" (2001) 60(2) Cambridge Law Journal 271.

that which “is commonly known as ‘corporate personality’ raises difficult questions which have been among the most controversial in law and legal theory.”

Nevertheless, corporate law scholarship has developed a variety of theoretical frameworks. Perhaps too many. As Professor Stevens has observed, corporate law is “incremental and unsystematic in its process and external and consequentialist (rather than internal and coherentist) in its normativity.” As Professors Arlen et al have observed; “Company law has always been a somewhat contested policy landscape.” A brief survey of the major schools of thought is therefore apposite as a starting point in the current investigation.


28 For an excellent survey of various theories of legal personality in the context of the corporation sole, see Hemphill, PC, "The Corporation Sole and Theories of Legal Personality", PhD thesis, University of Sydney, Sydney, 1988 Ch 1. This chapter has been significantly influenced by the work of Dr Hemphill.
THEORIES OF THE CORPORATION

Fiction and Concession Theories

These theories, while not entirely contiguous, are so closely related that they are usually considered at the same time.\textsuperscript{29} Fiction theory claims that a corporation is a legal fiction whereby a legal status (or persona) equivalent to that of a competent individual human is granted to a group of persons.\textsuperscript{30} Concession theory regards the corporate group as the recipient of a gift of legal personality from the state.\textsuperscript{31} This gift (or “grant”) is the mask of legal persona, which in turn is a recognition that the group can now claim legal rights


and owe legal duties in a group name. The fictionalist view therefore suggests an underlying assumption about the nature of a corporation while the concessionalist view suggests the source from which incorporated status is obtained. As with the communitarian theory discussed below, the concessionalist theory is strongly supportive of corporate regulation given the central role played by the State in granting legal personality to corporations. This theory was highly influential during the period prior to general incorporation statutes in the second half of the nineteenth century and reflects the common law suspicion of entities other than the state or the individual. Prior to this time entities were mainly incorporated by “charters” granted by special petition to the Crown or State. Following the introduction of general incorporation statutes in the United Kingdom in 1844 and then in 1856, there was a massive numerical growth of trading companies incorporated by registration which in turn saw the decline of the concessionalist theory in corporate law.

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35 Flathman, RE & Johnston, D, (Ed) Thomas Hobbes "Leviathan" - Authoritative Text Backgrounds Interpretations, WW Norton & Co, New York, USA, 1997 at 169 “Another infirmity of a Common-wealth, is … the great number of Corporations; which are as it were many lesser Common-wealths in the bowels of a greater, like worms in the entrayles of a naturall man”.

"Realist" Theory

Realist theory essentially views corporations as naturally occurring or “organic” bodies. As with any theoretical proposition, it is expressed by a variety of adherents in varying degrees of orthodoxy. At one end of the organicist’s spectrum, the theory is expressed as pure anthropomorphism. That is to say, groups are strongly analogised with human beings. This version of the theory has been extremely influential in


common law articulations of criminal and tort liability as they apply to corporations.41

For example, in Lennards' Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705 Viscount Haldane LC recognised that if a corporation (in this case, a company) was to be found to be directly liable in tort, then the person acting for the corporation must be found to be the ‘embodiment of the company’

[H]e hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company.

If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.

At the other, less doctrinaire end of the realist theory spectrum, is the soft edge of corporate realism which holds that groups, including corporations, are a peculiar type of social organism, existing somewhere between the existence of the individual and the state.42

Broadly, however, most adherents of the realist theory hold that the individual corporators, by coming together and joining for the furtherance of common aims and objectives, create a unique entity separate from themselves, and functioning in a mutually agreed manner.43 This creation is entirely irrespective of any grant or


concession from the state. Each individual becomes subsumed in a sense into the “life” or “existence” of the group in so far as their actions occur within the framework of the group. In essence, the corporation as a peculiar mask or persona causes the human actors behind it to perform within the construct of the overall corporate character in ways which are not entirely consonant with their natural individual characters. This theory, by implication, requires corporate law to facilitate the private internal decisions and activities of the group rather than as providing a purely regulatory construct. That is to say, the realist theory as defined here, perceives corporate law to have an essentially facilitative and descriptive, rather than prescriptive, function.

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Aggregate Theory

Aggregate theory (closely related to “bracket theory”49) focuses on the right of individuals to associate for common purposes.50 Aggregate theory focuses on the individual’s roles and rights within the corporation as matters for corporate regulation.51 Hence, aggregate theory places strong emphasis on the role of contract law in corporate law.52 In addition, the aggregacist sees no need for specialist regulation of the corporation when operating in the community.53 An aggregacist requires a simple legal structure which treats all legal actors equally, in a sense reducing all such actors to the same legal unit. In addition, the aggregacist makes no allowance for the phenomena of individuals adopting different cognitive approaches when engaged in collective enterprise as opposed to individual enterprise.


“The authority of the sovereign toward the corporation … is no greater and no less than its authority toward any other Private agreement among contracting parties.”
Bracket Theory

It is believed that bracket theory was originally developed in Germany by Jhering.\textsuperscript{54} This theory holds that the notion of a corporation is simply a convenient linguistic technique for replacing the names of the individuals constituting a corporation with a single identifier.\textsuperscript{55} That is to say, the corporation is a device used to simplify legal discourse concerning groups. Essentially, bracket theory is centred on the fundamental proposition that the only true legal actors are individual people.\textsuperscript{56} In a sense, therefore, this theory is one in which the concept of the corporation is even more heavily discounted than even the fiction theory in that the “corporation” is almost totally irrelevant.\textsuperscript{57}

\begin{itemize}
  \item \textsuperscript{57} Hemphill, PC, "The Corporation Sole and Theories of Legal Personality", PhD thesis, University of Sydney, Sydney, 1988 at 64-71.
\end{itemize}
Economic ("Contractual") Theories

This school of thought is often referred to as the “law and economics” school. The architects of this theoretical framework examine law from a predominantly classical liberal economic perspective. According to adherents of this theoretical framework, all law can be analysed and understood in economic terms. The typical underlying assumptions that are relied upon in this conceptual framework are: separation of ownership and control within “firms”; zero transaction costs; perfect knowledge; efficient markets; rational and self-interested human actors; and the primacy of profit or wealth maximisation as a motivator.


It has been suggested that there are two broad perspectives in law-and-economics theory applicable to corporate law, namely transaction-cost theory and agency theory.

Corporate law agency theory adopts the traditional economic view of the “firm” as a “nexus of contracts” between the individuals involved in a corporation. The centrality of an economic conception of contracts in this school of thought is an important point.

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of connection with the aggregate theory. Given the traditional separation of ownership and control that is suggested exists in large business corporations, a corporation is the lowest cost vehicle whereby managers are bound to the economic wellbeing of the enterprise, and the investment of the “owners” is protected through the appropriate “monitoring” of managers.

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70 This epithet denoting the status of shareholders is by no means a settled point, see Hill, J, "Visions and Revisions of the Shareholder" (2000) 48 American Journal of Comparative Law 39, below under “Communitarian Theories” and in chapter 2.

Transaction-cost theory uses economic theory to analyse all relevant interrelationships at work within the “firm” in an attempt to identify the most efficient structure for the enterprise in question.\textsuperscript{72} The nature of the contracts operating between the economic actors that constitute a corporation are also a primary focus of transaction-cost theorists. Transaction-cost theory differs from agency theory, however, mainly in that the relationships which its adherents are concerned with are not limited to those between investors and managers. This theoretical approach also does not automatically assume that the modern business corporation is the most efficient structure for all “firms”. The interrelatedness of all significant “stakeholders” can be considered, as can the relative costs borne by these parties in the course of maintaining transactional relationships. The structure in any given situation which results in the lowest average cost as between all stakeholders is the structure that will lead to long term economic efficiency.\textsuperscript{73}

Law and economics analysis has strongly (and perhaps rightly) been criticised as being either ethically bankrupt\(^{74}\) or so abstract and divorced from the real world as to be characterised as a poor metaphor rather than a reliable predictive model,\(^ {75}\) or both.\(^ {76}\) It

\(^ {73}\) The leading exponent of this theory as it relates to differentiated corporate forms is Hansmann (Hansmann, H, *The Ownership of Enterprise*, The Belknap Press of Harvard University Press, Cambridge, USA, 1996).


has also been criticised for labelling all corporate law as being “anticontactarian” without regard to the nuances in contract law theory. However, it should be noted that a number of law and economics scholars have sought to address these criticisms while trying to remain true to the underlying economic theory. Indeed there is a respectable


emerging school known as “behavioral law and economics” that seeks to enrich neoclassical law and economics theory through the fusion of psychology, law and economics.79

Purpose (“Subjectless” Property) Theory80

Some corporations, such as charities, have no shareholder class. In addition, since at least the development of double-entry bookkeeping,81 the assets of a corporation as a going concern have not been viewed, either legally or practically, as directly attributable to such shareholders as there may be.82 There is a theory of the corporation which attempts to deal with such difficulties by stating that a corporation is an association of persons for the pursuit of certain shared purposes.83 Indeed, this theoretical school

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80 Sometimes referred to as the “form of ownership” theory.

81 Note the following from Cooke, CA, Corporation Trust and Company: An Essay in Legal History, Manchester University Press, Manchester, UK, 1950 at 46:

If a limit to individual liability is to be operated it requires a separation of the accounts of the firm from the capital accounts of the capitalist partners. The double-entry bookkeeping necessary for this separation had been developed in Italy in the fifteenth century, reaching a stage of systematic exposition in Luca Pacioli’s Suma de Arithmetica, published in 1494. The method came as an entirely new procedure to England in translations of Pacioli, published in 1543 and 1588.


claims that the very existence of a corporation is only explicable by reference to the purposes for which it was formed and those for which it is being operated.84

“Common-Fund” Theories

This is a term that is used here to describe two similar but not identical theories of the corporation. The theories are respectively those of Professors Maitland and Stoljar. It has been observed elsewhere that Maitland’s views had great sympathy for the realist perspective,85 however, there is a case which argues that Maitland held a view of corporations that was grounded in the device of the trust.86 In Maitland’s own words, the “trust has given us a liberal substitute for a law about personified institutions. The trust has given us a liberal supplement to a necessarily meagre law of corporations.”87 In essence, according to Maitland, the existence of property, representatively administered by trustees for the benefit of individuals or for a public purpose is at the heart of the corporation.


Stoljar likewise resorted to the trust, in a particularised form, as the core of his own theory of the corporation as a legally recognised group. To Stoljar, the existence of a “common kitty” or “common fund” was a prerequisite without which there can be no separate legal entity. As he put it:

Now the outstanding feature shared by all corporate bodies is that each has a separate estate or fund of property, controlled by private members or public managers, but used for the pursuit of declared or designated purposes as well as for the discharge of the costs of these pursuits, including debts and liabilities.

This premise is perhaps Stoljar’s major contribution to corporate legal theory. His identification of the indicia of a separate legal persona in unincorporated associations is one of the earliest and clearest articulations of something approaching a coherent common law theory of the corporation. Consider the following passage:

… with its internal features of private government and majority rule, with the members’ joint interests in their common fund or property, together with the fact that each member’s interest is, by his expulsion, defeasible by majority decision, with the principle of a member’s limited liability, and his immunity from suit, with the resulting focus on the committee functioning as an “organ” and, especially, on the common fund reachable by a representative action, the voluntary association emerges as a corporate body in all but name.

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88 Which he designated a “streamlined trust”, or a trust with a number of practical difficulties rectified (Stoljar, SJ, Groups and Entities: An Inquiry into Corporate Theory, Australian National University Press, Canberra, 1973 at 155).
90 Ibid at 44.
91 Ibid at 175.
92 Ibid at 59. See Fletcher, KL, The Law Relating to Non-Profit Associations in Australia and New Zealand, Law Book Company, North Ryde, 1986 at 23-203 for the best and most comprehensive critical unpacking of these comments.
This approach does sidestep the issue of corporate personality, however it does use a familiar legal model to explain the nature of the corporation. In addition, the simplicity and pragmatism of Stoljar’s summary are difficult to conjure with.

“Communitarian” Theory

This theory of corporate law views the corporation as “a community of interdependence, mutual trust, and reciprocal benefit”.93 The scholarly origins of this school of thought can be traced back to an influential article by Professor Dodd in 1932.94 Dodd’s article (which was in response to a more economically orthodox piece by Berle the year before)95 argued that the corporation served more constituencies than simply shareholders,96 such as employees, creditors, consumers and the general community.97

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94 Dodd, EM, "For Whom Are Corporate Managers Trustees" (1932) 45 Harvard Law Review 1145.


“Furthermore, these interests could conflict with those of shareholders.” The central thesis of communitarian discourse is therefore a challenge to the primacy of the shareholder as a corporate constituent over all others.
It is probably more correct to speak of the communitarian perspective rather than use the
term theory.\textsuperscript{100} This perspective is vitally concerned with the nature of the complex web
of relationships which bind the corporation to the broader community.\textsuperscript{101} In essence, the
theory tries to place the legal concept of the corporation within a social, moral and
political framework. It is argued within this perspective that purely legal analysis fails
to adequately account for the roles played by a corporation within the community.\textsuperscript{102}
One of the major affective consequences of this theory is the emergence of the notion of
the “good corporate citizen”.\textsuperscript{103} Indeed, the social responsibility imperative that

\textsuperscript{100} Tolmie, J, "Corporate Social Responsibility" (1992) 15(1) University of New South Wales Law
Journal 268 at 269; Cheffins, BR, "Using Theory to Study Law: A Company Law Perspective"
(1999) 58(1) Cambridge Law Journal 197 at 211-213; For example, the so called “team
production theory” of Professor Blair, Blair, MM, "Team Production Theory and Corporate
Business, Economics, and Regulatory Law and Public Law and Legal Theory ; and Blair, MM,
"Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth

\textsuperscript{101} As Hutton, W observed in “The State We’re In” London, UK, Johnathan Cape, 1995 at 111
(quoted in Andrews, N, Is Corporate Law Really Thick? The Return of Culture in Corporate
Law Studies and Its Effect on the Economic, Comparative and Historical Analysis of Corporate
Law with Some Chinese Examples, Faculty of Business & Law, Victoria University, Melbourne,
2001 at 2) “[F]irms’ legal structures and their aims necessarily reflect and reinforce a business
culture and institutional structure and these in turn relate to the wider culture of the political and
economic elite. The firm is not only at the heart of the economy; it is at the heart of society.” See
also Greenfield, K, "The Place of Workers in Corporate Law" (1998) 39 Boston College Law
Review 283 at 311-21.

\textsuperscript{102} Mitchell, LE, "Cooperation and Constraint in the Modern Corporation: An Inquiry into the
Causes of Corporate Immorality" (1995) 73 Texas Law Review 477; Blair, MM, "Team
Theory ; Millon, D, "The Ambiguous Significance of Corporate Personhood" (2001) 1(2)
Stanford Agora 39; and O'Neill, TA, "Gender and Corporate Personhood: A Feminist Response
to David Millon" (2001) 2(1) Stanford Agora 77.

\textsuperscript{103} Millon, D, "The Ambiguous Significance of Corporate Personhood" (2001) 1(2) Stanford Agora
39 at 51. This aspect of communitarianism is so entrenched in academic debate that it is
occasionally identified as an entirely separate theoretical framework (see Tomasic, R, et al,
Corporations Law in Australia, 2nd ed, Federation Press, Annandale, 2002 at 63).
characterises a dominant school of communitarian theory provides a rationale for its “favourable disposition towards regulation.”

**Feminist Theory**

Feminist theory is a relatively new phenomenon in mainstream legal scholarship generally, and in corporate legal theory in particular. Essentially, this school of thought is concerned with decoding the gender bias operating in the subtext of legal structures. Strictly speaking it is probably facile to refer blankly to “feminist theory”

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“Our lack of response to the feminist challenge is also testament, I believe, to the extent to which we as corporate law scholars have been (and still are) submerged in the traditional ideology and methodology of corporate law. Many women academics, just as women generally, have internalised the values of capitalism, patriarchy and domination which are reflected by the corporation.”

Note also Wheeler, S, "An Alternative Voice in and around Corporate Governance" (2002) 25(2) *University of New South Wales Law Journal* 556 at 556 “There is an emerging literature that describes itself as taking a feminist approach to-the corporation”.

either generally within the study of law, or with respect to corporate law in particular.\textsuperscript{107} Feminist legal scholarship represents a very broad spectrum of theoretical critique from “liberal” to “radical”, and from “reconstructive” to “Marxist”.\textsuperscript{108} At one end of this theoretical spectrum there are liberal feminist scholars who advocate the advancement of women within corporations through processes of education and the reform of informal structures within corporations.\textsuperscript{109} This liberal feminist vision may also extend to re-


focussing corporate engagement in civil society through “targeted interventions”.¹¹⁰ At the other end of this spectrum are those feminist legal scholars who use radical critique of capitalism and large bureaucratic enterprises to question the validity of the economic and social status quo.¹¹¹ In the context of corporate law, radical feminist legal theory challenges the notion that social utility is maximised by the perpetuation of self-interest as expressed in enforcement oriented, profit maximizing, hierarchically structured, non-regulated bureaucratic entities servicing a masculist constructed capitalist society.¹¹² The theory to some extent builds on notions of communitarian theory,¹¹³ gender equality and the perceived dignity of the individual human being by questioning the way in which


corporations are interpreted, and their impact on society evaluated.\textsuperscript{114} Central to feminist legal theory in this field is its critique of modern capitalism as a potent expression of the patriarchal tendency to fragment and control communities and individuals.\textsuperscript{115} The role that corporate law fulfils therefore in legitimising and enforcing what is argued to be a masculist economic structure is of prime concern to feminist legal scholars.\textsuperscript{116} The aim of radical feminist critique “should try to debunk and demystify the claims of the dominant discourse, not perpetuate them by collaborating in their pretentions.”\textsuperscript{117}

\textsuperscript{114} Lahey, KA & Salter, SW, "Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism" (1985) 23(4) Osgoode Hall Law Journal 543 at 554-5.

\textsuperscript{115} Brown, W, "Challenging Bureaucracy" (1984) 2 Women's Review of Books 16 at 16, Lahey, KA & Salter, SW, "Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism" (1985) 23(4) Osgoode Hall Law Journal 543 at 554 & 556; and, Gabaldon, TA, "The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders" (1992) 45(6) Vanderbilt Law Review 1387 at 1419; Ireland, P, "History, Critical Legal Studies and the Mysterious Disappearance of Capitalism" (1999) 65 Modern Law Review 120 at 131-5. Consider the observation of Acquaah-Gaise, G, Corporate Crimes: Criminal Intent, and Just Restitution, Faculty of Business & Law, Victoria University, Melbourne, 2001 at 2 “When criminals do not come face to face with their victims, they feel less guilt.” See also Bottomley, S, "Taking Corporations Seriously: Some Considerations for Corporate Regulation" (1990) 19(3) Federal Law Review 203 at 215. Compare also Samford, S, "Law, Institutions and the Public/Private Divide" (1991) 20 Federal Law Review 185. See the elegant metaphor with sport utilizes by MacKinnon, CA, Feminism Unmodified: Discourses on Life and Law, Harvard University Press, Cambridge, USA, 1987 at 120; “It is not that men are trained to be strong and women are trained to be weak. It’s not learned; it’s very specifically learned. Also, observing athletics as pursuits, we notice that most athletics, particularly the most lucrative of them, have been internally designed to maximize the attributes that are identical with what the male sex role values in men. In other words, men, simply learning to be men, learn not only sports but learn those things that become elevated, extended, measured, valued, and organized in and as sport itself.”

Feminist corporate law theory is, however, more than merely a contradictory amalgam of subversive compliance and utopian opposition. Scholars in this field present coherent alternatives to traditional corporate law schemas that eloquently expose the patriarchal foundations of accepted models of the corporation.118 Alternative scenarios that strike at the heart of the corporation as it is currently perceived include the suggested abolition of limited liability for shareholders119 and its replacement with a concept of “limited risk”120 (which would in turn be managed through insurance contracts),121 and the abolition of the separate legal entity doctrine as it applies to directors.122 The special disadvantage of disenfranchised women directors of small closely held corporations has also prompted feminist scholars to question the gender specific impact of apparently “objective” legal rules such as the duty of care.123 As has been observed by Professor MacKinnon:

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121 Ibid at 1449. The use of insurance as an Alternative to limited liability is not an exclusively feminist proposal, indeed it was most famously raised by Easterbrook, FH & Fischel, DR, "Limited Liability and the Corporation" (1985) 52 University of Chicago Law Review 89 at 101; see also Easterbrook, FE & Fischel, DR, The Economic Structure of Corporate Law, Harvard University Press, Cambridge, USA, 1991 at 47.


123 Ibid at 174-80; Hall, KH, "The Interior Design of Corporate Law: Why Theory Is Vital to the Development of Corporate Law in Australia" (1996) 7(1) Australian Journal of Corporate Law 1...
Concealed is the substantive way in which man has become the measure of all things. Under the sameness rubric, women are measured according to correspondence with man, their equality judged by proximity to his measure. Under the difference rubric, women are measured according to their lack of correspondence from man, their womanhood judged by their distance from his measure. Gender neutrality is the male standard.\textsuperscript{124}

Liberal legalism is thus a medium for making male dominance both invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society.\textsuperscript{125}

These oppositional critiques are deliberately confronting and they provide a unique opportunity to reflect on the assumptions underlying received wisdom in corporate law. The world may be constructed thus, but why should it not be deconstructed and reconstructed after a different fashion?\textsuperscript{126} As one feminist corporate law scholar has observed the “more accurate, and more just, conception of the corporation is that it is a site where participants express both competitiveness and cooperation in their relations with other stakeholders.”\textsuperscript{127}

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\textsuperscript{125} Ibid at 237.

\textsuperscript{126} Hall, KH, "The Interior Design of Corporate Law: Why Theory Is Vital to the Development of Corporate Law in Australia" (1996) 7(1) \textit{Australian Journal of Corporate Law} 1 at 1.

\textsuperscript{127} O'Neill, TA, "Gender and Corporate Personhood: A Feminist Response to David Millon" (2001) 2(1) \textit{Stanford Agora} 77 at 84. Note also the comments of Gabaldon, TA, "The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders" (1992) 45(6) \textit{Vanderbilt Law Review} 1387 at 1430 in relation to the suggested abolition of limited liability: “This policy would, of course, eliminate many significant distinctions between equity and debt and would wreak havoc upon capital markets as we know them, but political feasibility is the subject of a later section.”
\end{flushright}
Organisational Theory

Organisational theory as developed and articulated by “political scientists, sociologists and communications theorists suggests that corporations, especially large corporations, must be understood as complex organisational environments.”128 The models used by these scholars are far more complex and, it is submitted, more true to the nature of corporations than anything produced by traditional legal theorists.129 This body of theory suggests that while the relational and decision-making processes within bureaucratic organisations are rational, they are not necessarily logical. Organisational theory therefore poses some significant problems for a number of alternative schools of corporate thought.130

Applying Broadly Conceived Organic Theory

It can be seen that adherence to a theoretical perspective will be crucial to the way in which corporations are perceived and corporate regulation and corporate activity interpreted. The summary of “Realist” theory I have provided above, concluded by stating that corporate law should have an essentially facilitative and descriptive, rather than prescriptive, function. This thesis will apply realist organic theory, broadly conceived, to the problem of identifying the most suitable source of analogy from which to develop a jurisprudence of incorporated associations. This in turn requires that I first


consider the role of analogy in legal reasoning. As will be discussed in the following chapter, I intend to do this by reaching into cognitive science literature to develop a robust model of analogical problem solving that can be applied to the task of identifying the richest source analogue for the purpose. Having done this I will then use the principles of broadly conceived organic theory to test whether or not the legislative framework for incorporated associations is reflective and facilitative of the observed reality of those incorporated associations. Chapter three contributes to this enterprise by summarising the legislative framework for incorporated associations in Australia and New Zealand using a typology with international application. In chapter four an empirical analysis of incorporated sporting associations in all jurisdictions will be summarised. By comparing the legislative framework of incorporated associations from chapter three with the empirical data summarised in chapter four, chapter five will demonstrate how broadly conceived organic theory can be applied to highlight any lack of fit between that legislative framework and empirical reality. This will enable a meaningful and theoretically sound critique of the legislation to emerge. Only then can a theoretically defensible assessment be made as to the potential utility of the alternative source analogue schemas presented in chapter two. This will be outlined in chapter six below.

See Dan-Cohen, M, Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society, University of California, Berkeley, USA, 1986 at 21-25.
THE INFLUENCE OF THEORY ON CORPORATE LAW IN
AUSTRALIA & NEW ZEALAND

Evidence of the influence exerted by various juristic corporate theories upon the common law can be found when considering briefly the aspects of corporate law at the heart of this investigation. The Australian corporate law legislative framework includes aspects closely associated to the aggregate approach. For example, a corporate constitution will be determined by the corporators, and subsequently, by members in general meeting. To varying degrees, the contents of the constitution will need to conform to a statutory formula, but in only one jurisdiction is this restrictively mandated. Companies wishing to minimise their drafting burden may opt to leave a wide range of constitutional issues to optional clauses of the Corporations Act 2001

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133 Corporations Act 2001 (Cth) s 135; Associations Incorporations Act 1991 (ACT) s 32 & Sch; Associations Incorporations Act 1984 (NSW) s 11 & Sch 1; Associations Incorporations Act 1981 (Qld) s 68C(c) & Regs; Associations Incorporations Act 1983 (SA) s 23A; Associations Incorporations Act 1964 (Tas) s 17 & Sch 1; Associations Incorporations Act 1981 (Vic) s 6 & Sch; & Associations Incorporations Act 1987 (WA) s 16 & Sch.

134 Associations Incorporations Act 1981 (Qld) s 25A.
(Cth) known as “replaceable rules”. Incorporated associations do not face such a regime. These, essentially domestic arrangements relating to corporate constitutions, can be seen as indicative of the organic approach to internal corporate self-determination. On the other hand, however, corporate law also mandates certain matters of internal corporate governance, indicating an acceptance of some of the tenets of the aggregate approach.

Perhaps the most significant instance of the acceptance of the organic theory in Australian corporate law is the broad acceptance of the modern commercial principle of a division of powers between a typical company's board of directors and its members in general meeting. This principle may not be applicable to incorporated associations, a point at the heart of the current investigation. This “separation of powers” principle is enshrined in the optional constitutional clause at Corporations Act 2001 (Cth) s198A (a replaceable rule) and in turn, is based on the former optional rule in Table A Article 66.

In an oft-quoted passage, Greer LJ elucidated the effect of this “division of powers” in the following terms:

135 Corporations Act 2001 (Cth) s 135.
136 See Chapter 3 below generally.
A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of shareholders can control the exercise of powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.\(^{139}\)

This delegation of management authority to directors has been considered in a line of case law stretching back into the 19th century.\(^{140}\) In perhaps the most influential judgment as to its effect, Denning LJ stated:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will of the company, and control what it does. Others are directors and managers who represent the directing mind and will of the company, and control what it does.\(^{141}\)

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\(^{139}\) *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at 134.


\(^{141}\) *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172. See also Acquaah-Gaise, G, *Corporate Crimes: Criminal Intent, and Just Restitution*, Faculty of Business & Law, Victoria University, Melbourne, 2001 at 3. This type of anthropomorphic group/person analogy is far from new, however, see for example Romans 6:4-5. Other United Kingdom cases of interest on this point involving the issue of corporate state of mind near in time to the *Bolton* decision include; *Betty’s Cafes Ltd v Phillips Furnishing Stores Ltd* [1956] 1 WLR 678; *Reehorn v Barry Corporation* [1956] 1 WLR 845; and, *Fleet Electrics Ltd v Jacey Investments Ltd* [1956] 1 WLR 1027. These cases appear to require formality of procedure before corporate intention could be proved. The effect of this would have been to focus on questions of traditional agency where a corporation acts through individual s. On this point, the *HL Bolton Case* can be seen as a watershed decision in that it eschews traditional agency issues and a focus on formality. See
As a result of Denning LJ's speech in the *HL Bolton Case*, the board of directors and members general meeting have come to be referred to as corporate “organs”, each in their various capacities exercising the powers of the company, not as mere agents, but as the principal (i.e. the corporation) itself. In this respect, the term “organic theory” has become, to some extent, synonymous with both the realist or “internal self-determination” school of corporate law theory, and the idea that a company is personified by its various “organs” as derived by the application of agency theory.

Obviously, where a company determines that it is appropriate to be governed by a board of directors vested with independent management powers and a members' meeting with specific residual power, it is possible to use the term “organic theory” in its two senses contiguously. That is to say, in terms of a self-determined governance model, and in terms of agency concepts. However where a corporation chooses not to adopt the

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equivalent of the replaceable rule at Corporations Act 2001 (Cth) s 198A,\textsuperscript{145} or alternatively, where the corporation is an incorporated association and its constitution does not contain an equivalent of this replaceable rule, the term “organic theory” must be restricted in its application to the broad principle of internal self-determination as propounded by the less anthropomorphically doctrinaire corporate realists.

A number of important issues therefore present themselves for consideration in the case where a corporation chooses not to delegate broad management power to a “board of directors” or an equivalent body in incorporated associations. For instance, what are the implications for corporate law theory and regulation of a board of directors who are at best mere agents of the corporation? Would the membership generally of such a body be in the same fiduciary position as directors in the delegated management model? What actual and apparent authority can be ascribed to corporate officers where they cannot be said to represent the “directing mind-and-will” of the corporation? What implications are there for the application or otherwise of the doctrines of ultra vires and constructive notice to the non-delegating model corporation?

\textit{Internal Control of Corporations}

To enable a corporation to function, and to ensure that there are controllers upon whom the performance of duties can be imposed, legislation generally provides that a

\textsuperscript{145} Acquaah-Gaise, G, \textit{Corporate Crimes: Criminal Intent, and Just Restitution}, Faculty of Business & Law, Victoria University, Melbourne, 2001 at 3.
corporation should always have a minimum number of directors and members.146 More broadly, however, common law has long held that the majority of the members of a corporation can act for it, their acts being held to be the acts of the corporation. This position was later refined to refer to the majority of members present and voting at a general meeting, or voting by proxy under the terms of the corporate constitution.147

It cannot be disputed that wherever a certain number are incorporated a major part of them may do any corporate act; so if all are summoned, and part appear, a major part of those that appear may do a corporate act.148

In general terms, Australian corporate law does not disturb this principle, which is also at the root of the historical principle in Foss v Harbottle (1843) 2 Hare 461; 67 ER 189 relating to majority rule.149 However, as indicated above, the constitutions of modern companies invariably vest the company's management powers in the directors by adopting the equivalent of Corporations Act 2001 (Cth) replaceable rule s 198A. Where this is the case, the members in general meeting may not interfere in management decisions of the board of directors.

146 Corporations Act 2001 (Cth) ss 201A & 114; Associations Incorporations Act 1991 (ACT) s 14(1)(a); Associations Incorporations Act 1984 (NSW) s 7(1); Associations Incorporations Act 1981 (Qld) s 7(1)(a); Associations Incorporations Act 1981 (Vic) s 3(1); & Associations Incorporations Act 1987 (WA) s 4(1). See also: Incorporated Societies Act 1908 (NZ) s 4(1).


148 See Att-Gen v Davy (1741) 2 Atk 212.

149 Eg: Corporations Act 2001 (Cth) ss 9 & 203D; Associations Incorporations Act 1991 (ACT) ss 68-70; Associations Incorporations Act 1984 (NSW) ss 5, 26 & 28; Associations Incorporations Act 1981 (Qld) ss 5A & 28-29A; Associations Incorporations Act 1985 (SA) ss 3(1) & 39; Associations Incorporations Act 1964 (Tas) ss 22A & 23; Associations Incorporations Act 1981 (Vic) ss 29 & 30(1)-(2); & Associations Incorporations Act 1987 (WA) ss 23-24.
In some respects one can observe the influence of the law and economics school in general, and aggregate theory in particular in company law, relating to this question of demarcation between corporate “organs”. As indicated in the introduction, the contractualist views the corporation as a “nexus of contracts” between corporate participants to facilitate the achievement of economic outcomes. Aggregate theory requires a set of “default” contract terms to be provided for to govern the internal relationships within a corporation. The constitutional demarcation between directors and members referred to above is reinforced by Corporations Act 2001 (Cth) s 140, which provides that the constitution of a company has the effect of a “contract between the company and each member; between the company and each director and company secretary; and, between a member and each other member”. In Australia there is considerable uncertainty as to the contractual effect of the constitution of an incorporated association due to the High Court judgment in Cameron v Hogan (1934) 51 CLR 358. This case related to an unincorporated political association which failed to comply with its constitution in the expulsion of one of its members. The unanimous view of the full bench of the High Court was that such a constitution was consensual and not contractual. The invariable practice of courts since Cameron v Hogan, has been to avoid any interpretation of the constitutions of voluntary unincorporated groups as being contractual. Although this view is not shared by English courts,\textsuperscript{150} it has been persuasive in New Zealand.\textsuperscript{151}

\textsuperscript{150} Conservative and Unionist Central Office v Burrell [1982] 2 All ER 1.

\textsuperscript{151} Finnigan v New Zealand Rugby Football Union Inc [1985] 2 NZLR 159; and Walker v Mt Victoria Residents Association Inc [1991] 2 NZLR 520.
There have been occasions where courts have extended this consensual rationale of constitutions developed in the context of unincorporated groups to incorporated sporting associations.\textsuperscript{152} At the very least, there is uncertainty as to whether Australian common law views the constitution of incorporated sporting associations as being contractual or consensual.\textsuperscript{153} This lack of certainty has lead to a number of Australian jurisdictions clarifying the issue in legislation.\textsuperscript{154}

**External Relations of Corporations**

One of the most influential consequences of the grant (or concession) theory of corporate law over time has been in the dual effect of two doctrines. These doctrines are the common law doctrine of ultra vires as it pertains to corporate objects clauses, and the equitable doctrine of constructive notice.

Ultra vires has now been largely eliminated as a feature of Australian corporate law.\textsuperscript{155} The abolition of ultra vires occurred largely due to the harsh manner in which it operated for so long to the detriment of corporate creditors who dealt in good faith with company officers acting outside the terms of company objects clauses. This was problematic for a  


\textsuperscript{153} Note the comments of Cox J in Smith \textit{v} South Australian Hockey Association Inc (1988) 48 SASR 263 at 264-8, and the particular caution to judges to “… not lightly interfere in domestic disputes of a non-profit body”.

\textsuperscript{154} Associations Incorporations Act 1984 (NSW) s 11(2); Associations Incorporations Act 1981 (Qld) s 41; Associations Incorporations Act 1985 (SA) s 23; & Associations Incorporations Act 1981 (Vic) s 14A.

variety of reasons. Grant theory, at its most doctrinaire, stipulates that a corporate charter, or letters patent, or a certificate of incorporation was granted to allow a corporation to pursue specified objects. Acting outside of this charter left the corporation open (and in some jurisdictions, such as Western Australia, theoretically still may leave it open) to prosecution by the Attorney General via an information in *Quo Warranto*, with the possibility of the cancellation of its incorporation.156

A corporation always had the option of disavowing any contract which was executed by officers on its behalf, where the subject matter of the contract was without the scope of the objects clause.157 In certain situations where the contracting parties had actual knowledge that the objects clause was being overridden, they could not complain of such alleged breach of contract.158 Similarly, where the contracting parties had a particularly close relationship, courts often took the view that the plaintiff party should have been on inquiry to determine the veracity of the contracting officers’ claim to be representing the company in a matter.159 This cause of commercial difficulties in the area of ultra vires arose mainly due to the equitable doctrine of constructive notice.

156 *Eastern Archipelago Co v R* (1853) 2 E&B 856; 118 ER 988; *High Court Rules* (Cth) O 55 r 47-53; *Supreme Court Rules* (ACT) O 55 r 34-42; *Supreme Court Rules 1970* (NSW) Pt 54; *Supreme Court Act 1995* (Qld) ss 186-187; *Supreme Court Civil Procedure Act 1932* (Tas) s 83; *Rules of the Supreme Court 1971* (Vic) O 56 r 34-35; *Supreme Court Act 1925* (WA) s 36; & *Rules of the Supreme Court 1971* (WA) O 56 r 34-35.


159 *Barclays Finance Holdings Ltd v Sturgess* (1985) 3 ACLC 662.
Constructive notice essentially places an onus on a contracting party to make all the usual and reasonable inquiries prior to executing an agreement.\textsuperscript{160} Any matter forming part of the public record was considered to be reasonably discoverable in such situations, and the contracting parties were regarded as having \textit{constructive} notice of the matter. Corporate law regulation has always required the lodging of documents (commonly including or, in the case of “replaceable rules”, assuming the constitutions of companies) as a precondition of incorporation.\textsuperscript{161} As this information forms part of the public record, contracting parties were deemed as a consequence of the doctrine of constructive notice, \textit{inter alia} to be aware of constitutional limitations to corporate power. When combined with the doctrine of ultra vires, the doctrine of constructive notice sometimes left contracting parties who faced cancelled contracts by parties acting outside of their constitutions, without legal remedy, due to their having deemed notice of the lack of corporate capacity of the defaulting party.\textsuperscript{162} The doctrine of constructive notice is now something of a non issue as regards corporations,\textsuperscript{163} except in limited circumstances.\textsuperscript{164}

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\textsuperscript{160} Meagher, RP, et al, \textit{Equity Doctrines and Remedies}, 3rd ed, Butterworths, Sydney, 1992 at 253-
\textsuperscript{161} 254; \& Irvine \textit{v} Union Bank of Australia (1877) 2 App Cas 366.
\textsuperscript{163} \textit{Corporations Act 2001} (Cth) ss 128-130(1); \textit{Associations Incorporations Act 1991} (ACT) ss 47
\textsuperscript{164} & 117; \textit{Associations Incorporations Act 1984} (NSW) ss 60-61; \textit{Associations Incorporations Act 1981} (Qld) ss 32(2)&(3); \textit{Associations Incorporations Act 1985} (SA) ss 28; \& \textit{Associations Incorporations Act 1981} (Vic) ss 41-42.
\textit{Corporations Act 2001} (Cth) ss 128(4) & 130(2).
\end{flushleft}
One of the consequences of the devaluation of the doctrines of ultra vires and constructive notice in Australian corporate law is that it is now rather more difficult for members to fetter the actions of the directors or their equivalents. In addition, Australian corporations have the full legal capacity of a natural person and of a body corporate.\textsuperscript{165} To the extent that the board is vested with management power, this could be viewed as weakening the significance of the “member-organ” and the elevation of the “director-organ”. The measures which have created this situation could be viewed as having an aggregacist or contractualist origin, in that they simplify the contractual basis of the internal corporate relations. Likewise, as the legislation mandates such a state of affairs, it could be viewed as hard-edged concession or grant theory inspired. From here it is but a short step to adopt the functional viewpoint of fictionalist corporate theory. For such scholars, inquiry or reflective thought as to the actual nature of corporate bodies is meaningless. A corporation, in the world-view of the fictionalist, is whatever the legal system declares it to be, nothing more and nothing less. At the other end of the spectrum, realist theory does not suggest that a prescribed corporate structure is superior to a corporate structure mediated by group decision-making processes. Reference to the discussion of organic theory above suggests that the corporate law realist/organicist would view interrelationships between corporate “organs” as not being a matter for legislation.

\textsuperscript{165} Corporations Act 2001 (Cth) ss 124 & 125(2); Associations Incorporations Act 1991 (ACT) s 24; Associations Incorporations Act 1984 (NSW) s 17; Associations Incorporations Act 1963 (NT) s 11; Associations Incorporations Act 1981 (Qld) s 20; Associations Incorporations Act 1985 (SA) s 25; Associations Incorporations Act 1964 (Tas) ss 12 & 21; Associations Incorporations Act 1981 (Vic) s 16; & Associations Incorporations Act 1987 (WA) s 13. See also: Incorporated Societies Act 1908 (NZ) s 10.
One aspect of Australian corporate law that can be argued at least to be reflective of propositions advocated by radical feminist theory is the introduction of specific insolvent trading provisions.\textsuperscript{166} These provisions make directors personally liable for the debts of a relevant corporation where these are incurred while the corporation trades while insolvent.\textsuperscript{167} Given that such a measure is now accepted as a valid aspect of mainstream Australian corporate law, the possibility for future feminist influence on corporate law reform is very much alive.

\textbf{Corporate Regulation}

The differing perspectives held by adherents of the different corporate theories must lead the development of corporate law in different directions. In addition, the very process by which corporate law is developed also impacts upon the ensuing regulation. As outlined in the introduction, no single corporate theory has dominated Australian or New Zealand company law. It must, however, be acknowledged that the influence of contractarianist corporate law theory has been profound in both jurisdictions. The actual process of “reform” of corporate law in both countries has been unashamedly


economically driven for most of the past two decades.¹⁶⁸ That being said, no corporate law theory has dominated the way in which corporate law has been drafted, interpreted or applied. Rather, both legislative development and common law case decisions appear to have been informed by a wide range of corporate theory viewed (perhaps darkly) as all legal theory, through the looking glass of pragmatism.

The benefit of the realist/organic theory in the development of corporate regulation is that it recognizes the existence of the corporations as something unique in the legal world. It encourages consideration and analysis of the nature of corporations as they are, not merely from the perspective of an assumed reality. The regulatory framework can provide a space within which corporate bodies can exist and operate without doing violence to their peculiar internal structures. In the alternative, indifferent regulation can have an opposite effect by requiring the corporate entity to modify its internal arrangements to suit the regulator.¹⁶⁹


¹⁶⁹ For an example of the consequences of such a legislative approach see *Re Vassallo* [2001] 1 QdR 91 and the thoughtful consideration of the broader issue in Fletcher, K, "Incorporated Associations: Cheap Incorporation - Limited Choices" (2001) 22(1) *The Queensland Lawyer* 20. See also Eisenberg, MA, "Corporate Law and Social Norms" (1999) 99(5) *Columbia Law Review* 1221 for a discussion of regulatory forces internal and external to corporate actors that can influence behaviour.
CORPORATE LAW, ANTHROPOMORPHISM & BROADLY CONCEIVED

ORGANIC THEORY IN CONTEXT

As indicated above, corporations have been described as being “artificial” or “fictional”.170 Such descriptions are used in the anthropomorphic sense as meaning devoid of human life. A number of authors have taken issue with this terminology by pointing out that books, sculptures and music are equally devoid of human life but are not described as “artificial” or “fictional”.171 As discussed previously, this school of thought is usually collectively referred to as the “realist” school.172 In essence, corporate realists assert that it is in the nature of civilised society for individuals to associate together for common purposes. The realist argument is such that the role of corporate law is to recognise such groups rather than to create and regulate them.173


Debate over the extent to which a group mirrors the qualities and behaviour of an individual has raged in the distant past and continues at a somewhat more sedate pace in recent times.\textsuperscript{174} Such questions are, however, peripheral to the investigation at hand.\textsuperscript{175} This inquiry will consider how incorporated nonprofit sporting groups are constructed, and how they operate in two common law jurisdictions. It will attempt to ascertain: how these groups view their own corporate identity; the circumstances surrounding their formal incorporation; the way in which they have structured themselves; and the extent to which, and the way in which, these factors are respected, or have been otherwise impacted upon, by corporate law. In addition, by means of a broad-form organic


\textsuperscript{175} Indeed, one might well observe that such metaphysical and anthropomorphic questions are probably always incidental and best left to von Jhering’s “legal concept heaven” (Cohen, FS, "Transcendental Nonsense and the Functional Approach" (1935) 35(6) Columbia Law Review 809).
approach, some indication will be derived as to the suitability to the entities under consideration of the various influential theories of the corporation. What will emerge is a picture of how well the groups in question, and the corporate law in their jurisdictions, fit together. A lack of fit may indicate the need for debate on the nature of corporate law as it is conceptualised in the jurisdictions in question.

It is apparent, however, that there are a number of different ways in which a corporation may be perceived. Several writers have observed that the way in which a corporation is perceived is essentially a reflection of an individual's world view. Such an hypothesis may be helpful in surveying the development of common law corporate law theory. For instance, European renaissance theological and scientific philosophy placed the person at the centre of the universe. It is unsurprising, therefore, to observe the same pre-eminence of the liberal tradition’s view of the individual at the heart of the common law. Thus, when searching for an appropriate analogy from which to develop


corporate law theory, the natural inclination of Newtonian oriented legal scholars from the classical liberal tradition was toward a reduction of the group dynamic to the individual and personal. Gierke, the “modern” father of corporate realist theory reached his professional zenith at the post-romantic nineteenth century when the German states were moving toward unification. It has been suggested that this movement of social cohesion greatly influenced his championing of what he termed “organic” corporate theory. The demonstrable influence of world view on the development of corporate law theory can also provide a useful explanation for the diversity of judicial opinion on the subject of corporate law both over time, and at fixed moments in time.
For instance, current legal debate relating to corporations centres on the trading corporation. However, over time, this debate has variously centred on universities, charitable bodies, towns and boroughs, chartered and statutory authorities.

While the concept of the individual person remained simplistic and unsophisticated, the implications of such analogy presented few problems. However, as psychological and sociological theories of the person, and the notion of “personality”, have become more complex, the anthropomorphic “corporation-as-a-person” analogy has become more and more subject to criticism. In addition, in a post-Newtonian and post-modern era, old
notions of a universe centred on the individual are no longer counted among dominant world views. Nevertheless, the notion that the corporation is a legal “person” has persisted into the twenty-first century.\textsuperscript{186}

It is the organic theory broadly conceived with its origins in realist theory that will be applied throughout the current investigation as it professes a strong belief in the natural existence of corporate groups, including voluntary associations, and requires respect for the internal autonomy of such groups in the area of self-determination.\textsuperscript{187} To some extent, the view adopted was first suggested by Professor Geldhart in 1911 in the following terms:

If, as I have tried to show, none of these conceptions are really adequate to the facts, there seems to be at least a prima facie case for holding that our legal theory ought to admit the reality of a

\textit{“[Corporations] cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls.”}

See also, Ford, \textit{et al.}, \textit{Ford's Principles of Corporations Law} at para 4.110 note the comment:

\textit{“The statement that a corporation, including a registered company, is an artificial legal person is to be understood subject to a rider that it is an artificial legal person only in certain respects.”}


\textsuperscript{186} Ford, HAJ, \textit{et al.}, \textit{Ford's Principles of Corporations Law}, 11th ed, Butterworths, Chatswood, 2003 at 105 “Over the centuries judges in conceptualising a corporation have resorted to metaphor by equating it to an individual .” Nevertheless, the difficulties of abandoning the analogy have also been recognised: per Simmonds, RL, \textit{Juridical Personality in Canada: The Case of the Corporation}, Institute of Comparative Law, McGill University, Montreal, CA, 1990 at 82; and Smith, B, "Legal Personality" (1928) 37(3) \textit{Yale Law Journal} 283” at 287 observing of the legal profession:

\textit{“But to devise a new system of jurisprudence for the purpose, to work out new forms and theories and processes, would too severely tax the ingenuity of the profession.”}

personality in permanent associated bodies, or at least of something so like personality that we may provisionally call it by that name for want of a better.\textsuperscript{188}

Such an approach appears to at least reflect the pragmatism of corporate law practice.\textsuperscript{189}

\section*{Theoretical Convergence and Corporate Persona\textsuperscript{190}}

As indicated above, Professors Stoljar, Dan-Cohen, Hansmann & Kraakman, Blair & Stout, and Lahey & Salter are scholars with dramatically different perspectives regarding the nature of “corporateness” in terms of legal theory. Professor Stoljar argues that our modern legal conception of the corporation can be adequately explained in terms of a model he describes as a sort of streamlined trust.\textsuperscript{191} Professor Dan-Cohen on the other hand urges a reconstructed jurisprudence of corporations largely from the perspective of organisational theory. At an earlier stage, Professor Hansmann applied an ingeniously conceived transaction-cost approach from the law and economics school to the task of explaining the empirical diversity of corporate structures.\textsuperscript{192} More recently

\begin{thebibliography}{99}
\bibitem{187} Machen, AW, "Corporate Personality" (1911) 24(4) \textit{Harvard Law Review} 253 & 347 from 258; Geldhart, WM, "Legal Personality" (1911) 27(Jan) \textit{Law Quarterly Review} 90 at 102. See also Brown, WJ, "The Personality of the Corporation and the State" (1905) 21 \textit{Law Quarterly Review} 365.
\bibitem{188} Machen, AW, "Corporate Personality" (1911) 24(4) \textit{Harvard Law Review} 253 at 347 & 363-5.
\bibitem{189} Attempts to mediate between competing corporate law theories have been attempted elsewhere of course, but the perspective of the reviewer plays an important mediating role, as is discussed more fully in the following chapter. For an Alternative perspective, see Macmillan-Patfield, F, "1. Challenges for Company Law" in Macmillan-Patfield, F, (Ed) \textit{Perspectives on Company Law: I}, Kluwer Law International, London, UK, 1995 at 11.
\bibitem{190} Stoljar, SJ, \textit{Groups and Entities: An Inquiry into Corporate Theory}, Australian National University Press, Canberra, 1973 especially at Chapter 12.
\end{thebibliography}
however, Hansman, writing in collaboration with Professor Kraakman, appears to have revised his views somewhat, such that they are now much more in line with those of Stoljar.\textsuperscript{193} Professor Blair has refined economic “team production theory” (an insight articulated in collaboration with Professor Stout) to highlight the relevance of the communitarian perspective in corporate law and corporate governance.\textsuperscript{194} It is significant that Blair has recently expressed support for the central role of Hansmann’s “asset partitioning” in the proliferation of the modern trading corporation.\textsuperscript{195} Professors Lahey and Salter wrote the leading work in feminist corporate law theory almost twenty years ago\textsuperscript{196} and it is still so regarded.\textsuperscript{197} Lahey and Salter together with other feminist corporate law scholars identify the element of “fragmentation” as a masculist

\textsuperscript{193} Hansmann, H & Kraakman, R, "The Essential Role of Organizational Law" (2000) 110(3) Yale Law Journal 387 in which the concept of “asset partitioning” is held out as a key requirement.


\textsuperscript{196} Lahey, KA & Salter, SW, "Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism" (1985) 23(4) Osgoode Hall Law Journal 543.

\textsuperscript{197} Hall, KH, "Starting from Silence: The Future of Feminist Analysis of Corporate Law" (1994) 7 Corporate & Business Law Journal 149; Gabaldon, TA, "The Lemonade Stand: Feminist and...
tendency. Feminist corporate law scholars also stress the importance of alternative corporate forms and internal structures to that in evidence in the modern trading corporation. Each of these influential theorists in their own way, make invaluable contributions to the development and evaluation of corporate entity theory that are highly relevant to what is here classified as a broad form organic theory approach to corporate groups.

Stoljar, by using the dynamic of the trust relationship as his basic model, contributes greatly to the task at hand. In essence, he asserts that the most significant aspect of corporateness is what passes between corporate members and not on the members themselves. According to Stoljar the emptiness of anthropomorphic analogy and debate is avoided by looking beyond the individual and pondering the nature of the group. His choice of the trust as a relationship of comparison is felicitous for at least two reasons. Firstly, to some extent, it provides much needed ballast with which to deal robustly with the overwhelming current of law-and-economics based literature based on “contract” considerations. Secondly, there is, as will be seen in the following chapter, a great deal of common ground between incorporated associations and charitable trusts. For this reason alone, Stoljar’s treatment is worthy of note.

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Dan-Cohen has suggested a theory of bureaucratic organisations based on organisational sociology and moral and political theory. The most important caveat on the work of Dan-Cohen is that it expressly deals with “large bureaucratic organisations”. Implicit in this limitation is that there are important differences between large and small (closely held) corporations, of which any body of theory must take account. There is also a strong emphasis in the Dan-Cohen theory on the centrality of organisational goal orientation. In addition, Dan-Cohen’s analogy of an “intelligent-machine” as a type for corporate groups serves to encourage thinking about such groups beyond their constituent individual members. In so doing, we are provided with a powerful contra-metaphor to aid in the difficult task of resisting the distraction of unhelpful anthropomorphic reductionism.

Hansmann uses his background in economic theory in a unique way by asking why “ownership” of certain enterprises is structured in particular ways as between different

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201 Ibid Chapter II, especially at 34. The significance of organisational size for corporate law theory is a common feature of academic writing which often goes without comment (Henning, J, "Company Law for the New Millennium: "Think Small First" (Editorial)" (2003) 24(12) Company Lawyer 353).
202 Tomasic, R, et al, Corporations Law in Australia, 2nd ed, Federation Press, Annandale, 2002 at 186. Professor Eisenberg is possibly the most prolific scholar to specifically include the consideration of large and small closely held corporations in his work (see Eisenberg, MA, The Structure of the Corporation: A Legal Analysis, Little, Brown and Company, Boston, USA, 1976 at Chapter 2; and Eisenberg, MA, "The Structure of Corporation Law" (1989) 89 Columbia Law Review 1461 at 1463-70).
203 Dan-Cohen, M, Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society, University of California, Berkeley, USA, 1986 at 36.
204 Ibid Chapter III and especially at 49.
The most refreshing aspect of Hansmann’s analysis is in his consideration of optimisational behaviours by individuals in broader terms than merely the generation of wealth or other forms of pecuniary utility. The transaction-cost analysis in which he engages is also singular in its scope, given that he ventures beyond the monoculture of commercial trading corporations into the multitude of corporate forms as they exist in reality. Divergent enterprise structures, according to Hansmann are utilised to facilitate the attainment of a variety of purposes. One of the key reasons why a particular enterprise structure will be favoured above another is which class of the organisation’s patrons has the greatest incidence of “homogeneity of interests” in order to reduce the overall costs of contracting within the “firm”. In other words, there needs to be shared conceptions as to the purpose(s) of the enterprise between the owners. A second key factor is the existence of “asymmetrical information” such as where the potential owners of the enterprise possess imperfect information about the ultimate provision of goods and services to the end user. Both of these requirements are in harmony with the notion of a corporation as a form of purpose-driven trust relationship.

It is also of interest to note that Hansmann, in conjunction with Kraakman, has recently expressed the view that a corporation can be viewed as a contractual device for separating a class of assets from the assets of organisational owners for the purpose of

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206 Ibid especially Chapters 10 & 12-14.
207 Ibid at 1-8.
208 Ibid at 39-44.
209 Ibid at 27-29 and 229-230.
limiting the claims of creditors. This aspect is viewed from both the perspective of “defensive” and “affirmative” asset partitioning.\(^{210}\) Hansmann previously brought this insight to a consideration of trusts.\(^{211}\) The similarity of this view to the “kitty” theory of Stoljar is very striking.

Blair has, in collaboration with Stout, refined a version of “team production theory” borrowed from economics into a sophisticated form of communitarian corporate law theory.\(^{212}\) She argues that large corporations are hierarchically structured problem solving entities, with each “team member” contributing to the ongoing problem solving process for which the corporation was formed.\(^{213}\) Of particular interest to this paper, Blair has expressed the view that there is an internal dialogue at work within large corporate entities that is unique in its complexity.\(^{214}\) This perspective has much in common with Dan-Cohen’s view of the organisation as “intelligent machine”. In


addition, Blair also acknowledges Hansmann’s view of the centrality of “asset partitioning” as a corporate characteristic.215

Radical feminism is not favourably disposed towards the typical large modern trading corporation.216 On the basis of opposition to the masculist tendency to fragment and control, feminist scholars are highly critical of the separate legal entity concept and its close relation, limited liability.217 Similarly there is strong feminist opposition to the hierarchical structure of the typical large modern trading corporation being an expression of the masculist tendency to control and dehumanize.218 This critique bears favourable comparison with communitarian theory in that both seek to emphasise the importance of connection and mutual dependence in corporate activity. One of the calls of feminist corporate law scholars is for alternative corporate forms and structures based


on feminist principles. Uniformity is argued to be another key masculist trait, and so diversity is to be fostered and encouraged.\textsuperscript{219}

These seemingly disparate theoretical frameworks have at least three important aspects in common. The first of these is the prime role played by the \textit{underlying purposes} of a group in the development of a legal theory of the corporation. Second, the complexity of relationships at work in the organisation and the need for appropriate structures to effectively manage these relationships. Third, it is also interesting to note that all of the authors referred to limit the full import of their observations to “large” organisations. The implications of this convergence are significant. Briefly, these are as follows:

- If the trading corporation in its context of liberal capitalism is a creature of an essentially masculist world view, it is conceivable that non-trading corporate entities might, to some extent, express alternative world views in their presumably non-capitalist contexts. This could mean for instance, that non-profit corporations might display unorthodox internal operational structures.

- Just as there are different types of trusts, it would be appropriate to find the corporate form expressed in different ways reflecting particular attributes. Any

particular corporate expression can therefore be argued to be rationally defensible due to the specific circumstances surrounding the group in question.

- Corporate size appears to be a significant factor in the application of corporate law theory. This is a commonly identified issue that is raised in different ways by most theorists.

- The centrality of corporate purposes and the “partitioning” of corporate funds in favour of those purposes, even to the disenfranchisement of “owner/shareholder/member” patrons is a defining attribute of the corporation. Feminist scholars are highly critical of this point, however they recognise the importance of “fragmentation” as a key pillar of the masculist capitalist economy.

- The accountability of corporate “managers” in terms of the purposes of the group rather than as agents of the “owner/shareholder/member” patrons is also a determinative aspect of the corporation.

It can be appreciated that these points of convergence in corporate law theory are all consonant with broadly conceived organic theory as defined in this chapter.

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220 See also Associations Incorporation Act 1991 (ACT) at s 83(1). See also Reform of the Canada Corporations Act: Draft Framework for a New Not-for-Profit Corporations Act, Corporate and Insolvency Law Policy Directorate, Policy Sector, Montreal, Canada, March, 2002 at 2.
SUMMARY

This chapter commenced with a definition of key terms and a brief discussion of the role of legal theory generally. I then surveyed the major schools of corporate law theory in particular. This survey revealed that corporate law theory is a well stocked treasury from which to draw when surveying the terrain of novel corporate forms. It is however apparent from the theoretical survey that the vast majority of corporate law theory is drawn from, and aimed at, the modern trading corporation. Given the primacy of the modern trading corporation in corporate law theory, I then proceeded to highlight some examples of the influence that corporate law theory has had on the Corporations Act 2001 (Cth) and the Corporations Act 1993 (NZ). Following this, I restated the preferred theoretical approach to be applied in the remainder of this thesis, namely broadly conceived organic theory. Finally in this chapter, I have sought to map out points of convergence that are currently evident in the major schools of corporate law theory. The relevant schools featuring in the discussion of theoretical convergence were; common fund theories; organisational theories; contractarian theories; communitarian theories; and feminist theories. I have also indicated that none of these emergent points of convergence are inconsistent with the broadly conceived organic theory that forms the lens through which incorporated sporting associations in Australia and New Zealand will be examined. First, however, it is important to consider how the status of the modern trading corporation as the “benchmark” in corporate law might influence the application of corporate law theory in the investigation of incorporated associations. Is

the modern trading corporation an appropriate analogy to use when applying corporate
law theory of any school to such novel corporate forms? If not, what analogy might
suitably be used in its place?

The following chapter addresses the role of analogy in legal reasoning from a theoretical
perspective. It then canvasses a number of alternative analogies, including the modern
trading corporation. The purpose of this comparative analysis will be to test whether the
current orthodox view that the modern trading corporation is the most apt source
analogue for incorporated associations can be supported.
CHAPTER 2

ANALOGICAL REASONING AND POTENTIAL LEGAL ANALOGIES FOR INCORPORATED SPORTING ENTITIES

“Twinkle, twinkle little star,
How I wonder what you are?
Up above the world so high,
Like a diamond in the sky.
Twinkle, twinkle little star,
How I wonder what you are?¹

Above all, it is imperative that the jurist should not submit to be dragged weakly submissive at the chain of metaphor.²

INTRODUCTION

As discussed in the previous chapter, the challenge of broadly conceived organic theory is to consider the intrinsic reality of organizations and associations in their social context. In terms of corporate law, this challenge extends to the development of a jurisprudence which facilitates such corporate structures rather than restricting and controlling them in an inappropriate manner. This chapter outlines the significance of analogy in the development of theory generally, and corporate law in particular. The investigation will then present four well documented alternative legal forms that may provide guidance in the analogical development of an appropriate

¹ Child’s nursery rhyme.
jurisprudence for incorporated associations. The following chapter will survey the legislative framework currently in place in Australia and New Zealand, allowing voluntary sporting associations to become incorporated bodies. That survey will consider in broad terms what the eligibility criteria are in each jurisdiction, the internal structural requirements, the operational requirements and the dissolution requirements as laid down in the various statutory measures. The next chapter summarises an epidemiological investigation of actual incorporated associations in the relevant jurisdictions. Research indicates that anything up to one in three incorporated associations could be sporting groups.\(^3\) This constitutes the largest definable user-group of the relevant legislation. In order to ensure the greatest utility from the findings of the thesis, the survey will focus on this most significant subset of incorporates associations. The remaining chapters will consider the extent to which the current legislative framework could be said to reflect broad form organic theory and also suggest a basis upon which a coherent jurisprudence of incorporated sporting associations could emerge.

**THE PLACE OF ANALOGY IN LEGAL REASONING**

If, as is suggested by this research, incorporated associations can be accurately categorised as a novel corporate form with a peculiar legal identity, the question ought to be asked, how do we deduce an appropriate jurisprudence from which to develop an appropriate body of law? In the absence of specific guidance, one is left to construct an appropriate legal theory by such imperfect means as analogy and

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metaphor. Imperfect though such means may be they are nonetheless pervasive. As Gick and Holyoak have observed: “To make the novel seem familiar by relating it to prior knowledge, to make the familiar seem strange by viewing it from a new perspective – these are fundamental aspects of human intelligence that depend on the ability to reason by analogy.”

This type of problem solving imperative is as familiar in law as it is in any other field. Common law reasoning as it is presently understood can be crudely characterised as involving an inductive process where individual cases of a similar nature that have already been resolved are examined in order to extract some “rule” or “schema” that will explain the outcome in each case. Common law goes one step

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8 As to the way in which this has emerged over time, see Evans, J, "Change in the Doctrine of Precedent During the Nineteenth Century" in Goldstein, L, (Ed) Precedent in Law, Oxford University Press, Oxford, UK, 1987.

9 See Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298 at 305 per Spigelman CJ for a more elegant consideration of this proposition. Hunter, D, "Reason Is Too Large: Analogy and Precedent in Law" (2001) 50(Fall) Emory Law Journal 1197 at 1207-1209. Note that the clearest instance of purely inductive reasoning in the common law context is the application
further than pure inductive reasoning however, in that the inductively derived schema is then applied to a given novel situation to determine the outcome.\textsuperscript{10} This technique is at the heart of the doctrine of precedent, one of the distinguishing features of the common law system.\textsuperscript{11}

Common law legal reasoning is of course only one methodology. Civilian legal reasoning on the other hand could perhaps be crudely characterised as a methodology where the inquirer refers to a body of precepts and deductively divines general principles that are applied to a given novel problem to generate a conclusion.\textsuperscript{12} As

\begin{flushright}
Farrar, JH & Dugdale, AM, \textit{Introduction to Legal Method}, 3rd ed, Sweet & Maxwell, London, UK, 1990 at 87; Hunter, D, "Reason Is Too Large: Analogy and Precedent in Law" (2001) 50(Fall) \textit{Emory Law Journal} 1197 at 1202; Murray, JR, "The Role of Analogy in Legal Reasoning" (1982) 29 \textit{UCLA Law Review} 833 at 847; & "(R)easoning by analogy is properly understood as a patterned sequence of distinct reasoning processes, including abduction and either induction or deduction. I also explain that this process is not ‘disparate’ but coherent; that although it is admittedly far from determinate, is nevertheless not quite ‘unstable’ either; and that its processes do have sufficient ‘content,’ when well executed and properly understood, to give it serious rational force.” Brewer, S, "Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy" (1996) 109(5) \textit{Harvard Law Review} 923 at 961.  “English case law thus is the product of practical reasoning emerging from decision-making, and combining the attributes of reasoning by analogy with those of reasoning by rules.” Farrar, JH & Dugdale, AM, \textit{Introduction to Legal Method}, 3rd ed, Sweet & Maxwell, London, UK, 1990 at 89-90; and, Coleman, CH, "Rationalising Risk Assessment in Human Subject Research" (2004) 46 \textit{Arizona Law Review} 1 at 28.  See also Dietrich v The Queen (1992) 177 CLR 292 at 322 per Brennan J; “The classic example is to be found in Lord Atkin’s speech in \textit{Donoghue v Stevenson} … where, perceiving the theme common to earlier cases, he reasoned to a unifying principle which, once articulated, governed a host of cases that followed. Inductive reasoning leads to the expression of a normative principle which prescribes with some particularity the character of the facts to which the principle applies. The principle must be more precise than a value or concept, else its content is left for contention in later cases.” Sunstein, CR, "On Analogical Reasoning" (1993) 106(3) \textit{Harvard Law Review} 741 at 749-750.  This type of legal reasoning is not totally foreign to common law. “Case law also involves reasoning by rules … Again, as the law develops, broad statements of principle are made which are pitched at a higher level of generality and these often epitomise basic values or traditions of the legal system.” Farrar, JH & Dugdale, AM, \textit{Introduction to Legal Method}, 3rd ed, Sweet & Maxwell, London, UK, 1990 at 88.
\end{flushright}
valid as this alternative methodology for legal reasoning may be, given that it is not pervasive in Australia or New Zealand, it is not considered here in any further detail.

The above characterisations of the major legal systems are for the purposes of illustration and are somewhat arch and oversimplified, but are nevertheless sufficient for our purposes. The inductive process of legal reasoning that was articulated above in the context of common law is most accurately characterised as “analogy”. Given Mill’s view that there “is no word which is used more loosely, or in a greater variety of senses, than Analogy”, it is necessary at this point to more carefully define the term “analogy” as it will be used in this investigation.

**Analogy Defined**

For the purposes of clarity, the term “analogy” will be used from this point forward to refer to the type of logic process identified above with common law legal reasoning. That is to say, it is a kind of inductive, instance-to-instance comparison-based, problem solving methodology. An analogy typically involves comparing

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14 Mill, JS, A System of Logic, Ratiocinative and Inductive, 8th ed, Harper and Bros, New York, USA, 1882 at 393. “The pertinence of semantic flexibility to analogy is highlighted by the academic quandary regarding the relation of analogy to metaphor” Hoffman, RR, "Monster Analogies" (1995) 16(3) AI Magazine 11 at 18; & “(L)egal commentators have caused enormous problems by failing to explain how analogy differs from the related inference processes of induction and metaphor. This has lead to sloppy thinking and poor analysis.” Hunter, D, "Reason Is Too Large: Analogy and Precedent in Law" (2001) 50(Fall) Emory Law Journal 1197 at 1206.
attributes of a known “source analogue” with those of an unknown “target analogue” for the purpose of either prediction or insight.15

**Metaphor Defined**

The term “metaphor” will be used from this point to refer to the comparison of a familiar concept in a semantically disparate context, with a novel concept in the present context. This bears close resemblance to the way in which the term “metaphor” is used linguistically. In that environment, a metaphor is a device whereby one abstract phenomenon is so closely and favourably compared with another, semantically distant,16 phenomenon that the two are indistinguishable.17 Thus defined, metaphor is in some respects a similar concept to analogy in that a source is compared to a target. However, for our purposes it will be helpful to place both terms at either end of an allegorical continuum with “analogy” favouring the concrete and “metaphor” favouring the symbolic. This will be explained more fully below.


Mapping

In cognitive science the nature of the interplay between a “source analogue” and a “target analogue” is analysed (at an appropriate level of abstraction) with a view to utilising the known (source) as a means of understanding the unknown (target). This process is almost universally referred to as “mapping”. Mapping is considered to be central to reasoning by analogy. Mapping theory also assists in the development of artificial intelligence programming and in the treatment of pathological cognitive disorders.

Notwithstanding the criticisms of analogical reasoning, there is little doubt that it is central to cognitive processing. Cognitive scientists postulate that in order to make meaningful comparisons, individuals develop a simplified, abstract portrait of both

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source and target.\textsuperscript{23} It is at this point that a critical element is introduced into the process which will lead to the success or ultimate failure of the analogy in question. The simplification process is purpose driven in that the investigator, for some subjective purpose, chooses to ignore characteristics of either the source or the target which are deemed not relevant to the problem in question.\textsuperscript{24} It is argued that this elimination may lead to self-fulfilling hypotheses or pre-determined outcomes and is therefore “unscientific” and misleading.\textsuperscript{25} The consequence of such purpose-driven analogical thinking, so it is argued, is that it can negatively alter or even “cloud over” the way both source and target are perceived.

There is however an alternative view of purpose-driven mapping. This view points out the infinite range of possible outcomes to any given problem. Rather than seeing the purpose constraint as a weakness, this view considers that it acts as a type of filter, narrowing the field of inquiry and eliminating wasteful effort.\textsuperscript{26} However, the purpose constraint is only one of the constraints that operate in the mapping process.

\begin{thebibliography}{9}
\bibitem{24} Gick, ML & Holyoak, KJ, "Schema Induction and Analogical Transfer" (1983) 15 Cognitive Psychology 1 at 5; & "(T)he goal structures of a stored source problem may influence the mapping process indirectly by affecting the degree of structural consistency between the source and the target. There are reasons to suspect, however, that pragmatic considerations – the analogist’s judgements about which elements of the analog [sic] are most crucial to achieve a useful mapping – may also have a more direct influence on the mapping process.” Sunstein, CR, "On Analogical Reasoning" (1993) 106(3) Harvard Law Review 741 at 744.
\end{thebibliography}
Professor Hunter, applying advanced cognitive science theory to the legal problem-solving context, suggests a “multiple constraint” model of analogical mapping. This model suggests that there are at least three constraints at work in the analogical mapping process.

Hunter’s first constraint is termed “surface-level” and concerns the extent to which source and target have similar “surface-level” elements or attributes. There is empirical evidence that suggests experienced decision-makers (including legal decision-makers) are strongly influenced by surface level similarity when seeking and applying appropriate analogies.

Of additional interest is the extent to which perceived structural similarity can be manipulated by context variables such as “contrast effects” and “relational effects”. Hunter’s second constraint is the “structural” constraint and requires consideration of the internal relational patterns (structures) within and between attributes of either source or target. This constraint limits the use of analogies by requiring observable structures within the source analogue to be capable of being mapped onto the target analogue. The preferred structural comparisons are those “higher-order” relational patterns capable of explanatory or predictive utility. “We should therefore expect to see certain analogies preferred if they operate at a higher, causative level than the

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28 “These two studies in law, together with the many other cognitive psychological studies, give strong initial indications that surface-level mapping is almost certainly undertaken in precedential reasoning and legal analogy-making generally.” Hunter, D, "Reason Is Too Large: Analogy and Precedent in Law" (2001) 50(Fall) Emory Law Journal 1197 at 1216.
29 Ibid at 1217-1220. Context effects include the existence of strong contrasts between alternative analogues and presenting alternatives as a continuum.
alternatives.” This is what is meant by an analogy being described as more “apt”, or “relevant”. The final constraint identified by Hunter is the “purpose” constraint that was first mentioned above. This constraint “is consistent with the legal realist tradition.” That is, the purpose constraint is concerned with those personal exigencies that serve to direct the decision-maker to resolve the problem at hand.

Hunter suggests that each of these three constraints operate together to restrict the way in which analogical reasoning operates in practice. It follows that an analogy should be recognised as being relatively poor by a decision-maker if it is made on the basis of purely attributional similarity. The “optimal level of representation will be that which maximises the degree of correspondence between causally relevant features of the analogues.” This is another way of stating that a better analogy is one which has relevance to the situation under investigation.

The “Allegorical Continuum”
According to cognitive science then, the most basic type of comparison, in terms of its concreteness, operates by mapping surface level attributes in both source and

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30 Ibid at 1223-1224.
32 Ibid at 1228.
33 “Aristotle notes that a metaphor (sic) can go awry in at least two ways – it can be dull or it can be obscure – and that too much similarity contributes to the one problems, whereas too little contributes to the other.” Tourangeau, R & Sternberg, RJ, "Understanding and Appreciating Metaphors" (1982) 11 Cognition 203 at 208; & Holyoak, KJ & Thagard, P, "Analogical Mapping by Constraint Satisfaction" (1989) 13 Cognitive Science 295 at 302.
target analogues.\textsuperscript{36} This type of comparison has been defined above as an analogy. Given that this comparison would be essentially cosmetic, it would probably also be relatively unsophisticated and therefore less predictively useful.\textsuperscript{37}

The second type of comparison maps similarities in the relational structures within the source and the target analogues. These internal relational-similarities then form the basis of a somewhat more sophisticated analogical investigation than can be achieved by the purely attributional assessment. As a simple example, consider the comparison of the human body to a machine.\textsuperscript{38} A machine can be said to comprise a system whereby inputs are processed to deliver an outcome. The human body also processes inputs to deliver an outcome. Note the comparative processing of input and the delivery of outcome in both models. The human/machine analogy is capable of further refinement, but the analogy is based on internal relational similarities rather than mere attributional similarities.

The third type of comparison is closest to the literary use of the term “metaphor” that I have chosen to equate to the use of the term metaphor for present purposes. This type of metaphor is more figurative and more truly allegorical than the types of comparisons previously mentioned. As such, it is potentially more didactic in terms

\begin{itemize}
  \item \textsuperscript{37} Hoffman, RR, "Monster Analogies" (1995) 16(3) \textit{AI Magazine} 11 at 207-8. This can be compared to the so-called “representativeness heuristic” which is “a characteristic judgement process in which small samples are often wrongly taken to be representative.” (Eisenberg, MA, "The Structure of Corporation Law" (1989) 89 \textit{Columbia Law Review} 1461 at 1465).
\end{itemize}
of conveying complex, multi-layered and even contradictory insights into both source and target. Consider for example Shakespeare’s exchange between Lord and Lady Macbeth following the murder of Duncan. In this scene the blood on their hands is metaphorically compared to the act of regicide itself. So closely are the physical blood and the “bloody deed” allied in the conversation, that Lady Macbeth ends the exchange by making the well known metaphorical statement “A little water clears us of this deed”. Both the communicative strength within this elegant literary metaphor, and the cognitive constraints arising from it, are graphically illustrated later in the play when we see the now psychotic Lady Macbeth trying desperately to lift the stain of the deed from her hands long after the blood has gone. Her frantic plea is: “What, will these hands ne’er be clean?” It is only at the most abstract level that such semantically distant notions can be compared in any meaningful sense. And yet no-one would question the power of the metaphor to convey meaning.

Of course, when taken too far the process of abstraction renders the metaphor deductively meaningless. Consider the example of comparing a stray feral cat (target) with one’s pet dog (source). If a metaphor (schema) is developed that can expressively accommodate both source and target, one might reduce the schema to “four-legged animals with a tail”. The outcome of such an “investigation” would be

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38 Apologies to Descartes and de Condillac (Hoffman, RR, "Monster Analogies" (1995) 16(3) AI Magazine 11 at 13).


40 See also the discussion of Shakespeare’s reference to the world as a stage in As You Like It (Joo, TW, "Contract, Property and the Role of Metaphor in Corporations Law" (2001) Research Paper 01-10 Stanford/Yale Junior Faculty Forum at 5).

41 Shakespeare, W Macbeth Act II, Scene II Line 83.
that the target is a dog. Within the confines of the schema as constructed and articulated, the outcome is totally accurate in theory but absolutely erroneous in reality.\textsuperscript{43} In order to counter the devaluing effect of logical fallacy which permeates the more abstract metaphorical comparisons, a schema must be constructed that adequately observes the tension between accurate identification of surface attributes and an abstraction of internal relational structures, so as to accommodate both the source and the target while at the same time retaining the capacity for insight.

Cognitive science chooses to see past the literal absurdity of metaphors to explore the allegorical truth (or lack thereof) of the comparison being made.\textsuperscript{44} In this way the metaphor is viewed as a useful didactic, forcing the investigator to view both source and target analogues from a fresh perspective. By a process of abstraction, the metaphor is reduced to more generalised terms allowing the development of a schema that will accommodate both source and target. Such metaphorical comparisons are typically utilised for the purpose of insight rather than prediction.\textsuperscript{45}

For the purposes of the present investigation, the term analogy will be used where source and target enjoy a close semantic relationship and a predictive outcome is desired. Metaphor on the other hand, will be used to designate a schema based

\textsuperscript{42} Ibid Act V, Scene I Line 17.
\textsuperscript{43} Tourangeau, R & Sternberg, RJ, "Understanding and Appreciating Metaphors" (1982) 11 Cognition 203 at 208.
\textsuperscript{44} Reference is often made in this context to the great insights gained through disparate, though inspirational metaphorical thinking such as “the heart is a pump” (Harvey); and “sound moves in waves, like water” (Vitruvius) (Hoffman, RR, "Monster Analogies" (1995) 16(3) AI Magazine 11 at 13); & Brewer, S, "Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy" (1996) 109(5) Harvard Law Review 923 at 954.
\textsuperscript{45} Hunter, D, "Reason Is Too Large: Analogy and Precedent in Law" (2001) 50(Fall) Emory Law Journal 1197 at 1210.
comparison between contextually disparate sources and targets for the purposes of insight rather than for predictive purposes. The conception of schema can be diagrammatically expressed as follows:

As is suggested by these diagrams, the richer or more apt the schema, the greater the utility of the analogy or metaphor. Where a posited solution to a novel problem is based on metaphorical comparison, the predictive value must be open to serious

question given the necessary degree of abstraction required.\textsuperscript{48} Such a schema can be said to be relatively poor. An apt analogy, on the other hand, should enjoy a higher predictive value due to its stronger contextual alignment with the novel analogue.\textsuperscript{49} Unfortunately, as articulated above, the more abstract a schema becomes and the greater generality with which it is expressed, the less insight it may give the investigator trying to interpret novel phenomena due to its lower predictive utility.\textsuperscript{50}

**THE ROLE OF ANALOGY AND METAPHOR IN PROBLEM SOLVING**

**Discovery and Justification**

One of the central debates concerning analogical legal reasoning is which part of the process is most analogy dependent.\textsuperscript{51} Cognitive scientists and legal logicians alike postulate that analogy plays an important function in the early (discovery) stages of the problem-solving process.\textsuperscript{52} On the other hand it is also postulated that analogy is principally of import when “justifying”, or giving reasons for reaching a decision.\textsuperscript{53}

\textsuperscript{48} "(T)he basic problem in using an analogy between remote domains is to connect two bodies of information from disparate semantic contexts." Gick, ML & Holyoak, KJ, "Analogical Problem Solving" (1980) 12 *Cognitive Psychology* 306 at 349.


\textsuperscript{51} Gick, ML & Holyoak, KJ, "Schema Induction and Analogical Transfer" (1983) 15 *Cognitive Psychology* 1 at 5.

\textsuperscript{52} "(T)he logic of discovery roughly corresponds to that part of the legal decision-making process that can include judicial hunches, emotions, and personalities, as well as judicial knowledge of the law.” Murray, JR, "The Role of Analogy in Legal Reasoning" (1982) 29 *UCLA Law Review* 833 at 839.

Given that “(o)ne of the goals of reasoning is giving good reasons,”\(^5\) this debate could be argued to be peripheral to the current investigation.\(^5\)

The significance of this issue for present purposes is that if experienced legal problem-solvers have a stored bank of “analogy schemas” in long-term memory, it will be these which direct (and therefore limit) the entire problem-solving process from the moment of initial thinking.\(^5\)\(^6\) As a result, the process would in a sense, be short-circuited in that a plausible outcome is deductively inferred based on preconceptions. Justification in such a scenario is with reference to hardwired, experience-generated analogues.\(^5\)\(^7\) If, on the other hand, the legal problem-solver is more passively receptive to data without preordained analogy schemas, analogy will be of vital importance at all stages of the more heuristic problem-solving process.\(^5\)\(^8\)


The reality of course is that analogy is important at all levels of the legal problem-solving process.\footnote{59}

Empirical research strongly suggests that more experienced practitioners have a greater “schema-bank”\footnote{60} on which to draw, and can rapidly access a plausible analogue based on familiar semantic retrieval cues.\footnote{61} However, there is also clear empirical evidence that experienced practitioners, when faced with a novel problem situation, are quick to apply preconceived analogical schemas without necessarily considering their aptness to the new situation, or the potential richness of alternative analogues.\footnote{62} The same empirical evidence indicates that less experienced practitioners are less inclined to refer to inapt analogues to novel problems, probably


\footnote{61} “Analogy and precedent are the stuff of the law because they are the only form of reasoning left to the law when general philosophical structures and deductive reasoning give out, overwhelmed by the number of particular details. Analogy is the application of a trained, disciplined intuition where the manifold of particulars is too extensive to allow our minds to work on it deductively.” Fried, C, "The Artificial Reason of the Law Or: What Lawyers Know" (1981) 60 Texas Law Review 35 at 57 (italics added). See also Kamm, FM, "Theory and Analogy in Law" (1996) 29 Arizona State Law Journal 405 at 417 “Mine is not an argument against employing theory and for merely relying on cases. It is an argument for doing theory well, so that we do not generate overly-broad theory which carries with it incorrect implications.”

due to the lack of analogy-schema hardwiring. In order to maintain flexibility in legal analogical reasoning one therefore “must analyse competing analogies if one is seeking the best plausible justification.”

**Prediction and Insight**

Why do we compare the novel with the familiar? One reason is the search for a didactic that will shed new light onto the nature of both source and target analogue. Another reason is a desire to provide an hypothesis about a novel target analogue based upon what is known about a familiar source analogue. As indicated above, a key issue in both situations is the *quality* or strength of the points of comparison.

This separate weighing of the “aptness” of the points which are mapped in any process of analogical problem solving is a crucial aspect of the process.

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64 Murray, JR, "The Role of Analogy in Legal Reasoning" (1982) 29 *UCLA Law Review* 833 at 845 (emphasis added). It should be conceded though that even a seemingly disinterested consideration of the most appropriate alternative hypotheses is itself open to unintentional biases and influences such as so called “compromise effects” and “contrast effects” (Kelman, M, et al, "Context-Dependence in Legal Decision Making" (1996) 25(2) *The Journal of Legal Studies* 287 at 288-289.

65 “The effectiveness of analogy is based on the relevance of the similarities, not the quantity of similarities.” Murray, JR, "The Role of Analogy in Legal Reasoning" (1982) 29 *UCLA Law Review* 833 at 853; & “Perhaps the single most important feature of argument by analogy is this: in order for an argument by analogy to be compelling – to have what I have called rational force – there must be sufficient warrant to believe that the presence of an ‘analysed’ item of some particular characteristic or characteristics allows one to infer that presence in that item of some particular other characteristic.” Brewer, S, "Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy" (1996) 109(5) *Harvard Law Review* 923 at 965.

66 “For example, the number of similarities between two situations is not necessarily relevant to that value of the analogy. Two analogues can be similar in many respects, and yet one difference between them may destroy the value of the analogy … Obviously, it is the relevance and significance, not just the quantity, of the similarities between two analogies that determine the worth of the analogy.” Murray, JR, "The Role of Analogy in Legal Reasoning" (1982) 29 *UCLA Law Review* 833 at 852; & Sunstein, CR, "On Analogical Reasoning" (1993) 106(3) *Harvard Law Review* 741 at 743-746 & 773-781.
As explained, models of comparison can often only survive rigorous empirical scrutiny if they are either sufficiently bare (or “analogical”), in which case their predictive value is highly questionable, or highly sophisticated (“metaphorical”), in which case they risk becoming abstracted into irrelevance. A comparison which is more highly structured than a bare analogy based upon mere attributional analysis, but which avoids purely figurative metaphorical abstraction, is that which is most compelling. In other words, where possible, the most instructive analogy in developing theory to suit a novel problem is one which takes account of attributional similarities but also considers internal-relational similarities between source and target. As Joo has aptly stated:

A structured analogy can be a useful heuristic. It can generate hypotheses in an orderly fashion: a number of structured correspondences suggest a structured schema from which we can extrapolate further correspondences. Figurative metaphors, however, lack a structure to guide the process of schema formation and exploitation.

**ANALOGY & METAPHOR IN LEGAL REASONING**

As already indicated, analogical and metaphorical thought are both widely evident in the context of problem-solving. In the words of one scholar, “the core activity of

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lawyers entails problem-solving and the making of decisions.”  

Legal problem-solving is no exception, indeed it has been stated that; “Reasoning by analogy is the most prevalent form of legal reasoning.”  

Analogy is central to the doctrine of precedent as it is applied in the common law system when resolving case disputes, resolving broad questions of jurisprudence, and in statutory interpretation.  

In a fairly recent Australian High Court negligence judgment, McHugh J made the following observations about the utility of developing law by analogy:

> Analogical reasoning therefore reduces the cost of decision-making and the chance of error. Where the background of legal decision-making is relatively fixed, the range of evidentiary materials is narrower than is usual where a case is to be decided by vague standards or relatively indeterminate principles. This reduces the cost of litigation and the cost per case of providing public courts. It also makes it easier for professional advisers to predict the outcome of litigation with the result that costly litigation can be avoided or, at worst, settled at an early stage when the relative strengths of the opposing cases become apparent. Where the

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background is relatively fixed, there is also less chance that appellate courts will take a
different view of the material facts from that of the trial court, thus discouraging appeals and
preventing the defeat of the expectations of the successful party at the trial.\(^76\)

Relevant areas of settled jurisprudence could therefore provide a rich source of
guidance in the exegesis of the jurisprudence of incorporated associations. As
alluded to by McHugh J in the above passage, this possibility gives hope both to the
student of legal theory searching for certainty, and the legal practitioner seeking
guidance and economy in the process of administering the law.

So far as the current investigation is concerned, it is as well to note that in his
cautionsary paper Professor Greenfield observes that “metaphor drives much of the
debate within corporate law jurisprudence and corporate law scholarship.”\(^77\) As has
been indicated above metaphor can be a flawed basis upon which to generate sound
legal theory if followed too slavishly. Justice Benjamin Cardozo warned in the third
decade of the last century that; “Metaphors in law are to be narrowly watched, for
starting as devices to liberate thought, they often end by enslaving it.”\(^78\) Brennan J
(as he then was) of the Australian High Court was more expansive when stating that:

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\(^{75}\) Hunter, D, "Reason Is Too Large: Analogy and Precedent in Law" (2001) 50(Fall) Emory
Law Journal 1197 at 1233.

\(^{76}\) Crimmins v Stevedoring Industry Finance Committee (1999) 74 ALJR 1 at 15. See also
Sherwin, E, "A Defense of Analogical Reasoning in Law" (1999) 66 University of Chicago
Law Review 1179 at 1186.

\(^{77}\) Greenfield, K, "From Metaphor to Reality in Corporate Law" (2000) 2(1) Stanford Agora 59
at 59.

\(^{78}\) Berkey v Third Avenue Pty 244 NY 84 (1926) at 94-5 quoted in (1999) 11 BLR 259 at 259.
DeMott has also observed that while “(r)aison by analogy on the basis of observed
similarities is, of course, a conventional source of insight … passing too quickly over
dissimilarities leads to confusion, not insight.” (DeMott, DA, "Shareholders as Principals" in
Ramsay, IM, (Ed) Key Developments in Corporate Law and Trust Law: Essays in Honour of
Professor Harold Ford, LexisNexis Butterworths, Chatswood, 2002). See also Greenfield,
K, "From Metaphor to Reality in Corporate Law" (2000) 2(1) Stanford Agora 59 at 61;
Analogical reasoning is the handmaid of strict logic in developing the common law … When a legal rule or result is attached to certain relationships or phenomena, the perception of similar characteristics in another relationship or phenomenon leads to the attachment of a similar legal rule or result. Unless the analogy is close, the applicability of the legal rule or analogy to the supposedly analogous relationship or phenomenon is doubtful. It is fallacious to apply the same legal rule or to attribute the same legal result to relationships or phenomena merely because they have some common factors; the differences may be significant and may call for a different legal rule or result. Judicial technique must determine whether there is a true analogy.79

This cautionary advice is echoed by Professor Dan-Cohen who suggests that simultaneously investigating multiple (as opposed to mixed) metaphors or analogies may be a way of overcoming some of the cognitive constraints and enlarge legal thought:

Given the dubious status of metaphors as intellectual tools, even readers who agree that the person metaphor is inadequate and leads all too easily to unthinking anthropomorphism may doubt that legal thinking about organizations will be helped by instituting another metaphor in its place.80

Expressing similar views, Professor Sunstein observes that:

Analogical reasoning can go wrong when one case is said to be analogous to another on the basis of a unifying principle that is accepted without having been tested against other possibilities, or when some similarities between two cases are deemed decisive with insufficient investigation of relevant differences … When these problems occur, the right response is to say that the court has not properly engaged in analogical reasoning. It is a part of

79 Dietrich v The Queen (1992) 177 CLR 292 at 322.
80 Dan-Cohen, M, Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society, University of California, Berkeley, USA, 1986 at 41; and “Although we have seen that every stage of a [sic] analogical argument need not be explicit or methodical to be useful, the role of analogy as justification is legitimate only if all the relevant analogies can be examined within the constraints of a legal opinion.” (Murray, JR, "The Role of Analogy in Legal Reasoning" (1982) 29 UCLA Law Review 833 at 859); Blasi, GL, "What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory" (1995) 45(3) Journal of Legal Education 313 at 358; and Markman, AB & Moreau, CP, "Analogy and Analogical Comparison in Choice" in Gentner, D, et al, (Ed) The Analogical Mind: Perspectives from Cognitive Science, MIT Press, Cambridge, USA, 2001. See also Lewis, CS, "Bluspels and Flalansferes" in Black, M, (Ed) The Importance of Language, Prentice
the analogical method, as I understand it here, that judges must identify and test the possible available principles, and evaluate them against one another.\textsuperscript{81}

As noted elsewhere, much scholarship has sought to chart a sure course through the \textit{terra incognita} of incorporated associations based upon long experience of the familiar territory of company law.\textsuperscript{82} However, given that in ancient times \textit{terra incognita} was usually identified with phrases such as “Here there be dragons”,\textsuperscript{83} it is well to proceed with caution. On the specific question of the validity of analogising from company law into the incorporated associations context, Cooke J of the New Zealand High Court\textsuperscript{84} observed:

The law or practice relating to limited liability companies is not necessarily a helpful analogy in approaching [incorporated society] cases. The doctrine of ultra vires in company law was evolved mainly to protect investors and creditors. The same considerations are not easily

\begin{itemize}
\item Delivering judgment on behalf of the full bench, the other justices being Richardson, McMullin and Somers JJ and Sir Thaddeus McCarthy.
\end{itemize}
transportable to cases where the *raison d'être* of an organization is not to make profits but to promote a certain activity.\(^85\)

It is clear that the trading company corporate form is a source analogue that can be readily applied to incorporated associations. It is also clear that this source analogue is familiar to experienced legal problem solvers engaged in the analogical process with respect to the incorporated association as a novel corporate form. The research considered above strongly suggests that such experienced practitioners may be disadvantaged by their very expertise.\(^86\) The consideration of a variety of alternative source analogues offers the potential to bring fresh insights and offer alternative hypothetical premises to the task of understanding incorporated associations in new and more meaningful ways.\(^87\)

Given this background of learned commentary, it is both valid and indeed necessary to consider more than one possible analogy in the development of a jurisprudence of incorporated associations. As noted above, the most orthodox analogy is the modern


trading corporation, that is to say the company.\textsuperscript{88} This analogy will be explored in detail below. However, I will also introduce and give critical consideration to three alternative analogies which are reasonably settled in our law, these being the charitable trust, the eleemosynary corporation and the closely held trading company.\textsuperscript{89} In providing a variety of alternative source analogies, it is hoped that enough evidence will be provided to either confirm or refute the primacy of the modern trading company as the preferred source analogue for incorporated associations.\textsuperscript{90}

The Trading Company Paradigm

Perhaps the most familiar and therefore most immediately compelling source of analogy for incorporated associations is the modern trading company. Numerically, the vast majority of company incorporations involve small closely held corporations. For this reason, special consideration is given below to the closely held trading company. However it must be stressed that the great bulk of corporate law scholarship is focussed on the large, publicly listed modern trading corporation. It is therefore important to consider the nature of the large modern trading company as the most common scholarly articulation of the corporation. It has been suggested that the law relating to the trading company has been refined close to the point of

\textsuperscript{88} For example, Sievers observes that “It has always been assumed that committee members of incorporated associations are in a similar position to company directors and owe similar fiduciary duties to the association although there is very little authority on this point.” (Sievers, AS, \textit{Associations and Clubs Law in Australia and New Zealand}, 2nd ed, Federation Press, Annandale, 1996 at 121). See also White, DJ, "The Law Relating to Associations Registered under ‘the Incorporated Societies Act 1908’", Master of Laws Honours thesis, Victoria University of Wellington, Wellington, NZ, 1972 at 11.

\textsuperscript{89} As I am concerned to make the findings of this thesis equally applicable to both Australia and New Zealand, the company limited by guarantee will not be resorted to as a potential source analogue.
completion at the dawn of the third millennium. Whether this is indeed the case or not, the current dominant conception of the trading company’s most significant legal features has been conveniently summarised by Professor Hansmann in the following terms:

1. Full legal personality, including well-defined authority to bind the firm to contracts and to bond those contracts with assets that are the property of the firm as distinct from the firm’s owners,
2. Limited liability for owners and managers,
3. Shared “ownership” by investors of capital,
4. Delegated management under a board structure, and
5. Transferable shares.

This summary of the characteristics of the modern trading company is a useful structure upon which to base a more detailed consideration. To this list, I would add “raison d'être” on the basis that it has been judicially identified as a possible delineating feature as between incorporated associations and trading companies. Such a consideration of the trading company will then assist in evaluating the usefulness of the trading company as a legal analogy for the student of incorporated associations.

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Raison D'être

It is generally accepted that the *raison d'être* of the modern trading company is something akin to the rather vague notion of “maximising shareholder wealth”. The sufficiency of such an objective is of course debatable both normatively, and in terms of its particularity. However, leaving such questions to one side, given the abolition of the doctrine of ultra vires as it applies to trading companies, and the limited opportunity for shareholder involvement in company management, further consideration of the objectives of trading companies is probably not profitable. The only exception to this proposition would presumably be the “No-Liability” company.

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93 Eisenberg, MA, "An Overview of the Principles of Corporate Governance" (1993) 48 The Business Lawyer 1271 at 1275; Blair, MM & Stout, LA, "Director Accountability and the Mediating Role of the Corporate Board" (2001) 79(2) Washington University Law Quarterly 403 at 405. See also Eisenberg, MA, "The Structure of Corporation Law" (1989) 89 Columbia Law Review 1461 at 1461: “A Corporation is a profit seeking enterprise of persons and assets organized by rules.”; and, Greenfield, K, "From Metaphor to Reality in Corporate Law" (2000) 2(1) Stanford Agora 59 at 64 “Let me suggest that one useful way to think of these issues is to look at corporate law as regulation.”


96 See the heading “Closely Held Companies” below, and Carpenter, CE, "Should the Doctrine of Ultra Vires Be Discarded?" (1923) 33 Yale Law Journal 49.

**Full (and Separate) Legal Personality**

The current meaning attached to this characteristic of trading corporations is radically different from that which it originally connoted. As indicated in the previous chapter, this concept originally amounted to little more than legal “visibility” in the sense of the actor’s “personae”. Incorporation granted a group of individuals the ability to acquire, hold, enforce and dispose of legal rights and interests, and have legal claims enforced against it, all in the group name rather than the names of all the group members. Nevertheless, the notion of the corporation being a legal entity that was entirely “separate” from the individual members took a long time to take root in the common law tradition.

The development of concepts such as the trust and double entry bookkeeping served to provide a logical basis for separating the legal and financial affairs of the commercial trading enterprise from those if its constituent members. Such a conceptual framework also assisted in the articulation of what such separateness might mean to, and require of, the various participants in the group enterprise. The modern trading company, with its origins in the joint stock companies of the

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99 See chapter 1 under the heading “Fiction/Concession” Theories.


eighteenth century, can be traced directly back to the partnership business form.\textsuperscript{103} It was not until 1897 and the case of Salomon’s boot-making business\textsuperscript{104} that limited liability as a corporate characteristic took on its modern form.

The most recent development with respect to this characteristic of the trading corporation has been the abolition of the so-called doctrine of ultra vires and the statutory imbuing of trading companies with the full legal personality of a natural person.\textsuperscript{105} The effect of this development has been to allow the unhindered management of trading corporations by those to whom the constituent documents grant management power. Important exceptions to such full and free legal personality include the Australian No-Liability company innovation which is permitted only to operate as a mining company;\textsuperscript{106} the company “Limited by Guarantee” which, in certain circumstances is not permitted to issue dividends to shareholders;\textsuperscript{107} and, “Proprietary Limited” companies which are limited to 50 non-employee shareholders.\textsuperscript{108}

The consequences of this corporate attribute are profound.\textsuperscript{109} All corporate property and income is legally and (subject to any trusts), equitably owned by the company

\begin{flushleft}
\textsuperscript{104} Salomon v Salomon & Co Ltd [1897] AC 22.
\textsuperscript{105} Corporations Act 2001 (Cth) s 124.
\textsuperscript{106} Ibid s 112.
\textsuperscript{107} Ibid s 150(1).
\textsuperscript{108} Ibid s 113(1).
\end{flushleft}
itself and not by any of its corporate constituents.\textsuperscript{110} The corporation per se\textsuperscript{111} will bear sole direct liability for all of its legal actions including the liability for taxation.

\textbf{Limited Liability for “Owners” and Managers}

Limited liability is one of the most prized attributes of a trading company. However, in Australia it is probably more correct to speak of a liability continuum. Provision is made under the \textit{Corporations Act 2001} (Cth)\textsuperscript{112} for the incorporation of companies where shareholders have no liability,\textsuperscript{113} limited liability or unlimited liability\textsuperscript{114} for the debts of the trading company. The New Zealand \textit{Companies Act 1993} (NZ)\textsuperscript{115} allows for the incorporation of limited and unlimited liability companies only. The notion of an incorporated trading enterprise offering limited liability to its constituent members has been influenced greatly by two pre-existing legally recognised relational forms. As indicated above, one of these is the trust, with its separation of legal and beneficial ownership, discretionary trustee supervision and enforceable fiduciary obligations owed to beneficiaries. The other relational form that proved influential in the development of the modern trading corporation was the partnership.\textsuperscript{116} This in turn is a creature of both agency and contract law.

\begin{itemize}
  \item \textsuperscript{110} \textit{Bligh v Brent} (1837) 2 Y & C Ex 268; DeMott, DA, "Shareholders as Principals" in Ramsay, IM, (Ed) \textit{Key Developments in Corporate Law and Trust Law: Essays in Honour of Professor Harold Ford}, LexisNexis Butterworths, Chatswood, 2002 at 5.
  \item \textsuperscript{111} Blair, MM & Stout, LA, "Director Accountability and the Mediating Role of the Corporate Board" (2001) 79(2) \textit{Washington University Law Quarterly} 403 at 423.
  \item \textsuperscript{112} At s 112.
  \item \textsuperscript{113} Only available to companies formed for “mining purposes” per s 112(2).
  \item \textsuperscript{114} Limited by shares and (in the case of public company) by guarantee, and without limitation of liability respectively, per s 112(1).
  \item \textsuperscript{115} At s 97.
  \item \textsuperscript{116} Mansen, E, "One Man Companies" (1895) 11 \textit{Law Quarterly Review} 185.
\end{itemize}
While the legal affairs of members of a corporation have always been treated as being separate from those of the corporation in the first instance, this separation did not always extend to a limitation of personal liability. Where a corporation could not satisfy the claims of its creditors from available corporate property, any outstanding corporate debts could be satisfied by means of an enforced levy on corporate members. This several liability was limited only to the extent of the members’ own property. Thus can be seen the influence of partnership law on the corporate form.

Law and economics theorists postulate that the application of limited liability to shareholders was necessary for the development of modern securities markets. Without limited and definable levels of risk exposure, each individual shareholder’s personal risk from investing in a given corporation would be a factor of their personal wealth, as in the case of partnerships. This would make shares less readily transferable in practical terms and discourage securities trading.

Additional evidence of the influence of partnership law can be seen in that corporate controllers such as directors were bound to follow the corporation’s constituent documents in the same way that partners are required to comply with the terms of the partnership agreement. Where directors acted within the terms of the constituent documents, their actions effectively bound the corporation and not themselves personally in the first instance. This is directly analogous to the situation where the properly authorised acts of a partner will bind the partnership generally, except of

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117 Salmon v The Hamborough Company (1671) 1 Ch Cas 204; 22 ER 763.
course, that the directors unlike the partner in this example are not usually personally liable.

Principles of trust law have also been influential in the development of the trading corporation with respect to limited liability. For instance, the beneficiaries of a trust who have a mere expectation of future entitlements and who also have no trustee role will not be personally liable for any of the liabilities of the trust.\textsuperscript{119} This is somewhat analogous to the position of modern investor-shareholders who do not participate in corporate management.

\textit{Shared “Ownership” by Investors of Capital}

There can be no doubt that shareholders are owners of shares.\textsuperscript{120} Try to build from this bald assertion, however, and investigate what a “share” might be,\textsuperscript{121} or how exactly shareholders relate to a typical large public trading company, and one is soon caught in an intellectual quagmire.\textsuperscript{122} It is difficult to find support for the notion that corporate members might “own” a corporation in the way one “owns” other forms of

\begin{itemize}
\item \textsuperscript{120} Pennington, R, "Can Shares in Companies Be Defined?" (1989) 10 Company Lawyer 144 at 143-4; and Marlow, CG, "The Extent of Directors' Control of Share Transfers", PGradDipLaw thesis, School of Law, University of Otago, Dunedin, NZ, 1976.
\item \textsuperscript{121} Pennington, R, "Can Shares in Companies Be Defined?" (1989) 10 Company Lawyer 144.
\end{itemize}
real or personal property.\textsuperscript{123} There was at one time a dominant theory of corporate structure that viewed the shareholders in general meeting as constituting the company, and that this body engaged a board of directors to do the bidding of the general meeting under a principal-agent type relationship.\textsuperscript{124} While this partnership-type agency theory held sway, it could be said that shareholders were equitably possessed of a share in the company in the same way as partners in a firm.\textsuperscript{125} This theory lost most of its support in the common law world in the first half of the twentieth century.\textsuperscript{126}

\begin{itemize}
\end{itemize}
What I have in the previous chapter termed “narrow form organic theory” came to replace the agency-based theory. To recap, this form of organic theory stipulates that the board of directors and members in general meeting represent two separate “organs” of the trading corporation. The board of directors are typically delegated full management powers amounting to complete control over corporate assets.

Once this arrangement is established, shareholders cannot, without amending the corporate constitution, interfere with the management of the company or otherwise assert actual control over corporate assets. This means that the key indicium of “ownership”, namely the element of control or the ability to freely deal with property without impediment, resides not with the shareholders of trading corporations, but with directors. Shareholders have therefore come to be characterised in more recent times as “functionless investors” or mere “rentiers of capital”. As one

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129 Corporations Act 2001 (Cth) s 198A; and Companies Act 1993 (NZ) s 128. Automatic Self-Cleansing Filter Syndicate Ltd v Cuninghame [1902] 2 Ch 34; and John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113.
author has observed; “As their ‘ownership’ rights were steadily eroded, shareholders ‘surrendered a set of definite rights for a set of indefinite expectations’.”

In addition, where directors do not comply with the constituent documents of the trading corporation, there was a time when such activity could result in the corporation being wound up, or at the very least have the actions declared ultra vires and set aside. The combined abolition of the doctrine of ultra vires (discussed in the previous chapter) and the statutory modification of so-called “derivative actions” by shareholders has even watered down the rights of shareholders to enforce the terms of their statutory contract with the company. At the same time the emergence of the so-called “indoor management rule” has resulted in the residual supervisory powers of shareholders being further eroded.

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Nevertheless, shareholders (or at least the majority of them) do collectively retain certain unique powers in the nature of “ownership rights”. Generally speaking, these ownership rights cannot be exercised individually but need to be exercised through meetings and votes of the shareholding cohort.\(^{137}\) This “sharing” of ownership rights is an important characteristic of the modern trading corporation.\(^{138}\) In most cases, majority decisions will bind the group. However, at common law the members of a corporation can only by unanimous consent effect particular decisions\(^{139}\) such as to wind the entity up, as in the case of the beneficiaries of a trust.\(^{140}\) Statute has modified this position to reflect the majority-rule perspective.\(^{141}\) In the event of a winding up, any surplus on liquidation is returned to the shareholders in a type of

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final capital “dividend”. This ultimate entitlement is very much in the nature of an ownership right.  

Residual property rights are stressed as a major indicium of ownership by contractarian corporate theorists. These rights are given as the justification for the unique residual power which is exercised by shareholders over trading corporations. Should a corporation become insolvent many of the ownership rights attributed to shareholders including the power to wind the company up, are lost to the shareholders, and are exercised instead by creditors. That creditors and other corporate “stakeholders” have a basis on which to assert moral and legal rights with respect to corporations is now widely accepted. Why preference should be given to shareholders over other corporate constituents by the existing legal framework is far less unanimously agreed. Indeed, the fractured nature of corporate ownership rights has caused one communitarian scholar to observe that; “When property rights have been broken up in this way, trying to identify one party as the ‘owner’ is neither meaningful nor useful”. The notion of shareholders as the sole


repository of “residual property interests” has even been criticised from within the contractarian paradigm.\textsuperscript{146}

A persuasive reason propounded by legal historicists for the identification of shareholders as the legitimate repository of residual ownership rights is the influence of the ancient usury laws, which delineated between capital (productive) financing and money (unproductive) financing.\textsuperscript{147} This has a strong resonance with the predominant culture of English common law. As indicated in the previous chapter, communitarian theory strenuously denies that shareholders possess unique and exclusive claims to “ownership” of corporations and any special status which might follow.

\textbf{Delegated Management Under a Board Structure}

The application of this purported corporate characteristic can only be said with any certainty to apply to the large bureaucratic organisations such as the larger proprietary companies, listed and unlisted public companies.\textsuperscript{148} Smaller proprietary companies are more likely to be owned and managed by more patently homogenous groups of individuals. The extent to which the idea of management being in any

\begin{itemize}
\item \textsuperscript{147} Ireland, P, "Company Law and the Myth of Shareholder Ownership" (1999) 62(1) \textit{Modern Law Review} 32 at 34-8.
\item \textsuperscript{148} Eisenberg, MA, "An Overview of the Principles of Corporate Governance" (1993) 48 \textit{The Business Lawyer} 1271 at 1278-80; Bratton, WW, "Berle and Means Reconsidered at the Century's Turn" (2001) 26 \textit{Journal of Corporation Law} 737.
\end{itemize}
sense “delegated” in such situations must therefore be discounted. Interestingly, it is in precisely such situations that the shareholders could be said to be the “owners” of the corporation. This will be discussed further with respect to closely held corporations below.

As I have already observed, the recognition of the board of directors as an independent “organ” of the corporation is one of the most significant modern developments in our corporate law.149 At the same time the indoor management rule has become pre-eminent, while the ultra vires and constructive notice doctrines have receded into the background.150 One highly significant outcome of this trend has been that the status of shareholders has been transformed from being ultimate corporate controllers, to being mere “investors” with an expectancy as to future returns. Concomitantly, directors can perhaps best be described as “autonomous fiduciaries” rather than as “agents.151 Such legal or equitable duties as are required of directors are not owed to corporate constituents, but to the corporate entity


The influence of the trust in the development of corporate law theory can readily be identified in this trend. The influence of the trust can also be observed in the readiness of the courts to hold directors to similar fiduciary duties as trustees in the discharge of their office. Nevertheless this is also an important point of differentiation between corporation and trust. Implicit in the fiduciary position of the company director is the tension between conservative fidelity on the one hand, and the more highly valued entrepreneurial risk taking and profit maximising business judgement on the other.


As is discussed below in connection with charitable trusts, such a tension is not a characteristic of a trustee.

The influence of partnership law can be observed in that (while ultra vires is no longer an issue of significance in our law of trading corporations) members can theoretically bring an action against the company where directors fail to comply with the terms of the “statutory contract” which, in part, takes the form of the corporate constitution.\(^\text{156}\) This is (imperfectly) analogous to the situation where partners are contractually bound by the terms of the partnership agreement.

The importance of realistic accountability mechanisms over the conduct of directors as corporate controllers is stressed by most scholars in the interests of efficiency.\(^\text{157}\) The nature and extent of such accountability mechanisms and the identity of those parties with responsibility for their maintenance and implementation is at the heart of modern corporate governance scholarship.\(^\text{158}\) While opinions may vary on the best mix of governance mechanisms, few would argue with the premise that managers


\(^\text{158}\) Blair, MM & Stout, LA, "Director Accountability and the Mediating Role of the Corporate Board" (2001) 79(2) Washington University Law Quarterly 403; and Farrar, JH, Corporate Governance in Australia and New Zealand, Oxford University Press, South Melbourne, 2001 at 165-202. On the governance implications of corporate debt see Simmonds, RL, Corporate
“should be held accountable precisely because they are managing assets that are not their own and because they do not personally bear all of the costs of their decisions.”

However, there is a pronounced circularity in corporate law given that the corporation for whom directors manage is itself managed by the directors. This circularity is underscored by the so-called “proper plaintiff rule”.

The issue of management supervision is one of, if not the most researched in corporate law. As indicated in the previous chapter, an entire school of contractarian corporate law theory has developed to deal with the particular problems associated with the so-called “separation of ownership and control”. A number of scholars have suggested that the principal reason why corporate regulation of managerial conduct has been singularly ineffective over the past two decades is its loss of focus on the fiduciary principles borrowed from trust law.

**Transferable Shares**

This is an aspect of trading corporations with origins in partnership law. Subject to the terms of the partnership agreement, a partner is usually permitted to transfer their

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160 This highlights the need for “mandatory rules” dealing with directors being a matter for corporate law (Eisenberg, MA, "The Structure of Corporation Law" (1989) 89 *Columbia Law Review* 1461).

161 See the discussion of “agency theory” under the heading “Contractarian Theories” in chapter 1.

economic interest in the partnership to another individual. Constitutional restrictions on the transferability of shares in proprietary companies and some public companies are commonplace. However, the proposition holds true that shares in trading corporations have traditionally been transferable. Indeed this is a prerequisite to eligibility for listing on the stock exchange.163

The Closely Held Company

As identified above, the law relating to the large modern trading corporation is based on key structural characteristics that have been said to have been refined close to perfection.164 However, it is generally accepted that most company incorporations involve small closely-held companies.165 There is also a considerable body of

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163 ASX Listing Rule 8.10.


165 Tomasic, R, et al, Corporations Law in Australia, 2nd ed, Federation Press, Annandale, 2002 at 171; and Lipton, P & Herzberg, A, Understanding Company Law, 11th ed, Thompson Lawbook Co, Sydney, 2003 at 74 (“Proprietary companies are by far the most popular type of company. They outnumber public companies by a ratio of approximately 50 to 1.”) Bonollo, F, “The Nexus of Contracts and Close Corporation Appraisal” (2001) 12 Australian Journal of Corporate Law 165 at 176, “It is well documented that the proportion of closely-held corporations to all companies is very high. For example, the UK Department of Trade and Industry has recently stated that, in the United Kingdom, “over 70% of companies have only one or two shareholders. Some 90% have fewer than five shareholders.” Based on a small-scale survey, the DTI found that a significant proportion of those companies would have “complete identity of directives and shareholders.”” Dugan, R, et al, Closely Held Companies: Legal and Tax Issues, CCH New Zealand Ltd, Auckland, NZ, 2000 at 22 “It is estimated that over 90% of the companies registered under the 1955 [New Zealand] Act were private companies.”; and at 3 “Closely-held companies are different from other corporate entities. First, the sheer number of closely-held companies gives them an economic and social significance. A sample of 100 companies registered under the 1993 Act indicates that 86% of the 200,000 registered companies in New Zealand have only one or two members, and 95% have fewer than five members.” It appears also that closely-held companies “comprise the vast majority of corporations in the United States.” (Hochstetler, WS &
literature that indicates that small closely-held companies, while exhibiting the same structural qualities as large modern trading corporations, do present certain specific theoretical problems and issues.\textsuperscript{166} Firstly however, I must define what I mean by a “small closely-held company” in this context. Opinions on this matter differ.\textsuperscript{167} In Australia, under the \textit{Corporations Act 2001} (Cth) ss 112 & 113 a “proprietary company” structure is an incorporation option for a company which is limited by shares, or unlimited, with a share capital having no more than 50 non-employee shareholders (s 113). In addition, proprietary companies are not permitted to engage in any activity that would require the preparation of a prospectus. That is to say, there are limitations on the company’s ability to issue securities on the primary market.

In New Zealand, the current \textit{Companies Act 1993} (NZ) does not provide for differentiated classes of company. However, its predecessor in time, the \textit{Companies Act 1955} (NZ) (“1955 Act”), did so provide. Under New Zealand’s 1955 Act


provision existed for the formation of so-called “private companies”. This allowed for a company consisting of at least two, but not more than 25, members to be able to form a private company. Both the 1955 Act in New Zealand, and the Corporations Act 2001 (Cth) in Australia, contained and contain respectively special provision for small closely held companies. In the United States, the Model Statutory Close Corporations Supplement to the Model Business Corporations Act allows\(^{168}\) for specific incorporation of closely-held companies by 50 or fewer shareholders.\(^{169}\) This restriction on the numbers of shareholders is widely regarded as the most significant defining feature of the closely-held company.\(^{170}\)

The consequence of the small shareholder cohort which is evident in small closely-held corporations is that there is often a strong positive correlation between the membership of the board of directors and the shareholders’ register. Indeed this could be said to be a defining quality of truly closely-held corporations or companies.\(^{171}\) Taking each of the characteristics of the trading company that were identified above in turn, I will now consider how each applies, or fails to apply, with regard to closely-held companies.

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\(^{168}\) At s 3.


\(^{171}\) Professor Eisenberg has defined the closely held corporation as “corporations that have a small number of shareholders, most of whom either participate in or directly monitor corporate management.” (Eisenberg, MA, "The Structure of Corporation Law" (1989) 89 Columbia Law Review 1461 at 1463). See also Hochstetler, WS & Svejda, MD, "Statutory Needs of Close Corporations - an Empirical Study: Special Close Corporation Legislation or Flexible General Corporation Law?" (1985) 10 Journal of Corporation Law 849 at 852 & 865.
**Raison D'être**

As indicated above the *raison d'être* of a large public trading corporation is to maximise shareholder value (wealth). This is a very broad and general corporate purpose and is very much in line with the proposition that modern trading corporations have the full legal personality of a natural person. As I have already indicated, this is also consonant with the trend of modern company law, which has seen the abolition of the doctrine of ultra vires\(^{172}\) and a decline in the amount of direct influence that may be exercised on directors by shareholders.

Whether or not the same can be said to be true of small closely-held companies is a point of some conjecture.\(^{173}\) As noted above, directors of large trading companies look to the corporate constitution and the relevant statute for justification of the very wide discretionary powers of management that are concentrated in their hands.\(^{174}\) However, as discussed below\(^{175}\) the literature indicates that these may not be the only sources of legitimacy for the authority (and any restrictions on authority) of directors of closely-held companies.\(^{176}\)

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\(^{172}\) *Corporations Act 2001* (Cth) Chapter 2B; and *Companies Act 1993* (NZ) s 16.


\(^{175}\) See the discussion at the heading “Delegated Management” below.

**Full Legal (and Separate) Personality**

As already mentioned, all companies in Australia and New Zealand have the full natural legal personality of a natural person.\(^\text{177}\) In addition, since at least 1897 all companies (whether large or closely-held) have as a matter of law been held to be legal entities separate from their shareholders or directors.\(^\text{178}\) This, however, has to be read in light of the fact that, in the case of a small closely-held company, a specific shareholder agreement may exist, having contractual effect between shareholders in their capacity as shareholders and also in their capacity as directors.\(^\text{179}\) An established line of authority\(^\text{180}\) indicates that shareholders can sue to enforce their rights as shareholders under the “statutory contract” provided at *Corporations Act 2001* (Cth) s 140.\(^\text{181}\) However courts are reluctant to enforce purely personal rights in the hands of shareholders on the basis of a corporate constitution.\(^\text{182}\) Courts have instead allowed shareholders to enforce such generic rights as, for instance, the right to vote,\(^\text{183}\) the right to participate in regularly

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\(^\text{177}\) *Corporations Act 2001* (Cth) Chapter 2B; and *Companies Act 1993* (NZ) s 16.

\(^\text{178}\) *Salomon v Salomon & Co Ltd* [1897] AC 22; and *Lee v Lee’s Air Farming Ltd* [1961] AC 12.


\(^\text{181}\) The *Companies Act 1993* (NZ) eschews the statutory contract model but does leave room for extensive shareholder agreements as separate binding contracts (Dugan, R, et al, *Closely Held Companies: Legal and Tax Issues*, CCH New Zealand Ltd, Auckland, NZ, 2000 at Chapter 9).


\(^\text{183}\) *Pender v Lushington* (1877) 6 Ch D 70.
constituted and properly conducted meetings\textsuperscript{184} etc.

As a consequence, in most countries\textsuperscript{185} the practice has grown up whereby shareholders of closely-held corporations often execute a separate shareholder agreement which binds shareholders and directors in an enforceable contract under general contract law principles to observe certain forms of conduct in the discharge of their various duties and functions.\textsuperscript{186}

This shareholder agreement is very much in the nature of a partnership agreement.\textsuperscript{187} This is one point at which one must accept the close correlation between the structure and conduct of closely-held corporations and the structure and conduct of partnerships. Of course, this is not without its problems given the fact that a partnership is not viewed as a separate legal entity. For example, the similarity between closely-held corporations and partnerships has led to occasional lifting of the corporate veil in order to ascertain whether or not personal liability for various

\begin{itemize}
\item \textsuperscript{184} Efstathis v Greek Orthodox Community of St George (1988) 6 ACLC 706.
\end{itemize}
actions should apply to individual directors or shareholders.\textsuperscript{188} It is well settled that personal liability may attach to individual partners of a partnership for unauthorised or fraudulent acts or acts that are committed in breach of partnership fiduciary duties. This has some similarity to the situation where the authority delegated to directors of a closely-held corporation may be modified, restricted or otherwise circumscribed under the terms of both the corporate constitution and any shareholder agreement that might be executed outside of the corporate constitution.\textsuperscript{189} A breach of such provisions would open the possibility for recovery from the director in breach by either their fellow board members or shareholders depending on the terms of such agreements and restrictions.

However, for present purposes it is sufficient to stress the fact that any shareholder agreement in addition to the corporate constitution, or replaceable rules, may provide for restrictions or limitations on the powers of directors to manage the business of the company.\textsuperscript{190} Such an agreement may also bind all of the shareholders and directors to a course of corporate action, or a nature of corporate business which is contractually binding on all parties notwithstanding any judicial policy regarding a corporate constitution. This is in sharp contradistinction to the state of affairs pertaining to large public companies where restrictions that may be placed on the

\textsuperscript{188} Re Darby [1911] 1 KB 95; Gilford Motor Co Ltd v Horne [1933] Ch 935; Creasey v Breachwood Motors Ltd (1992) 10 ACLC 3,052; and Ascot Investments Pty Ltd v Harper (1981) 148 CLR 337.


discretion of directors are notoriously difficult to enforce.\textsuperscript{191} This is a strong point of similarity between the trading corporation and the trust as they are both juridically conceptualised. There is abhorrence in the common law tradition of permitting the fettering of discretion with respect to trust-like powers.\textsuperscript{192}

**Limited Liability**

It is significant to note that in many cases all or a substantial proportion of the personal assets of individual shareholders will have been invested into the small closely-held corporation.\textsuperscript{193} As a consequence, the failure of the company will also often entail personal bankruptcy. This combined with the fact that most lending institutions would require personal guarantees from shareholders or directors of closely-held companies, allowing recourse to the personal assets of these shareholders or directors, compromises the effect of the limited liability status of small closely-held corporations in practice.\textsuperscript{194}


There are also compelling arguments questioning the suitability of this corporate attribute for small trading enterprises.\textsuperscript{195} The potential vulnerability of so-called “involuntary creditors” or tort victims of closely-held company activities is particularly in issue. The core question is the possible link between potential personal liability and risk-taking on the part of closely held company shareholders and managers.\textsuperscript{196}

\textbf{Shared Ownership by Investors}

By definition small closely-held corporations are financed and “owned” (in the ambiguous sense of share ownership discussed above) by employees or directors rather than by investors. As indicated in the previous paragraph, this often means that all or a significant portion of the personal assets of individual shareholders are vested in the small closely-held corporation.\textsuperscript{197} This creates a number of problems which are exacerbated in many cases by the provisions of the corporate law in a particular jurisdiction and also by the existence of any shareholder agreement.

Given the restrictions which may exist on the entry and exit of capital investors in small closely held companies (both constitutionally and in terms of a separate shareholder agreement) there is a pronounced lack of liquidity of share ownership in


\textsuperscript{197} Hochstetler, WS & Svejda, MD, "Statutory Needs of Close Corporations - an Empirical Study: Special Close Corporation Legislation or Flexible General Corporation Law?" (1985)
these corporations. This is understood to be amongst the most significant theoretical and practical issues facing small closely-held corporations in contradistinction to large public trading companies. Both the Corporations Act 2001 (Cth) and the Companies Act 1993 (NZ) provide that small closely-held corporations can restrict the transfer of shares as part of the corporate constitution. As already indicated, such restrictions are designed along similar lines to the kinds of restrictions one would observe in standard partnership agreements. These agreements commonly stipulate that either the company or the remaining shareholders should have the first right of refusal on the sale of a share of the business. Certain clauses may even stipulate that the price of such a sale will be determined by the remaining shareholders. It is also conceivable that in situations of deadlock or freeze-out by remaining shareholders, a serious oppression of the exiting shareholder may occur. Given that unlike a partnership, a company has perpetual succession, intractable


At s 1072G.

At ss 84-87.

Marlow, CG, "The Extent of Directors' Control of Share Transfers", PGradDipLaw thesis, School of Law, University of Otago, Dunedin, NZ, 1976 at Chapter IV.


problems such as these will not necessarily be resolved with the mere effluxion of time.\textsuperscript{204}

This is a problem which has been identified by a variety of scholars. From a purely contractarian position this is a matter for contract before the investor chooses to invest in the closely-held corporation and it is not a matter for regulation of any kind.\textsuperscript{205} However, given the existence of bounded rationality, and the lack of perfect knowledge or perfect markets, it has been equally argued that certain default mechanisms should be provided in legislation.\textsuperscript{206} Two mechanisms which have been recommended by scholars in this regard are firstly what is known as “appraisal rights” and secondly, a statutory fiduciary duty between shareholders of closely-held companies.

In the event that a shareholder of a closely-held corporation wishes to liquidate their investment in the company, statutory appraisal rights safeguard the right of such persons to have an independent valuation placed on their share of the business, with a default remedy to the courts. The courts would then be required to provide fair market value in the legislation.\textsuperscript{207} This may address instances of oppression by

\begin{thebibliography}{99}
\bibitem{204} Eisenberg, MA, "The Structure of Corporation Law" (1989) 89 \textit{Columbia Law Review} 1461 at 1464.
\end{thebibliography}
remaining shareholders who choose to undervalue the exiting shareholders’ shares where such an outcome is permitted under the shareholder agreement.

The second proposed statutory methodology advocated by scholars for the prevention of oppression of exiting shareholders is the introduction of a statutory fiduciary duty between shareholders of closely held companies.208 It is argued that such a qualitative regulation could provide redress for oppressed shareholders by means of appeal to a court. Appeal for redress would be on the basis that they have not been dealt with in utmost good faith and that the court should consider whether in all of the circumstances it should make appropriate remedial orders.

**Delegated Management**

In a partnership, all partners (unless they are operating under a limited partnership) have the right to participate in the management of a partnership subject to alternative provision in the partnership agreement.209 In other words, the right to participate in management and the right to participate in partnership decisions is not based on contributions to capital as a default rule, but on a person’s status as a partner.

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209 Partnership Act 1958 (Vic) s 28(5); Partnership Act 1891 (Tas) s 29(e); Partnership Act 1891 (SA) s 24(e); Partnership Act 1891 (Qld) s 27(e); Partnership Act 1997 (NT) s 28(e); Partnership Act 1892 (NSW) s 24(5); Partnership Act 1963 (ACT) s 29(5); Partnership Act 1895 (WA) s 34(5); and Partnership Act 1908 (NZ) s 27(e).
This per capita voting entitlement does not strictly apply in corporate law. Under corporate law each shareholder has the right to vote and, where votes are taken on a show of hands, each shareholder has an equal say in a vote. However, a poll can be demanded at any time and a poll is decided on the basis of one share one vote. Alternative provisions in the constitutions of small closely-held companies or in separate shareholder agreements may operate along the same lines as those partnerships. However, in their absence, the corporate law default position could result in undue hardship on a minority shareholder who is “frozen out” of company management. At the same time such a minority shareholder could face the double jeopardy of being unable to freely (and fairly) transfer an investment in the company to another party that constitutes all or most of their net wealth.

Whether or not management is delegated to managerial specialists is very much decided on a company-by-company basis. However Professor Hansmann stresses that one of the most significant aspects contributing to the social cohesion of small closely-held employee-owned firms is what he refers to as “the homogeneity of interest”. Indeed he suggests that without homogeneity of interest, a closely-held firm is more than likely to revert to some form of public ownership either by being

211 Corporations Act 2001 (Cth) ss 250E & 250J; and Companies Act 1993 (NZ) Sch 1 cl 5 & 7.
sold up or by being converted into a public company.\textsuperscript{215} This is because, as Hansmann indicates, the cost of collective decision-making can be very high in small owner-operated enterprises.\textsuperscript{216} This is one of the most significant advantages of the large modern trading corporation. A large body of shareholders will have a wide range of different views on any collective decision that has to be made, and therefore the likelihood of making efficient decisions and cost-free or low cost decisions is unlikely. These costs are eliminated in the large public trading company through the use of specialist delegated management.\textsuperscript{217}

One of the greatest pressures facing small closely-held corporations is therefore to maintain a homogeneity of interest between owners. Where this homogeneity is damaged, or in some way compromised it is more than likely that a closely-held firm will fail. This of course places constitutional clauses such as those stipulating corporate objects on the one hand, and any terms concerning the management of the enterprise in any shareholder agreement on the other in a central position in the case of a small closely-held corporation.\textsuperscript{218} The assumption that in successful closely-held companies there is a strong homogeneity of interest is the principal reason for relaxing many of the regulatory formalities facing large trading companies in the context of the small closely-held company.\textsuperscript{219}

\begin{flushright}
\textsuperscript{216} Ibid at 90-1.
\textsuperscript{217} Ibid Chapter 6.
\textsuperscript{219} Ibid at 910.
\end{flushright}
As has been stressed by scholars since Berle and Means, the delegated management model is essential in large bureaucratic trading companies. However, from a contractarian perspective, this requires the introduction of agency-related mechanisms to adequately monitor management. Conversely, management is not typically delegated to such an extent in the case of small closely-held companies.\textsuperscript{220} This is felt to be the greatest strength of small closely-held corporations where the owners are the managers. Such owner/managers are in a good position to monitor themselves and their owner/manager colleagues to avoid such problems as shirking and other inefficiencies. In the alternative, however, where there is a disagreement between owner/managers of a small closely-held corporation the problems of deadlock and freeze-out become manifest.\textsuperscript{221}

\textbf{Transferable Shares}

As indicated above, one of the key characteristics of a small closely-held corporation is that restrictions are usually placed on the ability of shareholders to transfer their shares, somewhat along the same lines as may be found in a partnership agreement. However in the case of partnerships (which in any case are always formed for a defined term) at will, these can be readily dissolved at the instance of each individual partner.\textsuperscript{222} Given the corporate characteristic of perpetual succession, this is not the case with small closely-held corporations subject to separate shareholder agreements

\begin{flushleft}
\textsuperscript{220} Ibid at 853 & 901-4.
\end{flushleft}
and constitutional restrictions on transferability of shares.\textsuperscript{223} The consequences of this situation in situations involving deadlock and freeze-out have been identified above.

The Charitable Trust\textsuperscript{224}

\textit{Definition and Status}

In order to define a charitable trust, the first concept which must be determined is that of the trust generally. A trust arises where one or more persons (the trustee/trustees) hold property (trust fund/corpus) either for the benefit of another person or persons (the beneficiary/beneficiaries) in the case of a private trust, or to accomplish some specified “charitable” purpose in the case of a public charitable trust.\textsuperscript{225} This is rendered diagrammatically in figure 2 below:

\begin{center}
\end{center}

\begin{itemize}
\item \textsuperscript{223} Hochstetler, WS & Svejda, MD, "Statutory Needs of Close Corporations - an Empirical Study: Special Close Corporation Legislation or Flexible General Corporation Law?" (1985) 10 Journal of Corporation Law 849 at 845.
\item \textsuperscript{224} See Sitkoff, RH, "An Agency Costs Theory of Trust Law" (2004) 89 Cornell Law Review 621 for an excellent treatment of private trust law from a contractarian perspective. The significance of Hansmann’s “asset partitioning” referred to in the previous chapter is evident in this work.
\end{itemize}
Private Trust

Charitable Trust

For the benefit of

To Achieve a

Figure 2

As trusts are a creature of equity they have no common law status. However trust property is always treated as a separate “corpus”. As indicated in the previous chapter, this has led a number of scholars to postulate that the trust is in fact the progenitor of the corporation. A trust places legal ownership, and commonly broad discretion regarding the utilisation of trust property, in the hands of the trustee or trustees. Trustees are thereafter under equitable duties to administer the trust property strictly in accordance with the terms of the trust.

At common law there is very little difference between a trustee and the absolute owner of property. In equity, however, the trustee is personally obliged to deal with

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the trust property for the benefit of the stipulated beneficiaries or for the purposes identified in the trust deed.  These obligations, while unenforceable against the trustee at common law, are nevertheless enforceable against the trustee in person in equity. Among the foremost of the equitable obligations placed upon trustees is the fiduciary relationship. This relationship demands of trustees that they act with utmost good faith in the discharge of their duties. In addition, a trustee owes a duty to act gratuitously (that is to say without payment) unless otherwise provided for in the trust deed.

One of the problematic aspects of trusts when considering their suitability as an appropriate analogy for incorporated associations is the issue of the so called “rule against perpetuities”. This rule stipulates that trusts must “vest” (terminate) no later than a life in being plus 21 years. While this rule applies to private trusts, it does

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231 Evans, M, *Equity and Trusts*, LexisNexis Butterworths, Chatswood, 2003 at 473; “A trustee’s plainest and overriding duty is to obey the terms of the trust. This is because a trustee is duty-bound to give effect to the intention of the creator of the trust as expressed in the trust instrument, irrespective of how seemingly insignificant such terms may appear. The duty of obedience qualifies virtually all the other duties of a trustee. The trust instrument is the trustee’s ‘charter’, by which he or she must constantly be guided.” (Dal Pont, GE & Chalmers, DRC, *Equity and Trusts in Australia*, 3rd ed, Lawbook Co, Pyrmont, 2004 at 617-8). Maitland, FW, "Trust and Corporation" in Fisher, HAL, (Ed) *Fw Maitland, Collected Works*, Cambridge University Press, Cambridge, UK, 1911, 321 at 349.


234 *Cadell v Palmer* (1833) 1 Chl & F 372; 6 ER 956; Evans, M, *Equity and Trusts*, LexisNexis Butterworths, Chatswood, 2003 at 352; and Dal Pont, GE & Chalmers, DRC, *Equity and Trusts in Australia*, 3rd ed, Lawbook Co, Pyrmont, 2004 at 496-9. This “expiry date” for trusts has a statutory alternative (usually 80 years) in a number of jurisdictions (*Perpetuities Act 1984* (NSW) s 7; *Perpetuities and Accumulations Act 1968* (Vic) s 5; *Property Law Act 1974* (Qld) s 209; *Property Law Act 1969* (WA) s 101; *Perpetuities Act 1994* (NT) s 7;
not apply to charitable trusts. In effect therefore charitable trusts may carry on in perpetuity, whereas private trusts have a limited lifespan. As equity takes the view that “a trust will not fail for want of a trustee”, provision is made in the case of charitable trusts for the successive appointment of new trustees when existing trustees vacate their office. The significance of this issue is that incorporated associations as bodies corporate, and charitable trusts whether incorporated or not, are endowed with a form of “perpetual succession”. The charitable trust therefore shares an important structural similarity with incorporated associations (and indeed all corporations) which is absent in case of the private trust. This corporate characteristic is a key reason why I have discounted the private trust as a potential analogy for incorporated associations.

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Perpetuities and Accumulations Act 1992 (Tas) s 6; Perpetuities and Accumulations Act 1985 (ACT) s 8; Law of Property Act 1936 (SA) s 62; and Perpetuities Act 1964 (NZ) s 6 & 8.


237 “But the fact that the government, or the law, purports to establish a new entity, an ‘artificial person,’ should not be allowed to obscure the fact that, in reality, it does no more than it accomplishes when it recognizes a charitable trust. No more in kind, that is: in degree it generally goes considerably farther.” Baty, T, "The Rights of Ideas - and of Corporations" (1919) 33 Harvard Law Review 358 at 364.

238 “When we come to the Trading Corporation we find an entity which in many ways closely resembles that unincorporated trust. If we can imagine a partnership created by trust deed of the capital we approach very near the conception of a trading corporation. The perpetual succession which the corporation postulates is supplied in the latter case by the principle that “a trust shall never fail for want of a trustee.” Except for small and technical advantages, such as the facility of dealing with shares instead of miscellaneous property, and the simplicity of litigating with one imaginary person instead of a thousand real ones, the only remarkable feature of a trading corporation is the limited liability of its members.” Baty, T, "The Rights of Ideas - and of Corporations" (1919) 33 Harvard Law Review 358 at 368.
Raison D'être

In contradistinction to the trading company then, a charitable trust is almost entirely explicable by reference to its stated purposes as disclosed in the foundation deed.\(^{239}\) The central question with respect to charitable trusts is therefore to determine what purposes can be categorised as “charitable purposes”.\(^{240}\) This is a difficult question to answer with much specificity. The first enunciation in common law of any moment was the Preamble to the Statute of Charitable Uses 1601 (UK)\(^{241}\) which includes the following:

Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; repairs of bridges, ports, havens, causeways, churches, seabanks and highways; education and preferment of orphans; relief, stock or maintenance for houses of correction; marriage of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.

This non-exhaustive expression of charitable purposes was summarised most famously by Lord Macnaghten thus:\(^{242}\)

1) Trusts for the relief of poverty;
2) Trusts for the advancement of education;

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\(^{241}\) 43 Elizabeth I c4. (“The Statute of Elizabeth”).

3) Trusts for the advancement of religion;
4) Trusts for other purposes beneficial to the community not falling under any of the preceding heads.

In addition to the categories above, the notion of “charitable purposes” is subject to statutory modification. The most common modification has been the inclusion of trusts established for “recreational” purposes, as has occurred in New Zealand, Queensland, South Australia, Tasmania and Western Australia.243

**Management of Charitable Trusts**

The nature and enforceability of such equitable obligations as are borne by trustees is an important issue when evaluating the validity of charitable trusts as possible analogies for incorporated associations. As stated above, trusts are administered by a trustee or trustees. This management is entirely circumscribed by the terms of the trust deed. The equitable obligations of trustees, particularly with respect to charitable trusts, do not extend to purely entrepreneurial ventures. The duty is much more in the nature of preserving and protecting trust funds in the attainment of the stated charitable purposes. Indeed in the event of a trust loss as a result of a risky investment of trust corpus, a trustee may well be made to account for the loss out of

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243 The wording of the New Zealand Charitable Trusts Act 1957 (NZ) at s 61A is “recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare”; in Queensland s 103 of the Trusts Act 1973 (Qld) contains the identical phrase used in New Zealand, namely “recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare”; in South Australia s 69C of the Trustee Act 1936 (SA) refers to “recreational facilities for the public benefit”; In Tasmania, the Variation of Trusts Act 1994 (Tas) at s 4 provides that “sport, recreation or other activities associated with leisure” are within the range of charitable purposes; and in Western Australia s 5 of the Charitable Trusts Act 1962 (WA) again uses the terminology utilised in New Zealand, being “recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare”. See Dal Pont, GE & Chalmers, DRC, *Equity and Trusts in Australia*, 3rd ed, Lawbook Co, Pyrmont, 2004 at 559.
their personal assets. 244 The standard of care owed by trustees has been expressed as the standard of the “ordinary prudent business person”.245 In exercising their powers, trustees also have the duty to act personally and not to delegate their discretion.246 These features of trustee powers and obligations are significantly at odds with the nature of large modern trading companies outlined above.

The trustee of a private trust stands in a personal fiduciary relationship with the beneficiaries of the trust. Should a trustee fail to observe their equitable obligations, the beneficiaries of the trust may personally bring remedial court actions that will compel the trustee to observe these obligations and compensate beneficiaries for any loss suffered.247 This situation should be contrasted with that of a trustee of a charitable trust who does not stand in a fiduciary relationship with persons who might benefit from a charitable trust.248

It can therefore be observed that the nature of trusteeship, particularly with respect to charitable trusts, is in the nature of care and maintenance of trust property. Indeed there is specific remedy available to interested parties in the form of an action against

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trustees for “wasting” of the trust property. This must be contrasted with the requirement of directors of trading companies to be entrepreneurial risk takers with limited personal liability.

With respect to charitable trusts there are no “beneficiaries” as such who have a recognised personal equitable interest in the property of the trust such as would grant them standing to sue for enforcement of the trust deed. Rather, in a general sense the beneficiary of trusts established for charitable purposes is the public interest. Given this public nature of charitable trusts, at common law an action can only be brought by the Attorney General either in person or on relation where a trustee of a charitable trust trustee fails to observe their equitable obligations. It is possible, however, for any private person to petition the Attorney General to bring an action to enforce the charitable trust deed against the trustees. Alternatively, the Attorney may approve of a relator action being brought to the same ends. Ensuring against the likelihood of such actions, and reducing the possibility of frivolous litigation, is the potential liability of the relator to bear the costs of the action. In addition,

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249 Ibid at 474-87.
251 Maurice, SG & Parker, DB, Tudor on Charities, 7th ed, Sweet & Maxwell, London, UK, 1984 at 328 & 334; Evans, M, Equity and Trusts, LexisNexis Butterworths, Chatswood, 2003 at 384-5; Dal Pont, GE & Chalmers, DRC, Equity and Trusts in Australia, 3rd ed, Lawbook Co, Pyrmont, 2004 at 529; Attorney General v Brown (1818) 1 Swan 265 at 291; and National Anti-Vivisection Society v Inland Revenue Commissioners [1948] AC 31 at 62. This position is subject to statutory modification. See Charitable Trusts Act 1993 (NSW) ss 5-7; Trusts Act 1973 (Qld) s 106; Trustee Act 1936 (SA) ss 60-9; Supreme Court Civil Procedure Act 1932 (Tas) s 57(2); Religious Successory and Charitable Trusts Act 1958 (Vic) s 61; Charitable Trusts Act 1962 (WA) s 21; Trustee Act 1925 (ACT) ss 94A-E; and Charitable Trusts Act 1957 (NZ) s 60.
253 Ibid at 331.
interested parties with a special interest in the affairs of the charity are denied the right to bring a relator action where they are also plaintiffs.\textsuperscript{254}

The deed of a charitable trust may make provision for the power of appointment in connection with the trust, or the power to vary the trust deed, to be exercised by named parties (such as trustees) in a stated manner. Alternatively, these matters may be left to the supervisory jurisdiction of the court.\textsuperscript{255}

\textit{Limited Liability?}

As already indicated charitable trusts are formed for charitable purposes and have no ascertainable beneficiaries. The only person or persons who could conceivably face a legal action arising out of trust affairs therefore are trustees. As previously discussed, there is no limitation for personal liability where a trust loss has arisen through the breach of duty by a trustee. Alternatively, where a trust loss has arisen and there has been no breach of duty the trustee will still be personally liable in the first instance, but they will have a right of indemnity against trust assets.\textsuperscript{256} Persons who are not trustees, but who derive a personal benefit from the operation of a charitable trust, bear no potential liability for any trust loss other than the potential loss or diminution of such benefits as they may enjoy.

\textsuperscript{254} Ibid at 332.


**Shared Ownership**

As stated above, most of the usual incidents of ownership of property reside with the trustee of a charitable trust. However, the trust property must be applied to the nominated charitable purposes rather than for the benefit of the trustees per se. Likewise any persons who may benefit from the operation of a charitable trust do so only as an incident of the attainment of the trust purposes.\(^{257}\) There is no proprietary ownership of trust property by such persons other than that which they may receive gratuitously from the hands of the trustees.\(^{258}\) In this sense therefore it is facile to speak of there being an “owner of a charitable trust”. This is underscored by the fact that at common law, due to the public nature of charitable trusts, the Attorney General is the only individual with standing in their own right to enforce charitable trusts, and to bring action against charitable trustees for breach of duty. There are situations where other parties may in fact bring such an action, but with few exceptions, standing to do so will be by way of a relator action as previously mentioned or as provided by statute.

The final aspect of trust property that remains to be considered relates only to charitable trusts. This is the so called “cy-près doctrine”.\(^{259}\) Cy-près literally means

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“near to it”.\textsuperscript{260} The doctrine applies where property has been set aside for charitable purposes. Once this has been done, the property is utterly lost to the donor and must always be used for charitable purposes.\textsuperscript{261} The concept originated in the Mosaic Law requirement for religious sacrifice. This tradition considered that once property had been given over to God, it was lost forever to the donor.\textsuperscript{262} Where a gift is made and a general charitable purpose is intended, should the gift be otherwise flawed, the court can modify the terms of the gift to ensure that the property is directed so as to (as near as possible) meet the donor’s charitable intention.\textsuperscript{263} In other words, the property should be transferred to a charity as similar as possible to that which the donor originally identified. The property does not revert back to the donor in such cases, but rather becomes the responsibility of the Crown in the person of the Attorney-General who, as \textit{parens patriae}, has responsibility for all charitable activities and will give effect to the cy-près doctrine.\textsuperscript{264}

\begin{itemize}
  \item \textsuperscript{260} Nygh, PE & Butt, P, (Ed) \textit{Butterworths Australian Legal Dictionary}, LexisNexis Butterworths, Chatswood, 1997 at 316.
  \item \textsuperscript{262} Baty, T, "The Rights of Ideas - and of Corporations" (1919) 33 \textit{Harvard Law Review} 358 at 363. See Leviticus 27, especially verse 28 "nothing that a man owns and devotes to the Lord … may be sold or redeemed; everything so devoted is most holy to the Lord”.
  \item \textsuperscript{264} Evans, M, \textit{Equity and Trusts}, LexisNexis Butterworths, Chatswood, 2003 at 364; and, Dal Pont, GE & Chalmers, DRC, \textit{Equity and Trusts in Australia}, 3rd ed, Lawbook Co, Pyrmont, 2004 at 529;
\end{itemize}
The Eleemosynary Corporation

**Definition and Status**

It is perhaps somewhat misleading to consider this entity separately from charities given that the word eleemosynary itself originates in the concept of “alms-giving”. Indeed the traditional treatment of eleemosynary corporations is to include them as a particular expression of charities. Nevertheless, given that these bodies have always been specifically regarded as corporations, they are worthy of separate investigation as possible analogies for incorporated associations. This is particularly so given that the eleemosynary corporation boasts a far more impressive pedigree than that of the modern trading corporation.

Eleemosynary corporations are “constituted for the perpetual distribution of the free alms or bounty of the founder to such persons has he has directed.” Traditionally,

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there are two classes of eleemosynary corporations namely “hospitals” and “colleges”. These classes are further defined as follows:

1) Hospitals for the maintenance of the poor sick and impotent, and
2) Colleges of Oxford and Cambridge universities and elsewhere, founded for the promotion of piety and learning and the maintenance of members of such colleges.

**Raison D'être**

Eleemosynary corporations are in the common law sense therefore drawn from the broader category of charities referred to above, namely, the “hospital”. This class should be understood as referring to a body formed “for the education of impecunious scholars or for the relief, whether by way of giving food and shelter or by way of medical treatment, of the indigent poor.” Seen in this context, it is apparent that the traditional class of eleemosynary corporation referred to as colleges is but a further particularisation of a sub-class of hospitals. Given the very particular nature of such educationally focussed “hospitals” it is traditionally regarded as appropriate to consider them quite separately from other eleemosynary corporations.

Properly constituted, eleemosynary corporations require two elements namely property, and the separate legal persona of incorporated status. The property of

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273 Also known as the fundatio percipiens.
an eleemosynary corporation is held on charitable trust, the terms of which are contained in the corporate constitutional documents.\textsuperscript{275} One of the features of the eleemosynary corporation is the right of visitation which inheres in the “founder” or “endower” of the corporation.\textsuperscript{276} The visitatorial jurisdiction is a form of “supervision over the domestic affairs of an institution.”\textsuperscript{277} This jurisdiction is viewed as a type of personal property and is said to arise due to the “power everyone has to dispose, direct and regulate his own property; like the case of patronage”.\textsuperscript{278} The nature of the founder’s visitatorial power is \textit{forum domesticum}, that is to say, the “private jurisdiction of the founder.”\textsuperscript{279} While the visitatorial jurisdiction is said to be exclusive, there is a limited supervisory role played by the courts in keeping with their general supervisory function with respect to charities and trusts.\textsuperscript{280} The structure of an eleemosynary corporation has been diagrammatically represented in figure 3 below:

\begin{itemize}
\item \textsuperscript{274} Also known as the \textit{fundatio incipiens}.
\item \textsuperscript{275} Maurice, SG & Parker, DB, \textit{Tudor on Charities}, 7th ed, Sweet & Maxwell, London, UK, 1984 at 314.
\item \textsuperscript{277} Ibid at 316.
\item \textsuperscript{278} Green \textit{v} Rutherforth (1750) 1 Ves Sen 462; 27 ER 1149. This notion is quaintly captured in the Gaelic proverb “\textit{Is bean-taighe 'n luchag air a taigh fhéin.}” (The mouse is mistress in her own house.)
\end{itemize}
Management of Eleemosynary Corporations

Generally speaking, an eleemosynary corporation consists of the founder/visitor and a board of governors281 charged with the administration of the body according to its constituting documents. The final element of such a corporation is the body of members, for whose benefit the corporation exists. It is also true that most eleemosynary corporations are “collegially governed”. That is to say, there is often a large degree of consensus based, participatory management within the organization282 with ultimate power and responsibility for decisions resting with a supervisory board.283 The model is derived from the ecclesiastical origins of

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281 Sometimes referred to as a council or trustees.

282 In Oxford for example, since 1st October 2002 the governing “Council” initiates legislation which is proposed to the “Congregation” comprising senior university officials and academics. The Congregation then approves or amends this legislation before it proceeds to the Queen in Council. These are the provisions of the current University of Oxford Statutes III and IV. These statutes and the legislative history of Oxford can be viewed at: http://www.admin.ox.ac.uk/statutes/ (Accessed 17th May 2004). See also Lockley, GL, "The Foundation, Development and Influence of Congregationalism in Australia: With Emphasis on the Nineteenth Century", PhD thesis, University of Queensland, Brisbane, 1968; and Oleck, HL, "Nature of Nonprofit Organizations in 1979" (1979) 10 Toledo Law Review 962.

Monasteries and abbeys operated under the headship of a senior cleric, but were otherwise congregationally governed based on principles of fraternal equality.

**Limited Liability?**

As the eleemosynary corporation is most commonly a statutory innovation, the extent to which an eleemosynary corporation offers limited liability for corporate administrators will be decided entirely according to the terms of the constituent documents. In this regard the position is much more like the situation facing the chartered corporation. In the absence of statutory provision, limited liability has never been held to be an inherent characteristic of eleemosynary corporations. This situation is vindicated on the basis of the voluntary nature of eleemosynary corporations. If corporate participants are willing to be bound by a corporate foundation instrument that withholds limited liability, then they must accept the consequences. Obviously, this is an important structural dissimilarity between eleemosynary corporations and more modern corporate forms.

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**Shared Ownership**

“Membership” of an eleemosynary corporation is a matter that will be provided for in the founding document of the body.\(^{288}\) As with charities generally, although the members do not have either a legal or equitable interest in the property of the eleemosynary corporation, they do have the power to petition the supervising authority (in this case the Visitor, rather than the Attorney General in the first instance) to have the constituent documents enforced.\(^{289}\) This is the major sense in which eleemosynary corporations are a unique sub-genus of charitable trusts. Interested persons with no direct proprietary interests in the property of the trust are nevertheless possessed of enforceable rights with respect to the way in which the corporation is administered. It should be recalled that on dissolution, given the application of the cy-près doctrine to eleemosynary corporations, any surplus property would be applied to charitable purposes and not the members or the founder.

Unlike the situation facing unincorporated charitable trusts, the administration of eleemosynary corporations is readily reviewable through actions brought by interested persons so long as they are “members” of the corporation or, in certain

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\(^{287}\) On the common law position facing members of chartered corporations, see *Dr Salmon v The Hamborough Company* (1671) 1 Ch Cas 204.


limited situations, prospective or former members.\textsuperscript{290} As already mentioned, review is achieved either by means of a petition to the Visitor of the eleemosynary corporation or via a prerogative writ (in the event that there is prima facie jurisdictional error) from a court of competent jurisdiction.\textsuperscript{291}

Given the structure of eleemosynary corporations, a version of the so-called doctrine of constitutional ultra vires has application.\textsuperscript{292} This could alternatively be described as an enforceable duty of loyalty to follow the constituent documents of the corporation which are in the nature of a trust deed. However described, it is clear that at common law where an eleemosynary corporation purports to act contrary to its constitutional documents, any such act is open to a finding of invalidity.\textsuperscript{293} As noted above, the ultra vires doctrine has been abolished by statute in both Australia and New Zealand with respect to trading corporations, due in part to its potential harshness to innocent third party creditors.

\begin{itemize}
\item \textsuperscript{290} Whiston \textit{v} Dean and Chapter of Rochester \textup{(1849)} 7 Hare 532; 68 ER 220; \textit{R v Warden of All-Souls College, Oxford} \textup{(1681)} T Jo 174; 84 ER 1203; \textit{St John’s College, Cambridge \textup{v} Todington} \textup{(1757)} 1 Burr 158; 97 ER 245; \textit{R v Master and Fellows of St Catherine’s Hall, Cambridge} \textup{(1791)} 4 Term rep 233; 100 ER 991; \textit{Ex parte Wrangham} \textup{(1795)} 2 Ves 609; 30 ER 803; and \textit{R v Hertford College} \textup{(1878)} 3 QBD 693.
\item \textsuperscript{291} Sadler, RJ, “The University Visitor: Visitatorial Precedent and Procedure in Australia” \textup{(1981)} 7 \textit{University of Tasmania Law Review} 2 at 12-5 & 30-3.
\item \textsuperscript{292} Sadler, RJ, “The University Visitor: Visitatorial Precedent and Procedure in Australia” \textup{(1981)} 7 \textit{University of Tasmania Law Review} 2 at 5.
\item \textsuperscript{293} This is the whole thrust of visitatorial jurisdiction. See for example Blackstone, W, \textit{Commentaries on the Laws of England}, Legal Classics Library, New York, USA, 1983 (Reprint) Book I at 467 where he observes (possibly with a sideways glance at his children) “For corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, enquire into and correct irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary.”
\end{itemize}
SUMMARY

This chapter commenced with a detailed discussion of the role of analogy in human thought. That discussion commenced with the linguistic use of the terms “analogy” and “metaphor”. As these terms are capable of widely varying treatment I decided that it was best to define them narrowly for the purpose of this thesis. Further, the treatment of cognitive science was adopted and an “allegorical continuum” was developed with bare analogy (based on surface level similarities) at one end, and highly abstract metaphors at the other. The weaknesses of both extremes of the allegorical continuum were considered. I also introduced the concept of “mapping” from cognitive science, in which attribute schemas from known source analogues are mapped onto unknown target analogues for purposes of insight and prediction.

Building from this discussion, I made the proposition that common law legal reasoning could be characterised as an inductive process of analogical reasoning. I then analysed this characterisation in considerable detail and found it to be both accurate, and widely supported. Insights borrowed from cognitive science revealed that lawyers are trained to be master classifiers, and that this training leads to the acquisition of a memory bank of source analogue schemas. As I then discussed, there is evidence that experienced legal practitioners become memory “hard wired” to use familiar semantic retrieval cues in restricting the range of analogue schemas to be referred to when faced with novel problems. It has been suggested that one way of dealing with the limitations of such cognitive hard wiring is to provide multiple analogies of sufficient richness to “short-circuit” this hard wiring.
I then demonstrated that the most common choice of analogy for experienced legal practitioners dealing with incorporated associations is the large modern trading company. I considered this source analogue from the structural and relational perspective recommended by the foregoing discussion. In order to test whether or not this choice of analogue schema is the result of memory-hardwiring, I then provided three analogical alternatives known to the law that fit within the theoretical framework outlined in the previous chapter. These alternate analogies were: the small closely-held trading company; the charitable trust; and, the eleemosynary corporation. Each of these analogical alternatives was also considered in turn from the structural and relational perspective referred to previously.

The following chapter provides a structural and relational analysis of sporting associations, being the largest user-group of the relevant legislation, that are incorporated in Australia and New Zealand. As will be seen, it is my assertion that the incorporated association is sui generis and is a novel corporate form. From this viewpoint, incorporated associations are, within the framework of this chapter, in the position of the “target analogue”. It would be tempting to jump to an untested conclusion and state categorically, at the end of the next chapter, which of the alternative source analogues provided in this chapter offers the most apt allegorical schema for incorporated associations.294

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294 I note that the dogmatic assertion of untested hypotheses is not uncommon in legal discourse. In particular, this has been the case with respect to incorporated associations (Stevens, D, "Framing an Appropriate Corporate Law" in Phillips, J, et al, (Ed) Between State and Market: Essays on Charities Law and Policy in Canada, McGill-Queen's University Press, Montreal, Canada, 2001 at 548; “Research on this form of organization and legal development in this area now lag far behind its business counterpart.”). For instance, see Levy, KJ, "An Historical Analysis of Incorporated "Non-Profit" Entities in the United Kingdom, New Zealand and Australia with the Purpose of Raising the "Profit/Non-Profit" Debate", Master of Laws thesis, University of Melbourne, Melbourne, 1994 at 109-16 where the abolition of associations incorporation legislation is advocated in favour of the company limited by
However, the purpose of this thesis is to apply organic theory, broadly conceived to the problem at hand. This theoretical commitment requires that I first consider whether or not the legislative framework outlined in the next chapter is reflective and facilitative of the observed reality of incorporated associations. If an empirical analysis of incorporated sporting associations reveals a lack of fit with the legislative framework, then important qualifications must be made on the potential utility of the alternative source analogue schemas presented in this chapter. For this reason, chapter 3 will not conclude this thesis, although as I have just indicated, without the influence of corporate law theory it just as easily could have done.

Chapter 4 presents the findings of an empirical study of a representative sample of all incorporated sporting associations in Australia and New Zealand. Chapter 5 will compare the legislative framework with the empirical data and concludes with a consideration of the extent to which there is a closeness of fit between the two. Chapter 6 will then attempt to explain and justify the analogy schema that emerges as the most appropriate for the development of a jurisprudence of incorporated sporting associations in Australia and New Zealand. The thesis thereafter concludes.

guarantee. While some of the limitations of the associations legislation are admirably elucidated by that author, I note that the excellent work of Woodward, S, "Not-for-Profit Motivation in a 'for-Profit' Company Law Regime - National Baseline Data" (2003) 21 Company & Securities Law Journal 102tiv is the first attempt at a comprehensive empirical study of companies limited by guarantee in Australia by a legal scholar. That work reveals that these corporate entities are less than 10% by number of Australian incorporated associations (Huntly, C, "Dionysius, Damocles and the Unseen Perils of Insolvency for Officers of Incorporated Associations" (2000) 18(4) Company & Securities Law Journal 262). As will be seen in chapter 4 below, the principal user group of associations incorporation legislation in Australia and New Zealand has simultaneously expressed general satisfaction with that legislation and strong opposition to the possibility of Corporations Act 2001 (Cth) jurisdiction. On the basis of the empirical data therefore, I respectfully disagree with the posited abolition of the associations' incorporation legislation in favour of Corporations Act coverage. This view appears to be consonant with those of Sievers, AS,
CHAPTER 3

INCORPORATED SPORTING ASSOCIATIONS:

ONE ACT WITH TWO SCENES

“Drafters of legislation face real difficulties of communication. As well as being applicable to the general public or at least to a large group within it, legislation often deals at length with complex matters. The chance of not foreseeing every possible contingency or circumstance that might arise is therefore vastly increased.”

INTRODUCTION

As discussed in chapter 1, the challenge of what I have there defined as broad form organic theory is to consider the contextual reality of corporate entities both internally and externally. This challenge extends to the development of a jurisprudence facilitative of such corporate structures rather than one that is overly prescriptive or otherwise inappropriate. Where novel corporate forms are concerned, we have already observed in the previous chapter that reasoning by analogy is likely to play a central role in the development of such a jurisprudence. The previous chapter of this thesis also examined the characteristics of four alternative legal analogies that may provide guidance in the development of an appropriate jurisprudence for incorporated associations.

This chapter will survey the legislative framework currently in place in Australia and New Zealand allowing voluntary sporting associations to become incorporated
associations. The survey will consider the eligibility criteria for incorporation in each jurisdiction, the internal structural requirements (if any), the operational requirements and the dissolution requirements as laid down in the various statutory measures. Having completed that task, the next chapter provides a summary of an epidemiological investigation of actual incorporated sporting associations in the relevant jurisdictions.

The remaining chapters of this thesis will consider the extent to which the current legislative framework could be said to reflect broad form organic theory and then suggest a basis upon which a coherent and appropriate jurisprudence of incorporated sporting associations may emerge.

**WHAT IS AN INCORPORATED ASSOCIATION?**

Dr Fletcher has observed that the incorporated association or society, as a distinct corporate form, is an Australian creation. He states that:

> Legislative development was initiated in South Australia, where Captain Bagot, a member of the Legislative Council, provided the impetus for action. In the First Session of the First Parliament, he introduced an Institutions Incorporation Bill intended “to obviate the difficulties and lessen the expense attached to the management of associations by means of trust deeds”.

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The means proposed to obviate the difficulties were unique in that in place of trustees, group property would be held by a body corporate. According to Professor Bottomley, this “Act had no direct precedent in any British statutory provision.” However:

… there was nevertheless an established practice whereby businesses conducted through trustees which could demonstrate that they fulfilled a ‘public purpose’ could in certain cases obtain statutory incorporation by a private Act ... In a sense, then, the [Institutions Incorporation Bill of Captain Bagot] applied pre-existing procedures.

This early South Australian measure was consolidated in the Associations Incorporation Act 1890 (SA). Since that time, all Australian jurisdictions have followed the lead taken by South Australia such that there is now an equivalent measure in each.

It would be tempting at this distance to surmise that an independent sequence of events saw the New Zealand legislature introduce a very similar measure in 1895. However, it should be remembered that New Zealand (like most Australian colonies)

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5 Bottomley, S, The Corporate Form and Regulation: Associations Incorporation Legislation in Australia, Canberra, 1985 at 52.

6 Associations Incorporation Act 1858 (SA).

7 The current statutes in each Australian jurisdiction are as follows: Associations Incorporation Act 1984 (NSW); Associations Incorporation Act 1981 (Qld); Associations Incorporation Act 1985 (SA); Associations Incorporation Act 1964 (Tas); Associations Incorporation Act 1981 (Vic); Associations Incorporation Act 1987 (WA); Associations Incorporation Act 1991 (ACT); and Associations Act (NT).

8 Unclassified Societies Registration Act 1895 (NZ).
was for a period, a dependency of New South Wales. In addition, given the close relationship between the Australian colonies and New Zealand in the period leading up to the federation of Australia (note in particular New Zealand’s attendance at the National Australasian Convention 1891), it is of course highly likely that New Zealand legislators were aware of the South Australian innovation from an early stage. Indeed, as early as 1884 the South Australian legislation caused the New Zealand parliament to amend the *Religious Charitable and Educational Trusts Act 1856* (NZ) to allow for the incorporation of those groups to which that measure applied. For this reason, although the South Australian legislation is not mentioned in New Zealand parliamentary debates on the *Unclassified Societies Registration Act 1895* (NZ), it may be asserted with some confidence that there was some trans-Tasman legislative copying in its drafting.

The *Unclassified Societies Registration Act 1895* (NZ) was designed to address the concerns of various voluntary associations which complained to the then New Zealand Premier about the “unsatisfactory position in which they were placed through having no status. Some of these associations had acquired very large sums of money, which was placed in the hands of trustees”. After proving to be deficient in a number of respects, including the restrictions on generating pecuniary profits,

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11 New Zealand, Parliamentary Debates (Hansard) House of Representatives, (1884) Vol. 48, September 16 at 351 per Hon. Mr Harper MP. Note that the original measure was essentially copied into the statute books of Queensland under the name *Religious Educational and Charitable Institutions Act 1861* (Qld).
12 New Zealand, Parliamentary Debates (Hansard) 90 (1895) at 553 per Attorney-General.
this Act was repealed and replaced by the still current *Incorporated Societies Act 1908* (NZ).\(^{14}\)

**Characteristics of “Incorporated Associations”**

As a matter of first principle, it is perhaps instructive to consider the joint judgment in the High Court decision of *Cameron v Hogan* (1934) 51 CLR 358.\(^{15}\) In determining the intended effect of the rules of voluntary associations (in this case an unincorporated political party) Rich, Dixon, Evatt & McTiernan JJ observed obiter that:

> Such matters are naturally regarded as of *domestic concern*. The rules are intended to be enforced by the authorities appointed under them. In adopting them the members ought not to be presumed to contemplate the creation of enforceable legal rights and duties so that every departure exposes the officer or member concerned to a civil sanction.\(^{16}\)

The “domestic” nature of incorporated associations can also be demonstrated by reference to the common law concept of “mutuality”.\(^{17}\) This refers to the non-taxable status of members contributions to the funds of a club or association. The


\(^{15}\) This is a common starting point for approaching both incorporated and unincorporated voluntary associations. (See Fletcher, KL, *The Law Relating to Non-Profit Associations in Australia and New Zealand*, Law Book Company, North Ryde, 1986 at 308 and Chapter 13; and Sievers, AS, *Associations and Clubs Law in Australia and New Zealand*, 2nd ed, Federation Press, Annandale, 1996 at 130-3.)

\(^{16}\) At 376. As to the theoretical question of the justiciability of some promises to the exclusion of others more generally, see Buckley, FH, "Paradox Lost" (1988) 72 *Minnesota Law Review* 775.

logic of this proposition is enshrined in the dictum that no-one can make a profit from themselves.\textsuperscript{18}

As incorporated associations are a creation of statute, it is instructive to consider the views of legislators when attempting to discern the nature of these entities.\textsuperscript{19} The following comments taken from Hansard records in the various jurisdictions are of particular interest. First, during his Second Reading of the New South Wales measure,\textsuperscript{20} the then Attorney General observed in the Legislative Assembly that:

\begin{quote}
… of course, it has always been possible for an association to be incorporated under the companies’ legislation, usually as a company limited by guarantee, or under the Co-operative Act as a co-operative society. The cost of gaining incorporation under the national Companies Code, and the continuing requirements the Code and its predecessor imposed, have always operated to deter community groups, and the situation we have today where most small organisations have decided to remain unincorporated is evidence of the degree to which this deterrent effect has prevailed. It is certainly intended that the new scheme will always be simpler, less expensive and more attractive to small non-profit bodies than the Companies Code.\textsuperscript{21}
\end{quote}

\begin{quote}
… it is clearly the intent of the legislation that it not be used by organisations whose principal purpose is trading with the public as these bodies are more appropriately regulated by the Companies Code or the Co-operative Act.\textsuperscript{22}
\end{quote}

The current South Australian Act\textsuperscript{23} was passed in 1985. The Second Reading speech to that Act was delivered in the Legislative Council by the then Attorney General.\textsuperscript{24}


\textsuperscript{19} Styles \textit{v} New York Life Insurance (1889) 2 TC 460.

\textsuperscript{20} See for example \textit{Interpretation Act 1987} (NSW) s 34.

\textsuperscript{21} \textit{Associations Incorporation Act 1984} (NSW).

\textsuperscript{22} New South Wales, Legislative Assembly, Parliamentary Debates (Hansard) 19 September 1984, at 1163 per Hon. Mr Landa.

\textsuperscript{23} New South Wales, Legislative Assembly, Parliamentary Debates (Hansard) 16 October 1984, at 1923 per Hon. Mr Landa.
Following a lengthy adjournment, debate on the measure was resumed by Hon. KT Griffin MLC who was concerned that:

... the Associations Incorporation Act continues to provide a flexible mechanism for groups of people formed together for particular purposes not directed towards profit-making or business, but for charitable or other purposes, to gain the benefit of incorporation: and those benefits are substantial.

... Although those companies limited by guarantee have not been subject to the same measure of regulation as have companies with limited liability, limited by shares or no liability companies, they were subject to a greater level of regulation than associations under our Associations Incorporation Act.25

... an association registered under this Act is not a limited liability company or a trading partnership – it is a special kind of organisation which I think we are trying to look after without killing the whole idea.26

In the Second Reading of the Victorian measure27 in the Legislative Assembly, the then Minister for Transport highlighted the unique thrust of the associations incorporated legislation in the following terms:28

... some non-profit associations have sought incorporation under the Companies Act or the Co-operation Act. However, both of these Acts have been framed primarily to deal with profit-making bodies. As a result they include very detailed and extensive provisions relating to the management and control of bodies registered under them. The Companies Act in particular, imposes very stringent requirements as to the keeping, auditing and lodging of books and accounts. Consequently the vast majority of unincorporated associations have been unwilling to seek incorporation under those Acts.

23 Associations Incorporation Act 1985 (SA).
24 5 December 1984 per Hon. CJ Sumner.
25 South Australia, Legislative Council, Official Reports of the Parliamentary Debates (Hansard), 19 February 1985 at 2583.
26 South Australia, Legislative Council, Official Reports of the Parliamentary Debates (Hansard), 19 February 1985 at 2584.
27 Associations Incorporation Act 1981 (Vic).
In 1947 the Western Australian Attorney General, comment ing on the then Western Australian Act, stated that:

These associations, which are non-trading and non-profit-earning bodies, and which provide for certain activities of their members, are in general not of a kind that fits within the framework of the Companies Act. A limited liability company is one which is based upon a theory in general of trading. As such it comes under the Companies Act and has to comply with a great number of requirements that are necessary to safeguard shareholders, creditors and the public interest. For an association to register as a company would represent an acceptance of a constitutional framework that would be alien to the purposes for which an association in general is formed. These associations are usually assemblies of people who wish to proceed in a democratic way, but with no great degree of regulation, managing their own affairs on a domestic basis...

I think I can give the Leader of the Opposition a complete assurance that the associations which should come under the Companies Act will not be able to come under the Associations Incorporation Act.

On 3 July 1908 the then Prime Minister of New Zealand moved the Second Reading of the Incorporated Societies Bill 1908. He noted that:

Victoria, Legislative Assembly, Parliamentary Debates (Hansard), 4 December 1981, at 4285 per Hon. Mr MacLellan

Hon. Robert McDonald.

Associations Incorporation Act 1895 (WA).

Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 1947 (11 George VI) at 2772.

Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 1947 (11 George VI) Legislative Assembly at 2840. Support for these views can also be found in statements made in the Western Australian Parliament by a cross section of members from both Houses, and all political persuasions. Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 1987 (36 Elizabeth II) at 2289 and 3700 per Hon. Joseph Berinson, at 3275 per Hon Max Evans; Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 1987 (36 Elizabeth II) at 4005 per Hon. Peter Dowding, at 5007 and 5009 per Hon. Andrew Mensaros. See also the Preamble to the Associations
… the principal section of the present Act defining qualification is that relating to pecuniary gain, and it is deemed expedient to extend that definition in order that societies which, broadly speaking, are not direct trading concerns may become entitled to the benefits of registration.34

It can be seen therefore, that associations incorporated under the various incorporated association statutes under consideration here35 may be characterised as being “sui generis” in that they do not fit within the framework, structure or operations of the law associated with other corporate forms.36

This proposition is further supported by the fact that in many of the relevant statutes specific provision is made for the transfer of associations into37 the incorporated association statutory regime out of another regime, where the nature of the association is compatible with the incorporated association statutory regime.38 The comments of the then Victorian Minister for Transport during his Second Reading speech to that jurisdiction’s measure are particularly relevant in this regard:

Incorporation Act 1858 (SA). The Western Australian Law Reform Committee was also of the same opinion when it reviewed the Associations Incorporation Act 1895 (WA) in 1971.33

The Rt. Hon. Sir JG Ward MP.34

New Zealand, Parliamentary Debates (Hansard), Vol. 143 at 155.35

Associations Incorporation Act 1984 (NSW); Associations Incorporation Act 1981 (Qld); Associations Incorporation Act 1985 (SA); Associations Incorporation Act 1964 (Tas); Associations Incorporation Act 1981 (Vic); Associations Incorporation Act 1991 (ACT); Associations Act (NT); and, Incorporated Societies Act 1908 (NZ).36


Associations Incorporation Act 1984 (NSW) ss 48-49; Associations Incorporation Act 1981 (Qld) Pt 11; Associations Incorporation Act 1964 (Tas) ss 25A-25B; Associations Incorporation Act 1981 (Vic) s 10; and Associations Incorporation Act 1991 (ACT) Pt 6. But note that trading companies are prohibited from incorporating as incorporated associations in the Northern Territory (Associations Act (NT) s 8(6)).38

In various jurisdictions provision is also made for the transfer of non-eligible bodies out of the legislative scheme (Associations Incorporation Act 1984 (NSW) ss 56-57A; Associations Incorporation Act 1981 (Qld) Pt 11; Associations Incorporation Act 1985 (SA) s 42; Associations Incorporation Act 1964 (Tas) s 34; Associations Incorporation Act 1981 (Vic) Pt VIIA; Associations Incorporation Act 1987 (WA) s 34; Associations Incorporation Act 1991 (ACT) Pt 6; and Associations Act (NT) Pt 7).
… the provisions of clauses 10 and 11 are important, as they will permit many bodies, which
have incorporated or registered under various Acts which were not really intended to cater for
their requirements, to become incorporated associations. As such they will receive the benefits
of simplicity and cheapness of administration, management and control bestowed by the bill.
However I believe I should point out that bodies which are appropriately registered or
incorporated under other Acts will not be able to effectively transfer their registration.39

Consideration should also be given to the following extracts of parliamentary debate
in connection with the importance of volunteers to incorporated associations. In the
Western Australian Upper House the Attorney General observed:

Some [incorporated associations] are staffed by large staffs and professional assistance. By far
the majority are likely to be constituted by modest numbers of members and serviced by
volunteers.40

… The overwhelming majority are serviced by volunteers, people putting in work in good faith
and not looking for personal advantage.41

The Hon. Max Evans MLC also stated in the same place that:

Some associations have a very large professional staff, and others have no staff at all and the
work is done by a lot of do-gooders … [S]ome of these community-minded people are very
capable, but others are not; they do not carry out their responsibilities in the manner in which
they should be carried out, not due to any malice or lack of intent, but because they are not
qualified to do the job.42

39 Victoria, Legislative Assembly, Parliamentary Debates (Hansard), 4 December 1981, at 4291
per Hon. Mr MacLellan.
40 Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 1987 (36
Elizabeth II) at 2289 per Hon. Joseph Berinson.
41 Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 1987 (36
Elizabeth II) at 2289 per Hon. Joseph Berinson at 3700.
42 Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 1987 (36
Elizabeth II) at 2289 per Hon. Max Evans at 3275.
In a similar vein, the Hon. Andrew Mensaros MLA, speaking in the Western Australian Lower House observed that:

These bodies are numerous and cover all sorts of groups in the community, many without much business skill whose members are not only entirely composed of volunteers but are also fairly simple people; they are not trading bodies.43

So much for Australia and New Zealand, but what of the broader international context? Is the characterisation of incorporated sporting associations proposed by this thesis justified by reference to relevant international conceptions? Professor Salamon has suggested that, on an international basis, voluntary nonprofit associations can be identified for ease of comparison and analysis on the basis of five common and distinctive characteristics.44 These characteristics are that such entities are:

1. *Organised*, that is institutionalized to some extent
2. *Private*, that is, institutionally separate from government, even if they receive governmental support
3. *Nonprofit-distributing*, that is, not returning any profits they may generate to their owners or directors
4. *Self-governing*, that is, controlled according to their own internal procedures and not operated from outside
5. *Voluntary*, that is, non-compulsory and involving some meaningful degree of voluntary participation

43 Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 1987 (36 Elizabeth II) at 5009.
Salamon’s work, referred to above, was inclusive of a panoply of organisational types. The present thesis, however, is restricted in its investigation to incorporated associations in two common law countries only. As the focus of this work is sporting entities incorporated by a legislative scheme of registration, they are very much a creature of the parliaments of their domestic jurisdiction. It is therefore necessary to add to the list of characteristics generated by Professor Salamon in order to account for the particularity of the current project. The first addition that I propose to make to Salamon’s list is that of eligibility for incorporation. This characteristic will be considered first. Following on will be a consideration of those defining characteristics identified by Professor Salamon as enumerated above. Finally the special taxation treatment of eligible sporting associations as a sub-genus of incorporated associations will be considered. As will be seen, this treatment directly questions the suitability of the modern trading corporation as a legal analogy for incorporated associations and provides important insight in selecting an alternative analogy.

45 In Salamon, L.M., The International Guide to Nonprofit Law, John Wiley & Sons, New York, USA, 1997 Chapter 4 “Australia” (country rapporteur Dr Mark Lyons UTS) the treatment is inclusive of unincorporated and incorporated associations, trusts, companies, cooperatives, friendly societies, Aboriginal corporations and industrial organisations as well as a number of others. The treatment adopted in this thesis applies the more general framework proposed by Professor Salamon in the introductory chapters of his text.

46 There are several aspects of Salamon’s research in this area that make it problematic for translation into this thesis. Of particular significance in this regard are firstly the breadth of Salamon’s treatment, and secondly the exclusion of New Zealand from particular investigation. By taking a broad approach to the non-profit sector, Salamon has, of necessity, had to resort to abstraction and generalisation to a degree that is not appropriate for present purposes. The breadth of the research in an Australian context in particular has already been referred to above. The implications of such schema generation were outlined in some detail in the previous chapter of this thesis. In addition, I am interested in determining to what extent the situation in Australian jurisdictions corresponds with, and converges from, that pertaining in New Zealand. Unfortunately, Salamon’s research does not allow for such comparison based insight.
Eligibility for Incorporation

To be eligible to incorporate in the jurisdictions under present consideration, a sporting association must comply with two types of statutory eligibility requirements. The first of these is as to the purposes for which the association was formed. The second requirement is as to minimum membership. There is a further issue relating to eligibility for incorporation which is not raised in any of the legislation but which is nonetheless relevant to incorporated associations from a policy perspective. That is the question of whether the association is formed primarily for the benefit of members, or for the benefit of the community in general. Where this issue is of particular significance is with respect to possible exempt taxation status that will be dealt with separately below. Each of these eligibility considerations will now be addressed in turn.

Eligible Purposes

In general there are two ways of articulating the purpose constraint as an eligibility criterion for incorporated associations. One of these is a positive expression and the other a negative expression. The first is the requirement to comply with a statutory list of eligible purposes for which an incorporated association can be formed. This list is usually non-exhaustive with the inclusion of a term of the


ejusdem generis type phrased in terms such as “and any other purpose”. The other approach that is adopted with regard to eligibility for incorporation by reference to purposes is to state that all associations of persons are eligible to incorporate provided that they are not formed primarily for the purpose of trading or generating a pecuniary profit. New Zealand, New South Wales, Queensland, Victoria and the Australian Capital Territory all allow for an association to incorporate where it is formed for a non-profit purpose and not primarily for trading purposes, or for making a pecuniary profit to be distributed to the members. In contrast in South Australia, Tasmania, Western Australia and the Northern Territory a list of the purposes for which an eligible association is formed is included in the legislation.

Of significance to this thesis is that, regardless of the eligibility criteria that are mandated, the key determinant as to whether or not a group of people are eligible to incorporate is the nature of group purposes. In some jurisdictions this requirement is put positively, that is to say there are an agreed range of association purposes for

50 See for example Associations Incorporation Act 1987 (WA) s 4(1)(f).
51 Incorporated Societies Act 1908 (NZ) at s 4
52 Associations Incorporation Act 1984 (NSW) s 7.
53 Associations Incorporation Act 1981 (Qld) s 5(1) (curiously phrased in the negative).
54 Associations Incorporation Act 1981 (Vic) s 3(1).
55 Associations Incorporation Act 1991 (ACT) s 14.
57 Associations Incorporation Act 1985 (SA) s 18(1).
58 Associations Incorporation Act 1964 (Tas) s 2(1).
59 Associations Incorporation Act 1987 (WA) s 4(1).
60 Associations Act (NT) s 4.
which an eligible association may be formed.\textsuperscript{62} In the remaining jurisdictions the eligibility requirement is expressed negatively. That is to say, a group of persons can incorporate as an incorporated association in these jurisdictions provided that they do not pursue trading purposes or are not formed for the purpose of distributing pecuniary profits to members.\textsuperscript{63} It is extremely significant that the purposes for which an association is formed are the paramount determining eligibility criteria for incorporation in all jurisdictions, whether in Australia or New Zealand. For instance New South Wales,\textsuperscript{64} Victoria\textsuperscript{65} and the Australian Capital Territory\textsuperscript{66} all require a separate statement of purposes to be included with an application for incorporation. This statement of purposes then forms part of the constitution or rules of incorporated associations in those jurisdictions.\textsuperscript{67} The remaining jurisdictions also require that the purposes for which the group is formed and operates are to be stated clearly in the rules of the association.\textsuperscript{68} To further emphasize the prime import of the purposes of incorporated associations, from the point in time at which an association is incorporated, any amendment to the purposes of the association or the rules of the association must meet statutory requirements. These are stated in all jurisdictions.\textsuperscript{69}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{62} South Australia, Tasmania, Western Australia and the Northern Territory.
\item \textsuperscript{63} New South Wales, Queensland, Victoria, the Australian Capital Territory, and New Zealand. See White, DJ, "The Definition of "Gain" for the Purposes of Incorporation" (1970) 5 Victoria University of Wellington Law Review 536.
\item \textsuperscript{64} Associations Incorporation Act 1984 (NSW) ss 8 & 19(1).
\item \textsuperscript{65} Associations Incorporation Act 1981 (Vic) ss 5(1)(b) & 21(1).
\item \textsuperscript{66} Associations Incorporation Act 1991 (ACT) ss 16(b) & 29.
\item \textsuperscript{67} The term “rules” will be used throughout to refer to both “constitutions” and “rules” for ease of reference.
\item \textsuperscript{68} Associations Incorporation Act 1981 (Qld) ss 25-25A; Associations Incorporation Act 1985 (SA) s 23; Associations Incorporation Act 1964 (Tas) s 17; Associations Incorporation Act 1987 (WA) s 16; Associations (Model Constitution) Regulations (NT) Reg 2(2) & Sch Pt 1 Cl 2; & Incorporated Societies Act 1908 (NZ) s 6.
\item \textsuperscript{69} Associations Incorporation Act 1984 (NSW) s 20; Associations Incorporation Act 1981 (Qld) ss 26A-26D; Associations Incorporation Act 1985 (SA) s 24; Associations Incorporation Act
\end{itemize}
\end{footnotesize}
The centrality of association purposes has also been stressed by scholars outside of legal discourse who have examined not-for-profit associations.\textsuperscript{70}

The purposes which are prescribed in South Australia, Tasmania, Western Australia and the Northern Territory, are of further interest for present purposes. As will be seen, there is a close approximation between this list of acceptable purposes and the range of charitable purposes at common law. That is to say, the statutorily prescribed purposes closely correlate to those contained in the Preamble to the \textit{Statute of Charitable Uses 1601} (UK).\textsuperscript{71} It will be recalled from chapter 2, that this statute designated the following as charitable purposes:

> Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; repairs of bridges, ports, havens, causeways, churches, seabanks and highways; education and preferment of orphans; relief, stock or maintenance for houses of correction; marriage of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.

It will also be noted from the previous chapter that sport and recreation has been brought within the definition of charitable purposes in a number of jurisdictions. The statutory list of eligible purposes provided for at s 4(1) of the \textit{Associations Incorporation Act 1964} (Tas) ss 18-19; \textit{Associations Incorporation Act 1981} (Vic) s 22; \textit{Associations Incorporation Act 1987} (WA) ss 17 & 19; \textit{Associations Incorporation Act 1991} (ACT) ss 30 & 33; \textit{Associations Act} (NT) ss 23(1)(a) (5) (6) & (8) & 25; and \textit{Incorporated Societies Act 1908} (NZ) s 21. Consider Stevens, D, "Framing an Appropriate Corporate Law" in Phillips, J, et al, (Ed) \textit{Between State and Market: Essays on Charities Law and Policy in Canada}, McGill-Queen's University Press, Montreal, Canada, 2001 generally.


\textsuperscript{71} 43 Elizabeth I c4. (The "\textit{Statute of Elizabeth}")
Incorporation Act 1987 (WA) is fairly typical of the list used in other jurisdictions.

That list is as follows:

(a) for a religious, educational, charitable or benevolent purpose;
(b) for the purpose of promoting or encouraging literature, science or the arts;
(c) for the purpose of sport, recreation or amusement;
(d) for the purpose of establishing, carrying on, or improving a community, social or cultural centre, or promoting the interests of a local community;
(e) for political purposes; or
(f) for any other purpose approved by the Commissioner.  72

In South Australia the prescribed eligible purposes are as follows:

(a) for a religious, educational, charitable or benevolent purpose; or
(b) for the purpose of promoting or encouraging literature, science or the arts; or
(c) for the purpose of providing medical treatment or attention, or promoting the interests of persons who suffer from a particular physical, mental or intellectual disability; or
(d) for the purpose of sport, recreation or amusement; or
(e) for the purpose of establishing, carrying on, or improving a community centre, or promoting the interests of a local community or a particular section of a local community; or
(f) for conserving resources or preserving any part of the environmental, historical or cultural heritage of the State; or
(g) for the purpose of promoting the interests of students or staff of an educational institution; or
(h) for political purposes; or
(i) for the purpose of administering any scheme or fund for the payment of superannuation or retiring benefits to the members of any organisation or the employees of any body corporate, firm or person; or
(j) for the purpose of promoting the common interests of persons who are engaged in, or interested in, a particular business, trade or industry; or
(k) for any purpose approved by the Minister, ...

In Tasmania, the list of eligible purposes is as follows:

(i) for a religious, educational, benevolent, or charitable purpose;
(ii) for the purpose of providing medical treatment or attention;
(iii) for the purpose of promoting or encouraging literature, science, or art;
(iv) for the purpose of recreation or amusement;
(v) for the purpose of establishing, managing, carrying on, or beautifying a community centre;
(vi) for the purpose of administering (whether as trustee or otherwise) any scheme or fund for the payment of superannuation or retiring benefits to the members of any organization or undertaking or the employees of any person or body of persons (whether incorporated or unincorporated); or
(vii) for promoting any of the foregoing purposes or any like purpose; and ...

72
While this surmise can be criticised with respect to a number of specific listed purposes such as “amusement” or “political” purposes, the relevance of the apparent connection between common law charitable purposes and eligible purposes for incorporated associations should not be discounted. Indeed, the more generalised formulation of charitable purposes propounded by Macnaghten LJ that was mentioned in the preceding chapter can be closely aligned to the eligible purposes listed above.\textsuperscript{73}

The consequence of this is that a number of the incorporated associations that are the subject of this thesis could also qualify as charitable organisations under the common law principles of charitable trusts. Such a close connection between incorporated sporting associations and charitable trusts is further highlighted when considering the dissolution of incorporated associations. This will be discussed in more detail below.

It is also important to stress that eligibility for incorporation under the relevant statutes will be mutually exclusive of the kind of broad trading thrust that is assumed

\begin{itemize}
\item In the Northern Territory the list of eligible purposes is as follows:
\begin{itemize}
\item \textit{a)} an association, society, institution or body formed or carried on for –
  \begin{itemize}
  \item \textit{(i)} a religious, educational, benevolent or charitable purpose;
  \item \textit{(ii)} the purpose of providing medical treatment or attention;
  \item \textit{(iii)} the purpose of promoting or encouraging literature, science, art or a cultural activity;
  \item \textit{(iv)} the purpose of recreation or amusement;
  \item \textit{(v)} the purpose of beautifying or improving a community centre, being an association, society, institution or body the activities of which are carried on in whole or in part in the Territory …
  \end{itemize}
\end{itemize}
\end{itemize}
to be the case with respect to the modern trading corporation, as outlined in the previous chapter. This is so regardless of the exact wording adopted to confer eligibility for incorporation in all Australian and New Zealand jurisdictions.

**Minimum Size**

An association wishing to incorporate in most of the jurisdictions under present consideration must meet an additional eligibility requirement relating to minimum membership. The minimum eligible membership varies across jurisdictions from zero to fifteen. However, the majority of jurisdictions require a multiplicity of members. In contrast with partnership law, there is no maximum membership limit in any jurisdiction.

**Mutual vs. Public Benefit Eligibility**

This eligibility criterion could theoretically be imposed on incorporated associations either from the perspective of initial eligibility for incorporation, or from the perspective of obtaining special status once incorporated. It is suggested that there is fundamental difference between associations formed for mutual benefit as opposed

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73 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583:

1. Trusts for the relief of poverty;
2. Trusts for the advancement of education;
3. Trusts for the advancement of religion;
4. Trusts for other purposes beneficial to the community not falling under any of the preceding heads.

74 With the exception of South Australia and Tasmania.

75 *Associations Incorporation Act 1984* (NSW) s 7 (5 members); *Associations Incorporation Act 1981* (Qld) s 7 (7 members); *Associations Incorporation Act 1985* (SA) (no minimum); *Associations Incorporation Act 1964* (Tas) (no minimum); *Associations Incorporation Act 1981* (Vic) s 3 (5 members); *Associations Incorporation Act 1987* (WA) s 4 (6 members); *Associations Incorporation Act 1991* (ACT) s 14 (5 members); *Associations Act* (NT) s 26 (5 members); and *Incorporated Societies Act 1908* (NZ) s 4 (15 members).
to those formed for public benefit.76 For present purposes, it will be recalled that one key aspect of charitable trusts is that such trusts are not formed for the benefit of individuals, but to promote charitable purposes with a strong public benefit element. This has been referred to as the public benefit requirement of charitable trusts.77 As noted above, this is not currently a determining eligibility criterion for incorporated associations in any of the Australian or New Zealand jurisdictions. It is however a point of considerable importance to the taxation treatment of these bodies. This point is addressed separately below.

**Organised/Institutionalised**

As indicated already, all of the sporting entities which are the subject of this thesis are incorporated under relevant statutes in each state of Australia and in New Zealand. The very process of incorporation therefore suggests a degree of organisation and institutionalisation. For instance in each of the Australian states and territories and in New Zealand, incorporated associations are given a formal statutory definition, and various statutory requirements are laid down with respect to eligibility for incorporation.78 For example, only South Australia and Tasmania do not

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78 *Associations Incorporation Act 1984* (NSW) s 3; *Associations Incorporation Act 1981* (Qld) s 3; *Associations Incorporation Act 1983* (SA) s 3; *Associations Incorporation Act 1964* (Tas) s 2; *Associations Incorporation Act 1981* (Vic) s 3; *Associations Incorporation Act 1987* (WA) s 3; *Associations Incorporation Act 1991* (ACT) s 3; *Associations Act* (NT) s 4; *Incorporated Societies Act 1908* (NZ) s 3 (definition); *Associations Incorporation Act 1984* (NSW) s 7; *Associations Incorporation Act 1981* (Qld) s 7; *Associations Incorporation Act 1985* (SA) s 18; *Associations Incorporation Act 1964* (Tas) s 2; *Associations Incorporation Act 1981* (Vic) s 3; *Associations Incorporation Act 1987* (WA) s 4; *Associations Incorporation Act 1991* (ACT) s 14; *Associations Act* (NT) s 8; and *Incorporated Societies Act 1908* (NZ) s 4 (eligibility).
stipulate a minimum membership requirement for incorporated associations. In each of the other jurisdictions the membership requirements are for more than one person. In New Zealand, which has the highest number of prerequisite members, the minimum number of members is 15 persons.

In addition, there are stipulations as to the use of association names and these are found in all of the relevant statutes. Each jurisdiction has specific requirements relating to the rules of incorporated associations. With the sole exception of Western Australia, in each jurisdiction there is a requirement for an incorporated association to have a public officer, secretary, or registered office. All but two jurisdictions provide for the identification or appointment of a committee with

79 Associations Incorporation Act 1984 (NSW) 5 members (s 7(1)); Associations Incorporation Act 1981 (Qld) 7 members (s 5(1)(a)); Associations Incorporation Act 1981 (Vic) 5 members (s 3); Associations Incorporation Act 1987 (WA) 6 members (s 4(1)); Associations Incorporation Act 1991 (ACT) 5 members (s 14(1)); and Associations Act (NT) 5 members (s 26).

80 Incorporated Societies Act 1908 (NZ) s 4(1). Each corporate member equates to 3 natural person members (s 31).

81 Associations Incorporation Act 1984 (NSW) ss 12-14; Associations Incorporation Act 1981 (Qld) Pt 4; Associations Incorporation Act 1985 (SA) ss 20(1)(c), 60 & 65; Associations Incorporation Act 1964 (Tas) ss 9-10; Associations Incorporation Act 1981 (Vic) Pt III & s 52; Associations Incorporation Act 1987 (WA) ss 8, 10(b) & 18; Associations Incorporation Act 1991 (ACT) Pt 3 Div 3.5; Associations Act (NT) ss 15-19; and Incorporated Societies Act 1908 (NZ) ss 11-11A.

82 Associations Incorporation Act 1984 (NSW) ss 11, 19-20 & Sch 1; Associations Incorporation Act 1981 (Qld) Pt 5; Associations Incorporation Act 1985 (SA) Pt 3 Div 3; Associations Incorporation Act 1964 (Tas) ss 7, 16, 18-19; Associations Incorporation Act 1981 (Vic) ss 5(1)(c), 6 & 21-22A; Associations Incorporation Act 1987 (WA) Pt IV & Sch 1; Associations Incorporation Act 1991 (ACT) ss 16 & Pt 3 Div 3.4; Associations Act (NT) ss 21-25; and Incorporated Societies Act 1908 (NZ) ss 6 & 21.

83 Associations Incorporation Act 1984 (NSW) ss 22-25; Associations Incorporation Act 1981 (Qld) Pt 2 Div 3, & ss 65-69; Associations Incorporation Act 1983 (SA) s 56; Associations Incorporation Act 1964 (Tas) ss 14-15; Associations Incorporation Act 1981 (Vic) ss 24-28; Associations Incorporation Act 1991 (ACT) Pt 4 & s 121; Associations Act (NT) ss 27 & 28; and Incorporated Societies Act 1908 (NZ) s 18.

84 Exceptions being New Zealand and the Northern Territory.
respect to an incorporated association. All jurisdictions with the exception of the Northern Territory and New Zealand provide for the holding of meetings in an incorporated association in a reasonably formal manner.

Western Australia alone does not require the lodgement of periodic returns with the regulator. This coupled with the fact that Western Australia does not require notification of any public officer, secretary or registered office to the government regulator means that the reliability of the Western Australian register of incorporated associations is currently very much a matter of conjecture. However, even in Western Australia there is a formalised requirement for incorporated associations to report to members the nature of their financial dealings on an annual basis. With respect to the remaining Australian and New Zealand jurisdictions there are formalised requirements for account preparation, audit and the periodic filing of

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86 *Associations Incorporation Act 1984* (NSW) ss 5, 26 & 28; *Associations Incorporation Act 1981* (Qld) ss 3, 55-57 & 60-69; *Associations Incorporation Act 1985* (SA) ss 3, 39, 40 & 51; *Associations Incorporation Act 1964* (Tas) ss 2 & 22A-23; *Associations Incorporation Act 1981* (Vic) ss 29 & 30(1)-(2); *Associations Incorporation Act 1987* (WA) ss 23-24; and *Associations Incorporation Act 1991* (ACT) ss 68-70.

87 *Associations Incorporation Act 1984* (NSW) s 27; *Associations Incorporation Act 1981* (Qld) s 59(4); *Associations Incorporation Act 1985* (SA) s 36 (“prescribed” associations only); *Associations Incorporation Act 1964* (Tas) s 24B; *Associations Incorporation Act 1981* (Vic) s 30(4); *Associations Incorporation Act 1991* (ACT) ss 79-80; *Associations Act* (NT) ss 41-45; and *Incorporated Societies Act 1908* (NZ) s 23. See also reform proposals in Canada in Reform of the Canada Corporations Act: Draft Framework for a New Not-for-Profit Corporations Act, Corporate and Insolvency Law Policy Directorate, Policy Sector, Montreal, Canada, March, 2002 at 13.

88 *Associations Incorporation Act 1987* (WA) ss 25-26 & 39. Most other jurisdictions, except Tasmania and New Zealand, have a similar requirement (*Associations Incorporation Act 1984* (NSW) s 26; *Associations Incorporation Act 1981* (Qld) s 59(1); *Associations Incorporation Act 1985* (SA) s 35 (“prescribed” associations only); *Associations Incorporation Act 1981* (Vic) s 30(3); *Associations Incorporation Act 1991* (ACT) ss 72-73; and *Associations Act* (NT) ss 43 & 44. See also Sadhu, MA, A Framework for Financial
official returns with the regulator. Finally, in matters related to the dissolution of incorporated associations, each of the various jurisdictions has specific requirements relating to the disposition of surplus assets on dissolution.

All incorporated associations are required to have a document which serves as the rules of the association. In all jurisdictions the minimum requirements that have to be provided for in the rules of incorporated associations are laid down. With the exception of New South Wales, Queensland and Tasmania the wording of the rules of incorporated associations is entirely a matter for incorporated associations to determine for themselves. The rules of an incorporated association must be lodged

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89 
Associations Incorporation Act 1984 (NSW) ss 26-28; Associations Incorporation Act 1981 (Qld) Pt 6 Div 2; Associations Incorporation Act 1985 (SA) Pt 4 Div 2 & 3B, Reg 9; Associations Incorporation Act 1964 (Tas) ss 23A-24 & 24B; Associations Incorporation Act 1981 (Vic) ss 30-30B; Associations Incorporation Act 1991 (ACT) Pt 5; Associations Act (NT) ss 41-45; and Incorporated Societies Act 1908 (NZ) s 23.

90 
This will be discussed in more detail below. Associations Incorporation Act 1984 (NSW) Pt 8; Associations Incorporation Act 1981 (Qld) Pt 10; Associations Incorporation Act 1985 (SA) Pt 5; Associations Incorporation Act 1964 (Tas) ss 32-34A; Associations Incorporation Act 1981 (Vic) Pt IIIV; Associations Incorporation Act 1987 (WA) Pt VI; Associations Incorporation Act 1991 (ACT) Pt 7; Associations Act (NT) Pts 8 & 9; & Incorporated Societies Act 1908 (NZ) ss 23A-28.

91 
Associations Incorporation Act 1984 (NSW) s 11; 19(2); Associations Incorporation Act 1981 (Qld) s Pt 5; Associations Incorporation Act 1985 (SA) ss 23-23A; Associations Incorporation Act 1964 (Tas) s 16; Associations Incorporation Act 1981 (Vic) ss 6, 21(2)-(4) & Sch; Associations Incorporation Act 1987 (WA) s 16; Associations Incorporation Act 1991 (ACT) ss 16(c) & 31; Associations Act (NT) ss 21, 119(1)(d), & Associations (Model Constitution) Regulations (NT) Reg 3; and Incorporated Societies Act 1908 (NZ) s 6.

92 
Associations Incorporation Act 1984 (NSW) s 11 & Sch 1; Associations Incorporation Act 1981 (Qld) s 47 & Reg 7; Associations Incorporation Act 1985 (SA) ss 23A; Associations Incorporation Act 1964 (Tas) s 17(2) & Sch; Associations Incorporation Act 1981 (Vic) s 6 & Sch; Associations Incorporation Act 1987 (WA) s 16 & Sch 1; Associations Incorporation Act 1991 (ACT) s 32 & Sch 1; Associations Act (NT) s 119(1)(d), & Associations (Model Constitution) Regulations (NT) Sch; and Incorporated Societies Act 1908 (NZ) s 6.

93 
Associations Incorporation Act 1984 (NSW) s 19, Reg 9 & Sch 1.

94 
Associations Incorporation Act 1981 (Qld) s 25A & Reg 8.

95 
Associations Incorporation Act 1964 (Tas) s 16, (Model Rules) Reg 3 & Sch 1.
with the application for incorporation. Thereafter, with the exception of South Australia, Northern Territory and New Zealand, any alterations made to the association’s rules require the passing of a “special” resolution. Clearly as a result of the foregoing and in line with the assertion of Professor Salamon above, it can be seen that there is a high degree of statutory organisation and institutionalisation of incorporated associations.

**Private**

A key element of all incorporated associations (whether sporting or otherwise) is their essentially domestic (as opposed to commercial) nature. Sometimes referred to as “third sector” entities, they generally operate autonomously from both government (ie: the “public” sector) and commerce. The so-called “domestic”

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96 Associations Incorporation Act 1984 (NSW) s 9; Associations Incorporation Act 1981 (Qld) s 9; Associations Incorporation Act 1985 (SA) s 19; Associations Incorporation Act 1964 (Tas) s 7 & Reg 12; Associations Incorporation Act 1981 (Vic) s 5; Associations Incorporation Act 1987 (WA) s 5; Associations Incorporation Act 1991 (ACT) s 18; Associations Act (NT) s 119(1)(d), & Associations (Model Constitution) Regulations (NT) Reg 3(1)(a); & Incorporated Societies Act 1908 (NZ) s 7.

97 The special resolution is a default methodology only in South Australia (Associations Incorporation Act 1985 (SA) s 24).

98 Notice of any change in the rules must be lodged but the methodology for changing the rules is a matter for members (Associations Act (NT) ss 21(1)(g) & 23).

99 Incorporated Societies Act 1908 (NZ) s 21.

100 Associations Incorporation Act 1984 (NSW) s 20; Associations Incorporation Act 1981 (Qld) s 48; Associations Incorporation Act 1964 (Tas) s 18; Associations Incorporation Act 1981 (Vic) s 22; Associations Incorporation Act 1987 (WA) s 17(1); and Associations Incorporation Act 1991 (ACT) s 33. Compare with the reform proposals in Canada outlined in Reform of the Canada Corporations Act: Draft Framework for a New Not-for-Profit Corporations Act, Corporate and Insolvency Law Policy Directorate, Policy Sector, Montreal, Canada, March, 2002 at 7.

101 Cameron v Hogan (1934) 51 CLR 358.

sphere is one in which both the judiciary and the legislature have traditionally been reluctant to interfere. In this thesis, the term “private” as a characteristic of incorporated association should be read to equate with the notion of “domestic”. As Salamon states, “one of the defining features of these organisations is their self-governing character, their ability to control their own internal operations.”

As observed by a number of authors, the private nature of such domestic entities has been the source of concern and suspicion on the part of the judicial and political establishment over the centuries in the English common law tradition. More lately there has been growing scholarly interest in the way in which non-profit entities, traditionally viewed as being strictly domestic enterprises, interact with government on the achievement of political social agendas. Of particular interest is the extent to which nonprofit entities rely on government for their legislative framework and financial contributions for their continued operation. Related to this is the favourable taxation status of nonprofit groups. This suggests a blurring of the “public/private” distinction as it relates to the voluntary non-profit sector generally.

104 See for example the excellent treatment in Fletcher, KL, The Law Relating to Non-Profit Associations in Australia and New Zealand, Law Book Company, North Ryde, 1986 at 10-8 with particular note of the action for “Contempt of the Prerogative”.
107 As this issue has a number of facets worthy of consideration for present purposes, it is considered separately below under the heading “Income Tax Status of Incorporated Associations”.

178
The issue of funding sources and the uses to which they may be put is both unique and at the heart of incorporated associations. As indicated above, any trade in which the association engages can only be incidental to the attainment of the association’s core purpose or purposes.

Research reveals that incorporated associations are typically funded by a combination of subscriptions, donations, sponsorship and operating activities. If one narrows the consideration of funding to sporting groups (being the most common form of incorporated association and the category with which this work is primarily concerned), the Australian Bureau of Statistics reports that roughly 24% of funding for such groups comes from subscriptions, 39% of all income comes from an assortment of donations and sponsorship with the remainder being generated from operations.\textsuperscript{108} Interestingly Commonwealth, State and Local government outlays on the broader sector of "recreation"\textsuperscript{109} account for about 45% of total income to the sector.\textsuperscript{110} Voluntary associations in general, and incorporated associations in particular are, therefore, quite unlike trading companies in particular in terms of likely funding sources.

\textbf{NonProfit Distributing / Personal Benefit Restrictions}

In keeping with the eligibility requirements discussed above, incorporated associations in all jurisdictions are prohibited from distributing income or capital to

\begin{itemize}
  \item \textsuperscript{108} Sports Census 1996, Ministry of Sport and Recreation, Perth, 1997 at 37.
  \item \textsuperscript{109} Accounting for about one third of all Western Australian incorporated associations.
  \item \textsuperscript{110} Sport and Recreation - a Statistical Overview: Australia, 4156.0, Australian Bureau of Statistics, Adelaide, 11 December, 1997.
\end{itemize}
members. However, as will be demonstrated, the nature and degree of this prohibition is variable across jurisdictions and depends on whether one speaks of an association that is operational or one that is being dissolved.

Operational Associations

As has been stressed above, a nonprofit association is formed to pursue purposes, and the income and assets of the association are utilised to achieve those organisational purposes to the exclusion of all else. This is particularly so with respect to the prohibition against nonprofit entities distributing any pecuniary profits to members. All of the various statutes under consideration in this thesis, with the sole exception of the Northern Territory,\footnote{\textit{Associations Act} (NT) s 4 ("association" definition at (c) & provisions dealing with "trading associations").} prohibit the formation of an incorporated association for the purposes of trade, or to obtain pecuniary profit or gain for members.\footnote{Salamon, L.M., \textit{The International Guide to Nonprofit Law}, John Wiley & Sons, New York, USA, 1997 at 4 & 30-2.} Professor Salamon has identified this as a defining characteristic of nonprofit enterprise throughout the world.\footnote{See \textit{Associations Act} (NT) s 4 ("association" definition at (c) & provisions dealing with "trading associations").} This is occasionally referred to as the “non-distribution constraint” and it is a key point of departure between trading enterprises and nonprofit enterprises.
Non-Operational Associations

The final destination of the assets or funds of an incorporated association on dissolution is a question which also raises the issue of distributing the funds of an association to members.\textsuperscript{114} As Dr Fletcher makes very clear, because of the unique nature of unincorporated associations there is some controversy (and certainly a great deal of confusion) relating to the basis upon which the distribution of surplus assets of such groups to their members should proceed. Fortunately we are saved the intellectual exercise of resolving a plethora of contradictory rationes because the area of dissolution of incorporated associations has been dealt with as a matter of statute in each of the jurisdictions that this thesis is considering. This statutory resolution of an unsatisfactory common law situation was not always the case, but as at the date of this thesis the dissolution of surplus assets of incorporated associations is provided for very clearly in the relevant legislation.\textsuperscript{115} The details of these provisions are set out below.

In broad terms, an incorporated association can determine either through cancellation of incorporation by the government regulator on the one hand, or by a winding-up (either voluntary or involuntary) on the other.\textsuperscript{116}

\begin{itemize}
\item \textsuperscript{114} The situation with respect to unincorporated associations is somewhat complex and is dealt with exhaustively in Fletcher, KL, \textit{The Law Relating to Non-Profit Associations in Australia and New Zealand}, Law Book Company, North Ryde, 1986 at Chapter 10.
\item \textsuperscript{116} Cancellation of incorporation (\textit{Associations Incorporation Act 1984} (NSW) ss 54 & 55A; \textit{Associations Incorporation Act 1981} (Qld) ss 93 & 105N; \textit{Associations Incorporation Act 1985} (SA) ss 42, 43A-44; \textit{Associations Incorporation Act 1964} (Tas) ss 34-34A; \textit{Associations Incorporation Act 1981} (Vic) ss 31AA-31AB & 36E; \textit{Associations Incorporation Act 1987} (WA) s 35; \textit{Associations Incorporation Act 1991} (ACT) ss 83 & 93; \textit{Associations Act} (NT) Pts 6 (voluntary transfer of all property) and 8 (non-trading
\end{itemize}
Cancellation of Incorporation

In Tasmania and the Northern Territory an incorporated association may suffer cancellation of its incorporation compulsorily by administrative decision of the registrar\(^{117}\) or voluntarily at its own request.\(^{118}\) Tasmania is silent on the issue of the disposition of property of an association following the cancellation of incorporation.\(^{119}\) This means that the issue may be decided by members as they see fit. Such a scenario could conceivably result in the distribution of surplus assets to members. There is no statutory direction to the Tasmanian registrar regarding surplus assets on cancellation by administrative decision of the registrar. Common law would therefore presumably devolve such property to the crown as *bona vacantia*.\(^{120}\) In the Northern Territory, voluntary cancellation of incorporation requires the prior transfer of all association assets to an association formed for similar purposes, to charity or to a local government authority.\(^{121}\) In New South

\(^{117}\) Associations Incorporation Act 1964 (Tas) s 34; and Associations Act (NT) Pts 6 (voluntary cancellation) and 8 (compulsory cancellation).

\(^{118}\) Associations Incorporation Act 1964 (Tas) s 34A.

\(^{119}\) Considerable ambiguity is created by the interaction of ss 7, 16 and Associations Incorporation (Model Rules) Regulations 1997 (Tas) Sch cl 6(2). It is entirely unclear as to whether the prohibitions against allowing pecuniary distributions to members that are contained in these provisions extend to surplus assets on dissolution by cancellation.


\(^{121}\) Associations Act (NT) s 54(1).
Wales, Queensland, Western Australia, and the Northern Territory (in the case of a compulsory cancellation) on cancellation of incorporation the surplus property of the association in question vests with the registrar in each state. In South Australia the surplus assets of defunct incorporated associations which have their incorporated status cancelled vest in the registrar and are then paid into consolidated account via the treasurer. Similar provisions to those in force in South Australia also apply in Victoria and the Australian Capital Territory. In New Zealand the assets of incorporated associations that have their incorporated status cancelled face the same disposition procedures as associations that are wound up by the court.

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122 *Associations Incorporation Act 1984* (NSW) s 55. The ultimate destination of surplus assets is decided by members via a special resolution (s 53) with the registrar holding a veto power. Under this provision assets must not be transferred to a member unless it is itself an association which prohibits distributions to members. (Section 53(2A)(b) is somewhat tautological as it speaks of potential “unincorporated” members – obviously a nonsense). Trusts must be respected and government contributions must be returned (s 53(2A)(c) & (2B)).

123 *Associations Incorporation Act 1981* (Qld) ss 92 & 94. The registrar may vest such property in the public trustee or other persons or incorporated associations for specified purposes (s 94).

124 *Associations Incorporation Act 1987* (WA) s 35 gives the registrar power to cancel an association’s incorporation. Section 36(1) vests any surplus assets on cancellation of incorporation in the registrar and gives them discretion to deal with the assets. This discretion is restricted (at s 36(3)) by reference to s 33 which inter alia requires surplus assets to be directed to another incorporated association or to charitable purposes (s 33(2)(b))).

125 *Associations Act* (NT) ss 66-69. These funds are ultimately paid into the government account (s 68(6)).

126 The term “registrar” is used for simplicity throughout to denote the statutory officer responsible for the administration of the relevant legislation in each jurisdiction notwithstanding the official nomenclature.

127 *Associations Incorporation Act 1985* (SA) s 46.

128 *Associations Incorporation Act 1981* (Vic) s 36F.

129 *Associations Incorporation Act 1991* (ACT) s 95.

130 *Incorporated Societies Act 1908* (NZ) s 27.
Winding-Up

Once an incorporated association has been wound-up (either voluntarily or involuntarily) there may be surplus assets on winding-up requiring distribution. In New Zealand the destination of any surplus funds on winding-up will be a matter to be decided by the rules of the association,\textsuperscript{131} or otherwise\textsuperscript{132} by the registrar.\textsuperscript{133} This is subject to the rider that where any remaining property is subject to a trust, that trust continues to apply.

In Victoria the legislation provides that the Supreme Court has the power to determine all matters relating to the winding-up of an incorporated association under a compulsory winding-up.\textsuperscript{134} Where a Victorian incorporated association is to be voluntarily wound-up, the members may provide for the subsequent distribution of any surplus assets on winding-up. This may be via a special clause in the rules of the association\textsuperscript{135} or by a special resolution.\textsuperscript{136} In the event that the rules or any such special resolution do not otherwise provide, any surplus property must be divided equally amongst the remaining members.\textsuperscript{137}

\footnotesize
\begin{itemize}
\item \textsuperscript{131} This is one of the matters that must be provided for in the rules of an incorporated society in New Zealand (\textit{Incorporated Societies Act 1908 (NZ)} s 6(1)(k)). No further direction is given in this matter. Consequently, distribution between members is entirely possible. \\
\item \textsuperscript{132} Such a situation may arise for instance where the rules allow for surplus assets to be devolved onto a non-existent association or a defunct charity. \\
\item \textsuperscript{133} \textit{Incorporated Societies Act 1908 (NZ)} s 27. \\
\item \textsuperscript{134} \textit{Associations Incorporation Act 1981 (Vic)} s 34. The Supreme Court is to proceed under the modified winding up provisions of the \textit{Corporations Act 2001 (Cth)} pursuant to the \textit{Associations Incorporation Act 1981 (Vic)} s 36D. \\
\item \textsuperscript{135} \textit{Associations Incorporation Act 1981 (Vic)} Sch cl 15 provides that an association must provide for the destination of funds in the event of a voluntary winding-up of the association. \\
\item \textsuperscript{136} Ibid s 33A. \\
\item \textsuperscript{137} Ibid s 33B. But note the specific restrictions contained at ss 33C (government contributions received), 33D (orders of the Supreme Court), and 33E (property subject to trusts).
\end{itemize}
The Queensland Supreme Court also has the power to determine all matters relating to the winding-up of an incorporated association. All Queensland incorporated associations must provide for the distribution of any surplus assets on winding-up in their rules. If the model rules have been adopted, or if a distribution clause is not included in the association’s rules, then surplus assets must be directed to a similar association in a cy-près manner. Incorporated associations may, however, specifically provide for an alternative distribution methodology. Notwithstanding anything in the association’s rules, members of associations in Queensland can make specific provision for distributing surplus assets by way of a special resolution. Such a resolution is binding on all parties. This could conceivably include a distribution between members. As a default position, where there is no rule or special resolution, the Queensland registrar may vest such property in the public trustee or other persons or incorporated associations for specified purposes. This would presumably apply where, for example an association is defunct, or the membership body has been reduced below quorum levels.

As in other jurisdictions, the Tasmanian Supreme Court has the power to determine all matters relating to the winding-up of an incorporated association under a winding-

138 **Associations Incorporation Act 1981** (Qld) ss 89-90. The Supreme Court is to proceed under the modified winding-up provisions of the **Corporations Act 2001** (Cth) pursuant to the **Associations Incorporation Act 1981** (Qld) s 91.
139 **Associations Incorporation Act 1981** (Qld) s 47.
140 Ibid s 47 & Regs 7, 8 & Sch 4 cl 36.
141 Ibid s 47.
142 Subject to any trusts (**Associations Incorporation Act 1981** (Qld) s 92(1)).
143 Ibid ss 92 & 94.
144 Ibid s 47(2).
In Tasmania a two-thirds majority of the members at a meeting called to wind-up an association can approve a resolution for the disposition of any surplus assets. There is nothing in the legislation to prevent such a resolution directing the surplus assets to association members. Once approved by the Supreme Court, this resolution becomes an order of the court. Where there is no such resolution the Supreme Court is required to make sufficient orders to distribute any surplus property “having regard to the objects and purposes of the association being wound up”. This could perhaps be argued to require a cy-près style distribution methodology on the part of the court.

The legislation in remaining jurisdictions specifically prohibits the distribution of surplus assets of incorporated associations to any of the members or former members of the incorporated association. In New South Wales the Supreme Court has the power to determine all matters relating to the winding-up of an incorporated association under a winding-up. However, any surplus assets of an incorporated association on dissolution can only be vested (under the terms of a special resolution of members) in another association with similar objects to the association which is

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145 *Associations Incorporation Act 1964 (Tas)* ss 32-33. The Supreme Court is to proceed under the modified winding-up provisions of the *Corporations Act 2001* (Cth) pursuant to the *Associations Incorporation Act 1964 (Tas)* s 32.

146 *Associations Incorporation Act 1964 (Tas)* s 33.

147 The Supreme Court may refuse to approve any resolution it deems to be “unjust” (s 33(2)).

148 *Associations Incorporation Act 1964 (Tas)* s 33(1).

149 *Associations Incorporation Act 1964 (Tas)* s 33(2)(b). Presumably this would suggest to the court that a cy-près scheme should be considered as the first alternative.

150 *Associations Incorporation Act 1984 (NSW)* s 51. The Supreme Court is to proceed under the modified winding-up provisions of the *Corporations Act 2001* (Cth) pursuant to the *Associations Incorporation Act 1984 (NSW)* s 51(3).
being dissolved. In addition, the recipient of the surplus assets so transmitted must also prohibit distribution of surplus assets to its members. It is also interesting to note that, under the New South Wales provisions such a recipient association need not itself be incorporated.

As with other Australian jurisdictions, in South Australia the Supreme Court has the power to determine all matters relating to the winding-up of an incorporated association. The South Australian provisions relating to the surplus assets of a dissolved incorporated association do allow for the distribution of surplus assets to be made to a member of the incorporated association. However, such a recipient member must itself be an incorporated association with identical or similar aims and objects. Other than this, incorporated associations cannot distribute their surplus assets on dissolution to a member. Where the distribution of surplus assets on winding-up is not provided for in an association’s rules, the distribution may be directed by a special resolution of members in the first instance, or in default of this, by the Supreme Court. Where the distribution of surplus assets is decided by the Supreme Court, the court is required to make sufficient orders to distribute any surplus property and in so doing, must “have regard to the objects of the

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151 *Associations Incorporation Act 1984 (NSW)* s 53. Subject to any trust and the return of any government contributions.

152 Ibid s 53(2A)(b). Note the veto of the registrar (s 53(2A)(a)).

153 *Associations Incorporation Act 1985 (SA)* s 41. The Supreme Court is to proceed under the modified winding up provisions of the *Corporations Act 2001 (Cth)* pursuant to the *Associations Incorporation Act 1985 (SA)* s 41(2).

154 *Associations Incorporation Act 1985 (SA)* s 43(1a)

155 Ibid s 43(1).

156 Ibid s 43(2)(a).

157 Ibid s 43(2)(b).

158 Ibid ss 43(2) & (3).
association”. Again this seems to imply that the court must apply any surplus “cy-près” the purposes of the dissolved association. The Northern Territory provisions are identical to those in South Australia.

The provisions of the Australian Capital Territory legislation are similar to the provisions of South Australia. As with South Australia, there is no provision for a distribution of surplus assets on winding-up between members. In addition in the Australian Capital Territory any cy-près distributions of surplus assets on winding-up must be nominated by the association that is wound-up (either in its rules or by way of a special resolution) otherwise in the alternative, those assets vest in the registrar for transmission to the Territory.

Once again the Western Australian Supreme Court has the power to determine all matters relating to the winding-up of an incorporated association. The Western Australian provisions relating to any surplus assets on the dissolution of incorporated associations are essentially borrowed from Parts II and III of the Charitable Trusts

159 Ibid s 43(4). Presumably this would suggest to the court that a cy-près scheme should be considered as the first alternative.

160 Associations Act (NT) s 76.

161 Associations Incorporation Act 1991 (ACT) ss 88-91. For example the Australian Capital Territory Supreme Court has the power to determine all matters relating to the winding-up of an incorporated association under a winding-up and must proceed under the modified winding-up provisions of the Corporations Act 2001 (Cth) (Associations Incorporation Act 1991 (ACT) ss 89-92).

162 Associations Incorporation Act 1991 (ACT) s 92.

163 Ibid ss 92(1)(a)(i) & (1)(b)(i).

164 Ibid ss 92(1)(a)(ii) & (1)(b)(ii).

165 Ibid s 92(1)(c).

166 Ibid s 95.
Act 1962 (WA) governing statutory cy-près schemes concerning the dissolution of charitable trusts. This indicates the close relationship in Western Australia between incorporated associations and charitable trusts. While not strictly cy-près schemes in the sense applicable to charitable trusts, the Western Australian legislation requires the distribution of surplus assets on dissolution to be made exclusively to another incorporated association, or in the alternative to charitable purposes. Such distribution can be provided for in the rules of the dissolved incorporated association, either by way of a distribution plan produced by members generally, or the committee, otherwise it will be decided by the registrar.

Provisions in the relevant association incorporation statutes are not the only provisions that must be considered when seeking to determine the true nature of incorporated associations. Cy-près type schemes may be enshrined in the constitutions of incorporated associations, or be adopted by members’ resolutions, even in jurisdictions where distribution on dissolution to natural person members is a

167  *Associations Incorporation Act 1987 (WA)* ss 30-31. The Supreme Court is to proceed under the modified winding-up provisions of the *Corporations Act 2001* (Cth) pursuant to the *Associations Incorporation Act 1987 (WA)* ss 30(4) & 31(3).

168  *Associations Incorporation Act 1987 (WA)* s 33.

169  Section 33(2)(b).

170  Section 33(4). This is a matter that must be provided for in the rules of associations under *Associations Incorporation Act 1987 (WA)* s 16 & Sch 1.

171  This plan may be produced by members (s 33(3)) or the committee with or without approval via ordinary resolution of members. The plan is then lodged with the registrar for one month prior to implementation. If these steps cannot be taken the registrar has the power to act administratively to credit the surplus assets into the state Consolidated Fund. These funds are probably still subject to the cy-près style distribution constraints at s 32(2)(b).

172  Section 33(5).

173  Section 33(10).

174  *Associations Incorporation Act 1984 (NSW)*; *Associations Incorporation Act 1981 (Qld)*; *Associations Incorporation Act 1985 (SA)*; *Associations Incorporation Act 1964 (Tas)*; *Associations Incorporation Act 1981 (Vic)*; *Associations Incorporation Act 1987 (WA)*;
statutory possibility.\textsuperscript{175} This is because of the income tax treatment of incorporated associations, specifically possible entitlement to beneficial taxation status. This will be discussed below under the heading of “Income Tax Status of Incorporated Associations”.

\textbf{Internal Governance}

Professor Salamon recognises four key issues relating to internal governance namely:\textsuperscript{176}

1. The locus of ultimate authority in the organisation,
2. The size in terms of office and role of the governing board if any,
3. The officers of the organisation if any, and
4. The decision-making procedures the organisation will use.

In order to facilitate comparison with the allegorical alternatives identified in the previous chapter, it is convenient to consider issues 1, 2 and 3 above together under the heading “Delegated Management” while issue 4 will be considered separately.

\textbf{Delegated Management}

This characteristic raises the question of whether or not the authority to make management decisions on behalf of the association rests with the membership generally, or with a smaller group of elected representatives. Professor Salamon has recognised the existence of two alternative governance structures with respect to

\textsuperscript{175} Such as Tasmania subsequent to a voluntary cancellation or winding-up; Queensland Victoria and, New Zealand following either a cancellation or winding-up,

nonprofit incorporated associations. The first of these is what he terms “membership organisations” and the second of these he terms “board-managed organisations”. Sometimes membership organisations are referred to by other authors under the epithet “collegially” or “congregationally” governed.

Clearly where an incorporated association chooses to be membership-governed, this would present problems for the traditional narrowly conceived organic theory as it has been applied to trading companies. As will be recalled from chapter 1 such a theoretical construct requires the existence of two corporate organs, one being the membership meeting and the other being the board of directors. Both chapters 1 and 2 illustrated that this is the dominant paradigm in corporate law scholarship relating to the modern trading corporation. Such a narrow conception would not have ready application to membership-governed associations given that in those groups all association decisions would be made by the membership as a whole. Two jurisdictions within the scope of this study do not adequately allow for the possibility of an incorporated association being a membership organisation as defined by Salamon.

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178 Lockley, GL, "The Foundation, Development and Influence of Congregationalism in Australia: With Emphasis on the Nineteenth Century", PhD thesis, University of Queensland, Brisbane, 1968 at Chapter XII generally, and at 359 & 364 in particular, where the founding fathers of the Australian associations incorporation legislation (Charles Bagot in South Australia and George Randell in Western Australia) are identified as members of the “Congregationalist” Church.

179 Namely Queensland and the Australian Capital Territory. The *Associations Act* (NT) is positively gnostic given that it neither adequately defines “committee” nor “management committee” but places various statutory responsibilities on this body (e.g. at s 27(6)). On the straight jacketing effect of such prescriptive and inflexible statutory frameworks see *Re Vassallo* [2001] 1 Qd R 91 and the excellent discussion of this case in its broader context in
In most other jurisdictions the relevant measures define the “committee”\(^{180}\) as the group that manages the association (or similar wording), which theoretically could include all members in a membership-governed association.\(^{181}\) The situation in the Northern Territory may allow for both membership and board governance models, however, the provisions of both the new *Associations Act* (NT) and the relevant Regulations are too poorly drafted to allow a definitive statement.\(^{182}\) In New Zealand there is no mention whatever of a “committee” in the *Incorporated Societies Act 1908* (NZ), however, provision must be made in the rules of all associations in that country for the appointment of “officers”.\(^{183}\)

In Queensland the traditional narrow form organic theory is most rigidly applied.\(^{184}\) In this jurisdiction an incorporated association *must* have a committee\(^{185}\) with at least 3 members, 2 of whom will *always* be the president and treasurer of the association and the third will be the secretary.\(^{186}\) This committee *must* meet at least once in

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\(^{180}\) Throughout this work the term “committee” will be used for ease of reference to include all equivalent nomenclatures such as “management committee” and “board” etc.


\(^{182}\) *Associations Act* (NT) ss 4 “committee”, 29 (a blank statement of persons not precluded from membership) & 30 (persons disqualified from committee membership); and *Associations (Model Constitution) Regulations* (NT).

\(^{183}\) At s 6(g).

\(^{184}\) *Associations Incorporation Act 1981* (Qld) Pt 7.

\(^{185}\) Ibid ss 60-61.

\(^{186}\) Ibid ss 65-67.
every four months,\textsuperscript{187} and notice of any changes to the association’s statutory officeholders \textit{must} be lodged with the registrar.\textsuperscript{188}

Likewise in the Australian Capital Territory an incorporated association \textit{must} have a committee of at least 3 members and notice of changes in its composition \textit{must} be lodged with the regulator.\textsuperscript{189} As indicated above, none of the other jurisdictions under present consideration are as mandatory in their stipulations regarding officers or committees of incorporated associations.

The structural governance question of an association having a committee raises one additional consideration which must be addressed. As has been highlighted, in most jurisdictions the legislation is drafted in such a way as to apply to “membership-governed” associations without forcing them to adopt a notional organic-style board structure.\textsuperscript{190} In addition, it may be the case that an association does follow the “board-managed” model of governance, but has a constitutional provision granting management power to the general meeting of members and that this power will be exercised between members meetings by the committee.\textsuperscript{191} The implications of such scenarios in the majority of relevant jurisdictions would be that all of the statutory duties of committee members would be applicable to those ordinary members present at general meetings when exercising management powers. Indeed, it is probable that

\textsuperscript{187} Ibid s 63.
\textsuperscript{188} Ibid s 68.
\textsuperscript{189} \textit{Associations Incorporation Act 1991 (ACT)} ss 60 & 62. See Sievers, AS, \textit{Associations and Clubs Law in Australia and New Zealand}, 2nd ed, Federation Press, Annandale, 1996 at 120.
\textsuperscript{190} All except Queensland and the Australian Capital Territory.
\textsuperscript{191} \textit{Report on the “Associations Incorporation Bill 1987”}, The Law Society of Western Australia, Conveyancing Committee, Perth, 1987 at 14, para 8.
any and all legal duties applicable to committee members in these jurisdictions, whether statutory, common law or equitable, would be applicable to such persons in such circumstances.

Management powers, whether delegated to a board, or retained by the members in general meeting, also raise the issue of statutory duties required of committee members where they exist and have powers of management. For present purposes I will characterise these duties as technical, qualitative or fiduciary in nature. By technical duties I refer to such administrative matters as observing time limits, keeping records, lodging documents, holding meetings etc. Qualitative duties here should be taken to refer to the equivalent of the common law duty of skill, care and diligence of the reasonable person (with or without the additional inclusion of a “business judgement” criterion). Duties of a fiduciary nature here refer to such matters as the duty of loyalty and utmost good faith normally imposed by equity on persons standing in a fiduciary relationship.

Technical duties (together with statutory sanctions for their non-observance) are placed on members of committees or specifically identified individual members, in all jurisdictions. In addition, technical duties of a most grave nature apply to such

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193 By technical duties I should not be taken to be characterising these duties of committee members of incorporated associations as trivial. It is merely an appellation under which I choose to assemble like duties of a particular type. Eg: Associations Incorporation Act 1984 (NSW) ss 20, 23(2), 25, 26(7), 27(1), 38(1) & (5), 63(3), 66(2), 67(5) & (6), 68 (specific duties of members), & 70 (default of the association creates personal liability for members); Associations Incorporation Act 1981 (Qld) ss 17, 24, 52-54, 57, 59, 65-66, 68, 70, 83, 87, 93, 121A, 122 & 124 (specific duties of members); Associations Incorporation Act 1985 (SA) ss 5, 8, 14, 30, 35(7), 37, 39C, 41B, 41D, 41E, 49AB-49AD, 49AF, 49A, 51, 53, 55, 58-59, 62, 62D-62 (specific duties of members), & 57 (default of the association creates personal liability for members); Associations Incorporation Act 1964 (Tas) ss 14, 15, 18, 23A, 24, &
individuals by virtue of incorporated associations being caught within the definition of a “Part 5.7 Body” at s 9 of the *Corporations Act 2001* (Cth).194

Only South Australia imposes statutory duties of a qualitative nature on committee members of incorporated associations.195 Even in South Australia, however, this statutory impost is not universal. These duties of reasonable care and diligence are applied to the committees of “prescribed associations” only.196 The relevant South Australian provision reads as follows:

An officer of a *prescribed association* must at all times act with reasonable care and diligence in the exercise of his or her powers and the discharge of the duties of his or her office.197

The wording of this provision is borrowed in large part from the wording of the former *Corporations Law* (Cth) s 232(4). It would seem likely therefore that any case law relevant to that provision has application to the South Australian

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194 See for example Huntly, C, "Dionysius, Damocles and the Unseen Perils of Insolvency for Officers of Incorporated Associations" (2000) 18(4) *Company & Securities Law Journal* 262 for a detailed analysis of the technical consequences of this, particularly in regard to “technical insolvency” arising from poor accounting records.


196 Being those associations that have “gross receipts in that association's previous financial year in excess of $200,000” (*Associations Incorporation Act 1985* (SA) s 3).

197 Ibid s 39A(4).
equivalent.\textsuperscript{198} However, as I have already discussed in the previous chapter, the \textit{Corporations Act 2001} (Cth) now contains a caveat on the directorial duty of care in the form of the business judgement rule. No such modification has been made to the South Australian provision.\textsuperscript{199}

As to the existence or nature of any qualitative duties that may be owed by committees of incorporated associations at common law, we are left to conjecture and surmise. Given the centrality of analogy in legal reasoning, it is unsurprising to note in the writings of leading scholars in this area a consistent reference back to the duties of directors of trading companies when seeking to expound a coherent jurisprudence.\textsuperscript{200} As painstakingly expressed in the previous chapter of this thesis, such analogical reasoning is based on the unquestioned proposition that the trading corporation is either the best or the only valid source analogue when mapping legal


\textsuperscript{199} That this may present problems in resorting to company law as an analogy for incorporated associations, see Fisher, AF, "Duties of Company Directors and Committee Members of Incorporated Associations: Have the Paths Divided?" (2001) 13(2) \textit{Australian Journal of Corporate Law} 143.

\textsuperscript{200} “Although case law has not established the principle, it is probable that committee members in all jurisdictions owe in the same measure, the common law and equitable duties which law and equity have imposed on company directors.” (Fletcher, KL, \textit{The Law Relating to Non-Profit Associations in Australia and New Zealand}, Law Book Company, North Ryde, 1986 at 289); “It also appears likely, although once again there is no supporting Australian authority, that the members of the committee of an incorporated association would be seen as being in the same position as a company director and subject to a similar duty of care, skill and diligence.” (Sievers, AS, "What Is the Future for Honorary Directors and Committee Members? - Their Duties and Liabilities" in McGregor-Lowndes, M, et al, (Ed) \textit{Legal Issues for Non-Profit Associations}, LBC Information Services, North Ryde, 1996 at 33); “The position of the members of the committee of an incorporated association varies considerably … It appears probable that they would be regarded as being in an analogous position to company directors.” (\textit{Halsbury’s Laws of Australia} ¶435-205); “The relation of committee members to an incorporated association is identical to that of directors to a company.” (\textit{The Laws of Australia} Topic 4.8 “Non-Corporate Organisations” Chapter 3 ¶135); and “The accepted wisdom is that the duties of company directors arising under the common law and equity also apply to those involved in the governance of incorporated associations.” (Fisher,
duties in the incorporated association environment. To date, while there has been some tentative recognition that such an analogical approach may not be entirely appropriate, it is yet to be carefully analysed or seriously questioned. For present purposes, however, it is important to note that the committee members of the vast majority of incorporated associations, whether sporting or not, are unencumbered by statutory duties of a qualitative nature. Whether or not the general law will (or should) follow that applicable to trading companies is currently very much a moot point.

In contradistinction to the general legislative silence concerning qualitative duties of committees of incorporated associations, there is more widespread inclusion of duties of a fiduciary nature in the relevant legislation. These duties are:

- To act honestly in the discharge of their office.
- Not to make improper use of information gained by virtue of their position (such as to benefit themselves or cause detriment to the association).

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201 See the discussion in the previous chapter; Fisher, AF, "Duties of Company Directors and Committee Members of Incorporated Associations: Have the Paths Divided?" (2001) 13(2) Australian Journal of Corporate Law 143 at 147.


203 Associations Incorporation Act 1984 (NSW) ss 38 (trading while insolvent or fraudulently obtaining credit) & 68 (false and misleading statements); Associations Incorporation Act 1981 (Qld) ss 62 (management committee members deemed agents for the associations), 121A (False and misleading statements), 122 (fraud and misappropriation), & 123 (officers deemed servants for the purposes of the Criminal Code); Associations Incorporation Act 1985 (SA) s 39A(1) (curiously expressed in the negative); and Associations Act (NT) ss 33(1), 88 & 92 (fraud and misappropriation).

204 Associations Incorporation Act 1985 (SA) s 39A(2); Associations Incorporation Act 1981 (Vic) s 29A(1); and Associations Act (NT) s 33(2).
• Not to make improper use of their position.\textsuperscript{205}

• To disclose any direct or indirect pecuniary interest in a contract with the association. (There may be additional restrictions pertaining to participating in deliberations or voting on the contract).\textsuperscript{206}

If one were to attempt a general characterisation of the statutory duties of committee members of incorporated associations based on the summary above, it would perhaps be along the following lines: there are various technical requirements laid out by the legislature in each jurisdiction binding on committee members, (most jurisdictions demand high fiduciary standards of such persons) but little concern has been expressed on the part of legislatures about the care, skill or diligence that these persons may possess or exercise. Indeed it would appear from the foregoing discussion that the legislatures of jurisdictions relevant to this thesis are content to leave the resolution of questions concerning the qualitative and (to a lesser extent) fiduciary duties of committee members of incorporated associations to the judiciary. The central premise of this thesis is to question the dominant paradigm that is likely to be relied upon when these questions are judicially considered.

As will be appreciated from the foregoing discussion, the nature of internal governance mechanisms within incorporated sporting associations is not a matter about which one can, on the basis of current scholarship, be dogmatic. Careful empirical analysis is required in order to determine the extent to which a model of

\textsuperscript{205} \textit{Associations Incorporation Act 1985} (SA) s 39A(3); \textit{Associations Incorporation Act 1981} (Vic) s 29A(2); and \textit{Associations Act} (NT) s 33(3).
governance can be said to be dominant (if indeed there is a dominant model). This is the challenge of corporate law organic theory, broadly conceived. Such insight is of course irrelevant to adherents of narrow form organic theory, as defined in chapter 1. However as identified in chapter 2, any jurisprudential inference based on such an impoverished theoretical foundation together with a lack of regard for the observed reality of incorporated sporting associations must be open to scholarly criticism. While it is of course possible to resort to narrow form organic theory as a jurisprudential metaphor for incorporated associations, without empirical study, such a source analogue will always lack the persuasive force of highly structured analogy.

**Decision-Making Procedures**

This aspect of the structure of incorporated associations is potentially relevant in two settings, namely a propos the committee (if there is one) on the one hand, and with respect to the general meeting of members on the other.\(^\text{207}\) Firstly one must determine whether such procedures are mandated by statute, or are left for internal decision within the broader context of the general law. As will be appreciated from chapter 1, broad form organic theory would require the minimum legislative interference in such matters, and would leave them to be decided by members. With respect to any decision-making procedures applicable to the committee of an association the key question is whether the association in question actually has a management committee and, if so, what is the nature of the powers of such a body?

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\(^{206}\) Associations Incorporation Act 1985 (SA) ss 31-32; Associations Incorporation Act 1981 (Vic) ss 29B-29C; Associations Incorporation Act 1987 (WA) ss 21-22; Associations Incorporation Act 1991 (ACT) s 65; and Associations Act (NT) ss 33-32.
**Member Governed Associations**

Where there is no committee of an association as distinct from the membership generally, or if the rules of the association provide that the association will be managed by members in general meeting and between members’ meetings by the committee, then any statutory decision making requirements logically fall to be borne by the members’ meeting.

With a single exception,208 every Australian and New Zealand jurisdiction requires the holding of an annual general meeting of members.209 In most jurisdictions there is specific statutory requirement for provision to be made in the rules of incorporated associations in relation to the holding of meetings. These requirements vary considerably but include such matters as registers of members, votes and polls, voting qualifications, notice, quorum, ordinary and special voting majorities, elections, proxies, appointment, removal, powers and duties of chairs, disclosures, reserved powers of members, disciplinary proceedings etc.210 It is clear that the general law will apply where there is statutory and constitutional silence on a

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208 Namely, Tasmania.


210 *Associations Incorporation Act 1984* (NSW) s 11 & Sch 1; *Associations Incorporation Act 1981* (Qld) s 68C(c) & Reg; *Associations Incorporation Act 1985* (SA) s 23A; *Associations Incorporation Act 1964* (Tas) s 17 & Sch 1; *Associations Incorporation Act 1981* (Vic) s 6 & Sch; *Associations Incorporation Act 1987* (WA) s 16 & Sch 1; *Associations Incorporation Act 1991* (ACT) s 32 & Sch; *Associations Act (NT)* s 33(1), *Associations (Model Constitution) Regulations* (NT) Sch; and *Incorporated Societies Act 1908* (NZ) s 6.
particular issue. Where general law norms are not observed in such cases, subsequent conduct may result in access to the supervisory and appellate jurisdiction of courts over incorporated associations.

**Delegate Managed Associations**

As far as decision-making procedures of committees are concerned, other than any general requirements concerning meeting procedures that have already been mentioned, a number of jurisdictions do have specific statutory requirements. In Queensland there is a statutory requirement for committees of incorporated associations to meet on at least 3 occasions during the year either in person or electronically. The quorum for such meetings must be provided for in the rules of an association in that state. In South Australia minutes of all meetings (whether of members or the committee) must be kept as prescribed. There is no other statutory requirement specifically relating to meetings of a committee in that state. In Western Australia the sole statutory requirement is expressed in broad terms. In that state, provision must be made in the rules of every association for the “quorum and

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213 i.e.: *Associations Incorporation Act 1984* (NSW) s 11 & Sch 1; *Associations Incorporation Act 1981* (Qld) s 68C(c) & Reg; *Associations Incorporation Act 1985* (SA) s 23A; *Associations Incorporation Act 1964* (Tas) s 17 & Sch 1; *Associations Incorporation Act 1981* (Vic) s 6 & Sch; *Associations Incorporation Act 1987* (WA) s 16 & Sch 1; *Associations Incorporation Act 1991* (ACT) s 32 & Sch; and *Incorporated Societies Act 1908* (NZ) s 6. Note also the requirements of statutory duties of a qualitative or fiduciary nature pertaining to decision making by committees as discussed above.

214 *Associations Incorporation Act 1981* (Qld) s 63.

215 *Associations Incorporation Act 1985* (SA) s 51.
procedure at meetings of the committee." Care should also be taken to ensure that the meeting procedure adopted does not result in personal liability under the insolvent trading provisions of the Corporations Act 2001 (Cth).

Voluntary Association

The voluntary nature of incorporated associations as an essential characteristic has been considered by a variety of authors. Likewise, the importance of volunteering in the sport and recreation sector generally is well documented. A study conducted in 2000 indicated that in New Zealand 77% of “workers in the sector were unpaid (voluntary)’. The estimated economic value of this work, based on an average rate of pay for these volunteers of $17.25 per hour, was in the region of $NZD1.9 billion. In Australia the available statistics are more current, having

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216 *Associations Incorporation Act 1987 (WA) s 16 & Sch 1 cl 6(e).*

217 Section 588G. This provision would require regular inquiry into the financial affairs of the association at committee meetings as a matter of course.


221 Id.

222 Ibid at 28.
been published in 2003.\textsuperscript{223} These indicate that in the Australian not-for-profit sport and physical recreation sector 78\% of workers in the sector were unpaid (voluntary).\textsuperscript{224} In total these volunteers worked for an estimated 130 million hours.\textsuperscript{225} Assuming an average rate of pay for these volunteers of $17.19 per hour,\textsuperscript{226} the economic value of this voluntary work was in the region of $AU2.235 billion. Despite this empirical evidence, all of the governing statutes fail to refer to the issue of volunteerism in any respect.

The above research indicates that incorporated sporting associations are typically funded by a combination of subscriptions, donations, sponsorship and operating activities. If one narrows the consideration of funding to sporting groups (being the most common form of incorporated association and the category with which this work is primarily concerned), based on a Western Australian study\textsuperscript{227} roughly 24\% of funding for such groups comes from subscriptions, 39\% of all non-government sourced income comes from an assortment of donations and sponsorship\textsuperscript{228} with the remainder being generated from operations. In Australia Commonwealth, state and local government funding for sports and physical recreation totalled $AU2.1 billion

\textsuperscript{223} Sport and Recreation - a Statistical Overview: Australia, 4156.0, Australian Bureau of Statistics, Adelaide, 14 November, 2003
\textsuperscript{224} Sport and Recreation - a Statistical Overview: Australia, 4156.0, Australian Bureau of Statistics, Adelaide, 14 November, 2003 at 48, Table 5.5.
\textsuperscript{225} Ibid at 52, Table 5.9.
\textsuperscript{226} Being the average weekly ordinary time earnings for full-time workers in the sector ($687.60 p/wk) divided by 40 hours (Sport and Recreation - a Statistical Overview: Australia, 4156.0, Australian Bureau of Statistics, Adelaide, 14 November, 2003 at 47, Table 5.4)
\textsuperscript{228} Business contributions to these sports and recreation funding sources totalled $AU628 million in 2000-1 (Sport and Recreation - a Statistical Overview: Australia, 4156.0, Australian Bureau of Statistics, Adelaide, 14 November, 2003 at 62).
in 2000-1.\textsuperscript{229} This accounts for about 45\% of total income to this sector.\textsuperscript{230} As can be seen, the voluntary nature of associations in general, and incorporated associations in particular, leads to a unique and complex funding formula that is quite unlike that which is in evidence in the modern trading company context.\textsuperscript{231}

Most commentators accept that the existence of such bodies is to be fostered and encouraged. The voluntary nature of incorporated associations should therefore be recognised when considering the legislative framework. It is also suggested that the term \textit{volunteer} should be defined in a broad sense to include individuals who may receive some form of honorarium or gratuity. Of further interest is that a common theme in the governing legislation is the primacy of fiduciary considerations as opposed to qualitative considerations as benchmarks of acceptable conduct applicable to committee members of such bodies.\textsuperscript{232}

**Taxation Status of Incorporated Associations**

In Australia the \textit{Income Tax Assessment Act 1997} (Cth) Pt 2-15 Div 50 deals with specific exemptions from income tax that apply to clubs and associations. The equivalent provisions in New Zealand are at section CB 4 of the \textit{Income Tax Act 1994} (NZ).\textsuperscript{233} Of particular interest to this research is the fact that the legislation in

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\textsuperscript{229} Commonwealth 9.4\%, states and territories 41.2\%, and local governments 49.4\% (\textit{Sport and Recreation - a Statistical Overview: Australia}, 4156.0, Australian Bureau of Statistics, Adelaide, 14 November, 2003 at 60)


\textsuperscript{232} See under the heading “Delegated Management” above.

\textsuperscript{233} Note that from the 2005-6 financial year, identical provisions will apply in New Zealand pursuant to the \textit{Income Tax Act 2004} (NZ) ss CW 34-40.
both jurisdictions provides for the exemption from income tax of clubs formed for the encouragement or promotion of animal races, a game or sport.\textsuperscript{234}

In Australia, the Federal Commissioner of Taxation has determined how the taxation exemption for sporting entities will be administratively applied.\textsuperscript{235} The core eligibility requirements for exemption from income tax from a financial perspective are the “mutuality” of receipts from members, and the prohibition of pecuniary distributions to members. The issue of mutuality was discussed above under the “private” status of incorporated sporting associations. The requirement for prohibitions on pecuniary distributions to members is expressed by the Commissioner of Taxation as follows:

**Non-profit requirement**

9. A club must not be carried on for the purposes of profit or gain to its individual members.

10. A club's Memorandum and/or Articles of Association or other constituent documents should contain a prohibition against a distribution of profits and assets among members while the club is functional and on its winding-up. Alternatively, a club satisfies the test if the law governing its activities prevents the club from making distributions to members. The club's activities should conform to the prohibition.\textsuperscript{236}

\textsuperscript{234} *Income Tax Assessment Act 1997* (Cth) ss 50-45 at item 9.1(c) of the table; and *Income Tax Act 1994* (NZ) ss CW 39-40.


\textsuperscript{236} Ibid at 2. See also page 5, paragraph 22 the model clauses for inclusion in an association’s rules or constitution to evince the requisite non-profit character:

**Non-profit clause**

*The assets and income of the organisation shall be applied solely in furtherance of its above mentioned objects and no portion shall be distributed directly or indirectly to the members of the organisation except as bona fide compensation for services rendered or expenses incurred on behalf of the organisation.*

**Dissolution clause**

*In the event of the organisation being dissolved, the amount that remains after such dissolution and the satisfaction of all debts and liabilities shall be transferred to any*
The Commissioner of Taxation requires that these prohibitions attach to distributions to members both while associations are operational and on winding-up. This provides a strong incentive for incorporated sporting associations to adopt the equivalent of a *cy-près* scheme within their rules.\(^{237}\)

However, the Commissioner of Taxation has additional requirements before ruling in favour of an incorporated sporting association that desires exemption from income tax. The most relevant of these requirements from the perspective of this thesis, are a close examination of the purposes for which the association exists,\(^{238}\) and participation by members in the “management” of the association.\(^{239}\) Once again it is instructive to observe the centrality of the purposes of an association in determining its eligibility for nonprofit status. It is also instructive to note that a strict separation of membership from control such as exists in the theoretical modern trading corporation is considered the exception rather than the rule in nonprofit sporting associations.

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\(^{237}\) Australian Taxation Office, Taxation Ruling Income Tax: Exempt Sporting Clubs, TR 97/22, 3 December 1997 at 5, paragraph 22 “Dissolution Clause”.

\(^{238}\) Ibid at 3 the Commissioner states:

**Main purpose**

13. *To be exempt, the main purpose of the club must be the encouragement of the relevant game or sport.*

14. *A club's main purpose can only be ascertained after objectively weighing all of the club's features, including those features described in paragraphs 15 and 16. The presence or absence of a feature may not conclusively determine that the club's main purpose is or is not the encouragement of a game or sport.*

This is further stressed at paragraph 15 as a “highly persuasive feature”. Considerable further attention to this determinant is given at 10-15.

\(^{239}\) Ibid at 4, paragraph 16 the Commissioner states that features that are “relevant but less persuasive” are:

- *the members of the committee, or persons who control the direction, of the club are predominantly participants in or concerned with the encouragement of the game or sport (as distinct from day to day management of the club).*
By way of comparison, it is also worth noting that the specific requirements for a sports entity to be entitled to an exemption from income tax in New Zealand are as follows:

(a) the club, society, or association is established mainly to promote an amateur game or sport; and

(b) the game or sport is conducted for the recreation or entertainment of the general public; and

(c) no part of the funds of the club, society, or association is used or is available to be used for the private pecuniary profit of a member, proprietor, shareholder, or associate of any of them.\(^\text{240}\)

The similarity of this legislative provision to that applicable in Australia is remarkable.\(^\text{241}\) Note again the central role played by organisational purposes and the prohibitions on distributing pecuniary profit to members.\(^\text{242}\)

It is not the purpose of this thesis to inquire into the rationale behind the granting of these income tax exemptions to voluntary nonprofit associations. The issue of taxation status is addressed here partly because it is identified by Professor Salamon as a key attribute of voluntary nonprofit associations, and partly because it may also

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\(^{240}\) Income Tax Act 1994 (NZ) s CW 39.

Even more significant is the fact that the administrative requirements of Inland Revenue New Zealand are substantially the same as those enumerated above in connection with the Australian Taxation Office. As advised in “IR Booklet 254: Clubs and Societies”, tax exempt associations must have a clause in the constitution in substantially the following words:

*If upon the winding up or dissolution of the organization there remains after the satisfaction of all its debts and liabilities any property whatsoever the same shall not be paid to or distributed among the members of the organization but shall be given or transferred to some other organization or body having objects similar to the objects of the first organization, or to some other charitable organization or purpose, within New Zealand.*

\(^{241}\) It is interesting to note that these issues are addressed in an almost identical manner by recent reform proposals in Canada (*Reform of the Canada Corporations Act: Draft Framework for*
explain the inclusion of cy-près style schemes in the constitutions of sporting associations in Australia and New Zealand even where these are not required in the relevant incorporation statutes. Whether or not exemption from taxation is actually a motivating factor for incorporated associations to adopt particular constitutional clauses is a matter for further investigation. To a limited extent this will be addressed in chapter 4 which details the empirical testing carried out in the course of this research. Related questions, including whether or not incorporated associations are aware that taxation exemptions exist, are outside of the scope of this thesis.

Given that incorporated associations are prevented from distributing pecuniary profits to members it is a matter of conjecture as to the relative significance of taxation provisions to incorporated sporting associations. Three possible reasons why an incorporated sporting association might wish to generate profits present themselves for consideration. Firstly, subsidising the cost of providing services and facilities to members; secondly, subsidising the provision of facilities and services to the general community; and thirdly, generating profits to promote some other purpose such as the general promotion of a sport or game, or contributing towards some other philanthropic purpose.

**Summary**

It is apparent that there is a lack of uniformity in the legislative requirements of each jurisdiction at the heart of this investigation. There have been several calls for a more streamlined approach at least within Australia, even to the point of a referral of

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208
power from the states to the Commonwealth.\textsuperscript{243} Rather than focus on the extent of legislative divergence, I have chosen in this chapter to divine the broad themes in the governing legislation in order to discern a coherent framework within which a jurisprudence might develop. In doing this, I have sought to apply a recognised schema with international application. All of the above findings are consonant with the characteristics identified by Professor Salamon.\textsuperscript{244} The unique nature of incorporated associations identified above suggests that incorporated associations manage their affairs on a domestic basis\textsuperscript{245} often with a minimum of formality,\textsuperscript{246} and in particular:

i) Incorporated associations are organisations complying with statutory eligibility criteria.

ii) Incorporated associations are all, broadly speaking, organised institutions exhibiting varying degrees of formality. Statutory duties are usually imposed on “committees” of these associations, in particular, duties of a technical and fiduciary nature and, more rarely, duties of a qualitative nature.

iii) Incorporated associations are primarily private or domestic organisations falling somewhere between the public and commercial sectors.

\begin{itemize}
  \item Levy, KJ, ”An Historical Analysis of Incorporated "Non-Profit" Entities in the United Kingdom, New Zealand and Australia with the Purpose of Raising the "Profit/Non-Profit" Debate”, Master of Laws thesis, University of Melbourne, Melbourne, 1994 Chapter 5. A more cautionary and reasoned approach is outlined by Sievers (Sievers, AS, ”Incorporation of Non-Profit Associations: The Way Ahead?” (2000) 18(5) \textit{Company & Securities Law Journal} 311; and Sievers, AS, ”Incorporation and Regulation of Non-Profit Associations in Australia and Other Common Law Jurisdictions” (2001) 13(2) \textit{Australian Journal of Corporate Law} 124).
\end{itemize}
iv) Central to the nature of incorporated associations is the non-distribution constraint vis-a-vis the association and its members, both as a going concern, and in the event of corporate determination.

v) Incorporated associations exhibit a range of internal governance structures from purely membership-governed to purely board-governed.

vi) Incorporated associations are voluntary organisations both in terms of freedom of association and in terms of organisational operation. In other words associations depend strongly on the work of volunteers to achieve their purposes.

vii) The most important funding sources for incorporated associations are members, donations, sponsorship and government grants or concessions rather than commercial sources.

viii) Incorporated sporting associations enjoy beneficial taxation treatment in return for adopting distribution constraints, including cy-près style constitutional clauses.

The following chapter will investigate the extent to which the legislative framework outlined above is understood by, and the extent to which it meets the needs of, user groups. This was achieved by means of a large survey of incorporated sporting associations in Australia and New Zealand.
CHAPTER 4
EMPIRICAL DATA: METHODOLOGY AND
DESCRIPTIVE STATISTICS

“The great tragedy of Science –
the slaying of a beautiful hypothesis
by an ugly fact.”

INTRODUCTION

As discussed in chapter 1, “broad form” organic theory challenges us to consider the social and inherent reality of organizations and associations. In a corporate law context, this challenge extends to the development of a jurisprudence which facilitates such corporate structures rather than restricting and controlling them in an inappropriate manner. Chapter 2 explored three possible legal analogies or metaphors that may provide guidance in the development of an appropriate jurisprudence for incorporated associations. The previous chapter surveyed the legislative framework currently in place in Australia and New Zealand allowing voluntary sporting associations to become incorporated bodies. This chapter summarises an epidemiological investigation of actual incorporated sporting associations in the relevant jurisdictions. The following chapter considers the implications of the findings of the epidemiological investigation in the light of the theoretical framework that was developed in the first three chapters. The final chapter will consider the extent to which the current legislative framework could be

said to reflect broad form organic theory, and also suggest a basis upon which a coherent jurisprudence of incorporated sporting associations could emerge.

**Methodology**

A questionnaire was prepared which sought to obtain empirical data about incorporated sporting associations for the purpose of testing the theoretical framework that was developed in preceding chapters. Practical technical assistance, together with reference texts informed the development of a research plan to achieve the desired outcome. This plan required the following steps:

1. Decide sampling methodology based on preliminary population investigation.
2. Produce a draft budget and secure funding.
3. Prepare a draft questionnaire.
4. Pre-test the draft questionnaire.
5. Produce a 2nd draft questionnaire based on pre-test feedback.
6. Discuss format and coding issues with technical staff.
7. Produce a final draft questionnaire.
8. Discuss final draft questionnaire, covering letter, respondent inducements and ethics clearance with supervisor.
9. Apply for ethics clearance.
10. Determine survey sample and generate mailing list.

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2 The preparatory assistance of Ms Jennifer Lalor of the Learning and Scholarship Network at Curtin University was crucial to the success of the final survey.

11. Arrange printing and mailing.
12. First mail-out.
13. Reminder card mail-out.
15. Competition draw.
16. Data processing.
17. Data analysis and interrogation.

**Sampling Methodology**

My previous research suggested that the single largest distinct user-group of the associations incorporation legislation in Australia and New Zealand was sporting groups. That research suggested that there could be as many as one in three, or around 50,000 incorporated sporting associations in Australia and New Zealand. This estimate lacked reliability, as a number of jurisdictions had not classified incorporated associations in any way that would facilitate the identification of sporting associations as a distinct category. This presented the first significant obstacle to performing a stratified sample cohort. Previous potentially relevant published surveys\(^4\) have been marked by a lack of sufficient coverage, or a failure to distinguish adequately between incorporated and unincorporated sporting groups.\(^5\) In addition, there is no published data available from any of the regulators that may have been of assistance in the generation of a stratified sample. For these reasons it was decided to proceed with the research project on the basis of a random 10% sample.


\(^5\) Salamon, L.M., *The International Guide to Nonprofit Law*, John Wiley & Sons, New York, USA, 1997 at Chapter 4 "Australia" (country rapporteur Dr Mark Lyons); and Lyons, M,
sample of the total incorporated sporting association population. Initially, a budget was prepared based on the basis of a sample size of 5,000 incorporated sporting associations.

**Budget and Funding**

Indicative quotes, based on the estimated sample size, were obtained for printing and mailing envelopes, cover letters, surveys, competition cards and reminder cards. Joint funding between Murdoch University and Curtin University of Technology was arranged in consultation with the thesis Supervisor and the Head of the School of Business Law at Curtin.

**Draft questionnaire**

By reference to the theoretical framework, a draft self-administered questionnaire was produced in consultation with the thesis Supervisor. This questionnaire was then pre-tested using a small reference group that was representative of a range of individuals with an involvement in sporting associations. The feedback obtained from this exercise was invaluable in considering the degree to which the covering letter explained the project adequately to a range of potential recipients. The reference group identified ambiguities in draft survey questions and interrogated all of the documents with a view to improving and clarifying general readability and

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stimulating reader interest. A second draft self-administered questionnaire was thereafter produced, incorporating the feedback derived in the pre-test interviews.

**Format and Coding Issues**

I met with staff experienced in survey design and implementation to ensure that the design and format of the second draft questionnaire would exhibit maximum user-friendliness and ease of data entry. The feedback obtained in this process was invaluable in choosing the type and size of font, page layout, paper quality and colour, and instructions to respondents. Likely response rates were discussed, in addition to methods of inducing greater participation rates. It was recommended that a competition be used, with participation in the survey exercise being a pre-requisite to entry in the competition. It was also recommended that a follow-up mail-out occur shortly after the original contact to encourage participation.

**Final Draft Self-administered questionnaire**

After incorporating all of the above feedback into the design of the questionnaire, a final draft self-administered questionnaire, covering letter, competition card and reminder card were all produced in “mock-up” form. These were then discussed in detail with the thesis Supervisor. It was agreed that a competition involving a draw to win a case of quality wine would be an appropriate inducement to encourage recipient participation in the survey. This was also raised with the Murdoch Division of Research and Development Research Ethics Office and an opinion obtained that such a competition was permissible under the relevant Murdoch research guidelines.

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6 My thanks to Mr Gavin Jahn, Ms Jenny Owens and Mr Cameron Yorke for their insight and
Following this, the necessary documents were submitted to the Murdoch University Human Research Ethics Committee for approval. This approval was notified by the Murdoch Research Ethics Office in a letter dated 27\textsuperscript{th} March 2003.\footnote{Permit number 2002/294.}

\textbf{Survey Sample Selection}

The single most significant obstacle in achieving the research objectives was in identifying the population, a suitable sample and mailing list. Research I had previously completed in 1998\footnote{Huntly, C, "Dionysius, Damocles and the Unseen Perils of Insolvency for Officers of Incorporated Associations" (2000) 18(4) Company & Securities Law Journal 262.} indicated that there were 114,502 such corporate groups in Australia alone. Earlier research that I had conducted in 1996\footnote{Huntly, CT, "A Century of Incorporated Associations in Western Australia: 1896-1996" (1996) Working Paper Series 96.05 26.} indicated that, of the total figure, anything up to one in three incorporated associations could be sporting groups. This was the most significant user-group of the associations’ incorporation legislation throughout Australia. My Master of Commerce research, completed in 1999, revealed that some classification of associations had taken place in New South Wales, Queensland and Victoria. No classification had ever taken place in the other states and territories – together representing 35\% of the national total. New Zealand had never classified its approximately 22,000 incorporated societies.
In theory therefore it was possible to identify more than 75% of the Australian incorporated sporting associations with some effort. In order to identify the target population it was necessary to:

1. Obtain the co-operation of the regulatory authorities in New Zealand and all states and territories in Australia.

2. Determine what data the regulatory authorities had, in particular the names and mailing addresses of incorporated associations in their jurisdiction.

3. Find out if the regulatory authorities had the required data in an electronic format.

4. Find out if it was possible to extract the required data.

5. Resolve any ethical/legal issues connected with the provision of the data.

6. Resolve any ethical/legal issues connected with the use of the data.

7. Negotiate a price for the provision of that data if necessary.

8. Modify the data for use in the project.

All of these issues had operated together to prevent any research of the kind envisaged from being conducted previously. One of the major problems associated with obtaining source data in the research area is that while most jurisdictions allow for the taking of extracts of information relating to individual associations, there is nothing to allow for research related access. Outside of an exercise of administrative discretion, researchers are faced with utilising the relevant non-uniform freedom of information legislation\(^\text{10}\) in a manner that is consistent with the *Privacy Act 1988* (Cth).

\(^{10}\) *Freedom of Information Act 1989* (NSW); *Freedom of Information Act 1992* (Qld); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas); *Freedom of
Jurisdictional Review & Target Sample Selection

New Zealand

There were 22,156 incorporated societies (the NZ equivalent of incorporated associations) in New Zealand as at 30th June 2002. These had never been classified. An email to the office of the Registrar of Companies in New Zealand readily elicited their support for the research project.11 After requiring and obtaining an assurance that the data would be used for research purposes only, payment was requested for the provision of data.12 This secured an Excel database with the names and mailing address (excepting postcodes) of every incorporated society in New Zealand.

The New Zealand database was then classified piecemeal so as to extract only the sporting societies. The address details then had to be reformatted in line with the standard used in the project. Following this, the postcodes had to be manually entered. At this point the SPSS for Windows program was utilised to extract a random 10% sample (or 561 societies) for use in the master survey mailing list.

Western Australia

I had previously collaborated with the Registrar of Incorporated Associations in Western Australia in 1999.13 That collaboration, commencing in 1996, had been

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11 My thanks to Ms Jacqueline Reynolds, Companies Office, Christchurch, New Zealand.
12 In the amount of $NZ764.00.
13 Mr Ray Neal, Manager, Business Names Ministry of Fair Trading, Western Australia.
both close and productive. After 1999 there was a new Minister, the department name and philosophy had been radically altered, the responsible manager had retired, and the relevant office had been geographically relocated and restaffed.

Mr Steven Meagher, Manager, Business Names in the Department of Consumer and Employment Protection granted me unrestricted access to the relevant data at no cost. This arrangement was mutually advantageous, as the department retained all incorporated associations data on microfiche. The only data that the department held electronically in 1999 was a list of names, file numbers, date of incorporation and whether the association had been deregistered. This was still the case in 2002. The only significant advance that had been made was that such data as the department had was now Excel-friendly. In 1996 when I had earlier classified Western Australia’s 14,000 plus incorporated associations, all the department could provide me with was a hard copy of their summary register. This had to be scanned onto disk and translated into Excel format. As a result of this earlier work, I had an Excel database that was fully classified up to 30th June 1998. This data was very useful for the department in 2002. I agreed to provide an electronic copy of these records and update the classification for the department. I was also able to provide the department with a copy of my published research, records of which had been lost in the office relocation. In return, the department opened their files completely for this research and cooperated with it to the fullest extent possible.

The Western Australian register is still mainly a microfiche database. In addition, there is no statutory requirement for incorporated associations to lodge a current
mailing address with the department.\textsuperscript{14} Neither is there any requirement for an annual return to be lodged.\textsuperscript{15} Given that Ngala Inc., the oldest incorporated association in Western Australia, has been operational for over a century, ascertaining an accurate mailing address for the target sample in Western Australia is somewhat problematical. The SPSS for Windows program was used to extract a random 10\% sample (or 370 associations) from the list of association names for use in the master survey mailing list. A manual search of the white pages website and, in the alternative, “Google” searches were useful in locating the addresses of around two thirds of the target sample associations in Western Australia. For the remaining 120 selected associations, all that could be done was to access the relevant microfiche files manually, one at a time, and find out the most recent notified address in the Departmental files.

\textit{Australian Capital Territory}

An email to the regulator in the Australian Capital Territory requesting assistance was all that was required to receive their cooperation.\textsuperscript{16} The day after this email request, the entire Australian Capital Territory incorporated association database in Excel format was emailed in reply with a request not to use it other than for research purposes. No fee was charged for this data. The database then had to be classified in a one-name-at-a-time manner to extract only the sporting societies. The address

\textsuperscript{14} Section 40 of the \textit{Associations Incorporation Act 1987 (WA)} provides that an incorporated association “may lodge with the Commissioner notice of an address …”. (Underlining added for emphasis)

\textsuperscript{15} Section 26 of the \textit{Associations Incorporation Act 1987 (WA)} requires only that accounts of the association must be submitted to members at the Annual General Meeting.
details had to be reformatted in line with the standard used in the project. At this point the SPSS for Windows program could be utilized to extract a random 10% sample (or 48 associations) for use in the master survey mailing list.

**Northern Territory**

Within a week of emailing the regulator in the Northern Territory, I was offered a database in Excel format of all sporting associations in that jurisdiction.¹⁷ A fee was charged for the data¹⁸ and the regulator requested that the data only be used for research purposes. The database then had to be classified in a one-name-at-a-time manner to extract only the sporting societies. The address details had to be reformatted in line with the standard used in the project. Some 14 associations had no recorded mailing addresses. These were located firstly by manually checking the white pages website, and in the alternative, via “Google” searches. At this point the SPSS for Windows program was utilized to extract a random 10% sample (or 49 associations) for use in the master survey mailing list.

**South Australia**

The initial approach to the South Australian regulator was very positive and an assurance was given that the data would be provided forthwith. Assurances were made to the regulator that the data would not be used other than for research

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¹⁶ Special thanks to Mr Mick Martinovic, Assistant Office Manager, Business Services Unit, Registrar-General's Office, Australian Capital Territory.
¹⁷ Special thanks to Mr Malcolm Bryant, Deputy Registrar (Business Names & Associations) Consumer & Business Affairs, Department of Justice, Northern Territory.
¹⁸ In the amount of $13.00.
purposes. It was made clear that sporting groups could not be extracted, so the entire register would need to be provided to enable a manual classification. The person responsible shortly thereafter took leave and was subsequently transferred out of the area. In the event, after much prolonged negotiation, South Australia was the last jurisdiction to actually provide the relevant data for a fee,\textsuperscript{19} in a mixed format, in the first week in March 2003.\textsuperscript{20}

Two databases were eventually received from the regulator. One had names and file numbers, the other had file numbers and addresses. The contents of both files were non-identical. Significant time and labour intensive reconstruction of the data into a usable format was required before it could be accessed and utilised. As with other jurisdictions, the South Australian database then had to be classified in a one-name-at-a-time manner to extract only the sporting societies. Some 45 associations had no recorded mailing addresses in either file. These were located firstly by manually checking the white pages website and, in the alternative, via “Google” searches. The address details then had to be reformatted in line with the standard used in the project. At this point the SPSS for Windows program could (finally) be utilized to extract a random 10% sample (or 485 associations) for use in the master survey mailing list.

\textsuperscript{19} In the amount of $110.00.

\textsuperscript{20} This data was provided by Mr Steven Burrows, Customer Services Officer Office of Business Affairs, South Australia.
**Tasmania**

An initial email approach requesting cooperation from the regulator in Tasmania was unsuccessful. Representations made by Mr Steven Meagher to his counterparts in other states to assist with the research opened the door of access to data in Tasmania. Eventually a copy of their entire database was provided in a non-Excel format. Assurances were given that the data would not be used other than for research purposes.\(^{21}\)

The database then had to be transformed into an Excel worksheet and reconstructed into a usable format. It was then necessary to classify the associations in a one-name-at-a-time manner to extract only the sporting societies. The address details had to be reformatted in line with the standard used in the project. At this point the SPSS for Windows program was utilized to extract a random 10% sample (or 99 associations) for use in the survey mailing list.

**Victoria**

An initial email approach requesting cooperation from the regulator in Victoria was unsuccessful. Representations made by Mr Steven Meagher to his counterparts in other states to assist the research opened the door of access to data in Victoria. Although Victoria classified its associations until 1999, it did not classify them after that time. Discussions with the manager in that office made it possible to obtain the

\(^{21}\) Special thanks to Mr Darren Dillon, Senior Clerk, Business Affairs Branch, Consumer Affairs & Fair Trading Tasmania.
classified data until 1999 and a copy of all associations incorporated since then. Assurances were provided that the data would not be used other than for research purposes. The data was forthcoming shortly thereafter for a fee.

The database then had to be partially classified where the data required it in a one-name-at-a-time manner to extract only the sporting groups. Some 67 associations had no recorded mailing addresses. These were located firstly by manually checking the white pages website and, in the alternative, via “Google” searches. The address details had to be reformatted in line with the standard used in the project. At this point the SPSS for Windows program was utilized to extract a random 10% sample (or 1,038 associations) for use in the master survey mailing list.

Queensland

An initial email approach to the Queensland regulator requesting their cooperation was unsuccessful. Representations made by Mr Steven Meagher to his counterparts in other states to assist with the research were also unsuccessful. The Head of the School of Business Law at Curtin Business School, Dr Rob Guthrie, agreed to request the assistance of the Minister for Consumer and Employment Protection, Hon. John Kobelke MLA in contacting his equivalent in Queensland to request their assistance with the research. The Minister was kind enough to write to his then equivalent, the Hon. Merri Rose MLA in Queensland requesting her personal support.

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22 Special thanks to Mr Andrew Levens, Director Business Operations Branch, Department of Justice, Victoria.
23 In the amount of $187.00.
for the project. Within a week, the relevant department provided an offer of assistance. Assurances were provided that the data would not be used other than for research purposes. Shortly after this a copy of the entire Queensland database of incorporated associations was provided in return for a fee.

This database then had to be classified in a one-name-at-a-time manner to extract only the sporting societies. Some associations had no recorded mailing addresses. These were located firstly by manually checking the white pages website and, in the alternative, via “Google” searches. The address details had to be reformatted in line with the standard used in the project. At this point the SPSS for Windows program was utilized to extract a random 10% sample for use in the master survey mailing list.

**New South Wales**

An initial email approach to the New South Wales regulator requesting their cooperation was unsuccessful. An initial email approach to the Queensland regulator requesting their cooperation was unsuccessful. Representations made by Mr Steven Meagher to his counterparts in other states to assist with the research were also unsuccessful. The Head of the School of Business Law at Curtin Business School, Dr Rob Guthrie, agreed to request the assistance of the Minister for Consumer and Employment Protection, Hon. John Kobelke MLA in contacting his equivalent in

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24 Special thanks to Mr David Graham, Manager - Non Profit Enterprises Branch, Queensland Office of Fair Trading.

25 In the amount of $14.50.
New South Wales to request their assistance with the research. The Minister was kind enough to write to his then equivalent, the Hon John Acquilina MLA in New South Wales requesting, and ultimately securing, his personal support for the project.

Although New South Wales had classified its associations until 1998, it did not classify them after that time. After discussing the matter with the New South Wales registrar’s office, assurances were provided that the data would be forthcoming in exchange for assurances that the data would not be used other than for research purposes. While the New South Wales data was among the last to be secured, it was provided free of charge and had been completely classified with very little manipulation required in order to be used for the research task. The address details had to be reformatted in line with the standard used in the project. At this point the SPSS for Windows program was utilized to extract a random 10% sample (or 595 associations) for use in the master survey mailing list.

Survey Implementation

The master mailing list of 3,762 incorporated sporting associations was used to print the covering letters, surveys, envelopes and competition cards during the week prior to Easter 2003. These were processed via bulk mail so that they would arrive at their destinations during the week following Easter. The master mailing list was amended as responses and returned mail were received. Four weeks after the original mail-out, the amended master mailing list was used to print and post a reminder card to the

26 Special thanks to Ms Dinah Traurig, Co-ordinator, Ministerial & Parliamentary Operations, Department of Fair Trading, New South Wales.
non-respondents. This resulted in the receipt of a large number of “second wave”
responses. By the time the response period had ended, there were 279 returned mail
surveys representing an undeliverable proportion of 7% (or 1 in every 14
associations surveyed). In addition, the response rate was 822 or 22% of the sample.
As each survey was received, it was stamped with a consecutive number. This
number has since been utilised in the coding and data processing.

By the end of the receiving period, 750 competition cards had been received. The
draw was conducted by means of a random SPSS for Windows selection executed by
Dr Rob Guthrie, Head, School of Business Law, Curtin Business School on Friday
6th June 2003.27

Once received and stamped, completed respondent surveys were sent to data
processing staff to be entered in SPSS for Windows format ready for analysis and
interrogation. A data consultant28 assisted by supervising and auditing the data entry
process to ensure the reliability of the data entry. To ensure the integrity of the data,
none of the data from the questionnaires was entered into the final SPSS for
Windows data file by me personally.

27 The winning group was the Morawa Golf and Bowls Club Inc [(08) 9971 1213]. The prize
was delivered to Ms Noelene Fleay, Manager of this group on 28th June 2003.
28 Ms Jennifer Lalor, Curtin University of Technology Learning Scholarship Network.
Survey Results

A detailed frequency report showing responses to the survey is provided in appendix B, following an example questionnaire at appendix A. The major findings of the survey are discussed below.

Error Structure

The potential for coverage error in this project was minimal in that the entire population of incorporated sporting associations is registered with a government regulator. This statement, however, should be read with the caveat that the accuracy of the master mailing list that was generated was ultimately a factor of the completeness (or otherwise) of the regulators’ official register of incorporated associations. This was most notably a potential problem with respect to Western Australia which, as noted above, has never required incorporated associations to lodge regular returns to the regulator. The full results of the final survey mail-out are discussed in detail in appendix B, however the results for all jurisdictions are summarised in chart 1 as follows:

---


30 There was a total rate of returned mail of 11% representing 362 returns out of a 3,201 addressee mail-out.
A stratified random sample of the population was not possible owing to the paucity of existing data in this field. Indeed the present study should be regarded as providing baseline data with respect to incorporated sporting associations in Australia and New Zealand. As indicated above, under the circumstances it was considered that the most appropriate approach was to survey a random 10% sample from the population of incorporated sporting associations on the official registers within each jurisdiction. An overall response rate of 22% can therefore be regarded as a strong result. In addition, it is generally accepted that the central limit theorem which underpins statistical sampling as an empirical methodology is valid where
sample size is in excess of 30. The overall sample of 822 provides a sound empirical basis for this research. Of the 822 responses, 732 came from Australian incorporated sporting associations and 90 responses from New Zealand incorporated sporting societies. Nevertheless, two points of caution should be noted. First, only 9 responses were received from incorporated sporting associations in each of the Australian Capital Territory and the Northern Territory. Jurisdiction-by-jurisdiction comparison is therefore problematical with respect to the data from these jurisdictions. In addition, total responses to the survey instrument still only represent 2.2% of the population, and care must therefore be taken when seeking to generalise on the basis of such a relatively small population subset. In light of this issue, standard errors (where provided) are calculated to the 95% degree of confidence unless otherwise stated.

Coverage error in an unstratified sample such as that used in this research may be indicated where, for example, responses are skewed in favour of a particular target category. In this research it is only possible to categorise the Australian sample in terms of home jurisdiction. Comparisons between jurisdictions on the basis of their proportional contributions to both the sample, and their proportional contributions to the response group are as per chart 2:

As noted in appendix B the most striking feature of chart 2 is the close approximation of both sample and response distributions. Given the lack of significant difference between the comparative jurisdictional figures in chart 2 and the adequate size of the response cohort, the central limit theorem is supportive of the decision not to weight the raw response data to allow the extrapolation of justifiable inferences.

The rigorous preliminary design and pre-testing of the survey instrument attempted to minimise the impact of potential measurement error. Nevertheless, given the vagaries of human communication, no survey is free from this weakness. Specific identifiable aspects of the questionnaire that may have resulted in measurement error include the requirement for the respondent’s “best estimate” or “opinion” in various
questions.\textsuperscript{32} There were also two questions that asked respondents to provide numerical or frequency data by reference to given fixed alternatives. In certain cases these alternatives may not have been adequately discriminating, or may have failed to include other obvious alternatives.\textsuperscript{33}

Given the voluntary nature of the questionnaire, the potential for non-response error was one of the prime concerns in the design of this survey. Non-response was approached from the perspective of reducing disincentives, introducing self-interest based incentives and offering participants an opportunity to influence the regulation of incorporated sporting groups in their jurisdictions.\textsuperscript{34}

In order to maximise the chances of obtaining responses, reply paid postage was arranged by enclosing a pre-printed return mail envelope with the survey and covering letter. This ensured that participants were not faced with bearing the cost of participating in a voluntary exercise and also reduced the risk of misdirected returns. In addition, the questionnaire was deliberately printed on high quality bright yellow paper so as to be clearly visible when placed on a desk with other documents, most of which would presumably be printed on white paper.\textsuperscript{35} The covering letter contained a number of features that were also included to encourage participation.

\textsuperscript{32} Questions 1-6, 14, 15 and 20.
\textsuperscript{33} Questions 5 & 6.
\textsuperscript{35} This decision is somewhat at odds with the comments of Alreck, PL & Settle, RB, \textit{The Survey Research Handbook}, 2nd ed, McGraw-Hill, New York, USA, 1995 at 185, however,
Specifically, there was an offer to participants to provide feedback relevant to law reform concerning incorporated sporting groups in each jurisdiction.\textsuperscript{36}

In addition to the usual assurances of confidentiality, participants were advised that the project had obtained full Murdoch University Human Research Ethics Committee approval. Participants were able to independently confirm these assurances and clarify any additional issues by contacting any one of the thesis Supervisor, the Chair of the Human Research Ethics Committee, or me by means of contact telephone numbers or email addresses. Four weeks after the original survey mail-out, a reminder card was mailed to all incorporated sporting associations on the mailing list with the exception of those for which returned mail had been received and registrants in the wine draw. Together, these measures served to reduce non-response error by removing some of the disincentives to participate.

As indicated above, the major self-interest based incentive to participate in the survey was entry in a draw for a case of quality wine. Evidence of the incentive effect of this measure is the high number of respondents who chose to enter the draw (750 out of 822 representing 91\% of respondents). The fact that almost one-in-ten participant groups chose to respond without entering the wine draw addresses some of the concerns that competition-based inducements may result in non-response bias. The extent to which the results discussed in this research may or may not be compromised by such bias is outside of the scope of the research but is nevertheless a

\textsuperscript{36} A preliminary report was provided to regulators in each jurisdiction concerning the issue of return to sender rates.
consideration that should be taken account of when considering the results. The covering letter to the survey also indicated that the findings of the survey would be used to influence reform of the incorporated associations legislation in each jurisdiction. This will be achieved by means of jurisdiction specific reports to be produced. This provided additional motivation for target sample members to participate in the survey.

**KEY FINDINGS**

*Operation Prior To Incorporation*

All of the relevant legislation allows for existing eligible unincorporated associations to become incorporated. The question therefore arises as to how common such a situation is in practice. A consequent question is how long such unincorporated associations operate before becoming incorporated. These questions were raised in question 2 of the questionnaire. The results for this question were are discussed in detail in appendix B and are presented in summary in chart 3:

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37 *Associations Act* (NT) ss 8 & 12; *Associations Incorporation Act 1984* (NSW) s 9; *Associations Incorporation Act 1981* (Qld) s 11; *Associations Incorporation Act 1985* (SA) s 19; *Associations Incorporation Act 1964* (Tas) s 7; *Associations Incorporation Act 1981* (Vic) s 5; *Associations Incorporation Act 1987* (WA) s 5; *Associations Incorporation Act 1991* (ACT) s 18; *Incorporated Societies Act 1908* (NZ) s 7. Specific consideration of the effect of incorporation on the pre-existing unincorporated association is taken in *Associations Incorporation Act 1984* (NSW) s 15(3), Sch 2 cl 3; *Associations Incorporation Act 1981* (Qld) s 19A-19B; *Associations Incorporation Act 1985* (SA) s 20(3)(c); *Associations Incorporation Act 1987* (WA) s 10(c).
As can be seen, approximately 1 in every 3 New Zealand respondents incorporated sporting societies formed by incorporating, while their Australian equivalents formed by incorporating at a rate closer to 1 in every 6. Or put another way, incorporated sporting groups in New Zealand are twice as likely to form by incorporating than their Australian equivalents.

Where a group had operated prior to incorporation, the second part of question 2 asked them to indicate how long this pre-incorporation history had been. The responses to this part of question 2 are shown in table 1:
<table>
<thead>
<tr>
<th>Years</th>
<th>Australia</th>
<th>Aust %</th>
<th>New Zealand</th>
<th>NZ %</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-5</td>
<td>102</td>
<td>19.39%</td>
<td>13</td>
<td>27.66%</td>
</tr>
<tr>
<td>6-10</td>
<td>66</td>
<td>12.55%</td>
<td>2</td>
<td>4.26%</td>
</tr>
<tr>
<td>11-15</td>
<td>41</td>
<td>7.79%</td>
<td>4</td>
<td>8.51%</td>
</tr>
<tr>
<td>16-20</td>
<td>56</td>
<td>10.65%</td>
<td>7</td>
<td>14.89%</td>
</tr>
<tr>
<td>21-30</td>
<td>64</td>
<td>12.17%</td>
<td>2</td>
<td>4.26%</td>
</tr>
<tr>
<td>31-40</td>
<td>48</td>
<td>9.13%</td>
<td>4</td>
<td>8.51%</td>
</tr>
<tr>
<td>41-50</td>
<td>38</td>
<td>7.22%</td>
<td>2</td>
<td>4.26%</td>
</tr>
<tr>
<td>51-60</td>
<td>25</td>
<td>4.75%</td>
<td>5</td>
<td>10.64%</td>
</tr>
<tr>
<td>61-70</td>
<td>31</td>
<td>5.89%</td>
<td>1</td>
<td>2.13%</td>
</tr>
<tr>
<td>71-80</td>
<td>20</td>
<td>3.80%</td>
<td>1</td>
<td>2.13%</td>
</tr>
<tr>
<td>81-90</td>
<td>12</td>
<td>2.28%</td>
<td>1</td>
<td>2.13%</td>
</tr>
<tr>
<td>91-100</td>
<td>7</td>
<td>1.33%</td>
<td>3</td>
<td>6.38%</td>
</tr>
<tr>
<td>101+</td>
<td>16</td>
<td>3.04%</td>
<td>2</td>
<td>4.26%</td>
</tr>
</tbody>
</table>

Table 1

As discussed in detail in appendix B, the combination of skewed results and the effect of outlying responses together render the use of an arithmetic mean otiose as a measure of central tendency with respect to both the Australian and New Zealand responses. However, the median Australian response to this question was 20 years. This was also the modal Australian response (34 groups). Five groups indicated that they had operated prior to incorporation for only 6 months (the least amount of time). A single group reported the longest pre-incorporation history of 130 years.

The median response to this question from New Zealand respondents was the same as that of Australia, namely 20 years, while 1 year was the modal response (4 groups). These 4 groups had been in existence prior to incorporation for the least amount of time. A single group reported the longest pre-incorporation history of 115 years.
These results tend to suggest that most respondent incorporated sporting groups in both countries were already well established before becoming incorporated. This must be read with the caveat that, in New Zealand, respondent sporting groups sometimes sought incorporated status at an earlier stage in their development than those in Australia. Graphically, the responses from both countries as plotted in chart 4 bear out this assessment:

![Chart 4: No. of Years Prior to Incorporation: By Country?](image)

**Alternative Incorporation Regimes**

The popularity of the legislative regimes at the heart of this investigation has already been referred to above. The question then arises as to whether the legislative framework has been durable as well as popular. Question 1 asked how long
respondent groups had been incorporated. The responses to this question according to country of incorporation are as described in table 2:

<table>
<thead>
<tr>
<th>Years Since Incorporation</th>
<th>Australia</th>
<th>%</th>
<th>NEW ZEALAND</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-5</td>
<td>128</td>
<td>18.00%</td>
<td>14</td>
<td>16.47%</td>
</tr>
<tr>
<td>6-10</td>
<td>148</td>
<td>20.82%</td>
<td>9</td>
<td>10.59%</td>
</tr>
<tr>
<td>11-15</td>
<td>177</td>
<td>24.89%</td>
<td>4</td>
<td>4.71%</td>
</tr>
<tr>
<td>16-20</td>
<td>148</td>
<td>20.82%</td>
<td>5</td>
<td>5.88%</td>
</tr>
<tr>
<td>21-30</td>
<td>57</td>
<td>8.02%</td>
<td>17</td>
<td>20.00%</td>
</tr>
<tr>
<td>31-40</td>
<td>24</td>
<td>3.38%</td>
<td>8</td>
<td>9.41%</td>
</tr>
<tr>
<td>41-50</td>
<td>10</td>
<td>1.41%</td>
<td>9</td>
<td>10.59%</td>
</tr>
<tr>
<td>51-60</td>
<td>6</td>
<td>0.84%</td>
<td>3</td>
<td>3.53%</td>
</tr>
<tr>
<td>61-70</td>
<td>2</td>
<td>0.28%</td>
<td>5</td>
<td>5.88%</td>
</tr>
<tr>
<td>71-80</td>
<td>4</td>
<td>0.56%</td>
<td>3</td>
<td>3.53%</td>
</tr>
<tr>
<td>81-90</td>
<td>4</td>
<td>0.56%</td>
<td>2</td>
<td>2.35%</td>
</tr>
<tr>
<td>91-100</td>
<td>2</td>
<td>0.28%</td>
<td>3</td>
<td>3.53%</td>
</tr>
<tr>
<td>101+</td>
<td>1</td>
<td>0.14%</td>
<td>3</td>
<td>3.53%</td>
</tr>
</tbody>
</table>

Table 2

As discussed in detail in appendix B, the combination of skewed results and the effect of outlying responses together render the use of an arithmetic mean irrelevant as a measure of central tendency with respect to both the Australian and New Zealand responses. Ordinal data of this type is more appropriately assessed for this purpose by reference to median and mode. The most common response to this question for New Zealand respondents was 3 years (4 groups, or 5%) while in Australia it was 10 years (77 groups, or 11%). The median response in New Zealand was 29 years, while in Australia it was 13 years. The life span range reported in New Zealand was between 1 and 138 years, while in Australia it was from 6 months to 120 years. As can be confirmed visually by reference to chart 5 below, it appears that incorporated sporting societies in New Zealand tend to be older than incorporated sporting associations in Australia.
These figures also clearly indicate the durability of the various legislative measures in both countries, given that 61% of all Australian and 73% of all New Zealand respondents reported that they had been incorporated for more than 10 years.

As has been noted elsewhere, it is conceivable that a group that is eligible for incorporation under the legislative measures at the heart of this enquiry would be equally eligible to incorporate under the provisions of the general trading company incorporation statutes in Australia\(^\text{38}\) and New Zealand\(^\text{39}\). In Australia this would firstly involve deciding upon the choice of “public” or “proprietary” company status. Eligibility for incorporation as a proprietary company is restricted to entities which

\(^{38}\) *Corporations Act 2001* (Cth).

\(^{39}\) *Companies Act 1993* (NZ).
have fewer than “50 non-employee shareholders”. When this limitor is applied to the response data, the comparative results are as per table 3:

<table>
<thead>
<tr>
<th></th>
<th>Australia</th>
<th>%</th>
<th>New Zealand</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt; 50</td>
<td>423</td>
<td>58.83%</td>
<td>62</td>
<td>74.70%</td>
</tr>
<tr>
<td>≤ 50</td>
<td>296</td>
<td>41.17%</td>
<td>21</td>
<td>25.30%</td>
</tr>
</tbody>
</table>

Table 3

The comparisons are more striking when illustrated graphically as in chart 6:

![Chart 6](chart6.png)

It appears from this data that respondent groups from both countries would be eligible to incorporate as proprietary companies in the minority of cases. This is strongly suggestive of the inference that incorporated sporting associations are not, in the majority of cases, small in terms of membership (3 in 4 New Zealand respondent

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40 *Corporations Act 2001 (Cth) s 45A.* In New Zealand there is no longer any differentiation between any type of company incorporated under the *Companies Act 1993 (NZ).*
groups, and 3 in 5 Australian groups, are relatively large). However, it is equally true to infer from this data that a significant proportion of incorporated sporting associations are relatively small in terms of membership. This raises the significance of corporate size as an issue for corporate regulators. The data relating to the numbers of members reported by respondent groups in each country is provided in table 4:

<table>
<thead>
<tr>
<th>No. of Members</th>
<th>Australia</th>
<th>%</th>
<th>New Zealand</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-10</td>
<td>43</td>
<td>5.99%</td>
<td>1</td>
<td>1.19%</td>
</tr>
<tr>
<td>11-20</td>
<td>71</td>
<td>9.89%</td>
<td>8</td>
<td>9.52%</td>
</tr>
<tr>
<td>21-30</td>
<td>72</td>
<td>10.03%</td>
<td>2</td>
<td>2.38%</td>
</tr>
<tr>
<td>31-40</td>
<td>46</td>
<td>6.41%</td>
<td>4</td>
<td>4.76%</td>
</tr>
<tr>
<td>41-50</td>
<td>63</td>
<td>8.77%</td>
<td>6</td>
<td>7.14%</td>
</tr>
<tr>
<td>51-100</td>
<td>137</td>
<td>19.08%</td>
<td>24</td>
<td>28.57%</td>
</tr>
<tr>
<td>101-200</td>
<td>141</td>
<td>19.64%</td>
<td>15</td>
<td>17.86%</td>
</tr>
<tr>
<td>201-300</td>
<td>59</td>
<td>8.22%</td>
<td>6</td>
<td>7.14%</td>
</tr>
<tr>
<td>301-400</td>
<td>16</td>
<td>2.23%</td>
<td>4</td>
<td>4.76%</td>
</tr>
<tr>
<td>401-500</td>
<td>11</td>
<td>1.53%</td>
<td>2</td>
<td>2.38%</td>
</tr>
<tr>
<td>501-1000</td>
<td>27</td>
<td>3.76%</td>
<td>7</td>
<td>8.33%</td>
</tr>
<tr>
<td>1001+</td>
<td>32</td>
<td>4.46%</td>
<td>5</td>
<td>5.95%</td>
</tr>
</tbody>
</table>

Table 4

As can be seen from a membership perspective, very small incorporated sporting associations are more common in Australia, while those groups with very large memberships are not common in either country. Membership data is analysed in detail in appendix B. The median Australian response to this question was 70 members and in New Zealand it was 96 members. In Australia 50 members was the modal response while in New Zealand it was 150 members. The range of memberships reported by Australian incorporated sporting associations was from 1

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41 Survey instrument question 3.
member to 8000 members. The membership range reported by New Zealand incorporated sporting societies was from 2 members\(^{42}\) to 7,000 members.

Chart 7 illustrates how the reported memberships from respondents in both countries compare proportionally:

![How Many Members: By Country?](chart7.png)

Given that the majority of respondents would have more than 5 non-employee members, those incorporated sporting groups considering transferring to the trading company regulatory framework would be faced with incorporation as a public company. In Australia, the most appropriate option would presumably be the

\(^{42}\) This of course is contrary to the provisions of s 4(1) of the *Incorporated Societies Act 1908* (NZ) which requires a minimum membership of not less than 15 members. Three responses from New Zealand reported memberships lower than the statutory minimum, namely 1 response at 2 members and 2 responses at 12 members.
company limited by guarantee. Question 8 of the questionnaire asked respondents if they would consider incorporating under these alternative incorporation measures. The comparative responses to this binary question were as per chart 8:

<table>
<thead>
<tr>
<th></th>
<th>NZ</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>17.98%</td>
<td>16.36%</td>
</tr>
<tr>
<td>No</td>
<td>82.02%</td>
<td>83.64%</td>
</tr>
</tbody>
</table>

The degree to which this opinion is mirrored in each country is remarkable. It appears that in both countries, only 1 in 6 incorporated sporting associations would consider incorporation as a company to be a viable alternative to incorporation under the legislative measures at the heart of the present enquiry. Question 8 then asked those respondents who answered in the negative to indicate reasons for their preference from a given list of possible alternatives. The alternatives provided were as follows:

---

1. Lack of understanding of the *Corporations (Companies) Act*.
2. Cost of incorporation;
3. Increased running costs (accounting, taxation etc).
4. Annual reporting requirements.
5. The group is a social body, not a commercial enterprise.
6. Associations are more appropriately regulated for our purposes.
7. Other(s) (please specify).

The results of this part of question 8 are shown in chart 9:
The alternatives open to respondents in this part of the question can be broadly separated into two types of objection, namely technical and philosophical. If “other” responses are excluded from the comparative data, comparisons can be made between responses on the basis of country of incorporation using the technical and philosophical classification. As chart 10 below illustrates, respondent objections are reasonably evenly split between the technical and the philosophical in both countries. The very small variation from 50%-50% evinced in the Australian results in favour of technical objections is not statistically significant.

**Chart 10**

---

44 I.e. Lack of understanding of the Corporations Act 2001 (Cth) or Companies Act 1993 (NZ); cost of incorporation; increased running costs (accounting, taxation etc); and, annual reporting requirements.

45 I.e. The group is a social body, not a commercial enterprise; and, associations are more appropriately regulated for our purposes.
At this point it is also worth mentioning the results of question 21, which asked respondents if there was some way in which the regulatory measure was in some way “inappropriate, inadequate or irrelevant”. The results are illustrated in chart 11:

Note the insignificant proportion of respondents in both countries expressing positively a serious dissatisfaction with the governing legislation. This is entirely consistent with the results from question 8 above. Of the remaining respondent groups which favour maintaining the legislative status quo in both countries, it is interesting that the views of New Zealand respondents are significantly more emphatic than those expressed by the (clearly less well informed) Australian respondent group.
**Size As A Corporate Characteristic**

As indicated above, corporate size is highly relevant to the choice of regulatory framework for incorporated sporting associations. In addition to bare membership statistics, two further measures of corporate size were used to compare responses from both countries, namely the definition of “small proprietary company”\(^{46}\) and the definition of “prescribed association”\(^ {47}\).

Question 4 of the questionnaire asked respondents to report how many full-time, part-time and casual employees their groups employed. As indicated in appendix B, less than 10% of respondents reported that they had any full-time employees. The largest number of employees reported by a single respondent group was 21. Approximately 87% of respondents reported that they had no part-time employees. A single respondent group reported the largest number of part-time employees, namely 17. Fewer than 15% of respondent groups reported employing any casual employees. A single incorporated sporting association reported the largest number of casual employees, namely 52. The responses to this question are summarised as follows in chart 12:

\(^{46}\) *Corporations Act 2001* (Cth) s 45A.

\(^{47}\) Being those associations that have “gross receipts in that association's previous financial year in excess of $200,000” (*Associations Incorporation Act 1985* (SA) s 36; & *Associations Incorporation Act 1981* (Vic) s 4(1).
The low incidence of employment reported by the respondent group means that the utility of the “small proprietary company” classification is restricted. In fact, even if one were to convert all employment classifications into a single binary of employee/no employee status, this together with the asset and revenue parameters applicable to the classification all combine to exclude 100% of the respondent groups from qualifying as a “large proprietary company”. That is to say, none of the respondent groups satisfied the two out of three criteria required to qualify for classification as a large proprietary company.
Question 5 asked respondents to report the total assets of the incorporated sporting association. The results for this question are reported in detail in appendix B. On a proportional basis the results from both countries exhibit interesting points of difference as per chart 13:

![Chart 13: Total Assets: % By Country](chart.png)

It is clear from this comparison that there are significant differences between the typical asset bases of incorporated sporting groups in Australia and New Zealand. The asset bases of respondent groups in Australia tend to be significantly smaller than those reported in New Zealand. The median Australian response to this question was in the $10K-$50K category while in New Zealand the median response was in the $50K-$100K category. In Australia the $1K-$10K category was the modal response while in New Zealand the modal response was the $100K-$500K category.
Question 6 asked respondents to report the most recent recorded gross annual revenue within certain bands on an ordinal scale. The comparative proportional responses as between each country were as per chart 14:

In this instance it is interesting to note the similarity of results rather (as was the case with responses to question 5) than significant variation in responses between countries. In this instance the median Australian reported gross revenue was identical to that in New Zealand, namely the $10K-$50K category. Some variation is, however, evident when the modal response is considered. In Australia this was in the $1K-$10K category, while in New Zealand the modal response was in the $10K-$50K category. Of further interest are the relatively small reported gross revenue figures, with more than 80% of groups in both countries earning less than $100,000 per annum in gross as opposed to net revenue. The implications of the distinction
between large and small incorporated sporting entities have been the subject of limited scholarship to date.\textsuperscript{48}

South Australia delineates its incorporated sporting associations by size according to a single criterion, namely “gross annual receipts in excess of $200,000”.\textsuperscript{49} Unfortunately, the questionnaire did not provide options to question 6 that permit a definitive indication of how such a delineator would separate respondent groups in this study.\textsuperscript{50}

\textit{Management Structure}

Question 13 asked respondent groups if they had an elected management committee. The results of responses to this question are examined in detail in appendix B. These results are summarised in chart 15:


\textsuperscript{49} \textit{Associations Incorporation Act 1985 (SA) s 36, Associations Incorporation Act 1985 (SA) s 36, & Associations Incorporation Act 1981 (Vic) s 4(1)}.

\textsuperscript{50} An independent analysis of the question 6 response data was obtained from Mr Alan Simpson with this problem in mind. Mr Simpson performed 20 repetitions of a standard Monte Carlo approximation (see Manly, BFJ, \textit{Statistics for Environmental Science and Management}, Chapman & Hall/CRC, Boca Raton, USA, 2001) using the $200,000 delineator. This exercise produced very consistent results in the range 80.29\%-81.75\%. This suggests that less than 20\% of all respondent groups would be classified as “prescribed” if they had been formed in South Australia or Victoria.
As can be seen there is no significant difference in the proportionate responses to this question from both countries. Only around 1 in 15 incorporated associations in either country operates without an elected management committee.\textsuperscript{51} Of that cohort 82% have memberships of less than 100. Interestingly, there was one group in this subset with 1,500 members and no elected management committee. The statutory presumptions that operate where there is no formally constituted management committee have been highlighted in chapter 3. The relative infrequency of such a phenomena having been reported by this response group serves to set such entities apart as a curiosity (or, in the case of the single group of 1,500 members and no elected management committee, an enigma). One can, however infer from this data that the groups with the fewest members tend not to have an elected management committee.

\textsuperscript{51} 10% of all respondent groups with no elected management committee were based in New Zealand and 47% were based in Victoria.
committee. There is virtually no significant correlation between the size of the management committee and the total assets of respondents from either Australia\textsuperscript{52} or New Zealand.\textsuperscript{53} While there is a higher negative correlation between the size of the management committee and the gross revenue reported by respondents from either Australia\textsuperscript{54} or New Zealand,\textsuperscript{55} it must be emphasised that the result is still very weak and not conducive to parametric inference.

Where groups reported the existence of an elected management committee, the average ratio of management committee to total group membership in Australia was 1 in 33\textsuperscript{56} while in New Zealand the ratio was 1 in 45.\textsuperscript{57} There is however a tendency of New Zealand respondent groups to report a higher number of management committee members. This together with the skewed distribution and impact of extreme outliers are illustrated in detail in appendix B. The proportionate comparisons between the size of reported management committees in each country are shown in chart 16:

\begin{itemize}
\item The Spearman rank correlation was computed in this instance due to the ordinal nature of both variables. The 732 Australian respondents returned a coefficient of -0.147.
\item As for Australian responses, the Spearman rank correlation was used here. The 90 New Zealand respondents returned a coefficient of -0.123.
\item The Spearman rank correlation for the 732 Australian survey respondents returned a coefficient of -0.185.
\item The Spearman rank correlation for the 90 New Zealand respondents returned a coefficient of -0.212.
\item Average group membership where the group has an elected management committee is 278 and average management committee size is 8.
\item Average group membership where the group has an elected management committee is 429 and average management committee size is 9.
\end{itemize}
Chart 16

It can be seen that, while management committees in New Zealand respondent groups tend to be larger than in Australia, in both countries they are most likely to be between 6 and 10 persons in size.

When it comes to paying management committee members for their services it is unarguably the case that this is very much an exceptional practice among respondent groups. This is demonstrated in chart 17:
While it is more likely that management committee members in New Zealand respondent groups will be paid for their services than is the case in Australia, the overwhelming proportion of respondent groups in both countries are managed by volunteers. Given the distorting effect of volunteers in chart 17, the same results are recast in chart 18 as follows with the exclusion of volunteers:
Chart 18

It follows that, even where respondent groups in either country pay management committee members for their services, in the majority of cases this payment is made to only one of their number.

Meetings

Question 11 asked respondents to indicate how frequently members’ meetings were held in each group. Responses to this question are detailed in appendix B, however reference to chart 19 summarises these responses graphically:

---

As can be seen from the graphic data, it is possible that this question may have been misconstrued by some respondents to refer to sporting as opposed to members’ business meetings.
It can be seen that the modal meeting frequency in Australia is monthly while in New Zealand it is annually. However the next most common frequency in each country is the modal response from the other. Together the monthly and annual responses in both countries accounted for over 70% of total responses. Those respondent groups operating with only annual members’ meetings were in the minority in both countries.

Where respondent groups in both countries had elected management committees, question 16 asked how often this body meets. The results of this question are summarised in chart 20:
It is clear that most management committees in both countries meet monthly. However it is significant that 23%, or almost 1 in every 4 Australian respondent groups, have management committee meetings on less than a monthly frequency. In New Zealand respondent groups, this rate is down to 1 in every 5 respondents (or 20%) but this is a still significant proportion of respondent groups. Also of interest is that members meet as frequently, or more frequently, than management committees in 57% (or 382) of the Australian respondent groups and in 49% (or 40) of the New Zealand respondent groups.

**Management Decisions**

Question 18 asked respondents to indicate what considerations weigh on management committees when making decisions. A variety of alternative responses were provided as follows:
1. Achieving the objects of the group as laid out in the constitution.
2. Satisfying the desires of members as expressed from time to time.
3. Safeguarding the asset base of the group.
4. Justifying the decisions to the members.
5. Other (please specify).

The first part of this question allowed for multiple responses. The second part of question 18 required respondents to indicate the main consideration only. Chart 21 below shows the proportional responses to the first part of question 18 from respondents in each country. Chart 22 shows the country-by-country comparisons for the second part of the question.


**Chart 21**

When respondents had to nominate a “main” consideration, these comparisons are as follows:
What is the MAIN Consideration When Making Management Decisions: By Country?

<table>
<thead>
<tr>
<th></th>
<th>Australia</th>
<th>New Zealand</th>
</tr>
</thead>
<tbody>
<tr>
<td>Satisfying Constitution</td>
<td>48.4%</td>
<td>55.8%</td>
</tr>
<tr>
<td>Satisfying Members</td>
<td>38.7%</td>
<td>32.6%</td>
</tr>
<tr>
<td>Safeguarding Assets</td>
<td>7.3%</td>
<td>7.0%</td>
</tr>
<tr>
<td>Self Justification</td>
<td>3.9%</td>
<td>1.2%</td>
</tr>
<tr>
<td>Other</td>
<td>1.6%</td>
<td>3.5%</td>
</tr>
</tbody>
</table>

Chart 22

The way in which the data in both charts 21 and 22 is rendered is suggestive of the possibility of informal or “donkey” voting. The only way this possibility can be tested is by repeating the exercise and reordering the alternative responses. Nevertheless, without such post-hoc testing, the data must be interpreted without prejudice to indicate that member expectations, whether expressed constitutionally or in some other forum, are the most significant considerations weighing on management committee decisions.

The first part of question 19 asked respondents to indicate if management committee decisions have ever been overruled by decisions of members meetings. The comparative proportional results of responses to this question are illustrated in chart 23:
Thus, members have overruled management committee decisions in 1 out of every 6 Australian respondent groups and in 1 out of every 9 New Zealand respondent groups. The second part of question 19 then asked those groups answering the first part in the affirmative to indicate whether this has occurred “extremely rarely”, “occasionally” or “frequently”. Comparative responses to this part of question 19 are illustrated in chart 24:
These responses suggest that while the incidence of membership veto is comparatively common in both countries, its frequency is limited in practice.

**Management Powers**

Question 17 asked respondents to indicate whether there were any restrictions on the management committee to spend the funds of the group. As with all other questions, the results to this question are provided in detail in appendix B. The comparative proportional results are summarised in chart 25:
Chart 25

There is no significant difference in the results as between countries and it is clear that such restrictions apply to management committees in 1 out of every 3 respondent groups.

In addition, question 12 asked respondent groups to indicate how the power to make a selection of typical broad management decisions is allocated in each group. The question asks which of the members meeting, management committee or “other” group has the final authority to do each of the following:

1. Hiring And Firing Employees.
2. Taking Out Loans.
3. Executing Contracts.
4. Initiating Legal Action in The Group Name.
5. Grant or Refuse Membership.
6. Set Subscription Rates.
The comparative proportional responses to this question are provided in table 5:

<table>
<thead>
<tr>
<th></th>
<th>Australia %</th>
<th></th>
<th>New Zealand %</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Members</td>
<td>Management Committee</td>
<td>Other</td>
<td>Members</td>
</tr>
<tr>
<td>Hire &amp; Fire</td>
<td>22.16%</td>
<td>74.64%</td>
<td>3.21%</td>
<td>12.90%</td>
</tr>
<tr>
<td>Loans</td>
<td>34.46%</td>
<td>61.39%</td>
<td>4.14%</td>
<td>32.47%</td>
</tr>
<tr>
<td>Contracts</td>
<td>22.37%</td>
<td>75.33%</td>
<td>2.29%</td>
<td>17.11%</td>
</tr>
<tr>
<td>Suing</td>
<td>31.08%</td>
<td>65.54%</td>
<td>3.37%</td>
<td>29.27%</td>
</tr>
<tr>
<td>Membership</td>
<td>27.94%</td>
<td>69.41%</td>
<td>2.65%</td>
<td>21.84%</td>
</tr>
<tr>
<td>Subs</td>
<td>47.95%</td>
<td>49.50%</td>
<td>2.55%</td>
<td>61.80%</td>
</tr>
</tbody>
</table>

Table 5

This dense dataset is rendered graphically in chart 26:

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59 Refer to annexure B for raw data.
Chart 26
The most significant feature of these responses is that, regardless of the country, important management decisions are not universally regarded as the exclusive domain of the management committee. However, it is equally clear that the management committee is the most important decision making body within each respondent group.

**Winding-Up**

Question 9 asked respondents to indicate where the group constitution directs surplus assets on winding-up to be directed. A range of options were provided from which respondents could choose as follows:

1. Shared among the members
2. Transferred to an association with similar aims
3. Donated to charity
4. Transferred to state revenue
5. Other (please specify)

The comparative proportional responses to this question are illustrated in chart 27:
Question 10 asked respondents to indicate if they believed the constitutional provision for directing surplus assets on winding-up was inappropriate. No respondents answered this question. Presumably this indicates unanimous acceptance of these winding-up provisions.

**Raison d’être**

Question 7 asked respondents to indicate in an abstract sense why they existed. The comparative proportional results are as per chart 28:
Once again it is possible that these responses may be compromised by the informal voting phenomena. However, taken at face value they do indicate the clear primacy of member satisfaction, which is an essentially internal focus, as the guiding *raison d'être* of respondent groups in both countries. It is also interesting to note the lack of significant difference in the results as between country of incorporation.

**SUMMARY**

The responses to the research project questionnaire provide an important insight into the actual structure and operation of incorporated sporting associations and societies in both Australia and New Zealand respectively. Special note should be taken of the findings that in many respects there is no significant difference between groups in both countries. However, it is also true that this research has highlighted some important points of difference between respondent groups in both countries.
Appreciating the nature of these differences is necessary when seeking to generalize on matters of legal principle. Such appreciation is also necessary when determining whether various legislative measures are appropriate to the needs of user groups. The following chapter of this thesis compares the findings of the survey that have been discussed above with the legislative framework that was analysed in chapter 3. This comparison seeks to determine the extent to which the legislative framework can be said to be a good fit with the observed reality of the bodies surveyed. In the final chapter, the theoretical framework that was developed in chapters 1 and 2 of this thesis, which has been referred to throughout as broad form organic theory, will be applied in order to determine the most appropriate basis upon which a coherent and appropriate jurisprudence of incorporated sporting associations can be developed. The thesis thereafter concludes.
CHAPTER 5

APPLYING BROADLY CONCIEVED ORGANIC THEORY:

LEGISLATIVE DRESS SUIT OR STRAITJACKET?

“Errors, like straws, upon the surface flow;
He who would search for pearls must dive below.”¹

“The strength of our persuasions is no evidence at all of
their own rectitude: crooked things may be as stiff and
inflexible as straight: and men may be as positive and
peremptory in error as in truth.”²

INTRODUCTION

It is tempting to theorise about the nature of incorporated sporting associations exclusively by reference to the pattern or pattern that has been laid out in the various statutory regimes that have been analysed in this thesis. However, such analysis would be based on the assumption that incorporated sporting associations in practice mirror a particular legislative model. Careful reading of chapters 3 and 4 above will have suggested that this form of superficial analysis is inadvisable. Not only is there variability in the legislative schemes adopted in each jurisdiction as documented in chapter 3, but there is tremendous variability in the reported nature and functions of incorporated sporting associations within each jurisdiction, as was disclosed in chapter 4. This chapter seeks to examine the interplay between legislative models and observed reality in order to determine whether, and to what extent, one can generalise about incorporated sporting associations. The extent to which one can

¹ Huxley, TH Biogenesis and Abiogenesis in “Collected Essays”, 1893.
make general observations will be singularly important when approaching the task of developing an appropriate jurisprudence of incorporated sporting associations. Given the commitment of this thesis to a broadly conceived organic theory, the underlying normative approach that is adopted from this point is that where there is a lack of fit between observed reality and statutory framework, the statutory framework is open to criticism.

**Legislative Framework vs. Observed Reality**

It will be recalled from chapter 3 above that the legislation relating to incorporated sporting associations was analysed across 8 defining characteristics based principally on the research of Professor Salomon. To recap, it was suggested in chapter 3 that incorporated sporting associations could be understood in terms of their:

1. Sui generis nature.
2. Eligibility for incorporation.
3. Degree of organisation / institutionalisation.
4. Private status.
5. Binding non-profit distribution / personal benefit restriction constraints.
6. Unique internal governance mechanisms.
7. Voluntary nature.
8. Distinctive taxation status.

The extent to which these legislative characteristics are reflected in the empirical findings discussed in chapter 4 is explored in detail in the following paragraphs.

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Sui Generis?

With respect to this aspect of incorporated associations, it is of course theoretically possible for an eligible sporting association to incorporate under the provisions of the Corporations Act 2001 (Cth). However, chapter 4 reveals that in practice the majority of Australian groups (60%) and New Zealand groups (75%) would only be eligible to incorporate as a public company. Presumably this would require incorporation as a company limited by guarantee. Given that less than 40% of Australian and 25% of New Zealand respondents report membership of less than 50 persons, the minority of respondents would in theory, be eligible to incorporate as a proprietary limited company.³

The significance of the difference of course relates to the reporting and regulatory requirements of proprietary limited companies as opposed to public companies. The New Zealand statistics, while not strictly relevant to the propriety/public company distinction, are nevertheless of interest as a point of comparison. As indicated in chapter 4 above, responses to question 3 of the questionnaire indicated that some three-quarters of incorporated sporting societies in New Zealand would be ineligible to incorporate in Australia as a proprietary limited company because their membership numbers exceeded 50 persons. This data is important when considering the suitability of the closely-held company as a possible analogy for incorporated associations. Contrary to what might have been thought to be the case, the clear majority of incorporated associations have medium to large memberships rather than

³ See the discussion of the responses to question 3 of the questionnaire in chapter 4 above.
very small numbers. Indeed, as reported in chapter 4, responses to question 3 of the questionnaire also indicate that the average number of members in incorporated sporting associations across both Australia and New Zealand was 277 members. On an Australia-wide basis the average was 261 members while in New Zealand the average number of members was 415.

One remaining aspect relating to the theoretical possibility of incorporation as a company by reference to the *Corporations Act 2001* (Cth) is the issue of how many full-time equivalent employees incorporated associations actually employ. This question was asked in question 4 of the questionnaire and, as can be seen from the results presented in chapter 4, some 92% of incorporated associations in Australia and 83% of incorporated societies in New Zealand report that they have no full-time employees. In addition, it will be recalled that 89% of Australian incorporated associations and 70% of New Zealand incorporated societies reported that they employed no part-time employees. Further, as to the number of employees of a casual nature employed by incorporated associations, it will be recalled that in Australia 85% of respondents and in New Zealand 79% of respondents employ no casual employees.

Even where incorporated sporting societies reported employing people, chapter 4 revealed that the vast majority of such groups reported employing one or two employees while very few groups in percentage terms reported employing more than three employees. It is therefore an accurate generalisation to state that the vast majority of incorporated sporting associations employ no people. It follows from
this generalisation that most of the work of incorporated sporting associations is performed by volunteers.

Responses to question 5 of the questionnaire presented in chapter 4 revealed that more than 90% of all respondents report total assets of less than $500,000. On a country-by-country basis the data revealed that more than 95% of Australian respondents have assets of less than $500,000, while New Zealand the figure was closer to 78%. It will be recalled that in Australia the most common response category for question 5 was total assets between $1,000 and $10,000.4 The results also clearly indicated that New Zealand respondents tended to be wealthier on the whole given that the modal response in that country was total assets in the $100,000 to $500,000 category.

As discussed in chapter 4, question 6 of the questionnaire revealed that more than 95% of respondents reported total income of less than $500,000, and that more than 50% reported total income of less than $10,000. Again it is interesting that the modal response from Australian respondents was between $1,000 and $10,000 in total income, while in New Zealand the modal response was between $10,000 and $50,000. This is consistent with the reported responses from New Zealand relating to total assets and indicates that, on average New Zealand respondent groups were economically larger than Australian respondents.

Taken in combination, the above discussion reveals that none of the incorporated associations in either Australia or New Zealand would satisfy the criteria for a

4 Note the wealthiest Australian respondent group reporting assets in excess of $10 million.
proprietary limited company that is set out in section 45A of the Corporations Act 2001 (Cth) either “small” or “large”. The significance of this of course is that small proprietary limited companies face less onerous reporting and regulatory requirements than large proprietary companies. Large proprietary companies in fact face a very similar regulatory framework to public companies. The only public companies that are entitled to any special dispensation under the Australian legislation are those companies which are limited by guarantee.

These companies were the subject of a recent investigation by Woodward and by Woodward and Marshall.\(^5\) It appears therefore that the majority of incorporated sporting associations in Australia and New Zealand are indeed theoretically eligible to incorporate as a public company (as already mentioned, probably the company limited by guarantee). What does the empirical evidence suggest about the relative popularity of incorporation regimes to not-for-profit entities? The statistics indicate very clearly that the favoured method of incorporation for the types of groups that are the subject of this study is the associations incorporation regime by a margin in excess of 10 to 1.\(^6\)

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Special note should also be taken of the results of question 8 of the questionnaire which asked respondents if they would consider being incorporated as a company incorporated under the Corporations Act 2001 (Cth) or the Companies Act 1993 (NZ). As reported in chapter 4, the response in both countries to this question was overwhelmingly in the negative. In addition, there is no significant difference in the proportion of responses for the affirmative and those for the negative regardless of country. On average 17% of respondents were open to the possibility while the remaining 83% of respondents were not. Further, almost 70% of respondents to this question indicated that they would not incorporate under the Corporations Act 2001 (Cth) or the Companies Act 1993 (NZ) because they viewed the group as a social body and not a commercial enterprise. This philosophical hostility to incorporation under the Corporations Act 2001 (Cth) or the Companies Act 1993 (NZ) was the single most significant objection raised by respondents. However, as discussed in chapter 4, there was a fairly even split between respondents who were opposed to the Corporations Act 2001 (Cth) or the Companies Act 1993 (NZ) when separated between technical and philosophical reasons.

It is apparent from the records of parliamentary debate discussed in chapter 3 that incorporated associations are viewed by the legislatures as sui generis and do not fit within the regime that exists for the regulation of trading companies. As a consequence of the empirical research contained in this thesis, it is now possible to generalise as to how incorporated sporting associations view themselves in relation to the existing legislative framework and that which exists primarily for trading companies. On the basis of the research presented in chapter 4, incorporated sporting
associations in Australia and New Zealand view themselves as sui generis, unique and essentially different to trading corporations.

**Eligibility for Incorporation**

It is clear from the empirical data reported in chapter 4 that the majority of jurisdictions in Australia and New Zealand choose to express the eligibility for incorporation with respect to eligible purposes and the minimum operational size. There is no mention in any of the statutes of the issue of “mutual benefit versus public benefit”. As was discussed in chapter 2, this is a significant difference between incorporated association statutes and the law relating to charities in a general sense.

**Eligible Purposes**

As is discussed in chapter 3, New Zealand together with more than two-thirds of the Australian jurisdictions all express the eligibility for incorporation with respect to the purposes for which an association or society can be formed in a negative sense. That is to say, an association can be incorporated in New Zealand, New South Wales, Queensland, Victoria and the Australian Capital Territory so long as they are not formed for trading purposes, or for the purpose of securing pecuniary profit to the members. In contrast South Australia, Tasmania, Western Australia and the Northern Territory which together account for less than one-third of the Australian incorporated associations choose to express the eligibility for incorporation with respect to purposes in a positive sense. That is to say, a positive list of acceptable purposes is provided and incorporation is available so long as the applicant
association can show that it falls within the range of approved purposes. Clearly therefore, if the governing legislatures in the relevant jurisdictions wished to harmonise the legislation in each jurisdiction on a national or Australasian basis, it would be sensible to adopt a negatively phrased purpose constraint in terms of eligibility for incorporation. This would involve the least impact on the fewest numbers of incorporated associations already in existence. The centrality of association purposes to the operation of incorporated associations is highlighted in chapter 4 in the discussion of question 18 of the questionnaire which asked respondents to indicate the main consideration made by management committees when making decisions. Interestingly, over 48% of Australian respondents, and over 55% of New Zealand respondents, indicated that this was; “Achieving the objects of the group as laid out in the constitution.” In each country, this was the single most common response and indicates symmetry between the legislation and empirical data concerning the primacy of association purposes.

Minimum Size

As discussed above, one remarkable outcome from the data received in the process of the survey is the finding that the majority of incorporated sporting associations would fail to satisfy the membership size restrictions to qualify as a proprietary limited company (i.e. the majority of incorporated sporting associations have more than 50 members). In Australia the data suggests almost 60% of incorporated sporting associations have more than 50 members, while in New Zealand the data suggests that almost 75% of incorporated sporting societies have more than 50 members. It is also significant to note that the data reveals that in Australia less than 6% of all incorporated sporting associations have fewer than 10 members, while in
New Zealand less than 2% of incorporated sporting societies have less than 10 members.

At first this may seem puzzling with reference to the New Zealand statistics, given the statutory minimum membership in that jurisdiction of 15 members. However, one must remember that the *Incorporated Societies Act 1908* (NZ) does provide that where an incorporated society has a member which is a body corporate, that body corporate will be equivalent to three natural person members for the purposes of minimum membership eligibility requirements. It is conceivable therefore, that an incorporated society could consist of five body corporate members each of which represents the equivalent of three natural persons.

As is indicated in chapter 2, much has been written in corporate law literature relating to trading companies about the unique issues surrounding small closely-held companies. Some of this scholarly debate centres around whether or not there should be a minimum membership requirement in such companies. These do not appear to be live issues with respect to incorporated sporting associations, given that actual membership numbers in respondent incorporated sporting societies seem to be significant. As is observed in chapter 3, the most common response on the question of size of membership of incorporated sporting associations in Australia was 50 members while in New Zealand the most common response was 150 members. It follows therefore, that concerns about incorporated associations and societies not consisting of sufficient numbers of people to constitute what might be thought of ordinarily as an association of persons may not be worth pursuing further in terms of

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7 Section 31.
research or scholarship. Indeed, the data seems to suggest that there would be negligible impact even if all jurisdictions were to introduce a minimum membership requirement of more than 10 members, given the very small numbers of incorporated sporting associations that reported memberships of less than 10.8

**Mutual vs. Public Benefit Eligibility**

Question 7 of the questionnaire asked respondents to indicate why their group existed in order to determine the *raison d'être* of each participating incorporated sporting association. Chart 28 of chapter 3 presents the results of this question graphically. The options that were given to respondents to choose from were:

1. The association is formed to serve members.
2. To achieve objectives laid down by members.
3. To serve the general community.
4. To achieve governing body objectives.
5. Other reasons.

The number of respondents indicating that they were formed to provide a service or benefit to the general community (option 3) in Australia were 25% of responses, while in New Zealand this option accounted for 19% of responses.

In consequence it is fair to say that the majority of incorporated sporting associations (at least 75%) are formed for mutual benefit purposes rather than for the sake of public benefit. This is an important delineating feature of incorporated sporting associations as compared to charities. As was outlined in chapter 2, it is a

8 This research could equally be argued as being supportive of the elimination of any minimum membership requirement as a prerequisite to incorporation. See Reform of the Canada Corporations Act: Draft Framework for a New Not-for-Profit Corporations Act, Corporate and Insolvency Law Policy Directorate, Policy Sector, Montreal, Canada, March, 2002 at 7.
requirement of charitable trusts that they be formed for the benefit of the general community. This is of course a matter which will be of significance in chapter 6.

**Organised/Institutionalised**

It will be recalled that Professor Salomon has stated that this is a key characteristic of voluntary non-profit organisations internationally.\(^9\) As was already observed in chapter 3, the very fact that an association of persons is in a position to seek incorporated status under the various statutes within each jurisdiction is proof that the group is in fact organised to some extent. The first question which arises with respect to the degree to which incorporated associations may be characteristically organised or institutionalised is that of existence prior to incorporation. It is conceivable both with respect to trading companies and associations incorporation legislation that a group of persons may choose to form themselves as an incorporated structure from the outset. However, it has been to some extent an open question whether incorporated associations generally operate for some period prior to seeking incorporation.

As discussed in chapter 4, question 2 of the questionnaire asks respondent groups to indicate whether or not they existed as a group before incorporation and, if so, to indicate how long they had operated prior to incorporation. The results in chapter 4 indicate that approximately 1 in every 3 New Zealand incorporated sporting associations formed their association by incorporation. In other words the majority of New Zealand respondents were to some extent institutionalised and organised

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prior to incorporation. In Australia, considerably fewer by number and by percentage (1 in 6 groups) reported that they had formed by incorporation. In Australia therefore, it seems that the vast majority of incorporated sporting associations had some form of institutionalisation and organisation prior to incorporation. This empirical data speaks strongly to the correctness of the assertion by Salomon that voluntary non-profit associations are to some extent organised and institutionalised.  

As chapter 4 has already indicated, the modal responses to this question in Australia was 20 years, while in New Zealand the modal response was 1 year. Further, the data presented in chapter 4 also indicates that in Australia, just over 50% of respondent groups had been in existence for up to 20 years prior to incorporation. In New Zealand the proportion of incorporated sporting societies which reported having been in existence for up to 20 years prior to incorporation was closer to 33%. It is possible to state therefore, that in New Zealand incorporated sporting societies tend to have a considerably longer life prior to incorporation than their Australian equivalents. It will be recalled that in Australia the longest reported pre-incorporation history of a respondent incorporated sporting association was 130 years while in New Zealand the figure was 115 years.

The significance of these findings from a broadly conceived organic perspective, is that it may be more important for the governing legislation to be accommodating of pre-existing institutional systems and structures within incorporated sporting

10 See also the excellent treatment of this issue in a British Columbian context by Williams, T, "Structure and Involvement in a Voluntary Sport Organization", Master of Arts thesis, University of Victoria, Vancouver, CA, 1979.
associations than may be the case for trading companies. The empirical data also
might serve to explain why the reported membership of incorporated sporting
associations in both countries is reasonably substantial. The data indicates that these
groups are typically higher than one would expect to see reported by a survey of
partnerships. It should be remembered from chapter 4 that the median membership
of Australian incorporated sporting associations is 70 members, and in New Zealand
it is 96 members. It will also be recalled from chapter 4 that the modal number of
members reported in Australia was 50, and in New Zealand the modal response was
150 members.

These findings are also significant with respect to one of the issues addressed by the
questionnaire that has already been considered above, namely question 8; “Would
your group consider becoming a company?” The fact that most incorporated
sporting associations are organised or institutionalised prior to seeking incorporated
status suggests that the association will have reached some degree of institutional
maturity. Such an organisation could be expected to consider the pros and cons of
particular incorporation regimes prior to selecting that which is most appropriate to
its needs. The strikingly similar overwhelmingly negative responses in both
Australia and New Zealand to the question; “Would you consider becoming a
company?” (namely 83% in both jurisdictions) is therefore entirely explicable. In
addition, this suggests that reported responses to question 8 of the questionnaire
should be taken to represent an informed response with reference to the individual
needs of the respondent groups.
Responses to a number of different questions asked in the questionnaire give some insight into the extent to which incorporated associations should be regarded as private entities in the sense used by Salomon. For instance, it will be recalled that the most common response to question 8 as to why would a respondent would not choose to become an company under the *Corporations Act 2001* (Cth) or the *Companies Act 1993* (NZ) was that the respondent group is a social body and not a commercial enterprise. Approximately 40% of groups in New Zealand, and just over 30% of groups in Australia indicated that this was a prime reason why they chose not to become a company.

Also relevant to the question of whether or not an organisation is private is the extent to which the activities of the association are conducted by volunteers. In this regard it is significant that less than 10% of respondent incorporated sporting associations in either country indicated that they employed anyone. Further, it will be recalled from the consideration of question 12 of the questionnaire in chapter 4 that the setting of subscriptions in more than 50% of respondent cases was a matter for members meetings to decide. Finally as has already been referred to above, 75% of all Australian respondents and more than 80% of New Zealand respondents report that they existed for reasons other than providing services to the general community. This is all strongly suggestive of a private focus for incorporated associations in both jurisdictions.
**Non-Profit Distributing / Personal Benefit Restrictions**

As has already been stressed in chapter 3, incorporated associations are not formed with the sole intention of providing pecuniary profits or monetary benefits to members. The question arises therefore what is the purpose for which the association operates? This question is answered in part by two questions asked in the questionnaire. The first of these is the second part of question 18 which, it will be recalled, asked respondent groups to indicate the main considerations that are taken into account when management committees make decisions. As has already been indicated above, the most common responses to this question were firstly, satisfying the objectives laid out in the corporate constitutions, and secondly, satisfying the wishes of members as expressed from time to time in members’ meetings. It appears that members of incorporated sporting associations look to these entities to meet non-monetary needs as they have been mutually agreed.

**Operational Associations**

The reader will recall that question 7 of the questionnaire asked respondents to indicate why they existed. Again the most common responses were the service of members’ needs, to meet objectives laid down by members, or to meet governing body objectives. While a significant proportion of respondents (25% of from Australian responses and 19% of New Zealand responses) did indicate that they existed to provide a service to the general community, this was still a minority position. It is therefore apparent that the operation of a typical incorporated sporting association is essentially inward-focused. Further, such entities do not operate for the purpose of generating pecuniary profit for members.
One should also recall the responses to question 8 discussed above which asked why a group would choose not to incorporate as a company. The most common response to this question was that respondents felt that group was predominantly a social group and not a commercially-focused entity. This, it would appear, is one of the prime reasons why incorporated associations legislation is so popular with incorporated sporting associations in that seems to be a very good fit between the legislation on the one hand and the perceptions and requirements of the groups using it on the other. Such a closeness of fit is essential for the ongoing operational success of incorporated sporting associations.

Non-Operational Associations

It will be recalled from chapter 3 above that there is the possibility of the surplus remaining on winding-up or cancellation of an incorporated sporting association. Chapter 3 further demonstrated that such a surplus could conceivably be distributed amongst remaining members of the association in question with respect to legislation as it exists currently in New Zealand, Victoria and Queensland. In all other Australian jurisdictions it was argued in chapter 3 above that some form of cy-près scheme does apply or should be applied in all other jurisdictions by virtue of the wording of the particular legislation in each state and territory.

It will be recalled from chapter 4 that the questionnaire at question 9 asked respondents to indicate where the constitution of the group currently directed the surplus assets on winding-up to be distributed in the event of winding-up. Consideration of the New Zealand perspective leads one to recall from chapter 3
above that under the *Incorporated Societies Act 1908* (NZ)<sup>11</sup> it is conceivable that incorporated sporting societies in New Zealand could direct all of the surplus assets on winding-up to be distributed to members. However, as revealed in chapter 4, it is interesting to note that this is only provided for in 14% of the response sample from New Zealand. Approximately 58% of respondents from New Zealand allow for what I would refer to as cy-près schemes (i.e. to similar incorporated societies) and in 7% of cases the ultimate destination is charity. It will also be recalled that in chapter 4 the questionnaire asked respondents to indicate whether or not they believed that the distribution provisions were inappropriate. There were no responses to this question from any jurisdiction. This indicates a universal acceptance on the part of response groups that these provisions are appropriate. Given that in New Zealand it is entirely possible that 100% of groups could allow for the distribution of surplus assets on winding-up to members personally, the very deliberate provision of cy-près schemes as the majority method is very significant, as is the 7% allocation to charity.

So far as the responses from Australian jurisdictions are concerned, it is important to remember that distributions to remaining members of incorporated associations are only possible under the legislation currently in force in Queensland<sup>12</sup> and Victoria.<sup>13</sup> Together these jurisdictions represent 48% of the Australian sample of incorporated sporting associations. The remaining 52% of Australian incorporated sporting associations that were sampled all require the distribution of surplus assets on winding-up either to a similar association, to charity, or to state revenue.

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<sup>11</sup> Section 6(1)(k).

<sup>12</sup> *Associations Incorporation Act 1981* (Qld) ss 47 & 92(1).
Nevertheless when the total Australian responses to question 9 of the questionnaire are analysed one discovers that only 17% of Australian response groups allow for distribution of surplus assets on winding-up to members when, in fact this percentage could easily be as high as 48%. This reveals that even in those two very large Australian jurisdictions by numbers of incorporated sporting associations (namely Victoria and Queensland) where distribution to members is a statutory possibility, this possibility has not been adopted by the majority of incorporated associations. In fact, as can be seen from the results to question 9 displayed in chapter 4, the majority dissolution provision throughout Australia is for surplus assets on winding-up to be distributed to a similar association, or cy-près. More will be said about this matter below under ‘Income Tax Status of Incorporated Associations’.

**Internal Governance**

Obtaining some insight into the governance methodology used by respondents was one of the key objectives of this research. As discussed in chapter 4, question 13 of the questionnaire asked respondents to indicate whether or not they had an elected management committee. As will be recalled, the response to this question in both jurisdictions was very consistent, namely 14 out of every 15 incorporated associations in both jurisdictions reported that they do in fact have an elected management committee. It is therefore apparent, on the basis of the empirical data, that only around one in every 15 incorporated sporting associations in Australia and New Zealand has a method of governance which does not include an elected group of delegated managers. However, is it true to state that the existence of a managing group elected from the general membership body is a characteristic of a more

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13. *Associations Incorporation Act 1981* (Vic) s 33B.
organised incorporated association? It is suggested that such a generalisation would oversimplify the matter given that Professor Salomon has indicated member-governed internal governance structures are a recognised alternative adopted in voluntary non-profit organisations.¹⁴

**Member-Governed Associations**

Turning exclusively to the phenomena of member-governed incorporated associations, it will be recalled from chapter 4 that typically (i.e.: more than 4 out of every 5 reported cases), such groups are reasonably small (i.e.: memberships of less than 100). This may indicate that there is less need for delegated management as a mechanism for reducing the costs of reaching decisions, an important transactional cost recognised by Hansmann.¹⁵ However this proposition does not necessarily hold true in the reverse. For instance, as has already been demonstrated, in excess of 50% of incorporated sporting associations reported having fewer than 100 members. Also noted in chapter 4 was the remarkable respondent group that reported a membership of 1,500 members while at the same time reporting that it did not have an elected management committee. Given that Queensland and the Australian Capital Territory require that every incorporated association must have at least one or two statutory officeholders, one wonders how incorporated associations in these jurisdictions manage to fit within the framework of the relevant governing legislation when that legislation mandates the existence of a management committee. This is clearly a

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lack of fit that is incompatible with the broadly conceived organic theory advocated in this thesis.16

Delegated Management Associations

Returning again to the issue of incorporated associations which have a management committee, the next most significant question is how large the management committee might be. As is indicated in chapter 4, the results of questions 3 and 14 of the questionnaire indicate that in Australia the average ratio of management committee to general membership is 1 committee member to every 33 regular members, while in New Zealand the average ratio is 1 to every 45 members. As a general proposition, approximately 50% of Australian incorporated sporting associations report management committees of between 6 and 10 members, while in New Zealand approximately 60% of respondent groups report that their management committee was between 6 and 10 members. This indicates that in both jurisdictions it is more likely than not that an incorporated sporting association will have a management committee consisting of between 6 and 10 members.

Given that most incorporated sporting associations have management committees, the question arises as to whether or not these management committees are voluntary or paid. The results of question 15 of the questionnaire as discussed in chapter 4 reveal that it is overwhelmingly the case that management committee members are volunteers. In Australia the percentage of all management committee members

holding office in a voluntary capacity exceeds 90% while in New Zealand the volunteer proportion is closer to 75%. Even where incorporated sporting associations pay management committee members for their services, in the clear majority of cases, only one of these management committee members is paid for their services. Approximately 5% of groups in Australia reporting that they have a management committee indicated that one of those management committee members was paid for their services, and approximately 14% of incorporated sporting societies in New Zealand who reported having a management committee indicate that the services of only one of those committee members was paid for. The questionnaire did not ask whether the paid management committee members were paid on an economic basis, or some form of honorarium for their services. This is a significant delineation, given the fact that normal economic rates would be more indicative of an employment relationship while the payment of honorarium would not necessarily indicate that the incorporated association is an employer.

As Professor Salomon indicates, an organised, institutionalised non-profit entity would be one that would be characterised as holding regular meetings of both members on the one hand, and management committee members on the other.17 It will be recalled that question 11 of the questionnaire asked respondents to indicate how frequently members meetings are held. As indicated in chapter 4, in both jurisdictions the most common responses to this question were that members meet annually or monthly. It will be recalled that annual members’ meetings are held in approximately 43% of all incorporated sporting societies in New Zealand while just over 30% of respondent groups indicate that members met on a monthly basis.
Annual members’ meetings were reported in just over 30% of Australian incorporated sporting associations while approximately 40% of respondents in Australia indicated that members met monthly.

It should be noted, however, that members of a significant number of respondent groups in both countries indicated that they meet on a basis ranging from daily meetings in extreme cases, to weekly, fortnightly, monthly, quarterly, semi-annually as well as annually. This is not the sort of response that one would normally associate with trading companies, except perhaps closely-held companies.

As detailed in chapter 4, with respect to the meetings of management committee members, question 16 of the questionnaire asked respondents to indicate how frequently management committees met. In both countries, the vast majority of incorporated sporting associations reported meeting on a monthly basis. Australian respondents with management committees reported that they met on a monthly basis in more than 70% of cases, while the New Zealand response rate was in excess of 80%. A very small proportion of respondents reported holding management committee meetings more frequently than on a monthly basis.

As discussed in chapter 4 and in this chapter under the heading “Eligibility for Incorporation”, question 18 of the questionnaire asked respondent groups to indicate where management decisions were made, what were the main considerations. Recall that in both Australia and New Zealand the majority of respondent groups indicated the primacy of the constitution when management decisions were made. One can see

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on the basis of the results to question 18 that the nature of the purposes as laid down by a respondent’s constitution was of prime importance to both legislators and regular members of incorporated associations. It is equally important to note that management committees of incorporated sporting associations look to the constitution of the association as the prime source of guidance when making management decisions. This is not the general, open-ended entrepreneurial discretion that one would normally associate with directors of trading companies.

Following on from question 18, it will be recalled that question 19 asked if management committee decisions had been overruled by members. There was a statistically significant affirmative response to this question in both countries with the New Zealand rate (11%) slightly lower than that in Australia (16%). This is a phenomenon that would not be permitted in trading companies given the accepted application of narrow form organic theory as defined in chapter 1. However, the significance of this finding remains somewhat ambiguous, given that the results to question 19 discussed in chapter 4 also indicate that such situations of members vetoing the decisions of management committees is extremely rare. As will be recalled, this was the response in more than three-quarters of all respondent groups where members have overturned management decisions.

In addition to the question of whether or not members have a power of veto over decisions of management committees in incorporated sporting associations, is the issue of whether or not there are any restrictions placed on the powers of management that are given to management committees by way of the association’s
constitution. At this point a potential flaw in the questionnaire must be highlighted. A question that could have been asked is whether or not management committees have the power of management exclusively, or whether this power of management is held by the management committee only between members’ meetings. This point is made by Professor Salomon\textsuperscript{18} and is one that would be an important issue to empirically test in the context of Australian and New Zealand incorporated associations. Unfortunately, this question was not included in the questionnaire, and is an area in which future research is required in order to put this research into greater perspective.

However, it will be remembered that the questionnaire did ask whether or not any restrictions were placed on the power of management committees to manage the affairs of the incorporated sporting association. It is interesting to note, as discussed in chapter 4, that in approximately one-third of all respondent groups, whether in New Zealand or Australia, restrictions are placed on the management committees of incorporated sporting associations. Reference to chart 26 of chapter 4 demonstrates the sharing of what would normally be called “management power” between management committees and membership bodies in incorporated sporting associations that would be unthinkable in a trading company given the application of narrow form organic theory as defined in chapter 1. This power-sharing phenomena appears to be variable. As was demonstrated in chapter 4, generally speaking there was very little variation between the Australian and New Zealand responses over the 6 management power areas. For instance, in nearly all cases somewhere between 20% and 30% of respondent groups reported that members have the requisite powers,

\textsuperscript{18} Salamon, L.M., \textit{The International Guide to Nonprofit Law}, John Wiley & Sons, New York,
whether it be hiring and firing, taking out loans, executing contracts, bringing suit in the name of the association, or admitting individuals to membership. The one case where most power is apparently given to members’ meetings was in the setting of subscriptions. Recall that in both countries, more than 50% of respondent groups indicated that this power resides with members.

The extent of management power-sharing varies according to the type of management power that one is considering. This suggests that there is a fairly high degree of sophistication in the contents of corporate constitutions.

The overall picture that emerges from the empirical investigation summarised in chapter 4 is that in most cases incorporated sporting associations exist for considerable periods of time prior to incorporation. These groups are generally organised in such a way that their affairs are administered on a day-to-day basis on behalf of members by a group of between 6 and 10 mainly volunteer delegates that can collectively be referred to as a management committee. Many such management committees are constrained in their activities as delegated managers by restrictions contained in corporate constitutions, including in a few cases a power of veto in the hands of membership meetings. Further, in the majority of cases, the constitutional arrangements under which members agree collectively to participate in the affairs of the association would be negotiated some years prior to incorporation.

It is also important to keep in mind the extent to which management committee members themselves feel constrained by the requirements of corporate constitutions.

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USA, 1997 at 21.
As was discussed in chapter 4, in a significant proportion of respondent groups it is not unheard of for a management committee to be overruled by the exercise of a power of veto held by members in general meeting. In addition, as one would perhaps expect, management committees tend to meet monthly but, perhaps surprisingly, respondents indicated that members’ meetings are much more frequent in incorporated sporting associations than one would normally expect in a body that has been compared to trading companies in the literature. Other than closely-held companies, the operation of trading companies is characterised by annual members meetings. As was highlighted in chapter 2, this lack of involvement by shareholders in the affairs of the company is a key assumption in the separation of ownership and control doctrine at the heart of narrow form organic theory and the neo-classical economic theory of the firm.

Finally, while it is true to say that incorporated sporting associations can be regarded as being economically small enterprises when compared to large public trading companies, it would be erroneous to think of them as small enterprises in terms of membership numbers. We have already seen when considering the issue of corporate size that, by comparison with such entities as proprietary limited companies or partnerships, some incorporated sporting associations are possessed of significant assets. On the other hand of course, as discussed in chapter 4, it is the case that the overwhelming majority of incorporated sporting associations in both Australia and New Zealand have a total asset base of less than $500,000 (indeed in the majority of cases the assets held by respondents are less than $10,000) and, at least in Australia, a significant proportion have assets of less than $1,000.
Incorporated sporting associations are therefore typically groups that may have a considerable number of members while at the same time are not necessarily possessed of considerable assets, or generators of pecuniary profits. These groups are formed for the pursuit of non-commercial purposes, and are characterised by a strong shared commitment by members and committee members alike to the contents of the group constitution. The ongoing success of the incorporated sporting association is facilitated through regular meetings of both management committees and members generally to maintain what Professor Hansmann has termed the homogeneity of interest between members. The interests of members in incorporated sporting associations are always of prime importance, so much so that members themselves retain and exercise significant supervisory powers over management committees. Importantly and, one would venture to say characteristically, this appears to be the accepted status quo by management committee members.

**Voluntary Association**

As has already been noted both in chapter 4 and in this chapter, the most commonly reported number of members by respondent incorporated associations in both countries ranged between 50 and 200 members. Further, chapter 4 reveals that less than 15% of respondent groups reported having any employees whether full-time, part-time or casual. In addition, despite most groups having an elected management committee consisting of between 6 and 10 members, meeting on at least a monthly basis, some 92% of respondents in Australia and 77% of respondents in New Zealand reported that they had no paid committee members. As has already been discussed above, the questionnaire was not discriminating enough to determine whether or not payments to committee members were by way of honoraria, or
payment at a true economic cost basis. Nevertheless, the strong inference that can be derived from the available responses is that the operations of incorporated associations are only secured by the activities of volunteers.

It will be recalled from chapter 3 that estimates have been placed by official statisticians in Australia and New Zealand on the value of voluntary work in the sport and recreation sector generally. It will be recalled that the estimate for New Zealand was just under $NZ2 billion for the year 2000, while in Australia the official estimate of voluntary work in the sport and recreation sector was in excess of $AU2 billion. Remember also that restrictions are commonly placed on the management powers of management committees (including spending restrictions in about a third of all cases). Given that such substantial voluntary contributions are made to incorporated sporting associations, and that they are predominantly “managed” by volunteers who also happen to be members, it is unsurprising that such groups should have as their primary raison d’être the pursuit of group objects, or the satisfaction of members’ objectives as opposed to the satisfaction of needs of the general community. It is clear therefore that Professor Salomon’s hypothesis referred to in chapter 3, that not-for-profit entities typically demonstrate a private and voluntary nature, corresponds directly to the findings of the empirical research undertaken in this thesis.

**Taxation Status of Incorporated Associations**

It will be recalled from chapter 3, that in Australia the Commissioner for Taxation requires that in order to qualify for an exemption from income tax, an incorporated association formed for sporting purposes cannot be carried on for the purposes of
profit or gain to its individual members. The Commissioner further requires that the
distribution of profits and assets among members must be applicable to both when
the incorporated sporting association is operational and when it ceases to operate. In
addition, it will be recalled that the Commissioner for Taxation in Australia places a
strong emphasis on the requirement that members participate in the management of
incorporated sporting associations before granting the administrative discretion to
allow an exemption from income tax to such groups.

As discussed in chapter 3, the provisions in New Zealand are almost identical to
those which are required by the Commissioner for Taxation in Australia. This is
perhaps the strongest reason why groups that could otherwise lawfully allow for
distribution of surplus assets on winding-up to members, would voluntarily elect not
to include such provisions in their constitutions. As was discussed in chapter 3 this
is of particular relevance to incorporated sporting associations in New Zealand,
Victoria and Queensland and goes some way to explain the lack of popularity of such
a distribution alternative in practice, even though it is lawfully permitted in those
jurisdictions.

It should be recalled that chapter 4 revealed that responses indicated that 52% of
Australian incorporated sporting associations, and 58% of New Zealand incorporated
sporting societies provide that on winding-up any surplus assets remaining should,
pursuant to constitutional provision, be directed to an association formed for similar
purposes. In both countries this is the single most common response. In addition, as
already stressed above, question 10 of the questionnaire asked if participants felt that
this was inappropriate. Bear in mind that there were no responses indicating dissatisfaction with these provisions.

On the basis of the questions contained in the questionnaire, it is not statistically possible to determine the extent to which the income tax legislation alone is the cause of the popularity of the cy-près-style constitutional provisions. It may of course be produced by the mirroring effect of the predominance of cy-près-style legislative provisions in the majority of Australian jurisdictions. An additional reason may be that members who are committed to the purposes for which an association is formed would, as a natural choice, wish to continue to allow those assets that have been set aside for those purposes to be utilised in achieving the same purposes though another group. Further research is necessary in this area to determine the specific causal factors that might explain the relative popularity of the cy-près provisions in practice across all jurisdictions. One can however, be definite about the fact that the unanimous non-response to question 10 of the questionnaire suggests that respondents believed that there is a good fit between the legislation in place in each jurisdiction and the way incorporated sporting associations choose to order their affairs in practice.

**SUMMARY**

This chapter compared the legislative framework outlined in chapter 3 governing incorporated sporting associations with the empirical findings of the epidemiological investigation discussed in chapter 4. This was done to determine to what extent the governing legislation could be said to embody the requirements of broadly conceived organic theory as defined in chapter 2. In the course of this chapter it emerged that
incorporated associations generally are viewed as sui generis by both the majority of legislatures and incorporators alike. Further, the majority of the respondent incorporated sporting associations replying to the questionnaire would not qualify as a small proprietary company for the purposes of the Corporations Act 2001 (Cth). Incorporation as a limited company would, therefore, mean incorporation as a public company for the majority of incorporated sporting associations. Only a minority of respondent groups would be entitled to incorporate as a proprietary limited company, and not all of these would be eligible for small proprietary company status. Finally, the results of question 8 of the questionnaire revealed that regulatory framework is not accidental but represents a rational choice on the part of incorporated associations. In as much as respondents choose the incorporated association legislative regime they can also be said to eschew the trading company regime. The research is therefore strongly supportive of the claim that incorporated associations are sui generis.

The legislative requirement for eligibility that was demonstrated to exist in Australia and New Zealand incorporated association legislation in chapter 3 was uniformly focussed on the purposes for which the association was formed. Minimum membership requirements were not uniform. There was no requirement for incorporated sporting associations to be formed for public benefit. The empirical research is consistent with the legislative framework in this regard given that in Australia and New Zealand the vast majority of incorporated sporting associations report that they exist to meet objectives laid out in the constitution, or to meet the wishes of members as expressed from time to time in members’ meetings. These purposes are also expressed as the main considerations when management committee
decisions are made. The research reveals that the vast majority of respondents in both countries had more than 10 members, suggesting that minimum membership levels are not a significant concern in practice. The lack of focus on public benefit appears to be a feature that the legislation has in common with the empirical data. In keeping with broadly conceived organic theory, it appears then that both the governing legislation and incorporated sporting associations are primarily purpose driven.

Chapter 3 revealed that there is detailed provision in the governing legislation in all jurisdictions for the organisation and institutionalisation of incorporated sporting associations. Chapter 4 revealed that formation by incorporation is a minority phenomena in both Australia (18%) and New Zealand (35%). The legislative provision is therefore facilitative in that it provides a basic structure within which the new association can begin to operate. However, as outlined in chapter 3, the legislation (particularly that in Queensland and the Australian Capital Territory) can be highly restrictive, rather than facilitative, of the requirements of many associations that convert to incorporated sporting associations bringing with them organisational structures that have developed and evolved over many years. This is potentially a greater problem in New Zealand where incorporated sporting societies tend to have a longer pre-incorporation history than those in Australia. In this regard, the legislation does not meet the requirements of broadly conceived organic theory.

The empirical data discussed in chapter 4 reveals that incorporated sporting associations in both Australia and New Zealand are run by members for members and to meet objects agreed by members. Importantly, members typically retain a
significant degree of management type control over the affairs of incorporated
sporting associations even where management committees are elected. While the
legislation surveyed in chapter 3 is not in conflict with these characteristics, it fails to
take adequate note of the valuable contribution of volunteers, particularly with
respect to sporting groups. There is no legislative casting of duties and obligations in
light of the prime role of volunteers. The significance of volunteerism in
incorporated sporting associations in both countries can be grasped when one asks
how many such groups would be affected if such groups were prohibited from
employing any staff. Only 15% of respondents to the questionnaire would be
affected by such a requirement. This failure to allow for the particular requirements
of volunteers is an important area where the legislation is not in keeping with broadly
conceived organic theory. It is also a further reason why incorporation under the
Corporations Act 2001 (Cth) and the Companies Act 1993 (NZ) is not in keeping
with the private nature of respondent groups.

Legislative internal governance requirements of associations in both Australia and
New Zealand were also summarised in chapter 3 and discussed above. It will be
seen that this is one of the key areas of asymmetry between the law and the reality.
None of the legislation adequately allows for member-governed associations. The
legislation in Queensland and the Australian Capital Territory is to varying degrees
positively hostile to this accepted governance structure. It also appears that the
extent to which members of the majority of incorporated sporting associations can,
and do participate in the management of those groups, up to and including the power
of veto over management committees is not understood by relevant legislatures.
Indeed, it should be recalled from the empirical data presented in chapter 4 that even
where members do not seek to interfere in particular decisions of management committees, such committees are often constrained by general constitutional restrictions on the power to manage incorporated sporting associations. This runs contrary to narrow form organic theory as defined in chapter 1 in addition to most legislation which seeks to abolish the application of the so-called ultra vires doctrine. The empirical evidence calls the premises on which the legislation has been based into serious question. This is the most significant area of disparity between the legislative framework and the requirements of incorporated sporting associations in practice. As such it represents a significant affront to broadly conceived organic theory.

Finally, an analysis of the taxation status of incorporated sporting association revealed that the majority of these groups in Australia and New Zealand adopts a cy-près approach even when the governing legislation permits distribution of surplus assets on dissolution to members personally. This is strong evidence in support of the primacy of purposes within incorporated sporting associations. It is also a strong statement by incorporated sporting associations in both countries that the governing legislation, including the taxation laws, facilitate their activities. This evinces great sympathy with broadly conceived organic theory.

Chapter 6, which follows, takes the detailed appreciation of incorporated sporting associations developed in this chapter and chapters 3 and 4, and compares it to each of the four analogies introduced in chapter 2. This comparison aims to determine which of the four analogies offers the richest analogical schema in the development of a jurisprudence of incorporated sporting associations.
“… lawyers who think in terms of profit-oriented organization law are basically not the right people to decide what public policies, concepts, and principles should undergird nonprofit organization law … The principles of nonprofit organizational law should be analogized out of the guiding principles of religious, fraternal, community-service, charitable, and mutual aid groups that have illuminated civilization for many centuries. The fact that the Bronze Age temple or agricultural commune also often evolved into the idea of a pirate crew should not make us conclude that we must make the pirate crew the model of our nonprofit laws.”\(^1\)

**INTRODUCTION**

It will be recalled that in chapter 2, I stressed that in law as in any other discipline, when seeking to reason by analogy it is essential that a rich source analogue be selected. A known source analogue that shares important structural and internal-relational similarities with an unknown target analogue will permit the development of a sophisticated analogical schema. A sufficiently sophisticated analogical schema can then be utilised to allow cognitive mapping onto the unknown target analogue to more accurately provide both insight and predictive capacity. On the basis that alternative analogies might be a way of overcoming the restriction of cognitive hard-

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wiring that blights the selection of an apt analogy, four alternative legal source analogues were introduced and analysed in the same chapter. A modified version of the characteristics listed by Professor Hansmann as being essential to the modern corporation was used to facilitate the analysis of alternative potential source analogues.

Using a modified list of the characteristics of not-for-profit associations postulated by Professor Salomon in his international survey, I analysed incorporated sporting associations by reference to the governing legislation in Australia and New Zealand. This picture was greatly enhanced by means of an epidemiological investigation of a 10% sample of all incorporated sporting associations in both countries. Together then, chapters 3, 4 and 5 applied the principles of broadly conceived organic theory as it was defined in chapter 1, to incorporated sporting associations in Australia and New Zealand.

In this final chapter I will compare the alternative potential legal source analogues discussed in chapter 2 to the detailed analysis of incorporated sporting associations in chapters 3, 4 and 5 in order to determine which source analogue shares the greatest degree of internal structural similarity with the target incorporated sporting associations. This will have significant implications for the analogical development of a jurisprudence of incorporated sporting associations.
CHARACTERISTICS OF INCORPORATED ASSOCIATIONS

Trading Companies

It will be recalled from chapter 3 that, as a matter of first principle, it is important to account for the domestic nature of voluntary associations that are not formed for profit. However, it must be conceded that the large modern trading company, being the archetypal model on which modern corporate law is based, is not formed as a domestic enterprise. On the contrary, such entities are formed precisely to operate in the public domain. As a consequence, the formal relationships that exist within a large modern trading corporation are inherently legally enforceable. This runs counter to the ratio decidendi in the case of *Cameron v Hogan* (1934) 51 CLR 358 as discussed in chapter 3. As a matter of pure logic, one cannot on the one hand, claim the domestic nature of an association as the key basis for denying common law remedies equivalent to those available in relation to trading companies, while discounting it as a distinguishing feature when seeking to apply common law duties and obligations derived in the context of trading companies on the other hand.

Unquestioning acceptance of the aptness of the large modern trading company as a source analogue for incorporated sporting associations would also require an acceptance of a source analogue that has been described in numerous parliamentary debates as being patently inappropriate to the needs of voluntary, domestic associations as a basis upon which to develop an appropriate jurisprudence. As I have discussed in chapter 3, this view has been expressed in parliamentary debate in New South Wales, South Australia, Victoria, Western Australia and New Zealand. As far as foundational principles are concerned, any jurisprudential reasoning by
analogy from the law relating to large modern trading corporations must account for this essential difference from the outset. In this regard it is remarkable that the Corporations Act 2001 (Cth) should fail to address the distinction completely and be expected to reconcile the legislative needs of public commercial enterprises and private domestic entities under a single corporations measure.

**Closely-Held Companies**

In terms of the small closely-held company it should be noted that, by definition, there is usually a high degree of mutuality with respect to the small closely-held company that could be argued to be analogous to what is observed in incorporated sporting associations. In this regard it is important to recall the one limitation of the closely-held company as a source analogue for incorporated sporting associations. That is the fact that small closely-held companies, by definition, consist of a small shareholder group which typically has a large degree of participation in the management of the corporation. In general, the shareholder group in small closely-held companies consist of no more than 50 shareholders. As demonstrated in chapter 4 the majority of respondents in both Australia and New Zealand reported membership levels in excess of 50 members. This asymmetry between small closely-held companies and incorporated sporting associations serves to limit the utility of small closely-held companies as a potential source analogue. In addition, as observed in chapter 2, in small closely-held companies shareholders are typically bound by enforceable agreements struck between them, governing such matters as

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2 See *McKinnon v Grogan* [1974] 1 NSWLR 295 at 298 per Wootten J.

3 At s 18.
exercising shareholder rights, restrictions on management powers, and transferability of shares. It will be recalled that these agreements often exist outside of the corporate constitution. Such enforceable relationships between shareholders are also outside of the orthodox view of shareholders generally under the present corporate law regime, in addition to being at odds with the ratio decidendi in *Cameron v Hogan* discussed above.

**Charitable Trusts**

As discussed in chapter 2, in New Zealand and a number of Australian jurisdictions, a charitable trust can be formed for sporting purposes given that the definition of charitable purposes in these jurisdictions has been extended to specifically include bodies that are formed for the promotion of a sport. When considering the potential aptness of the charitable trust as a source analogue for incorporated associations generally, the charitable trust is (as discussed in chapter 2) essentially a memberless entity. It is managed by trustees in pursuit of a charitable purpose that is, broadly speaking, beneficial to the general community. As a consequence of this, it will be recalled that the terms of a charitable trust are only enforceable by way of an action brought by the Attorney General. The significance of this in the present context is that those persons who may benefit from the operation of a charitable trust do not

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4 A number of the difficulties this creates in the context of the company limited by guarantee are addressed in Woodward, S, "Not-for-Profit Companies - Some Implications of Recent Corporate Law Reforms" (1999) 17(8) Company & Securities Law Journal 390.

necessarily enjoy a right in the first instance to have the charitable trust enforced. They may of course petition the Attorney General to bring an action in the Supreme Court of each state and territory and in the High Court of New Zealand to enforce the charitable trust deed. Otherwise, as was demonstrated in chapter 2, such persons who may benefit from the operation of a charitable trust generally have no personal right to enforce any of the relationships at work in the administration of a charitable trust. This is an important favourable point of comparison between charitable trusts and incorporated sporting associations and a point of distinction with the previous two potential source analogues discussed above, namely large trading corporations and small closely-held companies. That is to say, there are ambiguities in the extent to which the interrelationships at work in the administration of a charitable trust are subject to legal enforceability. This, however, must be read subject to the major caveat that there are definite established personal duties that are required of charitable trustees in the conduct of their office.

Eleemosynary Corporations

As discussed in chapter 2, the eleemosynary corporation is an interesting, if somewhat arcane sub-genus of charitable trusts which is itself a potential legal source analogue for incorporated sporting associations. It will be remembered that members of an eleemosynary corporation do enjoy the benefit of the charitable trust formed for an eleemosynary purpose. Despite the fact that eleemosynary corporations are within the general class of charities, members of eleemosynary corporations can bring actions to enforce the charter or deed of the eleemosynary corporation. It will be recalled that such actions exist outside of common law, and are exercised by way of petition to the Visitor of the eleemosynary corporation. In
this way an eleemosynary corporation essentially deals with its internal disputes on an internal basis. Further, it is also important for present purposes to note that the visitatorial jurisdiction is reviewable by the courts by way of prerogative writ. This is of significance to the possible utility of the eleemosynary corporation as a source analogue for incorporated sporting associations. As indicated in chapter 3, the majority judgment of the High Court of Australia in *Cameron v Hogan* specifically considered the intended effect of association rules. Their Honours\(^7\) expressed the firm view that:

> Such matters are naturally regarded as of domestic concern. The rules are intended to be enforced by the authorities appointed under them. In adopting them, the members ought not to be presumed to contemplate the creation of enforceable legal rights and duties so that every departure exposes the officer or member concerned to a civil sanction.

Clearly in eleemosynary corporations there exist internal mechanisms for ordinary members, enjoying benefits under the charter of the eleemosynary corporation, to have the charter enforced. Namely, appeal to the Visitor to hear and settle disputes arising out of the administration of the eleemosynary corporation. As we have seen the visitatorial jurisdiction, although subject to the ultimate supervision of the courts, operates outside of the civil law. It should be appreciated that there is a close comparison to be made between eleemosynary corporations and incorporated sporting associations in this area. This suggests considerable utility in the eleemosynary corporation as a potential source analogue for incorporated sporting associations.

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\(^7\) (1934) 51 CLR 358 at 378 per Rich, Dixon, Evatt and McTiernan JJ.
Raison d'être

As highlighted in chapter 3, associations must meet certain eligibility requirements in order to be permitted the legislative facility of incorporated status. The analysis in chapter 3 further highlighted that a number of the purposes for which incorporated associations may be formed in a minority of jurisdictions are broadly analogous to charitable purposes referred to in the Preamble to the Statute of Elizabeth.\(^8\) It will also be recalled that in the majority of jurisdictions, which do not allow for incorporation with reference to specific purposes, associations may become incorporated so long as they are not formed for trading purposes.

Trading Companies

The primacy of corporate purposes is an important point of contrast with the large modern trading corporation. As was discussed at length in chapter 2, the reason why a modern trading company exists is to maximise shareholder wealth, or profit maximisation in a general sense. It is of course the case that, under the Corporations Act 2001 (Cth)\(^9\) it is possible to incorporate as a company limited by guarantee. However as Sievers has noted,\(^10\) the company limited by guarantee has never been as popular as the incorporated association for the purposes of operating a nonprofit entity. This is reinforced by the results of question 8 of the questionnaire as discussed in chapters 4 and 5. Further, as has been demonstrated in chapter 3, while it is the case that associations may seek incorporation under the Corporations Act 2001 (Cth) or the Companies Act 1993 (NZ), it is not the case that a company

\(^8\) Statute of Charitable Uses 1601 (UK).

\(^9\) At s 112(1).

incorporated in Australia or New Zealand can automatically qualify for incorporation under the relevant associations legislation in Australia and New Zealand.

The implications for incorporated sporting association legislation in relation to this point of departure are far reaching. One of the reasons why the doctrine of ultra vires was deemed to be inappropriate for modern trading corporations in both Australia and New Zealand, as in other jurisdictions, is that the very general purpose for which trading companies are incorporated (namely the maximisation of shareholder wealth) does not lend itself to restricting the entrepreneurial role of managers in trading companies. However the same logic is not necessarily applicable considering that incorporated sporting associations are only eligible for incorporation by reference to specific qualifying purposes that restrict the type of activities in which the association can engage. Recall the following comments of Cooke J of the New Zealand High Court\(^1\) that were emphasized in chapter 2:

> The law or practice relating to limited liability companies is not necessarily a helpful analogy in approaching [incorporated society] cases. The doctrine of *ultra vires* in company law was evolved mainly to protect investors and creditors. The same considerations are not easily transportable to cases where the *raison d'être* of an organization is not to make profits but to promote a certain activity.\(^2\)

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\(^1\) Delivered judgment on behalf of the full bench, the other justices being Richardson, McMullin and Somers JJ and Sir Thaddeus McCarthy.

It is important to remember that, as was indicated in chapter 3, in South Australia, Tasmania, Western Australia and the Northern Territory an association must comply with specific purposes in order to be eligible to incorporate. In the remaining jurisdictions, it will be recalled that eligible purposes are much less restrictive but there is still a prohibition on trading or returning pecuniary profits to members. It would seem to follow therefore, that given the central role of group purposes as a criterion for incorporation in all jurisdictions, that the abolition of the doctrine of ultra vires with respect to incorporated sporting associations is at least an open question from a theoretical perspective. Whatever the correct view on such a matter may be, it is clearly a significant area of asymmetry between large modern trading corporations and incorporated sporting associations that restricts the usefulness of the former as a potential source analogue for gaining insight or predictive capacity with respect to the latter.\textsuperscript{13}

\textbf{Closely-Held Companies}

It is assumed to be the case that small closely-held companies are also formed for the purposes of maximising shareholder wealth, or for maximising profits. As was noted in chapter 2, whether or not this is an appropriate assumption is still a point which has been inadequately researched in practice. However, from the point of view of purposes, the assumption is made that the comments above dealing with the potential aptness of the large trading corporation as a potential source analogue for incorporated associations are equally applicable to closely-held companies.

\textsuperscript{13} Sievers, AS, "Incorporation and Regulation of Non-Profit Associations in Australia and Other Common Law Jurisdictions" (2001) 13(2) \textit{Australian Journal of Corporate Law} 124.
Charitable Trusts

The charitable trust has already been referred to above as sharing some essential structural characteristics with incorporated sporting associations from the point of view of the primacy of the purposes for which both are formed. As has been mentioned already, this is most notable in South Australia, Tasmania, Western Australia and the Northern Territory. However, even in those other jurisdictions which refer to eligibility for incorporation from the point of view of non-trading purposes, favourable comparison is possible with charitable trusts. Recall that charitable trusts are formed for the public benefit and therefore not necessarily for the purpose of benefitting a particular class of society. Recall further, that when a charitable trust is operated in a manner that does not meet its charitable purposes, the charitable trust can be put under the administration of the Attorney General. The trustees can be held personally liable for breaching the trust deed. In extreme cases, the court may even order that the charitable trust be wound up, and the assets be devolved cy-près to a charity formed for similar purposes. As will be remembered from chapter 3, the strong emphasis on the original purposes for which a charitable trust is formed, and the extent to which these purposes circumscribe the way in which it may operate, bears close favourable comparison with the situation pertaining to incorporated sporting associations. Even in jurisdictions in which there is no statutory list of acceptable purposes, it will be recalled from chapter 3 that once

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14 However, the common law has struggled valiantly to come to terms with dispositions of property to non-charitable purposes (see for example Ford, HAJ, "Dispositions of Property to Unincorporated Non-Profit Associations I" (1956) 55 Michigan Law Review 67; Ford, HAJ, "Dispositions of Property to Unincorporated Non-Profit Associations II" (1956) 55 Michigan Law Review 235; and Ford, H.A.J., "Dispositions for Purposes" in Finn, PD, (Ed) Essays in Equity, The Law Book Company, North Ryde, 1985).
an incorporated association’s purposes are included in its constitution, any change to those purposes must comply with relevant statutory requirements. These include resolutions reaching statutorily prescribed minimum affirmative percentages before being passed by members, and the subsequent notification of the regulator in each jurisdiction.

As discussed in chapter 3, it is true that the list of eligible purposes for which a trust can be formed for charitable purposes is far more restrictive than anything that is in evidence in the relevant legislation in the relevant jurisdictions. However, as noted in chapter 2, in a number of jurisdictions trusts formed for the promotion of a sport do qualify as charitable trusts. In other words, a significant number of the associations that are been the subject of this thesis would also qualify as charitable trusts given the amended common law definitions in a number of jurisdictions. This speaks eloquently to the degree to which charitable trusts are a potentially rich source analogue with respect to incorporated sporting associations.

**Eleemosynary Corporations**

As was discussed in chapter 2, when one considers the eleemosynary corporation as a potential source analogue for incorporated sporting associations, the purposes for

15. *Associations Incorporation Act 1981 (Qld)* ss 25-25A; *Associations Incorporation Act 1985 (SA)* s 23; *Associations Incorporation Act 1964 (Tas)* s 17; *Associations Incorporation Act 1987 (WA)* s 16; *Associations Incorporation Act (NT)* s 15; and *Incorporated Societies Act 1908 (NZ)* s 6.

16. *Associations Incorporation Act 1984 (NSW)* s 20; *Associations Incorporation Act 1981 (Qld)* ss 26A-26D; *Associations Incorporation Act 1985 (SA)* s 24; *Associations Incorporation Act 1964 (Tas)* ss 18-19; *Associations Incorporation Act 1981 (Vic)* s 22; *Associations Incorporation Act 1987 (WA)* ss 17 & 19; *Associations Incorporation Act 1991 (ACT)* ss 30 & 33; *Associations Incorporation Act (NT)* s 16; and *Incorporated Societies Act 1908 (NZ)* s 21.

17. New Zealand, Queensland, South Australia, Tasmania and Western Australia.
which an eleemosynary corporation can exist are highly restrictive. In addition, eleemosynary purposes are mutually exclusive of the incorporated sporting associations that are the subject of this thesis. However, as some hospitals, colleges and other educational institutions are incorporated associations, there is obviously the potential for utilising the law relating to eleemosynary corporations as a source of analogy for these entities.

Nevertheless, for present purposes one of the interesting features of eleemosynary corporations is the extent to which the internal relations are circumscribed by the charter or deed of the eleemosynary corporation, and the restrictions which apply to the way in which those documents can be amended. The charter or deed of an eleemosynary corporation will state its charitable *raison d’être* and the corporation is not free to depart from those purposes. This bears close favourable comparison to the situation pertaining to incorporated sporting associations, none of which are free to depart from their declared purposes. This further indicates that reasons justifying the abolition of the ultra vires doctrine with respect to trading companies do not necessarily translate into the incorporated association context.

It is of further interest with respect to eleemosynary corporations, that there are long established mechanisms under which the constituent documents of the corporation can be enforced without recourse to the courts. Whether or not there is scope for such mechanisms to have general application to incorporated associations is unclear. Certainly the decision in *Cameron v Hogan* (1934) 51 CLR 358 currently stands as an almost insuperable barrier to direct and ready access by members of incorporated
associations to the courts. This barrier has, to some extent, been addressed by statute in a number of jurisdictions through a provision that the constitution is deemed to have contractual effect between the association and its members. The eleemosynary corporation model does suggest that something of a halfway position is achievable existing between the non-intervention policy of Cameron v Hogan on the one hand and the radical judicial activism of McKinnon v Grogan [1974] 1 NSWLR 295 on the other.

**Corporate Size**

As indicated in chapter 1, one of the points of convergence in corporate law theory appears to be the significance of corporate size. Essentially, as suggested in chapter 1, corporate law theory relating to large bureaucratic organisations can only be applied with certainty in the context of large public trading corporations. The specialised literature relating to small closely-held companies that was surveyed in chapter 2 is testament to the significance of the small corporation / large corporation dichotomy. Given this background it is important to note as was discussed in chapter 3, that in a number of jurisdictions a minimum size requirement is stipulated with respect to incorporated associations. These minimum membership requirements operate in New South Wales, Queensland, Victoria, Western Australia, the Australian Capital Territory and in New Zealand. The empirical data discussed in

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19 *Associations Incorporation Act 1984* (NSW) s 7 (5 members); *Associations Incorporation Act 1981* (Qld) s 7 (7 members); *Associations Incorporation Act 1985* (SA) (no minimum); *Associations Incorporation Act 1964* (Tas) (no minimum); *Associations Incorporation Act 1981* (Vic) s 3 (5 members); *Associations Incorporation Act 1987* (WA) s 4 (6 members);
chapter 4 also highlights the extent to which minimum memberships are observed with respect to incorporated sporting associations. The inference that was drawn in chapter 5 from consideration of the empirical results was that the minimum membership restriction is not a particularly significant factor in practice.

**Trading Companies**

As was noted in chapter 5, it is significant that incorporated sporting associations exhibit a wide range of membership sizes from the very small to the very large. It will also be recalled from the analysis of the empirical data in chapters 4 and 5 that a minority of incorporated sporting associations in Australia or New Zealand would qualify for incorporation as a proprietary limited company under the provisions of the *Corporations Act 2001* (Cth).\(^{20}\) All of these groups would be eligible to claim “small” status mainly due to the fact that small incorporated sporting associations do not employ staff. Even if one measures corporate size on the basis of that used in South Australia (i.e.: $200,000 in total assets),\(^{21}\) or the two-way measure used in Victoria (i.e.: $200,000 in gross receipts/ $500,000 in total assets),\(^{22}\) to delineate between large and small incorporated associations, the vast majority of incorporated sporting associations would still qualify as small.

All of this empirical data suggests that the majority of incorporated sporting associations have a large number of members. Indeed the reported membership numbers exceed that which is be permitted for the continuing operation of a

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\(^{20}\) *Associations Incorporation Act 1991* (ACT) s 14 (5 members); *Associations Incorporation Act* (NT) (no minimum); and *Incorporated Societies Act 1908* (NZ) s 4 (15 members).

\(^{21}\) At s 45A.

\(^{22}\) *Associations Incorporation Act 1985* (SA) s 3 (“prescribed association”)
partnership in both countries. Notwithstanding the significant membership numbers reported by incorporated sporting associations in Australia and New Zealand, from an economic perspective the vast majority of these groups are relatively modest. This presents something of a problem when seeking to use the jurisprudence applicable to large trading corporations in an incorporated sporting association context. Clearly, issues that are of significance to a large economic entity such as the typical large public trading company will not resonate in an economically small structure. Once again the suitability of the large trading corporation as a potential source analogue for incorporated sporting associations is found to be in doubt.

**Closely-Held Companies**

As indicated in chapter 2, small closely-held companies are most commonly defined as consisting of fewer than 50 members. It will also be recalled from chapter 4, that the majority of respondents to the questionnaire reported memberships in their associations in excess of 50 members. The utility of using the closely-held company as a source analogue of incorporated sporting associations must therefore be open to criticism.

Bear in mind also that one of the key elements of small closely-held companies is an almost one-to-one correlation between owners and controllers. As discussed in chapter 3 there are two distinct types of voluntary associations, those that are membership governed, and those that are controlled by delegates. Where groups indicated that they were controlled by delegates, chapter 4 revealed that in both Australia and New Zealand the correlation between member and controller groups...
was nowhere near 1 to 1.\textsuperscript{23} However, it must be accepted that there are membership governed incorporated sporting associations that may invite resort to small closely-held companies as a source analogue for such membership governed incorporated sporting associations.

\textit{Charitable Trusts}

In terms of the charitable trust as a potential source analogue for incorporated sporting associations, it needs to be once again stressed that the charitable trust is formed for public benefit either in terms of the public generally, or some class of the public who would benefit directly from the operation of the charitable trust. This does present some difficulties when considering the charitable trust as a potential source analogue for incorporated sporting associations. This is primarily because, as we have seen, trustees are not entitled to benefit from the operation of a charitable trust in their capacity as trustees. Trustees are only in a position to benefit from the activities of a charitable trust in their capacity as a member of the general public, or as a part of the class for which the charitable trust was established. In this respect, the idea of the size of a charitable trust either in economic terms, or in terms of its intended beneficiaries, is not particularly significant. This being said, it should be noted, however, that there is no minimum size requirement with respect to charitable trusts in the sense of those persons for whose benefit it may be formed, and certainly there is no maximum size limitation. It is of interest that in all jurisdictions other than South Australia and Victoria the issue of corporate size is not a significant issue for incorporated sporting associations. This would seem to indicate a general point of favourable comparison with charitable trusts.

\textsuperscript{23} In Australia the average relationship was 1 to 33 and in New Zealand it was 1 to 45.
Eleemosynary Corporations

While there is no minimum or maximum size requirement for an eleemosynary corporation, it is the case that membership of an eleemosynary corporation must be provided for in the charter or deed of the eleemosynary corporation. Where eligibility requirements for membership are expressed in those documents they will be final. As to whether or not size requirements have any particular significance to eleemosynary corporations, this will be entirely a matter for the individual charter or deed. Once again there is a favourable comparison to be made between eleemosynary corporations and the majority of incorporated sporting associations.

Mutual vs. Public Benefit Eligibility

As was indicated in chapter 3, this characteristic is of no significance to the eligibility of an association to incorporate in either Australia or New Zealand. The only caveat that should be added to this is that it is of significance where the incorporated sporting association in question might seek to qualify as a charity in New Zealand and some Australian jurisdictions.24

Organised/Institutionalised

Trading Companies

It will be appreciated that large public trading companies that exhibit many of the characteristics of typical large bureaucratic organisations embody the idea of an

association that is organised and institutionalised. This is borne out by the literature that was discussed in chapters 1 and 2. Typically this involves the existence of a constitution that is enforceable between corporate constituents at common law and also under the relevant governing statutes.\textsuperscript{25} As was discussed in chapter 3, the degree to which the relevant associations’ incorporation legislation in Australia and New Zealand mandates the content of organising rules is variable. However, as was discussed in chapter 3, all jurisdictions require that incorporated associations must have a constitution setting out certain matters of an organisational nature. There is a lack of uniformity in the extent to which this constitution is legally enforceable on members of incorporated associations.\textsuperscript{26}

As a consequence, an incorporated sporting association which may have operated prior to incorporation on an informal basis is required to formalise the procedures under which the association intends to operate into the future. In some respects this may be deleteriously impacted on by the legislative requirements in various jurisdictions. As was noted in chapter 5, the requirements of the measures in Queensland and the Australian Capital Territory are the least flexible. In other jurisdictions, as discussed in chapter 3, the legislation in most jurisdictions provides for mandatory majorities for resolutions on matters such as changing the association’s purposes and appointing committee members. This is to some extent reflective of what pertains to large public trading companies.

\textsuperscript{25} \textit{Corporations Act 2001} (Cth) ss 117(3) & 140; and \textit{Companies Act 1993} (NZ) Pt 5.

\textsuperscript{26} For enforceable constitutions, see: \textit{Associations Incorporation Act 1984} (NSW) s 11(2); \textit{Associations Incorporation Act 1981 (Qld)} s 41(1); \textit{Associations Incorporation Act 1985 (SA)} s 23; \textit{Associations Incorporation Act 1981 (Vic)} s 14A(1); and \textit{Associations Incorporation Act 1991 (ACT)} s 48.
Closely-Held Companies

As was discussed in chapter 2, small closely-held companies are typically characterised by fairly detailed shareholder agreements that are binding between shareholders, directors and the company. This is a point at which incorporated associations depart from trading corporations. As discussed in chapter 3, and also the previous paragraph, the extent to which the constitutions of incorporated associations are enforceable as between members is a point about which there is considerable ambiguity. The common law, based as it is on the judgment of Cameron v Hogan, would presumably deny the enforceability of the constitution of an incorporated sporting association.\(^{27}\) Whether or not this decision might be distinguished from one involving an incorporated, as opposed to an unincorporated, group has not yet been tested and is outside the scope of this thesis.

Charitable Trusts

With respect to charitable trusts, it will be recalled that a charitable trust is created by a trust deed which provides for the organisation of relationships within the trust. As discussed in chapter 2 and this chapter, it will be remembered that while the duties, responsibilities and powers of trustees are delineated within the trust instrument, that instrument is only enforceable by the Attorney General on behalf of the public. Recall also that there are negligible rights for beneficiaries of charitable trusts to take action to seek such enforcement. This is very indirect supervision over charitable trusts by interested parties when compared to what one would normally expect to find with respect to trading companies. However, it does to some extent mirror the

judicial attitude to the enforcement of the constitution of voluntary associations at common law. This is perhaps a further point of favourable comparison between charitable trusts and incorporated sporting associations relevant to assessing the suitability of the former as a potential source analogue for the latter.

**Eleemosynary Corporations**

With respect to eleemosynary corporations, there is typically a high degree of institutionalisation given that the eleemosynary corporation’s founding instrument would normally provide details including the preconditions to membership, and the governance mechanisms that operate within eleemosynary corporation. As has been observed in chapter 2, eleemosynary corporations are very often characterised by varying degrees of membership based governance. This is reinforced by the usual mechanisms permitting the members of eleemosynary corporations to petition the Visitor of the eleemosynary corporation to have disputes settled or to seek enforcement of the founding instrument of the eleemosynary corporation. To this extent, it could be said that there is a strong alignment between the typical structure of eleemosynary corporations and what was observed in chapter 3 with respect to the degree of organisation and institutionalisation evident in incorporated associations. This suggests that there may be some utility in employing the eleemosynary corporation as a source analogue when dealing with incorporated associations.

**Private Trading Companies**

The private nature of incorporated associations has already been referred to above apropos the internal governance of incorporated associations. It is clear that large
public trading companies do operate in the private sphere, as opposed to the public (or government) sphere. However as I have already discussed, they are subject to the supervision of the courts at the instance of shareholders to a degree that one does not associate with voluntary associations given the decision in *Cameron v Hogan.*

It should be noted of course that the so-called “rule in *Foss v Harbottle*” together with the related “rule in *Turquand’s Case*” are indicative of a judicial policy of non-intervention in the internal affairs of trading companies from a common law perspective. However, it should also be remembered that even at common law, it has long been recognised that there are exceptions to the rule in *Foss v Harbottle* that have over time led to the current statutory derivative actions, and actions that are open to shareholders per se for breaches of the statutory contract.

A number of jurisdictions have legislated to ensure that the constitutions of incorporated associations in those jurisdictions do have the effect of a contract under seal. This opens the possibility of appeal to the various supervising courts where there is a breach of the constitution of an incorporated sporting association in those jurisdictions. Nevertheless it still appears to be the case that judicial attitudes regarding the private status of incorporated associations are somewhat tivless

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28 But note the contra statutory position re. the enforceability of incorporated association constitutions, see: *Associations Incorporation Act 1984* (NSW) s 11(2); *Associations Incorporation Act 1981* (Qld) s 41(1); *Associations Incorporation Act 1985* (SA) s 23; *Associations Incorporation Act 1981* (Vic) s 14A(1); and *Associations Incorporation Act 1991* (ACT) s 48.

29 *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189.

30 *Royal British Bank v Turquand* (1856) 6 R&B 327; 119 ER 886.


32 *Corporations Act 2001* (Cth) s 140; and *Companies Act 1993* (NZ) s 165(6).
interventionist than one would associate with trading companies.\footnote{Northey, JF, "Intervention in the Affairs of an Incorporated Society" (1964) \textit{New Zealand Law Journal} 29; Fletcher, KL, \textit{The Law Relating to Non-Profit Associations in Australia and New Zealand}, Law Book Company, North Ryde, 1986 at Chapter 6 & at 308; and Sievers, AS, \textit{Associations and Clubs Law in Australia and New Zealand}, 2nd ed, Federation Press, Annandale, 1996 at 128-9.} This is a significant limitation on the utility of the large modern trading company as a potential source analogue for incorporated associations.

\textbf{Closely-Held Companies}

The same principles which apply to large public trading companies relating to private status obviously apply to small closely-held companies. However, despite the small closely-held company being more private in its operations than a large public trading company, it should be remembered from the discussion in chapter 2, that the closer interrelationships between shareholders and directors of closely-held companies gives rise to greater potential for judicial intervention. This is exacerbated in most cases due to the existence of separate shareholder agreements and special restricting clauses contained within the constitutions of such companies.

If one accepts the view that the courts are more reluctant to intervene in the internal affairs of incorporated associations than is the case with companies, then the appropriateness of the small closely-held company as a source analogue for incorporated associations must be open to serious question. In addition to this, as discussed in chapter 3, government funding and donations are typically not major funding sources for either large public trading companies or small closely-held companies. These sources of funds are however highly significant with respect to
associations that are formed for sporting and recreation purposes in both Australia and New Zealand.

**Charitable Trusts**

With respect to charitable trusts, it should be appreciated that the private nature of charitable trusts is something of a tautology, given the fact that charitable trusts must be formed for purposes that are beneficial to the public, but at the same time are nevertheless regarded as private entities. In other words, charitable trusts are privately established but publicly focused, resulting in the somewhat paradoxical nature of charitable trusts. Uniquely among private entities, as has been discussed above, they are subject to supervision by the Attorney General. This is clearly a situation that one would normally associate with public institutions. The close connection that charitable trusts enjoy with both the private sphere and the public sphere is one of their defining attributes. As was noted in chapter 5, this has led to the development of the literature referring to the so-called third sector.

Further, as was indicated in chapter 2, it is important to bear in mind that the single most important source of funds for a charitable trust is the initial settlement of the trust corpus by the settlor in the form of a donation. It will also be recalled from chapter 2, that following the settlement of the corpus, the ongoing existence of a charitable trust is secured by a combination of investing the trust funds according to the trust deed and by obtaining funds in the form of further donations and sponsorships. In this regard, it must be noted that there is a strong similarity between charitable trusts and incorporated sporting associations. This is further indication of the potential suitability of the former as a source analogue for the latter.
Eleemosynary Corporations

As has been stressed above, and in chapter 2, eleemosynary corporations are a sub-genus of charitable trusts. As such, they share the same paradoxical public/private nature exhibited by charitable trusts generally. However it should be recalled from chapter 2, that there is typically an element of internal participatory membership-governance that to varying degrees will involve management by delegates. Such delegation of management is typically to a group of members of the organisation who are not necessarily chosen as expert managers. It follows therefore that the delegates so selected are chosen for more complex reasons that baseline managerial efficiency. It is suggested that such member-managers are selected on the basis of such considerations as mutual respect and trust, and superior understanding of the ethos and structure of the eleemosynary corporation. This is a significant point of potential similarity within incorporated sporting associations. As discussed in chapter 4, the empirical results of the questionnaire revealed that in incorporated sporting associations there is a strong degree of participation by members in the management of the group. In a significant proportion of cases, management is conducted by the entire membership body and, in other cases, by representatives elected from within the membership body. As discussed above, the extent to which management might actually be shared between management committee and members’ meetings requires more careful research. However, the findings presented in chapter 4 indicate clearly that there is potential for eleemosynary corporations to serve as a useful source analogue for incorporated sporting associations.
NonProfit Distributing/Personal Benefit Restrictions

Trading Companies

As discussed in detail in chapter 2, the dominant theoretical school in corporate law suggests that shareholders of a large public trading company are most appropriately referred to as the owners of the corporation. It was also discussed in chapter 2, that this notion is somewhat problematic given the fairly ambiguous nature of shareholding (i.e. it is not entirely clear what it is that shareholders actually own). Certainly it is clear that shareholders have rights that attach to their shares. In exchange for the capital that initial shareholders contribute to the company, they obtain a range of transferable rights such as voting rights, rights to participate in the distribution of profits from time to time, and a contingent right to receive a share of the capital of the corporation on winding-up (should there be any surplus assets to distribute). It was also discussed in chapter 2, that the primary indicium of ownership, namely control over the assets, vests in the directors of the large modern trading company. When one compares these trading company characteristics to the empirical data in chapter 4 and the legislative framework discussed in chapter 3, what one discovers is that the contribution of capital on incorporation will usually be from a pre-existing unincorporated sporting association. It might be argued that the members of the pre-existing unincorporated association have contingent interests in these assets. While such a point cannot be settled with a great degree of certainty, once an Australian unincorporated sporting association becomes incorporated, or once an incorporated sporting association is vested with assets, these assets belong to

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34 Fletcher, KL, *The Law Relating to Non-Profit Associations in Australia and New Zealand*, Law Book Company, North Ryde, 1986 at Chapters 5 & 10
the incorporated sporting association itself.\textsuperscript{35} There is no such statutory vesting in New Zealand. Further, as discussed in chapter 3, in all jurisdictions incorporated associations are prohibited from distributing any of the assets or earnings of the association to members by way of pecuniary returns to members while the association is operational. There is a clear legislative requirement that the purposes for which an association was formed are the only appropriate recipients of the assets and earnings of the association while it is a going concern.

Where a large trading company ceases to be a going concern and becomes defunct, as was discussed in chapter 2, shareholders retain a residual interest in any surplus property of the company that might exist after all of the other claims on those assets are satisfied. However, as it will be recalled from chapter 3, this is not the situation with the vast majority of incorporated sporting associations in both Australia and New Zealand. The empirical data reported in chapter 4 revealed that, in the majority of cases, the ultimate destination of the surplus assets of an incorporated sporting association on dissolution is to an association with similar aims and objectives, or to charity. Even in those jurisdictions (notably New Zealand, Victoria and Queensland) that theoretically allow for the distribution of surplus assets on dissolution to members, this option is rarely adopted.

The data analysed in chapter 4 conclusively indicates that the majority of incorporated sporting associations in all jurisdictions accept the principle that surplus

\textsuperscript{35} Associations Incorporation Act 1984 (NSW) s 15(3) & Sch 2; Associations Incorporation Act 1981 (Qld) s 22; Associations Incorporation Act 1985 (SA) s 20(3)(b); Associations Incorporation Act 1964 (Tas) s 13; Associations Incorporation Act 1981 (Vic) s 8; Associations Incorporation Act 1987 (WA) s 11(1); Associations Incorporation Act 1991 (ACT) s 23; and Associations Act (NT) s 12.
assets that have been set apart for a particular purpose should be distributed to another functioning association with similar purposes, or to charity. It is in fact only the minority of incorporated sporting associations that permit members to retain a residual interest in surplus assets on dissolution. This is a highly significant point of structural asymmetry between large modern trading companies and incorporated sporting associations. As before, this lack of structural similarity between the trading company model and the typical incorporated sporting association is a significant obstacle to the suitability of the former as a potential source analogue for the latter.

**Closely-Held Companies**

As identified both above and in chapter 2, small closely-held companies are characterised by a homogeneity of shared ownership of shares and management participation. To a significant degree therefore, unlike the situation pertaining to large trading companies, ownership and control tend to be held by the same persons in small closely-held companies. This strengthens the case for arguing that shareholders are the ultimate owners of the assets of a corporation. However, the basic shareholders-as-owners premise holds for large and small companies alike. It will be recalled from chapter 2 that some shareholders in small closely-held companies experience difficulties in participating in profits while the company is operational. However, in the event that there are surplus assets on dissolution, these will be distributed between remaining shareholders. Given these important similarities between large trading companies and small closely-held companies, the comments above relating to the extent to which incorporated sporting associations differ from large companies apply with equal force to the small closely-held company. In other words, on the basis of this structural characteristic, the small
closely-held company is also a problematic potential source analogue for incorporated sporting associations.

**Charitable Trusts**

It will be recalled from chapter 2 that the purpose of a charitable trust is to realise the purposes for which it was formed. Even where members of the public are beneficiaries of the operation of the charitable trust, they have no legal or equitable interest in trust property until it has been vested in them by the trustees.\(^3\)\(^6\) Entitlement to trust property is on the basis of a gift in furtherance of the purposes of the charitable trust. When one considers this aspect of charitable trusts and compares it with the statutory non-distribution constraints placed on incorporated sporting associations, one is immediately struck by the strong similarity that exists between charitable trusts and incorporated associations in this respect. As was also discussed in chapter 2, in the event that a charitable trust should fail or be dissolved, any remaining trust property must be disposed of cy-près to a charitable trust formed for similar purposes. It will be recalled that chapter 3 demonstrated that the governing legislation in most jurisdictions is framed in a similar, although not identical, fashion. Further, in chapter 4 the empirical data revealed that incorporated sporting associations strongly favour this approach even when it is not the only legislative alternative. This is one of the most significant internal structural similarities that can be observed between charitable trusts and incorporated sporting associations.\(^3\)\(^7\) This

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36 Compare also the situation in Canada (Parks, JM, "Registered Charities: A Primer" (2003) 17(4) *The Philanthropist* 4 at 8).

similarity further suggests the suitability of the charitable trust as a potential source analogue for incorporated sporting associations.

**Eleemosynary Corporations**

As discussed in chapter 2, eleemosynary corporations are typically characterised by a strong degree of participatory management by their members. In addition, being a sub-genus of charitable trusts, eleemosynary corporations too are bound by the cy-près doctrine where they are dissolved. Accordingly any surplus assets on dissolution must be transferred to another eleemosynary corporation formed for similar purposes, or to the Crown as *bona vacantia*. With respect to both eleemosynary corporations in particular, and charitable trusts in general, recall also that there is a public aspect to charitable trusts and eleemosynary corporations, given their supervision by the Attorney General and the overall supervisory role of the courts. So far as eleemosynary corporations are concerned however, as was explained in chapter 2, despite having no personal interest in the trust property, members do have rights to invoke the intervention of the Visitor in the event that there are disputes, allegations of maladministration or departures from the trust deed. Public supervision is also enshrined with respect to incorporated associations given the scrutiny of government regulators over the affairs of incorporated associations in most jurisdictions. In addition, there is public supervision concerning the enforcement of the non-distribution constraint laid down in statutes, both from an operational perspective and an income tax perspective, in both Australia and New Zealand.
Delegated Management

Trading Companies

As discussed in detail in chapters 1 and 2, narrow form organic theory as pertains to large modern trading companies is the notion that a company consists of two separate organs, namely the board of directors and the general meeting of shareholders. This theory holds that these organs are both of prime importance in their different respects. It was also observed in chapter 1, that where the power of management is devolved to a board of directors, it is not open to the shareholders’ meeting to interfere with management decisions once they are made by the board. Rather, the shareholders retain the right to change the corporate constitution to remove the management power from the board of directors, or even the directors themselves. Further, it is accepted that the operations of the large modern trading company are based on the principle that shareholders delegate the management function to a specially selected group of individuals who may or may not be shareholders or members but who have specialist management skills. The theory goes on to state that these corporate controllers are appointed by shareholders with the sole purpose of maximising shareholders’ wealth. In this respect, there is in some sense a relationship somewhat analogous to the relationship that exists in a charitable trust in which assets are settled under the control of trustees to pursue certain defined purposes. As was noted in chapter 2, the evidence suggests that trust law principles exercised a strong degree of influence over the development of modern corporate law.

The empirical evidence presented in chapter 4 together with the statutory requirements summarised in chapter 3 all demonstrates that the management of the
affairs of incorporated sporting associations are, in the majority of cases, delegated to a smaller group of elected members. However, neither the legislation nor the empirical results indicate a preference for appointing specialist managers with management skills from outside of the membership body. Given that the overwhelming majority of incorporated sporting associations report that they do not employ staff, the strong suggestion is that all or substantially all of the work of management committees is carried out by volunteers who are also members. The empirical results also confirm of the proposition put by Professor Salomon (analysed in chapter 3) that many not-for-profit associations choose to be membership governed.\(^{38}\) That is to say, a significant proportion of respondent incorporated sporting associations (some with large membership numbers) reported that they do not elect a smaller group of delegated managers from amongst their number. As indicated in chapter 5, one of the limitations of this research is that it did not inquire of respondents whether their constitutions granted management power to a management committee “between members’ meetings”. Such “hybrid” governance structures are not within the ken of narrow form organic theorists, but they may well be adopted by a significant proportion of incorporated associations.

It can be appreciated from the foregoing that the traditional corporate law conception of delegated management is not sophisticated enough to accommodate the variety of nuanced internal governance structures operating in incorporated sporting associations. In this regard it is interesting to note the highly restrictive internal governance requirements in the Australian Capital Territory and Queensland in particular. As was discussed in chapter 3, these jurisdictions effectively mandate that

all incorporated associations must comply with the narrow form organic view applicable to large modern trading companies, whether or not this corresponds with the model of internal governance actually operating within incorporated associations. Given that the point is yet to be decided by an Australian court, it is not yet clear how the internal governance structures of incorporated sporting associations may invite jurisprudence by analogy from the large modern trading company, given the highly suspect applicability of narrow form organic theory to incorporated sporting associations in practice. As has been demonstrated by reference to the empirical data in chapter 4 and even with respect to many of the governing statutes, the narrow form organic model does not fit all of the observable internal governance structures operating in the incorporated sporting association context. This is perhaps the most compelling reason why the trading company is a highly questionable source analogue for incorporated sporting associations.

This point has been addressed by Fisher, who asks whether the paths have diverged between the common law duties of incorporated association management committees and company directors. This is a very involved question. More so perhaps than even Fisher has addressed, given that prior to this thesis there has never been an empirical study of the types of internal governance structures operating within incorporated associations. However, on the basis of the findings discussed in chapter 4, it is appropriate to highlight the limitations of an unquestioning application of duties developed in the milieu of large modern trading companies into the context of incorporated sporting associations. Fisher was of course concerned about the

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USA, 1997 at 21-2.
introduction of the business judgement rule into the Australian companies legislation
and how that may or may not influence the development of the jurisprudence of
incorporated associations. The larger question of why corporate law should feature
as the source analogue of choice is not addressed in detail by Fisher.

It will be recalled from chapter 2 that delineation was identified between the duties
required of company directors and the trustees of charitable trusts. It was stressed
that company directors are understood to be entrepreneurial risk takers, motivated by
the necessity to maximise shareholder wealth and corporate profits. Such a function
is of course facilitated via the introduction of the business judgement rule in an
Australian context. However, this aspect of trading company directors is at odds
with the traditional view of trustees of a charitable trust. As will be recalled from
chapter 2, trustees of a charitable trust are expected to safeguard trust property and to
exercise prudence in the operation of the trust. Entrepreneurial flair is not generally
regarded as the prime requirement of charitable trustees. In this regard recall that
chapter 3 identified that in the majority of jurisdictions, management committees are
required to exercise duties of a fiduciary nature, however, with the exception of
South Australia there is a total lack of statutory duties as to a duty of care. This is in
direct contradistinction to what was highlighted in chapter 2 relating to trading
companies both in Australia and New Zealand.

Fisher, AF, "Duties of Company Directors and Committee Members of Incorporated
Associations: Have the Paths Divided?" (2001) 13(2) Australian Journal of Corporate Law
143.

This concern has recently been addressed specifically by Canadian policy researchers
(Reform of the Canada Corporations Act: Draft Framework for a New Not-for-Profit
Corporations Act, Corporate and Insolvency Law Policy Directorate, Policy Sector,
Montreal, Canada, March, 2002 at 2 & 33-5).
The issue of a statutory duty of care and the tempering business judgement rule are significant points of departure between incorporated associations and trading companies. Referring again to the empirical data discussed in chapter 4, it should be kept in mind that not only do incorporated sporting associations exhibit a diversity of internal governance structures, but there is evidence to suggest that only in the minority of cases do incorporated sporting associations endow management committees with unfettered management power. This is substantially at odds with the status quo pertaining to large modern trading companies. In light of the foregoing, it is suggested that the significant structural asymmetry between large modern trading corporations and incorporated sporting associations in the area of governance structures renders the former as a poor potential source analogue for the latter.

Closely-Held Companies

With respect to small closely-held companies, as has already been discussed in chapter 2 and the foregoing, there is often a very high correlation between the shareholding of a small closely-held company, and the composition of the management group. From an internal governance perspective it is therefore less likely that one would discover a delegated management model operating in a small closely-held company than would be the case in a large trading company. As was suggested in chapter 2, this relates to what Professor Hansmann describes as the homogeneity of interest requirement of a small closely-held company. Hansmann expresses the view that the strong homogeneity of interest is what holds small

\[\text{Greenhalgh v Arderne Cinemas Ltd [1946] 1 All ER 512; and John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113.}\]
closely-held companies together. In his view this is the key indicator of success or failure in small closely-held companies.\textsuperscript{42} This proposition does have implications for incorporated sporting associations that follow a general membership based internal governance model in preference to the delegated management model. Hansmann’s proposition that the success or failure of an incorporated sporting association that is managed by its members collectively will require a very high degree of homogeneity of interest is immediately intuitively appealing. The converse is also persuasive, namely that where the interests of the members in such incorporated associations become disparate, the group will not be successful. This again emphasises the prime importance of corporate purposes to incorporated sporting associations, or at least that sub-genus of incorporated sporting associations, embodying the member-managed internal governance model.

Recall also the problems of lock-in and freeze-out that were identified in chapter 2, in the context of small closely-held companies. Given that member contributions to an incorporated sporting association are in no sense an investment, it is suggested that these issues do not have ready application to incorporated sporting associations. However, it is conceivable that such issues may have implications where membership of an incorporated association is somehow a precondition to earning a livelihood such as in the case of professional sportspersons.

With respect to internal governance structures, one final point of potential comparison between small closely-held companies and incorporated sporting associations is that of restrictions that may be placed on management decisions. As

\textsuperscript{42} Hansmann, H, \textit{The Ownership of Enterprise}, The Belknap Press of Harvard University Press,
was discussed in chapter 2, legally enforceable restrictions on the power of management may be contained in the constitution of a small closely-held company, or in a separate shareholder agreement. As discussed in the foregoing, given the decision in *Cameron v Hogan* it is an open question as to whether restrictions on the power of management contained in the constitution of an incorporated sporting association will be judicially enforced from a common law perspective. There is however a possibility that the small closely-held company could provide important insight in the resolution of legal issues arising out of breaches of management restrictions contained within the constitutions of incorporated sporting associations. However, any such reasoning by analogy must allow for the complicating effect of the non-distribution constraints that pertain to incorporated sporting associations.

**Charitable Trusts**

When referring to the charitable trust as a potential source analogue for incorporated sporting associations in the area of internal governance structures, one must return to the relationships between a trustee, trust and beneficiaries that were described in chapter 2. It will be recalled that a form of delegated management applies to charitable trusts as between the trustee and the settlor/appointor of the trust. In addition, the trustee of a charitable trust has no pecuniary interest in the trust property in their role as a trustee. Neither does the appointor of the trust (usually the settlor of the trust property) retain a pecuniary interest in the trust property after it has been settled. These complex relationships arise out of the notion of gift, as opposed to contract or property. The fiduciary obligations that exist within a trust are therefore not enforceable at law, but rather in equity. In this regard, it is

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interesting to note the extent to which the governing legislation in Australia and New Zealand appears to prescribe duties of a fiduciary nature owed by incorporated association participants. On the other hand the broader range of statutory duties required of company officers that one normally associates with those arising out of contractual relationships are almost entirely overlooked in the governing legislation. This appears to be a significant aspect of structural similarity between the charitable trust and the incorporated sporting association. This further recommends the former as a potential source analogue for the latter.

As was described in chapter 2, the settlor of a charitable trust may retain the power of appointment enabling them to vary the trust deed, or to remove or appoint trustees as they see fit. These powers of appointment may also be vested in another person or persons including the trustees themselves. This issue is related to the notion that the settlement of charitable trust property is a donation and the power of appointment is also caught within the donative principle. All of this is a reminder that the relationship between the settlor or original appointor of a trust on the one hand, and the trustees and objects of the trust on the other hand is more nuanced than where a person is a paid agent or a paid employee. Given that the relationships within a charitable trust arise out of a donation, the enforcement principles are very different to those pertaining to contract-based relationships. Common law has traditionally found it much easier to enforce duties that exist where there is a commercial arrangement between the parties than arrangements that fall outside purely
commercial dealings. Equities have developed means of enforcing the non-commercial obligations established in a charitable trust.

Given that the original donor of charitable trust can settle property on trust in their own terms, including arrangements relating to the power of appointment, it can be seen that there is a direct analogy with the situation where the members of an incorporated sporting association set aside property for purposes on such terms as they see fit. Further, powers of appointment such as the power to appoint and remove trustees, the power to vary the trust deed, and the power to determine trust objects from time to time can either be provided for in the trust deed, or by analogy these powers can be provided for in the constitution of an incorporated sporting association. This is precisely what was found to be the case in chapter 3.

The involvement of the Attorney General in the case of charitable trusts and the regulatory framework within which charitable trusts operate, is also significant. It will be recalled from chapter 3 that incorporated sporting associations are required to operate under the supervision of the state and comply with various reporting and regulatory requirements under the governing legislation in both countries. Here, as with charitable trusts, is this almost incongruous mix of public and private capacities. This shared public/private status is one of the factors that results in the literature on the “third sector” failing to distinguish adequately between charitable trusts and incorporated associations.

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43 Oleck, HL, "Nature of Nonprofit Organizations in 1979" (1979) 10 Toledo Law Review 962; This issue is admirably analysed in depth by Fletcher, KL, The Law Relating to Non-Profit
There is a strong comparison that can be made at this point between the charitable trust and the incorporated sporting association. As demonstrated in chapter 3, these latter groups clearly operate outside of the commercial sphere, and concepts of donation, delegation and the granting or withholding of management powers are, as illustrated by the empirical data reported in chapter 4, central to their internal structure. Once again it appears that the charitable trust has the potential to serve as a suitable source analogue for incorporated sporting associations.

As was discussed above under the heading “Trading Company”, there is a distinction between the way the courts view the duty of care of charitable trustees, and the way the courts view the duty of care of company directors. Without wishing to cover the same ground again, it is sufficient for present purposes to note the differing treatment and suggest that, if the charitable trust proves to be a superior potential source analogue based on an objective evaluation of sufficient attributes, then it would be inappropriate to shackle incorporated sporting associations with the jurisprudence of a commercial entity.

**Eleemosynary Corporations**

Obviously what has been said above relating to the governance of charitable trusts has equal force with respect to an eleemosynary corporation. However, as was highlighted in chapter 2, it should be recalled that in the case of the more established eleemosynary corporations the internal governance mechanisms tend to be participatory membership focussed management structures in which the powers of appointment are shared among members. This is further evidence that the donative
principle at the heart of charitable trusts is a potentially rich analogical source for incorporated sporting associations.

**Voluntary Associations**

It is tempting to gloss over the implications of the proposition that incorporated associations are by nature voluntary associations of persons. Indeed, as has been mentioned by a number of authors, all associations of persons are to some extent voluntary. However as indicated in chapter 4, it remains the case that incorporated sporting associations only exist and function based on the willingness of members to voluntarily associate and volunteer their time and abilities in furtherance of the group purposes. It is suggested that this is an important internal structural characteristic of incorporated sporting associations which must be fully accounted for in any detailed consideration of potential source analogues.

**Trading Companies**

The large modern trading company is of course an association of persons formed for financial gain and, even though there may be elements of volunteerism present within trading companies, the trading company itself is a commercial entity. The relationships within it are essentially commercial, and the extent to which people volunteer their time and effort to further the objectives of a trading corporation is not central to their operation. As has already been discussed, the significance of this characteristic is that the courts have been far more willing to enforce legal obligations where there is a commercial relationship than where the relationships are essentially non-commercial. Having said this, it would be inappropriate to suggest
that exhibiting a voluntary nature should result in lower legal standards than exist in commercial enterprises. One would not, for example, suggest that the fiduciary obligations required of the trustees of a charitable trust are in any sense lower than those required of company directors. However, it may be relevant to consider the voluntary status of an entity when one considers the duty of care. Whether or not there may be grounds to argue for a unique standard of care in the context of incorporated sporting associations is an open question. The voluntary or commercial nature of the group in question then is a central structural attribute that must be accounted for when considering the appropriateness or otherwise of the modern trading corporation as a potential source analogue for resolving legal difficulties arising in incorporated sporting associations.

**Closely-Held Companies**

The same domestic vs. commercial question is relevant to small closely-held companies, given that these are also formed for the purposes of securing profit to the shareholders, and for maximising shareholder wealth. It follows therefore that there are also significant obstacles to be overcome when seeking to utilise small closely-held companies as a potential source analogue for incorporated sporting associations.

**Charitable Trusts**

A charitable trust is not necessarily assured of administration by volunteer trustees. It is possible that trustees may be professional managers appointed to exercise their skills with a right to claim normal commercial management fees. However, it must be accepted that the nature of a trustee office is not primarily an office for gain. It is an office of trust and one that is in the first instance discharged for purposes other
than obtaining gain or profit for the person exercising that office. In this regard, it is widely accepted that the trustee of a charitable trust holds their office usually in an honorary capacity and most commonly in a voluntary capacity. So far as this is the case, the jurisprudence that relates to the administration of charitable trusts is potentially a rich source of analogical inference when dealing with issues surrounding the administration of incorporated sporting associations.

**Eleemosynary Corporations**

As has already been discussed at length above, eleemosynary corporations often involve the sharing of powers of appointment among corporate members who then have the ability to participate in the governance of the eleemosynary corporation based on principles of membership governance. These members, while not obtaining any commercial interest in the trust property, nevertheless collectively exercise aspects of the power of appointment. It is also important to note that most of the offices held in large eleemosynary corporations are offices that are held for pecuniary profit. Nevertheless, such rights and powers as may be enjoyed by members within eleemosynary corporations are not enforceable under the common law on the basis of employment benefits. Rather, the rights of members are circumscribed by the foundation instrument of the eleemosynary corporation and are enforceable by means of appeal to the Visitor. In the event that a Visitor will not act, or exceeds jurisdiction, review by the courts by means of a prerogative writ is a possibility. Given the documented reluctance of courts to interfere in the internal affairs of voluntary domestic bodies the lack of property rights, the patterns of internal governance and the patterns of enforcement that one observes in
eleemosynary corporations as a sub-genus of charities may be a potentially rich source of analogy for incorporated associations from a juridical perspective.

**Taxation Status of Incorporated Associations**

*Trading Companies & Closely-Held Companies*

These entities enjoy no special taxation status when compared to the taxation treatment of incorporated sporting associations. This is therefore a structural attribute that does not recommend either as a potentially rich source analogue for incorporated sporting associations.

*Charitable Trusts & Eleemosynary Corporations*

Charitable trusts are exempt from income tax. It is also interesting to note in chapter 3, that favourable taxation treatment is extended both in Australia and New Zealand to incorporated sporting associations as long as they have cy-près style distribution clauses written into their constitution. It is also interesting to note that from an income tax perspective, the administrative requirements both in Australia and New Zealand call for a large degree of participatory management within the eligible tax exempt body. It will be recalled that the principal reason that is given for this is the mutuality principle.

When one compares this to the situation pertaining to trading companies, one finds perhaps the starkest point of contrast between trading companies and incorporated associations. Incorporated associations qualifying for the income tax benefits in Australia and New Zealand must approximate what we have discovered pertains to charitable trusts and eleemosynary corporations which is very much at odds with
what one discovers when one considers the internal structural characteristics of a trading company. Trading companies of the large variety, generally speaking, have professional managers and very little, if any, involvement by members in the management of the corporation. Profits are generated specifically to be distributed or made available to shareholders and at the end of the day there is no cy-près requirement for trading companies. Over and above all of this of course is the requirement for companies in both Australia and New Zealand to pay income tax in addition to other relevant taxes.

**Limited Liability**

*Trading Companies & Closely-Held Companies*

As has been identified in chapters 2 and 3, the members of both trading companies (large and small) and incorporated associations enjoy limited liability. From this perspective there is no significant difference between the large trading company, closely-held company and the incorporated association. This suggests that legal issues surrounding the issue of limited liability in the context of companies may permit advantageous resort to these entities as a potential source analogue for incorporated sporting associations.

*Charitable Trusts*

As was discussed in chapter 2, charitable trusts involve a form of limited liability, but not of the same nature that one discovers in modern incorporation by registration statutes. This is a significant point of difference between charitable trusts and incorporated associations and one that may limit the usefulness of the charitable trust as a potential source analogue for incorporated sporting associations.
**Eleemosynary Corporations**

Limited liability does inhere to a number of eleemosynary corporations that have been incorporated by statute or prescription. This means that there is a potential source analogue for incorporated sporting association outside of the commercial sphere.

**Separate Legal Personality**

To some extent this characteristic rounds out the discussion in this chapter. As discussed in chapter 2, separate legal personality as a corporate law concept has a very different meaning today to that which it denoted centuries ago. However, the modern conception of separate legal entity status that had its origins in trusts is now very different to that which pertains to each of the incorporated sporting association, the large modern trading company, and the closely-held company. The eleemosynary corporation has long been recognised as a separate legal entity and occupies its own peculiar place in the juridical firmament. On the other hand, when one considers the charitable trust, no such entity is recognised at law (these arrangements being arrangements of equity). It must therefore be conceded that the charitable trust does not share another important structural similarity with incorporated sporting associations. Having conceded this, however, it should be remembered that in many respects members of incorporated sporting associations are as removed from ownership of the association as are incidental beneficiaries of a charitable trust. There is therefore some potential for all four alternative source analogies to be useful in the context of incorporated sporting associations.
SUMMARY

On the basis of the theoretical framework developed in chapter 2, the foregoing discussion in this chapter has compared the key structural relational characteristics of incorporated sporting associations with four potential legal source analogues. It was hoped that this comparison would identify which of the four alternatives presents the richest, most apt analogical schema from which to develop predictive insights into the complexities of incorporated sporting associations. What emerged in this chapter is that incorporated sporting associations are truly sui generis and are significantly different to any of the four potential source analogues.

It is true that there are some structural similarities between incorporated sporting associations and trading companies. The separate legal personality and limited liability of both is an obvious strong point of similarity between them. However, it does not necessarily follow that because incorporated sporting associations share a few structural similarities in common with trading companies that the latter should be resorted to as the sole potential source analogue when developing a jurisprudence of incorporated sporting associations.

In adopting what is defined in chapter 1 as the narrow form organic approach, modern corporate law has moved beyond the traditional agency notions that previously viewed the board of directors as an agent of the shareholders’ meeting. Whether or not the narrow form organic approach is appropriate to incorporated sporting associations has in a sense been the central question raised by this thesis. For such an approach to be correct, it would require the existence of strong structural similarities between incorporated sporting associations and large trading corporations.
in the areas of organisational sophistication and internal governance structure. This chapter does not support such a conclusion. The organisational sophistication and internal governance structures that were reported by respondents to the thesis questionnaire and discussed in chapter 4 reveal a more varied and more nuanced range of these structural elements than can be accommodated by narrow form organic theory. One is bound to conclude that while there is some scope for utilising the large modern trading corporation as a source analogue for incorporated sporting associations, the lack of a significant range of internal structural similarities between the two renders the trading corporation as an impoverished analogical resource.

On the other hand, some intriguing similarities have emerged from this investigation between small closely-held companies and incorporated sporting associations. However, one would be well advised to consider carefully the way in which these potential commonalities can be utilised given that, as has been stressed, the majority of incorporated associations consist of memberships in excess of 50, while the literature suggests that the majority of small closely-held companies consist of not more than 50 members. The high degree of involvement by members in the management of small closely-held companies is means that to a limited extent, they may be an intriguing potential source analogue for the significant proportion of incorporated sporting associations with memberships of less than 50.

The above analysis has also highlighted the many respects in which the internal structural characteristics of incorporated sporting associations bear close resemblance to charitable trusts, both generally and in the more specific instance of eleemosynary corporations. It should be remembered from chapter 3, that at least in
South Australia and in New Zealand where the association incorporation innovation appears to have had its origins, the key motivating factor for introducing the associations incorporation legislation in both jurisdictions was the difficulties experienced by managing association funds through the aegis of trustees. This suggests very strongly that there has always been a close connection between the law relating to trusts, and the jurisprudence of incorporated associations.

When one considers the charitable trust as a potential source analogue for incorporated sporting associations in a detailed way as has occurred in this chapter, one cannot help but be impressed by the range and extent of the commonalities between them. Perhaps the most important of these is the fundamental role played in both by the purposes for which the entity was formed. But there are many other striking similarities between charitable trusts and incorporated sporting associations. For instance, when one considers the way in which both are formed, the way in which both operate, the public and yet private nature of both, issues surrounding the enforceability of relationships arising from the operations of both charitable trusts and incorporated sporting associations, the reliance of each on volunteerism, issues relating to dissolution and taxation treatment, one is struck profoundly with the extent to which the internal structural relationships bear close resemblance.

However, it must also be noted that there are some significant differences between the charitable trust and the incorporated association. These have also been identified above and strongly suggest that, while there may be much to recommend the charitable trust as a source analogue in the development of a jurisprudence of
incorporated sporting associations, incorporated sporting associations can only be appropriately considered sui generis.

Eleemosynary corporations as a sub-genus of charitable corporations also provide an intriguing possibility as a source analogue for incorporated sporting associations. In addition to limited liability and separate legal personality, there is a tradition of membership involvement in the management of eleemosynary corporation which we have also found to be the case in incorporated sporting associations.

The implications of these findings are far reaching and will be considered in the conclusion. However it is important to stress that the current universal acceptance within the Australian and New Zealand corporate law scholarship that jurisprudential questions relating to incorporated associations should be resolved by reference to the modern trading company is not based on sound principles of analogical reasoning. When viewed through the lens of broadly conceived organic theory, a theory that demands the equal consideration of empirical reality in addition to black letter law, a far richer potential source analogue is to be found in the jurisprudence of charitable trusts. This is at the heart of Professor Oleck’s observations at the beginning of this chapter that:

The principles of nonprofit organizational law should be analogized out of the guiding principles of religious, fraternal, community-service, charitable, and mutual aid groups that have illuminated civilization for many centuries. The fact that the Bronze Age temple or agricultural commune also often evolved into the idea of a pirate crew should not make us conclude that we must make the pirate crew the model of our nonprofit laws.”

INTRODUCTION

In the introduction to this thesis I suggested that if one was to exploit analogical reasoning in the development of a jurisprudence of novel corporate forms, one must articulate why certain source analogues are to be preferred over others. I also indicated that there appeared to be widespread support within the legal profession for the adoption of the modern trading company as an appropriate source analogue for the resolution of legal problems in the context of incorporated associations. Significantly, prior to this thesis, the reasons why such a source analogue should be preferred have never been forensically articulated or analysed.

In the introduction I also suggested that, as problem solving via bare analogical reasoning is open to criticism, the simultaneous application of a theory-based approach might serve to improve the quality of analogical problem solving. For this reason I proposed investigating potential known legal source analogues for incorporated associations on the basis of one of the most influential modern theories of corporate law, namely the organic theory.

In the subsequent chapters of this thesis I have endeavoured to follow this approach as methodically as possible in order to assess the largely unquestioned proposition that the modern trading company offers the richest and most apt source analogue for the development of a jurisprudence of incorporated associations. Given the panoply of categories of incorporated association, their vast absolute numbers in both Australia and New Zealand, and the poverty of published empirical research into this
area, I decided to focus this research effort on incorporated sporting associations in both countries. This was because previous research had indicated that such groups were likely to constitute the largest single definable category of incorporated associations in both countries. In this way I hoped to produce results capable of the broadest possible application. However, the conclusions I now outline in the following paragraphs can only be stated with any certainty to apply to incorporated sporting associations in Australia and New Zealand. Any broader inferences that are drawn from this research, for application to incorporated associations generally, are therefore subject to significant limitations. These are the first of the limitations of this research to which I draw the attention of the reader. The implications of the research and its limitations in this respect are therefore clear: more research into incorporated associations is required in order to determine if the findings of this thesis hold true across the incorporated association spectrum. In the paragraphs that follow I will summarise each chapter of the thesis, discuss the implications and limitations of the research and suggest the contributions each has made to knowledge in the area.

CHAPTER 1

Summary

Chapter 1 began with a general discussion of corporate legal personality. The chapter progressed to briefly discuss the important role of theory in the development of the law before indicating that common law lacked a coherent theory of the corporation. The multiplicity of contesting legal theories of the corporation was thereafter demonstrated by means of a survey of the central themes of, and contributions made by, the more prominent and influential theories of the

Of the competing theories of the corporation that were analysed in chapter 1, I decided to adopt the aspect of the realist school that has come to be known as the “organic theory” as the theoretical approach underlying this thesis. I had 3 reasons for adopting this theoretical approach. First, this approach emphasised facilitating corporate groups as they existed and operated in reality. Obtaining a more detailed understanding of actual incorporated associations was a key motivation in undertaking the research at the outset. Second, the organic theory has been, and continues to be, one of the most influential theories of the corporation in terms of legal practice. As such, it is a theoretical approach with which legal scholars and practitioners have an intuitive affinity – even those who would count themselves as “theory-phobie”. Also, at the end of the project, I wished to present findings that would resonate with legal scholars and practitioners. Finally, the organic approach was selected as the theoretical basis of the research because it was one with which I was fully familiar at the outset.

Chapter 1 then proceeded to provide some indication of how corporate law theory has influenced the development of company law in Australia and New Zealand. While a number of theoretical approaches were identified as being influential, the particular influence of what I have defined as “narrow form organic theory” was particularly highlighted. Following this discussion, I then highlighted the fact that
the common law has struggled to account for the existence and operation of corporate groups, given its tendency towards anthropomorphic reductionism. The benefit of the realist school (notwithstanding its civil law origins) to the common law is its insistence on recognising groups as real social phenomena and the requirement that the law should facilitate the actual needs of such groups. Such a pragmatic approach immediately appeals to the common law with its incessant resort to what is reasonable. This is the approach that I have adopted throughout the thesis and which I have termed broadly conceived organic theory.

Chapter 1 concluded with a discussion of what I have observed as convergence in diverse schools of corporate law theory. This convergence was demonstrated by reference to the seminal works of Professors Stoltjar, Dan-Cohen, Hansmann, Blair, Lahey and Salter. These scholars from the common fund, organisational, contractarian, communitarian and feminist schools respectively provide powerful insight into the legal and social nature of corporations. The areas of convergence that I identified in the work of these scholars were with respect to the following issues:

- Should the dominant world views that find expression in the modern trading corporation find full voice in alternative corporate forms based on the attainment of non-commercial objectives?
- Given that legal entities such as trusts can be rendered in different formats, might it not be appropriate to find the corporate form expressed in alternative ways in differing contexts?
- To what extent should corporate size be a significant factor in the application of corporate law theory?
• How significant are the centrality of corporate purposes and the “partitioning” of corporate funds in favour of those purposes (even to the disenfranchisement of “owner/ shareholder/ member” patrons) as defining attributes of a corporation?

• Should corporate “managers” be accountable in terms of the purposes of the group, or as agents of the “owner/ shareholder/ member” patrons?

**Implications and Limitations of the Research**

The major limitation of the theoretical treatment contained in chapter 1 is its brevity. Major schools of corporate law theory were summarised in order to sketch out their broad themes. This of necessity required simplification and a loss of expressive nuance. In addition, the focus of the chapter was in developing a broadly conceived organic theory that would provide a theoretical framework for the conduct of the subsequent research. In this regard, even the definition of the theoretical framework was purpose driven. Two excellent PhD theses that demonstrate the limitations of both aspects of the research in chapter 1 are those by Hemphill\(^1\) and Culley\(^2\).

The major implication of chapter 1 is that corporate law needs legal theory. In fact, corporate law needs legal theories. Theoretical insight is necessary in order to develop and understand the current corporate law, and it is perhaps more essential still in order to interrogate the underlying assumptions on which current corporate law is based and suggest alternative realities. Those legal theories, such as feminist

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theory, that can be characterised as oppositional, offer perhaps the greatest opportunity for insight about current and future corporate law. This opportunity for insight is invaluable when considering novel corporate forms such as incorporated associations.

**Contribution to Knowledge**

The principal original contribution to knowledge that was achieved in chapter 1 is the way I have suggested that major schools of corporate law theory can be seen to be in convergence. The schools of corporate law theory that were interrogated to this end include common fund theories, organisational theories, contractarian theories, communitarian theories, and feminist theories in addition to that which is advocated in the remainder of this thesis, namely broadly conceived organic theory. I suggest that this convergence highlights the central preoccupation of corporate law theory with the following three issues:

1. Corporate purposes;
2. Complexity of corporate relationships; and,
3. The impact of corporate size and context on corporate behaviour.

**CHAPTER 2**

**Summary**

chapter 2 began by highlighting the central role played by analogy in legal reasoning. In particular the strong reliance placed on analogical reasoning by the common law in contrast to the civil law system was emphasised. Thereafter I carefully defined analogy as involving a comparison of the attributes of a known “source analogue” with those of an unknown “target analogue” for the purpose of either prediction or
insight. The term “metaphor” is sometimes used as a loose alternative to the term analogy. For this reason I restricted the term to a meaning aligned with that given in the literary sense, namely the comparison of a familiar concept in a semantically disparate context, with a novel concept in the immediate context. I then suggested that both terms could be placed at either end of an allegorical continuum, with analogy at one end of the continuum (representing the more concrete one-to-one type structural comparison) and metaphor at the other end of the allegorical continuum (representing the more abstract and figurative comparison).

Chapter 2 then moved on to describe the concept of mapping as utilised in cognitive science. This occurs where a familiar “source analogue” and a novel “target analogue” are both analysed with a view to utilising the known (source) as a means of understanding the unknown (target). The relationship between mapping and reasoning by analogy was then discussed at considerable length and found to be paramount. It was indicated that the mapping process is beset by a number of constraints, namely the purpose constraint, the surface level attribute constraint, and the structural constrain. The influential work of Professor Hunter that informed much of this passage of chapter 2 is supportive of the view that mapping is central to legal reasoning by analogy, and that the quality of such reasoning is significantly impacted by the constraint effects identified above. Mapping theory suggests that an analogy should be recognised as being relatively poor by a decision-maker if it is made on the basis of purely attributional similarity. The “optimal level of
representation will be that which maximises the degree of correspondence between causally relevant features of the analogues.”3

I then moved on in chapter 2 in considerable depth to illustrate, by reference to the allegorical continuum identified above, that the strongest analogy operated somewhere between the pure attributional comparisons of mere analogy and the complex, multi-layered, potentially contradictory comparisons of pure metaphor. What is required of advanced analogical reasoning is a sophisticated comparison between source and target analogues on the basis of internal structural and relational similarities.

Chapter 2 continued to examine the processes involved in the application of analogical mapping to legal problem solving. I discussed the empirical data which reveals that experienced legal problem solvers carry a bank of analogical schemas with which they solve novel legal problems as they arise. This enables experienced legal problem solvers to rapidly assess a novel problem and expeditiously map an appropriate stored analogical schema to reach a plausible conclusion. It was discussed that the major downfall of this form of mapping is that comparisons are more likely to be made on the basis of semantic retrieval cues drawn from surface level attributes rather than complex internal structural and relational similarities. The research suggested that this amounted to a form of cognitive hard wiring that was not evident in less experienced practitioners. One way of overcoming some of the

limitations of cognitive hard-wiring it was suggested, is to present multiple competing analogies from which the most apt source analogue could be selected.

Chapter 2 then discussed the importance of choosing a rich analogical schema with which to map an unfamiliar target analogue when seeking to derive both insight and predictive capacity. Following this I surveyed the literature relating to the role of analogy in common law legal reasoning, before returning to the observation of Cooke J that: “The law or practice relating to limited liability companies is not necessarily a helpful analogy in approaching these cases”.

The foregoing discussion of analogical reasoning and its role in legal problem solving naturally led on in chapter 2 to the discussion of four known alternative legal source analogues of potential utility in the analogical development of a jurisprudence of incorporated sporting associations. These four analogical alternatives were: the large modern trading company, the small closely-held company, the charitable trust, and the eleemosynary corporation. Each of these potential source analogues was analysed on the basis of the essential features identified by Professor Hansmann as follows:

4 Finnigan v New Zealand Rugby Football Union Inc [1985] 2 NZLR 159 at 178.
1. Full legal personality, including well-defined authority to bind the firm to contracts and to bond those contracts with assets that are the property of the firm as distinct from the firm’s owners,
2. Limited liability for owners and managers,
3. Shared “ownership” by investors of capital,
4. Delegated management under a board structure, and
5. Transferable shares.

I chose to modify this classification slightly by adding to it “raison d’être” given that Cooke J had indicated that it was, in his Honour’s mind, a significant consideration.

The analysis that followed highlighted the internal structural and relational characteristics of each potential source analogue relevant to each of the classifiers above. Chapter 2 concluded once this task was completed.

**Implications and Limitations of the Research**

There are a number of limitations to the research contained in chapter 2. The first of these is the confusion created in the literature by a lack of uniformity in the use of the terms “analogy” and “metaphor”. I have attempted to correct for this limitation by narrowly defining the terms for the purpose of this research and placing both on what I have termed an “allegorical continuum”. The second major limitation is that, aside from the work by Professor Hunter, there is virtually no empirical research available that specifically tests cognitive science theory in a legal context. However, given that Hunter’s work tests mainstream cognitive science theory, I have been content to rely on both sources in constructing the theoretical framework for this thesis. The third limitation is in the choice of alternative source analogues. By definition, these inclusions have resulted in any number of exclusions. However, the purpose of my investigation was primarily to test the validity of the accepted wisdom that the large modern trading company was the most appropriate source analogue for
incorporated associations. As a consequence, the question of which precise alternatives were chosen is therefore less significant as long as at least one of those chosen calls the accepted wisdom into question.

The first major implication of chapter 2 is that much more empirical research is needed to ascertain if mainstream cognitive theory has application to legal reasoning. Flowing from this, it would obviously be beneficial if the loose terminology surrounding the use of the terms “analogy” and “metaphor” in legal theory was tightened up. The second major implication of chapter 2 follows on from the fact that I have demonstrated an empirically tested methodology for challenging the cognitive hard wiring of experienced legal problem solvers by analysing the internal structural and relational characteristics of alternative legal source analogues. It is surely now no longer appropriate to rely on untested analogy as a basis for the development of jurisprudence in corporate law generally and the law relating to incorporated associations in particular.

**Contribution to Knowledge**

The first major contribution to knowledge made in chapter 2 was that the lack of precision in the use of the terms “analogy” and “metaphor” in legal theory was highlighted and, by reference to cognitive theory, a workable definition of both was developed that I have chosen to refer to as the “allegorical continuum”. As a matter of first principle, poor use of terminology is an unnecessary retardant to clear thinking. The second major contribution to knowledge made in chapter 2 was that it has modelled how cognitive theory can be used to resolve an intensely practical legal problem, namely, is the large modern trading company the most apt legal source
analogue for incorporated sporting associations? All of this of course has built on the research of others however, by applying the theory, and by doing so within a unique context and in a unique manner, it is an original contribution to knowledge.

CHAPTER 3

Summary

In order to assess the relative merits of each of the potential source analogues analysed in chapter 2, it was necessary to develop a similarly structured analysis of incorporated associations in chapter 3. This was achieved primarily by reference to the relevant legislation and records of parliamentary debate. The origins of the associations incorporation legislation in Australia, and its equivalent in New Zealand, were traced, and the intriguing possibility of what I termed “trans-Tasman legislative plagiarism” on the part of the New Zealand Parliament was highlighted. Significantly, the legislative innovation appears to have been motivated in both South Australia and New Zealand owing to the practical difficulties associated with managing the property of voluntary associations through the aegis of trusts. chapter 3 then considered the High Court decision in \textit{Cameron v Hogan} (1934) 51 CLR 358 before surveying relevant passages of parliamentary debate before concluding that incorporated associations generally were a sui generis corporate form.

Given the scepticism over the suitability of the trading company as a potential source analogue for incorporated associations, the analysis of incorporated associations proceeded in chapter 3 on the basis of a catalogue of essential characteristics of
voluntary not-for-profit associations throughout the world suggested by Professor Salamon. 6 These characteristics were:

1. Organised, that is institutionalized to some extent.
2. Private, that is, institutionally separate from government, even if they receive governmental support.
3. Nonprofit-distributing, that is, not returning any profits they may generate to their owners or directors.
4. Self-governing, that is, controlled according to their own internal procedures and not operated from outside.
5. Voluntary, that is, non-compulsory and involving some meaningful degree of voluntary participation.

To this list, I added “eligibility for incorporation” and “taxation treatment of incorporated associations” on the basis that Professor Salamon’s research did not discriminate between incorporated and unincorporated entities.

Under eligibility criteria, I identified three potential bases for determining eligibility for incorporation that were potentially of relevance to incorporated associations, namely, eligible purposes, minimum size and mutual vs. public benefit eligibility. The subsequent analysis revealed that association purposes or objects were the only significant eligibility criterion required in both Australia and New Zealand. The requirement was either for purposes broadly in keeping with the Preamble to the Statute of Elizabeth, or non-trading purposes. In a number of jurisdictions minimum size was a prerequisite to incorporation, however, the quantum was variable. There

was no restriction on eligibility for incorporation on the basis of either mutual or public benefit in any jurisdiction.

Chapter 3 continued to reveal that there were significant statutory requirements that an incorporated association was an organised entity in all jurisdictions. The private status of incorporated associations was found to be something of an oxymoron given that they must comply with various statutory requirements, and to varying degrees tend to be dependant on a combination of donations, sponsorships and government grants in addition to membership subscriptions. There was clear evidence that strong non-distribution constraints operated in all jurisdictions preventing the funds of an operational incorporated association from being disbursed to members in their capacity as members. The non-distribution constraint appears to be slightly less rigid in New Zealand, Victoria and Queensland in the event of a surplus of assets on the dissolution of an incorporated association in those jurisdictions. In all other jurisdictions, the non-distribution constraint continues to apply on dissolution of the incorporated association and it was seen that a version of the cy-près doctrine is mandated.

Chapter 3 then considered the issue of internal governance mechanisms in incorporated associations. Professor Salamon’s research suggested that some voluntary associations adopt a delegated management model of internal governance similar to what is observed in large modern trading companies and that other groups adopt what he termed as a “member-governed” model of internal governance. As I discussed in chapter 3, the assumption of the legislation in all jurisdictions appears to be that the delegated management model is universally applicable to incorporated
associations. It was found that this is most rigidly applied in Queensland and the Australian Capital Territory. The statutory duties that apply to the “committee” of incorporated associations were also considered and I suggested that these could be classified as technical (preparing reports and accounts, reporting to the regulator, paying fees etc), qualitative (skill, care and diligence) or fiduciary (fidelity, honesty etc). The analysis revealed that statutory duties of a technical and fiduciary nature were universal, but that only South Australia had adopted qualitative duties, and that these only applied to the more economically significant incorporated associations.

The extensive statutory decision making procedures were then considered with respect to incorporated associations and it was again observed that the various measures appear to have been written on the basis that all incorporated associations adopt a delegated management model of internal governance. Following this, the voluntary nature of incorporated associations was analysed and, particularly with respect to sporting groups, the empirical evidence suggested that voluntary participation was fundamental to the operation of incorporated associations. Remarkably, the issue of volunteerism is addressed in none of the governing statutes. I also related the issue of volunteering to the general absence of qualitative statutory duties.

Chapter 3 concluded with special consideration of the taxation status of incorporated associations. It was revealed that incorporated sporting associations were eligible for income tax exemption in both Australia and New Zealand as a result of the mutuality principle. Where the constitution of an association contains a non-distribution constraint that applies while the association is operational and when it is dissolved it
can qualify for income tax exemption. This is provided the association has participation in its management by members and the ultimate destination of association funds on dissolution is cy-près or to charity.

**Implications and Limitations of the Research**

The major limitation of the research documented in chapter 3 is that in many instances it was impossible to reduce the findings down to readily comprehensible generalisations. This is a consequence of the disparate nature of the governing statutes, which itself is a cause of growing frustration among scholars, legal practitioners and incorporated association members throughout Australia and New Zealand. To some extent, the adoption of Salamon’s catalogue of characteristics as the basis of the analysis has minimised the devaluing effect of the legislative cacophony.

The first major implication flowing from the research in chapter 3 is that there is considerable support for the proposition that incorporated associations are sui generis corporate forms. The second major implication of the research is that there appear to be a number of potential points of comparison between incorporated associations and trusts. The third major implication of the research in chapter 3 is that the governing legislation in all jurisdictions seems to be failing to account for the possibility of internal governance structures other than the delegated management model observed in large modern trading corporations. A fourth major implication from this research is that the non-distribution constraint on incorporated sporting associations is not uniform in all jurisdictions.
**Contribution to Knowledge**

The first major contribution to knowledge made in chapter 3, was that the proposition I first raised in a Master of Commerce thesis in 1999 (that incorporated associations in Western Australia are a sui generis corporate form), has been shown to hold true throughout Australia and New Zealand (with reference to the governing legislation and records of parliamentary debate). The second major contribution to knowledge made in chapter 3 was the modification of Professor Salamon’s catalogue of characteristics of voluntary associations for use in the specific context of incorporated sporting associations. The third major contribution to knowledge made in chapter 3 was the identification of the failure of the governing legislation in all jurisdictions to account for the possibility that incorporated associations might be member-governed. The fourth major contribution to knowledge in chapter 3 was that I have highlighted a complete absence of statutory cognisance of the central role played in incorporated associations by volunteers. The final contribution to knowledge made in chapter 3 is that I have provided a rationale as to why incorporated sporting associations in New Zealand, Queensland and Victoria might chose to adopt a cy-près-style dissolution clause in their constitution rather than direct surplus on dissolution to members personally.

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7 A minor contribution to knowledge in this respect was the identification of the founding fathers of the associations incorporation legislation in Australia, namely, Captain Charles Bagot and George Randell, as members of the Congregationalist Church, a religious denomination founded on the basis of membership-governance.
CHAPTER 4

Summary

The broadly conceived organic theory that I defined in chapter 1 requires that legislation be structured to facilitate corporate entities in their structure and operations rather than regulate and restrict them in an inappropriate manner. It follows then that my theoretical commitment required an empirical investigation into incorporated sporting associations in Australia and New Zealand. This was done by means of a questionnaire sent to a 10% sample of the 37,620 incorporated sporting associations registered in Australia and New Zealand as at 30 June 2002. Other than 279 return to sender questionnaires, the final positive response rate was 22%. Once the results of the questionnaire had been analysed, I reported the key findings in chapter 4.

Chapter 4 outlined the survey methodology and then explained the difficulties that were met and overcome in order to generate a target sample and mailing list. The key findings of the epidemiological investigation were then presented. It was revealed that the majority of incorporated sporting associations in both countries were operational prior to incorporation. Chapter 4 also revealed that the majority of respondents viewed the companies’ legislation in each country as singularly inappropriate to their needs. Interestingly, owing to significant membership numbers, the majority of respondent groups would not qualify to incorporate as proprietary companies in Australia. Of further interest was the extent to which respondent groups were not employers.
Chapter 4 also revealed that while membership numbers were often significant, respondents indicated that the majority of incorporated sporting associations were relatively modest from an economic perspective. Another interesting finding reported in chapter 4 was that more than 5% of respondents in both countries operated without an elected management committee, one such group reporting 1,500 members. Of those groups with a management committee, it was reported that the vast majority of committee members are paid nothing for their services.

As demonstrated in chapter 4, respondents from both countries reported in the minority of cases that members meet only annually. The vast majority of respondents reported that management committees met monthly. When management committees made decisions, respondents indicated that the main consideration was the objects for which the association was formed. Significantly, over 10% of respondents from both countries indicated that management decisions had been overturned by members’ meetings, although this was extremely rare. Around a third of respondents from both countries reported that there were restrictions on the power of management committees to spend the funds of the association. Over a range of management type powers (including the power to hire and fire employees, take out loans, execute contracts, initiate legal action in the group name, grant or refuse membership, and set subscription rates) significant proportions of respondents indicated that the final say rested with the members’ meeting.

On the issue of determining the association, chapter 4 disclosed that less than 20% of incorporated sporting associations in both countries directed surplus assets on dissolution into the hands of the members. The most common response was the cy-
près approach. Finally, the vast majority of respondents reported that the incorporated sporting association existed for the benefit of the members.

**Implications and Limitations of the Research**

The principal limitation of the research presented in chapter 4 was the significant reply to sender rate. This indicates a concerning degree of unreliability in the various official registers held by the regulator in each jurisdiction.

The first major implication of this research is that the administrative obstacles to obtaining access to data in the official registers in each jurisdiction could conceivably mean that this is the first and last empirical investigation of incorporated associations in Australia and New Zealand. The second major implication of the research documented in chapter 4, is that the official registers, particularly that in Western Australia, are not 100% accurate. This has considerable enforcement implications. The third major implication of this research is that there is considerable membership involvement in the management of incorporated sporting associations. The fourth major implication of this research is that incorporated sporting associations are heavily reliant on volunteerism. The fifth major implication of the research documented in chapter 4, is that group objects and purposes are of prime importance in the operations of incorporated sporting associations. The final major implication of this research is that there is widespread acceptance of the suitability of a cy-près-style distribution methodology on dissolution of an incorporated association.
**Contribution to Knowledge**

For the first time there has been a targeted empirical study of incorporated associations in Australia and New Zealand. As a result, the key findings disclosed in chapter 4, and the full statistical data in appendix B to this thesis, represent a major original contribution to knowledge.

**CHAPTER 5**

**Summary**

Chapter 5 applied the broadly conceived corporate law organic theory as defined in chapter 2, to incorporated sporting associations in Australia and New Zealand. This involved a comparison of the statutory framework for incorporated associations and the empirical data reported in chapter 4 in order to determine the closeness of fit between the nature of both the legislation and its user-groups. The analysis in chapter 5 followed the eight part classification that was developed in chapter 3.

It was demonstrated that the legislative view of incorporated associations as a sui generis corporate form was strongly endorsed by the perception of sporting user groups themselves. Interestingly, both employment on the one hand, and economically significant size on the other were both shown to be relatively minor phenomena with respect to incorporated sporting associations. On the issue of eligibility for incorporation, in all jurisdictions there was uniformity of emphasis on the purposes for which an association was formed and continued to operate. This is expressed positively or negatively depending on the jurisdiction in question, however, it is always expressed in both emphatic and restrictive terms. The emphasis placed by a number of jurisdictions on the issue of minimum membership
was not shown to be significant to incorporated sporting associations in practice, given both the incidence of pre-incorporation formation and the significant membership numbers in practice. The issue of public vs. mutual benefit is relevant to the potential charitable status of incorporated associations. The research demonstrated that the great majority of incorporated sporting associations are not formed primarily for public benefit.

Incorporated sporting associations were thereafter typically shown to be characterised by a degree of organisational sophistication, given that two-thirds of such groups in New Zealand, and more than 80% of those in Australia, reported varying pre-incorporation histories. Chapter 5 then revealed that there was symmetry between the legislation and the perceptions of the great majority of incorporated sporting associations on Salamon’s proposition that incorporated sporting associations are private entities. The central defining characteristic of incorporated sporting associations, being entities that respect a non-distribution constraint, was considered in detail in chapter 5 and it was revealed, that from a legislative perspective, this constraint was universal while associations were in operation but variable when associations cease to operate. The empirical data revealed, however, that even in the absence of legislative fiat, there was majority voluntary acceptance by incorporated sporting associations of the non-distribution constraint in dissolution circumstances. Most significantly, the most common distribution on dissolution provision in practice was shown to be a type of cy-près arrangement.
Chapter 5 further demonstrated that one of the most significant areas of legislative non-facilitation for incorporated sporting associations was in the area of internal governance. While there are a range of internal governance methodologies in evidence in incorporated sporting associations, the flavour of the legislation in all jurisdictions was that to varying degrees, the narrow form organic model identified in chapter 1 applied equally to all groups. While chapters 5 and 6 acknowledged the limitations of empirical research in this area, it did demonstrate clearly that the narrow form organic model is not universally relevant to incorporated sporting associations.

Chapter 5 also indicated an additional lack of legislative facilitation of incorporated sporting associations on the issue of their voluntary nature. While this can be demonstrated to be a further defining feature of incorporated sporting associations, the legislative silence on this issue was shown to be deafening. Finally, the taxation status of incorporated sporting associations was considered in chapter 5 to be entirely in accordance with the empirical analysis of the majority of these groups in both Australia and New Zealand. This was a prime example of the principles of broadly conceived organic theory and reinforced those characteristics identified previously as defining the majority of incorporated sporting associations.

**Implications and Limitations of the Research**

The principal limitation of the research that was presented in chapter 5 was failure of the thesis questionnaire to determine the full spectrum of internal governance structures operating in incorporated sporting associations in practice. This retards the extent to which one can generalise from this research about the extent of the
observed lack of legislative facilitation of the internal governance of incorporated sporting associations, which is itself a key objective of the theoretical approach of the thesis. However, it must be recalled that there is an almost universal legislative assumption of the applicability of a narrow form organic model to incorporated associations on the one hand, and the scholarly acceptance of this married with the lack of empirical data on the other. In these circumstances, it is fortunate that the thesis questionnaire was at least able to provide clear evidence that the status quo is inappropriate. The trading company has been clearly shown to be an impoverished source analogue for incorporated associations when compared to other respectable potential legal source analogues.

A secondary limitation of this research is that, while it can be shown that cy-près style distribution methodologies are common in those jurisdictions where they are not statutorily mandated,\(^8\) the only readily ascertainable reason for this is the favourable taxation treatment that it can deliver. The research does not confirm that the taxation benefits are the only reason for these methodologies, or even whether they were persuasive. Likewise, the research does not reveal why those groups that did not choose to avail themselves of the taxation benefits of cy-près distribution methodologies did so. Clearly, much further research is called for before conclusions can be drawn from these findings.

In a general sense chapter 5 revealed that, while the governing legislation is respectful of the requirements of broadly conceived organic theory across a number of areas, there are significant points of divergence between the legislative framework

\(^8\) Namely, New Zealand, Victoria and Queensland.
and the empirical data. In this respect, the first major implication of this research is that there is now significant evidence in support of the proposition that incorporated associations are a sui generis corporate form. This requires that any future legislative development, whether in a unified manner or otherwise, must be sympathetic to the corporate form as it is currently expressed.

The second major implication of this research is that the legislation is universally based on a flawed assumption about the internal governance structures in evidence in incorporated sporting associations as reported in chapter 4. The narrow form organic model of internal governance is inadequate to account for the degree of nuanced variability in these mechanisms as they have evolved in these groups. Given that this research has not revealed the full range of membership involvement in internal governance, more research is necessary in order to bring the legislation in line with the needs of actual user groups.

A further implication of this research is that the voluntary nature of incorporated sporting associations is deserving of at least some form of express legislative recognition. Finally, at least in New Zealand, Victoria and Queensland, the legislation does not fully enshrine the non-distribution principle so far as the dissolution of incorporated associations is concerned. As indicated in chapters 3, 4 and 5, this is significantly at odds with the general nature of incorporated sporting associations. This is particularly significant with respect to the potential income tax status of incorporated sporting associations. Greater legislative harmony between the governing legislation and the income tax legislation in both Australia and New Zealand appears to be appropriate.
Contribution to Knowledge

One of the most potentially controversial contributions of chapter 5 is that it casts doubt on the claim of those scholars who advocate for an abolition of the governing legislation in favour of an expanded Corporations Act 2001 (Cth) regime. While this view can best be described as the accepted orthodoxy, it has been conclusively demonstrated in this thesis to be legislatively and empirically unsound. Chapter 5 demonstrated in practical terms how black letter corporate law can be critically analysed on a sound theoretical basis. While this in itself is not unique, it is an innovation with respect to incorporated associations. Further, by comparative analysis, specific aspects of the governing legislation in Australia and New Zealand have been shown to be out of step with the needs of users. This has only been possible as a result of the empirical data presented in chapter 4.

Finally, chapter 5 answers the central thesis question about the applicability of corporate law organic theory to incorporated sporting associations in Australia and New Zealand. Corporate law organic theory broadly conceived on the basis of realist principles as defined in chapter 2 is largely, with a few significant exceptions, at home in the incorporated sporting association context. Narrow form organic theory is likewise an inappropriate model of internal governance on which to base the legislative framework.
CHAPTER 6

Summary

The empirically tested nature of incorporated sporting associations that had been developed in chapters 3, 4 & 5 by means of the theoretical model defined in chapter 1, was compared in chapter 6 to the alternative source analogues presented previously in chapter 2. Primarily this was done in order to ascertain if the large modern trading company was the most superior available source analogue on which to base a jurisprudence of incorporated sporting associations. This forensic comparison, based on a modified classification suggested by Professor Hansmann, revealed that it was an impoverished source analogue. The general trading purpose of all companies was shown to be inherently contradictory to the non-trading purpose constraint required of incorporated sporting associations. The delineation between trading companies on the basis of economic size was also not relevant to incorporated sporting associations. These groups were shown to be potentially significant in terms of membership numbers while simultaneously lacking economic significance. While large trading companies operate in the public sphere, incorporated sporting associations, were found to be focussed on internal matters such as narrow corporate purposes and the needs of members. Incorporated sporting associations were however, demonstrated to exhibit a significant degree of organisational sophistication such as one would expect of a large trading company. The non-distribution constraint of incorporated sporting associations was highlighted as one of the clearest points of asymmetry with trading companies. While it was true that a majority of incorporated sporting associations reported having a delegated management structure, the empirical evidence suggested that the internal governance of incorporated sporting associations was significantly different to that pertaining to
large modern trading companies. The reliance of incorporated sporting associations on the volunteerism of its corporate constituents is a further significant point of dissimilarity with trading companies. Finally, the taxation treatment of incorporated sporting associations is also a crucial point of distinction between these groups and trading companies. While the small closely-held trading company was found to bear some structural alignment with the smaller incorporated sporting associations responding to the questionnaire, this group was the minority of respondents and therefore these observations were of limited utility. The only structural relational similarities of any significance between trading companies and incorporated sporting associations were those pertaining to limited liability and separate legal personality. In the context of such a wide-ranging analysis, this appears to be a rather small peg on which to hang such a large hat.

In chapter 6, in almost every instance, the most significant structural similarities were demonstrated to exist between the incorporated associations and charitable trusts. The extent to which both were shown to be primarily formed for limited purposes, to the exclusion of delivering pecuniary benefits to members, was striking. The same was shown to be true of the fact that both are institutionalised by reference to a foundation instrument which, again in both cases, is crucial to circumscribing their everyday operations. Intriguingly, both the charitable trust and incorporated sporting associations were found to have an almost identical mixed private/public character. In terms of non-distribution constraints, there is virtually no difference between incorporated sporting associations and charitable trusts up to and including the cy-près principle. Volunteerism was also found to be as important in the context of charitable trusts as it is in the context of incorporated sporting associations.
Finally, while the requirements relating to charitable trusts are somewhat more exhaustive than those for incorporated sporting associations, the difference was demonstrated to be one of degree and not nature. Effectively both are eligible for income tax exemption. It is however true that the charitable trust was shown to be a problematic source analogue for incorporated sporting associations on the basis of limited liability. The eleemosynary corporation was introduced as a recognised sub-genus of charitable trust with this characteristic in addition to significant similarities regarding internal governance methodologies of relevance to incorporated sporting associations. Finally, separate legal personality was highlighted as a reasonably weak point of difference between incorporated sporting associations and charitable trusts.

**Implications and Limitations of the Research**

The first principal limitation of the research presented in chapter 6 was in the limited range of alternative source analogues for incorporated sporting associations that were considered. Nevertheless enough such analogical alternatives were presented to highlight the impecuniosity of the favoured source analogue, namely the large modern trading company.

The second major limitation of this research is that only one class of incorporated associations was empirically investigated, namely sporting entities. The inferences that may be drawn from this research with respect to incorporated associations in Australia and New Zealand generally remain uncertain. This requires future research to consider the findings presented in chapter 6 and test their potential applicability across a wider user group spectrum.
The major implication from this research is that current corporate law scholarship with respect to the suitability of the large modern trading company as a source analogue for the development of a jurisprudence of incorporated sporting associations appears to be based on flawed assumptions. Any such jurisprudence must therefore be open to criticism.

**Contribution to Knowledge**

The research presented in chapter 6 combines the utilisation of multiple analogies, recommended by Professor Dan-Cohen, with models of the corporation, suggested by Professor Hansmann, that were informed by a model of the voluntary not-for-profit association, suggested by Professor Salamon, to present appropriately structured potential source analogues for incorporated associations. The structure that was developed for this purpose was drawn from cognitive science as recommended by Professor Hunter. The work of all of these scholars was implemented in one investigation for the first time in this chapter.

As a result of the research presented in chapter 6, it is now apparent that incorporated sporting associations should not be analogised with the modern trading company without significant qualification.

**Overall Conclusion**

This investigation clearly indicates that, of the alternatives presented, the charitable trust offers the richest source analogue schema for the analogical development of a jurisprudence of incorporated sporting associations. Certainly, it offers a far superior
analogical schema to that provided by the large modern trading company. This finding supports the views Professor Oleck, expressed in 1979, about the inapt utilisation of company law as an analogical resource for resolving jurisprudential problems pertaining to incorporated nonprofit entities. As a consequence of these findings, it would be more correct to suggest that the management committee of an incorporated association (where there is one) stands in a position most closely analogous to the trustees of a charitable trust. What this suggests is that management committee members of such entities owe duties of a fiduciary nature to the incorporated sporting association. Any articulation of the potential duty of care of such individuals should develop from the principles surrounding such duties in the context of the charitable trust. There are further implications concerning the appropriateness of abolishing the doctrine of ultra vires as has been necessary in the context of trading companies. Is it compatible with the nature of a corporate body formed for limited purposes to be free to act beyond those purposes? If it is so compatible, then why the peculiar and somewhat problematic requirement in the Corporations Act 2001 (Cth) for no-liability companies to honour trading restrictions contained within their objects clause?

The proposition that the charitable trust is the most appropriate source analogue for incorporated sporting associations also suggests that members of such an entity have no standing to enforce the association’s constitution on the basis of either contract, or in equity in a position analogous to beneficiaries of a private trust. However, such members may nevertheless enjoy standing on the basis of holding an interest that is in many respects analogous to the power of appointment over a charitable trust, such as is exercised by the members of an eleemosynary corporation.
Having arrived at this proposition, however, it remains to be seen whether the findings of this thesis as articulated above have broader application to incorporated associations generally.
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