BOOK REVIEWS

Groups and Entities: An Inquiry into Corporate Theory, by SAMUEL J. STOLJAR, LL.B., LL.M., PH.D., LL.D., (Australian National University Press, Canberra, 1973), pp. 1-206. Recommended Australian price $8.50. ISBN 0 7081 0701.

In this monograph Dr Stoljar, Professorial Fellow in Law at the Australian National University, advances the thesis that there can be corporateness without formal incorporation. By corporateness he appears to mean the quality of being a discrete unit amenable to control by the legal system. If his thesis is valid a group of people, such as a social club, who have not sought formal incorporation by charter, by statute or by registration under a general incorporation law may, nevertheless, be a legal unit against whose common fund orders can be made by courts without necessarily imposing personal liability on the members of the group. His conception of corporateness extends beyond groups to what he calls an 'entity' this being a specific set of assets maintained and managed for certain designated purposes: a charitable endowment is an example.

In the early stages of his discussion Dr Stoljar looks at various groups: the 'natural' groups—the family, the kindred and the village—and the 'territorial' groups—the town, the guild and the borough—to see how far the law at various times has treated the group as a unit. In this enquiry he brings to bear an impressive command of legal history and European legal philosophy. It is when he examines voluntary associations that he finds corporateness without formal incorporation. Corporateness exists where there is a 'committed fund'. In the voluntary association he sees corporateness after considering the internal features of private government and majority rule, the members' joint interests in their common fund, the fact that each member's interest is, by his expulsion, defeasible by majority decision, the principle of a member's limited liability implied in *Wise v. Perpetual Trustee Co.*,[1] the member's immunity from suit, with the resulting focus on the committee functioning as an 'organ' and, especially, on the common fund which can be reached by a representative order.

In a separate study of trade unions and friendly societies he finds the same informal acquisition of incorporateness even by unregistered trade unions. Moving on to partnerships his examination of the rules relating to the separate partnership estate suggest that a partnership is more properly to be regarded as an 'entity' rather than an 'aggregate'. He cannot fit the unregistered joint stock company into the category of entities but that is only because the full potential of the representative action was not realized in relation to it.

In Dr Stoljar's view even the registered company is within his thesis because the basic reason for its corporateness lies in there being a committed fund. There is no need to say that a company is a different person from the subscribers to the memorandum: the company is simply an estate or entity different from their other property. If this had been the accepted way of looking at a company when *Salomon v. Salomon and Co. Ltd*[2] arose the law might not have been led by *Salomon's* case into 'unreality and formalism'.[3] After looking at companies the thesis is argued in relation to public endowments, collegiate corporations, corporations sole and government instrumentalities.

[1] [1903] A.C. 139.
[2] [1897] A.C. 22.
[3] *Gorton v. Federal Commissioner of Taxation* (1965) 113 C.L.R. 604, 627 *per* Windeyer J.

So the touchstone of corporateness is the existence of a 'separate estate or fund or 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'. At first sight it may seem odd that lawyers should see corporateness in terms of property but this makes sense when we reflect that the law has remedied a situation more often by awarding monetary compensation than by giving specific relief. If Dr Stoljar's proposition about corporateness were existing law the unincorporated non-profit association would be more readily amenable to suit and would cease to be 'the spoilt darling of the law'.[4] His thesis, however, will not assist in those situations where it is necessary to identify parties to a relationship. If X contracts with 'the Fitzroy Football Club' (an unincorporated club) and later alleges that Z is threatening to procure the Fitzroy Football Club to break the contract, there is a problem of identifying the party with whom X contracted.[5] It may be easier to find a fund from which to indemnify a person harmed by the association's activity than to ascertain the parties to a legal relationship: in *Bonsor v. Musicians' Union*[6] all five Law Lords held that there should be recovery for breach of contract against the Union's common fund but some thought the contract was with the members while others thought it was with the union as a separate legal unit.

As Dr Stoljar acknowledges, this book is about the law as it ought to be. To arrive at the notion of the liability of a fund of a body not formally incorporated he relies heavily on the representative action being more readily available than is the case under existing law.

Only a court in the higher reaches of appellate jurisdiction could find itself free to adopt Dr Stoljar's theory and given the preference in the common law judicial process for fashioning new doctrines out of existing material it seems unlikely that even the most exalted tribunal would adopt his thesis. His arguments could, however, be helpful in jurisdictions such as South Australia[7] and Tasmania[8] in which Rules of Court have been made authorizing actions against an unincorporated association if the cause of action is one in respect of which the association would have been liable as principal if it had been a corporation. Dr Stoljar's argument could help to provide an answer to doubts[9] about the theoretical basis of such rules.

Dr Stoljar's book will not persuade all readers as to the validity of his thesis but it will cause them to re-think some of the basic learning of company law and the law of associations. At a mundane level it might even prompt radical thoughts as to whether the Income Tax Assessment Act 1936-1973 should continue to deal with trusts and private companies as separate forms of property organization.

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4 Paton, *A Textbook of Jurisprudence* (4th ed. 1972) 428.
5 *Carlton Cricket & Football Social Club v. Joseph* [1970] V.R. 487.
6 [1956] A.C. 104.
7 Rules of the Supreme Court, Ord. 48A rr. 13 ff.
8 Rules of the Supreme Court 1965, Ord. 54.
9 *Williams v. Hursey* (1959) 103 C.L.R. 30, 54 *per* Fullagar J.

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