# LEGAL DUTIES AND LIABILITIES OF FEDERAL UNION OFFICIALS

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*[The author examines the past reluctance of the legislature to impose legal obligations on Federal union officials. This he attributes to the tendency to categorize unions as non-commercial voluntary associations regulated by internal rules. The author argues that given the economic character of union activities, this model is inappropriate. More wide reaching duties and liabilities imposed by the legislature would, he suggests, strengthen and add to those duties which exist at general law (such as fiduciary duties) and in the Conciliation and Arbitration Act. The author encourages the adaption of company law notions of directors duties to union officials.]*

The nature of a union official's duties and liabilities to his/her union warrants examination for a number of reasons. The most obvious reason is that trade union officials often possess great power with respect to the welfare of union members. Recent Royal Commissions into the activities of two unions have questioned the standards of conduct that the law requires of union officials.[1] Proposals to encourage union representatives to sit on company boards focus attention on the fiduciary duties of union officials, as do the proposals that officials play a more active role in managing superannuation funds.

The precise nature of an official's[2] duties and liabilities to his/her union is a matter which has received virtually no attention from academic writers in Australia. The main reason for this may be that such duties are perceived to be the exclusive domain of individual trade union rules, which vary from union to union. Such a perception is understandable, for the legislature has done little to superimpose duties onto those found in the rule book. Perhaps the lack of academic interest can be viewed in a wider context — the role and functions of trade union officials have not received much attention in Australia and there is no equivalent to the pioneering study in the United Kingdom by Clegg, Killick and Adams.[3]

The purpose of this article is to consider some aspects of the legal duties and liabilities of federal trade union officials in Australia. Firstly, the article

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[1] *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, Final Report,* (A.G.P.S., Canberra, 1984), Vol. III; *Royal Commission of Inquiry into the Activities of the Australian Building Construction Employees and Builders Labourers Federation, Report* (A.G.P.S., Melbourne, 1982).

[2] The generic term 'official' is used at this stage. The distinction between officials who are 'officers' and those who are employees is discussed below.

[3] Clegg, H.A., Killick, A.J., Adams, R., *Trade Union Officers* (1961).

will deal with the traditional reluctance of Anglo-Australian legislatures to impose legal obligations on officials. Secondly, Parts II-VII will examine statutory obligations and the manner in which courts have enlarged the scope of the duties and liabilities beyond those expressly stated in the union's rules. Thirdly, the problem of enforcement will be analysed. Fourthly, the American law in this field will be briefly discussed in the light of the recommendation of the *Final Report of the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* that similar legislation be introduced in Australia.[4] Finally, some observations on future developments and some recommendations for reform will be made.

## I FACTORS INHIBITING THE DEVELOPMENT OF OFFICIALS' DUTIES

Historically, the law has largely refrained from developing duties for trade union officials. Unlike company directors — who have duties of care, honesty and diligence under the common law and statute[5] — trade union officials have had relatively limited duties and liabilities, other than those specified in the trade union's rule book. The reluctance of the legislature and courts to impose duties can be seen in the light of a general reluctance to interfere in the internal affairs of all non-commercial voluntary organizations, the dominant view traditionally being that the relationship between such a body and its officials is dependent on its internal rules. The rationale is, as one writer has put it, that a member who has a grievance, 'must address himself to his appropriate domestic forum, or, ultimately, to the majority. Alternatively, he can leave the society'.[6]

To what extent should the law intervene? Chafee concluded that the factors which have affected the level of judicial interference into the affairs of voluntary associations include the seriousness of the consequences of the act in dispute, the likelihood that judicial intervention will be successful and the extent to which the courts value the body's autonomy.[7] However, in his observation of the case law, he noted:

> The relations of a person to a club, a trade union, a church, and a state university are very different from each other. This fact seems so obvious that it may seem absurd to mention it, but it deserves emphasis because it has received so little elaboration in the cases.[8]

Whatever may be the merits of the view that members of voluntary associations such as social clubs should be able to sort out their own internal difficulties, it is submitted that it is inaccurate to regard a modern trade union

[4] Vol. III, 158.
[5] See Afterman, A.B., *Company Directors and Controllers* (1970); Ford, H.A.J., *Principles of Company Law* (4th ed. 1986) Ch.15.
[6] Stoljar, S.J., *Groups and Entities* (1973) 43.
[7] Chafee, Z., 'The Internal Affairs of Associations Not for Profit' (1930) 43 *Harvard Law Review* 993, 1021.
[8] *Ibid.*

as analogous to a voluntary, non-profit association. There are two reasons for this. Firstly, in Australia at least, membership of trade unions is often not in practice 'voluntary'. It has been suggested — and trade union law is largely based on this premise — that if a union member is unhappy with the running of the union he can 'vote with his feet' by resigning.[9] This is an option not open to most union members.[10] It is instructive to quote from the *Report* of the U.K. *Royal Commission on Trade Unions and Employers' Associations 1965-1968* under the chairmanship of Lord Donovan:

> In our view the connection between membership of a trade union and employees' livelihoods means that trade unions cannot be regarded simply as voluntary clubs from the members' point of view. A man who considers himself unfairly penalised by his union often cannot resort to resignation as a practicable course. If he works in a closed shop, he will lose his job. Even if he does not, he may prejudice his prospects of finding suitable jobs in the future. Resignation would also deprive him of benefits earned through membership of the union, sometimes over a considerable period. He would also lose all the other advantages of membership, some of which have a material bearing on the conditions of his working life.[11]

It is true that the notion rejected by the Royal Commission has been partially rejected in Australia: the extensive provisions governing registered organizations in the Conciliation and Arbitration Act 1904 (Cth) testify to this. But such provisions, as far as they fail to provide for officials' duties to their unions, continue to reflect that notion. Indeed, even the Donovan Royal Commission concluded that the above findings warranted judicial intervention only in cases of 'substantial injustice'.[12]

It is also unrealistic to suggest that trade unions are 'not for profit'. Indeed a union is more similar to a company than to a social club. The accurate definition of a trade union provided by Sidney and Beatrice Webb — 'a continuous association of wage earners for the purpose of maintaining or improving the conditions of their working lives'[13] — indicates that it is essentially an economic entity. The fact that a union may be a separate legal entity, so that the union *itself* does not derive profits, does not detract from this proposition. As the *Royal Commission of Inquiry into Activities of the Australian Building Construction Employees and Building Labourers Federation* noted, 'in a sense, the members of a Union are the shareholders of the organization, dependent on the activities of the organization to better secure their wages and conditions'.[14] In fact, the courts in recent years, most noticeably since the landmark decision in *Allen v. Townsend* in 1977[15], have tended to view union officials as being subject to similar fiduciary standards

[9] Allen, V.L., *Power in Trade Unions* (1954) 10.
[10] Kahn-Freund, Otto, *Labour and the Law* (2nd ed. 1977) 212.
[11] (1968) Cmnd 3623 para. 630.
[12] *Ibid.* para. 631.
[13] *Industrial Democracy* (1897) cited in Clegg, H.A., *Trade Unionism Under Collective Bargaining* (1976) 1. In *Victorian Employers Federation v. F.C.T.* (1957) 96 C.L.R. 390, 391, Kitto J. provided a similar definition, adding that the 'provision . . . of a pecuniary assistance' to members is a primary function of unions.
[14] *Report,* 230. This statement was quoted with approval in the *Final Report of the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union,* Vol. III, 145-7.
[15] 31 F.L.R. 431.

as apply to directors. But the legislature, with some exceptions,[16] has been reluctant to move in that direction.

Thus, historically, the failure of the law to develop stringent standards and duties for trade union officials emanates from the notion that trade unions are not-for-profit and voluntary. There is a further factor which the law has overlooked — the growing degree of expertise required of trade union officers if they are to work effectively. Clegg, Killick and Adams have traced the development of professionalism in trade union office positions: 'In the earlier days of trade unionism, officers liked to think of themselves as just an engineer or a miner, or a carpenter who has been given the temporary job of speaking for his fellow workers'. As trade unions grew bigger with larger complements of officers with equipment and staff, 'the distinctions between the full-time officer and the member were reinforced'[17]. In Australia, the increasingly complex tasks facing union officials have contributed to the establishment of formal training programmes since the 1960's. Martin has pointed out that those who have not received formal training are likely to have acquired 'knowledge and skills in administration, negotiation and industrial law through a mixture of experience and self-education' and that 'the results are often impressive at the top levels of officialdom'.[18]

Yet the Conciliation and Arbitration Act 1904 (Cth) has been slow in recognising that trade union officials often administer large enterprises with large assets and that their performance very much determines the financial well-being of members.[19] Unlike a company director — who must, pursuant to the Companies Act 1981 (Cth), 'at all times exercise a reasonable degree of care and diligence in the exercise of his powers and the discharge of his duties'[20] — a trade union official may be quite incompetent. Furthermore, as will be discussed below, the law is vague even in its imposition of minimal standards of honesty.

## II STATUTORY DUTIES

To be sure, the legislature has not been totally reluctant to provide for the official's duties. Part VIIIAA Conciliation and Arbitration Act, 1904 (Cth) (hereinafter referred to as 'the Act'), introduced into the Act in 1977, may

[16] See Pt II, below.
[17] *Trade Union Officers* 217.
[18] Martin, R.M., *Trade Unions in Australia* (2nd ed. 1980) 68. R.R.S. Tracey refers to '[t]he new breed of professional union managers. . . seen by the members as the providers of a specialist service': 'The Legal Approach to Democratic Control of Trade Unions' (1985) 15 M.U.L.R. 177, 179.
[19] Australian union members pay about $300 million in subscriptions each year. One large union, for example, has an investment portfolio of $7 million: see Chanticleer, 'The Left Plays it Safe in the Capital Markets' *Australian Financial Review*, 13 June, 1985. See also Wielgosz, J., 'Financial Resources of Australian Trade Unions' (1974) 16 *Journal of Industrial Relations* 314.
[20] Section 229.

indicate the way in which the law is developing. Under Part VIIIAA, trade union administrators must adhere to high standards of financial reporting.[21] Thus, copies of the auditor's report and the audited accounts must be freely available to members[22] and if a member of the committee of management makes misleading comments to members about any matter dealt with in such a report or accounts, he is liable to criminal prosecution.[23]

Part VIII of the Act deals with the obligations of registered organizations. But it makes little provision for the duties of officials. It certainly does not prescribe the standards one finds applied to company directors and officers by Pt V Div. 2 of the Companies Act 1981 (Cth), an observation made by the *Costigan Royal Commission*.[24] One exception to this is s.132B of the Act which disqualifies a person who has been convicted of a 'prescribed offence' within the previous five years from holding office in an organization. Section 132B closely parallels s.227 of the Companies Act.

Section 140 will be a source of limits on officials' activities in some circumstances. Section 140(1)(c) provides that a union's rules 'shall not impose upon applicants for membership or members, of the organization, conditions, obligations or restrictions which, having regard to the objects of this Act and the purposes of the registration of organizations under this Act, are oppressive, unreasonable or unjust'. There are numerous reported cases dealing with this section and its precedessor.[25] For example, in *Morgan v. Australian Hairdressers, Wigmakers, and Hair Workers Employees Federation*[26] a rule which empowered the union secretary to interfere unduly with members' employment opportunities was held to contravene s.140(I)(c). In *Re Amalgamated Engineering Union*,[27] Kirby C.J. said that a provision in the rules which created a separate fund, details of which were confined only to the officials of the union, was 'repugnant' to s.140(1)(c).

The salient feature of s.140(1)(c), for the purposes of this analysis, is that it lacks a positive requirement for rules: it is couched in the negative, and merely states what type of rule is liable to be struck down. For positive requirements one must turn to Regulation 115 of the Act's regulations. Regulation 115(1)(d)(ii) provides:

> [T]he following conditions are prescribed conditions to be complied with by an association applying for registration, namely: — the affairs of the association shall be regulated by rules . . . providing, in relation to the association, for . . . the powers and duties of the . . . officers.

[21] Also see Part VI of the *Conciliation and Arbitration Regulations*. For a discussion of Part VIIIAA, see Riches, A., 'Union Accounts — A Three Ringed Circus' (1984) 58 *Australian Law Journal* 96.
[22] Section 158AG.
[23] Section 158AG(6).
[24] *Final Report*, Vol. III, 125. A reference to the Companies Act in this article includes a reference to the correponding Companies Code of each state.
[25] See Mills, C.P. & Sorrell, G.H., *Federal Industrial Laws* (5th ed. 1975) 334.
[26] (1932) 31 C.A.R. 401 (on the corresponding former provision); and see *Clark v. Printing and Kindred Industries Union* (1977) 30 F.L.R. 39.
[27] (1961) 98 C.A.R. 283, 288.

The limitation of reg. 115 is that it fails to specify the *nature* or *extent* of a duty. Thus, while the duties of an official must be specified in the rules, such rules need not impose high standards.

The key provision relating to the official's duties is s.141, which provides:

141(1) A member of an organization may apply to the Court for an order under this section in respect of the organization.

141(1G) An order made under this section may give directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules.

Section 141 is given more detailed treatment below. At this stage, it is noted that the courts have used s.141 as a vehicle for developing a substantial body of law on the official's duties. In addition, Part IX of the Act considerably restricts the activities of the officials and others in election contexts. Part IX's scope is wide, based around the notion of 'irregularity'. It will be seen that principles developed by the courts in s.141 cases form part of the body of law of Part IX.

## III THE OFFICIAL AS FIDUCIARY

The foregoing discussion raises the question of whether the general law will apply a superimposing duty on officials in addition to those specified in union rules. Although a consistent principle is not readily extracted from the reported cases, it is submitted that the above question can be answered in the affirmative. In *Stephenson v. Dowdell*[28] J.B. Sweeney J. said:

> It has long been held by this Court and its predecessors that an officer of an organisation owes a fiduciary duty to its members.

This was held to be so even in the absence of an express rule to that effect. His Honour added:

> I am quite satisfied that such an officer does have a fiduciary duty owed to his members, one aspect of which is that he must not use the resources of the organisation to advantage certain members and to disadvantage others in an election. He is of course quite entitled to electioneer. The prohibition is against the use of resources of the Association to the advantages of some and to the disadvantages of other candidates.[29]

In discussing the fiduciary duty, J.B. Sweeney J. referred to *Carling v. Platt.*[30] In that case the union provided some cars for its officers and the cars were serviced and repaired at the expense of the organization at a garage which was secretly part-owned by the respondent official. It was claimed that the respondent was under a liability to pay to the union any profit he made from the union's transactions with the garage in question. The claimant submitted that the official 'as Secretary-Treasurer of the Branch, stands in a fiduciary relationship to that body and accordingly is not entitled to claim on his own

[28] [1980] I.A.S. Current Review 303.
[29] *Ibid.* On J.B. Sweeney J.'s view that the duty is owed to *members,* rather than the *union,* see Part VIII, below.
[30] (1954) 80 C.A.R. 283.

any secret profit made out of his position . . . [t]here is ample authority for the general proposition that a person standing in a fiduciary relationship owes, as a debt due to his principal, any secret profit'.[31] Counsel for the official argued that the latter stood in no fiduciary relationship to the branch; rather, it was argued, the official was a servant upon whom the degree of trust and responsibility necessary to create that relationship was not imposed. This proposition was rejected by the Court. Dunphy J. said:

> This proposition . . . is so untenable that it may be rather summarily dismissed. The answer is, that at all times and in all relevant circumstances [the official] was far more than an ordinary servant or agent. He was a member of the inner council of his organisation. He occupied the highest position of trust . . . [T]herefore he was in a position similar to that occupied by a director of a company and beyond all doubt stood in the necessary relationship. In any case, a servant can be placed in a fiduciary relationship if, for instance, he is put in a position of trust with respect to the control of the property of the principals. There is no doubt whatever that on a number of occasions [the official] had sole and absolute charge and control of Union property . . . the members [of the branch] trusted him and him alone to deal with such property to the best advantage of the organisation. They certainly never intended that any such dealing should result in pecuniary advantage to the [official] . . .[32]

McIntyre J. expressed a similar view on the fiduciary duty,[33] and relied on the authority of *Cook v. Deeks.*[34]

Establishing an official's fiduciary obligations will require an examination of the precise position held by the official — is he merely an employee or is he an 'officer'? If an official is merely an employee, it will be more difficult to argue that he owes fiduciary duties in many situations. Finn refers to 'the contract lawyer's stronghold of employment law'[35] and cites the decision of the Court of Appeal in *Vokes v. Heather,* where Lord Greene said:

> [I]t is not the case, as I see it, in these cases of master and servant, that some equitable principle is introduced. The introduction of equitable principles, apart from contract, into relationships of this kind is a thing which I think should be, in general, repudiated.[36]

In response to this, it should be noted that the fact that the official is a senior employee rather than an officer will not necessarily preclude the arising of fiduciary obligations.[37] Nonetheless, the scope of the responsibilities of union officials is crucial in defining their fiduciary obligations.[38]

In this respect, the case law regarding the meaning of 'officer' and possibly 'office' (which is partly defined in the Act) is instructive. Thus, in *Wool Selling*

[31] (1954) 80 C.A.R. 283, 292. The submission that there was a debt owed to the principal, as opposed to a constructive trust, is attributable to *Lister & Co. v. Stubbs* (1890) 45 Ch.D.1 But Sir Anthony Mason has stated that '[t]here is force in the view that [*Lister*] . . . ought no longer be followed': 'Themes and Prospects', in Finn, P.D., *Essays in Equity* (1985) 246.

[32] *Ibid.* 292-293.

[33] *Ibid.* 306. Moreover McIntyre J. held that on the facts there had been no profit.

[34] [1916] 1 A.C. 554.

[35] Finn, P.D., *Fiduciary Obligations* (1977) 237.

[36] (1945) 62 R.P.C. 135, 142.

[37] 'Fiduciary relations are of many different types, they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations': *Re Coomber; Coomber v. Coomber* [1911] 1 Ch. 723, 728 per Fletcher Moulton L.J. And *cf.* note 32, *supra*, and accompanying text. In this respect, not too much should be made of Lord Greene's comment; not only does it lack much support in the cases, but it is not entirely consistent with Lord Greene's own comments in *Saltman Engineering Co. v. Campbell Engineering Co.* (1948) 65 R.P.C. 203.

[38] See n. 32, *supra* and accompanying text.

*Brokers Officers Association v. Employers Association of Wool Selling Brokers* Kelly C.J. said:

> 'Officer' cannot, therefore, be used as a synonym for 'employee'. For the function of representation or agency, with usually the authority to make decisions dealing with outsiders without reference of the transaction to superior direction, is the element in the position of an 'officer' which, in whatever varying degrees, distinguishes it from that of a mere 'employee'.[39]

In *Re Elections for Officers in Amalgamated Engineering Union,* Spicer C.J. said that 'there is no reason why the position of organizer should not constitute an office and the question as to whether in any particular organization it does depend on the provisions to be found in that regard in the rules of that organization'.[40] Dunphy J. said that an 'office' was a permanent substantive position which has an existence independent of the person who filled it, 'which went on and was filled in succession by successive holders'[41], a view recently affirmed by the House of Lords.[42] The factors which determine whether an official is an officer — especially those outlined by Kelly C.J. above — will undoubtedly influence a finding in favour of the existence of fiduciary obligations.

It is not intended to analyse the vast body of law on fiduciary obligations in this paper.[43] However, judicial developments (discussed in the next chapter) have reached a stage where it can be said with some certainty that union officials owe fiduciary obligations identical to those owed by directors to companies. Undoubtedly, the pillars of fiduciary law — the duty of good faith, the conflict of interest rules and duty of confidence — apply to officials.[44]

One unclear area of fiduciary law of current interest is the position of a senior official who sits on the board of a company. The debate surrounding proposals for officials to sit on company boards has almost exclusively focussed on the conflict of interest problem from the angle of the company,[45] rather than that of the union.[46] Yet an official risks breaching his fiduciary

[39] (1950) 67 C.A.R. 224, 227. It has recently been said that an official can be both an officer and an employee: *Roughan v. Coulson* (1982) 3 I.R. 393; *Ransley v. Australian Public Service Association* (1985) 12 I.R. 55, 65. However it would appear that such circumstances are likely to be exceptional, where the official performs two separate functions.

[40] (1962) 3 F.L.R. 63, 67-68. However organisers are nornally 'paid servants of the organisation whose function is to carry out the policy of the union as laid down within the union rules by the controlling bodies in it, and to obey the instructions of superior officers': *Cameron v. A.W.U.* (1959) 2 F.L.R. 45, 98.

[41] *Ibid.* 70.

[42] *Edwards (Inspector of Taxes) v. Clinch* [1982] A.C. 845.

[43] See the exhaustive study of Finn, *op cit.* n. 35, *supra.*

[44] The case law and literature on directors' fiduciary duties is abundant. Perhaps the best starting point remains Sealey, L.S., 'The Director as Trustee' [1967] *Cambridge Law Journal* 83. See also n. 5, *supra* and texts there cited, and *ibid.*

[45] See Sadler, R.J., 'Employee Representatives on Boards of Directors: Limiting Directors' Fiduciary Duties' (1982) 24 *Journal of Industrial Relations* 282.

[46] *Cf.* Note, 'Serving Two Masters: Union Representation on Corporate Boards of Directors' (1981) 81 *Columbia Law Review* 639. American legal commentators on this issue give just as much attention to the fiduciary duty of the union official to his union as they do to the official's duty to the company.

duty not only to the company, but also to the union, because 'an agent cannot lawfully place himself in a position in which he owes a duty to another which is inconsistent with his duty to his principal'.[47] If the union explicitly authorizes the official to sit on the company board — as will invariably be the case — a court is most unlikely to find a breach of duty. But Finn argues that 'even if consents are obtained, they will not absolve the fiduciary from liability to one master if he cannot properly discharge his duties owed to the other'.[48] It remains to be seen how Australian law will accommodate union representation on company boards, though it appears unlikely that the Courts will apply Equity's rigour to prevent it, at least as far as the official's duties to the union are concerned.[49]

## IV THE OFFICIAL AS DONEE OF FIDUCIARY POWER

At this point, it is instructive to note that the term 'fiduciary', as used by the courts, has two usages. Finn, in his seminal work on fiduciary law, succintly explains this:

> Turning to the courts' usage of the term 'fiduciary', one initial line of demarcation clearly presents itself. In one usage, the term is employed to describe powers which are given to one person to be exercised for the benefit of another. The Judicial Committee, for example, has recently described a board of directors' power to issue shares as being a 'fiduciary power'. This usage seems to be intended to imply that certain rules of Equity regulate the manner in which the donee deals with, and exercises, such a power. In a second usage, the term describes in a very general way, persons who are acting for, or on behalf of, or in the interest of, or with the confidence of, another. An agent, for example, is often referred to as a fiduciary. This usage implies that certain standards of loyalty and fidelity will be expected of that person.[50]

*Carling v. Platt,* discussed above,[51] exemplifies the second usage as described by Finn. *Stephenson v. Dowdell*[52] falls into the first category (though J.B. Sweeney J. may have failed to grasp this distinction by his reliance on *Carling v. Platt*). *Stephenson v. Dowdell* itself falls into a sub-category of the first usage. This sub-category is unique to trade unions and can be described as encompassing the fiduciary who has some control over the elections in relation to the position which he holds. The principles enunciated by the courts in the election context will be discussed below, though it might be noted that cases dealing with elections have constituted a major vehicle for the growth of the body of fiduciary law that has evolved around union officials.

The leading authority on the official's fiduciary obligations in relation to the exercise of powers is the joint judgment of Evatt and Northrop JJ. in *Allen v. Townsend.*[53] The case concerned the powers of the Victorian branch of a federal union pursuant to the union's rules. The applicant argued that the

[47] *North & South Trust Co. v. Berkely* [1971] 1 W.L.R. 470, 484-5 *per* Donaldson J.
[48] *Fiduciary Obligations,* 252.
[49] *Ibid.*
[50] *Op. cit.* n. 35, *supra* 2. The decision of the Judicial Committee referred to is *Howard Smith Ltd. v. Ampol Petroleum Ltd.* [1974] A.C. 821.
[51] n. 30, *supra,* and accompanying text.
[52] n. 28, *supra,* and accompanying text.
[53] (1977) 31 F.L.R. 431.

members of the Victorian Committee of Management had acted in breach of the rules of the union, and sought an order pursuant to s.141 of the Act. Evatt and Northrop JJ. said:

> [T]he State executive is required by law to exercise the powers conferred upon it bona fide for the purposes for which they are conferred . . . members of the committee of management of an organization, a branch of an organization or a sub-branch of a branch of an organization owe a fiduciary duty to members of the organization, to members within the branch and to members within the sub-branch as the case may be.[54]

Their Honours concluded that, on the facts of the case, the committee of management passed a resolution which 'was not passed bona fide for the purposes of managing the Victorian branch nor for any of the purposes enumerated in [the rules]'.[55] In expressing the governing principles in this context, their Honours borrowed heavily from company law principles:

> Members of committees of management are to be compared with directors of incorporated bodies being companies incorporated under legislation such as the Companies Acts of the States of Australia. The courts have developed principles of law of general application regulating the manner in which directors of companies are required to exercise powers conferred upon them. Subject to necessary adaptations, similar principles of law should apply to regulate the exercise of powers upon members of a committee of management of an organization.[56]

Their Honours applied the following statement by Dixon J. in *Mills v. Mills* to union officials:

> Directors of a company are fiduciary agents, and a power conferred upon them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power.[57]

Evatt and Northrop JJ. also affirmed the relevance to trade unions of the decision of the Privy Council in *Howard Smith v. Ampol Petroleum.*[58] The principles enunciated by the Privy Council, and applied by Evatt and Northrop JJ, are as follows:[59]

1. The absence of any element of self-interest is not enough to make an exercise of a power valid. Self interest is the commonest, but not the only, instance of improper motive.
2. In order to determine the purpose for which a power has been exercised, a wider investigation may be required. Relevant factors are the state of mind of those who acted, their motives, their intention and surrounding circumstances.
3. Phrases such as 'bona fide in the interests of the company as a whole' or 'for some corporate purpose', to the extent that they add to the general principle applicable to fiduciary powers, 'at best serve, negatively, to exclude from the area of validity cases where the directors are . . . improperly favouring one section of the [members] against another'.

[54] *Ibid.* 483.
[55] *Ibid.* 488.
[56] *Ibid.* 483-484.
[57] *Ibid.* 485, referring to *Mills v. Mills* (1938) 60 C.L.R. 150, 185.
[58] [1974] A.C. 821.
[59] (1977) 31 F.L.R. 431, 486-488.

4. '[I]t is necessary to start with a consideration of the power whose exercise is in question . . . . Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls'.

The principles enunciated by Northrop and Evatt JJ. were recently affirmed unanimously by the Full Federal Court in *Scott v. Jess.*[60] However, the decision in *Allen v. Townsend* proceeded on the assumption that a breach of fiduciary duty necessarily constitutes a failure to comply with the rules of the union. Such an assumption is necessary for an action pursuant to s.141 of the Act to be available. But it is, with respect, misconceived, and it was not until the judgment of Beaumont J. in *Scott v. Jess* (at first instance)[61] that this misconception was implicitly recognised.

## V. THE OFFICIAL'S DUTIES UNDER IMPLIED RULES

Reconciling a breach of a fiduciary duty with a breach of the rules is perhaps the most difficult problem that arises in analysing the official's duties. The issue is one of great practical importance, for the use by a complainant of s.141 of the Act — the substantial benefits of which are discussed below — will only be available if a breach of the rules has occurred. Historically, the courts have not been troubled by analytical difficulties, and the assumption has usually been made that a breach of fiduciary duty constitutes a breach of the rules. Thus, in *Stephenson v. Dowdell,* J.B. Sweeney J. observed that an official's fiduciary duty 'has sometimes been referred to as an implied rule of the organization'.[62] Yet it is submitted that, contrary to the traditional judicial assumption, not all fiduciary duties will constitute implied rules of the union — a point that was recently affirmed by Beaumont J. in *Jess v. Scott.*[63]

*Jess v. Scott* provides the clearest statement by a Court on the extent to which equitable duties constitute implied rules of a registered organization under the Act. After referring to authorities that affirm the principle that certain terms can 'be implied into union rules in proper circumstances and

[60] (1984) 3 F.C.R. 263. See also *Tanner v. Maynes* (1985) 63 A.L.R. 197.
[61] *Sub. nom. Jess v. Scott* (1984) 1 F.C.R. 401.
[62] [1980] I.A.S. Current Review 303.
[63] (1984) 1 F.C.R. 401.

such implied terms can be the subject of directions pursuant to s.141',[64] Beaumont J. said:

> [A] remedy under s.141 is not available where the source of the right sought to be enforced is the general law as distinct from the operation of the rules on their true construction . . . s.141 cannot be invoked in aid of an equity which exists independently of the operation of the rules on their true construction.[65]

Beaumont J. added that on the facts of the particular case, 'these rules, as a matter of construction, should be construed to mean that there is at least implicit in them the usual obligation that all such powers shall be exercised bona fide for the benefit and in the interests of union members as a whole'.[66] Such an obligation arises from the true construction of the rules, not from 'any independent equity or any other right which may exist under the general law'.[67]

It is important to precisely identify, in any particular situation, the nature of the official's duty because the consequences of a breach of a purely fiduciary duty and of an implied rule may differ. Firstly, as *Jess v. Scott* indicates, s.141 is not available where a breach of a purely fiduciary duty is alleged. Secondly, the nature of the remedy may differ. The Court is given a wide discretion under s.141[68], while in an action for a breach of a purely fiduciary duty damages would not normally be available.[69] In addition the defences open to an accused official will differ.[70] In particular, the defence that the claimant has excessively delayed commencing action may be governed by different principles depending on whether there is an action pursuant to s141[71] or an action for a breach of a purely fiduciary duty.[72] A claimant who complains of a breach of a purely fiduciary duty will face not only considerable problems of standing,[73] but in addition, such a member will not have the benefit of ss.141A of the Act, which provide that in certain circumstances, the Commonwealth will pay the legal costs of the claimant.

Beaumont J.'s statement of the law was recently affirmed by the Full Federal Court in *Porter v. Dugmore.*[74] On appeal to the Full Federal Court in *Scott*

[64] *Ibid.* 405. Beaumont J. cited *Gordon v. Carroll* (1975) 27 F.L.R. 129; *Valentine v. Butcher* (1981) 51 F.L.R. 127; *Re A.P.T.U.; Ex parte Wilson* (1979) 28 A.L.R. 330; *Kanan v. Hawkins* (1979) 8 I.R. 371.
[65] 1 F.C.R., 406.
[66] *Ibid.*
[67] *Ibid.* Beaumont J. found an analogy in the case of an abuse of powers conferred on directors by the articles of association of companies, of which the governing principles are found in *Ngurli Ltd. v. McCann* (1953) 90 C.L.R. 425, 438.
[68] See Boulton, A.J., 'The Legal Enforcement of Union Rules: Commonwealth and New South Wales' (1977) 51 *Australian Law Journal* 823, 826-829 and cases there cited.
[69] Meagher, R.P., Gummow, W. and Lehane, J., *Equity: Doctrines and Remedies* (2nd ed. 1984) 617.
[70] *Cf. Carling v. Platt* (1954) 80 C.A.R. 283, 287.
[71] See *Krantz v. Maynes* (1967) 10 F.L.R. 134, 149; *Mayell v. Waters* (1967) 11 F.L.R. 316, 322-323.
[72] Meagher et al., *op. cit.* Ch.36.
[73] See Part VIII, *infra.*
[74] (1984) 3 F.C.R. 396, 408.

*v. Jess,*[75] Gray J. expanded on Beaumont J.'s analysis. In particular, Gray J. grappled with *dicta* of the Industrial Court in *Gordon v. Carroll.*[76] In that case a branch of a union paid certain sums to two officials, such payments being described as 'unusual leave entitlements'. A claimant submitted that the officials were not entitled to the sums and sought orders pursuant to s.141 of the Act in relation to the conduct of members of the Finance and Executives Committees of the branch in question. The respondents argued that there was no specific rule to which the court could direct its order. The Industrial Court (Smithers, Woodward and St. John JJ.) said:

> [As] in the case of a commercial contract, the rules of a union could be supplemented by implied terms . . . .
> Nowhere in the decided cases is there any suggestion to the contrary of the view that the rules, at least for purposes of construction, whatever the position may be as to enforceability, should be regarded as a contract between members. In *Hay v. Australian Workers Union* (1944) 53 C.A.R. 108, O'Mara J. in an application under s.58E of the Act, . . . as it was in 1944, examined the rules of a respondent organization to discover whether there was anything which "either expressly or by implication prohibits or invalidates the action which was taken with respect to the nominations." This approach has not been dissented from in any decision of this court and there have been many cases, for example, in which requirements of natural justice have been implied into rules . . . . However, it does not appear that the approach taken by O'Mara J, or any similar approach, has been the subject of attention by the High Court. Nevertheless, we are clearly of the view that implied terms can arise in proper circumstances and, if they do, such implied terms can be the subject of directions pursuant to s.141.
> In considering whether terms should be implied we follow the test laid down in *Heimann v. Commonwealth* (1983) 38 S.R. (N.S.W.) 691.[77]

*Gordon v. Carroll* represents the high water mark of an expanded judicial notion of implied rules. But it has been subject to considerable criticism. For one thing the decision was premised on views expreessed by Dixon J. in *Barrett's case*[78] which was not in any way supported by the other High Court judges in that case.[79] Dixon J.'s views are subject to further discussion below.

Furthermore, in *Scott v. Jess,* Gray J. observed:

> The idea that implied terms can be found in the rules of organizations, and those implied terms are capable of enforcement pursuant to s.141 of the Act, seems to have surfaced in *Gordon v. Carroll* (1975) 27 F.L.R. 129, especially at 155-156. In *Dugmore v. Porter* (1982) I.R. 418, at 421-422, Northrop J expressed doubts whether *Gordon v. Carroll* was authority for the proposition that the Court could give directions for the observance of an implied rule. On appeal, in *Porter v. Dugmore* (1984) 3 F.C.R. 396, Smithers J. (with whom Sheppard J. concurred) expressed the view that this doubt is well founded. I agree with that view.[80]

For Smithers J. to have expressed such a doubt in *Porter v. Dugmore* is of crucial importance, given that his Honour constituted part of the Court in *Gordon v. Carroll.* However, a close reading of Smithers J.'s judgment in *Porter v. Dugmore* reveals that his Honour's doubt appears to have related

[75] (1984) 3 F.C.R. 263.
[76] (1975) 27 F.L.R. 129.
[77] *Ibid.* 155-156.
[78] *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 C.L.R. 141.
[79] Indeed, Dixon J.'s views, on this point, are diametrically opposed to Latham C.J.'s; *cf.* Creighton, W.B. et al., *Labour Law: Materials and Commentary* (1983) 671.
[80] (1984) 3 F.C.R. 263, 283-284.

to a narrower point and that his Honour gave some approval to *Gordon.*[81]. If this is the case, Smithers J.'s support for *Gordon* does not sit easily with his Honour's support for Beaumont J.'s analysis in *Jess v. Scott.*[82]

In any event, it is respectfully submitted that *Gordon* should no longer be followed. The reasoning of Gray J. in *Scott v. Jess*[83] is to be preferred. His Honour referred to the principles governing the existence of implied contractual terms enuniated by the Privy Council in *B.P.Refinery Pty Ltd v. Hastings Shire Council*[84] and said:

> The application of these criteria to the rules of an organisation would not be free from difficulty. In particular, the concept of 'business efficay' is not easily transported from the commercial area into the rules of an organisation. In addition, the difficulty of finding something so obvious that it goes without saying, and is not already written in the rules, whether as a matter required by the Act or the regulations or otherwise, is difficult. A further problem which may arise is that the basis of the rules of an organization may not purely contractual. True it is that, before registration as an organisation is effected, there must be in existence an association complying with the prescribed conditions and the other provisions of the Act. The rules of such an association will bind its members as a contract, notionally made by each member with each of the others. Once registration takes effect however, the rules of an organization may be regarded as deriving some, at least, of their force and effect from the Act. The possibility was adverted to by Latham C.J. in *R v. Commonwealth Court of Councilation and Arbitration; Ex parte Barrett* (1945) 70 C.L.R. 141, 151.[85]

In the judgment of Latham C.J. referred to by Gray J., the Chief Justice said:

> The rules, as registered, are what are binding. It is not necessary or relevant in order to discover what the rules are to make any inquiry into any agreement by any of the members. In my opinion, the rules as rules of the organization derive their force from the Act.[86]

The problem arising in cases such as *Gordon v. Carroll* is that unless the Court accepts the principle of 'implied rules', wrongs to the union might not be remedied. This appears to have been the case in *McLure v. Mitchell*[87], a decision not followed in *Gordon v. Carroll*[88]. Thus it has been suggested that 'if the industrial Court in *Gordon v. Carroll* had found that it had no power to order that respondents to repay the monies involved, then the concept of organization officials being accountable to the members for the use of organisation funds, would be set at nought'.[89] Strictly speaking, this might be putting the position too forcefully; presumably, in *Gordon*, the union would have had a restitutionary remedy available to it against the official in question. It is true, nevertheless, that in practice, if the official was part of the controlling group of the union, no action might result because the union, not a member,

[81] See (1984) 3 F.C.R. 396, 407. This interpretation of Smithers J.'s judgment was rejected in *Troja v. Bird* (Fed. Court, 20 December, 1985, unreported) by Gray J. who affirmed his statement in *Scott v. Jess.*
[82] See notes 65 and 74, *supra,* and companying text.
[83] (1984) 3 F.C.R. 263, 283; affirmed in *Troja v. Bird* (Fed. Court, 20 December, 1985, unreported).
[84] (1977) 52 A.L.J.R. 20, 26.
[85] (1984) 3 F.C.R. 263, 283.
[86] (1945) 70 C.L.R. 141, 151.
[87] (1974) 24 F.L.R. 115. See also *Austin v. Deloraine* (1959) 1 F.L.R. 297.
[88] (1975) 27 F.L.R. 129, 154.
[89] CCH, *Australian Labour Law Reporter,* para. 7-752.

would be the proper plaintiff in such a case where s.141 is not available.[90] The Court was no doubt aware of this. However, it is submitted that this cannot justify extending s.141 beyond its proper limits. What is required is statutory amendment.[91]

In *Scott v. Jess,* Gray J. ventured beyond merely questioning *Gordon v. Carroll.* He stated:

> The difficulty of implying terms into the rules of an organisation does not, however, mean that such rules are to be construed as if no implications whatever arises from them. In many respects, there are to be derived from the express terms of the rules, the terms of the Act and the Regulations, and the nature, function and purpose of the organisation concerned, implications which limit what might otherwise be the extent of the express terms of the rules. The most obvious example is that powers given by the rules of organisations to inflict penalties on members are construed as being subject to the implication that such powers will not be exercised without adherence to the principles of natural justice. The implication of the requirements of natural justice is so well established that it is unnecessary to cite authority. *Porter v. Dugmore* was itself a case in which both Northrop J. and the Full Court held that there existed an implied limitation on the powers of the governing body of an organisation, preventing the institution of a system requiring members of an organisation to possess "OK" cards distributed by the organisation, in order that those members could obtain employment. In *Jansen v. Slater* (1975) 24 F.L.R. 279, the Australian Industrial Court held that a power in the rules of an organisation which enabled the organisation to make payments to former full time officials was impliedly limited to payments which did not constitute mere gifts. No doubt, other examples of implied limitations on the powers expressed in the rules of organisations could be found.[92]

Gray J. observed that in some cases, it is not possible to find a specific provision of the rules which, it is alleged, is not being complied with. In such cases, the courts may order or direct the performance and observance of the rules 'as a whole, the impugned act being regarded as a departure from the overall scheme of such rules'.[93]

The most common cases where this is done are those dealing with disputed elections. These are discussed below. As a matter of strict legal analysis, they represent an extension of the notion of 'implied rules' which may not be justified. They pre-date *Gordon v. Carroll* by several decades. In *Scott v. Jess,* Gray J. appears to express some doubts about them, although he concluded that 'the jurisdiction of the court in such cases seems to be so well established that it is too late to attempt to overturn it'.[94]

## VI. IMPLIED DUTIES OF OFFICIALS DURING ELECTIONS AND PLEBISCITES

The breach of an official's implied duties pursuant to the rules of a union has been relied on commonly in cases of disputed union elections or plebiscites.

[90] See Part VIII, *infra.*
[91] See Part X, *infra.*
[92] (1984) 3 F.C.R. 263, 284. For analyses of the implication of principles of natural justice into the rules, see Tracey, R.R.S., 'Section 141 of the Conciliation and Arbitration Act and Natural Justice' (1975) 18 *Journal of Industrial Relations* 58; 'The Conduct of Union Disciplinary Hearings', (1982) 24 *Journal of Industrial Relations* 204.
[93] (1984) 3 F.C.R. 263, 284. And see *Lennon v. Davenport* (1984) 4 F.C.R. 476, 479-480.
[94] *Ibid.*

In *Scott v. Jess,* Evatt and Northrop JJ., after discussing the principle in *Allen v. Townsend,*[95] stated:

> Over the years, the [Federal Court and its predecessors] have applied another general principle. The general principle is illustrated by *Short v. Wellings* (1951) 72 C.A.R. 84, although in reality that case is based on the principles enunciated in *Allen v. Townsend.*[96]

What characterises cases such as *Short v. Wellings* is a view by the courts that policy dictates that certain behaviour by officials be prohibited. As Gray J. pointed out in *Scott v. Jess,* '[i]n a real sense, the court is ordering or directing the performance or observance of the rules of the organization concerned as a whole, the impugned act being regarded as a departure from the overall scheme of such rules'.[97] However, as pointed out in the previous chapter, the early decisions have tended not to clearly analyse the extent to which implied obligations constitute rules of the organization. Irrespective of the looseness of judicial analysis, it is too late, as Gray J. has recently noted, to reverse the broad notion of implied rules adopted in decisions dealing with elections.[98]

The leading authority on duties of the officials during elections and plebiscites is *Short v. Wellings.*[99] In that case, officials used resources and funds of the trade union for the support of particular candidates. The court held that even though there were no specific rules which disallowed this, the Court would intervene pursuant to s.141. While no mention of fiduciary duty was made[1] the Court emphasised the policy reasons for judicial intervention:

> The funds and resources of the organisation belong as much to [the officials] and their supporters as to their opponents and theirs. It cannot be denied that the provisions of the Act and the regulations are directed to the end of having the management and control of the affairs and transactions of an organisation reposed in a democratically and freely elected body of executive and administrative officers.[2]

The Court said that to allow the alleged behaviour 'could result in a complete tyranny and a permanent denial of the democratic nature of the organization which the Act and the Regulations are calculated to ensure'.[3]

More recently, in *Lyons v. Deegan*[4] it was held that in the absence of an express rule against the use of the resources and funds of the union for the support of particular candidates (or particular views in the case of plebiscites), the court would find an implied rule to that effect. In the case of the returning officer, he 'should consider himself as an official at arms length from those members . . . having any interest in the vote going one way or the other'.[5]

[95] (1977) 31 F.L.R. 431.
[96] (1984) 3 F.C.R. 263, 270; *Tanner v. Maynes* (1985) 63 A.L.R. 179, 217 *per* Keely J.
[97] *Ibid.* 284.
[98] See n. 94 *supra*, and accompanying text.
[99] (1951) 72 C.A.R. 84.
[1] *Cf. Stephenson v. Dowdell* (1980) I.A.S. Curr. Rev. 303.
[2] (1951) 72 C.A.R. 84, 87.
[3] *Ibid.* 88. And see *Egan v. Harradine* (1975) 25 F.L.R. 336, 345.
[4] (1978) 35 F.L.R. 430, 444.
[5] *Ibid.* 443.

*Re Elections For Officers in Electrical Trades Union*[6] stands for a similar proposition, though the case was not referred to in *Lyons v. Deegan.* Joske J. stated that a union official 'should realise that even though his own office may be in jeopardy in an election, while he remains secretary he has a duty to all members to behave fairly and impartially'. On the facts of the case the official 'failed to carry out a fiduciary duty which a secretary should regard as a most important duty cast upon him'.[7]

The principle of *Short v. Wellings,* which is of fundamental importance for union officials, has been affirmed on a number of occasions.[8] In *Holmes v. Riordan,* Dunphy J. attempted to qualify the principle, by stating that during an election, the union management may use resources of an organization to publish material adverse to a candidate in order to rebut attacks made by the candidate upon the organization or its management.[9] Such a view is inconsistent with *Short v. Wellings* and its successors, and was expressly rejected, *obiter,* in *Scott v. Jess.*[10]

In *Scott v. Jess,* Gray J. stated that the principle in *Short v. Wellings* must be viewed in the light of three other established principles. The first is that:

> [I]t is proper, and perhaps necessary, for an organization to communicate with its members about the affairs of the organization and matters which may be of interest to the members![11]

There is substantial authority for this principle![12] The second principle is that:

> [I]n the expenditure of the funds and the use of the resources of an organization, its objects and powers are to be interpreted broadly, so that any action which can fairly and reasonably be regarded as falling within those powers and objects will be valid![13]

The third is the principle in *Allen v. Townsend.*[14] Gray J. observed that the principle in *Short v. Wellings* 'will only come into operation during the actual conduct of an election, *i.e.,* at a stage when it is known with some certainty who are the candidates contesting the election'![15] But even at that stage, the first two principles outlined above will still have some operation, according to Gray J. Thus, on the facts of *Scott v. Jess,* it was permissible, notwithstanding the conduct of the elections, for the union to inform its members of issues relevant to the election, such as the attitude of the union's governing body to the Prices and Incomes Accord, to specific political parties, and to the question of outside bodies taking an interest in the results of elections within the union. On the other hand, statements published during

[6] (1961) 3 F.L.R. 86.
[7] *Ibid.* 90-91.
[8] See for example, *Scott v. Jess* (1984) 3 F.C.R. 263, 271; *Valentine v. Butcher* (1981) 51 F.L.R. 127; *Holmes v. Riordan* (1956) 86 C.A.R. 180; *Kanan v. Hawkins* (1979) 8 I.R. 371; *Tanner v. Maynes* (1985) 63 A.L.R. 197.
[9] (1956) 86 C.A.R. 180, 197.
[10] (1984) 3 F.C.R. 263, 276. *Cf. Tanner v. Maynes* (1985) 63 A.L.R. 197, 215, *per* Keeley J.
[11] *Ibid.* 286.
[12] *Ibid.* where the cases are collected.
[13] *Ibid.* 287.
[14] Pt IV, *supra.*
[15] *Ibid.* 290.

elections which denigrated members of a contesting group in the elections were not permissible, '[t]here [being] a difference between stating facts or alleged facts about a particular subject, and offering opinions which are abusive or praiseworthy about particular candidates or the groups with which they are identified'.[16]

Determining the difference will often be a difficult exercise. But a distinction must be drawn, though at times it may appear arbitrary. Similarly, Gray J.'s determination of the point in time when an election is deemed to begin, for the purposes of the principle in *Short v. Wellings,* may appear arbitrary. But again a line must be drawn. If the principle of *Short v. Wellings* is permitted to apply prior to nominations being made — that is, without any time limit, to *potential* candidates — 'members of the Union could render themselves immune from criticism in the Union's publications by giving some written notice that they intended to nominate for the offices mentioned in future years'.[17]

These principles enunciated by Gray J. have recently been affirmed by the Full Federal Court in *Tanner v. Maynes.*[18] However, in the latter case, Keely J., while agreeing with the four principles outlined by Gray J. in *Scott v. Jess,* stated that the principle in *Short v. Wellings* applied in the pre-nomination period. This view is not consistent with that of the majority in *Tanner* nor with Gray J.'s view in *Scott v. Jess.* While one can appreciate the mischief to which Keely J. is alluding, it should be noted that even though the prophylatic principle in *Short v. Wellings* will not apply in the pre-nomination period, the principle in *Allen v. Townsend*[19] will. It might be noted that in *Scott v. Jess* the applicant did not attempt to establish the absence of bona fides on the part of the officials in question.

In *Ward v. Williams*[20], Spender J. held that the prohibition in *Short v. Wellings* does not apply to conduct after an election. Thus it was permissible in that case for the union to pay the costs of officials arising from litigation in connection with an election inquiry pursuant to Part IX of the Act — at least where there had been no preferential treatment. In *Ward* some of the members of the committee of management had a personal interest in voting in favour of such a resolution. It is submitted that such a degree of possibility of conflict of interst ought to perclude such officials from voting on such resolutions.

In analysing the official's obligations during elections, some mention should be made of Part IX of the Act. It provides special procedures in relation to conducting inquiries into elections in the course of which an 'irregularity'[21]

[16] *Ibid.*
[17] *Ibid.* 291.
[18] (1985) 63 A.L.R. 197, 215, *per* Evatt and Northrop JJ.
[19] (1977) 31 F.L.R. 431.
[20] (1985) 6 F.C.R. 384.
[21] 'Irregularity' is defined in s.4 of the Act, but not exclusively. Thus, the ordinary usage meaning of the word remains relevant. See *Re Gray; Ex parte Marsh* (1985) 59 A.L.J.R. 804.

is alleged to have taken place. Where it is found that such an irregularity has taken place, and such irregularity may have affected the outcome of an election,[22] the Court has significant remedies open to it. 'Irregularity' is defined to include a breach of the rules in certain circumstances.[23] Indeed the term 'irregularity' has wide import and there need not be a breach of the rules in order for Part IX to be attracted. In this respect Part IX is 'cumulative upon and in no degree substitutional for'[24] s.141.

Because a breach of the rules — express or implied — by an official in an election context may constitute an 'irregularity', a significant part of the body of law on breach of officials' duties forms part of the law on Part IX.[25].

## VII. THE OFFICIAL'S COMMON LAW DUTY OF CARE

So far in this article mention has been made of a trade union official's fiduciary duty and duties pursuant to implied rules. Some mention should be made of the official's liability for negligence. It is extremely rare for an official to be sued or dismissed by his union or sued by union members for negligence. One reported case is the Canadian decision of *Smith v. Cardwell,* where it was held that negligence involves 'an idea quite different from the action of men who do what they do under the authority of a vote of the members and as a result of their deliberate judgment as to what is best in the interests of the union they represented'.[26] The only reported English case in which a member sued a union official for negligence is *Buckley v. N.U.G.M.W.*[27] In that case the union rules provided that the official had a duty to give legal assistance to the members on, amongst other things, members' entitlement to damages arising out of their work. The plaintiff member claimed that her claim for personal damages against her employer had become statute barred due to the wrong advice given to her by the union and the union official. The court held that the official had a duty of care to her under the common law; this was *in addition* to the union's contractual duty to her which was embodied in the rules.[28] This case is instructive for Australian officials because they are increasingly involved in advising members

[22] Section 165(4);
[23] See s.4.
[24] *R v. Spicer; Ex parte Foster* (1958) 100 C.L.R. 163, 168.
[25] For a summary of the authorities on Part IX, see *Re Adamson* (1984) 57 A.L.R. 280.
[26] [1945] 1 W.W.R. 78, 83 (S.C. of British Columbia).
[27] [1967] 3 All E.R. 767. It is noteworthy that in this case the member sued both the union itself and the official personally. *Cf. Cross v. B.I.S.K.T.A.* [1968] 1 All E.R. 250 where, in a similar factual situation, the member sued only the union.
[28] [1967] 3 All E.R. 767, 773. Kidner, *Trade Union Law* (1979) 46-47 states: 'The duties owed by the officials to members depend on the rule book and no duty will be imposed without a rule, and where a duty does exist the content of the duty is determined by the rule book. In [*Buckley*] which raised the question of the duty owed by union officials to members in relation to the provision of legal assistance, the matter was decided by reference to the content of the rules.' With respect, this analysis is incorrect for *Buckley* expressly refers to the common law duties not covered by the rules.

on such matters as long service leave and workers' compensation. There are no reported Australian decisions on this point, but the expansion of the scope of the duty of care relating to advice in recent years[29] suggests that union officials must exercise reasonable care when advising members.

## VIII. THE ENFORCEMENT OF DUTIES

There remains the problem of enforcing an official's duties where that official has the support of the majority of the members. In a situation like that in *Buckley v. N.U.G.M.W.*, it would appear that nothing would prevent the individual member taking action because a specific duty of care to an individual would exist. And if a breach by an official is deemed to have been a breach of an 'implied' rule of the union, a member may seek an order from the court under s.141 of the Act giving directions for the performance or observance of the rules.

What is the position where an official has breached any of his fiduciary or common law duties to the union, but such a duty is not found by court to be in the rules, neither expressly nor impliedly? Beaumont J.'s judgment in *Jess v. Scott* was the first to expressly contemplate such a situation.[30] In such a case, it seems that only the *union* has standing to sue. A registered union under the Act is a separate legal entity from its members.[31] This should mean that the rule in *Foss v. Harbottle*[32] applies. This is a company law rule, but it applies to other incorporated bodies, such as registered unions.[33] According to the rule, if there is a duty owed to the corporate entity, 'then the primary remedy for its enforcement is an action by that entity against those in default'.[34] Where directors or officials have broken their duties of loyalty,[35] skill or care,[36] the corporate entity is the proper plaintiff in an action against them. The individual member normally has no standing.[37] If the union official's supporters control the union, the union itself will be unlikely to take action. In this event, the wrong will not be remedied.

[29] See Fleming, J.G., *The Law of Torts* (1983) 158-162, 601-612.
[30] (1984) 1 F.C.R. 401; see also *Carling v. Platt* (1954) 80 C.A.R. 283, 287.
[31] Section 136; *Jumbunna Coal Mine N.L. v. Victorian Coal Miners Association* (1908) 6 C.L.R. 309, *Williams v. Hursey* (1959) 103 C.L.R. 30; *Allen v. Townsend* (1977) 31 F.L.R. 431, 484; *Porter v. Dugmore* (1984) 3 F.C.R. 396, 406.
[32] (1843) 2 Hare 461; 67 E.R. 189.
[33] *Cotter v. National Union of Seamen* [1929] 2 Ch. 58; *Edwards v. Halliwell* [1950] 2 All E.R. 236; *Taylor v. National Union of Mineworkers (Derbyshire Area)* [1985] B.C.L.C. 237; cf. *Stevens v. Keogh* (1946) 72 C.L.R. 1, 13.
[34] Gower L.C.B., *Modern Company Law* (1979) 641.
[35] See *Percival v. Wright* [1902] 2 Ch. 421; *cf. Coleman v. Myers* [1977] 2 N.Z.L.R. 225 (an exceptional case in which the fiduciary of the corporate entity was held to owe a fiduciary duty to the members).
[36] *Cf. Buckley v. N.U.G.M.W.*, above, where on the facts a duty of care was owed directly to the members.
[37] The exceptions to the Rule in *Foss v. Harbottle* are beyond the scope of this article. See Gower, *op cit.* 642.

However there has been some support for the view that officials owe duties to the *members,* not merely to the union. Lord Wedderburn has said:

> The wrongdoing of union officers would normally be a wrong done to the association as such and therefore within the Rule [of *Foss v. Harbottle*]. But in 1963 Lord Denning . . . declared that 'an officer of a trade union . . . is in a fiduciary position towards the members'. In company law, directors owe their duties to the *company,* so individual shareholders cannot sue for breach of a fiduciary duty by a director, because of the Rule. But Lord Denning speaks of the duty as owed to union *members.* That might give each member a right to sue for the officer's breach of his fiduciary duty which could be a matter of the highest importance.[38]

The view that fiduciary duties are owed to *members* has been echoed in Australia but it is misconceived and no authority has ever been cited to support it.[39]

In any event, the question may not be of great practical importance. Firstly, as discussed above, the scope of s.141 of the Act has been so broadened by judicial decision that the question will not arise often. Secondly, and more importantly, an individual member would have little to gain whatever the procedural nature of his cause of action. For, unlike a minority shareholder in a company, a trade union member's interest in the union will necessarily be tiny. For example, if an official makes an improper profit of $X and the member has a cause of action as an individual union member, he could only have a pro-rata interest in the recovered sum of X/Y where Y is the size of the membership. This amount would belong to the union, not to the member. If the member managed to proceed on the basis of a personal action or under one of the 'exceptions' to the rule in *Foss v. Harbottle*[40] he would have no greater interest.

Thus, the Rule 'is of little practical importance in trade union law.'[41] Where a trade union has a cause of action against an official for breach of duty and the majority of a union blocks an attempt to take action, there is little point in a minority member taking action, unless the member is idealistic or politically motivated. This is the case even where s.141 of the Act is attracted.

Finally, on the topic of enforcing duties, mention should be made of the possible dual status of federal unions. There is some suggestion that a union, after registration, retains its character as a voluntary association.[42] This might have implications for the enforcement of duties of officials. In *Barrett's case* Dixon J. said that a union member's rights under the general law are by no means co-extensive with what may be covered or obtained by a 'complaint' under ... [s.141]. Under the general law, the rules of a voluntary association

[38] *The Worker and the Law* (2nd ed. 1971) 424-425. The judgment of Lord Denning referred to is *Boulting v. A.C.T.A.T.* [1963] 2 Q.B. 606. This part of the judgment appears to misunderstand the principle in *Percival v. Wright* [1902] 2 Ch. 421.

[39] See *Stephenson v. Dowdell* [1980] 1.A.S. Curr. Rev. 303; *Allen v. Townsend* (1977) 31 F.L.R. 431, 483; Gray J. in *Scott v. Jess* (1984) 3 F.C.R. 263, 287 questioned the assumption.

[40] See Ford, *Principles of Company Law* 490.

[41] Kidner, *Trade Union Law* 50; see also Grunfield, *Modern Trade Union Law* (1966) 96.

[42] See Rawson, D.W., 'The Law and Objects of Federal Unions' (1981) 23 *Journal of Industrial Relations* 295; *Federated Ironworkers' Association of Australia v. The Commonwealth* (1951) 84 C.L.R. 265, 283.

do not always confer enforceable rights upon members'.[43] In *Gordon v. Carroll* the Industrial Court referred to Dixon J.'s statement and concluded that it 'seems clear that s.141 is designed to supplement the members' power of enforcement under the common law and therefore, if the requisite proprietary interest resided in the member, proceedings at law or in equity would be available to him after registration'.[44]

It will be difficult for a union member to show that he has a proprietary interest. Perhaps an argument can be developed around the notion of a member's 'right to work' — a right that has, in recent years, been elevated to a status equivalent to proprietary rights.[45] It is arguable that, if the 'right to work' is treated as a proprietary right,[46] a union official — negotiating, for example, the close down of a plant — has a fiduciary duty to the members to do all he can to protect their jobs (particularly in a tight labour market where loss of a job might effectively extinguish all employment possibilities). If accepted by the courts, such a principle would have major effects on an official's approaches towards bargaining. It would mean, for example, that where an employee of an unprofitable employer faces unemployment because of high wage demands of the negotiating officials, the employee would have injunctive relief open to him.

## IX THE AMERICAN APPROACH

Historically, the Australian federal legislature has played a more active role in regulating the internal affairs of trade unions than has its American counterpart.[47] However, in the specific area of the trade union official's duties, the converse has been the case. The Federal Labor-Management Reporting and Disclosure Act of 1959[48] (the 'Landrum-Griffin Act') attaches duties and liabilities on officials to a degree not known in Australia. That Act deals with the internal affairs of unions and labour relations generally, but it is its provisions relating to the official's duties that are relevant for the purposes of this article. The *Final Report of the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* has recommended that similar provisions be enacted in Australia.[49]

The background of these provisions shares some similarities with Australian trade union history. As early as 1914 an official American enquiry concluded that 'if the State recognizes any particular union by requiring the employer

[43] *R v. Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 C.L.R. 141, 164. But see n. 79 and n. 86, *supra.*
[44] (1975) 27 F.L.R. 129, 155.
[45] *Nagle v. Feilden* [1966] 2 Q.B. 633; *Buckley v. Tutty* (1971) 125 C.L.R. 353.
[46] *Cf. Clark v. Printing and Kindred Industries Union* (1976) 30 F.L.R. 39, 48, 58-59; *Porter v. Dugmore* (1984) 3 F.C.R. 396, 399, 416.
[47] De Vyver, F.T., 'Government Control of the Internal Affairs of Trade Unions — Australia and the United States' (1973) 15 *Journal of Industrial Relations* 296.
[48] Public Law 86-257, 86th congress, 1st Session.
[49] Vol. III, 158.

to recognize it, the State must necessarily guarantee the union to the extent that it must strip it of any abuses it may practise'.[50] Cox has argued that the Landrum-Griffin Act's enactment became inevitable once Congress, by enacting the Wagner Act in 1935, granted employees the right to bargain collectively and designated unions to be the exclusive representatives of employees when bargaining.[51] As in Australia, the bargaining representative has, in conjunction with the employer, the power to fix conditions of employment without an individual's consent. The Chief Justice of the U.S. Supreme Court once said: 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents'.[52] It was widely agreed that since the legislature had conferred such power upon unions, the former should ensure that such power is not abused.

The enactment of the provisions in the Landrum-Griffin Act dealing specifically with union officials was motivated by the findings of a Senate select committee's investigation of the misuse of union funds by dishonest officers, of illicit profits, violence and racketeering.[53] Such disclosures built up pressure for reform and John F. Kennedy, who was a leading Senator at the time, played a leading role in enacting the legislation. Section 501(a) provides:

> The officers, agents, shop stewards and other representatives of a labour organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labour organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or on behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and by-laws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

To be sure, union officers in the United States owed fiduciary duties before the advent of this legislation. Violations were, and indeed still are, redressible in state courts. But because the duty was rarely enforced,[54] the legislature gave it a federal statutory base. Section 501(b) is crucial because it authorizes a member to bring a suit in the federal courts in the nature of a minority shareholder's suit wherever his union refuses to sue an officer or employee alleged to have breached his duty.

[50] *Report of the U.S. Commission on Industrial Relations,* 1915, 374, cited in Cox, A., 'Internal Affairs of Labor Unions Under the Labour Reform Act of 1959' (1959) 58 *Michigan Law Review* 819.
[51] Cox, *ibid.*
[52] *Steele v. Louisville & N.R. Co.* (1944) 323 U.S. 192, 202.
[53] *Senate Select Committee on Improper Activities in the Labour or Management Field (the McClellan Committee), Final Report,* Sen. Rep. No.1139, 86th Cong., 2nd Sess., 1960.
[54] Cox has found only two such reported cases prior to the enactment of s.501: *op. cit.* n. 137, 827.

The precise extent to which s.501 regulates the duties of officials has been subject to some debate. One school of thought holds that the section imposes narrow duties relating solely to the mishandling of money or property.[55] This approach is premised on the view that excessive judicial intervention in the internal affairs of unions is undesirable. An alternative and more widely accepted school of thought takes a more expansive interpretation of the section.[56] Thus, in *Johnson v. Nelson* the Court of Appeals said that 's.501 imposes fiduciary responsibility in its broadest application and is not confined in its scope to union officials only in their handling of money and property affairs'.[57] The Court quoted from a National Labor Relations Board publication entitled 'Legislative History of the LMRDA of 1959' which said that 'the section extends the fiduciary principle to all the activities of union officials'.[58] In spite of this interpretation it has been noted that 'even broadly interpreted, s.501 does not require the courts to step in and run the union; it directs them only to perform their traditional roles of protecting democratic rights, ferreting out wrong-doing, enforcing ethical standards'.[59]

It is noteworthy that s.501 may apply even where there is no bad faith involved. Cox has argued that the section draws heavily from existing principles of fiduciary duty and that the legislature clearly intended union officials to be subject to the duties of care and prudence normally required by trustees and agents.[60] It thus seems that lack of skill in the management of funds will not necessarily exonerate union officials from acts of carelessness.

It has been noted that, despite the breadth of the concept of fiduciary duty, judicial extension of s.501 has taken place slowly.[61] But while there remain serious problems of corruption involving union officials in the United States,[62] s.501 appears to have had a practical effect on the enforcement of union officials' duties — the increase in the number of successful actions testifies to this.[63]

Whether s.501, Landrum-Griffin Act provides the appropriate model for Australian reform will no doubt remain open to debate. The *Royal Commission into the Painters and Dockers* has recommended the enactment of similar legislation to s.501, though it left open the precise wording of such legislation.[64] It is interesting to note that in comparing the Landrum-Griffin

[55] *Gurton v. Arons* 339 F. 2d. 371 (1964) (2nd Circuit).
[56] In all jurisdictions except the Second Circuit: see Note, 'Serving Two Masters', n. 46, *supra* 645-646.
[57] 325 F.2d. 646 at 651 (1963) (8th Circuit).
[58] *Ibid.* 650.
[59] Note, 'The Fiduciary Duty Under Section 501 of the LMRDA' (1975) 75 *Columbia Law Review* 1189, 1191.
[60] Cox, 58 *Michigan Law Review* 828.
[61] Note, 'The Fiduciary Duty Under Section 501 of the LMRDA' , n. 59, *supra* 1213; see generally Leslie, D., 'Federal Courts and Union Fiduciaries' (1976) 76 *Columbia Law Review* 1314.
[62] See *Royal Commission on Activities of Federated Ship Painters, etc. op cit.* n. 1, *supra* 158.
[63] See n. 51 *supra* and accompanying text; and see Note, 'Serving Two Masters' 645-652, n. 46, *supra*.
[64] *Op. cit.* n. 1 *supra* 156-158.

Act as a whole to English law, Sir Otto Kahn-Freund once stated that 'much of what I found in the Act . . . I would find express or implied in union constitutions . . . other things I would not find at all because they are not needed'.[65] It is not clear whether he had s.501 in mind in making these observations. But whatever may be the position in the United Kingdom, the enormous corruption revealed by the *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union*[66] shows the urgent need for legislative reform in Australia.

## X. THE FUTURE OF LEGAL REGULATION OF UNION MANAGEMENT

Judicial decisions on s.141 of the Act, especially since the landmark decision in *Allen v. Townsend,*[67] have expanded the scope of that section. The result has been that minority union members have legal standing to seek the enforcement of a wide range of legal obligations of officials. The introduction of a provision similar to s.501 Landrum-Griffin Act into the Conciliation and Arbitration Act would further strengthen the position of minority union members: proof of a breach of rules would not be required in order to enforce an official's obligations, in particular equitable obligations 'which exist independently of the operation of the rules on their true construction'.[68]

In addition to the Landrum-Griffin Act, principles enshrined in Australia's own companies legislation may provide a guide for reform.[69] The legislature has already introduced provisions into the Conciliation and Arbitration Act which correspond to provisions in the Companies Act. The accounts and audits provisions contained in Part VIIIAA provide one example. Section 132B, which disqualifies people guilty of certain offences from holding office, is modelled on s.227, Companies Act.[70]

Trade union officials, understandably, are reluctant to have the obligations of the type applied to company officers extended to them.[71] However, it is submitted that such an extension is justified for a number of reasons. Firstly,

[65] 'Trade Union Democracy and the Law' (1961) 22 *Ohio State Law Journal* 4, 8.
[66] *Op. cit.* n. 1, *supra*, Vol. III.
[67] (1977) 31 F.L.R. 431.
[68] *Jess v. Scott* (1984) 1 F.C.R. 401, 406. See Pt. V, *supra.*
[69] The Hancock Committee expressed this view. It was of the view that provisions of the Companies Act applicable to directors are 'useful comparisons' for the purposes of reform of the Conciliation and Arbitration Act. But the Committee did not give a great deal of attention to this aspect of industrial law: *Committee of Review into the Australian Industrial Relations Law and Systems, Report* (A.G.P.S. Canberra, 1985) Vol. 2, para. 9.92.
[70] See Commonwealth, *Parliamentary Debates,* House of Representatives, 1982, 2539, 2884; *Re Ferris* (1983) I.R. 342; *Bingham v. Gallagher* (1985) 11 I.R. 457.
[71] The A.C.T.U.'s submission to the Hancock Committee calling for the repeal of ss.132B-132J in all probability typifies the views of officials. The Hancock Committee rejected this submission: *Committee of Review into Australian Industrial Relations Law and System, Report,* (A.G.P.S., Canberra, 1985), Vol. II, paras. 9.88-9.95.

as the courts[72] (and two Royal Commissions[73]) have recognised, the position of union officer has important similarities to that of company director or officer. Secondly, as Sir Otto Kahn-Freund has pointed out:

> The rights and duties of the citizen as a union member have a much greater impact on the totality of his existence than his rights and duties as an investor. If he has the necessary funds or credit he may invest in any number of companies (and if he is wise he will spread his interest) but he can have only one job. He may choose not to invest in corporate enterprise, but rather to buy real estate or government bonds or paintings. Yet how many people have any choice whether or not to work for wages? The job, then, is a far more intimate element of a man's life than his investments. Union membership is often a condition for getting and holding a job, but whether it is or not, what the union is and does determines in a decisive way the mode of its members' existence. Trade Union democracy has more to do with political democracy than with shareholders' rights or with the organization of clubs.[74]

The third reason has been referred to already in this paper.[75] It relates to the fact that, unlike a minority shareholder, a union member necessarily has a tiny interest in the union. As a consequence, unless the member is idealistic or politically motivated, it is highly unlikely that the member will take action in relation to a breach of legal duty by an official.

The legislature has yet to fully appreciate the weak position of the individual union member, though it long ago recognized that a minority shareholder had little practical redress where a company officer breached his duty to the company. This recognition is expressed in s.229, Companies Act, which provides for high standards of honesty, good faith and diligence. Under s.229(6), breach of the section constitutes a criminal offence and the court can additionally order the convicted officer to pay compensation to the company. The introduction of a provision similar to s.229(6) into the Conciliation and Arbitration Act would undoubtedly contribute towards raising the standards of conduct of union officials. Certainly, the legal difficulties in framing actions against officials of the Federated Ship Painters and Dockers Union would have been largely alleviated by the availability of such a provision.[76]

In the less immediate future, it may be asked whether there is any role in the Conciliation and Arbitration Act for the 'oppression' remedy, contained in s.320 Companies Act. The development of s.320 represents perhaps the greatest step forward for minority shareholders in recent years.[77] The nature of 'oppressive' conduct is given broad meaning in s.320 and an important body of case law has grown in relation to it.[78] The notion of oppression is

[72] See the cases discussed in Parts III, IV, V and VII of this paper. *Cf. N.U.M. (Kent) v. Gormley, The Times,* Oct. 30, 1977.
[73] See n. 14, *supra*, and accompanying text. See also the Hancock Report, n. 69, *supra*, para. 9.92.
[74] *Op. cit.* n. 65, *supra*, p.6.
[75] See Part VIII, *supra*.
[76] *Op. cit.* n. 1, *supra*, Vol. III, Chapter 4.
[77] See Austin, R.P., 'Protection of Minority Shareholders: Changes to Section 320' in R.P. Austin (Ed.), *Companies and Securities Legislation — the 1983 Bill* (1983).
[78] See *Scottish Co-operative Wholesale Society v. Meyer* [1959] A.C. 324 and *New South Wales Rugby League v. Wayde* (1985) 59 A.L.J.R. 798.

already expressed in the Conciliation and Arbitration Act in s.140(1)(c). And the meaning attributed by the courts in that context is identical to that found in decisions on s.320, Companies Act or its equivalent.[79] However s.140(1)(c) is limited to oppressive rules, rather than to oppressive conduct which is clearly a much broader concept.[80] It is difficult to predict whether the legislature will move in the direction outlined above. The attitude of officials can be summed up by their response to s.132B which disqualified people guilty of certain offences from holding office. While it is true that the contents of s.132B were virtually transplanted from the Companies Act, the principle expressed by the provision was affirmed in numerous countries long ago.[81] Yet even in the light of the findings of two Royal Commissions,[82] there has been a call by officials for the repeal of s.132B[83]. Thus, it is highly unlikely that officials would welcome the introduction of a provision similar to s.229, Companies Act, let alone one based on s.320, Companies Act.

Ultimately the precise development of the statutory regulation of union management may well be determined by political factors. In the meantime, one can expect the judiciary, in particular the Federal Court, to continue to make the fruitful contribution that it has made in recent years to this body of law.

[79] *Municipal Officers Assoc. v. Lancaster* (1981) 54 F.L.R. 129, 165 *per* Deane J.
[80] In *Porter v. Dugmore* (1984) 3 F.C.R. 396 the union management attempted to overcome the striking down of an oppressive rule in *Clarke v. Printing & Kindred Industries Union* (1976) 30 F.L.R. 39 by giving effect to the particular policy through a resolution. Though this failed, it is submitted that there remains scope for circumventing s. 140(1)(c) by the union giving effect to an 'oppressive' policy without having a rule to that effect.
[81] Including the United States (s.504 Landrum-Griffin Act) and France: see International Labour Office, *The Protection of Trade Union Funds and Property* (1960) 54.
[82] See n. 1, *supra*.
[83] *Committee of Review into Australian Industrial Relations Laws and Systems, op. cit.* n. 69, *supra*, paras. 9.88-9.95.