

DUTIES OF COMMITTEE MEMBERS UNDER THE ASSOCIATIONS INCORPORATION ACTS

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Australia has state based statutory regimes, known as the Associations Incorporation Acts, for the regulation of non-profit associations. Each state regulates the duties of committee members differently, ranging from partial codification of their duties to total reliance upon the general law. Committee members are generally held to a company director standard. This article argues that committee members of associations with an annual turnover less than A\$1 000 000 should be held to a lower standard than company directors. It sets out a principled basis for determining the appropriate level of regulation for committee members by examining committee composition and the reasonable expectations of committee members.

I INTRODUCTION

Scholarship on the duties of committee members¹ of non-profit associations at general law and under the Australian state and territory Associations Incorporation Acts is minimal² in comparison with the extensive literature on the duties of company directors³ at general law and under the *Corporations Act 2001*

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¹ Hereafter the term 'committee member' is used to denote a director of a non-profit association under the Associations Incorporation Acts.

² See Robert Fisher, 'Duties of Company Directors and Committee Members of Incorporated Associations: Have the Paths Divided?' (2001) 13 *Australian Journal of Corporate Law* 143; Keith Fletcher, *The Law Relating to Non-profit Associations in Australia and New Zealand* (1986); John Gooley, *Corporations and Associations Law* (4th ed, 1999) 60-73; Colin Huntly, *A Most Useful Enactment: The Legislative History, Function and Legal Philosophy of the Associations Incorporation Legislation in Western Australia* (M Com Thesis, Curtin University of Technology, 1999); Colin Huntly, *The Origin and Function of the Associations Incorporation Act 1987 (WA) in Three Scenes* (1999); Colin Huntly, 'Dionysius, Damocles and the Unseen Perils of Insolvency for Officers of Incorporated Associations' (2000) 18 *Company and Securities Law Journal* 262; K Levy, *An Historical Analysis of Incorporated Non-profit Entities: United Kingdom, New Zealand and Australia* (LLM Thesis, University of Melbourne, 1995); Myles McGregor-Lowndes, *Facing up to the liabilities of non-profit enterprise. a strategy to minimise financial liabilities* (1992); Myles McGregor-Lowndes, Keith Fletcher, and A S Sievers (eds), *Legal Issues for Non-profit Associations* (1996); A S Sievers, *Associations and Clubs Law in Australia and New Zealand* (2nd ed, 1996); A S Sievers, *Associations Legislation in Australia and New Zealand* (1989); Sally Sievers, 'Incorporation and regulation of non-profit associations in Australia and other common law jurisdictions' (2001) 13 *Australian Journal of Corporate Law* 124; A S Sievers, 'The Honorary Director: The Obligations of Directors and Committee Members of Non-Profit Companies and Associations' (1990) 8 *Company and Securities Law Journal* 87; Butterworths, *Halsbury's Laws of Australia*, vol 28 (at 18 July 2004) 435 Voluntary Associations, '3 Management' [205]; Andrew Twaits, 'The Duties of Officers and Employees in Non-profit Organisations' (1998) 10 *Bond Law Review* 313; Robert Wright, 'The Associations Incorporation Act 1981. Why and How to Use It' (1983) 57 *Law Institute Journal* 424.

³ Hereafter the term 'company director' will denote a director of an incorporated body under the *Corporations Act 2001* (Cth).

(Cth) ('Corporations Act').⁴ This may partly be explained by the long-standing assumption that the duties of committee members are the same as those of company directors. However, as the community comes to appreciate the importance of non-profit organisations as a real 'third sector' in the Australian economy, the wisdom of this assumption is being questioned. For example, in 1998 the Western Australian Ministry of Fair Trading released a public discussion paper that questioned 'whether it is appropriate to equate those duties and liabilities [of committee members] with those imposed on company directors under the Corporations Law or whether some lower standard is justifiable and, if so, what that standard should be.'⁵

The key distinction between a for-profit company and a non-profit association is that the purpose of a company is to make a profit whereas the purpose of an association is to pursue beneficial objectives. According to Professor Henry Hansmann, a 'nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees.'⁶ Although there is considerable disagreement over the definition of a 'non-profit organisation',⁷ Hansmann's basic formulation forms part of the legislative test for incorporation under the Associations Incorporation Acts in all Australian jurisdictions.⁸ Examples of non-profit associations include sporting clubs, community groups, political parties and bodies established for the promotion of literature, the arts and the environment.

The incorporated association is a uniquely Australian corporate form designed for non-profit organisations and without 'direct precedent in any British statutory provision'.⁹ The idea was conceived in 1858 by the Hon Captain Charles Bagot, MLC, who introduced it as the Institutions Incorporation Bill into the First Session of the First Parliament of South Australia. The purpose of the incorporated association was to simplify the management of societies established

⁴ See, eg, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Company Directors' Duties - Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989); Corporate Law Economic Reform Program, *Directors' Duties and Corporate Governance - Facilitating Innovation and Protecting Investors, Proposals for Reform, Paper 3* (1997); Ian Ramsay (ed), *Corporate Governance and the Duties of Company Directors* (1997).

⁵ Ministry of Fair Trading, Western Australia, *The Associations Incorporation Act 1987: proposals for amendment (March 1998)* (1998) 23.

⁶ Henry Hansmann, 'The Role of Nonprofit Enterprise' (1980) 89 *Yale Law Journal* 835, 838.

⁷ See, Industry Commission, *Charitable Organisations in Australia, Report No 45* (1995); Mark Lyons, *Nonprofit Organisations in Australia: what do we know and what should we find out next?* (1991).

⁸ *Associations Incorporation Act 1984* (NSW) s 7(2)(a); *Associations Incorporation Act 1985* (SA) s 18(5)(a); *Associations Incorporation Act 1895* (WA) s 4(2); *Associations Incorporation Act 1964* (Tas) s 2(1); *Associations Incorporation Act 1953* (ACT) s 14(2)(a); *Associations Incorporation Act 1963* (NT) s 4(1); *Associations Incorporation Act 1981* (Vic) s 51(1); *Associations Incorporation Act 1981* (Qld) s 5(1)(c).

⁹ S Bottomley, *The Corporate Form and Regulation: Associations Incorporation Legislation in Australia* (1985) 52; Fletcher, above n 2, 207; Levy, above n 2. Three jurisdictions have subsequently adopted legislation based on the Australian model: British Columbia (*Societies Act*, BC 1953); New Zealand (*Incorporated Societies Act 1908* (NZ)); Papua New Guinea (*Associations Incorporation Act 1963* (PNG)).

for the public good so that the society itself could hold property rather than it being vested in proprietors or trustees.¹⁰ Bagot's intention was that the enactment would not subject non-profit organisations to public scrutiny, but would 'interpose a minimum of regulatory machinery and leave the constitution and internal management to the members'.¹¹

The *Associations Incorporation Act 1858* (SA) was the model for the *Associations Incorporation Act 1895* (WA), and these pieces of legislation became the paradigm for enactments in the Australian Capital Territory (1953),¹² the Northern Territory (1963)¹³ and Tasmania (1964).¹⁴ However, it was not until the 1980s that Victoria,¹⁵ New South Wales¹⁶ and Queensland¹⁷ – the three most populous states – enacted incorporation schemes for non-profit organisations. This legislative flurry can be attributed to the pressure placed on these governments by the states' law reform bodies to overcome the inherent legal difficulties of unincorporated bodies.¹⁸ These problems are well documented.¹⁹ That said, there was still opposition to governmental regulation on the ground that it would threaten the viability of small organisations and undermine community involvement at the grass-roots level.²⁰ Although no two Acts are uniform, they may all accurately be described as variations on a common theme.

All Australian jurisdictions vigorously promote incorporation under the Associations Incorporation Acts. The Acts are very attractive for small organisations in comparison with the alternatives, being either incorporation as a company limited by guarantee under the *Corporations Act* or unincorporation. As figure 1 indicates, incorporating under the Associations Incorporation Acts has become increasingly popular over the years. However, from their origins as a method to simplify the management of non-profit organisations, the Associations Incorporation Acts have become – as is the trend in the governance of other non-profit organisations²¹ – complex regulatory schemes. The codification of the duties of committee members is the latest phenomenon in this

¹⁰ South Australia, *Hansard*, Legislative Council (1858) 56.

¹¹ Fletcher, above n 2, 209-10.

¹² *Associations Incorporation Act 1953* (ACT).

¹³ *Associations Incorporation Act 1963* (NT).

¹⁴ *Associations Incorporation Act 1964* (Tas).

¹⁵ *Associations Incorporation Act 1981* (Vic).

¹⁶ *Associations Incorporation Act 1984* (NSW).

¹⁷ *Associations Incorporation Act 1981* (Qld).

¹⁸ Western Australian Law Reform Commission, *Association Incorporation Act 1895-1969: Working Paper* (1971); Queensland Law Reform Commission, *Supplementary Paper on a Draft Association Incorporation Act* (1979); Chief Justice's Law Reform Committee, Parliament of Victoria, *Unincorporated Associations* (1980).

¹⁹ Having a corporate status gives an organisation: perpetual succession; the capacity to sue and be sued in the name of the organisation rather than through individual committee members; the ability to own property and enter into contractual agreements, as well as enabling the receipt of a bequest or gift from a will; and, often, government funding: Wright, above n 2; Sievers, *Associations Legislation in Australia and New Zealand*, above n 2, 60-73.

²⁰ R Parish, 'Commentary on "The Public Interest and Sporting Associations"', Monash University Faculty of Law and Sports and Recreation Association in conjunction with Department of Youth Sport and Recreation, *Sports and the Law: transcript: a two day National Conference held at Monash University on 9 and 10 April 1980* (1980) 15.

²¹ See, eg, *Aged Care Act 1997* (Cth); *Retirement Villages Act 1999* (NSW); *Cooperatives Act 1996* (Vic).

process.

Figure 1: number of incorporated associations in Australia.

State/ Territory	Year Legislation Enacted	31 Dec 1985 ²²	30 June 1998 ²³	31 Dec 2001 ²⁴
ACT	1953	1 119	2 446	3 569
NSW	1984	194	26 096	31 256
NT	1865 (SA)	1 134	1 937	1 534
Qld	1861	1 245	18 104	19 451
SA	1858	9 312	15 522	16 748
Tas	1964	981	3 348	3 772
Vic	1981	7 730	30 979	34 879
WA	1895	7 000 approx	16 070	17 716
Total		28 715	114 502	125 034

This article examines the duties and obligations of committee members under the Associations Incorporation Acts. It will be argued that non-profit associations require different duties and obligations of their committee members than those required of company directors of for-profit corporations because companies and associations are not analogous. Associations differ from companies in committee composition and business operation, such that grafting the corporate regulatory model without careful consideration would be retrograde. First, this article reviews the current state of the law and the actual level of accountability under the regulatory regime. Second, it acknowledges that most committees comprise volunteers and examines how the law can encourage volunteerism. If committee members are discouraged from serving on committees because of a burdensome legal regime, the non-profit sector will suffer and the community will lose services due to a shortage of willing participants. However, this article also accepts that this consideration must be balanced with the need for public accountability. In considering these latter issues, it was found that whereas several studies had been undertaken on the operation of committees of large non-profit organisations in Australia,²⁵ no study existed for the small non-profit

²² Fletcher, above n 2, 374.

²³ Huntly, *The Origin and Function of the Associations Incorporation Act 1987 (WA) in Three Scenes*, above n 2, 7.

²⁴ Philanthropy Australia, Factsheets: 'The Nonprofit Sector in Australia' (2002) <<http://www.philanthropy.org.au/factsheets/7-05-03-nonprof.htm>> at 21 July 2004.

²⁵ Susan Woodward, "Not-for-profit" motivation in a "for-profit" company law regime - national baseline data' (2003) 21 *Company and Securities Law Journal* 102; Peter D Steane and Michael Christie, 'Nonprofit Boards in Australia: A Distinctive Governance Approach' (2001) 9 *Corporate Governance: An International Review* 48; Catherine McDonald, *Board Members' Involvement in Nonprofit Governance* (1993).

organisations that make up the majority of associations.²⁶ A study was therefore undertaken of the 43 affiliated sporting clubs at the University of Melbourne, each with an annual turnover less than A\$40 000.²⁷ Although the demographic of the committee members at the University of Melbourne displays certain special characteristics, such as a higher level of education and a larger proportion of younger people, the lack of data on small associations makes this study a useful starting point for wider research.

II WHAT ARE THE DUTIES OF COMMITTEE MEMBERS?

There are four sources of duties for committee members:

- a) The general law;²⁸
- b) The Associations Incorporation Acts;
- c) Other State, Territory or Commonwealth legislation;²⁹ and
- d) The association's constitution.

However, as the focus of this paper is the appropriate standard of duties that should be imposed under the Associations Incorporation Acts, only the duties at general law and under the Acts will be examined.

A The General Law

The general law duties of committee members of non-profit associations are uncertain.³⁰ Although Australia has a long history of non-profit associations stretching back into the latter half of the nineteenth century, there is minimal case law on this issue. That said, the majority of academic opinion and all state and territory regulatory bodies suggest that committee members owe the same duties as company directors.³¹ According to Sievers,

[t]he fact that the company is not formed for profit-making or commercial purposes and the directors, unless they are employees of the particular

²⁶ See Huntly, *The Origin and Function of the Associations Incorporation Act 1987 (WA) in Three Scenes*, above n 2, 7.

²⁷ Charles Parkinson (Study into the expectations of the duties of committee members in the University of Melbourne Sports Associations, conducted in 2002).

²⁸ The common law and equitable duties are the general law.

²⁹ Eg, *Occupational Health and Safety Act 2000* (NSW).

³⁰ Keith Fletcher, 'Developing Appropriate Organisational Structures for Non-profit Associations' in McGregor-Lowndes, Fletcher and Sievers (eds), above n 2, 1, 12; A S Sievers, 'Honorary Directors and Committee Members' in McGregor-Lowndes, Fletcher and Sievers (eds), above n 2, 22, 30; Butterworth's, above n 2, [205]; Sievers, 'The Honorary Director: The Obligations of Directors and Committee Members of Non-Profit Companies and Associations', above n 2, 105.

³¹ Sievers, 'The Honorary Director: The Obligations of Directors and Committee Members of Non-Profit Companies and Associations', above n 2, 88-9; Fletcher, above n 2, 289; Simon Rofe, 'The Liability of Sports Organisations for Debts and Financial Management', Ian Fullagar et al, *Sports & the law 1994: papers delivered at a BLEC workshop held in May 1994* (1994) 128; Ministry of Fair Trading, Western Australia, above n 5, 22; Department of Sport and Recreation, Western Australia, *Board Member Roles and Responsibilities* <<http://www.dsr.wa.gov.au/organisations/responsibilities.asp>> at 1 September 2002; NSW Sport and Recreation, *Corporate Governance - Responsibilities of Directors* (2002) <http://www.dsr.nsw.gov.au/industry/r_a-z_cgdir.asp> at 1 September 2002.

organisation, are acting on a voluntary, unpaid basis with no expectation of deriving any personal profit is irrelevant. They are still directors.³²

Two arguments have been formulated in support of this proposition. The first is that as both committee members and company directors are acting in an analogous fiduciary relationship to a corporate body, they should have the same obligations.³³ This approach assumes that the relationship between a company director and a for-profit company is analogous to that of a committee member and a non-profit association. However, a recent study of the historical development of the incorporated association led one academic to conclude that non-profit incorporated associations are 'a different genus of corporate body' than for-profit corporations.³⁴ A second argument that overcomes the above critique is that the courts, extrapolating from the fact that some jurisdictions have legislated a company director standard of duties for committee members, may equate the general law position for committee members with that for company directors.³⁵ Certainly, all Australian jurisdictions have enacted sections taken directly from the *Corporations Act*.³⁶ However, the fact that not all jurisdictions have codified the duties of committee members, and that those that have codified have each enacted a different group of duties, indicates that no uniform view exists under the Associations Incorporation Acts.

The duties of company directors derive from general law and fiduciary obligations,³⁷ and can be divided into two categories:³⁸

- a) A duty of loyalty and good faith; and
- b) A duty of due care, skill and diligence.

The duty of loyalty and good faith underlies the fiduciary relationship of directors and includes the duty to act honestly, in good faith and for the benefit of the company (including potential creditors)³⁹ and the duties to act for a proper purpose, not to restrict future discretion, and not to have conflicts of interest.⁴⁰

There is no doubt that committee members have a duty to act honestly and in good faith. The uncertainty begins in pinpointing the standard of care, skill and

³² Sievers, 'The Honorary Director: The Obligations of Directors and Committee Members of Non-Profit Companies and Associations', above n 2, 88.

³³ See Rofe, above n 30 and accompanying text.

³⁴ Huntly, *The Origin and Function of the Associations Incorporation Act 1987 (WA) in Three Scenes*, above n 2, 12.

³⁵ Fisher, above n 2, 150-4.

³⁶ *Associations Incorporation Act 1991 (ACT)* s 91; *Associations Incorporation Act 1984 (NSW)* s 6; *Associations Incorporation Act 1963 (NT)* s 20; *Associations Incorporation Act 1981 (Qld)* s 91; *Associations Incorporation Act 1985 (SA)* s 3A; *Associations Incorporation Act 1964 (Tas)* s 3; *Associations Incorporation Act 1981 (Vic)* ss 36D, 53; *Associations Incorporation Act 1895 (WA)* s 30.

³⁷ See John Glover, *Commercial Equity: Fiduciary Relationships* (1995) 117-20; Harold Ford, R Austin and I Ramsay, *Ford's Principles of Corporations Law* (10th ed, 2001) part 111.

³⁸ Pamela Hanharan, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (2nd ed, 2001) 11-120.

³⁹ See *Walker v Wimborne* (1976) 137 CLR 1, 7 (Mason J); Sievers, 'The Honorary Director: The Obligations of Directors and Committee Members of Non-Profit Companies and Associations', above n 2, 102-05.

⁴⁰ Paul Finn, *Fiduciary Obligations* (1977).

diligence that a voluntary committee member without business expertise must exhibit. Following the decision of the Victorian Supreme Court in *Commonwealth Bank v Friedrich*,⁴¹ it is now certain that being an honorary director will not in itself entitle a person to be held to a lower standard than a paid director. In that case, Tadgell J held the unpaid voluntary directors of the non-profit National Safety Council, which was incorporated as a company limited by guarantee, to a company director standard. Tadgell J went on to state that

[w]hat constitutes the proper performance of the duties of a director will be dictated by a host of circumstances, including no doubt the type of company, the size and nature of its enterprise, the provision of its articles of association, the composition of its board and the distribution of its work between the board and other officers.⁴²

It was also stated in obiter in the New South Wales Court of Appeal decision of *Daniels v Anderson*⁴³ that the 'duty will vary according to the size and business of the particular company and the experience or skills that the director held himself or herself out to have in support of appointment to the office.' Nevertheless, common law cases in which company directors have been found liable for breaching this duty have been likened to needles in a very large haystack.⁴⁴ There has been no reported case in any Australian jurisdiction on committee member duties at general law,⁴⁵ leading to the conclusion from one commentator that the whole question of committee member duties is largely theoretical and somewhat irrelevant.⁴⁶

B The Associations Incorporation Acts

The Associations Incorporation Acts impose two broad categories of obligations on committee members. Firstly, the Acts impose personal liability on committee members for non-compliance with various accounting and audit requirements. These are set out in figure 2. It is important to note the burden these regulations place both on committee members and the limited resources of the association.

⁴¹ (1991) 5 ACSR 115.

⁴² Ibid 126.

⁴³ (1995) 37 NSWLR 438, 505 (Clarke and Sheller JJA).

⁴⁴ See Joseph Bishop Jr, 'Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers' (1968) 77 *Yale Law Journal* 1078, 1099.

⁴⁵ Sievers, 'The Honorary Director: The Obligations of Directors and Committee Members of Non-Profit Companies and Associations', above n 2, 97.

⁴⁶ Robert Baxt, 'Liabilities of Directors of Sporting Bodies', in *Sports and the Law: sports sponsorship - the role of tobacco companies* (1985) 89.

Figure 2: audit and accounting requirements under the Associations Incorporation Acts.⁴⁷ Note that the table reflects the obligations of prescribed associations in the Australian Capital Territory, South Australia and Victoria. 'Prescribed' associations are those with a turnover greater than A\$200 000, or assets greater than A\$500 000: *Associations Incorporation Act 1981* (Vic) s 30B.

Accounts and Audit Provisions	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Records to be maintained to allow preparation of accounts	✓	✓	✗	✓	✓	✓	✓	✓
Financial reports to show true & fair value	✓	✓	✗	✗	✓	✗	✗	✗
Financial reports to comply with Accounting Standards	✓	✗	✗	✗	✗	✗	✓	✗
AGM financial reports to be audited	✓	✗	✗	✓	✓	✓	✓	✗
Direct responsibility for financial management placed on committee members	✓	✓	✓	✓	✓	✓	✓	✗
Management committee responsible for insolvent trading	✗	✓	✗	✗	✓	✗	✗	✗
Association to hold AGM	✓	✓	✗	✓	✓	✗	✓	✓
Association to lodge Annual Return	✓	✓	✓	✓	✓	✓	✓	✗
Statutory specifications on which audit must report	✓	✗	✓	✓	✓	✓	✓	✗
Financial report must be made to members	✓	✓	✓	✓	✓	✗	✓	✓
Auditor given statutory right to records	✓	✗	✓	✗	✓	✗	✗	✓
Statutory penalty for obstructing audit	✓	✗	✓	✗	✓	✗	✗	✓
Statutory qualifications for auditor	✓	✗	✓	✓	✓	✓	✗	✗
Restrictions on auditor (eg no insiders)	✓	✗	✓	✓	✓	✓	✗	✗
Auditor granted qualified privilege (eg defamation)	✓	✗	✗	✗	✓	✗	✗	✗
Auditor required to report to Commission	✓	✗	✗	✗	✓	✗	✗	✗
Commission notified on removal of auditor	✗	✗	✗	✗	✓	✗	✗	✗
Commission may direct association to be audited	✗	✗	✓	✓	✗	✗	✓	✓
Commission granted investigative powers	✓	✓	✓	✓	✓	✓	✓	✓

✓ denotes that there is a statutory obligation; ✗ denotes that there is no statutory obligation.

The second category of obligations is the codified general law duties of committee members. These obligations are recent additions to the scheme, first appearing in South Australia in the 1980s, and subsequently being adopted to varying degrees in the Australian Capital Territory, New South Wales, Victoria

⁴⁷ Format based on tables in M Sadhu, 'A Framework for Financial Reporting by Incorporated Associations' (Legislative Policy Discussion Paper No 4, Australian Accounting Research Foundation, Melbourne, 1994) 9, 47.

and Western Australia. This indicates that there is a significant conceptual divide not only between those jurisdictions that have decided to codify committee member duties and those that have not, but also between the codifying jurisdictions themselves.

In all cases the codified obligations are based on the duties of company directors under the *Corporations Act*,⁴⁸ which themselves have their origins in general law.⁴⁹ But as figure 3 indicates, there is still at least some reliance on general law duties in all jurisdictions.

Figure 3: duties of committee members under the Associations Incorporation Acts.

Duty	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Good faith/honesty	X	X	X	X	X	X	X	X
Due diligence/reasonable care	X	✓ ⁵⁰	X	X	✓ ⁵¹	X	X	X
Avoid conflicts/disclosure	✓ ⁵²	X	X	X	✓ ⁵³	X	✓ ⁵⁴	✓ ⁵⁵
Improper use of position	*✓ ⁵⁶	X	X	X	*✓ ⁵⁷	X	✓ ⁵⁸	X
Improper use of information	X	X	X	X	*✓ ⁵⁹	X	✓ ⁶⁰	X
Liability for insolvent trading	X	*✓ ⁶¹	X	X	*✓ ⁶²	X	X	X
Not to act fraudulently	*✓ ⁶³	X	X	✓ ⁶⁴	*✓ ⁶⁵	X	X	X

* denotes that the maximum punishment for the offence is imprisonment.

All the jurisdictions that have decided to codify committee members' general law duties have enacted provisions for the duty of loyalty and good faith. Victoria and South Australia prohibit the improper use of information,⁶⁶ whilst Victoria, South Australia and the Australian Capital Territory also prohibit the improper

⁴⁸ *Corporations Act*: Improper use of information: ss 183, 184(3); improper use of position, s 184(2); insolvent trading ss 588G-Q; avoiding conflicts/disclosure, ss 191, 194, 195; due diligence, s 180.

⁴⁹ See Hanharan, Ramsay and Stapledon, above n 37, 11-120, Figure 11.1.

⁵⁰ *Associations Incorporation Act 1984* (NSW) s 70(1)(c). It operates as a defence.

⁵¹ *Associations Incorporation Act 1985* (SA) ss 39A(4), 57. It also operates as a general defence: s 58A.

⁵² *Associations Incorporation Act 1991* (ACT) s 65.

⁵³ *Associations Incorporation Act 1985* (SA) ss 31, 32.

⁵⁴ *Associations Incorporation Act 1981* (Vic) ss 29B, 29C.

⁵⁵ *Associations Incorporation Act 1895* (WA) ss 21, 22.

⁵⁶ *Associations Incorporation Act 1991* (ACT) s 111.

⁵⁷ *Associations Incorporation Act 1985* (SA) s 39A(3).

⁵⁸ *Associations Incorporation Act 1981* (Vic) s 29A(2).

⁵⁹ *Associations Incorporation Act 1985* (SA) s 39A(2).

⁶⁰ *Associations Incorporation Act 1981* (Vic) s 29A(1).

⁶¹ *Associations Incorporation Act 1984* (NSW) s 38.

⁶² *Associations Incorporation Act 1985* (SA) ss 39B, 49AD, 49AE. This includes invalidating all indemnities for committee members, unless the action is successfully defended.

⁶³ *Associations Incorporation Act 1991* (ACT) s 113.

⁶⁴ *Associations Incorporation Act 1981* (QLD) ss 122, 123.

⁶⁵ *Associations Incorporation Act 1985* (SA) ss 39A(1), 49AB, 49AF, 58.

⁶⁶ *Associations Incorporation Act 1981* (Vic) s 29A(1); *Associations Incorporation Act 1985* (SA) s 39A(2).

use of position.⁶⁷ The Australian Capital Territory, South Australia and Victoria require committee members to disclose, both to the committee and to the membership at the next Annual General Meeting, the nature and extent of any personal interest in a contract with the association,⁶⁸ whilst Western Australia only requires disclosure to the committee.⁶⁹ But whereas the Australian Capital Territory, South Australia and Victoria permit the committee member to partake in deliberations,⁷⁰ Western Australia does not.⁷¹ None of these jurisdictions allow the committee member to vote on the contract.⁷² New South Wales and South Australia make committee members personally responsible for debts incurred where there are reasonable grounds to expect the association was insolvent.⁷³ There is also some academic commentary to suggest that committee members of incorporated associations are subject to the insolvency provisions in the *Corporations Act* but the matter has not yet received judicial consideration.⁷⁴

The duty of due diligence and reasonable care operates as both a sword and a shield under the Association Incorporation Acts. In New South Wales and South Australia, due diligence by a committee member can be used as a defence against statutory liability for a breach of the Act.⁷⁵ In South Australia, it is an explicit offence for committee members of prescribed associations (with a turnover greater than A\$200 000 or assets over A\$500 000) not to exercise reasonable care and diligence at all times.⁷⁶ It is interesting that Victoria and the Australian Capital Territory, which both enacted provisions for the duty of loyalty and good faith, chose not to legislate a duty of due diligence and reasonable care.

III COMMITTEE MEMBER ACCOUNTABILITY UNDER THE ASSOCIATIONS INCORPORATION ACTS

Committee members may be held accountable for a breach of their obligations under the general law or under the Associations Incorporation Acts. As noted above, there has never been a reported case of a committee member being sued for a breach of a general law duty. There are several reasons for this. Firstly, few non-profit organisations would sue their committee members because the adverse

⁶⁷ *Associations Incorporation Act 1991* (ACT) s 111; *Associations Incorporation Act 1985* (SA) s 39A(3); *Associations Incorporation Act 1981* (Vic) s 29A(2).

⁶⁸ *Associations Incorporation Act 1991* (ACT) s 65; *Associations Incorporation Act 1985* (SA) s 31; *Associations Incorporation Act 1981* (Vic) s 29B.

⁶⁹ *Associations Incorporation Act 1895* (WA) s 21.

⁷⁰ *Associations Incorporation Act 1991* (ACT) s 65; *Associations Incorporation Act 1985* (SA) s 32; *Associations Incorporation Act 1981* (Vic) s 29C(1).

⁷¹ *Associations Incorporation Act 1895* (WA) s 22.

⁷² *Associations Incorporation Act 1991* (ACT) s 65; *Associations Incorporation Act 1985* (SA) s 32; *Associations Incorporation Act 1981* (Vic) s 29C(1); *Associations Incorporation Act 1895* (WA) s 22.

⁷³ *Associations Incorporation Act 1984* (NSW) s 38; *Associations Incorporation Act 1985* (SA) ss 39A(1), 49AD, 49AE.

⁷⁴ Huntly, 'Dionysius, Damocles and the Unseen Perils of Insolvency for Officers of Incorporated Associations', above n 2, 262.

⁷⁵ *Associations Incorporation Act 1984* (NSW) s 70(1)(c); *Associations Incorporation Act 1985* (SA) s 58A.

⁷⁶ *Associations Incorporation Act 1985* (SA) s 39A(4).

publicity would undermine their public reputation and have a negative impact on their fundraising capacity in the community. Second, it is difficult for individuals to enforce the general law. Although the courts have retreated from their earlier reluctance to intervene in internal association disputes,⁷⁷ the issue of justiciability still raises a significant barrier to litigation.⁷⁸ Third, as most alleged breaches usually concern minor amounts of money, there is little personal incentive to sue committee members. Further, the expense, time and uncertainty of gaining the desired remedy mean that few disputes against committee members ever reach court.

Although all Associations Incorporation Acts have set down a regulatory framework administered by a specifically designated government agency, it would appear that the provisions of the Acts are not being enforced.⁷⁹ There were no documented prosecutions for infringements of the Acts in New South Wales (1997-2002),⁸⁰ South Australia (1998-2002)⁸¹ or Western Australia (1999-2001),⁸² and no reported prosecutions at least within the last few years in Tasmania or Queensland. The South Australian Commissioner for Consumer Affairs noted the receipt of 'many complaints' but classified them all as internal disputes that did not breach the Act.⁸³ Further, in a recent case before the South Australian Supreme Court, Debelle J noted that a 1988 prosecution under the Act for not keeping proper records (which the magistrate found to be 'trifling' and a complete waste of resources) was 'probably the first and only prosecution' under the legislation.⁸⁴

Victoria takes an entirely different approach to enforcement. The Department of Consumer and Business Affairs uses complaint data to identify the areas of highest need and takes a campaign approach to tackling the problem.⁸⁵ In 1999, the emphasis was on associations fundraising without displaying their 'association number'. This led to one A\$400 conviction for the Care for Children Foundation and a A\$1 500 contribution to the Court Fund and a 12 month good behaviour bond for the Disabled Children's Foundation.⁸⁶ The subsequent investigation into the Care for Children Foundation also found that the organisation was not keeping records and that one of its committee members (Juka Ribeiro) had breached her duty to avoid conflicts by voting on a contract with the association in which she had an interest.⁸⁷ Ribeiro was convicted and

⁷⁷ The height of this approach can be seen in the decision of the High Court of Australia in *Cameron v Hogan* (1934) 51 CLR 258.

⁷⁸ Cf *Dixon v Esperance Bay Turf Club (Inc)* [2002] WASC 110 (Unreported, Roberts-Smith J, 17 May 2002).

⁷⁹ This conclusion is supported, albeit without any supporting evidence, by John Farrar, *Corporate Governance in Australia and New Zealand* (2000) 381.

⁸⁰ Department of Fair Trading (New South Wales), *Annual Reports*, 1997/98, 1998/99, 1999/00, 2000/01 and 2001/02.

⁸¹ Commissioner for Consumer Affairs (South Australia), *Annual Reports*, 1998/99, 1999/00, 2000/01 and 2001/02.

⁸² Office of Fair Trading (Western Australia), *Annual Reports*, 1999/00 and 2000/01.

⁸³ Commissioner for Consumer Affairs (South Australia), *Annual Report* (2001) 35.

⁸⁴ *Rowan v Cornwall (No 5)* [2002] SASC 160 (Unreported, Debelle J, 21 June 2002) [318].

⁸⁵ Consumer and Business Affairs (Victoria), *Annual Report* (2000) vii.

⁸⁶ *Ibid* 40, 45.

⁸⁷ *Ibid*.

fined A\$1 500.⁸⁸ In 2000, the Department targeted the traditionally low rate of submissions of annual returns through a letter campaign to all associations. This resulted in an increased compliance rate from 54 per cent to 74 per cent for prescribed associations, from 38 per cent to 53 per cent for non-prescribed associations, and in de-registration of 700 associations.⁸⁹ It is interesting to note that although both Victoria⁹⁰ and South Australia used enforceable undertakings in policing other legislation that they administer,⁹¹ neither considered this method appropriate for associations.

As the Associations Incorporation Acts are not enforced, it would seem that they provide a minimal basis for committee member accountability. A very similar trend exists in the United States.⁹² Although one American commentator has suggested this is due to a specific policy that 'aggressive attempts to enforce [non-profit director] responsibilities are viewed as inappropriate and likely to discourage others from serving on boards',⁹³ there is no evidence of such an explicit approach in Australia.⁹⁴ Rather, it would appear to be a question of prioritising certain public policy demands with limited resources.⁹⁵ The Associations Incorporation Act is merely one of many – in several cases over one hundred – legislative regimes which responsible departments administer. Within this context, the policing of other Acts, such as those that deal with licensing of second-hand car dealers, plumbers and electricians, receive greater priority.

Several implications may be identified as flowing from this minimalist regulatory regime. First, there is a culture in the non-profit director context in which corporate governance is not a key priority. The committees of small associations at the University of Melbourne were asked to rank five skill areas in order of importance from one to five.⁹⁶ As figure 4 indicates, the associations ranked corporate governance fifth. A similar result was found in a study of large non-profit boards in Australia, where corporate governance skills were ranked sixth out of seven skill areas deemed crucial for director effectiveness.⁹⁷ The 100 per cent stakeholder composition of the committees of small associations at the University of Melbourne is consistent with the explanation offered in two other Australian studies that a low prioritisation of corporate governance is often compensated by a large stakeholder representation on boards.⁹⁸ In other words,

⁸⁸ Ibid 45.

⁸⁹ Ibid 47-52.

⁹⁰ Victoria imposed 88 undertakings in 2000, *ibid*, vii.

⁹¹ *Building Work Contractors Act 1995 (SA)*; *Security and Investigation Agents Act 1995 (SA)*; *Travel Agents Act 1986 (SA)*; *Second-hand Vehicle Dealers Act 1995 (SA)*; *Plumbers, Gas Fitters and Electricians Act 1995 (SA)*; *Land Agents Act 1994 (SA)*; *Land and Business (Sale and Conveyancing) Act 1994 (SA)*.

⁹² James Fishman and Stephen Schwarz, *Nonprofit Organizations* (1995) 243.

⁹³ Jaclyn Cherry, 'The Current State of Nonprofit Director Liability' (1999) 37 *Duquesne Law Review* 557, 586.

⁹⁴ The author spoke with employees at the departments in Victoria, Tasmania, Queensland and New South Wales.

⁹⁵ This has also been identified in the United States: 'Developments in the Law - Nonprofit Corporations' (1992) 105 *Harvard Law Review* 1578, 1599.

⁹⁶ Parkinson, above n 27.

⁹⁷ Steane and Christie, above n 25, 53 figure 5.

⁹⁸ *Ibid*; McDonald, above n 23.

dedication to the non-profit sector is prized more highly than traditional board related skills.

Figure 4: committee member skills ranked by associations at the University of Melbourne.

Skill area	Mean response	Ranking
Computing skills	4.1	4
Corporate governance skills	4.2	5
Financial/accounting skills	2.5	2
Interpersonal skills	1.7	1
Strategic planning skills	2.6	3

Enforcement of the Acts would divert significant resources formerly available for the promotion of the non-profit activity to compliance.⁹⁹ Several studies of large non-profit boards in Australia found that directors undertake operational as well as strategic roles.¹⁰⁰ In small associations at the University of Melbourne, it was found that of the average committee comprising 7.7 members, 3.7 members engage in operational duties.¹⁰¹ This is a coping mechanism symptomatic of limited resources.¹⁰² In a business model, the loss of productivity from the reallocation of committee members from operational to strategic work in response to greater government regulation would be passed on to the consumer as the cost of hiring more staff, and the company's relative position would not alter because the reform would impact industry wide. In the case of non-profit associations, however, this lost productivity would translate either into fewer services being offered by the association or a greatly increased burden on committee members.

Greater enforcement of corporate standards for associations would also affect the operation of such organisations. Isomorphism, where one organism begins to copy another organism, is a recognised phenomenon in corporate bodies as a result of the imposition of similar corporate governance regulations.¹⁰³ And certainly, one of the key features of the non-profit sector in Australia is that it has been strongly modeled by government regulation.¹⁰⁴ Greater enforcement would

⁹⁹ Huntly, *The Origin and Function of the Associations Incorporation Act 1987 (WA) in Three Scenes*, above n 2, 5-6.

¹⁰⁰ M Muetzelfedt, 'Governments and the Nonprofit Sector: A Comment' (1998) 4 *Third Sector Review* 119-23; Robert Tricker, *International Corporate Governance: text, readings, and cases* (1994) 49; Paul Di Maggio and Walter Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 *American Sociological Review* 147.

¹⁰¹ Parkinson, above n 27.

¹⁰² Melissa M Stone, Barbara Bigelow and William Crittenden, 'Research on Strategic Management in Nonprofit Organizations: Synthesis, Analysis and Future Directions (1999) 31 *Administration and Society* 378.

¹⁰³ Steane and Christie, above n 25, 48.

¹⁰⁴ Mark Lyons, 'Contracting for Care: What is it and what is at issue?' (1997) 3 *Third Sector Review* 5-21; Deirdre O'Neill and Linda McGuire, 'Microeconomic Reform and the Third Sector: the Australian Experience' (1999) 1 *Public Management (UK)* 407.

shift the emphasis of committees towards corporate governance, perhaps altering the dominant stakeholder approach. The effects of such repositioning are uncertain because there are no Australian studies on whether a stakeholder governance model is more successful than a traditional business skill-based governance model within the non-profit sector.¹⁰⁵ While such a study would be useful in developing policy, determining what is 'successful' in the context of the non-profit area would require careful consideration.

IV COMMITTEE COMPOSITION AND REASONABLE EXPECTATIONS

The vast majority of committee members of non-profit associations are volunteers. The present study of small associations at the University of Melbourne found that 96.3 per cent of committee members receive no emoluments; a 1999 study of large non-profit organisations reported that 95.8 per cent of board members are not paid,¹⁰⁶ and in 2001 the Australian Bureau of Statistics estimated that 95.9 per cent of committee members in the sporting sector (numbering 595 000 people) were volunteers.¹⁰⁷ Further, there is a large number of voluntary committee members in Australia: the Australian Bureau of Statistics estimated the number in 2000 to be 1 978 020 people, or 14 per cent of the adult population.¹⁰⁸ That said, there is also a strong trend that suggests fewer people are serving on committees. In the sporting sector, the number of committee members as a percentage of the adult population fell from 5.1 per cent in 1997 to 4.0 per cent in 2001, representing a decrease of 134 400 committee members.¹⁰⁹ These issues were recognised in the recent decision of the Western Australian Supreme Court in *Dixon v Esperance Bay Turf Club (Inc)*.¹¹⁰ In that case, it was argued that several members of the Esperance Bay Turf Club committee were invalidly elected under the Club's constitution which prohibited bookmakers, horse-trainers, and owners from sitting on the committee because of potential conflicts of interest. Roberts-Smith J noted that if such people were not able to sit on a horse racing club committee, it would be very difficult indeed to

¹⁰⁵ Cf Robert Herman and David Renz, 'Nonprofit Organizational Effectiveness: Contrasts Between Especially Effective and Less Effective Organizations' (1998) 9 *Nonprofit Management and Leadership* 23.

¹⁰⁶ Steane and Christie, above n 25, 54. A further study conducted in 2003 found 92 per cent of non-executive board members were volunteers, but the author noted that this figure seemed too low: Woodward, above n 25, 116-7.

¹⁰⁷ Australian Bureau of Statistics, *Involvement in Organised Sport and Physical Activity, Australia: Report 6285.0* (2002). On the level of payment for other 4.1 per cent, see Huntly, *The Origin and Function of the Associations Incorporation Act 1987 (WA) in Three Scenes*, above n 2, 5-6.

¹⁰⁸ Australian Bureau of Statistics, *Voluntary Work in Australia: Report 4441.0* (2001).

¹⁰⁹ Australian Bureau of Statistics, above n 104.

¹¹⁰ [2002] WASC 110 (Unreported, Roberts-Smith J, 17 May 2002).

fill such positions.¹¹¹ These two characteristics of committee members – that they are volunteers and that their numbers can fluctuate greatly – have important policy implications for determining appropriate duties for committee members.

The future of most associations depends on the willingness of voluntary committee members to serve. It is also necessary to note that it is in the public interest for associations to be encouraged to operate for the benefit of the community – it must not be forgotten that much of the fabric of society is woven by the work of volunteers in community associations. Within this context, understanding the motivation of volunteers is a crucial consideration. The primary motivation for volunteerism in Australia is the desire to help the community (47 per cent), followed closely by personal satisfaction (43 per cent).¹¹² At an anecdotal level, it has often been said that if volunteers think the burden of duties is too great they will not sit on committees.¹¹³ In the study of small associations at the University of Melbourne, the six traditional duties for company directors (good faith; due diligence; disclosure of personal interests in contracts; prohibition in profiting from information obtained from the organisation; prohibition in profiting from one's position with the organisation; and prohibition of insolvent trading) were explained to committee members, and the following question asked: 'If you found out that you owed the above duties as a committee member and could be personally liable for any loss that your club suffered as a result of a breach, would it be a disincentive to you acting as a committee member in the future?'

Forty-five per cent of respondents answered 'yes', 50 per cent answered 'no', and five per cent were unsure. This result certainly reinforces the assertion by the Western Australian Ministry of Fair Trading that the difference between profit and non-profit bodies creates a clear expectation that the duties of directors and committee members should be different.¹¹⁴

The idea that personal liability could attach to the average person for acts done in good faith while serving in a voluntary capacity for a non-profit association would, in the words of one commentator, 'so offend his sense of fair play that he would refuse to believe that it could be so'.¹¹⁵ It is an old argument that people who are civic minded and serve without compensation should be held to a less

¹¹¹ Ibid [69]. It is also possible to give a similar reading to the decision of the Court of Appeal of the Supreme Court of Victoria in *Fitzroy Football Club v Bondborough Pty Ltd* (1997) 15 ACLC 638, in which the Court accepted the respondent's argument that he did not intend to divert a business opportunity from the Club, but was acting in the club's best interests in not letting it take up the opportunity. See also *Wayde and Anor v New South Wales Rugby League Ltd* (1985) 1 NSWLR 86, 102

¹¹² Volunteers may give more than one reason. Therefore figures for individual categories will not add to 100 per cent: Australian Bureau of Statistics above n 104.

¹¹³ McGregor-Lowndes, above n 2.

¹¹⁴ <http://www.fairtrading.wa.gov.au/charities/associations/assoc_amendments_full.html> at 1 September 2002.

¹¹⁵ Wright, above n 2, 17.

¹¹⁶ J Frederic Taylor, 'A New Chapter in the New York Law of Charitable Corporations' (1940) 25 *Cornell Law Quarterly* 382, 398.

stringent standard.¹¹⁶ In the United States, the federal government has enacted the *Volunteer Protection Act*¹¹⁷ to remove liability from bona fide volunteers,¹¹⁸ while some United States jurisdictions have given voluntary board members immunity from penal sentences.¹¹⁹ However, no jurisdiction grants blanket immunity to directors of non-profit organisations. There is still a significant possibility of abuse, graft and mismanagement in associations.¹²⁰ An appropriate response to the expectations of voluntary committee members would therefore be to grant them legislative immunity only from those actions taken honestly and in good faith. It is worth quoting here from the reasons of Mr Ackland SM, in the Christies Beach Magistrates Court, in the above mentioned sole South Australian prosecution under the *Associations Incorporation Act 1985* (SA) which involved a technical breach, with no allegation of misappropriation of funds by any of the defendants:

In my opinion, if the allegations before me are the only substantial allegations of wrongdoing made against the defendants, the not inconsiderable amount of money spent on this prosecution would have been better spent on the women and children for whose support and protection this shelter was set up.¹²¹

Two further comments on this proposal are necessary. First, as a breach of the duty of 'honesty and good faith' is notoriously hard to prove,¹²² this requirement should be a defence with the onus of proof resting on the defendant. Second, defining who is a 'volunteer' would need careful consideration as many voluntary committee members currently receive fringe benefits (eg discounted membership) from their association, albeit in usually very small amounts.

Finally, committee members also want certainty in the law. In the United States, a study of non-profit directors with big business backgrounds indicated that the lack of certainty of the standard expected of directors on non-profit organisations led to many resignations.¹²³ This consideration would appear not to be overly problematic for committee members of small associations at the University of Melbourne: only 20 per cent of respondents rated their knowledge of the current

¹¹⁷ *Volunteer Protection Act* 42 USC §§14501-05 (1997).

¹¹⁸ According to the *Volunteer Protection Act* 42 USC §14504(a) (1997), 'no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity' if 1) the volunteer was acting within the scope of the volunteer activity; 2) the volunteer was properly licensed, if applicable; 3) the harm did not occur because of willful misconduct, gross negligence, reckless misconduct or a conscious, outright indifference to the right or safety of the injured party; and 4) the harm did not occur while the volunteer was operating a vehicle. See Consuelo Kertz, 'The Volunteer Protection Act: a Response to the Liability Litigation Crisis' (1999) 6 *Journal of Legal Studies in Business* 1.

¹¹⁹ Patricia Cavallaro, 'No Longer Volunteering to go to Prison: New York's Legislative Trend Towards Insulating Volunteer Cooperative Board Members from Criminal Liability' (1999) 65 *Brooklyn Law Review* 1177.

¹²⁰ For example, the 1989 collapse of the National Safety Council (Victorian Division): *Commonwealth Bank v Friedrich* (1991) 5 ACSR 115; Sally Sievers, 'The National Safety Council Case' (1991) 9 *Company and Securities Law Journal* 338.

¹²¹ Quoted in *Rowan v Cornwall* (No 5) [2002] SASC 160 (Unreported, Debelle J, 21 June 2002) [318].

¹²² See above n 42 and accompanying text.

¹²³ Bennet Harvey Jr, 'The Public Spirited Defendant and Others: Liability of Directors and Officers of Not-for-profit Corporations' (1984) 17 *John Marshall Law Review* 665, 666-7.

legal duties of committee members as 'high'. There is no empirical data on this issue for large non-profit boards in Australia. That said, the requirement of certainty is one of the most basic tenets of our legal system. As the general law duties of committee members remain uncertain and it appears unlikely that they will receive judicial consideration in the foreseeable future, the duties of committee members should be codified.

V WHAT PRINCIPLES SHOULD BE ADOPTED TO DETERMINE THE LEVEL OF REGULATION?

The need to attract volunteers must also be balanced against the requirement of public accountability.¹²⁴ The community benefit gained from the benevolent activity promoted by the association must not be outweighed by the potential detriment caused by its negligent administration. There is also an inherent 'public interest' in the activities of some associations, such as those which accept donations from the public and those which gain public funds through tax exempt status. Further, there must be stringent laws to protect the community and in particular the vulnerable groups for whose benefit many associations operate from dishonest committee members. For this reason, the pre-existing regime based on the *Corporations Act* is highly appropriate as the backdrop against which good faith legislative immunity should rest.

Recognising that the vast difference in size and resources of associations is a major limitation to the uniform application of responsible corporate governance principles, is it therefore appropriate for voluntary committee members of large associations to also be given immunity for actions taken in good faith? A size-based approach has been adopted by South Australia and Victoria, which make a distinction for regulatory purposes between large and small associations. Both states categorise large associations (known as 'prescribed' associations) as those with a turnover greater than A\$200 000 or assets over A\$500 000.¹²⁵ Around five per cent of associations in Victoria (1 816 out of 34 879) are prescribed.¹²⁶ South Australia requires committee members of prescribed associations to exhibit due diligence and reasonable care,¹²⁷ while Victoria imposes tighter financial and audit requirements.¹²⁸ It is worth noting that New York, which has the most sophisticated legislation for non-profit organisations in the United States, divides organisations into 15 separate categories. However, for all 15 classes, the duties of board directors are the same: to act in 'good faith and with that diligence, care and skill which ordinarily prudent men would exercise under similar circumstances'.¹²⁹

¹²⁴ See Hayden Opie, *Sport and the Law: Implications for the Nonprofit Corporation* (1993) 1.

¹²⁵ *Associations Incorporation Act 1985* (SA) s 3.

¹²⁶ Consumer and Business Affairs (Victoria), above n 84, 47-52.

¹²⁷ *Associations Incorporation Act 1985* (SA) ss 39A(4), 57.

¹²⁸ *Associations Incorporation Act 1981* (Vic) s 30B.

¹²⁹ *Not For Profit Corporations Law* NY LAW B 201(b) (McKinney 1986); *Revised Model Nonprofit Corporation Act* (1987) art 8.30(1)(2).

The imposition of greater regulation on large associations can be rationalised in terms of the potential net effect on society. Associations beyond a certain economic size impact on the wider community as much as on their members, and are therefore no longer strictly in the private sphere. The *Corporations Act*, for example, accepts that regulation for small, closely held companies is inappropriate for larger companies.¹³⁰ This includes certain restrictions: public companies can solicit capital from the public, whereas proprietary companies cannot.¹³¹ In fact, in the Australian Capital Territory, New South Wales, South Australia, Victoria and Western Australia, associations can be directed to migrate to the *Corporations Act* if they reach a certain size or operate in more than one jurisdiction.¹³²

The issue, therefore, is identifying the point at which legislative immunity should not be given to committee members. An argument could be made that the levels set down in Victoria and South Australia are appropriate markers to indicate that the organisation has the capacity to impact significantly on the community if negligently managed. Further, this would affect only 5.2 per cent of associations (based on the proportion of prescribed associations in Victoria). However, it is submitted that the level should be determined according to the point at which the underlying rationale for the immunity of committee members is no longer valid. That being the case, the annual turnover of such an organisation should be at least A\$1 000 000. Although this figure is necessarily arbitrary, there is a clear rationale for making it at about this mark. First, at this level the decision not to pay committee members would be based on policy rather than necessity, such that if attracting voluntary committee members became difficult the organisation could afford to pay them without a significant reduction in services offered. Second, there is prestige attached to sitting on committees of large community organisations, with many professional directors having at least one such organisation to balance their stable of company directorships. Further, at A\$1 000 000 annual turnover, it becomes important for the community that the resources of the association are efficiently managed and that its committee can be held accountable. This could be achieved by making migration to the *Corporations Act* compulsory for associations with an annual turnover greater than A\$1 000 000. It would also increase the stringency of financial reporting requirements.

¹³⁰ For a discussion see, Harold Ford, R Austin and I Ramsay, *Ford's Principles of Corporations Law* (8th ed, 1997) 150.

¹³¹ *Ibid.*

¹³² *Associations Incorporation Act 1984* (NSW) ss 10(2), 56-58; *Associations Incorporation Act 1985* (SA) s 42; *Associations Incorporation Act 1981* (Vic) s 31AB; *Associations Incorporation Act 1987* (WA) s 34; *Associations Incorporation Act 1991* (ACT) s 83.

VI CONCLUSIONS

As is the case in most federal systems, the legislation governing the operation of non-profit organisations is different in each state.¹³³ Although the Associations Incorporation Acts are not uniform, they still share many common traits. In the area of committee member duties, however, a great variety of approaches has been taken. This perception that the current scheme is disjointed and a hindrance to the operation of non-profit associations led the Industry Commission to recommend uniform legislation in its report on 'Charitable Organisations in Australia'.¹³⁴ There is also the problem of national recognition, with the current situation being likened to that of companies in the years prior to the introduction of the Uniform Companies Acts in the 1960s.¹³⁵ Certainly, Australians have shared values about the importance of community organisations and common expectations about volunteering to sit on committees. In this regard, the operation of the non-profit sector could be improved by establishing a principle-based legislative scheme for the duties of committee members, perhaps through a referral of power by the states to the Commonwealth under s 51(xxxix) of the *Constitution*. Having such a scheme with a single national regulator would also address some of the accountability issues raised in part III of this paper.

The purpose of this paper has been to identify a principled basis for the codification of the duties of committee members of non-profit associations under the Association Incorporation Acts. It considered the current state of the law and assessed the impact of the minimalist regulatory regime. This paper then made the following recommendations:

- a) There is uncertainty about the current general law duties for committee members, thus the duties should be codified;
- b) As there is the possibility of graft and dishonesty by committee members (especially given the vulnerable position of many beneficiaries of associations) it is appropriate to impose the same duties that exist for company directors onto committee members;
- c) However, as associations depend on the work of volunteers, the law must encourage their valuable contribution by recognising their reasonable

¹³³ For example, in the United States, most states have legislated upon one of three models, either the New York *Not-for-Profit Corporation Act* of 1970, the California *Nonprofit Corporation Act* of 1980, or the *Revised Model Nonprofit Corporation Act* approved by the American Bar Association in 1987. Each takes a different approach to the key issues, especially director's duties: Henry Hansmann, 'Reforming Nonprofit Corporation Law' (1981) 129 *University of Pennsylvania Law Review* 497, 527; Thomas Boyd, 'A Call to Reform the Duties of Directors Under State Not-For-Profit Corporation Statutes' (1987) 72 *Iowa Law Review* 725; Gordon Marsh, 'Governance of Non-Profit Organizations: An Appropriate Standard of Conduct for Trustees and Directors of Museums and Other Cultural Institutions' (1981) 85 *Dickinson Law Review* 607, 608; Howard Leoner Oleck, *Nonprofit Corporations Organizations and Associations* (4th ed, 1980) 611-14.

¹³⁴ Industry Commission, above n 7.

¹³⁵ Sievers, 'Incorporation and Regulation of Non-profit Associations in Australia and other Common Law Jurisdictions', above n 2, 133-4.

expectations. The key expectation of volunteers is that they should not be held personally liable for acts done honestly and in good faith. This should act as a full defence for breaches of the duties by committee members;

- d) A further distinction should be made between small associations and those with annual turnovers greater than A\$1 000 000, because at this point the rationale for volunteer committee member immunity breaks down. Hence, such large associations should be forced to migrate to the *Corporations Act* which imposes higher regulatory requirements.

Significant reform usually occurs only after a public scandal. This has been demonstrated by the knee-jerk reaction in the United States, and to a lesser extent Australia, following the collapse of Enron and WorldCom. In an area of the law that has the potential to impact significantly on the fabric of society through the encouragement or discouragement of volunteerism, it is important that reform of the duties of committee members occurs on a principled basis without undue public pressure.