BALDWIN *v.* **EVERINGHAM**

[1991 No. 2124]

Supreme Court, Brisbane (Dowsett J.)

2–3, 6–7, 13–14, 30 January 1992

Associations and clubs – Jurisdiction of the courts – Interference in internal management – Ultra vires and illegal acts – Political party registered under Commonwealth Electoral Act 1918 (Cth). (A.Dig. 3rd [7]).

Associations and clubs – Miscellaneous societies and organisations – Political organisations – Political party registered under Commonwealth Electoral Act 1918 (Cth) – *Dispute concerning rules – Justiciability*. (A.Dig. 3rd [47]).

A dispute concerning the rules of a voluntary association registered as a "political party" under the *Commonwealth Electoral Act* 1918 (Cth) is, by reason of the application of that legislation to such an association, justiciable.

Edgar and Walker v. Meade (1916) 23 C.L.R. 29, 43–44 applied.

Cameron v. Hogan (1934) 51 C.L.R. 358 distinguished.

Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175, 190; *McKinnon v. Grogan* [1974] 1 N.S.W.L.R. 295, 297; *Finnigan v. New Zealand Rugby Football Union Inc.* [1985] 2 N.Z.L.R. 159, 179 considered.

CASES CITED

The following cases are cited in the judgment:

Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175.
Burton v. Murphy [1983] 2 Qd.R. 321.
Cameron v. Hogan (1934) 51 C.L.R. 358.
Edgar and Walker v. Meade (1916) 23 C.L.R. 29.
Finnigan v. New Zealand Rugby Football Union Inc. [1985] 2 N.Z.L.R. 159.
McKinnon v. Grogan [1974] 1 N.S.W.L.R. 295.
Rendall-Short v. Grier [1980] Qd.R. 100.

ACTION

C. J. L. Brabazon Q.C., with him *J. D. McKenna*, for the plaintiff.

A. J. H. Morris, with him *L. J. A. T. Hampson* for the defendants.

C.A.V.

DOWSETT J.: The parties were, at all material times members of the Liberal Party of Australia (Queensland Division) (hereinafter called the "Party"). The defendants (except Mr Crosby) were also members of the State Executive. Mr Crosby was the State Director and General Secretary. Mr Paul Everingham was President. The Party is an unincorporated association constituting the Queensland branch of the Liberal Party of Australia. Its organisation is regulated by the State Constitution. Clauses 2 and 3 of the Constitution describe the purpose of the organisation and its objects relevantly as follows:

"2.The Party shall be a voluntary organisation:

(a) To formulate a Platform and create a climate of opinion favourable to that Platform;

(b) To achieve the objectives of the Liberal Party of Australia;

(c) To secure the election of representatives to Commonwealth and State Parliaments and to such Local Authorities as the Party shall from time to time determine.

3. For Federal purposes the Party operates under the Liberal Federal Constitution as ratified by State Executive."

Clause 4 sets out the various objects of the Party, which are imprecise and perhaps Utopian in nature.

By cl. 7 a person who becomes a member, "shall … be bound by the Constitution and pledged to support the Platform".

Clause 10 provides that any member who, without consent, stands against a Party candidate in an election or actively assists another candidate automatically ceases to be a member and in the absence of a determination to the contrary by the State Executive, may not rejoin for at least three years. Clause 12 provides that a member may not be a member of any other political party or any proscribed organisation.

Clause 19 provides that, "a member shall have all the rights and privileges of membership for the financial year for which his subscription is paid".

Clause 20 provides for termination of membership where, in the opinion of the State Executive, a member has committed any conduct or act, "detrimental to the Party or any of its objects". Such a member must be given notice of the intention of the Executive to so proceed and is entitled to be heard.

Clause 36 provides that State Executive is responsible for the management of the Party.

Clause 49 provides:

> "Members elected to political office as candidates selected by the Party shall be responsible for the implementation of the Party Platform and the implementation of policy decisions of Convention, State Council and Policy Committee as approved by State Executive. Such members shall always have the right to vote in accordance with their conscience on a particular issue."

Clause 62 relates to Campaign Committees and provides:

> "State Executive shall appoint a Central Campaign Committee and a Director, which subject to State Executive approval shall have authority over all units of the Party for the purpose of campaigning including the direction of individual campaigning and all aspects of continuous campaigning."

Detailed provision is made for the selection of candidates for election. These provisions are critical to this action:

> "136. Subject to any direction of Convention, State Executive shall decide from time to time which electorates it is necessary to contest in any election, State, Federal or Local Authority, and the number of candidates in such electorates or Local Authorities, after consultation with relevant Zone Executives.
>
> 137. State Executive shall determine the composition of Selection Councils to endorse candidates in Federal, State and Local Authority elections. Members of State Executive shall not constitute more than one third of the members entitled to attend a Selection Council, including a Senate Selection Council, other than in exceptional circumstances as determined by State Executive. In such circumstances the members of the State Executive shall always be fewer than the number of other delegates entitled to attend such Selection Council …
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> 138. Subject to cl. 137 a Senate Selection Council shall comprise members of the State Executive together with an equal number of delegates from each Zone provided that wherever practicable the delegates shall be all from different Branches and the maximum possible number of Branches be represented.

> 139. Procedure at Selection Councils shall be determined by State Executive provided that Selection shall be by separate exhaustive ballot. The decision of the Selection Council shall, subject to cl. 142 be final. [The reference to cl. 142 should probably be a reference to cl. 143].
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> 140. (a) Applications for endorsement shall be called for by newspaper advertisement. Such advertisement shall be inserted by the General Secretary upon the direction of State Executive.
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> (b) The period for the submission of applications for endorsement shall be fixed by State Executive.
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> 141. Upon the direction of State Executive, the General Secretary shall call a Selection Council meeting to select a candidate for each of the seats for which nominations have been called.
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> 142. Where the only nomination for endorsement is that of the sitting Member, he shall nonetheless appear before the relevant Selection Council. Should the relevant Selection Council not endorse the sitting Member, State Executive shall immediately recall nominations for that endorsement.
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> 143. State Executive may with a minimum quorum of one-half plus one of its members present and by a resolution carried by three-quarters of those present, resolve that any endorsement be cancelled or that a further candidate be endorsed if in the opinion of State Executive such cancellation or further endorsement is desirable in the interests of the Party. In either case a new Selection Council shall be called."

Clause 149 prescribes the form of application for endorsement. The form seeks a substantial amount of information about the candidate and his background, including (in cl. 16) an inquiry as to indictable offences or investigations in relation to such offences. The form also contains a declaration to be made by all applicants. An applicant must declare that if not selected as a candidate by the Party, he will not contest the election or support any candidate in opposition to the selected candidate; that he will support and advocate the principles and policies of the party; that he is bound by the provisions of the Constitution of the party; that he will supply to the Vetting Committee, State Executive and the Selection Council further particulars as requested; and:

> "to abide by the decisions of the Vetting Committee and State Executive, even if a decision is made that my nomination shall be rejected and I hereby accept that such a decision will not in any way reflect adversely on my character and integrity and that it will be a decision made in the best interests of the Liberal Party and one with which I shall have no cause for complaint".

An applicant also undertakes to abide by decisions of the Executive, the Central Campaign Committee and his own Campaign Commitee and to campaign in accordance with financial limits approved for the campaign by his Campaign Committee and the Central Campaign Committee. He also acknowledges that he will be personally liable for any campaign expenditure in excess of that approved. He undertakes to refrain from accepting any donation from any person or organisation which imposes on him a guarantee, or pledge or undertaking.

Finally, an applicant accepts, "that any violation will lead to my

automatic expulsion from the party, and render me personally liable for any expenses incurred by any Party unit in the promotion of my campaign".

Clause 153 is as follows:

> "State Executive shall
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> (a) Determine any violation of any undertaking and take appropriate action
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> (b) Appoint annually a Vetting Committee from amongst its members to
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> (i) Examine the particulars of applicants for endorsement;
>
> (ii) Seek further information from applicants for endorsement as the Committee deems desirable;
>
> (iii) Obtain such other information as the Committee deems desirable;
>
> (iv) Recommend to State Executive that nominations be accepted or rejected and in any event to report to State Executive generally on the endorsements for particular seats."

Clause 155 provides for each candidate to appear before the Selection Council and to address it and answer questions. If any substantial allegation is made against a candidate, then he is to be given a further hearing before the Selection Council pursuant to cl. 156.

Clause 159 requires that each candidate be asked whether any objection is raised to the composition or proposed method of conduct of the Selection Council and in the event of an objection,

> "If the Chairman is of the opinion that the objection is so grave as to constitute a breach of the provisions of this Constitution he shall immediately adjourn the Selection Council to a date and time to be determined by the State Executive. If the Chairman is of the opinion that the objection is not so grave as to constitute a breach of the provisions of this Constitution he shall report the objection and his views thereon to the Selection Council which may then determine whether the Selection Council shall proceed. In all such cases the decision of the Selection Council shall, subject to cl. 143 be final."

Clause 164 provides that all property and funds of the party shall be deemed to be the property of the Party and under the control of the State Executive.

Clause 166 provides that there be no distribution of money, property or otherwise to members. Schedule A of the Constitution contains standing orders for the conduct of business at Conventions. Schedule B contains standing orders for the conduct of business of Party units.

On 16 September 1991 the plaintiff made application for endorsement for the federal seat of Moreton at the election currently expected for the first half of 1993. It is common ground that his application was not considered by a Selection Council because the State Executive decided that it should not proceed. In his application, the plaintiff disclosed that he had been charged on summons in 1977 with a number of indictable offences, "including conspiracy and forgery". He was committed for trial on one charge only, but following submissions to the Attorney-General, no indictment was presented.

Prior to his application for endorsement, the plaintiff had, on a number of occasions discussed these charges with various officers of the Party

and concluded that his prior difficulty would not be a bar to seeking public office. There is nothing in the evidence to suggest that the plaintiff had been guilty of any misconduct. This action has proceeded upon the basis that the plaintiff was in all respects free of any culpability.

Throughout these proceedings, it was suggested from time to time that the plaintiff had failed to provide to the various officers and bodies of the Party relevant material relating to his previous difficulties. I reject this suggestion entirely. He did not provide a copy of the transcript of the committal proceedings, but it would have been expensive and difficult to obtain a copy after such a long period of time. Similarly, he was not able to provide copies of the original summonses. On about 5 November, he provided a copy of a draft submission prepared by his solicitors after the committal proceedings and presumably then submitted to the Attorney-General. I am satisfied that this document provided adequate particulars of the allegations made against the plaintiff. To the extent that the plaintiff was under an obligation to provide further details pursuant to the declaration in his application, he discharged such obligation by providing that document. There were at least three lawyers on the State Executive. I would expect them to be sufficiently familiar with the intended purpose of such a submission to realise that any assertions of fact made therein in relation to the allegations against the plaintiff would be accurate. There would be little point in a solicitor making inaccurate representations in such a submission. It could reasonably be expected that these members would advise the other members accordingly, particularly as two of these lawyers, Messrs Everingham and Prentice were closely concerned in the selection process. Further, Mr Baldwin facilitated contact between representatives of the Party and the solicitor who had acted for him. He could not have been expected to do more to satisfy reasonable inquiries.

At some stage, certain persons in the Party, including as I find Mr Paul Everingham, came to the conclusion that although the plaintiff could not reasonably be suspected of criminal misconduct, it was possible that his previous difficulties with the police might be used against him in any election campaign. Moreton is apparently a fairly marginal seat, and if Mr Baldwin's political opponents chose, they might make short-term mileage out of these events, possibly affecting the outcome in a close contest. Although there was some suggestion that Mr Everingham demonstrated bias against the plaintiff, I do not think that this was so. His caution was reasonable in the circumstances. I can see nothing in the evidence to suggest bias. I am satisfied that Mr Everingham, in all respects acted in what he perceived to be the best interests of the Party.

The plaintiff now asserts a number of irregularities in the conduct of the endorsement procedure leading up to and including the resolution of the Executive to reject his application. It is submitted that such irregularities were in breach of the Constitution and rendered the endorsement procedure void. I am asked to determine that question by way of declaration.

At the outset, a question arises as to whether or not the Court will intervene in the internal affairs of the Party. The defendants rely upon the decision of the High Court in *Cameron v. Hogan* (1934) 51 C.L.R. 358 for the proposition that the Court will not so intervene. That case, it is said holds that a court will intervene to enforce the rules of a voluntary association only if the rules are construed as creating a contract amongst the members or if the party seeking relief is able to show some proprietary

right to ground jurisdiction in equity. A great deal of time was spent in examining many cases, both Australian and English in which courts have managed to avoid the occasionally unpalatable consequences of such an approach.

It is fair to say that in modern times, the expectation that the rules of a voluntary association will be enforced by the courts has become more widely held, at least if one is to judge by the number of occasions on which such relief is sought. Many of the procedural difficulties in so doing, as identified by the members of the High Court in *Cameron v. Hogan* are today of reduced significance because of the expansion of the availability of declaratory relief. Further, no particular point was taken in this case as to the constitution of the action, another area of difficulty underlying the decision in *Cameron v. Hogan*. It may also be that the existence of an appropriate proprietary right to found jurisdiction will now be satisfied if the action involves the due disposal and administration of property. See *Rendall-Short v. Grier* [1980] Qd.R. 100 at 109 and *Burton v. Murphy* [1983] 2 Qd.R. 321 at 325.

In the present case, very considerable difficulty lies in the way of establishing an enforceable contract binding upon the various members of the Party. As Mr Morris for the defendants pointed out in argument, if there be such a contract, then presumably, any member who claims to have suffered loss as a result of the perceived failure of a member of parliament (elected with Party endorsement) to advance the policies of the Party in accordance with his obligations under the Constitution, could sue for damages. Although this is an extreme case, it highlights why I find it difficult to construe the Constitution as having contractual effect.

As to the question of due administration of the property of the Party, it is arguable that as a major function of the party is the election of candidates to public office, this will consume much of that property and income therefrom. It might further be argued that a person joining the Party will expect its funds to be so expended and that a member seeking endorsement will have a reasonable expectation that some part of that property will be applied in support of his candidature in the event that he obtains endorsement. However the High Court in *Cameron v. Hogan* at 377–378, thought such an "interest" to be insufficient to justify judicial intervention.

In the course of argument, I inquired as to whether there had not been a change in the status of Australian political parties recognised by federal legislation. Mr Morris conceded that this was so and helpfully gave me certain references. The principal legislation concerning federal elections is the *Commonwealth Electoral Act* 1918 (Cth). That legislation gives statutory recognition to the existence of political parties. For a very long time, the parliamentary system functioned upon the assumption that parties had no official status in the electoral process. The Act indicates that such is no longer the case.

The term "political party" is defined by the Act to mean, "an organisation the object or activity, or one of the objects or activities, of which is the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it …"

The Party is such a political party and is also registered pursuant to the Act. In order that a party be so registered, it must have a written constitution setting out its aims and as previously indicated, those aims

must include the securing of the election of candidates to the Australian Parliament. Prior to registration, a party must provide a copy of its constitution to the Electoral Commission and must also indicate its name and any abbreviations thereof which it will use. Each party must have a registered officer and must also state whether or not it wishes to receive public moneys under Division 3 of Part XX of the Act.

Part XIV of the Act deals with the nomination of candidates for election and pursuant to s. 166 of the Act, the registered officer of a registered political party may nominate the candidates endorsed by that party for the particular election. This dispenses with the requirement for a nomination signed by six enrolled voters, which otherwise is necessary for an effective nomination. Pursuant to s. 169, such registered officer may request that the name or registered abbreviation of the name of that party be printed on the ballot papers adjacent to the name of the endorsed candidate.

Section 169B provides that:

> "… a person shall be taken to have been endorsed as a candidate in an election by a registered political party if:-
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> (a) the candidate is nominated by the registered officer of the party;
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> (b) the name of the candidate is included in a statement signed by the registered officer of the party setting out the names of the candidates endorsed by the party in the election and lodged:
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> (i) in the case of a Senate election, with the Australian Electoral Officer; and
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> (ii) in the case of an election of a member of the House of Representatives for a Division, with the Australian Electoral Officer for the State or Territory in which the Division is situated …"

Alternatively, the Electoral Commission may satisfy itself as to such endorsement by making appropriate inquiries of the registered officer of the party or otherwise (s. 169B(1)(c)). The question of party endorsement is obviously a very important matter specifically dealt with by the Act, clearly in the expectation that it will be possible for the Electoral Commission to determine whether or not a particular candidate has been so endorsed.

Part XX of the Act deals with election funding and financial disclosure. Section 287 is a definition section. Section 287A provides that, "Divisions 4 and 5 apply as if a campaign committee of an endorsed candidate or endorsed group were a division of the relevant State branch of the political party that endorsed the candidate or the members of the group". Division 2 of Part XX provides for the appointment of agents of political parties and candidates. Division 3 relates to election funding. In effect, it provides that candidates and registered parties may be refunded up to 60 cents for each vote obtained in a House of Representatives election and 30 cents per vote in the case of a Senate election. The maximum recoverable is the total of electoral expenses actually incurred. In the case of a registered party, all expenses incurred with the authority of a candidate are deemed to be incurred by the party and are recoverable by the party.

Division 4 relates to disclosure of donations and requires disclosure of all gifts received by a party or candidate during the disclosure period for the election. It would seem that gifts received by a campaign committee on behalf of a candidate would be deemed to be received by a division

of the party for accounting purposes. Division 5 requires disclosure of electoral expenditure by both parties and candidates.

On general principles, where an albeit voluntary association fulfils a substantial public function in our society, it may appear indefensible that questions of construction concerning its constitution should be beyond judicial resolution. It is one thing to say that a small, voluntary association with limited assets, existing solely to serve the personal needs of members should be treated as beyond such supervision; it is another thing to say that a major national organisation with substantial assets, playing a critical role in the determination of the affairs of the country should be so immune. This is what Wootten J. intended in *McKinnon v. Grogan* [1974] 1 N.S.W.L.R. 295 at 297, where his Honour said of *Cameron v. Hogan*:

> "The High Court has not had occasion to re-consider it squarely, and I venture to suggest that when such an occasion does arise there will at least be some qualification of what was there said. With the greatest respect to the eminent and forward-looking judges who gave the decision, it has tended to justify judicial abdication from areas the orderly regulation of which has become of ever-increasing importance. The resultant categorization in legal analysis of a great political party, or the effective regulatory institution of a major sport in the community, with a group of friends agreeing to meet for a game of tennis, is simply inadequate. One can understand that judges, who feel so keenly the importance of standing apart and being seen to stand apart from partisan politics, would be reluctant to see the internal factional struggles of political parties brought into the courts. But the proper desire to avoid identification of the judiciary with partisan politics is not a justification for eschewing responsibility for legal questions which happen to arise in the political arena. Courts have to venture amongst political divisions in many cases, notably in deciding constitutional issues and in enforcing the rules of trade unions, and a proper discharge of the judicial function in such areas will do more for their standing and reputation for impartiality that a failure to assist in settling the legal aspects of disputes which ravage great and small institutions in the community."

Whilst I am in general agreement with these observations as a matter of sentiment, they would not necessarily justify me in refusing to follow *Cameron v. Hogan* simply because of the passage of years since that judgment. Similar observations have been made in other jurisdictions, for example in *Finnigan v. New Zealand Rugby Football Union Inc.* [1985] 2 N.Z.L.R. 159, where on appeal, Cooke J. said in delivering the judgment of the Court at 179:

> "While technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance, for the reasons already outlined. In this particular case, therefore, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. This is not to be pressed too far. We are not holding that, nor even discussing whether, the decision is the exercise of a statutory power – although that was argued. We are saying simply that it falls into a special area where, in the New Zealand context,

> a sharp boundary between public and private law cannot realistically be drawn."

This observation was made in the context of an attempt to prevent the New Zealand Rugby team touring to South Africa. The questions of "major national importance" referred to by Cooke J. concerned the prominence of Rugby football in New Zealand, the importance of the Rugby Football Union in the administration of that sport and the likely consequences of such a tour at a time when international sanctions were being applied against South Africa.

Similar sentiments have been expressed by Lord Denning. See in particular *Breen v. Amalgamated Engineering Union* [1971] 2 Q.B. 175 especially at 190 as follows:

> "Does all this apply to a domestic body? I think it does, at any rate where it is a body set up by one of the powerful associations which we see nowadays. Instances are readily to be found in the books, notably the Stock Exchange, the Jockey Club, the Football Association, and innumerable trade unions. All these delegate powers to committees. These committees are domestic bodies which control the destinies of thousands. They have quite as much power as a statutory body of which I have been speaking. They can make or mar a man by their decisions. Not only by expelling him from membership, but also by refusing to admit him as a member: or, it may be, by a refusal to grant a licence or to give their approval. Often their rules are framed so as to give them a discretion. They then claim that it is an 'unfettered' discretion with which the Courts have no right to interfere. They go too far. They claim too much …. So should we treat this claim by trade unions. They are not above the law, but subject to it. Their rules are said to be a contract between the members and the union. So be it. If they are a contract, then it is an implied term that the discretion should be exercised fairly. But the rules are in reality more than a contract. They are a legislative code laid down by the council of the union to be obeyed by the members. This code should be subject to control by the courts just as much as a code laid down by Parliament itself. If the rules set up a domestic body and give it a discretion, it is to be implied that that body must exercise its discretion fairly."

It is not for me sitting at first instance to determine matters of policy. The difficulties inherent in applying *Cameron v. Hogan* to very many organisations and domestic tribunals have been considered on numerous occasions as is revealed by the cases to which I have been referred. However if *Cameron v. Hogan* applies fairly to the circumstances of the present case, then I must apply it, leaving matters of policy for determination by the High Court itself. The question for my determination is whether or not *Cameron v. Hogan* does apply to the present circumstances. If it were not for the statutory recognition of political parties to which I have referred in some detail, I would be compelled to the conclusion that the case does so apply. I can see no other basis for distinction between the Labor Party as it was in the 1930s and the Queensland Branch of the Liberal Party as it now is. However there is a passage in the decision in *Cameron v. Hogan* itself which is of some importance. It is the passage which cites the very principle at the heart of the case. At 372 in the judgment of the majority, their Honours cite with apparent approval an extract from a

judgment of Isaacs J. (as his Honour then was) in *Edgar and Walker v. Meade* (1916) 23 C.L.R. 29 at 43 as follows:

> "In the case of a purely voluntary association, a Court of equity bases its jurisdiction on property, there being nothing else for it to act on. A Court of common law before the *Judicature Act* regarded the invalid expulsion as void, and gave no damages. So between the two jurisdictions the plaintiff could rely only on property as the basis of jurisdiction …."

Reference to *Edgar and Walker v. Meade* discloses that Isaacs J. was there concerned with the rules of a trade union registered under the provisions of the *Conciliation and Arbitration Act* 1904 (Cth). At 43–44, following the passage cited above, his Honour continued:

> "But here the situation, in my opinion, calls for another view.
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> This organization is the creature of the Federal Parliament for a special reason, and as incidental to a specific power in the Constitution. The incorporation of employees in such an organization is a matter of public policy, and to effectuate the object of the Act. For this purpose rules are required to be registered, and in my opinion a member or a group of members forming a branch recognized by the rules have a *locus standi* to assert in a competent Court their legal rights to remain members of the organization, notwithstanding an invalid resolution to expel him or them, and so exclude him or them from the status and benefits which the Act intended them to have.
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> As to Edgar he has a proprietary right; but, as to both him and the plaintiffs in the second action, I hold their rights to sue do not in such a case as this depend on the question of property affected. The very object of the legislative provisions in incorporating such associations and facilitating the settlement of industrial disputes might be defeated if members and branches could be excluded by a governing body, contrary to rules, unless property was involved. The organization is therefore not in the same position as a voluntary club."

I have considered the terms of the *Conciliation and Arbitration Act* in the form which obtained in 1916. Section 55 of the Act provided that:

> "Any of the following associations or persons may, on compliance with the prescribed conditions, be registered in the manner prescribed as an organisation:-
>
> (a) any association of employers in or in connection with any industry …;
>
> (b) any association of not less than 100 employees in or in connection with any industry …;
>
> (c) any association of not less than 100 employees engaged in any industrial pursuit or pursuits whatever …"

Upon registration such an association became an organisation as identified by that legislation, acquiring perpetual succession and the power to lease, buy or sell property. Various other provisions dealt with the rules of such organisations and conferred certain powers on them in relation to industrial disputes.

Section 69 provided:

> "Every dispute between an organisation and any of its members shall

> be decided in the manner directed by the rules of the organisation; and the Court … may order the payment by any member of any fine, penalty or subscription payable in pursuance of the rules aforesaid or any contribution to a penalty incurred ….”

Disputes between the organisation and its members were to be settled internally pursuant to this section. Only actions to recover moneys were to be brought in the Court, a reference to the Commonwealth Court of Conciliation and Arbitration. It may be conceded that the Act more closely controlled the affairs of registered organisations than does the *Commonwealth Electoral Act* regulate the affairs of registered parties. The former legislation conferred a status at least akin to incorporation and there was clear recognition that some disputes between the organisation and its members would be justiciable. However it should be noted that Isaacs J. did not rely upon s. 69 in *Edgar and Walker v. Meade*.

In saying that a registered organisation under the *Commonwealth Conciliation and Arbitration Act* was a creature of the Federal Parliament, Isaacs J. cannot have meant that the association was itself created by the Act because the Act assumed the existence of an association prior to registration. Such an association became an organisation upon registration. I consider that it was the fact of statutory recognition which was important to the decision in *Edgar and Walker v. Meade*, and not the quasi-corporate status conferred by the Act. Statutory recognition of political parties is obviously a matter of public policy, designed to effectuate the conduct of federal elections, to adopt and adapt the language of Isaacs J. In effect, the rules of such a party are required to be registered, as were the rules of registered industrial organisations under the other Act, although it is true that there is no provision in the *Commonwealth Electoral Act* for registration of amendments to those rules.

In the end, I conclude that the reasoning which led Isaacs J. to consider that the issues in *Edgar and Walker v. Meade* were justiciable should lead me to conclude that disputes concerning the rules of political parties registered under the *Commonwealth Electoral Act* are now also justiciable. This conclusion differs from the conclusion in *Cameron v. Hogan* not because changing policy considerations dictate a different result, but rather because the Commonwealth Parliament, in conferring legislative recognition upon political parties has taken them beyond the ambit of mere voluntary associations.

Mr Morris submitted that political parties have been accorded de facto statutory recognition for many years, particularly in connexion with the “grouping” provisions for Senate elections. Whilst this is so, those provisions fell far short of the recognition now accorded them, and of course parties are also now entitled to receive public funds. The point at which a voluntary association acquires the significance in public affairs contemplated by Isaacs J. will always be a matter for judgment. It is my view that the current legislative recognition of registered political parties confers such significance.

There is one other submission made by Mr Morris for the defendants to which I should specifically refer. He submitted that to conclude, as I have concluded would be a curious result because it would mean that the Parliament had, by legislation changed the common law of the States. This submission is based upon the assumption that the rules as to whether or not a declaration should be made are, in some sense part of the common

law of the States. With all respect to Mr Morris's typically careful argument, I fear that this misconceives the issue. The conclusion reached in *Cameron v. Hogan* was based either upon the futility of declaratory relief in the light of the then prevailing rules as to declarations because no contractual or proprietary rights were involved or alternatively, upon discretionary considerations. In concluding that circumstances now dictate a different outcome, I am merely recognising a different regime created by federal legislation. To do otherwise would be to pretend that such legislation did not exist. That could never be a proper approach. Having concluded that the matter is justiciable, I turn now to consider the process which was followed and the consequences pursuant to the Constitution of the Party.

As previously outlined, State Executive is authorised to decide which electorates should be contested in any election and to determine the composition of Selection Councils to endorse candidates. Clause 137 limits the number of members of State Executive who may be members of any Selection Council to not more than one-third of its number. In exceptional circumstances this may be varied, but the number of Executive members must always be fewer than the number of other delegates.

Clause 139 provides that procedure at Selection Councils be determined by State Executive, "provided that selection shall be by separate exhaustive ballot".

Clause 140 requires that the party advertise for applications for endorsement, and even if only the sitting member is nominated, the relevant Selection Council must still sit to endorse his nomination. It is obviously contemplated that the Council may refuse such endorsement because cl. 142 provides that in such a case, the Executive shall immediately recall nominations.

Clause 143 authorises the State Executive to cancel an endorsement, but special quorum and voting requirements apply. There must be a quorum of one-half plus one of the members of the Executive, and the resolution must be adopted by three-quarters of those present. The State Executive may take such step if it considers that cancellation or further endorsement is desirable in the interests of the party. A new Selection Council must then be called to consider new nominations.

Provision is made for the election of delegates to Selection Councils. Clause 146 authorises State Executive to act as a Selection Council where there is insufficient time to summon a properly constituted Selection Council. Selection Councils are presided over by the President, one of the Vice Presidents or the immediate Past President of the Party. See cl. 148.

Obviously, it is intended that candidates be selected for endorsement by Selection Councils. Indeed, the Constitution goes to some lengths to ensure that other than in an emergency, State Executive should not be able to dominate such Councils. In the present case, it is common ground that the Selection Council for the Electorate of Moreton did not consider Mr Baldwin's application. He was asked to withdraw his application, and when he chose not to do so, Mr Everingham convened a meeting of State Executive to resolve to reject his application in accordance with the recommendation of a Vetting Committee appointed pursuant to cl. 153 of the Constitution.

Any authority in the State Executive to so act must be conferred by the Constitution. The State Executive is vested with, "the management

of the party". See cl 36. However in light of the specific provisions relating to Selection Councils and the specific provisions designed to ensure that State Executive does not dominate such Councils, one might readily conclude that the provisions relating to the functions of such Councils were intended to be specific provisions excluding the selection process from the general power of management conferred on the Executive. Mr Morris argued to the contrary, pointing to a number of provisions said to demonstrate a power in the Executive to reject applications.

Firstly, he submitted that the establishment of a Vetting Committee implies a power to exclude. Clause 153 certainly contemplates that a Vetting Committee may recommend to State Executive that a nomination be rejected. However nothing else in the Constitution specifically suggests such a power. The State Executive must appoint the Vetting Committee from amongst its members. Thus the Vetting Committee is a sub-committee of the State Executive. If it were intended that the State Executive have power to exclude candidates in its absolute discretion, one would expect to find an express power. Mr Morris also pointed to the prescribed declaration in the application for endorsement. The undertaking to abide by the decisions of the Vetting Committee and State Executive, "even if a decision is made that my nomination shall be rejected", suggests, it was argued, a power to reject. The acknowledgment that any such rejection will not reflect adversely on an applicant's character and integrity might also suggest this.

Clearly, State Executive must, in some circumstances have power to reject applications for endorsement. There would otherwise be no point in authorising the Vetting Committee to make recommendations as to acceptance or rejection. On the other hand, it is equally clear that the relevant Selection Council is primarily responsible for selection of candidates and that the Constitution demonstrates a clear intention that the State Executive not dominate the selection process. It is also beyond doubt that the Executive has the power to set aside the Selection Council's choice in special circumstances and subject to special procedural requirements. Mr Morris submitted that the vetting procedure was intended to allow the State Executive to prevent unsatisfactory candidates being considered by the Selection Council, whilst the power to set aside a Selection Council decision was primarily designed to deal with circumstances arising after the Selection Council had performed its function. Clause 143 does not purport to so limit that power. Further, the special procedural requirements suggest that intervention by the State Executive was seen by those who drafted the Constitution as being, in general undesirable. In that context, it seems most unlikely that it was intended that the State Executive should be able to control the selection of candidates by excluding candidates from the Selection Council process.

Further, where serious allegations are made against a nominee for endorsement, the Selection Council must afford him an opportunity to be heard on that matter. Neither the State Executive nor a Vetting Committee is subject to any such express obligation. It is curious that the Constitution should require the Selection Council to proceed in such a formal way if the State Executive can exclude candidates without observing such niceties.

In a similar vein, it will be noted that cl. 157 of the Constitution requires that selection be by exhaustive ballot. No provision is made to regulate

the way in which the State Executive should consider the question of permitting or not permitting nominations to proceed. Indeed, as I have already observed, the question of the State Executive rejecting applications is not expressly mentioned in the Constitution, save in connexion with the Vetting Committee. Finally, it will be noted that cl. 159 is also designed to give candidates an opportunity to object to the, "composition or proposed method of conduct of the Selection Council". No such opportunity is extended to a candidate when his application for endorsement is considered by the State Executive or the Vetting Committee.

In the end, I am led to the conclusion that the Constitution does not authorise the State Executive to exclude nominations, save where a particular nomination does not comply with the requirements of the rules. The function of the State Executive, and therefore the Vetting Committee is limited to ensuring that applications are in an appropriate form and that sufficient information has been made available by a candidate for consideration by the relevant Selection Council. It is quite appropriate to describe this process as "vetting", and it is understandable that a largely administrative function should be delegated to a sub-committee of the State Executive. Clauses 139, 140 and 141 suggest such a function for it. The Executive would be justified in excluding an applicant from consideration by the Selection Council if he were not qualified either for nomination or election or if inadequate information had been provided.

In this context it is understandable that there should be no question of a hearing before either the Executive or the Vetting Committee, but that there should be a hearing in the event that the Selection Council considers that a substantial allegation has been raised against a candidate. This interpretation has the very considerable advantage of leaving the issue of selection where it was clearly intended to be, namely with the Selection Council. It avoids the inconsistency inherent in prohibiting the State Executive from dominating the composition of the Selection Council whilst at the same time allowing it to regulate absolutely the entitlement of candidates to be considered by such Council. It is true that one or two of the declarations contained in the application form are a little difficult to reconcile with this interpretation, but on the other hand, whichever of the two interpretations be adopted, difficulties arise simply because the Constitution has not been drawn with great care.

The only substantial criticism made of Mr Baldwin's nomination was that he had failed to provide appropriate information as to the allegations made by the police against him. As I have said, I am of the view that this allegation is ill-founded. In any event, Mr Morris expressly abandoned such assertion in his submissions. Had there been a failure to provide information as to that matter, such failure may have been a ground for exclusion by the Executive on the recommendation of the Vetting Committee, but in the events which happened, there was no such justification. Thus I consider that the Executive had no power to exclude Mr Baldwin from the Selection Council process. It follows that the decision of the Executive was contrary to the Constitution of the party, and the selection process has miscarried. I am comforted in my view of the proper construction of the Constitution by the fact that the Executive has never previously purported to "vet out" any nominee, although this fact has not influenced my decision. It is not necessary to consider other attacks made by the plaintiff upon the selection process as adopted in his case.

It was submitted that Mr Baldwin had disentitled himself to equitable relief by indicating a willingness to accept a decision of the Vetting Committee on the matter. I do not see why such an indication should be so disentitling in the absence of something akin to a "submission to jurisdiction" (as in the case of arbitration), nor do questions of "clean hands" arise. The plaintiff was really indicating a willingness to be guided by the views of senior Party members. In the end, he found their approach unacceptable. Other bases for alleging an absence of "clean hands" included his support of his wife's candidacy and delay in mounting these proceedings until after his wife had failed to gain endorsement. There was no real temporal delay, and I do not see why these matters should cause me to decline relief on discretionary grounds. I also do not consider that the declarations made in the application for endorsement should have a disentitling effect for present purposes. At the very least, those declarations must have been based on an assumption that the Executive and Vetting Committee would act within power.

It was also submitted that the plaintiff had no real prospect of selection and that any relief was therefore pointless. As I have said, there is now a significant public interest in the enforcement of the rules of registered political parties. Further, there may be advantage to a person hoping for a political career in having applied unsuccessfully for endorsement. I do not consider that a declaration as to construction of the Constitution would be pointless in the relevant sense.

I will hear the parties further as to the appropriate form of declaration and other relief and also as to any further finding of fact.

Orders accordingly.

Solicitors: *Thynne & Macartney* (plaintiff); *McCullough Robertson* (defendants).

J. B. SWEENEY
Barrister