



# LEGAL CAPACITY OF INCORPORATED ASSOCIATIONS AND THE ASSOCIATIONS INCORPORATIONS ACT 1981 (QLD)

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## INTRODUCTION

The legal capacity of an incorporated association refers to the extent of its corporate power to enter into a particular transaction or to do a particular act that has legal effect. Neither Australian courts nor legal commentators have considered the legal capacity of an incorporated association in any depth. It is the purpose of this article to examine the legal capacity of an incorporated association registered under the provisions of the *Associations Incorporation Act 1981* (Qld).<sup>1</sup> This study is also undertaken against the background of a recent decision of the Supreme Court of Queensland.

The focal provisions, which govern the issue of the legal capacity of an association incorporated under the *Associations Incorporation Act*, are sections 25 and 26. The interpretation and operation of these provisions can more readily be understood by a consideration of two further issues. Firstly, there is a need to consider the nature of incorporated associations by outlining their legal characteristics, the purposes of the *Associations Incorporation Act* and the relevance of the objects clause of an association to the incorporation process. Secondly, the common law doctrine of *ultra vires*, particularly its ambit and operation, provides a focal point for discussion because there is a need to ascertain to what extent it applies to incorporated associations.

The issue of the legal capacity of an association incorporated under the *Associations Incorporation Act* is also discussed against the background of the recently decided case of the Supreme Court of Queensland of *Queensland Rugby Football League Ltd v Worrell*<sup>2</sup>. This case involved an application under section

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<sup>1</sup> Hereafter referred to as the *Associations Incorporation Act*.

<sup>2</sup> (2000) 35 ACSR 555, per Helman J.

536 of the *Corporations Law*<sup>3</sup> by the Queensland Rugby Football League Ltd and the Burdekin Junior Rugby League Club Inc. The application was for an order that the court make an inquiry into the conduct of the respondent in relation to his actions as liquidator in distributing the surplus assets of the Colts League Club Inc. The application was also for an order for the payment of that surplus of \$36,000 to the applicants with interest. Section 536 of the *Corporations Law* provided that, where a complaint was made to the Court by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties, the Court could inquire into the matter. Where the Court made such an inquiry, it could take such action, as it considered fit. The facts of the case can be stated in a few paragraphs.

The Colts League Club Inc was incorporated under the *Associations Incorporation Act* to foster the sport of rugby league in its local area and support two local rugby league teams. Rule 2 specifically provided for the objects of the club as follows:

2. The objects for which the club is established are: -
  - (a) To foster the sport of rugby league in the Lower Burdekin area and in particular to foster and support the Colts Rugby League Football Club and the Colts Junior Rugby League Club;
  - (b) To provide Clubhouse, training and recreational facilities for members of the club and for members of such other Football Clubs as may affiliate with the Club;
  - (c) To do any other thing and to provide any other service consistent with the foregoing objects.

At the time of the distribution of the surplus by the respondent the two clubs named in paragraph (a) of the objects clause had ceased to exist.

By virtue of section 89 *Associations Incorporation Act*, the members of the club resolved that it be voluntarily wound up. By virtue of section 91(1) *Associations Incorporation Act*, the provisions of the *Corporations Law* that dealt with winding up applied to the winding up of the club. The respondent was appointed liquidator. The respondent, as liquidator, was a party to a deed of settlement, which terminated a joint venture agreement between the Colts League Club, the second applicant, and another incorporated association, the Burdekin Touch Association Inc. Under the deed of settlement payments were made from club funds to the other joint venturers. After payment of the club's creditors a surplus remained. Rule 31 of the club's constitution dealt with the distribution of surplus assets as follows:

31. If the club shall be wound up in accordance with the provisions of the *Associations Incorporation Act 1981*, and there remains, after satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the Club, but shall be given to or transferred to some other institution or institutions having objects similar to the objects of the

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<sup>3</sup> This is now replaced by the *Corporations Act 2001* (Cth).

club, and which shall prohibit the distribution of its or their income and property among its or their members to an extent at least as great as is imposed on the club under or by virtue of Rule 28 (j), such institution or institutions to be determined by the members of the club.

The respondent, after consulting the club's members, distributed the surplus to four local sporting clubs, none of which were rugby league clubs. Before the final general meeting of the club's members and creditors, the applicants complained to the liquidator about the distribution of surplus assets. Accordingly, at the final general meeting the respondent proceeded to have the distribution ratified by a special resolution of the club's members pursuant to section 92 *Associations Incorporation Act*. Section 92 (1) provided as follows:

Where, upon the winding up of an incorporated association, a special resolution relating to the distribution of the surplus assets of the incorporated association has been passed by its members in accordance with its rules, all surplus assets shall, subject to any trust affecting the same, be disposed of in the manner so resolved

The incorporation of the Colts League Club was then cancelled. Subsequently, the application under section 536 was filed. The first applicant governed and controlled rugby league football throughout Queensland.

At the hearing of the application, the applicants argued that the respondent had not distributed the surplus assets in accordance with Rule 31.<sup>4</sup> More specifically, the applicants made two complaints. Firstly, the applicants argued that the respondent had acted *ultra vires* because the power to distribute any surplus was reserved to the club's members.<sup>5</sup> Secondly, the applicants argued that the distribution was void because the respondent distributed the funds to institutions that did not have objects similar to those of the Colts League Club, and as such could not be validly ratified by special resolution under section 92 *Associations Incorporation Act*.<sup>6</sup>

## Part A: Nature of Incorporated Associations

### Characteristics of Incorporated Associations

An incorporated association is defined as an association incorporated under the *Associations Incorporation Act*.<sup>7</sup> 'Association' is defined to mean an association, society, body, or other entity formed or carried on, for a lawful purpose.<sup>8</sup> An association must be eligible for incorporation under the *Associations Incorporation Act*.

The criteria for eligibility for incorporation are that the association should not be constituted primarily for the purpose of making profits<sup>9</sup> or for the purpose of

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<sup>4</sup> (2000) 35 ACSR 555, at 561.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Id* at 561-62.

<sup>7</sup> *Associations Incorporation Act* s 2.

<sup>8</sup> *Associations Incorporation Act* s.2.

<sup>9</sup> *Associations Incorporation Act* s 5(1)(b).

providing gain for its members either financially<sup>10</sup> or by the holding of property<sup>11</sup>, or the raising of loan funds<sup>12</sup>. These criteria are long standing principles underlying eligibility for incorporation under associations' incorporation legislation throughout Australia.<sup>13</sup>

Where an association does make profits incidental to its activities, such as by trading with the public or charging admission fees to displays, contests, sporting fixtures or other occasions conducted to promote its objects, these must be applied exclusively for the objects and purposes of the association. In this respect the *Associations Incorporation Act* recognises the commercialisation of sporting clubs and other community organisations. These provisions reflect the reality that such clubs and organisations quite often trade for the benefit of the organisation, as distinct from its members, in the pursuit of its objects.<sup>14</sup>

### Purposes of Associations Incorporation Act

The *Associations Incorporation Act* is undoubtedly designed to provide sporting clubs and other community groups with an uncomplicated and economical form of incorporation that takes account of the interests of members, creditors and the public.<sup>15</sup> The purpose of the *Associations Incorporation Act* through incorporation is to remedy those problems that may confront an unincorporated non-profit association.<sup>16</sup> An unincorporated non-profit association is not a separate legal entity but rather is the total of all its members at a particular point in time.<sup>17</sup> Consequently, it is characterised by a number of problems. These problems include the following: the entry into contracts with third parties; the non—existence of contractual rights of members under the association's constitution or rules; the ownership of property of the association; the conduct of legal proceedings by the association; and the personal liability of members.<sup>18</sup>

### Incorporation and the Relevance of the Objects Clause

An unincorporated association may incorporate under the *Associations Incorporation Act* by following the designated procedure.<sup>19</sup> Part of this procedure involves the passing of incorporation resolutions and the lodging of required documentation with the registering authority, the Office of Fair Trading. The association is required to adopt proposed rules, which may be the model rules

<sup>10</sup> *Associations Incorporation Act* s 5(1)(c), s 4(1).

<sup>11</sup> *Associations Incorporation Act* s 5(1)(e).

<sup>12</sup> *Association Incorporation Act* s 5(1)(f).

<sup>13</sup> *R v Judges of the Federal Court of Australia; Ex parte Western Australia National Football League Inc* (1979) 143 CLR 190 at 219.

<sup>14</sup> P Mendes, *Law and Management of Clubs and Community Organisations in New South Wales* (1986) 107 referring to the equivalent provisions under the *Associations and Incorporations Act 1984* (NSW).

<sup>15</sup> A Afterman and R Baxt, *Cases and Materials on Corporations and Associations*, Sydney, Butterworths, 8th ed, 1999 p149.

<sup>16</sup> *Id* at 150.

<sup>17</sup> *Leahy v Attorney-General (NSW)* (1959) 101 CLR 611 at 619.

<sup>18</sup> John Gooley, *Corporations and Associations Law*, Sydney, Butterworths, 4<sup>th</sup> ed, 1999, 74.

<sup>19</sup> *Associations Incorporation Act*. ss 6-10.

promulgated under the *Associations Incorporation Act*, or the association's own rules.<sup>20</sup> The documents that are required to be lodged with the registering authority include a copy of the objects proposed for the incorporated association if the association's proposed rules are the model rules or a copy of the association's proposed rules if they are not the model rules.

The model rules are set out in the *Associations Incorporation Regulation 1999* (Qld)<sup>21</sup> The *Associations Incorporation Regulation* makes provision for the objects of the association, which are to be stated fully.<sup>22</sup> Where an association proposes to be registered with its own rules, the *Associations Incorporation Regulation* requires that the rules must regulate specified matters,<sup>23</sup> including providing for the objects of the incorporated association.<sup>24</sup>

Where the association's application for registration is granted, it is registered either with the model rules or its own drafted rules.<sup>25</sup> In either case the registered rules include the objects of the association.<sup>26</sup>

### Part B: The Common Law Doctrine of *Ultra Vires*

Under the common law the concept of *ultra vires* has been understood in two senses. Firstly, there is the narrow or strict sense. This refers to the issue of whether an incorporated body has the legal capacity to enter into a particular transaction or perform a particular act having regard to any statement of objects or purposes set out in its constitution or governing statute.<sup>27</sup> Secondly, there is also a broad sense in which the concept is used. It refers to the issue of whether the natural persons who purport to act on behalf of the incorporated body have authority to do so or have abused their power.<sup>28</sup> Sometimes, it is also used in the sense of acts by the incorporated body, which contravene the law whether statutory<sup>29</sup> or general<sup>30</sup>. The English Courts have preferred to confine the concept to its narrow or strict sense.<sup>31</sup> Some Australian Courts have taken a similar view.<sup>32</sup>

<sup>20</sup> *Associations Incorporation Act*. s 6.

<sup>21</sup> *Associations Incorporation Regulation 1999* (Qld) reg 8, sch 4. The Regulation is hereafter referred to as *Associations Incorporation Regulation*.

<sup>22</sup> *Associations Incorporation Regulation* sch 4 rule.3.

<sup>23</sup> *Associations Incorporation Regulation*. reg 7.

<sup>24</sup> *Associations Incorporation Regulation* sch 3 pt 1 cl 2.

<sup>25</sup> *Associations Incorporation Act* s 46.

<sup>26</sup> *Associations Incorporation Act* s 46 (2)(b).

<sup>27</sup> *Rolled Steel Products Ltd v British Steel Corporation* [1986] 1 Ch 246 at 295-6, 303.

<sup>28</sup> *Ibid.*

<sup>29</sup> Eg. *DJE Constructions Pty Ltd v Maddocks* [1982] 1 NSWLR 5 (company breaching companies legislation in giving financial assistance for purchase of its own shares.)

<sup>30</sup> *Oatmont Pty. Ltd. v Australian Agricultural Co Ltd.* (1991) 5 ACSR 75.

<sup>31</sup> *Supra* n.27 at 302-3.

<sup>32</sup> *Advance Bank Australia Ltd v FAI Insurances Ltd & Anor* (1987) 5 ACLC 725 at 733-34; *Brick & Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* (1991) 9 ACLC 324 at 341; (1992) 10 ACLC 253 at 268.

Others, however, have been less reluctant to utilise the distinction between the narrow and broad senses of the concept.<sup>33</sup> This article focuses on the concept of *ultra vires* in its narrow sense.

The doctrine of *ultra vires* entered corporate law by the vehicle of the statutory corporation. The principle is that “a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act”.<sup>34</sup> Subsequently, the doctrine was applied analogously by the courts to companies incorporated under companies’ legislation. It was in this area of registered companies that the courts produced the most detailed analysis of the doctrine of *ultra vires* and related principles.

This section of the article explores the application of the common law doctrine of *ultra vires* to registered companies and incorporated associations. It also considers the parallel doctrine of constructive notice and categories of objects in objects clauses. This raft of principles provides a framework for the analysis of *Queensland Rugby Football League Ltd v Worrell*<sup>35</sup> and for the interpretation and operation of sections 25 and 26 *Associations Incorporation Act*.

### Legal Capacity of Registered Companies

Presently, the *Corporations Act 2001*(Cth) confers wide legal capacity on registered companies.<sup>36</sup> This has not always been the case. Under early companies’ legislation, a registered company had only a limited legal capacity to perform juristic acts.

Under early companies’ legislation, a company was required to state its objects in its memorandum of association<sup>37</sup>, which was then part of the company’s constitution.<sup>38</sup> This meant that a company had to specify the objects so as to delimit and identify the scope of businesses and activities that it could pursue.<sup>39</sup> The company could not provide in its objects clause that it might do anything that an individual might do for this did not comply with the statutory requirement that objects had to be stated.<sup>40</sup> There was, however, no statutory limit on the number of

<sup>33</sup> *Darvall v North Sydney Brick & Tile Co Ltd & Anor (No 4)* (1988) 6ACLC 1095, 1103-4; *Northside Developments Pty. Ltd. v Registrar-General & Ors* (1990) 64 ALJR 427, 433; *ANZ Executors & Trustee Co. v Quintex Ltd. (receivers and managers appointed)* (1990) 8 ACLC 980, 988.

<sup>34</sup> *Ashbury Railway Carriage and Iron Company v Riche* (1875) LR 7HL 653, 693; *Humphries v Proprietors “Surfers Palms North” Group Titles Plan 1955* (1994) 68 ALJR 479, 483.

<sup>35</sup> (2000) 35 ACSR 555.

<sup>36</sup> *Corporations Law* ss 124-125.

<sup>37</sup> This continued to be the case under the *Companies Act 1961* (Qld) s 18(b) and the *Companies Code 1981* [Qld] s 37.

<sup>38</sup> The concept of the memorandum of association is now abolished: *Corporations Law* s134.

<sup>39</sup> *Cotman v Brougham* [1918] AC 514, 522.

<sup>40</sup> *Re Crown Bank* (1890) 44 Ch D 634, 644; H A J Ford, *Principles of Company Law*, Sydney, Butterworths, 2<sup>nd</sup> ed, 1978 p 89.

objects that might be specified in the memorandum of association.<sup>41</sup> Consequently, under the common law, a corporation was not to be treated as having the legal capacity of a natural person.<sup>42</sup> The common law did not attribute to corporations a general capacity to contract or dispose of property for any lawful purpose.<sup>43</sup>

The requirement that a company had to state its objects produced the related development of the doctrine of *ultra vires* in the company law context.<sup>44</sup> Under the doctrine, if a company entered into a transaction, such as a contract, outside its substantive objects stated in its memorandum of association or what was reasonably incidental thereto or implied or any legislative list of powers attributed to the company,<sup>45</sup> then the transaction was classified as *ultra vires*.<sup>46</sup> This meant that the transaction was beyond the powers of the company and void as against the company. The members in general meeting could not, even with unanimous consent, ratify the transaction.<sup>47</sup> As such a transaction could not be enforced against the company, a person dealing with it could be seriously prejudiced by its inability to obtain payment for goods or services supplied or to recover loan monies. Exceptionally, a person dealing with a company could utilise the equitable doctrine of tracing to claim a particular asset or the proceeds of sale from it where the creditor's money or other property could be traced into that particular asset of the company.<sup>48</sup>

The common law doctrine of *ultra vires* applied not only to transactions for value but also to gifts.<sup>49</sup> However, where there was a substantive or independent object in a company's memorandum of association, permitting it to grant gratuities in the form of pensions to present and past directors and to make grants for charitable benevolent or public objects, then a pension policy granted by the company to an ex-director pursuant to the object was not *ultra vires*.<sup>50</sup>

An avowed purpose of the doctrine of *ultra vires* and the statement of objects in the memorandum of association was the protection of the interests of members from the use of monies invested by them for non-corporate purposes.<sup>51</sup> Another purpose was said to be the protection of persons who dealt with the company.<sup>52</sup> This latter proposition did not, however, go unchallenged judicially.<sup>53</sup>

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<sup>41</sup> *Supra* n.39 at 526.

<sup>42</sup> *Bonanza Creek Gold Mining Co Ltd v R* [1916] 1 AC 566; *Re the Honey Pool of Western Australia (No 2)* (1988) 14 ACLR 621; W. Paterson, H Ednie and H Ford, *Australian Company Law*, Sydney, Butterworths, 3<sup>rd</sup> ed; iii 53,011.

<sup>43</sup> *Supra* n.40 at 88.

<sup>44</sup> P Gillies, *The New Company Law* (1989) 49.

<sup>45</sup> *Supra* n.40 at 87.

<sup>46</sup> *Ashbury supra* n.34; *Rolled Steel Products supra* n.27 at 303.

<sup>47</sup> *Ashbury supra* n.34; *Rolled Steel Products supra* n.27 at 295-6, 303.

<sup>48</sup> *Ashbury supra* n.34 at 689.

<sup>49</sup> *In re Horsley & Weight Ltd* [1982] 3 WLR 431.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ashbury supra* n.34 at 667; *Cotman supra* n.39 at 526.

<sup>52</sup> *Ashbury supra* n.34 at 667; *Cotman supra* n.39 at 526.

<sup>53</sup> *Re KL Tractors Ltd (In Liquidation)* [1961] ALR 410.

Initially, the Courts applied the doctrine of *ultra vires* strictly. This regularly led to companies using the doctrine to avoid their contractual obligations. As a result, the doctrine did not achieve the purpose of protecting the interests of persons dealing with a company. However, the operation of this technical rule was attenuated by the practice of utilising a number of drafting techniques such as lengthy and complex objects clauses,<sup>54</sup> independent objects clauses<sup>55</sup> and subjectively worded objects clauses.<sup>56</sup> Additionally, the Courts began construing objects clauses liberally so that a transaction would not be invalid.<sup>57</sup> Consequently, the doctrine ceased to protect the interests of members.

### The Related Doctrine of Constructive Notice

The common law doctrine of *ultra vires* had its rationale in the closely related doctrine of constructive notice. The doctrine of constructive notice has its genesis in case law involving property and equity.<sup>58</sup> This doctrine was applied to registered companies, so that persons who dealt with a company were deemed to know the contents of the company's public documents. These were documents that a company was required to lodge and that were made available for inspection at the office of the public registering body. The courts applied the doctrine to the memorandum and articles of association of a company.<sup>59</sup> Consequently, persons who dealt with a company who failed to make inquiry as to the company's capacity were deemed, through the lodgement of the company's memorandum of association, to have knowledge of the company's objects and when it was acting *ultra vires*.<sup>60</sup>

The doctrine of constructive notice was considered, however, to lack a proper basis in its application to the public documents of a registered company.<sup>61</sup> It was considered unreasonable for all persons dealing with a company to be required to inspect a company's memorandum of association before contracting with it because this would impede commerce greatly.<sup>62</sup>

<sup>54</sup> *Supra* n.39 at 523.

<sup>55</sup> Eg *Cotman v Brougham* [1918] AC 514.

<sup>56</sup> Eg. *HA Stephenson & Son Ltd (in liq) v Gillanders* (1931) 45 CLR 476; *Bell Houses Ltd V City Wall Properties Ltd* [1966] 2QB 656.

<sup>57</sup> *HA Stephenson & Son Ltd (in liq) v Gillanders* (1931) 45 CLR 476, at 490-2; *Bell Houses Ltd V City Wall Properties Ltd* [1966] 2QB 656; Gillies, *Supra* n.44 at 51.

<sup>58</sup> *English & Scottish Mercantile Investment Co Ltd v Brunton* [1892] 2QB 700.

<sup>59</sup> *Re London and New York Investment Corporation* [1895] 2 Ch.860.

<sup>60</sup> *Mahony v East Holyford Mining Company* (1875) LR 7 HL 869, at 873; *Brownett v Newton* (1941) 64 CLR 439; *Freeman & Lockyer v Buckhurst Park Properties (Mengal) Ltd & Anor* [1964] 1 ALL ER 630, at 637.

<sup>61</sup> *Supra* n.40 at 90.

<sup>62</sup> Phillip Lipton. and Abraham Herzberg, *Understanding Company Law*, Sydney, Law Book Company, 1<sup>st</sup> ed, 1984 51; *Supra* n 40 at 90



### Categories of Objects: Substantive Objects, Dependent Objects and Implied Powers

In determining whether a particular corporate transaction was *ultra vires*, the Court had to construe the memorandum of association and in particular the objects clause of the company.<sup>63</sup> It was possible to classify the contents of an objects clause into the following three categories: substantive or independent objects; dependent objects; and implied powers.<sup>64</sup>

A substantive or independent object was one that a company was expressly authorised to pursue and was an object that, upon a construction of the memorandum of association as a whole, was capable of being pursued as an independent activity ie. as an end in itself.<sup>65</sup> In the case of a registered company, the wholesaling of various mining products<sup>66</sup> and the carrying on of the business of manufacturers of or dealers in building materials<sup>67</sup> have been construed as substantive objects. Additionally, an object to grant pensions and make disbursements for the benefit of present and former officers and employees as well as making grants for charitable, benevolent or public objects has been held to be a substantive or independent object.<sup>68</sup>

A dependent object was one that a company was expressly authorised to pursue but was one that, upon a construction of the memorandum of association as a whole, was incapable of being pursued as an independent activity. This type of object was a mere power to be exercised in furtherance of or as incidental to the substantive objects of the company.<sup>69</sup> In the case of a registered company, which was not a bank or other financial institution, an object to borrow and raise money or to give guarantees was to be construed as a dependent object.<sup>70</sup> Further, an object to distribute property of the company among the members, by way of dividend or return of capital, was construed as a dependent object.<sup>71</sup>

The principle of implied powers stated that a company had implied powers to carry out anything which was reasonably incidental to, or consequential upon, its substantive or dependent objects in order to enable it to carry out those objects.<sup>72</sup> The principle did not operate if what was reasonably incidental to the objects of the company was expressly prohibited.<sup>73</sup> Therefore, a company with a substantive object to carry on the business of mining had implied power for the purposes of its business to acquire equipment, borrow and give security, draw and accept bills of

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<sup>63</sup> *Supra* n.27 at 295-6.

<sup>64</sup> Lipton and Herzberg, *supra* n.62 at 49.

<sup>65</sup> *Rolled Steel Products supra* n.27 at 497; *In re Horsley supra* n.49 at 437.

<sup>66</sup> *Rolled Steel Products supra* n.27 at 497.

<sup>67</sup> *Supra* n.33.

<sup>68</sup> *Supra* n.49.

<sup>69</sup> *Rolled Steel Products supra* n.27 at 497; *In re Horsley supra* n.49 at 437.

<sup>70</sup> *Rolled Steel Products supra* n.27.

<sup>71</sup> *Supra* n.33 at 1098.

<sup>72</sup> *Attorney General v Great Eastern Railway Company* (1880) 5 AC 473, at 478.

<sup>73</sup> *Supra* n.49 at 437.

exchange, employ staff and pay them bonuses and pensions, and institute legal proceedings.<sup>74</sup>

Despite the Court's best efforts to distinguish between substantive and dependent objects the distinction was frequently obscured<sup>75</sup>.

### Legal Capacity of Incorporated Associations

It is noted above that the doctrine of *ultra vires* entered corporate law by the vehicle of the statutory corporation and that subsequently it was applied analogously by the courts to companies incorporated under companies' legislation. The courts applied this analogy even though companies were not created by a particular statute but by administrative action under a general statute.<sup>76</sup> The courts considered that the objects clause of a company was its basic law analogous with a statute of incorporation.<sup>77</sup> However, the doctrine of *ultra vires* was not simply a coincident of incorporation since it does not apply to a chartered corporation.<sup>78</sup>

Some courts have also favoured the application of the doctrine of *ultra vires* to associations incorporated under associations incorporation legislation based on the analogy of companies incorporated under early Australian companies' legislation or its equivalent.<sup>79</sup> However, this application of the doctrine of *ultra vires* to incorporated associations was not questioned on the basis of principle or policy.

It has been argued as a matter of principle that the doctrine of *ultra vires* applies to incorporated associations unless modified or excluded by statute.<sup>80</sup> The basis of this argument is that an incorporated association is a body corporate, which, like a company or other corporation, has its capacity and powers defined by the legislation under which it is incorporated.<sup>81</sup> It is true that an incorporated association, like a company under early companies' legislation, is required to state its objects in its rules. Additionally, an incorporated association's objects clause could be considered by the courts to be its basic law analogous with a statute of incorporation.

Despite these arguments, the writer takes the view that this issue must also be considered from the point of view of policy. The policy of the doctrine of *ultra vires* and of the requirement to state objects in relation to companies focused on the protection of members of companies and persons who dealt with companies.

<sup>74</sup> *Supra* n.72.

<sup>75</sup> Lipton and Herzberg, *supra* n.62 at 49.

<sup>76</sup> Ford, *supra* n.40 at 89.

<sup>77</sup> *Ibid.*

<sup>78</sup> Ford, *supra* n.40 at 88.

<sup>79</sup> *Automobile Association (Wellington) Inc. v Daysch* [1955] NZLR 520; *Cabaret Holdings Ltd v Meeanee Sports and Rodeo Club Inc* [1982] 1 NZLR 673; *The Catholic Church of the Diocese of Darwin Property Trust v Monteiro* (1986) 87 FLR 427, at 440.

<sup>80</sup> A Sievers., *Associations and Club Law in Australia and New Zealand*, Leichhardt, The Federation Press, 2<sup>nd</sup> ed; 1996, 104.

<sup>81</sup> *Id* at 104.

The application of this policy to incorporated associations is questionable for two reasons. Firstly, in the context of companies the policy failed. Secondly, the policy is not readily adaptable to incorporated associations having regard to their characteristics. They are associations that are not constituted primarily for the purpose of making profits or for the purpose of providing financial gain for their members. This latter consideration was to some extent raised in *Finnigan v New Zealand Rugby Football Union Inc.*<sup>82</sup> It was a case involving the issue of the standing of the plaintiff to claim that an incorporated association controlling a sport had acted beyond its powers. Cooke J. made the following relevant statement when he delivered judgment for the Court of Appeal<sup>83</sup>:

The law or practice relating to limited liability companies is not necessarily a helpful analogy in approaching these cases. The doctrine of *ultra vires* in company law was evolved to protect investors and creditors. The same considerations are not easily transportable to cases where the *raison d'être* of an organisation is not to make profits but to promote a certain activity.

There is also some authority for the proposition that, as with companies under earlier companies' legislation; the doctrine of constructive notice applies to associations incorporated under associations' incorporation legislation.<sup>84</sup> As with the doctrine of *ultra vires*, it can be argued that, as a matter of principle, the doctrine of constructive notice applies to incorporated associations unless modified or excluded by statute.<sup>85</sup>

Certainly, an incorporated association, like a company under early companies' legislation, is required to lodge its objects clause and rules which are then available for inspection at the Office of Fair Trading.<sup>86</sup> However, as with the doctrine of *ultra vires*, there are similar policy reservations in applying the doctrine of constructive notice to incorporated associations.

### Queensland Rugby Football League Ltd v Worrell

In *Queensland Rugby Football League Ltd v Worrell*<sup>87</sup> Helman J rejected the applicants' first complaint that the respondent had acted *ultra vires* because the power to distribute any surplus was reserved to the club's members. Helman J held that, although the respondent made the payments to the recipients of the surplus assets as liquidator, he made them as liquidator appointed in a voluntary winding up. Consequently, the respondent was the club's agent and he made the distribution in his capacity as agent.<sup>88</sup> Helman J held that the distribution was also made in accordance with the wishes of the club's members.<sup>89</sup>

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<sup>82</sup> [1985] 2 NZLR 175.

<sup>83</sup> *Id* at 178

<sup>84</sup> *Broadlands Finance Ltd v Gisborne Aero Club Inc* [1974] 1 NZLR 157; [1975] 2 NZLR 496.

<sup>85</sup> Sievers, *supra* n.80 at 104, 107.

<sup>86</sup> *Associations Incorporation Act* s 18.

<sup>87</sup> *Supra* n.35.

<sup>88</sup> *Supra* n.87 at 561.

<sup>89</sup> *Supra* n.87 at 562.

Helman J also rejected that part of the applicants' second complaint that the surplus distribution was void as being contrary to Rule 31 in so far as it required a distribution of the funds to some other institution or institutions having similar objects to those of the Colts League Club.

The respondent's case proceeded on the premise that, although the respondent had acted as agent of the Colts League Club in making the distribution and had acted in accordance with the members' wishes, he had acted without the proper authority of a special resolution under section 92(1) *Associations Incorporation Act*.<sup>90</sup> It was argued, however, that the members validly ratified this excess of authority by their subsequent special resolution.<sup>91</sup>

The argument for the applicants was based on the proposition that ratification is only effective where the relevant act is valid and effective when it is done.<sup>92</sup> The argument for the applicants was that the special resolution was not effective in ratifying the distribution because section 92(1) required a special resolution to be "in accordance with [the incorporated association's] rules". In this case, it was argued that the special resolution did not comply with Rule 31 because it required a distribution of the surplus to "some other institution or institutions having objects similar to the objects" of the Colts League Club.<sup>93</sup> The respondent, for this part of the argument, conceded that the distribution was beyond the power conferred by Rule 31 although added that it would depend on how the similar objects provision was construed.<sup>94</sup>

Notwithstanding the concession by the respondent Helman J still gave a ruling on the point. Helman J held that, although none of the four clubs, which received the surplus, had identical objects to those of the Colts League Club catering for the sport of rugby league, all were sporting clubs and as such had objects similar to those of the club.<sup>95</sup> Helman J accepted that none of the recipients had objects as near to those of the Colts League Club as those of the second applicant. Helman J. noted, however, that there was no requirement in Rule 31 that the recipient or recipients of the surplus assets should have objects as near as possible to those of the Colts League Club. Helman J found that there was no analogy between Rule 31 and the *cy-pr'es* doctrine applicable to a gift with charitable intention if the mode of execution specified by the donor could not be achieved.<sup>96</sup> Helman J emphasised that similarity of objects was all that was required and that as this was an imprecise concept, a good deal of latitude was necessarily permitted the members in disposing of the surplus assets. Helman J considered that in making their decision as to the identity of the recipients the members properly took into account their local knowledge and also their settlement with the second

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<sup>90</sup> *Supra* n.87 at 563

<sup>91</sup> *Supra* n.87 at 562.

<sup>92</sup> *Supra* n.87 at 563.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Supra* n.87 at 563-4.

<sup>95</sup> *Supra* n.87 at 564.

<sup>96</sup> *Ibid.*

applicant.<sup>97</sup> Helman J concluded that the decision of the members did not infringe the similar objects requirement of Rule 31.

### **Commentary Relevant to Queensland Rugby Football League Ltd v Worrell**

In relation to the applicants' first complaint, Helman J correctly identified the argument that the respondent had acted *ultra vires* as one relating to the broad sense of the concept because it raised an issue of agency. As this article focuses on the concept of *ultra vires* in its narrow sense there is no further analysis of this issue.

In relation to the relevant part of the applicant's second complaint, the issue for the Court was whether the surplus distribution was *ultra vires* in the narrow sense of the concept. Helman J did not question the application of the doctrine of *ultra vires* to incorporated associations either on the basis of principle or policy. Nor did Helman J. consider the application of the doctrine of constructive notice to incorporated associations.

The issue of *ultra vires* was certainly relevant to the surplus distribution even though it was not a transaction for value.<sup>98</sup> The issue of *ultra vires* raised the question of whether the distribution was within the substantive or independent objects of the Colts League Club or what was reasonably incidental thereto or implied. If it was not, then under the common law the distribution was *ultra vires* and void. It followed that the distribution was not capable of being ratified by even all the members of the Colts League Club. The recipients of the surplus distribution would, by virtue of the doctrine of constructive notice, be deemed to have knowledge of the rules of the Colts League Club through their registration and availability for public inspection with the Office of Fair Trading.

The issue of *ultra vires* raised the further question of the construction of Rule 31. This related to the requirement that any surplus was not to be distributed amongst the members of the club. Rather it was to be distributed to other institutions having similar objects to the Club, and which prohibited the distribution of their income and property amongst their members to the same extent as the club. Helman J did not expressly consider the status of Rule 31. It is clear, however, that Helman J took the view that the relevant part of Rule 31 was dealing with the issue of legal capacity rather than agency. It is also clear that Helman J applied a liberal construction to Rule 31. He implicitly took the view that Rule 31 was to be categorised as a substantive or independent object. Helman J. made no reference to Rule 2 that contained the nominated objects of the Colts League Club. The writer takes the view that this approach was correct. Rule 31 governed the situation where the Colts League Club was being wound up rather than where its business and operations were actively conducted. Rule 31 set up its own criteria for distribution of any surplus through use of the similar objects requirement and the requirement of an equally extensive prohibition against any distribution to members. Rule 31 was, upon a construction of the rules as a whole, capable of being pursued as an end in itself. It was distinguishable from case law identified

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<sup>97</sup> *Ibid.*

<sup>98</sup> See Legal Capacity of Registered Companies, *supra* Part B, p.44.

earlier<sup>99</sup> where an object to distribute property of a company amongst members, by way of dividend or return of capital, was construed as a dependent object.

If Rule 31 was not construed as a substantive object, but rather a dependent object to be exercised in furtherance of or as incidental to the substantive objects of the Colts League Club, the result from the application of common law principles may well have been different. Rule 2(a) and (b) in the objects clause were clearly substantive objects of the club but Rule 2 (c) was only a dependent object. If Rule 31 was construed as a dependent object, the distribution of the surplus would have been required to be in furtherance of the substantive objects in Rule 2(a) or (b). The distribution of the surplus to the four recipients would not have been reasonably incidental to Rule 2(b) because of the specific content of that substantive object, but also because the Colts League Club was no longer a going concern but existed only for the purpose of liquidation.<sup>100</sup> Nor would the distribution of the surplus have been reasonably incidental to that part of Rule 2 (a) relating to the fostering of the “ the sport of rugby league in the Lower Burdekin area” because although the four recipients were sporting clubs none were involved in rugby league. If the Court had construed Rule 31 as a dependent object, it could well have lead to a conclusion in favour of the applicants on the application of the common law principles of *ultra vires*.

### **Part C: Effect of Associations and Incorporations Act 1981(Qld)**

The common law doctrine of *ultra vires* has been modified by the *Associations Incorporation Act*. The relevant provisions in the *Associations and Incorporations Act* dealing with legal capacity of an incorporated association are to be found in Part 3 Division 3-Powers of Incorporated Associations. These provisions are sections 25 and 26 of the *Associations Incorporation Act*. These provisions substantially reduce the significance of the operation of the doctrine of *ultra vires*. Sections 25 and 26 are set out below.

#### **Division 3-Powers of incorporated associations**

##### **General Powers**

**25(1)** An incorporated association has, in the exercise of its affairs, all the powers of an individual.

**(2)** An incorporated association may, for example, —

- (a) enter into contracts; and
- (b) acquire, hold, deal with and dispose of property; and
- (c) make charges for services and facilities it supplies; and
- (d) do other things necessary or convenient to be done in carrying out its affairs.

<sup>99</sup> *Supra* n.33 at 1098.

<sup>100</sup> *Cf. Hutton V West Cork Railway Company* (1883) 23 Ch Div 654 (C.A) where gratuities to employees for loss of employment and to directors for past services were held to be not reasonably incidental to the carrying on of the business of a company because the company was no longer a going concern but existed only for the purpose of winding up.

(3) An incorporated association may also issue secured and unsecured notes, debentures and debenture stock for the association.

### Ultra vires transactions

**26(1)** No act of an incorporated association (including the entering into of an agreement by the incorporated association) and no conveyance or transfer of property, whether real or personal, to or by an incorporated association shall be invalid by reason only of the fact that the incorporated association was without capacity or power (whether by provision of this Act or by its rules or otherwise) to do such act or to execute or take such conveyance or transfer.

(2) Any such lack of capacity or power may be asserted or relied upon only in —

(a) proceedings against the incorporated association by any member of the incorporated association to restrain the doing of any act or acts or the conveyance or transfer of any property to or by the incorporated association;

b) any proceedings by the incorporated association or by any member of the incorporated association against the present or former officers of the incorporated association.

(3) If the unauthorised act, conveyance or transfer sought to be restrained in any proceedings under subsection (2) (a) is being or ought to be performed or made pursuant to any contract to which the incorporated association is a party, the court having jurisdiction in the matter may, if all the parties to the contract are parties to the proceedings and if the court deems it just and equitable, set aside and restrain the performance of the contract and may allow to the incorporated association or to the other parties to the contract ( as the case requires) compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and restraining the performance of the contract , but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained.

### The Operation and Effect of Section 25 *Associations Incorporation Act*

Section 25 was inserted into the *Associations Incorporation Act* by the *Associations Incorporation (Amendment) Act 1995 (Qld)*. The objectives of this amending legislation included the objective “to update the drafting of the Act into the modern drafting style”.<sup>101</sup> More particularly, the relevant provision was intended “to recast the present section 22 of the Act and set(s) out the general powers of incorporated associations”.<sup>102</sup> The former section 22 provided as follows:

(1) Unless expressly excluded or modified by its rules, and subject to this Act, the powers of an incorporated association include the power to own, take or otherwise acquire (whether on trust or absolutely) and sell real and personal property of any kind and description, but nothing in this section shall be taken-

(a) to empower the incorporated association to deal with property contrary to the provisions of any trust affecting the property; or

<sup>101</sup> *Associations Incorporation Amendment Bill 1994*, Explanatory Notes, 75.

<sup>102</sup> *Associations Incorporation Amendment Bill 1994*, Explanatory Notes, 80.

- (b) to empower the incorporated association to do anything which would have excluded it from incorporation under the Act; or
- (c) to limit in any respect the nature or extent of the powers conferred by this Act.

(2) Unless expressly excluded or modified by its rules the power of an incorporated association shall include the following powers: -

- (a) to take, or otherwise acquire, and hold shares, debentures or other securities of any company or body corporate;
- (b) to invest and deal with the money of the incorporated association not immediately required in such manner as may from time to time be thought fit;
- (c) in furtherance of its objects to lend and advance money or give credit to any person or body corporate; to guarantee and give guarantees or indemnities for the payment of money or the performance of contracts or obligations by any person or body corporate, and otherwise to assist any person or body corporate;
- (d) to borrow or raise money either alone or jointly with any other person or legal entity in such manner as may be thought proper and whether upon fluctuating advance account or overdraft or otherwise to represent or secure any monies and further advances to be borrowed alone or with others as aforesaid by notes secured or unsecured, debentures or debenture stock perpetual or otherwise, or by mortgage, charge, lien or other security upon the whole or any part of the incorporated association's property or assets present or future and to purchase, redeem or pay-off any such securities;
- (e) to remunerate any person or body corporate for services rendered, or to be rendered, and whether by way of brokerage or otherwise in placing or assisting to place or guaranteeing the placing of any unsecured notes, debentures or other securities of the incorporated association, or in or about the incorporated association or promotion of the incorporated association or in the furtherance of its objects;
- (f) to draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, bills of lading, and other negotiable or transferable instruments;
- (g) to take or hold mortgages, liens or charges, to secure payment of the purchase price, or any unpaid balance of the purchase price, of any part of the incorporated association's property of whatsoever kind sold by the incorporated association, or any money due to the incorporated association from purchasers and others;
- (h) to do all such other things as are incidental or conducive to the attainment of the objects and the exercise of the powers of the incorporated association.

The former section 22 *Associations Incorporation Act* was undoubtedly based on s 67 (c) of the *Companies Code* 1981 [Qld] and its predecessor section 19 (c) of the *Companies Act* 1961 (Qld). Under section 19 (c) of the *Companies Act* the powers of a company were deemed to "include" the powers set out in the Third



Schedule.<sup>103</sup> unless expressly excluded or modified by the memorandum or articles of association. The former section 22(2) *Associations Incorporation Act* adopted almost verbatim a number of the powers set out in the Third Schedule of the Companies Act that were of relevance to an incorporated association.<sup>104</sup> The purpose of this type of provision in the companies' legislation was to imply common form powers so as to induce the use of brief objects clauses.<sup>105</sup> Whilst these clauses in the Third Schedule were called powers, there was an issue as to whether they were to be construed as substantive objects or dependent objects. The question was posed that if these statutory implied powers were substantive objects whether there was then nothing outside a company's capacity unless it was illegal in the sense of being contrary to law.<sup>106</sup> Judicially, it was suggested that clause 1 in the Third Schedule 3<sup>107</sup> was not confined to matters that were incidental to the company's objects clause because that made the final clause in the Third Schedule, clause 26, unnecessary.<sup>108</sup> Clause 26 was the same as the former section 22(2)(h) *Associations Incorporation Act*. It was arguable, however, that this type of clause did not provide a conclusive answer, since it could be construed as a final all encompassing grant of incidental powers in addition to those more particularly specified in the preceding paragraphs.<sup>109</sup> The writer takes the view that most of the powers in section 22 *Associations Incorporation Act* would have been construed by the courts as dependent objects that were to be exercised in furtherance of the substantive objects in the objects clause of an incorporated association.

Section 25(1) *Associations Incorporation Act* provides that an incorporated association has, in the exercise of its affairs, all the powers of an individual. Section 25(1) *Associations Incorporation Act* is undoubtedly based on a predecessor<sup>110</sup> of the current provision in the *Corporations Law*, section 124(1), except that the latter provision provides that "a company has the legal capacity and powers of an individual". Ordinarily, an individual has a plenary power to make contracts and dispositions of property. This is confirmed by the examples provided in section 25(2) (a) and (b) *Associations Incorporation Act*. Consequently, section 25(1) would appear to grant an incorporated association extensive powers capable of operating beyond those in the former section 22 *Associations Incorporation Act*. It is arguable that, if an incorporated association has all the powers of an individual, it is difficult to see how the doctrine of *ultra vires* can limit those powers. Indeed, one writer has suggested that section 25(1) *Associations Incorporation Act* abolishes the doctrine of *ultra vires*.<sup>111</sup> Whether section 25 has this effect depends on its relationship with section 26 *Associations Incorporation Act*. A key factor in the interpretation of the relationship between

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<sup>103</sup> Second Schedule of the Companies Code 1981 [Qld].

<sup>104</sup> S 22 (2)(a)-(h) *Associations Incorporation Act* equated to Clauses 5,11,12,13,14,15,24 and 26 of the Third Schedule *Companies Act*.

<sup>105</sup> Ford, *supra* n.40 at 97.

<sup>106</sup> *Re Tivoli supra* n.106 at 471; Ford, *supra* n.40 at 97.

<sup>107</sup> This had no equivalent in s 22 *Associations Incorporation Act*

<sup>108</sup> *Supra* n.106 at 465.

<sup>109</sup> Ford, *supra* n.40 at 97.

<sup>110</sup> Section 161 (1) *Corporations Law*.

<sup>111</sup> Sievers *supra* n.80 at 105.

these provisions is that an incorporated association is required to state its objects. The relationship between sections 25 and 26 is considered separately after a discussion of section 26 *Associations Incorporation Act*.

If under section 25(1) *Associations Incorporation Act* an incorporated association is given unlimited legal capacity to perform basic juristic acts then, as with section 124(1) *Corporations Law*,<sup>112</sup> the only limits on its powers arise from its incorporeal character and from legislative or general law rules which specifically remove the powers of an individual from it. Thus, an incorporated association's legal capacity does not extend to acts that, an incorporated body as an artificial person is unable to do, such as entering into a contract to be an employee or appearing without a legal representative before a court.<sup>113</sup>

The limitations on section 25(1) *Associations Incorporation Act* by legislative rules, which specifically remove the powers of an individual from it undoubtedly, include the incapacity of an incorporated association to do anything that makes an association ineligible for incorporation.<sup>114</sup> This is despite the fact that there is now no provision equivalent to the former section 22(1)(b) *Associations Incorporation Act*.

By virtue of section 25(3) *Associations Incorporation Act* an incorporated association is granted the power to issue notes and debentures. These are commonly defined as documents acknowledging indebtedness by an incorporated body. Consequently, section 25(3) supplements the grant of powers of a natural person to an incorporated association.

### **Operation and Effect of Section 26 *Associations Incorporation Act***

In this section the operation and effect of section 26 *Associations Incorporation Act* is considered without reference to section 25 *Associations Incorporation Act*. The relationship between these two provisions is considered in the next section.

Section 26 *Associations Incorporation Act* is based on section 68 *Companies Code*<sup>115</sup>, which in turn was based on section 20 *Companies Act*. The policy of the legislature in enacting these provisions was to alleviate the "notorious injustices occasioned to innocent third parties dealing with companies resulting from the doctrine of *ultra vires*".<sup>116</sup> Case law based on these provisions is very instructive in relation to the operation and effect of section 26 *Associations Incorporation Act*.

Section 26 *Associations Incorporation Act* substantially reduces the operation of the doctrine of *ultra vires*. However, section 26 is not fully effective because it

<sup>112</sup> Paterson, Ednie, and Ford, *supra* n.42 at 53,101.

<sup>113</sup> *Sinto Resources Ltd v Normandy Capital Ltd* (1993) 11 ACLC 855; P Hanrahan, I Ramsay, and G Stapledon, *Commercial Applications of Company Law*, North Ryde, CCH Australia 2<sup>nd</sup> ed; 2001, 60.

<sup>114</sup> *Associations Incorporation Act* s 5(1).

<sup>115</sup> Prior to the introduction of ss33 and 34 of the *Companies and Securities Legislation (Miscellaneous Amendments) Act* 1983 (Cth), which replaced ss67, &68 with ss66A-68.

<sup>116</sup> *Re Edward Love & Co Pty Ltd* [1969] VR 230, at 234.

permits the avoidance of acts of an incorporated association, including contracts, which are *ultra vires* in certain restricted circumstances. Therefore, section 26 still requires a person contracting with an incorporated association to make certain that the contract is within the capacity of the incorporated association.<sup>117</sup> In this respect section 26 *Associations Incorporation Act* is unlike its modern counterpart section 125 *Corporations Act* that has the effect of abolishing the doctrine of *ultra vires* if a company acts outside self-imposed restrictions in the form of limits on its powers or stated objects.<sup>118</sup>

### (a) General Principle

Section 26(1) *Associations Incorporation Act* provides in terms that no act of an incorporated association, including the entering into of a contract, is invalid by reason only of the fact that the incorporated association is without the capacity or power to perform such an act.

Generally speaking, section 26(1) *Associations Incorporation Act* abolishes the general nullifying effect of the *ultra vires* doctrine such that an *ultra vires* transaction is no longer incapable of being recognised as a transaction at all.<sup>119</sup> Consequently, section 26(1) operates so as to preclude an incorporated association evading its contractual obligations by claiming that the contract is *ultra vires*.<sup>120</sup> This protects persons dealing with the incorporated association<sup>121</sup> even though they have constructive notice of the objects clause of the incorporated association.<sup>122</sup>

Section 26(1) *Associations Incorporation Act* operates only when there has been an act of the incorporated association, including the entering into of a contract, or a conveyance or a transfer of property.<sup>123</sup> This pre-condition raises the issue of the relationship between the operation of section 26(1) and the rules of agency.<sup>124</sup> Section 26(1) is here referring to acts of an organ or an individual acting as agent on behalf of an incorporated association so as to legally bind it without regard to any limitations on their powers implied in the *ultra vires* doctrine.<sup>125</sup> Therefore under section 20(1) *Companies Act*, the equivalent of section 26(1) *Associations Incorporation Act*, it was judicially decided that if a company had power under its objects clause to borrow only from members but it borrowed from non-members, the company's act through its organ, the board, was valid.<sup>126</sup> S 20(1) *Companies Act* was operative because there was an act of the company constituted by the board of directors exercising the company's borrowing power under the articles of

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<sup>117</sup> Ford, *supra* n.40 at 99.

<sup>118</sup> Explanatory Memorandum to the *Companies and Securities Legislation (Miscellaneous Amendments) Bill 1985* Paragraph 202.

<sup>119</sup> *Hawkesbury Development Corporation Ltd v Landmark Finance Pty Ltd* [1969] NSW 782, at 795-6.

<sup>120</sup> Lipton and Herzberg, *supra* n.62 at 54.

<sup>121</sup> *Ibid.*

<sup>122</sup> Ford, *supra* n.40 at 98.

<sup>123</sup> *Id* at 100.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid*; *Re Edward Love & Co Pty Ltd* [1969] VR 230.

association<sup>127</sup>. It is apparent then that s 26(1) *Associations Incorporation Act* will not operate unless the pertinent organ has acted.<sup>128</sup> It is therefore important to identify, in the case of each particular incorporated association, the appropriate organ to act on behalf of it. The issue of identifying the organs that have the power or authority to bind an incorporated association is beyond the scope of this article.

Section 26(1) *Associations Incorporation Act* operates where the capacity or power is lacking “by provision of this Act or by its rules or otherwise”. The reference in section 26(1) to “by provision of this Act” undoubtedly refers to the incapacity of an incorporated association to do anything that makes an association ineligible for incorporation.<sup>129</sup> The reference to “by its rules” is certainly a reference to the objects clause which an incorporated association is required to have in its own rules or which is fully stated in the model rules. Section 26(1) operates whether the legal capacity of the incorporated association is lacking because there is no grant of power in the objects clause or because there is an express prohibition against it in the objects clause.<sup>130</sup> However, section 26(1) in using the words “by reason only of”, does not validate any act or transaction which is proscribed by a provision of the *Associations Incorporation Act* or another general law principle unrelated to the issue of lack of capacity or power.

### (b) Exceptions to the General Principle

Section 26(2) *Associations Incorporation Act* provides by its terms that in certain limited circumstances an *ultra vires* act may still be asserted in legal proceedings. In relation to the corresponding provision in former section 20(2) *Companies Act* it has been judicially stated that “the legislature has marked out certain fields within which significance will still attach to an excess by a company or its officers of the legitimate scope for its activities as enunciated and restricted by the terms of its objects clause”.<sup>131</sup>

Two exceptions are created. Essentially, the effect of these exceptions is to give greater rights to minority members of an incorporated association where they object to it acting *ultra vires*.<sup>132</sup>

### Proceedings by Member Restraining Incorporated Association: Sections 26(2)(a) and 26(3) *Associations Incorporation Act*

The first exception is to be found in section 26(2)(a) *Associations Incorporation Act*. This subsection has the purpose of giving a member of an incorporated association standing to assert *ultra vires*.<sup>133</sup> The proceedings must be for relief against the incorporated association in the form of restraint against the doing of an act or the conveyance or transfer of property to or by the incorporated association.<sup>134</sup>

<sup>127</sup> The *Corporations Act* currently refers to the constitution of the company.

<sup>128</sup> Ford, *supra* n.40 at 101.

<sup>129</sup> *Associations Incorporation Act*. s5(1).

<sup>130</sup> *Re Edward Love & Co Pty Ltd* [1969] VR 230; Ford, *supra* n.40 at 98.

<sup>131</sup> *Supra* n.119 at 796.

<sup>132</sup> Lipton & Herzberg, *supra* n.62 at 55.

<sup>133</sup> *Supra* n.119 at 796.

<sup>134</sup> *Ibid.*

Section 26 (2)(a) *Associations Incorporation Act* is not complied with where no relief is sought against the incorporated association except, perhaps, that it is a party to the transaction that it is sought to have declared void.<sup>135</sup> This is the case where the transaction is wholly and completely executed so far as the incorporated association is concerned such that there is no occasion for restraining it from taking any step.<sup>136</sup> Section 26(2)(a) is also not complied with where the relief sought in the suit is recovery for the incorporated association of such of its property as has been received by an outsider.<sup>137</sup> This type of suit is not one within the meaning of “proceedings against the incorporated association” because in form and in substance it is one brought solely for the benefit of the incorporated association.<sup>138</sup> Section 26(3) *Associations Incorporation Act*, which in a sense is appended to section 26 (2)(a) in as much as it confers upon the Court certain jurisdiction in proceedings brought under it, confirms this construction.<sup>139</sup>

Section 26(2)(a) *Associations Incorporation Act* requires that the proceedings be in the form of restraint against the doing of an act or the conveyance or transfer of property to or by the incorporated association.<sup>140</sup> Section 26(2) (a), when read with section 26(1) makes it clear that the proceedings are not restricted to restraining acts relating to entry into or performance under a contract but also restraining acts relating to the making of an incomplete gift.<sup>141</sup> Further, it covers an internal dispute in which a member alleges against the incorporated association that some threatened rather than actual conduct is *ultra vires*.<sup>142</sup>

Section 26(3) *Associations Incorporation Act* stipulates the conditions under which the Court may set aside and restrain an unauthorised act, conveyance or transfer that is still to be fully performed or made pursuant to any contract to which the incorporated association is a party. Firstly, all the parties to the contract must be parties to the proceedings. Secondly, the Court must deem it just and equitable to make the order. Additionally, section 26(3) gives the Court a wide discretion to order compensation for loss or damage to the outsider or the incorporated association where the contract is restrained but this does not extend to damages for anticipated profits.<sup>143</sup>

Section 26(3) *Associations Incorporation Act* gives the Court a wide charter, where pursuant to section 26(2)(a) a member brings proceedings against his or her incorporated association and an outsider in respect of an existing *ultra vires* contract, to achieve justice and equity between the incorporated association and the outsider.<sup>144</sup> A number of alternatives are illustrative of the width of this

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<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> Ford, *supra* n.40 at 99.

<sup>142</sup> *Supra* n.119 at 797.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

provision.<sup>145</sup> In some cases, the Court might refuse to interfere under section 26(3), thereby permitting performance of the contract to proceed. In this respect, section 26(3) makes it clear that the proceedings under section 26(2)(a) do not automatically result in the other party to the *ultra vires* transaction being denied the benefit of the general validating effect of section 26(1). Alternatively, the Court might deem it just and equitable simply to set aside and restrain performance of the contract. In other cases, the Court's order to set aside and restrain performance of the contract might be coupled with an order that the incorporated association pays compensation to the outsider. Yet in other cases, the Court's order to set aside and restrain performance of the contract might be accompanied by an order that the outsider pays compensation to the incorporated association.

### **Proceedings by Incorporated Association or Member against Present or Former Officers: Section 26(2)(b) *Associations Incorporation Act***

The second exception is to be found in section 26(2)(b) *Associations Incorporation Act*. This subsection has the purpose of giving members of an incorporated association, as well as the incorporated association itself, standing to assert *ultra vires*.<sup>146</sup> The proceedings must be for relief against the present or former officers of the incorporated association. "Officer" of an incorporated association is defined in section 2 *Associations Incorporation Act* to mean the following individuals: the association's president; the association's secretary; the association's treasurer; a member of the association's management committee; a manager appointed by the management committee for the association.

### **Relationship between Sections 25 and 26 *Associations Incorporation Act***

Under the common law doctrine of *ultra vires*, a transaction was void where it was outside the company's substantive objects or what was reasonably incidental thereto or implied or outside any legislative list of powers attributed to the company. The extent of the general powers contained in section 25(1) *Associations Incorporation Act* is a crucial factor in determining the impact of the section on the common law doctrine of *ultra vires*. It is also a key factor in determining the relationship between sections 25 and 26 *Associations Incorporation Act*.

In considering the relationship between sections 25 and 26 *Associations Incorporation Act*, it must be recognised that there is an internal conflict or tension in their drafting. This internal tension arises because section 25 is a provision introduced in 1995, that is undoubtedly modelled on a predecessor of the current s 125 *Corporations Act* whilst section 26 has its genesis in a provision drafted for the *Companies Act* 1961(Qld). The internal tension between the provisions arises because it is unclear as a question of construction whether section 25 (1) *Associations Incorporation Act* is to be given its natural meaning, or a narrow interpretation.

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<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

If section 25 (1) *Associations Incorporation Act* is given its natural meaning, an incorporated association has unlimited legal capacity to perform basic juristic acts, such as entering into contracts and dealing with property,<sup>147</sup> without being restricted by its objects clause. If section 25 (1) is given this natural meaning, then arguably section 26 is left with little effective operation. If, however, section 25(1) is given a narrow interpretation, its implied powers are to be read down as ancillary to the objects clause of an incorporated association. Upon the basis of this narrow interpretation two consequences follow. Firstly, an incorporated association may only enter into contracts and deal with property in furtherance of the substantive objects in its objects clause. Secondly, section 26 *Associations Incorporation Act* is left with an effective operation.

The interpretation that section 25 (1) *Associations Incorporation Act* ought to be given its natural meaning is supported by a number of arguments. Firstly, the terminology in section 25, unlike the former section 22, makes no reference to the furtherance of the objects of the incorporated association. The terminology is very similar to that employed in section 124(1) CL that commentators accept is to be given its natural meaning.<sup>148</sup> Secondly, in so far as section 25(2) *Associations Incorporation Act* specifies some powers these are by way of example only. Thirdly, there is the argument that section 25(2) is not confined to matters that are incidental to the objects clause of an incorporated association because that would make the final clause in section 25 (2)(d), unnecessary.<sup>149</sup> Fourthly, in the model rules of the *Associations Incorporation Regulation*, Rule 3 deals with the objects of an incorporated association that “should be fully stated”. Rule 4, then deals with the powers of an incorporated association. It is virtually the same as section 25. Neither Rule 3 nor Rule 4 is qualified by the other.

The interpretation that section 25(1) *Associations Incorporation Act* ought to be construed narrowly is also supported by a number of arguments. Firstly, unlike the legislative scheme under the *Corporations Act* an incorporated association is required to state its objects. The common law viewed the requirement to state objects under early companies’ legislation as inherently inconsistent with the concept that a corporation was to be treated as having the legal capacity of a natural person.<sup>150</sup> Further section 25(1) does not expressly state that it is to have effect notwithstanding the requirement to state objects.<sup>151</sup> Secondly, the legislative purpose for introducing section 25 to replace the former section 22 was to modernise the drafting style in setting out the general powers of an incorporated association. Previously, the focal purpose of this type of provision has been to imply common powers so as to induce the use of brief objects clauses.<sup>152</sup> It

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<sup>147</sup> Paterson, Ednie, and Ford, *supra* n.42, at 53,011 applying this interpretation to s 124 (1) *Corporations Act*.

<sup>148</sup> S. Berns and P Baron, *Company Law and Governance*, Melbourne, Oxford Press, 1998 110; Paterson, Ednie, and Ford, *supra* n.42 at 53,011.

<sup>149</sup> Cf *Re Tivoli Freeholds Ltd* [1972] VR 445, at 465.

<sup>150</sup> Above B.1 Legal Capacity of Registered Companies.

<sup>151</sup> See former s 161(2) *Corporations Law* which was a statutory predecessor to s 124 *Corporations Act*.

<sup>152</sup> See The Operation and Effect of S 25 *Associations Incorporation Act*, *supra* Part C, p53.

follows that there was no legislative intent to effect the operation of section 26 *Associations Incorporation Act*. Thirdly, a narrow interpretation of section 25 would be consistent with the policy of the *Associations Incorporation Act*, when it was first introduced, to take account of the interests of both members and creditors. The interpretation that section 25(1) be given its natural meaning protects only the interests of those dealing with an incorporated association. Fourthly, unlike the legislative scheme under the Corporations Act that clearly favours persons dealing with a company, the related common law doctrine of constructive notice is not abolished under the *Associations Incorporations Act*.

### **Queensland Rugby Football League Ltd v Worrell**

In *Queensland Rugby Football League Ltd v Worrell* <sup>153</sup> Helman J rejected that part of the applicant's second complaint that, even if the distribution of the surplus was beyond the power conferred by Rule 31, it could not be validly ratified by a special resolution under section 92(1) *Associations Incorporation Act*. Helman J held that the respondent could rely on section 26 *Associations Incorporation Act* in resisting the application.<sup>154</sup> Helman J could "see no reason to suppose that a special resolution to which section 92(1) applies should be regarded as outside the scope of section 26, which is consistent with the provisions in the Corporations Law concerning the old narrow *ultra vires* doctrine."<sup>155</sup>

Helman J concluded that the special resolution was effective in removing any irregularity in the distribution by the respondent. Consequently, Helman J considered that there was nothing before the Court to suggest that it was in the public interest to inquire into the liquidator's performance of his duties.<sup>156</sup> Accordingly, Helman J refused the application for an inquiry under s 536 *Corporations Law*.

### **Commentary Relevant to Queensland Rugby Football League Ltd v Worrell**

Neither the applicants nor the respondent raised section 25 *Associations Incorporation Act* in argument in this case. Consequently, it received no judicial consideration. Importantly, there was also no judicial consideration of the relationship between sections 25 and 26 *Association Incorporation Act*.

If the Court had considered section 25 (1) and given the provision its natural meaning, it might well have held that the respondent was entitled to dispose of the surplus unrestricted by the limitations in Rule 31. Upon this interpretation, section 26 would have had no scope for operation.

If the Court had considered section 25(1) and given the provision a narrow interpretation, it would have been held that the implied power to dispose of the surplus was to be read down as ancillary to the restrictions in Rule 31. Upon this interpretation section 26 would have had scope for operation.

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<sup>153</sup> *Supra* n.87.

<sup>154</sup> *Supra* n.87 at 564.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid* applying *Burns Philp Investments Pty Ltd v Dickens* (1993) 11 ACLC 272; *Belvista Pty Ltd v Murphy & Triden Contractors Ltd* (1993) 14 ACSR 628.



The reference by Helman J to section 26 was clearly a reference to section 26(1) abolishing the general nullifying effect of the common law *ultra vires* doctrine. This undoubtedly provided protection to the four recipient clubs in relation to distribution of the surplus, which might otherwise have been *ultra vires*.

The statement of Helman J regarding the scope of section 26 *Associations Incorporation Act* was undoubtedly correct although no reference was made to authorities decided in relation to section 20 *Companies Act*.<sup>157</sup> In the case itself, the preconditions relating to the operation of section 26(1) *Associations Incorporation Act* were met.

The first precondition of section 26(1) was met because there was an act of the incorporated association constituted by the appropriate organ. Section 92(1) *Associations Incorporation Act* required a special resolution by the members for the distribution of a surplus.<sup>158</sup> This requirement was fulfilled prior to the winding up of the Colts League Club.

The second precondition of section 26(1) was met because the lack of capacity or power was said to arise by virtue of the rules of the incorporated association, namely Rule 31.

Helman J made no explicit reference to the exceptions created under section 26(2) *Associations Incorporation Act* whereby an *ultra vires* act may still be asserted in specified legal proceedings. However, it is probably implicit in his judgment that the applicants could not rely upon either exception in section 26(2).<sup>159</sup>

The first exception in section 26(2)(a) was inapplicable for a number of reasons. Firstly, the proceedings were not instituted by a member but rather by the governing body of rugby league and a former joint venturer. Secondly, the proceedings were not against the incorporated association, the Colts League Club, which had its incorporation cancelled but rather against the liquidator of the association. Thirdly, the distribution was wholly and completely executed so far as the Colts League Club was concerned such that there was no occasion for restraining it from taking any step.

The second exception in section 26(2)(b) was inapplicable because a member did not institute the proceedings. Further, the proceedings were not instituted against present or former officers. The definition of “officer “ in section 2 *Associations Incorporation Act* does not include a liquidator of an incorporated association.

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<sup>157</sup> Eg. *Re Edward Love & Co Pty Ltd* [1969] VR 230.

<sup>158</sup> *Queensland Rugby Football League Ltd v Worrell* (2000) 35 ACSR 555,562 where Helman J noted that the case was argued on this premise.

<sup>159</sup> *Id* at 563-4.

## CONCLUSION

### The Reform Process

The scheme under sections 25 and 26 *Associations Incorporation Act* dealing with the doctrine of *ultra vires* remains unclear as to the extent to which it abolishes the doctrine. An incorporated association is required to state objects in its constitution. Inconsistently with this section 25 grants an incorporated association all the powers of an individual. If section 25 is construed as the dominant provision, then where a company enters into a contract or disposes of property outside its substantive objects, the transaction is arguably not *ultra vires*. Consequently, the doctrine of *ultra vires* is abolished. However, on this interpretation section 26 is left with little effective operation. This interpretation, by virtue of poor drafting, clearly favours persons dealing with incorporated associations. If, however section 25 is not construed as the dominant provision, then section 26 is left with an effective operation. This interpretation takes into account the interests of persons dealing with incorporated associations and also that of members to a limited extent.

The decision in *Queensland Rugby Football League Ltd and Another v Worrell*<sup>160</sup> was decided on the basis that section 26 *Associations Incorporation Act* has an effective operation. Crucially, however, it made no analysis of section 25 *Associations Incorporation Act* or its relationship with section 26. Despite this the writer takes the view that it was correctly decided. Even if section 25 had been considered and given its natural meaning the result would not have differed.

The writer takes the view that the confusion surrounding the interpretation of sections 25 and 26 *Associations Incorporation Act* ought to be resolved by replacing section 26. The replacement provision could be based in part upon section 125 (1) *Corporations Act* and in part on section 112 (2), (3) and (5) *Corporations Act*. These latter subsections deal with a no liability company. This type of company is required to have a constitution which states that, its “sole objects are mining purposes.”<sup>161</sup> It is prohibited from engaging “in activities that are outside its mining purposes objects.”<sup>162</sup> However, “an act or transaction is not invalid merely because of a contravention of” this latter provision.<sup>163</sup> Section 112 provides a model of a provision, which abolishes the doctrine of *ultra vires* where a company is required to state its objects. The replacement provision might be drafted as follows:

### Section 26 Corporate Capacity Where Incorporated Association Acts Outside Limitations On Powers Or Stated Objects

**26(1)[Limitations in Rules]** The rules of an incorporated association may contain an express restriction on, or a prohibition of, the incorporated association’s exercise of any of its powers. The exercise of a

<sup>160</sup> *Supra* n.87.

<sup>161</sup> *Corporations Act* s 112 (2) (b).

<sup>162</sup> *Corporations Act* s 112 (3).

<sup>163</sup> *Corporations Act* s 112 (5).

power by the incorporated association is not invalid merely because it is contrary to an express restriction or prohibition in the incorporated association's rules.

**26(2)[Incorporated Association's Objects]** An act of an incorporated association is not invalid merely because it is contrary to or beyond any objects required to be stated in the incorporated association's rules.

The replacement provision would remove the last vestige of the *ultra vires* doctrine. Unlike the present section 26(2), it does not provide any specific remedies to members where an incorporated association has acted in breach of its objects. If the legislature adopted a provision drafted in this way the policy of the *Associations Incorporation Act*, like that of the present *Corporations Act* would then be balanced very much in favour of persons dealing with the incorporated body rather than its members. It is clearly different to the policy of the *Associations Incorporation Act* when it was first introduced to take account of the interests of both members and creditors. This shift in the policy balance can readily be justified by two considerations.

The first justification for the shift in policy balance relates to the liability of the members of an incorporated association for its debts. The liability of the members is limited. Section 27 *Associations Incorporation Act* provides that a member of an incorporated association as such, is not personally liable, to contribute towards the payment of the debts and liabilities of the incorporated association or the costs of a winding up of the incorporated association. There is an exception to this personal liability as provided in the rules of an incorporated association. Rule 7 of the model rules in the *Associations Incorporation Regulations* provides that a member is liable only for the membership fee for the particular class of membership to which he or she belongs. Consequently, the liability of a member of an incorporated association under the *Associations Incorporation Act* is minimal. Comparatively speaking, it would in most cases be far less than a shareholder in a public company<sup>164</sup> or at least be equivalent to the amount payable by a member of a company limited by guarantee.<sup>165</sup> Clearly, this consideration favours a change in policy under the *Associations Incorporation Act* to one that, like the *Corporations Act*, favours the interests of persons dealing with the incorporated body.

The second justification for the shift in policy balance has its genesis in the argument put earlier that the policy of the doctrine of *ultra vires* is not readily adaptable to incorporated associations having regard to their characteristics.<sup>166</sup> They are associations, which are not constituted primarily for the purpose of making profits or for the purpose of providing financial gain for their members.

While the replacement provision does not provide any specific remedies to members where an incorporated association has acted in breach of its objects or

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<sup>164</sup> *Corporations Act* s 516 where liability is limited to any amount left unpaid on shares.

<sup>165</sup> *Corporations Act* s 517 where liability is limited to an amount undertaken by a member.

<sup>166</sup> See Legal Capacity of Incorporated Associations, *supra* Part B, p. 48.

restrictions on its powers, this type of breach may still be of significance in internal proceedings under other provisions in the *Associations Incorporation Act*. Firstly, by virtue of section 71(1) *Associations Incorporation Act*, the rules of an incorporated association constitute the terms of a contract between the members from time to time and the incorporated association. Consequently, a member may be able to show that it is entitled to institute proceedings against the incorporated association based on a breach of the statutory contract. Secondly, where an incorporated association has acted in breach of its objects this may be asserted in other proceedings under the *Associations Incorporations Act*. Accordingly, a member might endeavour to show under section 90(1)(e) that it is entitled to an order for winding up the incorporated association on the just and equitable ground. By analogy with case law decided under section 461(k) *Corporations Act* or its predecessors,<sup>167</sup> it may be arguable that the substratum of the incorporated association has failed. One facet of this is that if the change in the incorporated body's purpose does not accord with the general intention and common understanding of the members when they became members, then the Court will wind up the incorporated body.

In addition to the replacement of section 26 *Associations Incorporation Act* the writer takes the view that the reform process would not be complete without the abolition of the related doctrine of constructive notice. The provision would be drafted in similar terms to section 130(1) *Corporations Act*.<sup>168</sup> A person would not be taken to have knowledge of an incorporated association's rules or any other information about the incorporated association by reason that such information has been lodged with the public registering authority, the Office of Fair Trading. Consequently, an incorporated association would not be able to argue that a person dealing with it is deemed, by virtue of the lodgement of the rules with the Office of Fair Trading, to have knowledge of the incorporated association's objects. Nor would an incorporated association be able to argue that a person dealing with it is deemed to have knowledge when it is acting outside its objects, in order to escape liability under a contract with it. This additional provision would form part of the framework of provisions, which would improve the protection of persons dealing with incorporated associations. This shift in policy balance away from the interests of members of incorporated associations has its justification in the consideration that the doctrine of constructive notice lacks a proper basis in commerce generally.<sup>169</sup> It also has its justification in the consideration that that the policy of the doctrine of constructive notice, like that of the doctrine of *ultra vires*, is not readily adaptable to incorporated associations having regard to their characteristics.

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<sup>167</sup> *Supra* n. 106.

<sup>168</sup> See Relationship between S 25 and S 26 *Associations Incorporation Act*, *supra* Part C, p60.

<sup>169</sup> See The Related Doctrine of Constructive Notice, *supra* Part B, p46.