Liddle v Central Australian Aboriginal Legal Aid Service Inc [1999] NTSC 37

PARTIES:	**LORRAINE LIDDLE AND JOHN LIDDLE** AND: **CENTRAL AUSTRALIAN ABORIGINAL LEGAL AID SERVICE INC.**
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL
FILE NO:	234 of 1998 (9826805)
DELIVERED:	9 April 1999
HEARING DATES:	5 February & 10 March 1999
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Declaration – unfair dismissal – powers of Association *ultra vires* – whether act of individual is act of Association – whether dispute is justiciable.

Declaration – unfair dismissal – contract of employment – master and servant – refusal to accept contract terminated – whether legal relations exist.

Mandatory Injunction – Association not held AGM in accordance with requirement constitution.

Legislation

Associations Incorporation Act

Commonwealth Electoral Act 1918 (Cth)

Legal Practitioners Act

Supreme Court Act of NT

Supreme Court Act of SA

Workplace Relations Act 1996 (Cth)

Cases

1. *Cameron v Hogan* (1934) 52 CLR 358, applied.
2. *Baldwin v Everingham* (1993) 1 Qd R 10, distinguished.
3. *Scandrett v Dowling* (1992) 27 NSWLR 483, discussed.
4. *McKinnon v Grogan* [1974] 1 NSWLR 295, discussed.
5. *Dietrich v Queen* (1992) 177 CLR 292, referred.
6. *Plenty v The Seventh Day Adventist Church of Port Pirie* (1986) 43 SASR 121, referred.
7. *Howes v Gosford Shire Council* (1961) 78 WN (NSW) 981; (1962) NSWLR 58, followed.
8. *McVicar v Commissioner of Railways (NSW)* (1951) 83 CLR 521, followed.
9. *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, referred.
10. *Slattery and Others v Public Service Board* (1983) 3 NSWLR 41, applied.
11. *Blank v Beroya Pty. Ltd.* (1967) 92 WN (NSW) 24, applied.
12. *Redland Bricks, Ltd v Morris* (1969) 2 All ER 576, applied.

REPRESENTATION:

Counsel:

Plaintiff:	J. Kelly
Defendants:	C. McDonald QC

Solicitors:

Plaintiff:	Clayton Utz
Defendants:	Martin and Partners

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OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 234 of 1998
(9826805)

Liddle v Central Australian Aboriginal Legal Aid Service Inc [1999] NTSC 37
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BETWEEN:

LORRAINE LIDDLE AND JOHN LIDDLE
Plaintiffs

AND:

CENTRAL AUSTRALIAN ABORIGINAL LEGAL AID SERVICE INC., EDWARD TAYLOR, EILEEN VAN IERSEL, SHARON HAYES, CARMY MCLEAN, JOYCE TAYLOR, MAUREEN ABBOTT, MAUREEN ROMAN AND EILEEN SHAW
Defendants

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 9 April 1999)

MILDREN J:

[1] The defendant Central Australian Aboriginal Legal Aid Service Inc. (CAALAS) is a voluntary association incorporated under the provisions

of the *Associations Incorporation Act (NT)*. In broad terms the function of CAALAS is to provide a legal aid service for Centralian Aborigines.

[2] On the 23rd November 1993 the plaintiff Lorraine Liddle was appointed to the position of Principal Legal Officer of CAALAS, a position she held until her employment was purportedly terminated on the 7th October 1998. The plaintiff John Liddle is an elected member of the Council of CAALAS and the plaintiff Lorraine Liddle's brother. The defendants Edward Taylor and Carmy McLean are respectively the president and vice president of CAALAS. The defendant Eileen Van Iersel is the public officer. The defendant Sharon Hayes is an elected counsellor who also occupies the position of secretary of CAALAS. There is dispute as to the validity of her appointment as secretary. The other defendants are all counsellors.

[3] In these proceedings the plaintiffs seek declarations and a mandatory injunction as follows:

1. (a) that the purported meeting of the Executive Committee of CAALAS on 7 October 1998 was not validly constituted;

(b) that the purported decision of the Executive Committee of CAALAS made at that meeting on 7 October 1998 to terminate the employment of the plaintiff Lorraine Liddle as Principal Legal Officer of CAALAS was void and of no effect;

2. that the Executive Committee of CAALAS has no power under the CAALAS constitution to terminate the employment of the Principal Legal Officer and that the sole body empowered under the CAALAS constitution to terminate the employment of the Principal Legal Officer is the Council;

3. (a) that the purported meeting of the Council of CAALAS on 24 September 1998 was not validly constituted; and

(b) the purported election of Sharon Hayes as secretary of CAALAS at that meeting was void and of no effect;

4. that the purported appointment of Eileen Van Iersel to the Executive Committee of CAALAS by Edward Taylor is void and of no effect and that Eileen Van Iersel is not a member of CAALAS' Executive Committee;

5. a mandatory injunction requiring the second, third, fourth, fifth, sixth and seventh defendants to forthwith convene an annual general meeting of CAALAS in accordance with the constitution for the purpose of conducting elections for President, Vice President and Council members.

[4] A great deal of evidence was placed before the court in the form of affidavits and other documentary evidence. It is not necessary to recite the evidence in detail. None of it was in serious contest although there

were some objections to the admissibility to some of it. I will refer only to such of the evidence as is necessary to dispose of this matter.

[5] The plaintiffs seek to challenge the purported termination of the employment of Lorraine Liddle as Principal Legal Officer on a variety of grounds which include lack of notice of the relevant meetings given to some of the members entitled to attend and vote; the lack of a quorum at the relevant meetings; and lack of constitutional power on behalf of the Executive Committee to dismiss the Principal Legal Officer. The mandatory injunction is sought on the basis that the constitution requires that there be an annual general meeting held within four months of the end of the financial year of each calendar year, there being no annual general meeting (at which elections for Officers and Council Members are to take place) held since 1996.

[6] Mr McDonald QC, who appears for each of the defendants, resisted the orders sought on a number of grounds which may be summarised as follows:

1. as CAALAS is a voluntary association established on a consensual basis, in the absence of a clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules of CAALAS were not to be treated as an enforceable contract and no action can be maintained

requiring CAALAS to observe its rules regulating its affairs (the "*Cameron v Hogan* point");

2. the plaintiff Lorraine Liddle has remedies under the *Workplace Relations Act* (Cth) and also under the provisions of the constitution of CAALAS and has taken steps to enforce those remedies. It was submitted that the existence of these alternative remedies, and the fact that the Industrial Relations Commission has the power to provide full remedies to the plaintiff Lorraine Liddle (including remedies which this Court cannot grant, such as reinstatement) is a powerful discretionary reason why discretionary relief should be refused (the "*Slattery and Others v Public Service Board* point");

3. it was further argued that there are other discretionary reasons why relief should be refused. Foremost amongst these was a submission that the relationship of master and servant no longer existed and that the suit was a subterfuge for an attempt to obtain specific performance of the contract of employment (the "*Howes v Gosford Shire Council* point").

4. the defendants say that in any event the plaintiff Lorraine Liddle's employment was validly terminated in accordance with the constitution of CAALAS;

5. finally it was submitted that the remedy of a mandatory injunction should not be granted to force any of the defendants to call an annual general meeting of CAALAS on the ground that no such order is necessary.

The Cameron v Hogan Point:

[7] CAALAS is a non profit making body whose principal objective is to "provide direct relief to all Aboriginals from poverty, suffering, destitution, misfortune, distress and helplessness caused directly or indirectly by their involvement with the laws of the Commonwealth or States of Australia (sic) and all matters ancillary thereto," and by clause 3 it is provided that "CAALAS shall advance its goals and objectives by the following means:

(a) by assisting Aboriginal people in need of legal advice representation or other legal services by the provision of a full legal service for Aboriginal people in Central Australia".

[8] The membership of CAALAS is somewhat unusual. According to clause 6 of the constitution, membership is of two kinds:

(a) every Aboriginal who is at least eighteen years old and ordinarily a resident in the Central Australian region serviced by CAALAS shall be a member of CAALAS (and apparently they are members irrespective of whether they wish to be a

member, have applied to become a member or whether they know they are members, or not);

(b) Aboriginal community associations which become members as "member communities" by virtue of clause 6(b) of the constitution.

[9] In *Cameron v Hogan* (1934) 51 CLR 358 Rich Dixon Evatt and McTiernan JJ said, at 370 – 371:

> Judicial statements of authority are to be found to the effect that, except to enforce or establish some right of a proprietary nature, a member who complains that he has been unjustifiably excluded from a voluntary association, or that some breach of its rules has been committed, cannot maintain any action directly founded upon that complaint. For example, in *Forbes v Eden* (1867) LR 1 Sc. & Div. H.L., at 581, Lord Cranworth said: "Save for the due disposal and administration of property, there is no authority in the Courts either of England or Scotland to take cognisance of the rules of a voluntary society entered into merely for the regulation of its own affairs." (Compare per Jessel MR, *Rigby v Connol* (1880) 14 Ch. D., at 487; per Barry J, *O'Keefe v Cardinal Cullen* (1873) IR 7 CL at 343). Gavan Duffy J considered that such statements should be understood as relating only to the jurisdiction of Courts of equity. There are, however, reasons which justify the statement that, at common law as well as in equity, no actionable breach of contract was committed by an unauthorised resolution expelling a member of a voluntary association, or by the failure on the part of its officers to observe the rules regulating its affairs, unless the members enjoyed under them some civil right of a proprietary nature. As a generalisation it expresses the result produced by the application of a number of independent legal principles: it is not in itself the enunciation or explanation of a rule or rules of the common law. One reason which must contribute in a great degree to produce the result is the general character of the voluntary associations which are likely to be formed without property and without giving to their members any civil right of a proprietary nature. There are for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in

> character, or otherwise stands apart from private gain and material advantage. Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal rights *inter se*, the rules adopted for their governance would not be treated as amounting to an enforceable contract.

[10] Mr McDonald QC submitted that not withstanding the tendency of later authority to distinguish *Cameron v Hogan*, the principles which emerge from this paragraph are binding upon this Court and have never been overruled. Further, he submitted that CAALAS was a body of a purely humanitarian character and a purely non profit making organisation. Indeed, under the provisions of the constitution itself, clause 23(a) provides that "the income and property of CAALAS shall be applied solely towards the promotion of the goals and objectives of CAALAS and no portion thereof shall be paid or transferred directly or indirectly by dividend bonus or otherwise to any Member of CAALAS." Even on a winding up, pursuant to clause 40(b), any surplus funds or assets are to be transferred, after the payment of any debts, to an Aboriginal controlled fund authority or institution with one or more similar goals to and objectives as CAALAS and which satisfy the requirements of s78(1)(a) to the *Income Tax Assessment Act* (a provision which at one time provided for the exemption from income tax on the basis of charity or benevolence). Mr McDonald QC submitted that there was nothing in the provisions of the constitution indicating an intention by the members that they contemplated the creation of legal relations *inter se*. There is

certainly no such express provision which counsel for the plaintiffs was able to point to. Further, in the Northern Territory, there is no provision in the *Associations Incorporation Act* equivalent to those provisions in the Acts of other states which provide that the rules of an incorporated association shall, subject to the Act, operate as a contract between the association and its members. Mr McDonald QC submitted that the case affects the plaintiff Lorraine Liddle in her capacity as an employee, but not in her capacity as a member of CAALAS. So far as the both plaintiffs are concerned in their capacity as members, it was submitted in effect that there were no facts upon which the Court could find that they were entitled to relief. No issue of the disposal or administration of CAALAS's property is involved and the members do not enjoy under the constitution some civil right of a proprietary nature.

[11] Ms Kelly on behalf of the plaintiff's submitted that this is not the sort of case where the Court should refuse to intervene in the internal affairs of a purely private or domestic association, because like the political party in *Baldwin v Everingham* (1993) 1 Qd R 10, CAALAS, as an incorporated association, is recognised by statute and it must register its rules. Further like the political party there at issue, although it is a voluntary association, it fulfils a substantial public function in society and also receives public funding through ATSIC. Ms Kelly also distinguished the case of *Scandrett v Dowling* (1992) 27 NSWLR 483 as there were no public policy reasons why the court in this case should not intervene to

enforce the constitution of the association such as existed in *Scandrett's* case.

[12] In *Baldwin v Everingham*, (supra) Dowsett J said at page 17:

> On general principles, when 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.

[13] His honour, after referring to what Wootten J had to say in *McKinnon v Grogan* [1974] 1NSWLR 295 at 297 continued:

> 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 judgement.

[14] At page 18 his Honour, after considering recent authority in New Zealand and in England said:

> 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.

[15] One difficulty with *Baldwin v Everingham* and the cases referred to therein from the point of view of the plaintiffs, is that, to the extent that there is dicta suggesting that there should be a policy shift, it seems to be limited to "major national organisations with substantial assets which play critical roles in the determination of the affairs of the country". Whatever else may be said about CAALAS, it can hardly fall into that category. On the other hand neither is it a small voluntary association with limited assets which exists solely to serve the personal needs of the members. Rather, it falls somewhere in between. I am not privy to what precisely CAALAS's property amounts to. I am aware that it occupies office premises in Alice Springs and that it employs a number of lawyers as well as other staff. Precisely how many people are on the payroll I am unable to find. Clearly CAALAS performs an important function in providing legal aid to the very many Aboriginal defendants who are required to appear in both the Supreme Court and the lower courts particularly in relation to criminal matters, but also in relation to civil matters. So far as this Territory is concerned, there is no doubt that it is an important organisation which fulfils an important public function and that it is substantially if not exclusively publicly funded.

[16] In *Cameron v Hogan,* (supra) at page 373 it was said:

> If a member of a voluntary association complains, not of an invalid expulsion, but of some failure to observe the rules on the part of the committee or other officers, it would be necessary for the member complaining to show that the rules were intended to confer upon him a contractual right to the performance of the particular duty up which he insists. It can seldom be the true meaning of the rules of any large association of such a kind that those undertaking office thereby enter into a contract with each and every member that they will execute the office in strict conformity with the rules. If, however, it were to determine that the committee or the officers of a voluntary association in attempting to exclude the member complaining, or in some other respect, had committed a breach of contract, the remaining members of the association would not be responsible. The committee or officers may be agents for the members of the association. But if so, they are agents for all the members. If in the case of a member complaining they have violated the rules, they have exceeded their authority. Upon no doctrine of agency can one of the joint principals hold the others responsible.

[17] I should refer also to two other passages which in *Cameron v Hogan* which refer to the question of whether the relief of the kind which is being sought in this case is available. At page 377 Rich, Dixon, Evatt and McTiernan JJ said:

> The question remains whether Gavan Duffy J was right in refusing relief by way of injunction or declaration of right. The foundation of the jurisdiction to grant an injunction is the existence of some civil right of a proprietary nature proper to be protected.

And at page 378:

> Further, such a case is not one for a declaration of right. The basis of ascertainable and unenforceable legal right is lacking. The policy of the law is against interference in the affairs of voluntary associations which do not confer upon members civil rights susceptible of private enjoyment.

[18] One point of difference between this case and the situation in *Cameron v Hogan* upon which the plaintiffs rely, is the fact that CAALAS is incorporated under the *Associations Incorporation Act*. Ms Kelly relied upon the reasoning of Dowsett J in *Baldwin v Everingham* who was able to distinguish *Cameron v Hogan* upon the basis that the Liberal Party of the State of Queensland was a registered political party under the provisions of the *Commonwealth Electoral Act (1918)* (Cth). In *Baldwin v Everingham*, Dowsett J, at page 20, concluded that it was the fact of statutory recognition which was important, not the quasi-corporate status conferred, and that statutory recognition of political parties was obviously a matter of public policy designed to effectuate the conduct of federal elections and that consequently disputes concerning the rules of political parties registered under the Act were now justiciable. I am unable to see any analogy between a voluntary organisation incorporated as a non-trading association under part II of the *Associations Incorporation Act* and the kind of organisation to which *Baldwin v Everingham* refers. In other words, I do not consider that mere registration under the *Associations Incorporation Act* of the Northern Territory has taken CAALAS beyond the ambit of being a mere voluntary association. Despite incorporation, CAALAS remains a voluntary association as being a body of persons "who have combined to further some common end or interest which is … humanitarian in character … [and] stands apart from private gain and material advantage". (*Cameron v Hogan*, supra, at pages

370 – 371.) Not only is CAALAS an association with an amorphous membership the character of which I have already described, and the objects and purposes of which are of an eleemosynary nature, but under the constitution and rules no member has or can have any interest in its property even on a winding up. It was submitted by Ms Kelly that *Cameron v Hogan* is generally distinguished and rarely applied in modern times, and reference was made by way of example to *McKinnon v Grogan* (1974) 1 NSWLR 295 where Wootten J said at page 297:

> The decision in *Cameron v Hogan*, relating as it does to the relationship of individuals to voluntary associations of which they are members or they desire to be members, deals with an area of human affairs which has changed and continues to change greatly in social significance, and in which there has been a great deal of judicial development of the law. On one aspect of such problems Lord Denning MR in *Nagal v Feilden* [1966] 2 QB 633 at 647 recently discarded some earlier statements of his own in *Russell v Duke of Norfolk* [1949] 1 ER 109, at 199 with the crushing comment: "But that was seventeen years ago". *Cameron v Hogan* was forty years ago, and I suspect that in that period it has been more frequently distinguished or ignored than it has been applied, simply because its application in full rigour has been increasingly out of tune with the felt needs of the time. The High Court has not had an occasion to reconsider it squarely, and I venture to suggest that when such an occasion does arise there will be at least some qualification of what was there said. With the greatest respect to the imminent and forward-looking judges who gave the decision, it is tended to justify judicial abdication from areas the orderly regulation of which has become of ever-increasing importance. The resultant categorisation of 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.

[19] At page 298 Wootten J continued:

> It seems to me that the real issue raised by *Cameron v Hogan* is one of judicial policy – whether or not the courts are to accept or reject responsibility for performing ordinary judicial functions in relation to the important voluntary associations of a non-business character that are so important today. I think this question should be squarely faced, and not lost sight of in the adoption of a conceptual approach which gives the misleading impression of a result inevitable in legal principle. The difficulties raised in *Cameron v Hogan* as explaining the policy of judicial non-intervention are capable of solution if a policy of intervention is adopted.

[20] At page 299, his Honour continued:

> Despite *Cameron v Hogan* the courts frequently deal with disputes between individual members and social clubs, such as RSL clubs. This seems to be both proper and desirable, and the courts should be willing to assist in resolving disputes in organisations, whatever their size, in which parties have deliberately adopted formal rules to govern their relations.
>
> In my opinion, people who join the league and subscribe to its constitution and by-laws should be taken to intend to be bound by them and should be entitled to invoke the courts in appropriate circumstances to have their disputes settled. What limitations, if any, shall be placed on this right is, no doubt, something to be worked out case by case. Suffice it to say that I can see no reason why the parties should not be able to seek the declarations they claim in this case. There are no procedural difficulties. The issues are of major importance, as they deal with the election of a general committee of a club, including delegates to the general committee of the league. They thus go to the heart of the control of the affairs of this important institution, and in terms of public importance, as well as of concern to the individuals, are far more worthy of judicial time than many issues about "civil rights of a proprietary nature".

[21] In *Scandrett v Dowling* (1992) 27 NSWLR 483 Mahoney JA said, at pages 503 – 505:

In considering whether such a breach should be restrained by injunction or the subject of a declaration, it will ordinarily be of assistance to consider three matters: whether the rules of the voluntary association were intended to create legally binding rights and obligations between the members; (if they were) whether there has been a breach of rules creating such rights and obligations; and (if there has) whether the rules or the breach are such that it was intended that legal consequences should flow from the breach and (if it was) whether those consequences warrant intervention to restrain the breach.

Whether, considered as a whole, the rules of a particular voluntary association were intended to create such rights and obligations must be determined according to the nature of the association, the terms of the rules, and the general context. In earlier times, there was seen by some to be a tendency to infer that in the case of voluntary associations formed for non-profit purposes, it was not intended that the rules create such rights and obligations: at least, this was so where property and similar rights where not involved or except in so far as they were involved. This tendency was seen in the judgement of the majority of the High Court (Rich, Dixon, Evatt and McTiernan JJ) in *Cameron v Hogan*.

In more recent times the courts have, I think, tended more often to see the consensual: *Cameron v Hogan* (at 371); or the contractual: *John v Reece* (1970) Ch 345; in *Re Recher's Will Trusts* [1972] Ch 526; in *Re Grants Will Trusts* [1980] 1WLR 360; [1979] 3 All ER 359; nature of such rules as binding the members contractually or otherwise by legally binding obligations; see, for example, *Buckley v Tutty* (1971) 125 CLR 353; *Nagle v Feilden* [1966] 2 QB 633 ….In one case in N.S.W., a trial judge saw justification in the modern changes in society to refuse to follow the decision or at least the approach adopted by the High Court in *Cameron v Hogan*; see *McKinnon v Grogan* [1974] 1 NSWLR 295.

There are in my opinion, substantial reasons why the Court should conclude that, in general, legally binding rights and obligations can arise from the rules of the Anglican Church. The rules of the Church are concerned with matters of importance to its members. They are not concerned merely with a 'common end' or a 'common interest'. The doctrines, rituals and practices are matters by which its members order their lives and to which they, as required, may dedicate themselves and their property. They are not the result merely of the members of the church having decided to combine for the effecting and the observance of them; they derive from centuries old organisations to which the members have come by adherence. These are matters which, I think, the

> members would see as capable of and, indeed, as warranting enforcement in formal court procedures in appropriate respects and in an appropriate circumstances.

[22] It may be said on the one hand that, given that the rules of CAALAS do not appear to require any positive step for Aboriginal persons to become members it is difficult to see how it could be inferred that each of the members have joined CAALAS with the intention to be bound by its rules. I think, however, that on the true construction of the rules, a person is not a member, nor does a community become a member, unless they apply to become members: see clause 6(c)(ii) and (iii). If this is so, this supposed difficulty does not arise.

[23] Further, when one examines the general context, it is not difficult to see why it was that the drafters of the constitution of CAALAS sought such a wide and all encompassing form of membership. This is after all an Aboriginal organisation, and it would seem that the constitution and the rules of CAALAS were drafted so as to reflect at least in part notions of consensus decision making, commonality of property and community membership which are common features of Aboriginal tradition and culture. Other features of the constitution reflect the importance of the role which CAALAS has to play as an institution. The positions of Director and Principal Legal Officer in particular indicate that the day-to-day management of CAALAS's activities is to be their sole province and that the Principal Legal Officer is to be responsible to the Director for the

administration of the legal staff and the provision of legal services; see clauses 18(i), 19 and 21. Other provisions of the constitution suggest that it was the intention of the drafters of the constitution that the rules were to be legally binding upon the members: see clauses 8(b) and 9 of the constitution dealing with expulsion and discipline of members; clause 22 relating to the appointment of a returning officer to supervise the elections at the annual general meeting; and clause 36 which deals with the disclosure of interests and forbids Officers or members of the Council to vote in respect in any contract or arrangement in which he or she is interested. The nature of the undertaking itself is a matter of some general significance and importance in that it provides a free legal service to a large number of Aboriginal people in the Centralian district. Further, there are provisions in the constitution relating to the keeping of bank accounts and the maintaining of a trust account which shall be kept in accordance with the provisions of the *Legal Practitioners Act:* see clause 31. Although not determinative, the fact is that CAALAS is incorporated under the *Associations Incorporation Act* pursuant to which it is required to file a copy of its rules with the registrar as defined under that Act (s15) and is not permitted to alter its rules unless it complies with the provisions of s16 of the Act. These considerations all point to the conclusion that the rules of CAALAS were intended to create legally binding rights and obligations between the members.

[24] There are further reasons in my opinion as to why *Cameron v Hogan* should not apply so as to preclude this Court from intervening in the internal affairs of CAALAS. First it is to be noted that CAALAS is an organisation whose main purpose is to provide "legal aid services" as defined by s6 of the *Legal Practioners Act* and as such it is entitled pursuant to s22(5) to recover costs and disbursements in respect of work of a professional nature done by a legal practitioner who is the holder of a current unrestricted practicing certificate or a restricted practicing certificate class one employed by that organisation. Furthermore it may recover costs not only against a client of the organisation pursuant to Part X of the *Legal Practitioners Act*, but also against another party to litigation: see s22 sub-sections 5 and 6 and s118A of the *Legal Practitioners Act* through the medium of the Principal Legal Officer who under the constitution is required to hold an unrestricted practicing certificate. CAALAS therefore holds a special position with this Court. If the rules of the constitution of CAALAS, particularly those rules relating to the employment of the Principal Legal Officer where non-justiciable, this would threaten that special relationship. In a practical sense, this Court relies very substantially upon CAALAS for the provision of legal aid to most of the defendants who appear in this Court's criminal jurisdiction when the Court is on circuit in Alice Springs. That is a factor which tends to support the proposition that the members of CAALAS would expect the rules to be legally binding. The

fact that CAALAS is almost entirely publicly funded through ATSIC adds further support to that consideration. The importance of legal aid in the criminal justice system has recently been emphasised by the High Court in *Dietrich v Queen* (1992) 177 CLR 292. In a practical sense, a legal aid agency such as CAALAS performs functions which are akin to public functions of great importance without which the work of the judiciary, the third arm of government, would be severely hampered. Furthermore the plaintiff Lorraine Liddle claims to be in contractual relations with CAALAS, albeit in the form of a contract of employment, and further claims that the procedures in order to remove her validly under the constitution have not been adopted. The importance of the position of Principal Legal Officer under the constitution of CAALAS in relation to the public functions of CAALAS to which I have referred is a further reason for thinking that these matters are justiciable.

[25] Finally reference should be made to the procedural difficulties which faced the plaintiff in *Cameron v Hogan* and to which the High Court referred at pages 371 and following. Those difficulties simply do not apply in this case. The fact that the defendant is incorporated disposes of one of the objections referred to therein. The fact that this court may make binding declarations of right whether or not any consequential relief could be claimed and that these proceedings are not open to objection on the ground that a declaratory order only is sought (s18 of the *Supreme Court Act*) it is yet another ground of distinction. So far as the latter is

concerned, in *Plenty v The Seventh Day Adventist Church of Port Pirie* (1986) 43 SASR 121, Olsson J thought that the equivalent provision in South Australia (s31 of the *Supreme Court Act (SA)*) was of some significance: see especially at pages 142 – 143. Finally, I refer to clauses 11(h) and 18(t) of the constitution which provides that in cases of dismissal or suspension of staff the Executive Committee will operate within the principles and procedures prescribed in the Northern Territory Aboriginal Legal Aid Award (1990) clause 28. These provisions also, it seems to me, lend added support for the conclusion that it was intended that the rules should confer legally binding rights and obligations upon the members. Accordingly I reject Mr McDonald QC's argument that the dispute between the parties is not justiciable.

Should relief be refused for discretionary reasons?

[26] On the assumption that the plaintiffs' argument that Lorraine Liddle's employment was not validly terminated by CAALAS is correct, Mr McDonald QC submitted that relief should nevertheless be refused in the exercise of the Court's discretion. There is no doubt that the remedy of a declaration is discretionary. Mr McDonald QC submitted that this discretion should be exercised against the plaintiffs for a number of reasons already alluded to in para [6] above.

[27] The first of these reasons is what I have described as the *Howes v Gosford Shire Council* point. In that case, (reported at (1961) 78 WN (NSW) 981;

(1962) NSWLR 58), the plaintiff, who was the Shire Clerk of the Council, brought action against the Council claiming a declaration that a resolution of the Council pursuant to which he was dismissed, was void, on the ground that there was not a quorum present at the meeting at which the resolution was passed. At pps 985 – 984, in a passage heavily relied upon by Mr McDonald QC, Jacobs J said:

> It is also argued that the rights of the plaintiff lie at law by way of either action for wrongful dismissal or an action at any rate to recover his salary during the period of suspension, assuming the suspension to be unlawful. It seems to me that this raises the question which is really the pivot of the argument whether the suit is maintainable. If this is a suit arising out of a mere relationship of master and servant, then this court has no jurisdiction to interfere. The remedy of the plaintiff, if he has a remedy, lies at law. It is a question how one characterizes the suit. If it is a suit between master and servant in which the servant seeks to prevent the master suspending or dismissing him and goes no further, then this court will not interfere. If it is a suit for a declaration that the service continues, again in the case of an ordinary relationship of master and servant, this court will not interfere. It is hardly necessary to refer to authority for that proposition. The reason for the existence of that rule has been variously stated. It has been placed upon the ground that the Equity Court will not compel either master or servant to continue a personal relationship which has become noxious to either one of them. It has also been placed upon the ground that the Equity Court will not enforce a contract which requires the constant supervision of the court.
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> There is of course a third ground for the rule, namely, that in the ordinary case of master and servant the dismissal of the servant by the master is never a nullity. The servant cannot refuse to accept his dismissal and continue to hold himself out as ready and willing to serve and thereafter claim for his wages during that period. The reasons for this are explained by Dixon J., as he then was, in *Automatic Fire Sprinklers Pty. Ltd. v Watson:* "A contract for the establishment of the relation of master and servant falls into the same general category of agreements to pay in respect of the consideration when and so often as it is executed, and is, therefore, commonly understood as involving no liability for wages or salary unless earned by service, even though the failure

to serve is a consequence of the master's wrongful act." ((1946) 72 CLR 435 at 465).

[28] However, as Jacobs J said, it is a question of how one characterizes the suit. In fact Jacobs J characterised the suit in that case not as one of master and servant, but as one of a person having a sufficient interest in the subject matter for a declaration as to the invalidity of the defendant corporation's acts. His Honour considered a line of English cases considered by the High Court in *McVicar v Commissioner of Railways (NSW)* (1951) 83 CLR 521 and said, at p 986:

> It seems to me the High Court in that case questioned whether the act of a corporation in dismissing a servant was ever void because matters were taken into account by the directors which ought not to have been taken into account. However, as I read the decision of four of the judges of the court, the English cases are accepted as establishing that an injunction will lie where the validity of the course proposed as being within the powers of the corporation and therefore as its act, is the question under consideration. It was said in relation to the English authorities: "The validity of the course proposed as within the powers of the corporation, and therefore as its act, was the question under consideration, not the question whether a *de facto* dismissal of the plaintiff would be actionable, although the plaintiff held only at pleasure." (11)
>
> I therefore do not find anything in the discussion of these English authorities in the High Court which throws any doubt upon the correctness of the approach adopted in them when the challenge is to the valid existence of the act upon which the corporation is purporting to rely. When the principal is applied to the facts of this case, therefore, if there was no quorum and thereby no resolution of the council, there is nothing to prevent a proper party from seeking relief in this court by way of declaration to that effect and by way of injunction against those who seek to put the invalid resolution into effect.

[29] This is precisely the point made by Ms Kelly, counsel for the plaintiffs, i.e., that the acts of the individual defendants in purporting to dismiss Ms Liddle were not the acts of CAALAS. Jacobs J went on to hold that the plaintiff had a special interest because he was the servant of a statutory corporation whose service was governed by statute, and that he could therefore sue in his own name. Although Ms Liddle's service is not governed by statute, it is difficult to see on what basis it could be asserted that she does not have a sufficient interest in bringing this suit given the importance and special position under the constitution of Principal Legal Officer and given that she is a member of the Corporation. Mr McDonald QC did not suggest otherwise. I therefore reject Mr McDonald's argument based upon the premise that the action is merely one to enforce a contract of employment.

[30] In *McVicar v Commissioner for Railways (NSW) supra,* at 531, Dixon Williams Fullagar and Kilto JJ said:

> Now it may at once be said with reference to this passage that it is of course undeniable that if the act purporting to dismiss the employee is ultra vires of the corporation, then it is not the act of the corporation and must be inoperative. *Ex hypothesi* it could not in itself be a dismissal, wrongful or otherwise, because it is not the act of the corporation; but it might be followed by a *de facto* exclusion from the duties and emoluments of the office, which would amount to a dismissal.

[31] Mr McDonald QC submitted that, on the facts of this case, the relationship of master and servant had come to an end. The facts, which

are not in dispute, are that on 7 October 1998, Mr Taylor, the President of CAALAS wrote to Ms Liddle advising her that her employment had been terminated, and that an amount of $25,897 would be paid into her bank account for wages, payment in lieu of notice, accrued annual leave and long-service leave entitlements (see Ext ET30 to the affidavit of Mr Taylor). The money was paid into Ms Liddle's account subsequently that day and has not been returned. Ms Liddle's position has not been filled since then, and Mr David Bamber has been appointed Acting Principal Legal Officer. Miss Liddle has not returned to her place of employment. She has lodged an appeal to a grievance committee pursuant to clause 28 of the Northern Territory Aboriginal Legal Aid Salaries Award 1990 (see Ext ET33 to the affidavit of Mr Taylor) and she has instituted proceedings in the Australian Industrial Relations Commission pursuant to the provisions of the *Workplace Relations Act 1996* (Cth) seeking, *inter alia* reinstatement. In those circumstance, I have no doubt that the employment relationship has come to an end (see also *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 426 – 429 per Brennan CJ and Dawson and Toohey JJ) even if the contract of employment is still on foot until such time as Ms Liddle accepts the repudiation of her contract. There is no evidence that this is so; but, as was pointed out by their Honours in *Byrne v Austrlian Airlines Ltd,* supra, at 428, the possible continuation of a contract of employment after a wrongful dismissal will ordinarily be of no real significance, as the contract for all practical

purposes will also be at an end. I consider that these conclusions are of significance in the exercise of my discretion as to whether or not, on the assumptions previously identified, the relief sought ought to be given. If I were to grant the declarations sought, that would not restore Ms Liddle to her position; and this Court will not order specific performance of a contract of employment. To what end will the declarations sought be of use? Ms Kelly suggested that, if the declarations sought were made, they would assist CAALAS, or its members or Council, to resolve the issue of Ms Liddle's employment. I do not see how they can, as the relationship has ended.

[32] A further point relied upon by Mr McDonald QC is what I have described as the "*Slattery and Others v Public Service Board*" point. Ms Liddle has commenced proceedings in the Australian Industrial Relations Commission, which can order reinstatement, with or without back pay, or order compensation: see s170 CH *Workplace Relations Act* (Cth). In *Slattery and Others v Public Service Board* (1983) 3 NSWLR 41, Lee J said, at 47 that:

> … the former Industrial Commission should deal with industrial matters, and that the Supreme Court should refrain from dealing with matters that are in truth industrial matters.

Similar views have been expressed by other Judges. In *Blank v Beroya Pty. Ltd.* (1967) 92 WN (NSW) 24 for example, Street J, as he then was said:

> As a general proposition the jurisdiction of this Court to grant declaratory relief will not be exercised when another tribunal has full jurisdiction to investigate and determine the matters raised and where that other tribunal can be seen to be the tribunal either expressly indicated by Parliament or indicated by considerations of convenience to be the preferable tribunal to entertain the contest.

[33] The fact that this Court cannot finally resolve all matters in controversy between the parties, whereas the Commission has the power, if it determines that the termination was 'harsh, unjust or unreasonable' (see s170CG and s170CH), to *inter alia*, order reinstatement is, I consider a most relevant matter.

[34] As to the plaintiff's brother, his interest in obtaining the declarations is based upon his membership both of CAALAS and as an elected member of the Council of CAALAS. He is, as I have said, the brother of Ms Liddle, and as such, interested in Ms Liddle's appointment, in the sense of being partial to her out of presumed brotherly loyalty. Whether that would preclude him from voting on her appointment or dismissal under clause 36 (c) of the constitution, I do not find it necessary to decide, but I do not consider that his presence as a co-plaintiff alters the position.

[35] For the reasons given, I decline to exercise my discretion to grant any of the declarations sought.

[36] As to the mandatory injunction sought for the calling of an Annual General Meeting, I find it difficult to understand why this was not

attended to at the proper times in 1997 and 1998. Clearly the Annual General Meeting is well overdue, and there is in my opinion, no excuse for failing to hold one. However, the evidence before me suggests that some steps have been put in train recently to call such a meeting; see Ext D18. An attempt to supplement that information by Mr McDonald QC at the resumption of the hearing in Darwin was objected to by Ms Kelly. As a result, no further information was received, and I gathered from Ms Kelly that the plaintiffs do not trust those responsible to properly and genuinely attend to this. No under-takings to the Court have been offered by any of the defendants.

[37] The responsibility for calling the Annual General Meeting appears to rest with the Council (see clause 20(c)(i)), not all the members of which have been joined as a party to these proceedings. There are difficulties, it seems to me, in the granting the relief sought. A mandatory injunction, if it is to be granted, must tell the defendants exactly what they must do: see *Redland Bricks, Ltd v Morris* (1969) 2 All ER 576 at 580. The form of order sought is "to convene an Annual General Meeting … in accordance with the Constitution …" The provisions of the constitution do not make it clear, as a matter of fact, exactly how the defendants (as opposed to the Council) are to act. This is an organisation which has had a history, according to the evidence, of failing to obtain quorums at Council meetings. There may be difficulties in arriving at a conclusion as to

whether the defendants, or some of them, have disobeyed any order made if the meeting fails to occur because of an inability to form a quorum.

[38] There is also the possibility of another remedy, which may be more appropriate if CAALAS is unable to function because of its quorum provisions, viz., an investigation of the association under Part IIIA of the Act, leading, perhaps, to the appointment of a judicial manager.

[39] In all the circumstances I decline to grant a mandatory injunction at this time, and I adjourn the further consideration of this issue to a date to be fixed when I will hear, if necessary, any further evidence and submissions which the parties wish to put before me on this issue. If an Annual General Meeting in fact occurs within the next few weeks, no further relief will be necessary and the declaration sought relating to the validity of the appointment of Sharon Hayes as Secretary will become otiose in any event.

[40] The question of costs is reserved for further consideration at a date to be fixed.