From Frontierland to Tomorrowland: A Magical Journey Through the Four Enchanted Realms of Unincorporated Associations Unincorporated Associations: History, Foreign Jurisdictions, Emerging Forms and Reform.

> We will wish upon a star and enter the four lands of unincorporated associations. Frontierland with tall tales and true of unincorporated associations from the legendary past. Adventureland is the wonderland of exotic unincorporated association creatures from across the globe. Fantasyland is the happiest kingdom of them all, with SLAPPed Facebook Beagle Warriors and decentralised autonomous organisations fuelled by magical digital coins. Tomorrowland is the promise of things to come. What could the legislative scientists in the parliamentary laboratories and the judicial wizards of the high citadel do to benefit future generations?

The John Emerson Oration is in honour of John Emerson AM. John retired from Herbert Smith Freehills, where he was a partner for almost four decades. He remains recognised as an expert in the tax laws applicable to charities in Australia. John was also a member of the Board of Taxation and a number of other legal and public sector committees. He was a key contributor to the reform of laws which led to the establishment of the Australian Charities and Not-for-profits Commission. John is a Member of the Order of Australia for services to law and to the community, particularly through the provision of advice to charities and not-for-profit organisations and the development of public administration reform to encourage philanthropy in Australia.

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Preamble

Thank you, Natalie.

I too acknowledge the Traditional Owners of the unceded land on which we work, learn, and live.

I also acknowledge John Emerson AM, who is notable this evening by his resplendent Disney tie.

I heartily endorse all that previous annual oration speakers have said about John, but I would add that a lasting legacy is the relatively robust Australian framework of ancillary funds. Australia is substantially free of the systemic tax abusive behaviour that often goes with such funds in large part due to John's work with the Tax Board, ATO, Treasury, Philanthropy Australia, and fellow practitioners. My count is that he was responsible for a large percentage of the first tranche of approved PPFs. John, we owe you a great debt for this alone.

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Introduction

It is clear this evening that the Disney theme has struck a chord with some charity lawyers. Who knew so many would dust off their Minnie and Mickey ears and other bling for tonight's oration?

Although Disney has been a significant creative influence in the Western world, it also has a dark side. I acknowledge that and seek not to perpetuate those features.

I will use the four lands of Disney to frame legal aspects of unincorporated associations. The Great Depression High Court case on unincorporated associations, which has set the legal tone in Australia for ninety years. How the law has developed in other common law jurisdictions. Technological innovations impacting unincorporated associations, and the future trajectory of the law relating to them.

I want to take a moment to reflect on the critical importance of associations – incorporated or unincorporated.

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The classical definition of an association is an organised group of persons:

> (1) that is formed to further some common interest of its members;
>
> (2) in which membership is voluntary in the sense that it is neither mandatory nor acquired through birth; and
>
> (3) that exists independent from the state. (Sills, 1968: 363)

In modern society, associations play a crucial role in the space between the family, the state, and the market. Civil society, which is the sum of institutions, organisations, and individuals in this space, acts as a buffer between these three sectors. It is in this space that associations operate, furthering the interests of their members and contributing to the fabric of society.

Many acknowledge that civil society is a foil to the state, but I have come to appreciate that it is just as important as a foil to the for-profit market. Markets are challenging the state, as we will see in FantasyLand. It has not always been so.

Before industrialisation, western history was dominated by family and kinship clans. They were closed, nonvoluntary systems in which individuals were linked by ties based on ascriptive characteristics (such as ethnicity, religion, or caste) that were relatively immutable.

Shortly after the Statute of Elizabeth in 1601 things began to change. Associations began to flourish in the mid-seventeenth century England, particularly in London coffee houses, and were an intellectual product of an industrialising 18th-century Europe in which citizens sought to define their place in society independent of the aristocratic state, feudalism, and formal religion.

As Fletcher, in his book, *Nonprofit Associations*, acknowledged, this was not well received by the monarchy, who perceived it as a potentially destabilising and subversive threat to be ruthlessly crushed. I might say I get a faint whiff of this when all sides of politics grill the ACNC Commissioner at Senate Estimates hearings on allegations of unfair political competition by charities.

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As an aside, my students here this evening will know of my award of Freddo Frogs in lectures for deserving contributions (originally a product made by the great Victorian philanthropist Sir Macpherson Robertson), and I now have another - Kit Kats. Christopher (Kit) Catling was a coffee house proprietor famous for his mutton pies known as Kit Kats, a standing dish at his subversive Kit-Cat club. John Locke and others of the club had objectives of a strong Parliament, a limited monarchy, resistance to France, the Protestant succession to the throne, and long toasts to reigning beauties of the day.

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Almost three centuries on, associations were seen as a critical moving part of the 1948 Universal Declaration of Human Rights, transcending cultures, religions, legal systems, and political ideologies. Article 19 of the Declaration states that "[e]veryone has the right to freedom of opinion and expression." Article 20 protects the right of individuals to "peaceful assembly and association."

The subsequent International Covenant on Civil and Political Rights (ICCPR) creates direct binding obligations for over 150 countries. Articles 19, 21, and 22 of the Covenant guarantee the rights of expression, peaceful assembly, and association. It not only explicitly guarantees rights enjoyed by individuals, but also requires State Parties to adopt laws or other measures assuring protection for these freedoms.

However, like the fairy Tinker Bell in Peter Pan, associations legally are ultimately a construct of our imagination, and they can't exist unless we clap for them. Lawyers are continually clapping where authoritarian states seek to diminish associations' presence, and consequently cause civil society life to fade away.[1] Their place in a healthy civil society should not be taken for granted, nor the lawyers who keep clapping for them.

[1] Sidiropoulos and Others v. Greece, the European Court of Human Rights unanimously held that the refusal by Greek courts to establish a Macedonian cultural association was an interference with the applicants' exercise of their right to freedom of association; United Communist Party of Turkey and Others v. Turkey, holding that the action by the government of Turkey to dissolve the United Communist Party of Turkey (UCP) was a violation of Article 11 of the European Convention.

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FRONTIERLAND

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Disney's Frontierland is full of tall tales and true of the legendary Wild West - of rugged individualism, self-reliance, pioneering entrepreneurship, and resilience associated with the expansionary frontier experience that has shaped so many American myths for better or worse.

What was the Australian unincorporated association's Frontierland tale?

It begins with the High Court case of Cameron v Hogan (1934) 51 CLR 358, which has now set the legal tone of the courts' dealings with unincorporated associations for 90 years - that the Courts will only interfere if there is a member contract or proprietary right at stake.

Some judges have sought to find a way to consider the internal affairs of associations despite the precedent. We now have the Victorian and New South Wales Courts of Appeal at seemingly different understandings, and the High Court has turned down special leave three times to settle the matter. It is in stark comparison to other common law jurisdictions – but more of that when we trek into the wilds of Adventureland.

The tale begins in the Great Depression in 1932, when the Premier of Victoria, Edmond Hogan, was an ALP member but was not re-endorsed as a Labor Party candidate. He brought an action in the Supreme Court of Victoria seeking declarations about his membership, and damages.

At first instance before Justice Gavan Duffy in Hogan v Cameron Vic 1934 VLR 88, the ALP argued that the party rules did not form a contract; it was like accepting an invitation to a social party, and alternatively, the rules were so vague that they were unenforceable.

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To which the Court's response was [at 94]:

> There are, obviously, voluntary associations of which one would unhesitatingly say that the members never did intend, in associating, to acquire legal right or incur legal duties, but in my opinion this is not one of them.

And [at 91]:

> The objects of the association and the pledge required may be vague or incapable of having an exact definition, but I think the general body of rules is quite explicit enough.

A key authority cited was the English tennis club case of Young v. Ladies' Imperial Club [1920] 2 KB 523, where a tennis player was expelled.

The result was reversed in the High Court. It was argued that Young's case could be distinguished as its purpose was for members to enjoy property purchased by club funds and distributed back to members on dissolution, whereas political party funds were for purposes not intended to benefit subscribers; property was not an issue.

The majority noted that in equity or common law, the cases supported the proposition that an action cannot be founded on a breach of the rules, and the limitations of declaratory remedies at that time. Note the key phrases here being:

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> 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.
>
> They 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 relations inter se, the rules adopted for their governance would not be treated as amounting to an enforceable contract**. (emphasis added)

Then along came a Queensland single judge decision in Baldwin v Everingham [1993] 1 Qd R 10, which was based on the High Court authority of a pre-Cameron v Hogan trade union case. Cameron v Hogan was not being departed from because of changed policy considerations but because of the Commonwealth Parliament's subsequently conferring of legislative recognition upon political parties that took them beyond the ambit of mere voluntary associations.

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> On general principles, where an albeit voluntary association fulfils a substantial public function in our society, it may appear indefensible that questions of construction concerning its constitution should be beyond judicial resolution. **It is one thing to say that a small, voluntary association with limited assets, existing solely to serve the personal needs of members should be treated as beyond such supervision; it is another thing to say that a major national organisation with substantial assets, playing a critical role in the determination of the affairs of the country should be so immune.** (emphasis added)

There have been other judicial breakouts, independent of contract and property interests, often based on existing principles. Examples are interventions to preserve the right to work, to restrain improper use of an association's funds, and damage to reputation, unfair loss of status and dignity, and to protect by judicial review other legal interests that might be affected by intra-association decisions.

All such cases have specific facts and circumstances that are beyond the scope of this brief overview. Besides, there is a much more interesting development regarding Cameron v Hogan to touch upon.

The Victorian Court of Appeal (Asmar v Albanese [2022] VSCA 19) held that an ALP pre-selection dispute was justiciable despite Cameron v Hogan (at [214]), harking back to Baldwin, due to "the need to ensure that the provisions of the Commonwealth Electoral Act are not undermined by endorsements which are not in accordance with the registered party's internal processes" (at [216]).

The High Court refused special leave - Kiefel CJ and Gageler J gave their reasons in just one sentence - Asmar & Ors v Albanese & Ors [2022] HCASL 71.

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> Giving due weight to the context of Pt XIV of the Commonwealth Electoral Act 1918 (Cth), we are not persuaded that there are sufficient prospects of departing from the view of the construction and interrelationship of the Australian Labor Party National Constitution and the Australian Labor Party Victorian Branch rules adopted by the Court of Appeal to warrant the grant of special leave to appeal.

Just a few days later, the New South Wales Court of Appeal, in a Liberal Party matter, expressly held that it was "comfortably satisfied" that the Victorian Court of Appeal's decision was wrong: Camenzuli v Morrison [2022] NSWCA 51 (at [46]). There were two visits to the High Court for leave to appeal, one the day before the Court of Appeal hearing and then after the appeal decision. Both were unsuccessful.

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Camenzuli v Morrison [2022] HCATrans 060

> The Court of Appeal of the Supreme Court of New South Wales held, in effect, that the provisions of the Commonwealth Electoral Act did not affect the decision in Cameron v Hogan and the matter was not justiciable. On the substantive question, which the Court of Appeal determined in the interest of finality, the court held that the Federal Constitution gives the committee appointed the requisite power. In our view there are insufficient prospects of success on an appeal from that decision in relation to either proposed ground to warrant the grant of special leave.

Then, in 2024, the Queensland Supreme Court (Gerard Brock Rennick v Benjamin Riley and Ors [2024] QSC 130), hearing a Liberal Party pre-selection dispute followed the NSW Court of Appeal because the Court said that it was correct, and perhaps read the mind of the High Court being that the critical part in Asmar was arguably obiter. Further, the Court agreed that Baldwin v Everingham did not explain how legislative recognition gave rise to a cause of action or other "ascertainable and enforceable legal right".

As with the other Great Depression case about the meaning of PBI (Perpetual Trustee Co Ltd v Federal Commissioner of Taxation (1931) 45 CLR 224), "excited commentators" await the

High Court revisiting the point in light of contemporary policy issues, the apparent divergence of Court of Appeal views, and other common law jurisdiction's case development.

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Like all good Disney episodes, you are left wanting more:

- Will the ouster of a 'binding in honour only agreement' used in commercial non-agreements now found in the ALP constitution be respected?
- How is turning up to the High Court with a pre-selection matter, days out from an election being called, conducive to a considered judicial response?
- Is the current lack of justiciability the only reason preventing the major political parties from joining One Nation and the Greens as incorporated entities?
- Would Pauline Hanson have spent time in jail if her party had remained unincorporated?
- Will the major unincorporated religious denominations shift to being incorporated if the High Court allows their internal decisions to be reviewed?

Hold your excitement, it is time to travel in Adventureland.

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ADVENTURELAND

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Adventureland is all about nature documentaries featuring amazing animals in far-off exotic lands. I never cease to be amazed when David Attenborough discovers paw prints and scats on the forest floor. He then deduces all sorts of interesting information about the evolution of unseen animals.

I'll leave any analogy to scats aside, but let's treat paw prints as cases in the legal jungle that can enlighten us about the state of evolution of the unincorporated association species.

I'll look at recent paw prints of unincorporated beasts roaming England, Scotland, Ireland, Canada, New Zealand and the USA. We may even come across some fossilised prints.

What does this tell us about the evolution of unincorporated association law and do different environmental conditions matter?

Just six Australian paw prints, - err I mean cases, - out of 27 were cited by the High Court in Cameron v Hogan. The English Ladies' Imperial Club, the Scottish Episcopal Church, a Scottish Football case and an American case about the democratic party all were given weight.[2] Has the wildlife overseas evolved since the Australian great depression? What conditions are responsible for evolution, or are conditions in Australia just not conducive to it?

If the High Court were to pay attention to these contemporary cases, what would the result be – more Tennis Club cases or Political Parties cases?

<u>England</u>

Political parties and faith-based unincorporated organisations provide a steady stream of business for the Courts, as my case notes testify. Substantial unincorporated associations appear to be far more numerous than in Australia, with only the recent introduction of charitable incorporated organisations (CIOs). There are more incorporated associations in

[2] Young v. Ladies' Imperial Club [1920] 2 KB 523; Forbes v Eden (1867) L.R. 1 SC & Div HL 58; Murdison v Scottish Football Union (1896) 23 R. (Ct. of Sess.) 449; and an American authority McKane v Adams (1890) 123 NY 609.

Victoria (not restricted to charities) alone than CIOs in the whole of the UK.[3] There are some living fossils - the Inns of Court established as a documented unincorporated association in 1388 remains the oldest.

Our first paw print is in Haque v Hussain & Ors [2024] EWCA Civ 806, a case concerning a schism in a Pakistani political party with significant property in London and Pakistan. The MQM, a political party founded as an unincorporated association in Pakistan, and governed by the law of Pakistan, proceeded on the basis that the law of England was not materially different. Neither party claimed otherwise. In an associated earlier proceeding, Haque & Anor v Farahdi & Ors (Rev 1) [2023] EWHC 1135 (KB), the Court baldly stated: "As with the constitution or rules of any unincorporated association, the Constitution had contractual effect between the members."

It cited the Court of Appeal in Evangelou v McNicol [2016] EWCA Civ 817, concerning the Labor party, where the Court stated:

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- The nature of the relationship between an unincorporated association and its individual members is governed by the law of contract;

- The contract is found in the rules to which each member adheres when he or she joins the association;[4]

- Whether or not they have seen them and irrespective of whether they are actually aware of particular provisions;[5]

- The constitution and rules of an unincorporated association can only be altered in accordance with the constitution and rules themselves;[6] and (cont'd point over)

[3] https://www.gov.uk/government/statistics/companies-register-activities-statistical-release-2022-to-2023/companies-register-activities-2022-to-2023#:~:text=For%20FYE%202023%2C%20there%20were,%25%20of%20all%20corporate%20bodies). With 31,542 Charitable Incorporated Organisations (CIO) in England, Wales and Northern Ireland (0.6% of all corporate bodies) and 5,960 Scottish CIOs (0.1% of all corporate bodies). There are also companies limited by guarantee 39,459 (0.7% of all corporate bodies) and 170,000 charities.

[4] See Choudhry v Triesman [2003] EWHC 1203 (Comm) at [38] per Stanley Burnton J.

[5] John v Rees [1970] 1 Ch 345 at 388D – E; Raggett v Musgrave (1827) 2 C & P 556 at 557.

[6] Dawkins v Antrobus (1881) 17 Ch D 615 at 62; Harington v Sendall [1903] 1 Ch 921 at 926; Re Tobacco Trade Benevolent Society (Sinclair v Finlay) [1958] 3 All ER 353 at 355B – C.

- Actions are brought either in the names of the individual members on the basis of their personal rights (where they exist) or in the name of one or more members as representing all or some relevant part of the membership such as the managing committee.[7]

Commentators have argued this evolution has been held back in Australia as special industrial courts to deal with the affairs of trade unions arose soon after Cameron v Hogan, and were absent in the UK.[8] In the UK it was argued that highly unionised industries and even closed-shop union rules were intended to have contractual status. The UK Labor Party cases of John v Rees [1970] Ch 345 and Lewis v Heffer [1978] 1 WLR 1061 were assumed to be on a contractual basis.

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While there are earlier paw prints to be found, some might say these are fossilised, with the defining moment in the evolutionary timeline being Lord Denning in Lee v Showmen's Guild of Great Britain [1952] 2 QB 329. It traces the line of trade union cases evolving the law and Lord Dennings proclaimed that:

> The jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied. Outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as Parliament authorizes it or the parties agree to it. The jurisdiction of the committee of the Showmen's Guild is contained in a written set of rules to which all the members subscribe. This set of rules contains the contract between the members and is just as much subject to the jurisdiction of these courts as any other contract.

And what's more …

> Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge

[7] This is governed by CPR 19.6.
[8] See above, Forbes, Orr and Guaja.

and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid.

Some other interesting paw prints this year in the UK were when a member and the spokesperson for an unincorporated association, The Green Party, sought a declaration and damages for discrimination and victimisation from the party because of his gender-critical beliefs. This was the first protected belief case against a political party. The applicant was awarded damages for injured feelings of £9,100 and a declaration that he had been subject to unlawful discrimination.[9]

This is a most interesting paw print – have you ever considered that designated terrorist organisations or armies were unincorporated associations? Wouldn't their purpose be illegal, but it wasn't raised in this case? In Clark & others v Adams & PIRA [2024] EWHC 62 (KB), three persons injured in bomb blasts in England brought an action against the Provisional Irish Republican Army and its commanders (the committee?) for the nominal sum of £1. The Court struck out the claim against the PIRA as it was not a legal entity, and the claim against Mr Adams, as a representative of the PIRA, was also dismissed as failing to identify a coherent class of defendants. The claim against Mr Adams proceeded on a personal basis.

Scotland - 1:30 m

The Scottish Council for Voluntary Organisations (SCVO) estimated in July 2009 that there are approximately 45,000 voluntary organisations in Scotland, the majority of which are unincorporated associations. Charities account for approximately 23,300 - 56% of which were unincorporated.

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The Scottish Law Commission in 2008 published a report focused on the legal personality issue of unincorporated associations. It made essentially four alternative proposals:

(1) optional acquisition of legal personality by registration;

(2) optional acquisition of legal personality by expression of intention;

[9] Dr Shahrar Ali v Ms Elizabeth Reason and Mr Jon Nott [2024] (CC).

(3) automatic attribution of legal personality;

(4) attribution of legal personality where a minimum threshold is fulfilled.

A Bill was drafted as part of the report to enable unincorporated associations that satisfied certain statutory conditions to be accorded separate legal personality if they had more than 2 members, a written constitution containing certain matters, and were nonprofit. There was no requirement to register publicly, but the association had to operate in Scotland with an official address on all its communications.

After examining Australian and New Zealand incorporated associations, the Commission did not consider that there was any need or demand for a new statutory corporate vehicle for not-for-profit associations. A Company Limited by Guarantee was fine. We'll come back to that finding of little difference in regulatory burden and complexity later.

Ireland

Recent paw prints in Ireland can be observed in a cluster of cases where a member sues the club's trustees or committee members as a representative of the members.[10] The actions founder on the basis that the plaintiff is actually suing themselves. The situation might be different in Australia with the decision in Healey v Ballarat East Bowling Club [1961] V.R. 206, and our practice and procedure provisions.

Still, representative and class actions appear to have limited success, as unlike the usual situation with one defendant, there are many, and they may have different defences with establishing the exact membership at the date of the tortious event being difficult.[11]

There may be other issues at play here, as in one case the court noted that:

> Imposition of a duty of care in these circumstances would result in a chilling effect on a wide range of social and leisure pursuits, enjoyed by a very large proportion of the population.[12]

[10] Doyle v Crumlin Boxing Club & Anor [2023] IEHC 665; Brady v Moore & Anor (Approved) [2022] IEHC 420; McGroarty v Kilcullen [2021] IEHC 679.
[11] Trustees of The Roman Catholic Church v Ellis & Anor [2007] NSWCA 117.
[12] Doyle v Crumlin Boxing Club & Anor [2023] IEHC 665 at 62.

New Zealand

New Zealand enacted the Incorporated Societies Act 1908 early in its legislative history. There are just over 20,000 registrations, and it is guesstimated that there are an equal number of unincorporated associations. There are 27,000 charities.

A recent set of unincorporated association paw prints involves a closed Christian community (Gloriavale) that had been operating for three generations cut off from the world, apart from operating several commercial businesses, including honey production and a 3,000-cow dairy farm. It had over $60 million in other assets.

Former female adherents sought the assistance of the Court to determine whether they were employees, and to identify their employer so that they could claim back pay.[13]

The Gloriavale leadership argued that the work was conducted on a wholly voluntary basis, and was an expression of religious commitment to live in a communal setting based on shared values, guided by the King James Version of the Bible, with no intention to create legal relations. The Court found that the members were employees of the leaders.

The claim was substantial, and I assume it could not be fully satisfied out of the leaders' personal assets, but could recourse be held to the assets of the community – perhaps held in trust by the leaders for the purposes of the association? My understanding of the matter is that it is presently on appeal.

As an aside, the community's commercial bank attempted to close the community's accounts because of their alleged human rights breaches. As a result of their Christian beliefs, Gloriavale did not receive any interest on any of its investments or other accounts for over forty years.[14]

[13] Serenity Pilgrim, Anna Courage, Rose Standtrue, Crystal Loyal, Pearl Valor and Virginia Courage v The Attorney-General Sued on Behalf of The Ministry of Business, Innovation and Employment, Labour Inspectorate [2023] NZEmpC 105; Serenity Pilgrim, Anna Courage, Rose Standtrue, Crystal Loyal, Pearl Valor and Virginia Courage v The Attorney-General Sued on Behalf of The Ministry of Business, Innovation and Employment, Labour Inspectorate [2023] NZEmpC 227; Courage v Attorney-General [2022] NZEmpC 77.

[14] The Christian Church Community Trust and Others v Bank of New Zealand [2023] NZHC 2523.

Canada

In Canada, political candidates in Ford v New Democrats of Canada Association, 2024 ABKB 141 created some pawprints. Ms Ford claimed to have been defamed in a press release and twitter feed of an unincorporated provincial branch of a political party whose federal association was also unincorporated. Just to make it interesting, the claim also named a trust with its trustee being an unincorporated association. In the end, the court ordered that an appropriate individual be appointed as a litigation representative by the provincial branch.

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The Court, some might say put its 'paw down' in Karahalios v. Conservative Party of Canada, 2020 ONSC 3145 on the issue of whether the Court had the jurisdiction to intervene in the internal affairs of an unincorporated political association.

> In the circumstances of the immediate case, where the Conservative Party condemns Mr. Karahalios for contravening the principles of the Conservative Party Constitution, it is perverse and hypocritical argument for the Conservative Party to even make the argument that it can contract out of the rule of law. In the immediate case, it is an ironical argument because among the Conservative Party's expressed principles and values is that Canada be governed in accordance with the rule of law.[15]

And

> Very significant private law rights or interest are involved, and the court has the jurisdiction to determine whether Mr. Karahalios' disqualification as a leadership candidate was carried out according to the applicable rules of the Conservative Party and with the procedural fairness and without bad faith and *mala fides.*[16]

Again, as in England, this evolutionary outcome was the result of union cases,[17] and flowed seamlessly over to political parties.[18]

The line in relation to faith-based unincorporated associations is battered but holding up. In Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, [2018] 1 SCR

[15] At [192].
[16] At [196].
[17] Orchard v Turney [1957] S.C.J. No. 26; Berry v Pulley [2002] S.C.J. No. 41
[18] Knox v Conservative Party of Canada [2007] 286 DLR (4th) 129.

750, the Court held it had no place interfering in a religious unincorporated association that had no constitution or rules, no property and carried out its purposes purely through volunteer effort.

This was confirmed in Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga, 2021 SCC 22: "Members of a religious voluntary association may undertake religious obligations without undertaking legal obligations."[19]

United States

There are paw prints in every American state, with variations. The historical position across the States started at a point close to the early English common law.

Recently, in Rosenberger v. Paduchik, 2023-Ohio-3898, the Court of Appeals dismissed a committee member seeking to hold to account the Republican party and its officials for financial transactions, and seeking their dismissal. The claims were not justiciable because they involved the internal workings of an unincorporated political party.

It was argued on appeal that the party was actually an unincorporated nonprofit association covered by the state's version of the Uniform Unincorporated Nonprofit Association Act - R.C. 1745.05(M). What? Legislation about unincorporated associations?

The Uniform Law Conferences of the United States, Canada and Mexico[20] have published a set of model laws (Revised Uniform Unincorporated Non-profit Association Act 2008 (RUUNAA 2008)) to provide micro nonprofit unincorporated associations with very basic legal persona. Many US states have adopted the laws, with California leading the way.

Under the laws, an unincorporated association is declared to be a legal entity separate from its members for the purpose of property ownership and property transactions, and can receive property by way of gift and testamentary disposition.

A statement of authority by the unincorporated association is filed in a State registry setting out the name of the association and other particulars, and the person authorised to act on behalf of the body. This person is then the "agent" for the body to relate to others legally. An

[19] At [51].
[20] Uniform Law Conference of Canada (ULCC), the National Conference of Commissioners on Uniform State Laws (NCCUSL), and the Mexican Center of Uniform Law (MCUL)

obligation or liability of the association will not be transferred to management or members; management and members are still responsible for their own actions, such as acting in excess of their authority or in breach of their duties to the association.

Apart from keeping contact details current at the State registry, there are no other annual reports or returns required from such bodies. It is difficult to find any criticisms of these provisions from the profession or scholars.

Summary

So, Adventureland shows that some evolution has been occurring in the legal jungle, some by the Courts, and some by direct statutory intervention. It's time to move on to Fantasy Land.

FANTASYLAND

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Part A Unincorporated Beagles on Facebook

Disney's happiest land of them all is full of cartoon mice, cats, dogs, ducks, 101 Dalmatians and even beagles – remember Duck Tales' Beagle Boys? It's anthropomorphism running riot with the attribution of human traits, emotions, and intentions to non-human entities. For some, there is a more serious side to our relationship with animals – have you noticed the growing space on supermarket shelves devoted to vegan products?

Our plot line is, could members of a Facebook page concerned with liberating beagles from the fate of vivisection be regarded as an unincorporated association and amenable to injunctions by a US multinational to prevent unlawful protest?

A word on the context here. It is generally a legal requirement in the United Kingdom that all potential new medicines intended for human use are tested on two species of mammal. Further, it wasn't until late 2023 that the UK provided relief from strategic lawsuits against public participation (or SLAPPs) intended to intimidate and silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition.

Subsidiaries of the US Marshall Farm Group Ltd (MBR), breed animals in England for medical and clinical research, including beagles.

MBR establishments were subject to protests from June 2021. The protests included obstruction of people and vehicles entering and leaving the sites, trespass, posting images of staff and vehicles, and posting video/drone footage of the facilities on Facebook. Staff and contractors were sent offensive texts, received telephone calls, and were followed to their homes by protestors.

In MBR Acres Ltd v Free the MBR Beagles [2021] EWHC 2996 (QB), injunctions were sought against two alleged unincorporated associations—Free the MBR Beagles and Camp Beagle—the Facebook page controllers and members—identified and unidentified.

This was some of the most brutal litigation I have ever seen unfold. A local solicitor who acted for some protestors in criminal proceedings unwittingly parked her car in the injuncted

exclusion zone. Contempt proceedings were brought against her. The Court was scathing, saying:

> In my judgment this contempt application has been wholly frivolous, and it borders on vexatious. The breaches alleged were trivial or wholly technical.[21]

It didn't end there. In the main proceeding, MBR claimed that the lawyer should be included as a defendant, but this failed due to lack of proper notice.

MBR claimed that the evidence for Free the Beagles and Camp Beagle being unincorporated associations was that they were established via Facebook group pages. These pages allowed a user to become a 'follower', and there were thousands. Posts were made about the protests, and it was alleged that there had been efforts to raise funds via the pages.

MBR sued the page controllers individually and as representatives of other members of the "association".

The Court found that even were it possible to identify the members on the basis that "followers" would be treated as "members" of the "unincorporated association", they could not all be alleged to have committed the same wrong.

The Court noted that (at [65]):

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> The Free the Beagles and Camp Beagle Facebook Pages are simply examples of modern campaigning platforms … The existence of the Facebook groups in this case no more demonstrates the existence of an underlying organisation or association than any other coagulation of people around a political cause. The fact that there have been recent fundraising efforts does not significantly alter the position, not least because the fundraising appears to have been to defend these proceedings.

The Court rejected the claim.

[21] At [96]

Now, if you were instructed to establish an unincorporated association for the Mickey Mouse Club[22] using a social media platform such as Facebook, could this be achieved?

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Using the guidance in Conservative and Unionist Central Office v Burrell (Inspector of Taxes) [1981] EWCA Civ 2; [1982] 2 All ER 1; Kibby v Registrar of Titles (1999) 1 VR 861; [1998] VSC 148 and City of Gosnells v Roberts (1994) 12 WAR 437 that endorses a wholistic view of the context in reference to indicia (but absence of any may not be fatal), I think it is possible on a Facebook page.[23]

But wait… this is mere legal child's play … there is more…

[22] The Mickey Mouse Club was rebooted under the name Club Mickey Mouse with a new set of Mouseketeers in September 2017, and for the first time, the series was made available on Facebook and Instagram, rather than its original half hour to full hour format on television, and is more like a reality show than a variety show, with about 90% of its content being behind the scenes.

[23] - Voluntary combination of identified persons, voluntary in nature;

    - *Mouseketeers and their friends could join.*
- Organisation and continuity of purpose;
    - *The purpose is clearly set out on the Facebook site and is ongoing rather than episodic.*
- Written Constitution;
    - *Set out in the "about tag" with appropriate ATO nonprofit and tax exemption clauses.*
- Agreement and mutuality between the members;
    - *Mouseketeers and their friends are required to agree to uphold the constitution.*
- Officers and/or a committee;
    - Head of the Mouseketeers and cast members;
- Meetings;
    - Held via a third-party provider platform;
- Bank account,
    - Perhaps a digital coin account
- Not for profit
    - Included in the constitution.

Part B Decentralised Autonomous Organisations – DAOs

I have no cute Disney segue other than to say that if it weren't unfolding before my eyes now, it would be pure fantasy worthy of J R R Tolkien (Lord of the Rings) or George R R Martin (Game of Thrones). Not even Walt himself could have made up what is happening now!

I want in the next few minutes to explain how the developments in cryptocurrencies, blockchain, contracts embedded in computer code (smart contracts), non-fungible tokens (NFTs) and Artificial Intelligence are all combining to give life to virtual associations - Decentralised Autonomous Organisations (DAOs). The law of unincorporated associations will be front and centre of any legal analysis.

DAOs are borne of crypto-anarchist thought, libertarian capitalists with a distrust of government and institutions, a penchant for complete transparency of transactions except for the identity of the punters, and inhabited by young persons who spent their youth, not in pool rooms, (for the younger here tonight – replace with making TikTok dance videos) but in clan or squad multiplayer Internet games, bringing all the game theory hooks, strategies, and culture to the table.

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First, some definitions on the slides for you to read, while I have a sip of water:

- Blockchain (or distributed ledger technology) is a distributed, shared, encrypted database or ledger synchronised and updated in real time that serves as an irreversible and incorruptible information storage platform without the need for a controlling authority. Blockchain is the tech that makes digital coins possible, but there are lots more useful applications that it can facilitate.
- Non-fungible tokens or NFTs are tokens with unique data attached to them, which renders each NFT itself unique and so non-fungible. This is recorded on the blockchain and might be an intellectual property right, digital art or right to be a member of a virtual group.
- Smart contracts are not smart and they are not necessarily contracts, although they can be. They are self-executing computer programmes, placed on a blockchain that

automatically and securely execute obligations when certain conditions are met without the ability of either party to interfere with it.

- DAOs are virtual communities that use smart contracts and distributed ledger technology to administer decisions. DAOs are an adaption of blockchain technology, in which interactions between users are recorded, verified, and distributed. Users can purchase non-fungible tokens, usually in exchange for cryptocurrency, which allows them to participate and form a central asset pool, capitalising the DAO. Token-holders then vote to make decisions, usually involving the application of the DAO's capital, and these decisions are administered and executed automatically by the blockchain. As decisions are made, transactions are executed autonomously and immediately, DAOs are without management and directors – code and members rule – OK!

I think I have lost a few people here…so let me try again…

In her doctorate and journal articles on the law and regulation of crypto assets Dr. Alexandra Sims explains the difference between contemporary arrangements and smart contracts using the metaphor of the monopoly board game and a video game. Let me try to stretch it a little.

With the board game, someone has to be the banker and paper notes are distributed and exchanged for property or getting out of jail.

You monitor whether other players abide by the rules, and the occasional dispute arises with gratuitous interpretations of the written rules dispensed, (if they can be found), and family customary law comes into play, such as the issuance of IOUs and grace and favour rental arrangements. As you are probably aware, the game can last hours, particularly if non-rule concessions are allowed and 'sticky banker fingers' are present.

Now, let's put the game on a computer and the blockchain. There would be no banker— rather a central ledger that was incorruptible, instantaneously updated, and had a record of everyone's wealth. Once your token had landed, it would make the financial adjustments, which would be available for all to see instantaneously, forever, even if your computer crashed, never to reboot. Unless it was in the code, there would be no IOUs, and once you have no funds, you are out of the game. There are no disputes; it all just happens in line with the code.

Now, let's change the situation a little. Instead of individual family member players, teams compete against each other with real "crypto-coin."

Each team could organise themselves as a DAO. Once they joined, a smart contract would transfer a membership fee from their crypto-coin wallet. A smart contract would govern the internal rules for the members. For example, strategy during the game for decisions as to whether to buy everything or concentrate on utilities or railway stations would be decided by a digital voting system.

The system could be of infinite variety – one vote for each member with a majority or consensus, proportional votes per experience of the player, for example, or controlled by one member with a 'god vote'. Alternatively, conviction voting may enable members to split their vote over multiple options, and change their vote until the voting window closes.

The voting result would then be implemented automatically by code without exception or intervention in the game, so if a vote succeeded, the team could switch from buying railway stations to Kent Road properties.

Any member could propose a change in strategy, but it would have to be digitally voted upon to be accepted, and implemented by code amendment.

Any winnings/surplus would be distributed to members instantly at the conclusion of the game (after tax was paid or an exempt nonprofit self-assessment return filed 😊) and the dissolution completed.

It would be impossible to owe any money as the code would not permit continuation in the game once all digital assets were consumed; that is, the DAO could not become insolvent. Now that some eyes have deglazed a little – let's look at what is really happening…

Despite some early setbacks, hacks, and frauds, DAOs were used as pool investment vehicles and for bootstrapping tech start-ups.

In 2021, the Senate Select Committee on Australia as a Technology & Financial Centre recommended that the Government establish a new DAO company structure. However, this was not continued under the incoming government. Some States of the USA and sandy shore tax havens in the Pacific and Caribbean also offer DAO incorporation with the prized limitation of member liability.

In practice, the pure DAO form is often supplemented by "wrapping," where incorporated bodies are created to hold assets or establish trusts. This usually happens already with large unincorporated associations. There are DAOs-as-a-service, which are online one-stop shops to create DAOs. Often, "curators" and "oracles" are involved, and they are real humans who make decisions such as vetting memberships, making various key decisions, and resolving disputes. Governance can be fraught with slack DAO member participation in voting, given they may not be experts, be time-constrained, or just want to free ride.

DAOs could have application in nonprofit enterprise – take for example, a giving circle – where a group of people pool their donations and decide on the recipients, often in a social setting. Or financing the acquisition of a national park by creating a unique NFT of each square metre that could be owned by a DAO member.

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Early nonprofit DAOs include AntidoteDAO funding cancer research initiatives, ApostolicDAO with funders receiving religious images https://www.apostolicdao.com and LexDAO, which is a guild of 'legal engineers' focused on advancing the DAO ecosystem. The most famous is probably Big Green - funding schools and community gardens https://biggreen.org/grantmaking/#section-3

Has anyone here joined a DAO or prepared the paperwork? I'd be interested in your comments in question time.

How will the law characterise an unwrapped DAO? So, 'for profits' might be dealt with as partnerships, or if they fall foul of partner number restrictions of s115 of the Corporations Act,

as illegal partnerships. A series of recent US cases have not gone well for DAOs or their token holders and there has been a flight to wrapped DAOs with more conventional governance,[24] and enthusiasm is waning. The time and cost taken to establish a DAO compared to an orthodox company is also an issue against widespread adoption.

Some of you will have already twigged to the notion that mutual and cooperative arrangements might hold more promise for what is sought to be achieved here, and I agree. The seven international principles of co-operatives have much to recommend themselves.

Others might be unincorporated associations if they are "for profit" in Australia. In a recently edited book by Rosemary Langford, contributors argue that such for-profit arrangements are best facilitated as unincorporated associations.[25]
The Australian Law Reform Commission's 'New Business Models, Technologies, and Practices' is a good start in considering the issues from a for-profit perspective, but where is the non-profit consideration?

So, what are the challenges of being considered a nonprofit unincorporated association DAO? No doubt the finely honed legal minds in the audience are already pondering them – here are some of mine…

[24] For example, CFTC v. Ooki DAO, 2022 WL 17822445 (N.D. Cal. Dec. 20, 2022), the court held that it was possible for a DAO to be sued as a kind of legal entity because it met the qualifications for being an "unincorporated association" under California state law. Citing Cal. Corp. Code §18035(a), the court held that such status requires only "an unincorporated group of two or more persons joined by mutual consent for common lawful purpose, whether organized for profit or not," where such persons "function under a common name under circumstances where fairness requires the group be recognized as a legal entity." Sarcuni v. bZx DAO, 2023 WL 2657633 (S.D. Cal. Mar. 27, 2023). In that case, a different court held that a negligence claim by platform users for losses stemming from hacking could be asserted not only against the defendant DAOs themselves but also against persons holding their tokens, where those tokenholders were sufficiently alleged to be members of a general partnership. As members of a general partnership, the individual tokenholders would face vicarious joint and several liability exposure for the alleged torts of the DAO.

[25] Moshood Abdussalam and Mia Rahim, "The advent of decentralised autonomous business networks in the disembodied economy: a discussion on why the governance regimes of corporations and partnerships are unsuitable to them", in Andrew Godwin, Pey Woan Lee and Rosemary Teele Langford (eds.). *Technology and corporate law : how innovation shapes corporate activity* (London: Edward Elgar Publishing, 2021), chapter 134; UK Jurisdiction Taskforce, *Legal Statement on Cryptoassets and Smart Contracts* (November 2019) (at [148]).

No Management Committee

There may be no management committee in a DAO. Not necessarily fatal in itself to the existence of an unincorporated association, particularly if there is only a handful of members. The law has looked to those leading the organisation to be representatives or agents of the members. If the controlling body is all the members of the association bound to each other by a network of 'smart' contracts, is that where the Courts are to look? Could the human coders be elevated to the role of a committee as the agents of the members?

Fluctuating Membership

The Courts have consistently baulked at finding that the members of large clubs can be meaningfully brought into legal proceedings, even with the relatively recent device of enhanced representative proceedings.

You will recall that in Carlton Cricket and Football Social Club v. Joseph [1970] V.R. 487 and Freeman v. McManus [1958] V.R. 15, and more recently in Trustees of The Roman Catholic Church v Ellis & Anor [2007] NSWCA 117, the Court struggled with the notion of a web of contracts between each member of the club and third parties, with retiring members agreeing to a novation to new members. The notion was too fantastic at the time.

Distributed Ledger technology is a good fit for real property and securities registers and could easily cater for large ownership pools that are ever-fluctuating.

If blockchain technology can confidently reveal who was or was not a member at any point in time, their financial situation in relation to all other members, and novations dealt with by smart contracts between all members, does this give comfort to the Courts to consider all the individual members as suitable parties to contractual disputes?

Fundraising

The securities regulators have been very engaged with those using commercial for-profit DAOs to raise capital on the web, with scalps being publicly displayed at every opportunity.

What about nonprofit fundraising? I can see the eyes rolling in the room already (Sue yours have fallen out) as to how our dated state regulations that don't recognise email, the Internet or social media, let alone Distributed Ledger technology, will respond.

One huge fraud may be enough for the Commonwealth to step into the field using its power to make laws with respect to 'postal, telegraphic, and other like services'.

Wait, there is more…

- The anonymity of private keys to digital wallets may obscure who is a member of the association. However, governments' "know your customer" requirements cascading through all sorts of intermediaries probably mitigate this issue in practice.
- Our younger generations' episodic behaviour of project based engagement compared to baby boomers, who join for life will probably mean a short lifespan for DAOs.
- Jurisdiction of where computer code and a DAO reside.
- What will be the tax issues?
- But will the Court's jurisdiction be ousted? True to crypto generation's distrust of government, which includes the Courts, Decentralised Dispute Resolution Service (DDRS), which are basically online mediation services specialising in resolving DAO and smart contract disputes are now in place outside the State institutions. For example, Aragon, Juris and Kleros all provide judicial services with appeal courts of experts.

<u>Summary</u>

In summary, Fantasyland driven by technology is stretching legal minds and the law, making what was seemingly impossible simply possible, and probably cheaper, better, and faster.

Some might be thinking along the lines of Michael Caton in "The Castle" – tell Myles he's dreaming.

We have all been dreaming for centuries.

Just reflect on the reality that corporations as a form are true legal fictions that have no existence beyond our collective imaginations. They contain capital funds that comprise different forms of value and which are in themselves fiction. Tinkerbell would relate.

The difference is that they have the coercive force imprimatur of the State. All this has implications for the theory of corporate persona and its various legal fictions – does the web of contracts theory now seem more plausible?

If the Australian government does legislate for a corporate DAO, it is essential that a bespoke nonprofit form is considered as well as commercial interests that will be the main policy driver?

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TOMORROWLAND

Slide 22

With self-referential humour, the 2007 Disney film Meet the Robinsons set in the year 2037 features an amusement park called Todayland, which has rides similar to Space Mountain and Rocket Jets in the original Disney Tomorrowland.

What could tomorrow hold for Australia's unincorporated associations? Will unincorporated associations continue to exist, or are they on the way to extinction and fossilisation?

Henry Hansmann and Reinier Kraakman's article 'The End of History for Corporate Law'[26] forecast continued convergence of corporate law in all jurisdictions with the dominance of shareholder primacy and a standard legal model of the corporation.

As our trek in Adventureland has shown, the jurisdictions with 'plug and play' from corporate statutes have the nonprofit corporate form as the legal vehicle of choice. The UK is slower in the uptake, but appears to be now rapidly changing.

The legal equivalent of Sea Change's estate agent Bob Jelly saying: 'I see not a sand fly infested swamp, but a site for a new shopping mall' for many lawyers is 'that is not an unincorporated association, but a budding company limited by guarantee'. Isomorphic forces of government and foundation grant conditions, regulatory requirements, increased personal liability, insurance preferences, and professionalised management will move most new and emerging nonprofits of any consequence to the corporate form.

Murray Baird reminds us that the potential personal liability for the controllers of unincorporated associations drives many practitioners to recommend incorporation to provide a shield of limited liability, and rightly so. But do we rush too quickly to this solution? If the organisation is small with limited exposure to risk and can manage that risk by insurance, indemnities and other mitigation tools, could the burden of incorporation be avoided?

[26] H. Hansmann and R. Kraakman, "The End of History for Corporate Law", 89 (2001) *Georgetown Law Journal* 439.

However, micro-organisations can't bear or justify the costs of present incorporation. To lose them would be a serious loss to civil society.

I do wonder how long political parties will be left alone to settle their internal disputes outside the Courts. As the Canadian Courts have remarked, it is problematic for those who publicly back the rule of law to settle their internal disputes outside those constraints. If the High Court does give the green light to hear member disputes, then I suspect they will take on corporate form.

As for faith-based organisations, they may be allowed more latitude by the State given their apparent waning influence in the public sphere. The legislative fix applied to hold them to account for historical sexual abuse, despite their unincorporated association form, may also promote the status quo.

I remain at the same time both fascinated and perplexed by competing issues raised by the New Zealand closed Christian community cases. So many questions – Could the community have existed in any other legal form other than an unincorporated association? Can a community of informed adults choose what they believe, how they live together and raise their children? Is it more like an extended family than an association? When do their children get a say? Can the State interfere based on undue power and influence over the vulnerable, and where are the boundaries?

All for another day – or perhaps several days, with adult beverages at the ready.

The tension between the State wanting to suppress rival forces, and to protect the common good from unacceptable behaviour, such as terrorism and other harmful activity, will require wisdom, and restraints on knee-jerk reactions disproportionately affecting unincorporated associations.

Two areas that governments may consider in the future are:

1. A facilitation of limited corporate persona for micro unincorporated associations that wish to opt into a legislative scheme as proposed in North America and Scotland; and
2. The technological advances of Distributed Ledgers and DAOs.

Limited Corporate Persona

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Several years ago - in fact, a decade and a half ago - Frances Hannah and I suggested that Australia should consider the model laws of North America and Scotland granting micro associations limited persona.[27] Dr Matthew Turnour, further considered such legislation for Australia in a journal article in relation to religious bodies.[28]

My resolve has only hardened in the intervening years as incorporated association legislation has increased prescription and compliance obligations over time. For example, the Associations Incorporation Act 1981 (Qld)[29] has only become more complex, with two and a half times more sections, and four and a half times more pages since the initial Bill.

Until relatively recently in Queensland, there was little proportionality of regulation or its cost depending on size. Fundraising events were held to cover the required audit fees and public insurance policies, which was the micro association's major annual expense. Thresholds have since been introduced to alleviate some of this burden.

However, it is becoming commonplace to reference whole divisions of the Corporations Act 2001 (Cth) in the legislation, further complicating matters. Plug and Play corporate law. Queensland now includes annual public disclosure of remuneration by the committee and senior staff without a threshold under the exacting and, often mysterious to the layperson,

[27] Myles McGregor-Lowndes and Frances Hannah, "Unincorporated associations as entities: A matter of balance between regulation and facilitation?" *Company and Securities Law Journal Volume* 28 (3) (2010): 197-221.
[28] Matthew Turnour, "Should Australians Have a Revised Uniform Unincorporated Nonprofit Associations Act?", *Company and Securities Law Journal* 37(4) (2020): 279-290.
[29] For example, the initial Associations Incorporation Act 1981 (Qld) contained 70 sections, comprising 31 pages, with a further 31 pages of regulations and forms. Today, the Act is 136 pages, 163 sections plus schedules, and 83 pages of regulations, excluding forms.

requirements of the AASB standards. More plug and play.

The original Queensland Law Reform Commission proposal for incorporated associations spoke of a "simple system of registration" with the object of "regulation which is less complex and onerous than the companies act."[30] Registering a proprietary company is now a walk in the park compared to an incorporated association, particularly if the association wants to fundraise.

Amendment to the incorporated association's legislation to provide a voluntary, capped to micro-size, incorporation of name and officer details with basic persona, to sue, be sued to the extent of its central fund, exist in perpetuity, and hold and receive property is worth considering. How the members organise their internal life would be up to them, but while liable for their own breaches of contract or tort, they would not be personally liable through the association.

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Technology

In a recently edited book about technology and corporate law[31] Rosemary Langford posed the question:

> … a critical issue is the extent to which advances in technology could or should be accommodated within the existing legal and regulatory framework. A related issue is 'technological exceptionalism'; namely, whether and to what extent new technologies generate such fundamental social change as to transform legal rules and frameworks, and whether law and technology are in fact intertwined such that each is a factor in the construction and development of the other.

We may find out the answer to this question in the next few years – will the law of unincorporated associations be modified, or will a completely new law of DAOs emerge?

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[30] Queensland Law Reform Commission, *Report of the law reform Commission on a draft associations Incorporation Act*, QLRTC 30, Feb 1980: 9-10.

[31] Andrew Godwin, Pey Woan Lee and Rosemary Teele Langford , "Introduction to Technology and Corporate Law," in Andrew Godwin, Pey Woan Lee and Rosemary Teele Langford (eds.) *Technology and corporate law: how innovation shapes corporate activity* (London: Edward Elgar Publishing, 2021).

Despite DAO and Distributed Ledger founders seeking to bypass government and other institutions, my observation is they want the facilitative benefits of a corporate persona. Business and government will no doubt be the dominant forces in laying down any legislative framework to facilitate commercial gain, and maybe to protect consumers and sovereign interests. Given recent adverse cases in the US, enthusiasm for commercial DAOs has cooled, but I suggest there may be niche uses for them in the future – particularly in nonprofit enterprises and fundraising.

It is up to those with what I call an "Emerson Passion" to advocate for the facilitation of nonprofit endeavours. At the genesis of the English modern company legislative framework, nonprofits were an afterthought. It was certainly 'after' and maybe not as 'thoughtful' as required. We must not miss the opportunity with DAOs.

We need 'Emersons' with a nonprofit voice to be at the inquiry, drafting and parliamentary tables when DAOs are being considered to be wrapped with corporate persona and other statutory recognition.

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We need 'Emersons' arguing in Court and on the bench as to how the law deals with significant issues. The slide contains some good starting issues:

1. An association without a committee, but with a membership that has the opportunity to vote on all transactions;
2. An association with permanent, incorruptible records as to who was a member and their financial status at any micro-second;
3. A constitution not as a contract of adhesion, but a bespoke infinitely variable, networked smart contract, between members;
4. When can a smart contract be terminated or varied, and what happens with loopholes or unintended consequences;
5. Property held by an arrangement between numerous members in differing proportions recorded on the Distributed Ledger;
6. Liability where it can be identified who was or was not supportive of the contributing misfeasance;
7. How do regulators and courts have jurisdiction over DAOs;

8. How does a DAO convert to, or from, another legal form;
9. Could a member leave an association with their contribution token valued at the time of departure – what about tax; and
10. How all of this syncs with associational freedoms and promoting civil society.

I welcome comments about my Tomorrowland, and what yours might look like.

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Conclusion

I want to end where I started, with Peter Pan's words:

> 'If you believe', he shouted to them, 'clap your hands; don't let Tink die.'
>
> Some clapped. Some didn't. A few little beasts hissed.[32]

Unincorporated associations are the product of legal imagination, and we need to believe in them.

If unincorporated associations are an essential part of freedom of opinion and expression, freedom of association and assembly, and civil society itself - clap for them and never stop.

[32] J.M. Barrie, *Peter Pan* by (first published in 1911, by Hodder & Stoughton). Refer Cameron Stewart, "The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Theoretical and Justifications For The Rule Of Law", 4 (2004) *Macquarie Law Journal* 135-164.

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