

FILIPINO COMMUNITY COUNCIL OF VICTORIA INC.

ISSUES

At the outset I wish to declare my interests as being a member of the Filipino Australian Friendship Association of Geelong Inc. (FAFA) which is a member organisation of the Filipino Community Council of Victoria Inc. (FCCVI). I am a barrister and member of the Victorian Bar primarily specialising in criminal law and a former member of the Victoria Police.

As a community service I have agreed to provide free of charge my opinion on the Constitution of FCCVI. I have been provided with a copy of search results from Consumer Affairs Victoria dated 26 September 2005 containing the Constitution of FCCVI together with registered amendments to the Constitution of 9 February 1997 and 23 March 1997. The search did not disclose any further amendments. I have sighted what purports to be a 1997 revision of the Constitution however as that document is not registered with Consumer Affairs I shall disregard its contents and base my opinion solely on the registered version.

Additional documents in the form of media releases and copy letters have been provided to me disclosing allegations and concerns held by various member organisations of FCCVI about a number of issues including:

- apparent irregularities in and around the time of the recent Annual General Meeting of the FCCVI concerning the late admission of additional new organisational members of the Council;
- the conduct of the elections at the AGM despite member objections;
- the title of the Filipino Community House situated at 93 Cowper Street Footscray;
- allegations of possible financial irregularities over a period of time;
- possible criminal conduct by a member or members of the Executive Committee regarding falsification of documents per section 83A of the *Crimes Act* 1958 carrying a maximum sentence of 10 years imprisonment if an individual is found guilty.

RELEVANT LEGISLATION

The *Associations Incorporation Act* 1981 (the Act) and *Associations Incorporation Regulations* 1998 (the Regulations) as amended is the overriding legislation controlling

incorporated associations and their Constitutions. This Constitution does not comply with that legislation in a number of matters.

LACK OF ADEQUATE GRIEVANCE PROCEDURE

Rule 28.(a) iv) is the only reference in the Constitution to complaints and or grievance resolution:

To investigate complaints and grievances and take such action as may required by these Rules or as may be otherwise deemed necessary in the interests of any member of the Council.

Section 6(a)(i) of the Act requires that the items in the Schedule to the Act be included in the rules of an incorporated association and s.6(a)(ii) requires such other matters as are prescribed also be included.

The Schedule item 17 specifies a grievance procedure for settling disputes under the rules between the incorporated association and any of its members or between a member and any other member.

One such matter specifically prescribed is contained in s.14B:

14B. Grievance procedure

- (1) The rules of an incorporated association must set out a grievance procedure for dealing with any dispute under the rules between—
 - (a) a member and another member; or
 - (b) a member and the incorporated association.
- (2) A member may appoint any person to act on behalf of the member in the grievance procedure.
- (3) The grievance procedure must allow for natural justice to be applied.

Section 14B is not an optional item to be included in the Constitution, it is mandatory. This provision became law on 1st July 1998. Comparing Rule 28.(a) iv) of the Constitution to s.14B of the Act clearly shows the Rule is not as comprehensive as the Act requires. Further comparison of Rule 28.(a) iv) with the model rules contained in the Regulations at Schedule 5 item 8 discloses a considerably more comprehensive grievance procedure which was contemplated by Parliament when s.14B was included in the Act.

The model rules' grievance procedure prescribes a meeting between those parties in dispute to attempt to settle that dispute within 14 days. If the parties are unable to resolve the dispute or one party fails to attend the meeting then they must within 10 days hold a meeting before a mediator. If the dispute is between a member and the association and they are unable to agree on a mediator then the mediator is to be appointed or employed by the Dispute Settlement Centre of Victoria (Department of Justice).

The dispute about the conduct of the recent elections at the FCCVI AGM is just such a dispute to which members should have had such a grievance procedure available to them. Due to the Constitution not having an adequate grievance procedure as required by the Act members are disenfranchised and unable to avail themselves of an effective procedure to resolve disputes when they arise.

From the additional materials provided to me it appears a person or persons did contact the Dispute Settlement Centre and invite the executive committee to participate in mediation on 23 September 2005; however it is alleged that they refused stating that they wanted to keep things in-house first. Such a situation leaves all members at the mere whim of the current executive committee.

FAILURE TO CLARIFY ISSUE OF PROXY VOTING

Apparently the issue of whether proxy votes would be accepted was another issue raised at the recent elections at the FCCVI AGM. The Act in Schedule item 5 reads:

5. The quorum and procedure at general meetings of members of the incorporated association and whether members are entitled to vote by proxy at general meetings.

This is another example of the law requiring something to be in the Constitution of an incorporated association. The current Constitution does make reference to quorum and procedure; however, in my opinion does not go far enough in some respects. There is no mention whatsoever of whether members are entitled to vote by proxy or not. Had the Constitution complied with the law this point may not have been a hot issue during the elections. This provision became law on 7th January 1987.

GENERAL ELECTION ISSUES

The Constitution at Rule 44 states:

The ballot for the election of executive officers and ordinary members of the Committee shall be conducted at the annual general meeting in such usual and proper manner as the Committee may direct.

Obviously the question begs: Just what is the “usual and proper manner as the Committee may direct.”? Such a rule does nothing to inform members of their rights and obligations and again is one more time where members are at the mercy of any mere whim of the Committee.

An example of the questions left unanswered by such a vague rule is the issue said to have arisen at the recent elections about of the role of the returning officer. There is no mention of the actual role, authority, powers and qualifications of a returning officer. Questions of impartiality and bias are simply not addressed. In the absence of specific rules regarding such questions then the mere whim of the Committee of “such usual and proper manner” is all there is- meaning such a person’s role is not open and transparent therefore leaving room for speculations of abuse.

FAILURE TO PROVIDE INSPECTION POWERS TO MEMBERS

Correspondence to hand suggests that there was considerable controversy at the 17 September 2005 election day over the late reception by the Committee of many additional new members causing the election to be postponed for a period of time ultimately leading to some members walking out of the election without voting- thereby registering their protest by boycott. Although the Constitution, in Rule 10, addresses the issue of eligibility of new members, apparently no confirmation of the qualifications of the proposed new members was provided by the Committee when requests were made upon them to do so at a special meeting on 14 October 2005. The lack of a workable grievance procedure in the Constitution again disenfranchised members who were at the mercy of the whim of the Committee. Where the Constitution lists qualifications for membership each and every member has a right to know whether proposed members meet those qualifications.

Item 14 of the Schedule to the Act reads:

14. The inspection by members of the incorporated association of relevant documents of the incorporated association.

Parliament changed the words “books and documents” to read “relevant documents” which is defined in s.3 of the Act therefore providing a broad interpretation to the right of members to inspect documents held by the Committee. Although the law requires such a right to be included in the Constitution of an incorporated association once more this Constitution defies the law and does not provide such a procedure for members to inspect such documents. If the Constitution had complied with the law then members would have had a right to view the documents supplied by the proposed new members and satisfied themselves of their qualifications to join and also their legitimacy.

Although the Act only requires in broad terms that the procedure of elections be outlined in the Constitution and makes no mention of scrutineers it would appear that in light of recent issues raised at the election then candidates and members would be well served by inclusion in the Constitution of the appointment, rights and duties of scrutineers.

FINANCIAL MATTERS

Alleged possible financial irregularities are difficult issues to simply deal with by way of rules in a Constitution. There are provisions in the Constitution regarding internal and external auditors however without the inclusion of item 14 of the Schedule to the Act the members are left without an adequate procedure to satisfy themselves regarding possible financial irregularities and indeed any and all conduct of the committee. Without such checks and balances the conduct of the committee is not open and accountable. It must be remembered that even when an executive committee is acting in a totally proper manner the members have no way of knowing and confirming this when the Constitution fails to contain minimum checks and balances as required by law.

Fund raising, ownership of real property and government grants make the issue of open and accountable access to relevant documents all the more critical as large sums of money can be a source of real or perceived temptation.

OTHER ISSUES

I do not have enough material to hand to comment further on issues concerning the title to the Filipino Community House situated at 93 Cowper Street Footscray nor possible falsification of documents, being receipts of proposed new members.

POSSIBLE MEMBER LIABILITY

Section 14A of the Act reads:

14A. Rights of members under rules

(1) The rules of an incorporated association constitute the terms of a contract between the incorporated association and its members for the time being.

Members joining the Council of their own free will voluntarily take on the rights, privileges and liabilities that contract law gives to parties. The Act deems the rules in the Constitution to be a contract between the members and the association. Of particular note here is Rule 64 of the Constitution:

INDEMNIFICATION OF OFFICERS

64. Every officer or member of the Committee of Management shall be indemnified by the Council against any and all costs, losses, and expenses which such officer or Committee member may incur or become liable to by reason of any contract entered into or act or thing done by him/her as such officer or Committee member or in any way in the discharge of his/her official duties and other authorised activities.

Rule 64 is expressed in very broad terms. Just what, for example, are “other authorised activities?” They are not defined in the Constitution. The rest of the rule is extremely broad. In the absence of appropriate checks and balances in the Constitution there is little to prevent one or more executive officers from abusing this rule if they chose to do so.

Although this is an extreme example and I am in no way suggesting this or anything like this has occurred it will give some idea of the difficulties which could arise with the Constitution in its present form. If one or more executive officers decided to authorise an extended “study tour” back in the Philippines thereby incurring a huge debt for which the Council was not able to pay, then the member organisations would be left liable for the shortfall.

Although liability in the case of such an extreme hypothetical example such as this may or may not be open to challenge if it ever arose the issue is that a weak Constitution does not allow for member organisations to adequately inform themselves of the conduct of the executive Committee. As the old saying goes: “The law must not only be done, it must be seen to be done.” The same should apply to an organisation dealing with government grants and funds raised which are to be used for the good of the greater Filipino community.

Rules 49 to 53 under the heading “REMOVAL FROM OFFICE” outlines a number of non exhaustive “offences” for which an executive officer may be removed from office. Such rules are next to useless until the Constitution is amended to conform with the law.

CONCLUSION

The above is not an exhaustive analysis of any and all possible difficulties contained in the current FCCVI Constitution. It is my opinion that any attempt by member organisations to avail themselves of the Special General Meeting provisions in Rules 91 to 94 will accomplish little when the overriding controlling document of the Council, the Constitution, is so flawed. In the absence of appropriate rules to govern any future elections the same difficulties can and quite likely will arise again.

There is simply not enough checks and balances in the Constitution to ensure that difficulties which occurred at the last AGM elections on 17 September 2005 (suspended) and 15 October 2005 will not occur again. For member organisations, the greater Filipino community at large and the general public to have any confidence in the operation of the FCCVI, the problems would need to be fixed from the ground up by urgent amendments to the Constitution to ensure that it not only complies with the law, but to also address issues that have recently arisen and prevent foreseeable ones from occurring.

The Act does provide a measure in s.14A(2) whereby a single member organisation could take these matters before the Court for resolution. Such action in my opinion should be a last resort as litigation in the courts may be extremely divisive to the Filipino community by polarising persons in favour of one group or another. Unfortunately, if the executive committee attempted to stop moves to have the Constitution comply with the law, then such court action may be the only realistic option. The powers given to a court in this section are powerful enough to force the executive committee to cause the Constitution to be redrafted, to hold fresh and transparent elections and enforce any right of member organisations.

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