damages, is not faced with an easy task.

How difficult in fact the task can be is well illustrated by the different views taken by the Justices of the High Court on the facts of the *Australian Consolidated Press Case*. They all agreed that there was nothing meriting punishment in the libels alleged in the first two counts. But on the third and fourth counts, which concerned the allegation that the plaintiff was a "dupe" of Ivan Skripov, McTiernan[91] and Menzies,[92] JJ. held that the evidence justified an award of punitive damages; Windeyer, J.[93] held that it did not; Taylor, J.[94] was disposed to think that it did not; and Owen, J. [95] "felt some doubt" about it, but found it unnecessary to decide. In view of the unanimity as to the applicable law, such disagreement as to its application to the facts of the case surely justifies the expectation that the number of appeals in libel actions will not diminish. It may well be that plaintiffs will find it wise, except in the clearest cases, not to ask for punitive damages, but to seek instead aggravated compensatory damages; and it may well make very little difference to the size of the verdicts obtained.[96]

Uren's Case has resolved two areas of uncertainty: the authority in Australia of English decisions, and in particular the attitude to be taken by an Australian court faced with inconsistent English and Australian decisions; and the law to be applied in considering a claim for punitive damages in a case of tort. But by its method of resolving these questions, the Privy Council has, it is suggested, created a new area of uncertainty: the attitude that the Privy Council will in future adopt to Australian appeals, especially to appeals in which a decision of the High Court is challenged. It is to be hoped that this uncertainty will quickly be dispelled.

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LOCUS STANDI TO CHALLENGE DECISIONS AND RULES OF DOMESTIC BODIES

NAGLE v. *FEILDEN*

There has been a gradual trend in administrative law towards loosening the requirements for *locus standi* which must be established by a plaintiff claiming equitable relief where he is affected by the decision of a domestic tribunal. Initially, the courts would not intervene in this type of situation unless the plaintiff's proprietary rights were affected (for example, by an invalid expulsion), and this was later extended to situations where the plaintiff could point simply to his contractual relations with the other members of the domestic body, and show his livelihood was interfered with by the body's decision. Now it appears, in England at least, that a plaintiff may be granted equitable relief by way of declaration and/or injunction where no such contractual relationship exists, provided that his right to earn his livelihood is substantially affected by the decision of the domestic tribunal. This proposition

[91] *Supra* at 143.
[92] *Id.* at 145.
[93] *Id.* at 152.
[94] *Id.* at 143.
[95] *Id.* at 154.
[96] See *per* Windeyer, J. in the *Fairfax Case supra* at 138.

is established by the recent decision of the English Court of Appeal in *Nagle* v. *Feilden.*[1]

In that case, the facts were as follows: the Stewards of the Jockey Club had monopolistic control over horseracing on the flat in Great Britain. They made and enforced rules of racing and supervised the holding of race meetings. No person was allowed to train horses to race at such meetings, unless licensed by the Stewards. The appellant, Mrs. Florence Nagle, applied for a licence and, although she had trained horses for many years, her application was rejected by the Stewards in accordance with their unwritten practice of refusing to grant a trainer's licence to a woman in any circumstances. The Stewards had, however, granted licences to men employed by her, and in particular to her "head lad". The appellant brought an action against the respondents, two Stewards of the Jockey Club, claiming (1) a declaration that their practice of refusing to license women as trainers was void, as being contrary to public policy; (2) a prohibitory injunction restraining the continued following of this practice; and (3) a mandatory injunction ordering the Stewards to grant her a licence. Master Clayton struck out the appellant's statement of claim as disclosing no cause of action, and dismissed the action. John Stephenson, J. affirmed this decision.

On appeal[2] to the Court of Appeal (Lord Denning, M.R., Danckwerts and Salmon, L.JJ.), counsel for the appellant had three basic arguments, the first two of which were attempts to establish the presence of a contract: firstly, he argued that the Stewards had made an offer to the world at large that they would consider applications from trainers for licences, and that Mrs. Nagle's application constituted an acceptance of that offer, resulting in a contractual relationship between the Stewards and Mrs. Nagle on the basis of which the courts could intervene. The Court of Appeal rejected this argument, Lord Denning, M.R. pointing out[3] that the Stewards made no offer to the world at large, but at most an invitation to treat. Next, it was argued that when the appellant's "head lad" was granted a licence by the Stewards, he was acting as agent for her, and thus there was a contract between his principal, Mrs. Nagle, and the Stewards. This argument was also rejected, on the basis that the Stewards had made it clear, by declining to contract with Mrs. Nagle, that they were only willing to contract with her male employees.

Finally, it was argued, and this time successfully, that because the Stewards of the Jockey Club exercised a monopolistic control of horseracing on the flat in Great Britain, they were under a duty to all persons interested and concerned in such horseracing to exercise this control lawfully and reasonably, and not arbitrarily and capriciously. Further, it was said that the practice of refusing to license women as trainers was void as being contrary to public policy.

The Court of Appeal unanimously upheld this argument, and put forward the following general proposition: that, although no contractual relationship exists between the relevant parties, where a person's right to work at his chosen trade or profession is affected by the decision of a domestic body, especially where that body exercises monopolistic control over the particular trade or profession concerned and could thereby effectively deprive a person of his livelihood by its decision, the courts have jurisdiction to intervene to protect this right to work. Lord Denning, M.R. expresses the principle in these terms:

> The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those

[1] (1966) 1 All E.R. 689.

[2] For her appeal to succeed, the appellant merely had to establish that there was an arguable case for the matter to go to trial.

[3] (1966) 1 All E.R. 689 at 692.

> having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it.[4]

To support this proposition, he then cited the old *Ipswich Tailors' Case*,[5] and the more modern authority of *Weinberger* v. *Inglis*.[6] Lord Denning, M.R. later confined his remarks to trading or professional associations which operate what are called "closed shops":

> No person can work at his trade or profession except by their permission. They can deprive him of his livelihood. When a man is wrongly rejected or ousted by one of these associations, has he no remedy? I think he may well have, even though he can show no contract.[7]

This line of reasoning was also adopted by the other two members of the Court of Appeal. Lord Denning, M.R., however, made it quite clear[8] that his remarks did not apply to "social clubs", in relation to which judicial intervention must still be based on interference with property rights or an existing contractual relationship. Thus, it was the status of the domestic body (the Stewards of the Jockey Club) which ultimately determined the decision of the Court of Appeal in this case. It appears to be established in England, then, that a plaintiff whose right to work is affected by the decision of a domestic body, need no longer show the existence of a contract between himself and the body before he has *locus standi* to challenge as invalid a decision of that body.[9]

As pointed out earlier, this decision represents a major diversion from the traditional requirements of *locus standi* in this type of situation. Such a decision must necessarily be based, to a certain degree, on policy. An illustration of this appears in the judgment of Salmon, L.J.: "One of the principal functions of our courts is, wherever possible, to protect the individual from injustice and oppression."[10] This policy-based approach could be criticized as a weakness of the decision, but the Court of Appeal, on the other hand, can be complimented for not allowing rigid adherence to precedent to prevent it from coming to a decision which it regarded as just and reasonable in the circumstances.

The significance of *Nagle* v. *Feilden*[11] can only be appreciated fully by considering what the traditional requirements of *locus standi* in this sphere were, and seeing how this decision modifies, if not completely abandons, these former requirements. At the present time, I think one can isolate four stages of development in the law which emerge from the authorities: (1) the necessity to show that the plaintiff's proprietary rights were affected by the decision of the domestic body; (2) the necessity to establish the existence of a contractual relationship between the plaintiff and the domestic body or its members, together with the fact that the plaintiff's livelihood was affected by the body's decision; (3) the necessity to establish the same type of contractual relationship as in (2), but without the necessity to show an interference with livelihood; (4) the necessity to establish that the plaintiff's right to earn his liveli-

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[4] *Id.* at 693.
[5] (1614) 11 Co. Rep. 53a.
[6] (1919) A.C. 606.
[7] (1966) 1 All E.R. 689 at 694.
[8] *Id.* at 693.
[9] Admittedly the Court of Appeal was merely deciding a point of law, i.e., whether Mrs. Nagle had an arguable case, and for this reason the decision is not authority for the fact that the Stewards' refusal to license Mrs. Nagle was unlawful. However, the language of the three judgments makes it clear that, had the legality of the Stewards' action been the very question before the Court, the decision would have been the same. It is interesting to note that after this case, the Stewards forthwith granted Mrs. Nagle the licence she sought.
[10] (1966) 1 All E.R. 689 at 699.
[11] *Id.* at 689.

hood is affected by the body's decision, but without the need to show the existence of a contractual relationship.[12] Each of these stages will be considered in turn.

(1) *Proprietary Rights*

Early authorities emphasized that the jurisdiction of the courts to intervene when a person challenged the decision of a domestic tribunal was based upon the proprietary rights of the person affected by the tribunal's decision: see *Rigby* v. *Connol*,[13] where Jessel, M.R. said:

> The first question that I will consider is, what is the jurisdiction of a court of equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society and of which he is unjustly deprived. . . .

In Australia, the High Court in *Cameron* v. *Hogan*[14] imposed the same requirement.

As stated earlier, it appears that it is the status of the domestic body concerned which ultimately determines what is necessary for a plaintiff to establish *locus standi*, and, on this basis, it is interesting to note that the High Court in *Cameron* v. *Hogan*[15] and Jessel, M.R. in *Rigby* v. *Connol*[16] confined their remarks to "voluntary associations". This term was defined by the High Court (Rich, Dixon, Evatt and McTiernan, JJ.) in *Cameron* v. *Hogan*:

> 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.[17]

It follows from this that *Nagle* v. *Feilden*[18] cannot be compared directly with these two older authorities, for their *rationes decidendi* must be restricted to "voluntary associations", and are no authority whatsoever on the type of domestic body having monopolistic control of a trade or profession, such as the Stewards of the Jockey Club.

(2) *Contract Plus Livelihood*

Subsequently, the courts based their jurisdiction on a contractual relationship between the plaintiff and the domestic body, and on the fact that the plaintiff's livelihood was affected by the body's decision. There are numerous authorities on this type of case. *Russell* v. *Duke of Norfolk*[19] is interesting in this context, especially because it concerned the Stewards of the Jockey Club. In that case, the Court of Appeal (Tucker, Asquith and Denning, L.JJ.) refused the plaintiff relief from the Stewards' decision to withdraw his licence because, in its opinion, assuming that the application for a trainer's licence and the licence itself constituted a contractual relationship, the Stewards had the power under the contract[20] to withdraw a trainer's licence, in their absolute discretion, without any inquiry. This case was distinguished by Lord Denning, M.R. in *Nagle* v. *Feilden*[21] on this somewhat tenuous ground: ". . . but that

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[12] The proposition established by *Nagle* v. *Feilden* (1966) 1 All E.R. 689.
[13] (1880) 14 Ch. 482 at 487.
[14] (1934) 51 C.L.R. 358.
[15] (1934) 51 C.L.R. 358.
[16] (1880) 14 Ch. 482.
[17] (1934) 51 C.L.R. 358 at 370-1.
[18] (1966) 1 All E.R. 689.
[19] (1949) 1 All E.R. 109.
[20] As contained in rule 17 of the Rules of Racing.
[21] (1966) 1 All E.R. 689 at 694.

was seventeen years ago. The right to work has become far better recognized since that time."

Other cases involving associations which operated a "closed shop" in their respective professions are: *Lee* v. *The Showmen's Guild of Great Britain*[22] and *Bonsor* v. *Musicians' Union*.[23] In *Lee's Case*,[24] the Court of Appeal (Somervell, Denning and Romer, L.JJ.), affirming the decision of Ormerod, J., awarded the plaintiff a declaration and an injunction. In the course of his judgment, Denning, L.J.[25] referred to *Abbott* v. *Sullivan*[26] as authority for the proposition that "the power of this court to intervene is founded on its jurisdiction to protect rights of contract. If a member is expelled by a committee in breach of contract, this court will grant a declaration that their action is ultra vires. It will also grant an injunction to prevent his expulsion if that is necessary to protect a proprietary right of his; or to protect him in his right to earn his livelihood." In *Davis* v. *Carew-Pole*,[27] Pilcher, J. was of the view that where a domestic body[28] had the power to interfere with a person's livelihood by its decisions, a court of equity could grant equitable relief in the absence of any contractual link between the plaintiff and the domestic body. However, in *Byrne* v. *Kinematographic Renters Society*,[29] Harman, J., disapproving of Pilcher, J.'s reasoning in *Davis' Case*[30] and preferring to follow *Russell* v. *Duke of Norfolk*,[31] pointed out[32] that Pilcher, J.'s remarks concerning the jurisdiction of a court of equity in the absence of a contractual nexus were *obiter*, because Pilcher, J. did find that there was a contractual relationship between the plaintiff and the National Hunt Committee.[33]

The present state of the law on this question in New South Wales is illustrated in the case of *Hawick* v. *Flegg*.[34] In that case, McLelland, J., awarding the desired equitable relief to the plaintiff, a professional Rugby League football player, based his decision on the contractual relationship which he found to exist between each of the members of the association,[35] and on the fact that the decision of the committee, whereby the plaintiff was disqualified from playing Rugby League for one season, was, in the circumstances, "of sufficient substance and sufficient interference with the plaintiff's livelihood to warrant interference by the court".[36] The necessity of establishing both the existence of a contract and an interference with livelihood to give a plaintiff *locus standi* for judicial intervention in the decision of a domestic tribunal is apparent from this case.

(3) *Contract Without Livelihood*

A recent English decision which relaxed still further the requirements for *locus standi*, by dispensing with the necessity to show an interference with livelihood provided that a contractual relationship between the plaintiff and the domestic body exists, is the case of *Lawlor* v. *Union of Post Office Workers*.[37] In that case, the facts, in brief, were that the Director of Personnel

[22] (1952) 2 Q.B. 329.
[23] (1954) 1 All E.R. 822.
[24] (1952) 2 Q.B. 329.
[25] *Id.* at 341-2.
[26] (1952) 1 K.B. 189.
[27] (1956) 1 W.L.R. 833.
[28] Here, the National Hunt Committee.
[29] (1958) 2 All E.R. 579.
[30] (1956) 1 W.L.R. 833.
[31] (1949) 1 All E.R. 109.
[32] (1958) 2 All E.R. 579 at 596.
[33] Pilcher, J. found that a contractual relationship was in existence from the moment the plaintiff submitted to the Committee's jurisdiction.
[34] (1958) 75 W.N. (N.S.W.) 255.
[35] The N.S.W. Rugby Football League.
[36] (1958) 75 W.N. (N.S.W.) 255 at 259.
[37] (1965) 2 W.L.R. 579.

of the Post Office advised the General Secretary of the defendant Union that the employment of part-time postmen had become necessary if essential postal services were to be maintained. This information was passed on to the London District Council of the Union, and to Lawlor, the secretary of one of the sectional councils of that district. Lawlor, acting on his own behalf and for all the other members of the council's committee, threatened industrial opposition if this proposal were effectuated. On the General Secretary's recommendation, the executive council of the Union decided that Lawlor and others should be expelled for unconstitutional action in violation of the National Rules. The executive council was so empowered by rule 3(e), which provided for the expulsion from the Union of anyone who, in its opinion, was not a "fit and proper person" for membership. There was a right of appeal to the next annual conference. The plaintiffs sought a declaration that their expulsion was contrary to natural justice, for they were not informed of the charge against them, or that disciplinary action was proposed, and they had been given no opportunity to defend themselves. They also sought an interim injunction restraining the Union from acting on the executive council's decision.

Ungoed-Thomas, J. held, granting the desired relief, that even though expulsion from the Union did not entail loss of employment (livelihood), yet its effect was more than merely social, for it did affect the expelled member in his work—more specifically, in his standing with, and relation to, other members of the Union. On this basis, *locus standi* was extended to the plaintiffs to seek equitable relief from the courts in respect of the decision of the executive council of the Union of Post Office Workers, in the absence of any serious interference with their means of livelihood.[38]

Criticism has been levelled at the artificial nature of the contractual relationship upon which the courts seize to base their intervention in these circumstances. Very often, the kind of relationship existing between the plaintiff and the relevant association is, in fact, not a contract in the strict legal sense. In a situation, for example, where an association operates an effective "closed shop" in a trade or profession, and no person can work at this trade or profession without the association's consent, such a person has no choice but to submit to the conditions imposed by the association if he wishes to engage in the trade or profession concerned. On the other hand, a contract, in the strict legal sense, connotes an agreement between parties, made freely, voluntarily and without restraint. This artificiality was mentioned by Denning, L.J. in *Lee* v. *The Showmen's Guild of Great Britain*[39] and *Bonsor* v. *Musicians' Union*.[40] However, until the decision of the Court of Appeal in *Nagle* v. *Feilden*,[41] the courts insisted on basing their jurisdiction on this type of "contractual" relationship, even where domestic bodies exercising monopolistic control over a trade or profession were concerned.[42] The New South Wales courts, it would appear, have not yet progressed beyond this position.[43]

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[38] There was, however, a contractual nexus between the plaintiffs and other members of the Union.

[39] (1952) 2 Q.B. 329 at 343.

[40] (1954) 1 All E.R. 822 at 825-6.

[41] (1966) 1 All E.R. 689.

[42] But where social clubs and the like are involved, a contractual relationship is still necessary before the courts can intervene, but the criticism of artificiality does not apply to the same extent here for a person is in a position to exercise his free will in electing whether to join a social association or not. However, where large associations are involved, there is an element of artificiality in the contractual relationships which are said to exist, for the contracting parties (the members of the association) may, often, not even be aware of each other's existence.

[43] *Hawick* v. *Flegg* (1958) 75 W.N. (N.S.W.) 255.

(4) *Livelihood Without Contract*

Finally, the most recent development in this context is the proposition established in *Nagle* v. *Feilden*[44] that a person's right to work at his chosen trade or profession is sufficient to give him *locus standi* to seek equitable relief from the courts against the decision of a domestic body which would seriously interfere with his right to work, without the former necessity to establish the existence of a contractual relationship between himself and the domestic body.[45]

The principle enunciated in this case has been approved in an even more recent decision of the English Court of Appeal in *Dickson* v. *Pharmaceutical Society of Great Britain*.[46] In that case, the Pharmaceutical Society, among whose objects was that of maintaining the honour and safeguarding and promoting the interests of its members "in their exercise of the profession of pharmacy" sought, at a meeting of some of its members, to impose a new rule on all its members. The effect of the rule, if adopted, would be that, except with the Society's approval, new pharmacies would have to be situated in physically distinct premises, and their trading activities confined to "pharmaceutical and traditional goods" (for example, films, cosmetics, etc.); and existing pharmacies would not, without the Society's approval, be permitted to extend their present range of non-pharmaceutical goods. All registered pharmacists were required to be members of the Society, and any member guilty of misconduct could be struck off the register by the Society's disciplinary body, an independent statutory committee. There was a right of appeal from this body to the High Court. The plaintiff, a member of the Society, sought (1) a declaration that the proposed rule was *ultra vires* the Society's objects and contrary to public policy as being in unreasonable restraint of trade; and (2) a prohibitory injunction to restrain the Society from enforcing it.

Pennycuick, J., at first instance, held, granting the relief sought, that although the passing of the proposed rule was *intra vires* the Society's objects, it would operate as an unreasonable restraint of trade. The Court of Appeal (Lord Denning, M.R., Danckwerts and Sachs, L.JJ.), dismissing the Society's appeal, held that any person or body affected by a rule of professional conduct had *locus standi* to seek equitable relief from the courts, irrespective of whether an alternative procedure by way of appeal existed or not; that the proposed rule was *ultra vires* the Society's objects in that its operation would be so arbitrary and capricious as to be unreasonable, and the restraint of trade contemplated by it would seriously interfere with the means of livelihood of the Society's members.

In the course of his judgment, Lord Denning, M.R., referring to the provision for a right of appeal to the High Court, said:

> But I do not think that is the only remedy. In my opinion, if a professional body lays down a rule of conduct for its members which is regarded as binding on them, then the courts of law have jurisdiction to inquire into the validity of the rule.[47]

This would appear to give the courts a very wide power of intervention, but it must be remembered that a contractual relationship did exist between the plaintiff and the defendant Society, and the proposed rule, if enforced, would seriously interfere with the plaintiff's livelihood. On this basis, this decision is not authority for the much wider proposition established in *Nagle* v. *Feilden*[48] However, Lord Denning, M.R. again expressed his support for the broader principle:

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[44] (1966) 1 All E.R. 689.

[45] A narrow *ratio decidendi* of this case would confine this principle to situations involving domestic bodies which exercise monopolistic control over a trade or profession.

[46] (1967) 2 W.L.R. 718.

[47] (1967) 2 W.L.R. 718 at 728-9.

[48] (1966) 1 All E.R. 689.

> Suppose this society were to make a rule that they would not admit a woman to membership, so that no woman could ever become a registered pharmacist. I have no doubt that the court would intervene and declare the rule to be invalid and compel the society to admit her.[49]

He then cited *Nagle* v. *Feilden*[50] to support this proposition.

Although this dictum is merely *obiter* on the facts of *Dickson's Case*,[51] the attitude of the Court of Appeal, and especially of Lord Denning, M.R. towards this question is quite clear, for it is implied that even if no contractual relationship had yet arisen[52] between the plaintiff and the Society, the courts would still intervene, provided that the Society's decision seriously interfered with the plaintiff's livelihood. In one sense, however, *Dickson's Case*[53] does represent an extension of the *Nagle* v. *Feilden*[54] principle for the Court of Appeal granted relief not in respect of a *decision* of the Pharmaceutical Society, but in respect of a *rule* formulated by it which had not been enforced at the time, but upon which a future decision might be based.

Clearly, then, the English courts have expressed their willingness to extend *locus standi* for judicial intervention in the decisions of domestic tribunals, especially where such bodies exercise monopolistic control over a trade or profession in which the plaintiff seeks to work. At the present time, our courts, although they no longer insist upon the interference with proprietary rights before *locus standi* to seek judicial relief from the decision of a domestic body is granted to a plaintiff, have still not progressed beyond the proposition established in *Hawick* v. *Flegg*.[55] However, given the appropriate fact situations, they will probably have little hesitation in following the lead of the English courts—if not by directly following *Nagle* v. *Feilden*,[56] at least by showing their willingness to relax our present stringent requirements of *locus standi* in this area.

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THE APPLICATION OF *PHILLIPS* v. *EYRE* IN A FEDERAL SYSTEM

ANDERSON v. *ERIC ANDERSON PTY. LIMITED*

I INTRODUCTION

When an action is brought in one "country"[1] upon a tort alleged to have been committed in another, the fundamental problem is to ascertain specifically the legal system by which the rights and liabilities of the parties must be determined. Several possible choices have been postulated. The rights and liabilities of the parties may firstly be determined by an application of the *lex loci delicti*, the law of the place where the alleged wrong was committed.[2]

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[49] (1967) 2 W.L.R. 718 at 729.
[50] (1966) 1 All E.R. 689.
[51] (1967) 2 W.L.R. 718.
[52] Where the plaintiff, at the time he sought judicial intervention, had applied for membership of the Society, but had not yet received it.
[53] (1967) 2 W.L.R. 718.
[54] (1966) 1 All E.R. 689.
[55] (1958) 75 W.N. (N.S.W.) 255: that is, the dual requirement of a contractual relationship and an interference with livelihood before *locus standi* is made out.
[56] (1966) 1 All E.R. 689.
[1] In the private international law sense.
[2] We must assume for present purposes, in defining "locus delicti", that all the facts