WILLIAMS v. HURSEY
HURSEY v. HOBART BRANCH OF THE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA
WINCH v. AUSTRALIAN STEVEDORING INDUSTRY AUTHORITY[1]

Trade Union—Commonwealth Conciliation and Arbitration Act 1904-1956—Constitutional law—Validity of levy for political purposes—Conspiracy

F.H. and D.H. were members of the Waterside Workers' Federation of Australia,[2] a trade union registered as an 'organization' under the Conciliation and Arbitration Act 1904-1956 (Cth). More particularly, they were members of the Hobart Branch of the Federation,[3] which was not separately so registered. They were also, at all material times, registered as waterside workers in Hobart pursuant to the Stevedoring Industry Act 1956 (Cth).

Under its separate rules, the Hobart Branch resolved that a levy of 10s. be struck amongst its members to assist the Australian Labour Party in a forthcoming State election campaign. Neither F.H. nor D.H. paid the levy, and accordingly the secretary was forbidden by the Branch rules to accept their annual subscription for the ensuing year when it became due. They were thereupon treated as having ceased to be members of the Federation and the Branch. Thereafter, intermittently during the following ten months and consistently during the next five, members of the Branch prevented them by hostile physical demonstration and stratagem from working as stevedores.

Three actions in the Supreme Court of Tasmania ensued, the substance of which was as follows. The first was brought by F.H. against the Federation, and the Branch, its President and Secretary claiming, *inter alia*, a declaration that the levy was invalid. In the second action, F.H. and D.H. sued the Federation and the Branch for a similar declaration and other relief, and in addition for damages for conspiracy. The third action was commenced by certain members of the Branch who sued the Australian Stevedoring Industry Authority, F.H. and D.H. for injunctions and declarations that, since F.H. and D.H. had ceased to be members of the Branch, preference over them in employment should be given to Branch members.

The actions were heard together, and Burbury C.J. held: (a) that the levy was not authorized by the rules of the Branch and was therefore invalid; (b) that F.H. and D.H. had never ceased to be members of the Federation or of the Branch; (c) that F.H. and D.H. were at all material times entitled to equal opportunity of employment with other Branch members and (d) that all the defendants to the second action were parties to an actionable conspiracy for which the plaintiffs were each entitled to £2,500 damages.

[1] [1959] Argus L.R. 1383; (1959) 33 A.L.J.R. 269. High Court of Australia; Dixon C.J., Fullagar, Kitto, Taylor and Menzies JJ.

[2] Hereafter referred to as 'the Federation'. [3] Hereafter referred to as 'the Branch'.

It followed that the first two actions succeeded and the third failed. Appeals in each action to the High Court were heard together. The High Court reversed findings (a) and (b) of the trial judge, affirmed finding (c)[4] in part for different reasons and, although substantially agreeing with finding (d), reduced damages in each case to £1000.[5] In the result, the first appeal was allowed, the second was allowed in part and the third was dismissed.

On a preliminary jurisdictional point, the appellants from the first two actions argued that section 147 of the Conciliation and Arbitration Act[6] deprived the Supreme Court of Tasmania of jurisdiction to hear those actions. The actions, it was contended, concerned the interpretation of the union's rules and were therefore appropriate to be heard by the Commonwealth Industrial Court. This being so, the section made it a compulsory forum. The court easily and unanimously rejected that argument on the simple ground that the jurisdiction of the Commonwealth Industrial Court does not extend to claims of the type made. Menzies J. concisely stated the matter thus:

> . . . the section . . . deprives any other court of jurisdiction to hear a suit against an organization or a member of an organization if that suit is within the jurisdiction of the Industrial Court, but does not attempt to deny to another court jurisdiction to hear a suit—which the [Industrial] Court could not itself try on the ground that it concerned an act or omission about which the [Industrial] Court could decide in a suit which it could hear and determine.[7]

This was sufficient to determine the point, but Taylor[8] and Menzies JJ.[9]

[4] This finding involved the interpretation of two Port Orders for the Port of Hobart made under s. 14 of the Stevedoring Industry Act 1947, and is not discussed in this Comment. The Court held that, when the plaintiffs ceased to be members of the Federation, the Port Orders operated to deprive them of equal opportunity of employment with other members. However, at the time the third action was commenced the relevant Port Order had been revoked and equality restored. That action accordingly failed.

[5] It is not proposed to discuss the question of conspiracy at length here. The Court held (disagreeing with Burbury C.J.) that no cause of action lay against the defendants for bringing about breaches of contract between the plaintiffs and their employers: cases of the class of *Lumley v. Gye* ((1853) 2 E. & B. 216) were distinguished. But an action lay in tort, not for false imprisonment, but for conspiracy by the defendants in interfering with the plaintiffs' personal liberty and freedom of movement, and obstructing their path to their work. The Federation was a party to the conspiracy through the activities of its Branch members. Menzies J. held that, although not all the tactics of the defendants were unlawful, it was not possible to sever the lawful from the unlawful acts, each of which comprised a continuous, concerted scheme to damage the plaintiffs. The whole scheme amounted to an actionable conspiracy, and the lawful acts were not to be disregarded in determining the extent of the damage suffered or in assessing damages. Damages were reduced principally because the plaintiffs' wrong assertion that they were members of the Federation and entitled to equal employment with other members was the prime reason for the defendants' resorting to the unlawful measures for which damages were given.

[6] 'Unless the contrary intention appears in this Act, no organization or member of an organization shall be liable to be sued, or to be proceeded against for a pecuniary penalty except in the [Commonwealth Industrial] Court, for any act or omission in respect of which the Court has jurisdiction.'

[7] [1959] Argus L.R. 1383, 1433; (1959) 33 A.L.J.R. 269, 301.

[8] [1959] Argus L.R. 1383, 1416; (1959) 33 A.L.J.R. 269, 290.

[9] [1959] Argus L.R. 1383, 1433; (1959) 33 A.L.J.R. 269, 301.

went on to say that, construed in the manner sought by the appellants, the section would be invalid as seeking to deprive State courts of jurisdiction otherwise than by defining the extent to which the jurisdiction of a federal court is exclusive of that of State courts under section 77 (ii) of the Commonwealth Constitution.[10] This statement was not elaborated, but it is clear that to invest a federal court with exclusive jurisdiction in an *ad hoc* manner otherwise than by reference to matters of a stated nature is not to mark out the boundaries of exclusiveness,[11] but to make the boundaries elastic and capable of infinite expansion.

A question involving the nature of the legal personality of a trade union registered under the Conciliation and Arbitration Act arose (or was treated as arising) upon the submission by the appellants from the first and second actions that the Federation and the Branch should be struck out as parties to the writs and subsequent proceedings on the broad ground that neither was a body corporate capable of being sued.

In face of sections 136[12] and 146[13] of the Conciliation and Arbitration Act the conclusion was inescapable that, whatever its corporeal substance, the Federation was capable of being sued, and the Court so held. Fullagar J. alone examined the matter at length. The union was a perfect corporation, he said, as separate and distinct from the sum of its members as any statutory company.[14]

It was unnecessary to argue the point from principle, for here was a statute which in unmistakable terms allowed a trade union registered in accordance with its provisions to be sued, and which furthermore apparently allowed such a body to have a separate common fund which could be exploited by persons suing it. But Fullagar J., although approaching the matter purely as a question of the construction[15] of the Commonwealth statute, and in no way depending upon the meaning of the celebrated *Taff Vale* case,[16] ventured to disagree both with Farwell J. in that case and with those of their Lordships[17] in *Bonsor v. Musicians' Union*[18] who, whilst allowing to a trade union some corporate attributes, were

[10] 'With respect to any of the matters mentioned in the last two sections the Parliament may make laws . . . (ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States.'

[11] *Commonwealth of Australia v. Kreglinger & Fernau Ltd* (1926) 37 C.L.R. 393, 407, *per* Isaacs J.

[12] 'Every organization registered under this Act shall for the purposes of this Act have perpetual succession and a common seal, and may purchase take on lease hold sell lease mortgage exchange and otherwise own possess and deal with any real or personal property.'

[13] 'Any organization may sue or be sued for the purpose of this Act in its registered or other name, and service of any notice or process on the president, chairman, or secretary, or at the registered office of the organization shall be sufficient for all purposes.'

[14] [1959] Argus L.R. 1383, 1390; (1959) 33 A.L.J.R. 269, 273. See also *Brisbane Shipwrights' Union v. Heggie* (1906) 3 C.L.R. 686.

[15] [1959] Argus L.R. 1383, 1390; (1959) 33 A.L.J.R. 269, 274.

[16] *Taff Vale Railway Company v. Amalgamated Society of Railway Servants* [1901] A.C. 426.

[17] Lord MacDermott, Lord Somervell of Harrow and *(semble)* Lord Keith of Avonholm.

[18] [1956] A.C. 104; [1955] 3 All E.R. 518.

nevertheless not prepared to call it a true corporation. 'The notion of qualified legal capacity is intelligible,' argued Fullagar J., 'but the notion of qualified legal personality is not'.[19] Presumably, in face of this strongly expressed pronouncement, any effect *Bonsor's* case[20] had in clarifying the law relating to the status of trade unions not registered under a Commonwealth statute will be only temporary so far as Australian lawyers are concerned. For, although it was clearly *obiter* insofar as it related to that part of the case, it indicates that at least three members of the High Court[21] are unwilling to accept the reasoning of three out of five members of the House of Lords as to the status of such a body. The question may have no direct effect even upon unions registered only under the Trade Unions Acts of the Australian States,[22] for their liabilities, at least, have been substantially worked out by the courts. They may be sued in their registered name, and their common fund may be made liable at the suit of a third party[23] or a member whether they are treated as corporations or not.[24] The problem still has significance, however, as will appear below, in the interpretation of decided cases and in assessing the extreme limits of a union's powers.

Perhaps the most interesting and important issue in the present case was as to the validity of the so-called 'political levy'. Two questions arose under it: (a) whether a trade union being an 'organization' registered under the Commonwealth Conciliation and Arbitration Act was capable of imposing such a levy as a matter of law, and (b) whether, if so, the levy in question was in fact authorized by and validly imposed in accordance with the rules of the Federation.

It was submitted on behalf of F.H. and D.H. that, had the Federation been a trade union registered under the Tasmanian Trades Unions Act 1889-1924 and not under the Commonwealth statute, it could not, as a matter of Tasmanian trade union law, validly have imposed the levy. It was said that the case of *Amalgamated Society of Railway Servants v. Osborne*,[25] decided by the House of Lords at a time when the relevant English law was the same as present Tasmanian law, made that clear. It was then contended that the Scottish case of *Wilson v. Scottish Typographical Association*[26] was authority for the proposition that the Federation, which was by definition an unregistered trade union under the Tasmanian Act,[27] was subject to the same disability. The Regulations[28] made under the Commonwealth Act allow an organization to which the Act grants registration to make rules, *inter alia*, 'not contrary to law'. It

[19] [1959] Argus L.R. 1383, 1390; (1959) 33 A.L.J.R. 269, 273.
[20] [1956] A.C. 104; [1955] 3 All E.R. 518.
[21] Dixon C.J. and Kitto J. concurred in the judgment of Fullagar J.
[22] These Acts are: Trade Unions Act 1958 (Victoria); Trade Unions Act 1876-1935 (South Australia); Trade Unions Act 1902-1924 (Western Australia); Trades Unions Act 1889-1924 (Tasmania); Industrial Arbitration Act 1940-1957 (New South Wales); Trade Union Act 1915 (Queensland).
[23] *Taff Vale Railway Company v. Amalgamated Society of Railway Servants* [1901] A.C. 426.
[24] *Bonsor v. Musicians' Union* [1956] A.C. 104; [1955] 3 All E.R. 518.
[25] [1910] A.C. 87.
[26] [1912] S.C. 534.
[27] Trades Unions Act 1889-1924.
[28] Conciliation and Arbitration Regulations r. 115 (g).

was argued that, because the rules of the Federation purporting to authorize imposition of the levy were contrary to Tasmanian law, the levy was invalid; mere registration under the Commonwealth Act, it was said, could not allow *ab initio* or validate *ex post facto* a rule which was not in accordance with any State law applicable to it.

Menzies J.[29] accepted, and Taylor J.[30] did not deny, that the rule authorizing the levy was invalid by State law. Their Honours accepted the submission that the *ratio decidendi* of *Osborne's* case[31] applies equally to an unregistered trade union and that *Wilson's* case,[32] which so decided, was correct. Their Honours were unable, however, to accede to the further submission that the rule was therefore 'contrary to law' within the meaning of the Regulations. Fullagar J., on the other hand, denied that State law had any relevance, and decided the question purely as one concerning powers granted to a registered organization by the Commonwealth Act. Although, in his final analysis, Fullagar J. was not concerned with the correctness of *Wilson's* case,[33] he did discuss it, and dismiss it, for the purpose of demonstrating his inability to accept the first step in the argument against the validity of the levy that the reasoning in *Osborne's* case[34] is applicable to an unregistered trade union.

In order to appreciate the argument, it is necessary to look behind *Osborne's* case[35] to determine what it did decide. The basic premiss in *Osborne's* case[36] was that, immediately before the passing in England of the Trade Unions Acts in 1871 and 1876, a trade union, although not of itself illegal, could not legally enforce any of its rules because they were regarded by the common law as being in restraint of trade. The Trade Unions Acts legitimated and rendered enforceable in the courts certain specified objects of trade unions, and the question arose in *Osborne's* case[37] whether the law would countenance an object which, whilst not illegal, was not an object specified by the Acts as being enforceable. The reasoning by which the majority of the House of Lords held that such an object could not be pursued may be read in two ways: Fullagar J. interprets their Lordships as regarding the Trade Union Acts as defining a trade union's enforceable powers and objects exhaustively. Any object not defined was *ultra vires* on the same basis as the Acts of any other corporation are *ultra vires* if outside the scope of the objects clause of its memorandum of association. Fullagar J. regarded the *ultra vires* principle as being applicable because a registered trade union is a corporation. But if a union is not registered at all, and therefore not a corporation on any view, the principle could not apply, he said, for its whole basis 'lies in a region completely alien to natural persons—a region inhabited only by corporations'.[38] It followed, in His Honour's opinion, that the reasoning in *Osborne's* case[39] could never apply to an unregistered trade union, and that *Wilson's* case[40] was not supportable as an authority that it does. In

[29] [1959] Argus L.R. 1383, 1435; (1959) 33 A.L.J.R. 269, 302.
[30] [1959] Argus L.R. 1383, 1421; (1959) 33 A.L.J.R. 269, 293.
[31] [1910] A.C. 87. [32] [1912] S.C. 534. [33] *Ibid.* [34] [1910] A.C. 87. [35] *Ibid.*
[36] *Ibid.* [37] *Ibid.* [38] [1959] Argus L.R. 1383, 1400; (1959) 33 A.L.J.R. 269, 280.
[39] [1910] A.C. 87. [40] [1912] S.C. 534.

the view of Fullagar J., the levy was not on that basis invalid under State law.

The essence of the opinion of Fullagar J. lies in His Honour's acceptance of the premiss that the Conciliation and Arbitration Act, when it allows registration to an organization, creates a new and independent right and duty-bearing unit which owes its existence to and derives its powers directly or indirectly from the Act. The power granted to an organization is a rightful and illimitable exercise by the Commonwealth of its own wider constitutional power[41] to make laws with respect to conciliation and arbitration. Fullagar J. argued that State law cannot bear upon the fundamental powers of an organization or circumscribe them so as to derogate from the supremacy of power granted by the Commonwealth, for the one is quite outside the sphere of influence of the other. So regarded, the problem of whether the rule in question was 'contrary' to State law did not arise. Fullagar J. felt it impossible to say that to engage in political activities was in itself contrary to law; nor did a rule which authorized such activity frustrate the policy of the Act; nor was it 'tyrannical'[42] or 'oppressive';[43] nor did it impose unreasonable conditions upon membership of the union contrary to the Act. Indeed, the application of funds to assist a political party which was pledged to further the cause of trade unions in Parliament was, as Fullagar J. held, a normal and traditional means of furthering and protecting the interests of a trade union.

Taylor and Menzies JJ. preferred the other available interpretation of *Osborne's* case.[44] The Trade Union Acts, Their Honours said, defined a trade union as a combination having certain specified objects. A registered organization could not have objects foreign to those specified, for it would then cease to answer the definition. But Menzies J. held that, since the definition applies equally to registered and unregistered trade unions, the reasoning in *Osborne's* case[45] should also apply to disallow an unregistered trade union to have an unspecified object. Taylor J. considered that, even if some of the reasoning in *Wilson's* case[46] was open to doubt, it was too late to query its conclusion.

Having held that the rule purporting to impose the levy was invalid by Tasmanian law, Taylor and Menzies JJ. were concerned to interpret more closely the words 'contrary to law' in the Regulations made under the Commonwealth Act. Taylor J., unlike Fullagar J., expressly avoided posing the problem as one concerning the attempted limitation by State law of the powers of an organization brought into existence by a Commonwealth statute.[47] In effect, His Honour applied to this case similar reasoning to that involved in the rationalization adopted by himself and Menzies J. of *Osborne's* case.[48] In the view of Taylor J., the question was whether an association of employees with rules such as those in question

[41] Commonwealth of Australia Constitution Act 1900 s. 51 (xxxv). As to the validity of the exercise of the power to provide for registration of employees' organizations, see *Jumbunna Coal Mine (N.L.) v. Victorian Coal Miners' Association* (1908) 6 C.L.R. 309. [42] Conciliation and Arbitration Act 1904-1956 s. 140 (1).
[43] *Ibid.* [44] [1910] A.C. 87. [45] *Ibid.* [46] [1912] S.C. 534.
[47] [1959] Argus L.R. 1383, 1422; (1959) 33 A.L.J.R. 269, 294. [48] [1910] A.C. 87.

would satisfy the requirements of the Commonwealth Act with respect to registration. Taylor J. held that the fact that Tasmanian law rendered such a rule unenforceable at law was not sufficient to prevent the union's compliance with the stipulation in the Regulations that its rules must provide only for matters not contrary to law.

Menzies J., in direct contrast with Fullagar J., considered that State law can continue to operate upon a trade union which is also an organization registered under the Commonwealth Act.[49] His Honour saw the question as one of the degree to which State law could obtrude; it cannot add to or detract from the powers conferred by the Commonwealth. Menzies J. agreed with Taylor J. that a rule authorizing the imposition of a political levy was nugatory by State law rather than illegal and was therefore not 'contrary to law'. But Menzies J. went slightly further to endeavour to define the phrase 'not contrary to law', and considered that it did not import all the provisions of all State legislation. All that State law is concerned with, he said, is the effectiveness of a trade union rule for the purpose of that law; a union's compliance with State law is not a prerequisite to its obtaining registration as an organization under the Commonwealth Act.

Having thus confirmed the legality of the levy, the Court was concerned to determine the question of its validity within the framework of the rules of the Federation. As Menzies J. observed,[50] the problem was largely one of impression. Although there was no specific rule authorizing a political levy, the rules included objects to combine in order that members' 'interests might be protected, their status raised and their conditions improved', 'to foster the best interests of members . . .' and 'to raise funds for the furtherance of the aforesaid objects'. The Court held that these objects, taken as a whole, were sufficient to authorize a union to impose a levy to assist a political party which was pledged to support its interests.

This decision will no doubt be regarded as a leading case in Australian trade union law. But how far does it lead, and where? Of its diverse implications, perhaps two of the most outstanding questions it provokes may be raised, although not answered here.

First, is the decision to be interpreted as allowing to an organization registered under the Commonwealth Conciliation and Arbitration Act power unlimited to any extent by State law to apply its funds for political purposes? On the one hand, Fullagar J. if his words are to be read literally, would not permit the capacity of such an organization to be 'cribbed or confined *or in any way affected*'[51] by State law. Menzies J., on the other hand, appears to recognize that State law may affect an organization to some extent. The question may be exemplified thus: Suppose that an organization registered under the Commonwealth Act resolved to sponsor its president as a candidate at a State Parliamentary election, and that the organization imposed a levy to assist him which resulted in his receiving a gift of money in excess of that which the

[49] [1959] Argus L.R. 1383, 1434; (1959) 33 A.L.J.R. 269, 301.
[50] [1959] Argus L.R. 1383, 1437; (1959) 33 A.L.J.R. 269, 303.
[51] [1959] Argus L.R. 1383, 1402; (1959) 33 A.L.J.R. 269, 281. Italics supplied.

relevant State law allowed to be expended by any candidate in an election campaign. Such a levy would, on the reasoning of Taylor and Menzies JJ., be at least nugatory by State law. But further, it would be a levy the proceeds of which would be illegally applied, albeit for a purpose not in itself illegal. Is it safe to say that, on the authority of the present case, the High Court would uphold the validity of the levy? If a similar levy were imposed to enable a candidate at a federal election to infringe the provisions of the Commonwealth Electoral Act, there can be little doubt that it would be invalid either because it was imposed by a rule which was 'contrary to law' or because it was outside the scope of a valid rule which authorized the imposition of a political levy. It would be absurd if such a levy were held invalid in the case of a federal election and valid in the case of a State election, and it would be curious indeed if a federal court were to uphold the validity of an act which was positively illegal under a State law not inconsistent with Commonwealth law. Taylor and Menzies JJ. did not decide this point, and it is submitted with respect that it was unnecessary to do so. But Fullagar J. went further. His Honour would apparently not have regard to State law at all in determining the legal capacity of an organization to formulate a rule which authorized an act illegal by State law. But it is perhaps fair to predict that Fullagar J. would be influenced by State law in determining whether the power given by the rule was properly exercised.

It is submitted that it is no part of the *ratio decidendi* of this case that State law has no application to trade unions registered under the Commonwealth Act. Whilst it may have decided on one view that the formulation or existence of powers of an organization may not be influenced by State law, that is not to say that their exercise may not be very materially affected by it.

The case also provokes discussion of the powers of a trade union *vis-à-vis* its members. In particular, the question arises as to the extent to which it authorizes a trade union to compel a member, who relies upon his membership to obtain employment, to contribute funds against his will to a political body the policy of which he opposes on religious, moral or purely political grounds. To attempt to answer the question *in vacuo* would not perhaps be very useful, for the outcome of future cases in point will doubtless be influenced by matters of policy and impression as the present one was. But those to whom the very existence of the power is anathema[52] will take comfort from the fact that an organization is given life only by virtue of the conciliation and arbitration power of the Commonwealth Constitution.[53] It must therefore exist essentially as an industrial, and not as a political combination.[54]

R. C. TADGELL*

[52] The political party to which F.H. and D.H. belong has announced its intention of presenting a Private Member's Bill in the Commonwealth Parliament designed to prohibit the imposition of compulsory political levies on trade union members. It also proposes to bring the question of enforced political levies before the United Nations Committee of Human Rights, the International Labour Organization and the International Confederation of Free Trade Unions.

[53] Commonwealth of Australia Constitution Act 1900, s. 51 (xxxv).

[54] *Cf.* [1959] Argus L.R. 1383, 1424; (1959) 33 A.L.J.R. 269, 295 *per* Taylor J.

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